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Women and the Law

- Women at the workplace
- Women and matters of faith
- Women and Sexual autonomy
- #MeToo
- Bar Events

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From the President's Desk

You can tell the condition of a nation by looking at the status of its women.[1]

India is still a male dominated society, where women are considered subordinate and inferior to men. Discrimination is still highly visible throughout all strata of society. Chief Justice Dipak Misra in his main opinion in the *Sabarimala case* wrote, that no philosophy has so far convinced the large population of this country to open up and accept women as equal partners. He further lamented "historically, women have been treated unequally".[2]

In India, women face harassment, intimidation, and violence. Rapes are common and if the reports are to be believed, the growing evil of gang rapes has pervaded society. Belinda Goldsmith and Meka Beresford in a survey conducted on behalf of Thomson Reuters Foundation have come to the conclusion that India, in 2018, is the most dangerous country for women with sexual violence.[3] Among other reasons for regarding India as the most dangerous country in the world for women are human trafficking for domestic work, forced labour, forced marriage, and sexual slavery. The survey report goes on to record that other cultural traditions that impact women are acid attacks, female genital mutilation, child marriage, and physical abuse. The situation has worsened over the years and according to the report, seven years ago India was placed as the 4th most dangerous country for women as against the dubious distinction of heading the list in 2018. From managers to maids - India's working women all face sexual and other abuse.

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[1] Attributed to Jawaharlal Nehru, India's first Prime Minister.

[2] Indian Young Lawyers Association v. State of Kerala, Writ Petition (Civil) No. 373 of 2006.

[3] Belinda Goldsmith & Meka Beresford, *India most dangerous country for women with sexual violence rife- global poll*, Thomson Reuters Foundations, June 26, 2018, http://news.trust.org/item/20180612134519-cxz54/.

Mahatma Gandhi had said, "woman is the companion of man, gifted with equal mental capacity. She has the right to participate in the minutest details in the activities of man, and she has equal right of freedom and liberty with him".[4]

Echoing the Father of the Nation, Shri M.C. Bhandare, one of the most distinguished senior lawyers of the country has said in his article on 'Women's Rights' - quality, dignity, and safety of women are the three major issues that need to be addressed. Empowering women is empowering humanity. There should be equal liberty for every woman and every man to have access to quality education, healthcare, and economic empowerment with gainful employment.

#MeToo is a revolution. It is very significant that women in India have now felt emboldened to come out with revelations about sexual abuse they had been subjected to possibly since their childhood. The mindset of people is changing and they are receptive to supporting the cause of women victims. #MeToo has become a movement and it needs to be supported and encouraged so that grave injustice which has been caused to women victims can be even belatedly addressed by remedial steps.

In a recent article, Karla Bookman, editor of Swaddle.com, has concluded about #MeToo that:

> #MeToo can affect sweeping, global change in how we think about gender inequality. If you believe in that end result, then we should spend less time debating each individual allegation, or parsing the form it takes, and more time in throwing the full weight of our support behind a movement that truly has the power to change the world.

This issue under the dynamic editorship of Ms. Madhavi Divan is dedicated to Indian women, and rightly so.

Lalit Bhasin[†]

[4] Mahatma Gandhi, *Speeches and Writings of Mahatma Gandhi,* at 424, available at https://www.mkgandhi.org/indiadreams/chap54.htm.

[5] Karla Bookman, *Why #MeToo must be impolite*, Indian Express, October 17, 2018, https://indianexpress.com/article/opinion/columns/why-me-too-india-movement-must-be-impolite-5405268/.

[†] President, Bar Association of India and Society of Indian Law Firms.

From the Editor's Desk

Encouraged by the response to the last issue which explored diverse facets of nationalism and nationhood, we decided to continue with theme-based issues which enable the reader to examine a subject of topical interest more comprehensively and serve as a reference for the future.

For this issue, we chose 'Women and the Law'. I doubt there could be a more current subject for this issue. The myriad challenges that women face in the many spaces they occupy– in the home, at school, at work or in public places, are of abiding importance. But the timing of this issue gains significance because it follows a string of historic verdicts on gender rights. In August 2017, came the historic ruling in *Shayara Bano* v. *Union of India,*[1] striking down the regressive practice of *talaq-e-biddat* by a majority of 3:2. Given the chequered history of reform in Muslim personal law and the roadblocks it faced after the debacle following the *Shah Bano* judgment in 1985,[2] there is a change in the status quo at long last. Indeed, it has been a remarkable journey from *Shah Bano* to *Shayara Bano.* Very welcome as it was, the judgment striking down an egregious practice by which a man could divorce his wife by uttering, even thoughtlessly, three words, somehow does not say very much on gender justice. But nonetheless, it is a significant step forward in the journey for women's empowerment.

The landmark judgment of nine judges of the Supreme Court in 2017 in *Puttaswamy* v. *Union of India* resoundingly affirmed the fundamental right to privacy under our Constitution.[3] Privacy is now a many splendoured right, no longer limited to the right to be left alone

[1] (2017) 9 SCC 1.

[2] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

[3] (2017) 10 SCC 1.

by the State, but also the positive assertion of self-determination and personal choices, including sexual, marital and reproductive choices.

Taking a clue from *Puttaswamy,* in *Joseph Shine* v. *Union of India,*[4] where the Court struck down the antiquated law on adultery under Section 497 of the Indian Penal Code, 1860, we find a bold affirmation of women's sexual autonomy. The Court upheld not just marital choices for women as it has in the past, but also the right to sexual self-determination.

Puttaswamy laid the foundation for a flowering of gender rights–the decriminalization of homosexuality in *Navtej Singh Johar* v. *Union of India,*[5] where at long last, the Court undid the grotesque injustice of *Suresh Koushal* v. *Naz Foundation.*[6] With that watershed case, a long oppressed community found utterance. But the general discourse on LGBTQ rights has been centred around gay men. What largely gets left out of the conversation is the impact of *Navtej* in liberating queer women – for women, the challenges in many ways have been harder and more complex than for queer men.

Interesting debates have been raised in the context of the right of women to access places of religious significance. In the *Haji Ali case*, the Bombay High Court struck down the diktat which barred access of women to the inner sanctum of the *dargah*.[7] In the case of the age old temple of Sabarimala, dedicated to the celibate Lord Ayappan, by a 4:5 majority, the Supreme Court, lifted the barrier restricting the entry of women between the ages of 10 and 50.[8] Interestingly, the only dissent came from the lone woman judge on the bench, Justice Indu Malhotra who took the view that morality and rationality cannot be read into matters of faith, and that unless a religious practice was egregious to women, *sati* being one such obvious example, the courts should keep out of matters of worship.

[4] Writ Petition (Crl.) No. 194 of 2017.

[5] Writ Petition (Crl.) No. 76 of 2016.

[6] (2014) 1 SCC 1.

[7] Dr. Noorjehan Safia Niaz v. State of Maharashtra, (2016) 5 AIR Bom R 660.

[8] Indian Young Lawyers Association v. State of Kerala, Writ Petition (Civil) No. 373 of 2006.

It is always a challenge reconciling age old religious practices with a modern constitution that asserts freedom, gender equality and fraternity. Those challenges abound in the courts in India, possibly more than in any other country, because of the sheer range of rituals and customs that flourish here. In order to maintain the sensitive balance between fundamental rights, in particular, the right to equality and the right to freedom of religion, the Supreme Court drew out a distinction between the "core" and essence of religion from what it describes as "secular" practices that relate to particular religious communities such as marriage, divorce, succession and adoption. While the latter are subject to fundamental rights, the former remain immune from challenge. There will always be debate on what is the "core" of religion and indeed whether secular courts can be entrusted with the tenuous task of separating the "core" from the periphery. This is important in the context of women's rights because while religion transcends time, gives the faithful spiritual succour and a multi-cultural society its unique heterogeneity, it is often difficult to reconcile with rights under a modern constitution.

This issue of *The Indian Advocate* explores a vast range of issues from very accomplished authors. The Hon'ble Speaker, Lok Sabha, has made a seminal contribution to this issue, highlighting the need for more women in Parliament - because women take responsible decisions in the interest of the family and the community. Her own story- the rise of a homemaker to the position of Speaker, Lok Sabha is itself a deeply inspiring one. This issue carries accounts of courage and tenacity from other women who have broken the mould. A former judge of the Supreme Court, Justice Ranjana Samant Desai recounts her struggle entering the legal profession despite belonging to a family of distinguished lawyers. Veteran actress, Sharmila Tagore entwines her own brush with patriarchy with that on the silver screen.

This issue explores other challenges that women face in the work force- just staying the course can be a challenge, and the juggle between work and family drives many capable women out of the work place. Sexual harassment at the workplace, and perhaps even more ubiquitous, sexist attitudes of male bosses and colleagues, make the journey even harder for women.

Recently, the world watched as Judge Kavanaugh, then nominated to be judge of the US Supreme Court, was hauled over the coals over a serious charge of sexual assault that dates back several decades. While his appointment went through as women watched in dismay and disbelief, it coincided with a #MeToo movement in India. Women from different walks of life, risking actions for criminal defamation, came out to shame past offenders. These charges may be very difficult to prove in a court of law. But many of them suffered humiliation at a time and in an environment where to speak up would only shame them, not their predators. As news comes in of a union minister being made to resign as several women journalists accused him of having harassed them, we know this is a watershed moment. It is a wake-up call for men. It matters how you treat women, no matter where and how long ago.

I am thankful to all those who contributed to this issue. Mr. Lalit Bhasin, Chairman of the Editorial Board has been extremely supportive and encouraging. I must make special mention of the invaluable contribution of Nidhi Khanna, Advocate, who spent many long hours toiling over edits. Much gratitude is owed to her for her effort and patience over many months.

Madhavi Goradia Divan[†]

[†] Advocate, Supreme Court of India.

Enhancing The Presence of Women In Parliament

SUMITRA MAHAJAN[†]

Women are the fountainhead of life. The family, society, the community and the country, revolve around the woman and it is she, who not only holds the world together but as a 'sarathi', is the primary driving force of society.

The Bhagavad Gita states,

मृत्युः सर्वहरश्चाहमुद्भवश्चभविष्यताम्।
कीर्तिः श्रीर्वाक्चनारीणांस्मृतिर्मेधाधृतिःक्षमा॥२०:३४॥

(Translated: I am all-devouring death, and I am the generator of all things yet to be. Among women I am fame, fortune, speech, memory, intelligence, faithfulness and patience.)

With these qualities women steer the ship of life for the family, society, and the nation. Women have the power of creation, are natural care givers, the first providers, the first educators, the first resource allocators in the family and society, and are natural protectors of the environment.

The progress of any society depends, to a large extent, on the role and responsibility assumed by women who constitute half of humanity. It is said that the world of humanity is possessed of two wings: male and female. For the bird to fly, these two wings have to be equivalent in strength. The full and equal participation of women in all spheres of life is essential to social and economic development, and the ultimate

[†] Speaker, Lok Sabha.

establishment of peace and a united world.

Development must be gender inclusive, if it is to be equitable, sustainable and effective. Concerns about home, family and children are innate to a woman's nature. It is widely recognized that if there is money in a woman's hand, there is money in her home; if the woman's hand is strong, her family is strong; and if there is happiness on a woman's face, there is happiness in the home.

I feel happy that gender mainstreaming has become the central focus of many policies and programmes at governmental and non-governmental levels.[1] Parliaments and parliamentarians are also making significant contributions in terms of progressive legislation in the direction of women's empowerment in political, economic and social spheres.

A glance at the political systems at the global level makes it clear that in most political systems, right from developed to developing countries, the presence of women is low compared to men.[2] In many countries, women had to wage a prolonged struggle to even get their voting rights. But, fortunately this was not the case in India where gender equality is ingrained into our constitutional provisions.[3] The Constitution not only grants equality of treatment to women, but calls upon the State to adopt measures favoring women, thereby neutralizing the socio-economic, educational, and political disadvantages that they face.

Women's political participation results in tangible gains for democracy including greater responsiveness to citizens' needs and increased cooperation across party lines. It also has a profound positive impact on communities, legislature, political parties and citizens' lives. When women are empowered as political leaders, countries generally experience higher standards of living with positive developments in education, infrastructure, and health. In India, research shows that villages with greater representation of women in Panchayats saw more

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1 National Policy for Empowerment of Women, 2001; Beti Bachao Beti Padhao Guidelines, 2018.

2 Inter-Parliamentary Union, *Women in national parliaments,* June 1, 2018, http://archive.ipu.org/wmn-e/classif.htm

3 INDIA CONST. art. 14.

investments and improvement in drinking water facilities, roads, health, and education.[4]

Historically, Indian women have always held important positions in public life.[5] In the Vedic era, women played a key role in the family, in society and in public affairs. We have a galaxy of legendary women who have left behind their indelible imprint on our glorious history. Gargi, Maitreyi, Lilavati, Rani Lakshmi Bai, Ahilyabai, to name just a few, have substantially shaped and impacted our culture and history. The legendary Ahilyabai Holkar is even today remembered and worshipped for her piety, administrative ability, and her fairness and justice. Her rule in the 18th century is cited as a model of benevolent and effective government. There are many stories of her care for her people. In her administration, she tactfully used force and compassion as and when required. Dacoits, who had long been the torment of caravans, were brought to book by using appropriate force. But her motherly instincts guided her to talk to them and understand their problems from a human perspective. As a result, they settled down as honest farmers.

Women's vital role was unequivocally recognized in our freedom movement under the leadership of Mahatma Gandhi. He believed that women were ideally suited for *satyagraha* as they are endowed with qualities appropriate for non-violent struggle and social-upliftment programmes. Women contributed to the freedom struggle in a number of ways - they picketed shops selling foreign goods, participated in political protests, organized *prabhat pheris*, provided food and shelter for underground political activists and voluntarily donated their valuables for the cause of freedom. Thousands of women were jailed for participating in various events during the freedom struggle. Similarly, Durgavati Devi (famously known as Durga Bhabhi), will always be remembered with great reverence for her active support to Bhagat Singh and her participation in revolutionary activities to free our motherland

[4] *The cost of the missing women in Indian politics,* Livemint, June 23, 2018, https://www.livemint.com/Opinion/WXMWsnnWi1GNVmPlPmAXNP/The-cost-of-the-missing-women-in-Indian-politics.html.

[5] N. Devi & K. Subrahmanyam, *Women in the Rig Vedic age,* Int'l J. Of Yoga Phil., Psych. And Parapsych., Vol. 2, Issue 1 (2014).

from colonial rule. In the years since Independence, women have excelled invarious professions such as media, academia, medicine, law, judiciary, banking, corporate management, civil services, art, culture, entertainment, and now even the armed forces.

Participation of women in political decision-making processes after Independence has been a gradual process. Giving women constitutional rights to suffrage is one thing, but its tangible impact in raising women's power and influence in polity and society is an altogether different matter. To achieve political empowerment, reservation of one-third seats for women in our local bodies has been brought about by the 73rd and 74th Amendments to our Constitution. Over 12 lakh women have become active partners in the political processes of the country at the grass root level through free and fair elections. It is also the level from which future legislators at the state and national level are going to emerge. However, the limitations of the law as a means of social change must be understood. The fact is that law can only guide external behaviour; it cannot bring about changes in attitude. That needs a sustained social campaign. The imperative of respecting women must be inculcated in the mind from a young age.

I hope more women will come forward and join politics in the larger interest of society. I have personally seen in the Lok Sabha how women members passionately participate in the discussions on developmental issues. The task of nation-building is an arduous exercise and a complex process. It involves men as much as women. Women are also often the strongest voices for peace and non-violence. Women tend to work in a more participatory and collaborative manner. Thus, women's contribution is crucial to building a strong and vibrant nation.

More and more women are coming forward to enter politics. Many records were broken in the 2014 General Elections. The gap between the voter participation of men and women in the 2014 General Elections narrowed down considerably from that in 2009.[6] The number of women in the 16th Lok Sabha is the highest in terms of female representation in the history of parliamentary democracy

[6] Rajeshwari Deshpande, *Women's vote in 2014,* The Hindu, June 25, 2014,https://www.thehindu.com/opinion/op-ed/womens-vote-in-2014/article6151723.ece.

in India.[7] Yes, the increase may not be statistically very significant and needs tremendous improvement. The presence of women in our legislatures would definitely lead to enacting humane and pragmatic laws.

Rwanda has one of the highest percentage of women appointed to government in the world.[8] Women account for nearly 60 percent of its parliament. The story of how Rwandan women saved their nation after the genocide and created a model for lasting security for countries worldwide is one of the most heart-touching and beautiful stories of modern times. Rwanda was an economically ravaged and socially divided country after four years of civil war, followed by the 1994 genocide of nearly a million people. The traditionally patriarchal society thrust its women into the role of rebuilding the country.[9] They formed local councils, headed judicial proceedings, tilled the land, and rose through the ranks of government. Amazingly, against a backdrop of near total ruin, they ushered in a level of peace and reconciliation that propelled the country into the model of development and gender equality. Women achieved, what appeared an impossible task, with their motherly instincts, fairness, and a commitment for saving the family and society.

It is the responsibility of all of us - government, political parties, society and family - to provide an enabling environment for greater participation of women in political decision-making processes. From my own example, I can say that in 1989, my party gave a chance to an ordinary worker like me to prove myself against a stalwart leader from the opposition. It was a big challenge. But with the support of my family, I could successfully face this challenge, carve out a place

7 Profile of the 16th Lok Sabha, accessed at http://www.prsindia.org/media/media-updates/profile-of-the-16th-lok-sabha-3276/.

8 Gregory Warner, It's the No. 1 Country for Women In Politics – But Not In Daily Life, NPR,July 29, 2016, https://www.npr.org/sections/goatsandsoda/2016/07/29/487360094/invisibilia-no-one-thought-this-all-womans-debate-team-could-crush-it.

9 Claire Wallace, Christian Haerpfer & Pamela Abbott, Women in Rwandan Politics and Society, Int'l J. Of Socio., Vol. 38, No. 4, (Changing Conceptions of Gender, Winter, 2008/09).

for myself at the national level, and reach the Speaker's position after winning eight consecutive elections from Indore. So, it is important for political parties to recognize the fact that capable women not only need to be given opportunities, but parties also need to be patient with them. The support of the family also becomes very important because politics requires women to be away from home for substantial periods. I was very fortunate that my party gave me an opportunity and my family stood behind me like a rock. Very humbly and without sounding immodest, I would say that I am told by people that I have earned a clean image in politics and have always practiced politics of dignity, integrity, fairness, and commitment to the causes dear to my heart. This could be possible only because of the values and support I received from my family. I am proud to say that my workers who have, over the years, shown unflinching support to me, have also echoed the same sentiments and travelled the same policy path with me. It is very gratifying when they tell me that a woman's motherly instincts and sense of fairness are important reasons for my popularity in my constituency.

I have observed in Parliament that the women members' participation is no longer restricted to only women and child development related subjects. They are increasingly showing involvement and participation in other complex policy issues like finance, defence, external affairs etc. No wonder, that today we have our Defence and External Affairs Ministries led by very capable women Ministers.

Ever since I became the Speaker of the Lok Sabha, it has been my endeavour to promote women's rights to access political space. We successfully organized the first ever National Conference of Women Legislators in New Delhi in March, 2016. The theme of the Conference was, 'How can the empowered women empower the nation?' The message from this first ever National Conference of Women Legislators is that given an opportunity, women who are natural multi-taskers have the potential to excel in any field of their choice. We need to facilitate and build mechanisms to enable more women to reach decision-making positions. This will come about when more girls are imparted education and more institutions support the aspirations of women. The theme song of the National Conference of Women's Legislators

Ummeedam became very popular and beautifully explained that the woman is like a flowing river which finds its own way and creates and sustains life in its lap.

We must commit ourselves to help women and girls achieve their ambitions, challenge conscious and unconscious bias, develop gender-balanced leadership, create inclusive and flexible cultures, and value women's and men's contributions equally.

A Judge's Journey to the Highest Court*

Justice Ranjana Desai†

I am often asked how smooth my journey to the highest court in the country was. I want to answer that question today. It was very difficult at times, even turbulent, making me wonder whether it was a mistake to enter this profession. A few kind individuals and my determination saw me through. I feel that if I speak about my experiences, that will have the desired impact. It may perhaps benefit my sisters in the legal profession.

In any society, it is difficult for a woman to achieve her goal. This was more so when I began my career in 1973. At that time, there were very few women lawyers in the Bombay High Court, and the successful amongst them could be counted on the tips of one's fingers. I can name three of them whom I admired the most - Justice Sujata V. Manohar, who later became a judge of the Supreme Court, Mrs. Sohini Nanavati, and Mrs. Kusum Hariani. They inspired me. I remember how I used to walk up to the Original Side Library to see them sitting at the table working on their briefs. I wondered whether I would ever be like them.

I was fortunate to have parents with a liberal outlook. I have no brother. We were three sisters brought up in a free environment. We were encouraged to speak on any subject, we had the liberty to oppose our parents, and the liberty to move freely in society. No questions were asked; no restrictions placed. My father, Shamrao Samant, was a distinguished criminal lawyer. My mother, Sharayu, was a highly

* A version of this paper was delivered as a speech at the farewell event organized by the Supreme Court Bar Association (SCBA) in honour of Justice Ranjana Desai's retirement from the Supreme Court on October 29, 2014.

† Former judge, Supreme Court of India.

educated lady. She held a major in Western Philosophy and a degree from the prestigious Wilson College of Bombay. Surprisingly, when I passed my LL.B. examination and declared that I want to become a lawyer, my father opposed my decision. This came as a shock to me. From my maternal side, I was a third- generation lawyer. My grandfather, Mr. T.N. Walavalkar, had a good civil practice on the Appellate Side of the Bombay High Court. My maternal uncles also established successful practices. Several of my cousins continue to practise in the Bombay High Court. Surprisingly, my maternal uncle Mr. V.T. Walavalkar, a senior lawyer, was also not too happy about my decision to join the legal profession.

A criminal lawyer himself, my father was only being protective of me. He asked me whether I would be able to deal with the kind of people who came to his office. He suggested that I join the London School of Economics for further studies. I remember the day when I wanted to accompany my father to court. He was not keen to take me with him. I was shattered. At that time, it was my mother who stood by me. She said that if I wanted to practise law, no one could stop me, not even my father. She told me that if I had made up my mind, I should go to the Bar Council, take my *sanad* and start practice. So I went all by myself to the Bar Council, completed the formalities and took my *sanad*. Thereafter, it was my mother who constantly encouraged me. She wanted us sisters, to excel in the field of activity we chose for ourselves. To some extent we fulfilled her aspirations.

I had a similar encounter with my father-in-law, Dr. Amul Desai. He was very kind to me. But once he told me that there was no need for me to practise. He advised me to concentrate on managing the family property. I was again shattered. Another woman stood by me at the time. My mother-in-law, Indira Desai, heard what my father-in-law had said to me. She firmly told me not to give up on the legal profession. For her encouragement at that critical time, I am grateful to her.

After my father's resistance, my mother suggested I go and sit in the chamber of her cousin, Barrister Malati Patil, who was to leave for USA. I began my career alone from a small room on the 4th floor of Yusuf Building, Fort, Bombay. The chamber was full of books. Bands

and a gown were neatly kept ready for me. But there was no work. I was not practising for money. God was kind. I needed no money but I wanted work. I sat in the huge office of my aunt waiting for some work. Fortunately, one man showed some confidence in me. He wanted me to file a bail application for a person who had overstayed in India. He offered a fee of Rs.35/-. I was delighted to land my first brief. As luck would have it, the Magistrate rejected the application. I was very disappointed. Everyone around me except my mother, was opposed to my practice. I was determined to make it. The man who briefed me for the bail application asked me whether I could take the matter up to the High Court. I readily agreed. He increased my fee to Rs.45/-. I appeared before Justice S.K. Desai. In the Bombay High Court, at the time, his court was the most difficult in the sense that though one knew that justice would be done, one could not be sure how the judge would treat you. Being a brilliant judge, he expected precise arguments and would fly into a temper at shoddy work. I will never forget the day when I stood in that court – a slip of a girl, trembling at the thought of the judge, throwing my application into the dustbin. I argued and the judge granted my client bail. My modest career began there. Thereafter my father was all for my practice. I attended several sessions cases conducted by him. I assisted him, but never joined his chamber. I am grateful to my father for the liberal education that he gave us. I learnt from him the value of hard work. He would pour his heart into every case he took on. He worked 18 hours a day and told me that hard work would not kill me but no work was sure to ruin my health. I have tried to emulate him. I do not know how far I have been successful.

My parents set very high standards of behaviour for us. I was always conscious of the fact that even a slight deviation from the path of rectitude would not be tolerated by them. There was no compromise on the basic requirements of honesty, integrity and impeccable character. That upbringing has stood me in good stead.

My school, Bal Mohan Vidya Mandir at Shivaji Park, imbibed in me values of simplicity, honesty, integrity and a deep understanding of the reality that one cannot segregate oneself from the common man and woman, whom one must serve. My life changed when I joined Elphinstone College. A great college where Dr. Ambedkar, Dr. Homi

Bhabha, Dadabhai Naoroji, Gopal Krishna Gokhale, Jamsetji Tata, Mr. Seervai, and many such stalwarts studied. I can never compare myself with any of those stalwarts. But I am proud of the fact that I studied in an institution which gave this country such stalwarts. The Government Law College, Mumbai, which I joined after graduation, is equally a great institution and some of my fellow students are now on the Bench.

Coming back to my profession, I must also speak about my unsuccessful stint of a year and half on the Original Side of the Bombay High Court, where I was sent by my father after he realized that I had the potential to be a good lawyer. But in those days on the Original Side, work moved in circles and outsiders, particularly a young woman like me stood no chance. I had to return to the Appellate Side where I had my roots. But time spent on the Original Side had its own benefits. The Original Side has its own style and sophistication. Scholarship, erudition, and the crisp language of some of the counsel on the Original Side had a marked impact on my mind.

Justice Pratap, who later went on to become Chief Justice of the Andhra Pradesh High Court, played a great role in shaping my career as a lawyer. Once when I was arguing a civil revision application before Justice Apte, Justice Pratap, then at the bar, happened to be in the Court. That evening I received a call from him. He mentioned that he was likely to be elevated and asked whether I would join his chamber. I was thrilled. I started attending his chamber. That was a take-off point in my career. Justice Pratap gave me a range of matters to argue, both civil and criminal. Justice Ajit Shah, who later rose to be Chief Justice of the Delhi High Court, was my chamber colleague. Both of us worked together on a number of briefs. During that time, I had occasion to brief many stalwarts of the Bombay Bar. Some memories are etched in my heart. I remember having instructed senior Mr. Andhyarujina, Mr. T.R. Andhyarujina's father, in a Rent Act case. It was a great experience. I earnestly briefed him on all the points raised in the petition. Mr. Andharujina was an authority on the Rent Act. It was like taking coals to Newcastle. Obviously, he knew it all but he patiently heard me out. It was quite late in the evening. After the conference was over, he smiled, and in his typical Parsi accent and kindness, an inseparable attribute of a Parsi, asked me how I would make my way home. He was concerned

about my safety and insisted on getting his driver to take me home. I was touched. Such were the caring seniors at the Bar. I had occasion to work with Mr. V.R. Manohar, Advocate General of Maharashtra, Mr. Bobde, father of Justice Bobde, who was also Advocate General of Maharashtra, Mr. Jethmalani, and other such seniors. I appeared with them and later opposed some of them. Each one of them taught me something new.

It was during this period that I opposed Mr. Ramrao Adik, another senior lawyer of the Appellate Side, who later rose to be the Law Minister of the State of Maharashtra. It was Mr. Adik, who appointed me as an honorary Government Pleader in the High Court. In that office, I got the opportunity to deal with all types of cases involving important questions of law. But, even there, life was not easy. I remember the day when my appointment as Additional Government Pleader was expected, purely through the dint of my hard work. A person much junior to me, whom I used to guide even in drafting affidavits, came to be appointed instead. I wrote out my resignation letter and was about to tender it when I received a call from Mr. V.R. Manohar, the then Advocate General of State of Maharashtra. He told me that he had received information that I was tendering my resignation. I said that indeed, I wanted to resign because I felt humiliated. Mr. Manohar said to me, "Ranjana, this is our society. Mindsets will never change. Please do not tender your resignation. I see a great future for you." He was able to persuade me against tendering my resignation. His prediction came true and I was appointed Government Pleader of the Appellate Side. But, later I learned that even at that stage, there was opposition. Doubts were expressed as to whether I would be able to deal with so many police stations in Maharashtra and whether I would be able to sit till late into the evening in the office because there was a great pressure of work. Some well wishers stood by me and thus, I was appointed as the Government Pleader. It is from that office that I was elevated to the Bench of the Bombay High Court. That office was a stepping stone to judgeship.

Just as judgeship came, my mother was struck with Alzheimer's disease. I do not know whether she understood that I had become a judge. But to her I owe an enormous debt. As I was growing up,

it was my mother who single handedly took care of the house. Busy outside Bombay with big sessions court cases, my father was hardly at home. As children, my sisters and I were never taken out of Bombay for vacations. As a little girl, I once asked my mother when she would take me to Delhi. She was busy with her domestic chores. She looked at me sternly and said, "[Y]ou must go to Delhi only if the President calls you. Go, do your work." When the warrant of my elevation to the Supreme Court came so many years later, tears rolled down my cheeks as I thought of what she said. She was the woman who set the goals for us.

I must now come to the Bombay High Court. Each High Court has, in its own way, contributed to the development of law in this country. As a judge of the Supreme Court, I feel that all the High Courts of the country are my own. But as I demit office, memories of the Bombay High Court flood my mind. I would fail in my duty if I do not salute the Bombay High Court. The Bombay High Court taught me the value of hard work. It imbibed in me a work culture which helped me in the highest court in the land. There was and there always is a perfect equation in the Bombay High Court between the Bar and the Bench. The Court functioned exactly by the clock and judges apologized to the Bar if they came late. There were great judges like Justice Tulzapurkar, Justice Chandurkar, Justice Madan, Justice Lentin, Justice Mukherjee, Justice G.N. Vaidya, and Justice S.K. Desai to name a few. I also had the pleasure of appearing before Justice Mohta. As juniors, we sat in the Chief Justice's court and listened to the erudite arguments of Mr. Nariman, Mr. Sorabjee, Mr. Andhyarurijina, Mr. Chagla, Mr. Rafiq Dada, and so many others. As seniors, they were protective of us but never spared us when we committed mistakes. As a judge, I had the good fortune of sitting with the finest judges. I sat with Chief Justice Y.K. Sabharwal, Chief Justice M.B. Shah, and Chief Justice C.K. Thakker. I also shared the Bench with Justice A.V. Savant.

The three years and one month spent in the Supreme Court were the best part of my career. Time just flew. My brother and sister judges were very kind and friendly towards me. I shared the Bench with Justice Aftab Alam for almost half of my tenure. I always felt that I was sitting with an English Judge. He talked less, but his silence was eloquent. His

interruptions were meaningful. He taught me how to conduct the court proceedings with dignity. I do not know how far I have succeeded, but I have tried to follow him. Once in jest, I told Justice Alam that if I write an autobiography, there would be a chapter on him. He said to me – "[P]artner, a footnote will do". Partner, today I can say that I may have to devote a few chapters to you. I was fortunate to have spent so much time with you on the Bench.

I also shared the Bench with Chief Justice Dattu. I learnt how to deal with the heaviest matters in the shortest possible time and I realized that behind the tough exterior, there is a kind man. I shared the Bench with many of my brother judges and I enjoyed every bit of it. I had great stints with Justice Lokur and Justice Ramana.

We are all proud to be Indians, but, I did not know the true meaning of 'being an Indian' till I came to the Supreme Court. I saw my country in its true colours here. I was never parochial. But, if there was even a shred of any parochial tendency in me, it got washed away here. I saw lawyers coming from Jammu & Kashmir, Punjab & Haryana, Kerala, Andhra Pradesh, Karnataka, Tamil Nadu, Orissa, all with their typical accents, just as I have a Marathi accent. I realized what great talent there is in every state of our country. We are such a beautiful mix. The Supreme Court made me realize how little I knew of the law and perhaps an entire lifetime is not sufficient to learn the law. My experience truly humbled me. I learnt a lot from the Bar. If there were points arising out of a law totally new to me, the Bar was patient with me. I went back to read and the matter progressed beautifully. The Bar gave me a great deal of affection. Perhaps, at times, I might have been harsh to some and as I demit office, I ask for forgiveness. In this last court, the knowledge that there is no one above to correct a mistake I may have made, that my pen might do injustice to someone, brought immense pressure on me. But, as one judge in the Bombay High Court told me in the early years of my career, a judge should not have a vacillating mind. A judge must take a decision. That is exactly what I did and left the rest to God.

I must acknowledge the support my family gave me in this journey. My elder sister, Dr. Rekha Pandya, based in the U.K., stood by me

like a rock. Her husband, Dr. Suresh Pandya, and her daughter, Dr. Priyada were always there for support. My younger sister, Kirti Gupte's contribution has been immense. When our mother was struck with Alzheimer's disease, she sacrificed her precious time and career to take care of her. She took over the entire responsibility and never allowed me to stay at home, even for a day, to look after our mother. Without her support, I would not have made the strides that I did. I don't think I can ever repay her debt. That is a debt which will always remain unpaid. Her husband, Milind Gupte has been a great support. I must also mention the contribution of Mr. and Mrs. Vaidya, who were like parents to me. I have no words to express my husband's contribution to my life and career. He has a lion's share in my success. I have also deprived my son, Mike, of my company when he really needed it, but he makes no grievance about it.

My tenure in the Supreme Court was very short but, I am thankful to the Almighty. I was given the opportunity to serve the people in this highest court, which has shaped the destiny of our country. God gives you as much you deserve. Perhaps I deserved only this much and nothing more. Judges have come and gone. Their photographs still hang in the Supreme Court. I have already seen the corner where my photograph will be hung. I may be forgotten, but for me, it has been a great experience. All those who have interacted with me will have a place in my heart and their fond memories will be my companion till the day my memory serves me right.

Women's Rights

Murlidhar C. Bhandare[†]

We live in a world of human rights. No longer do we live in a society dominated by physical prowess. We live in a society governed by brain power. Nature has made men stronger than women in physical strength, but this imbalance has been corrected in the knowledge society that we now live in, where women have greater parity with men. Physical strength has been rendered redundant. Things now happen with the tap of a finger—be it a computer keyboard, a television remote or a smartphone.

In a world governed by brain power, girls are equal or even superior to boys. We notice that girls outshine boys in board, university and various competitive examinations. In 2018, girls outshone boys in the CBSE Class 12 and Class 10 examinations. Meghna Srivastava topped the Class 12 examination, getting 99.8%. She secured 499 marks out of 500. The second position was bagged by another girl, Anoushka Chandra, who secured 498 marks. Out of four students who topped the Class 10 examination, three were girls.[1]

This trend also continues in colleges and universities. According to a latest survey made by the Ministry of Human Resource Development, women perform better than men in all undergraduate and postgraduate streams, their dominance at the Masters level being the most

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1 Anisha Singh, *7 Girls in Top 3 Positions*, NDTV, May 26 2018, https://www.ndtv.com/education/cbse-12th-result-2018-meghna-srivastava-board-topper-with-499-marks-7-girls-in-top-3-positions-1857912.

conspicuous.[2] As the Chancellor of several universities in Odisha, I have noticed that women far outnumber men among gold medalists.

However, these super achievers in schools, colleges and universities seem to go missing in public life. True, we see women excelling in various fields such as teaching, nursing, medicine, administration, banking, engineering and information technology. In spite of a knowledge society creating opportunities for women, a conservative and patriarchal society is raising barriers in their path to excellence.

Women are under-represented in the highest institutions of the executive, legislative and judiciary of the country. Women's representation in elected bodies, Lok Sabha and State Legislative Assemblies, is abysmally low. They occupy just 63 seats in the 543-member Lok Sabha, which is less than 12%.[3] The situation in state legislative assemblies is even worse. While the global average for women in Parliament stands at 22.4 %, India ranks 103 out of 140 countries.[4] In Asia, India is at the 13th position out of 18 countries.[5] Of the 4,118 Members of Legislative Assemblies (MLAs) across the country, only 9% are women.[6] The gender imbalance is even sharper in the judiciary. The country's Supreme Court has had only eight women judges compared to more than 200 male judges.[7] For the very first time in history, the Supreme Court has three women judges at the same

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2 Ministry of Human Resource Development, Annual Report, 2016-17, http://mhrd.gov.in/sites/upload_files/mhrd/files/document-reports/English-Annual%20Report%202016-17.pdf.

3 Profile of the 16th Lok Sabha, PRS India, http://www.prsindia.org/media/media-updates/profile-of-the-16th-lok-sabha-3276/.

4 Bhanupriya Rao, *Women in Parliament: Where does India figure among the rest of the world?,* Factly, March 6 2016, https://factly.in/women-in-parliament-where-does-india-figure-among-the-rest-world/.

5 *Id.*

6 *Women in Politics 2017 Map*, Inter Parliamentary Union and UN Women, http://www.unwomen.org/en/digital-library/publications/2017/4/women-in-politics-2017-map.

7 Namita Bhandare, *67 years of Supreme Court, 6 Women Judges*, Livemint, Sept. 2, 2017, judges, https://www.livemint.com/Leisure/Ak3TNcLWpQuoFaD3gJUnmM/67-years-of-Supreme-Court-6-women-judges.html.

time, out of its sanctioned strength of 31. Today, out of over 600 High Court judges, only 73 are women.[8]

There was an effort to correct the imbalance of under-representation of women in Parliament and state legislatures. The Women's Reservation Bill or the Constitution (108th Amendment) Bill, 2008, proposed to amend the Constitution of India to reserve 33% of all seats in the Lok Sabha, and in all state legislative assemblies, for women. The seats were proposed to be reserved in rotation and would have been determined by draw of lots in such a way that a seat would be reserved only once in three consecutive general elections. The Rajya Sabha passed the Bill on March 9, 2010. However, the Lok Sabha never voted on the Bill, which lapsed after the dissolution of the 16th Lok Sabha in 2014. Our effort to bring an end to the disparity is only half-hearted and our commitment to half of our population remains unfulfilled.

The Constitution of India guarantees, to all its citizens, equality, dignity and freedom from exploitation. It makes no discrimination on the ground of caste, religion or sex. Naturally, women are entitled to equal rights as their male counterparts. Additionally, there are various statutes governing the rights of women. In a bid to establish equality and to cope with emerging situations, new laws are being enacted and rules are framed. Government agencies, NGO's, and other civil society institutions must generate legal awareness among women, especially among those living in remote areas and urban slums. Women living there must know their rights and entitlements. What follows is a brief discussion of laws which seek to ensure security and dignity of women.

I. Legislations governing Women's Rights

The Dowry Prohibition Act, 1961, is an important law which treats men and women on an equal footing. This Act penalizes the giving of dowry to the bride or the bridegroom and their family at the time of marriage. The lack of economic independence of women and the stigma surrounding divorce has resulted in grave suffering for women.

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8 Press Trust of India, *Out of over 600 High Court judges, only 73 are women*, Financial Express, March 14, 2018,https://www.financialexpress.com/india-news/out-of-over-600-high-court-judges-only-73-are-women/1098545/.

At times, when demands for dowry even after marriage are not met by the families of brides, they are tortured, beaten and even burned to death. This Act seeks to send a strong message against the abhorrent practice of dowry.

Similarly, the Prohibition of Child Marriage Act, 2006, which was made effective in 2007, seeks to prohibit marriages of girls and boys before they are ready to bear the responsibility of family and parenthood. This Act prohibits marriage where the groom or the bride is underage, that is, the bride is under 18 years or the groom is younger than 21 years.

The Equal Remuneration Act, 1976 prevents discrimination between men and women in terms of remuneration for the same work. It provides for payment of equal compensation to men and women workers.

The Medical Termination of Pregnancy Act, 1971, which came into effect in 1972, was amended in 1975 and 2002. The aim of the Act is to reduce the occurrence of illegal abortion and consequent maternal mortality and morbidity. It states the conditions under which a pregnancy can be terminated and specifies the persons qualified to conduct an abortion.

The Indecent Representation of Women (Prevention) Act, 1986 prohibits indecent representation of women through advertisements, or in publications, writings, paintings, figures or any other manner. It seeks to curb the sexual objectification of women.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is a milestone in ensuring safety and dignity of working women. It seeks to protect them from sexual harassment at their place of work. Such harassment includes the use of language with sexual overtones, invasion of private space with a male colleague hovering too close for comfort, subtle touches and innuendoes.

II. Leading Judgments on Rights of Muslim Women

Law seeks to address the grievances of all women, especially Muslim women. In *Bai Tahira* v. *Ali Hussain Fissalli Chothia*,[9] which my wife,

[9] (1979) 2 SCC 316.

Sunanda (later, better known as Justice Sunanda Bhandare, a judge of the Delhi High Court) and I argued, the Supreme Court ruled that a divorced Muslim woman was entitled to maintenance from her former husband. This was a precursor to the more famous *Shah Bano* case,[10] in which the Supreme Court delivered a judgment favouring maintenance given to an aggrieved divorced Muslim woman, Shah Bano Begum. The great Justice V R Krishna Iyer, a thinker ahead of his time who had written several landmark judgments, was also the author of both these judgments.

Orthodox Muslims considered the *Shah Bano* judgment an attack on their religion. They felt threatened by what they perceived as an encroachment on Muslim Personal Law. There was tremendous pressure from the Muslim orthodoxy to undo the judgment. I remember, in the General Body meeting of Congress Parliamentarians, which was attended by Prime Minister Rajiv Gandhi among others, I strongly opposed the proposed Bill. Incidentally, I was the only speaker who opposed the move. When the meeting was over, an overwhelming number of MPs congratulated me for expressing my view so forcefully. However, the party, in its collective wisdom, decided to introduce the Bill. Ultimately, Parliament diluted the judgment and allowed maintenance to a divorced Muslim woman only during the period of *iddat*, according to the provisions of Islamic law. This was in stark contrast to Section 125 of the Code of Criminal Procedure, 1973. The 'liability' of a husband to pay maintenance was thus restricted to the period of *iddat*. The onus of maintaining her thereafter is on her relatives or the Wakf Board. Later, in *Danial Latifi* v. *Union of India*,[11] the Court held that reasonable and fair maintenance is not limited to the *iddat* period. It extends for the entire life of the divorced wife until she remarries.

In 2017, the Supreme Court declared the Muslim practice of triple *talaq* unconstitutional. In a 3:2 verdict,[12] the Court held that the practice violates the fundamental rights of Muslim women as it

10 Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.
11 (2001) 7 SCC 740.
12 Shayara Bano v. Union of India, (2017) 9 SCC 1.

irrevocably ends marriage without any chance of reconciliation. The ball is now in Parliament's court. During the course of hearing, the Centre had told the bench that it would come out with a law to regulate marriage and divorce among Muslims if triple *talaq* was held invalid and unconstitutional. That law has not yet seen light of day.[13]

III. Challenges of the Women's Rights Discourse

Women's rights should not be viewed as a mere slogan of a few activists. "Women's rights are human rights", as Hillary Clinton said in her address to the fourth World Conference on Women held in Beijing on September 5, 1995.[14]

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood," reads Article 1 of the Universal Declaration of Human Rights adopted and proclaimed by the UN General Assembly on December 10, 1948. However, there is a huge gap between the ideal, and the real. Ideally, women and men are equal in all respects. But in reality, there is discrimination against women in every walk of life—within the family, in education, in employment and in society at large. In a largely patriarchal society, most families prefer a son to a daughter.

According to the 2011 Census there are 943 women per thousand men in India.[15] Among the states/UTs, only Kerala and Puducherry have a positive sex ratio for women—1084 and 1038 respectively.[16] On the other hand, Haryana, Delhi and Chandigarh record low figures of

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[13] On September 19, 2018, the President promulgated the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018. However, the Ordinance does not regulate the law of marriage and divorce among Muslims.

[14] First Lady Hillary Rodham Clinton, *Remarks for the United Nations Fourth World Conference on Women*, Beijing, China, September 5, 1995, United Nations Fourth World Conference on Women Secretariat in collaboration with the United Nations Development Programme, http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt.

[15] 2011 Census, Government of India, https://www.census2011.co.in/sexratio.php.

[16] *Id*.

877, 866 and 818 respectively.[17] In Daman and Diu, the ratio is as low as 618.[18] The Census data exposes this grim reality when, biologically, a woman has a longer lifespan than a man. The appalling sex ratio portends an ominous trend—in the days to come, there may not be as many young women for our young men to marry.

Unfortunately, women face discrimination almost everywhere, from womb to tomb. Sex determination is a crime; but it is carried on clandestinely in clinics and nursing homes across the country. In a family, women usually eat the last and the least, after serving every other member. In this context, I remember a childhood experience. In our family, my sisters were given food before me. My mother would say, "If I serve food to Babu (my pet name) first, he will eat the whole meal and nothing will be left for others." Of my three sisters, two are doctors and one is a lawyer.

A recent study indicates that 52 per cent Indian women are anaemic; around 15 per cent of them are moderately anaemic, and around 2 percent severely anaemic.[19] It is heartening to note that cases of anaemia have reduced over the years. But it is not enough by any means. Even educated middle class women suffer from anaemia. Blood donation camps in the Supreme Court and Delhi High Court conducted by the Justice Sunanda Bhandare Foundation reveal that even some women lawyers suffered from anaemia when their blood samples were tested to find out if they were fit to donate blood.

The consequences of anaemia for women include increased risk of low birth weight babies, perinatal and neonatal mortality, inadequate iron stores for the newborn, and increased risk of maternal morbidity and mortality. There is also the risk of lowered physical activity, mental concentration and productivity. Women with even mild anaemia may experience fatigue and have reduced work capacity.

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[17] *Id.*

[18] *Id.*

[19] ME Bentley and PL Griffiths, *The burden of anemia among women in India*, European Journal of Clinical Nutrition, (2003) 57, 52-60 (Nature Publishing Group, 2003).

In matters of education, the family gives priority to boys. People erroneously think that boys are the sole bread earners of the family. The 2011 Census data shows that the percentage of literacy of India stands at 74.04, male literacy at 82.14 and female literacy at 65.46.[20]

Women face violence and intimidation. Such reports appear in the press almost every day. A survey conducted by the Thomson Reuters Foundation in 2018 reveals that India is the most dangerous country in the world for women because of the high risk of sexual violence, human trafficking for domestic work, forced labour, forced marriage and sexual slavery, among other reasons.[21] It was also described as the most dangerous country in the world for its cultural traditions that impact women, citing acid attacks, female genital mutilation, child marriage and physical abuse. From managers to maids- India's working women all face sexual abuse, says the report.[22] Over the years, the situation has deteriorated in India. Seven years ago, a study conducted by the same Foundation placed India as the fourth most dangerous country for women.[23]

National Crime Records Bureau (NCRB) data reinforces Delhi's 'rape capital' tag as the city tops in crimes against women. NCRB data shows Delhi contributed to one in every three crimes against women in 2016.[24] Delhi Police says the numbers are high because more victims are coming out to report crime. The statistics of the Delhi Police reveal a horrible truth. More than five women were raped every day in the

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20 *Supra* note 15.

21 Belinda Goldsmith & Meka Beresford, *India most dangerous country for women with sexual violence rife- global poll*, Thomson Reuters, June 26, 2018, https://in.reuters.com/article/women-dangerous-poll/india-most-dangerous-country-for-women-with-sexual-violence-rife-global-poll-idINKBN1JM076.

22 *Id*.

23 Reuters Staff, *Factbox- the world's most dangerous countries for women*, Thomson Reuters, June 15, 2011, https://in.reuters.com/article/idINIndia-57704120110615.

24 *Crime in India 2016*, National Crime Records Bureau, Ministry of Home Affairs, http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Crime%20Statistics%20-%202016.pdf.

national capital in the first three and a half months of 2018.[25] According to the data, 578 rape cases were reported to the Police till April 15 this year as against 563 in 2017 during the same period in 2017.[26] The Police also reveal that in 96.63% of the rape cases reported in 2017, the accused was known to the victim.[27] With 13,803 cases, Delhi clinched the top spot for the highest number of rape cases, attempt to rape cases, acid attacks, dowry deaths, kidnapping and abduction, sexual harassment, forceful attempt to disrobe and stalking. Mumbai was a distant second with 5,128 cases registered in 2016.[28] Violence against women occurs at home, and in public spaces such as roads, marketplaces and gatherings. In most rape cases, offenders are not strangers. Offenders often include relatives, colleagues, employers, neighbours and even family members. What else could be more shocking than this?

Society expects women to conduct themselves the way it prescribes. And in some parts of north India, *khap* panchayats order honour killing for those who refuse to follow their diktats. *Khap* panchayats claim to be the custodians of age-old customs and traditions. The mere perception—which may not always be right—that a woman has brought 'dishonour' to her family or community is enough to violate her right to life. On March 27, 2017, the Supreme Court declared illegal any attempt by *khap* panchayats to end a marriage between consenting adults.[29]

Laws have been enacted to deal with acts of violence against women. But mere law is not enough. Action is necessary. It is necessary to bring reforms in every sphere of administration, particularly in the police administration. It is also the duty of the community and civil society to work towards eliminating gender-based violence and ensuring safety, equality and dignity of women. True, good progress has been achieved in providing better opportunities to girls and women in education and

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[25] *Five rapes reported every day in Delhi in first three and half months in 2018*, New Indian Express, May 6, 2018, http://www.newindianexpress.com/nation/2018/may/06/five-rapes-reported-every-day-in-delhi-in-first-three-and-half-months-in-2018-1810986.html.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Shakti Vahini v. Union of India, (2018) 7 SCC 192.

other fields of life. The pace, however, must be very rapid to ensure equal status to women in every walk of life.

International Women's Day is observed on 8th March every year to raise public awareness on the rights of women. Although National Women's Day was observed by different countries on different days since 1909, it was in 1975 that the United Nations started celebrating the day on the 8th of March. Since then the World Conference on Women has been held in different countries across the world, the first one in Mexico in 1975, the second in Copenhagen in 1980 and the third in Nairobi in 1985. The fourth conference was held in Beijing in 1995. It was a matter of great joy for me that my wife late Justice Sunanda Bhandare was a member of the Indian delegation to the first World Conference on Women held in Mexico in 1975. All through her life she worked hard for the empowerment of women. But for her untimely death, she might have been the first woman Chief Justice of India.

Patriarchal society must be replaced by an equal society. People must see women on an equal footing with men. As Mahatma Gandhi said, "[W]oman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him".[30] Equality, dignity and safety of women are the three major issues that need to be addressed. Empowering women is empowering humanity. There should be equal opportunity for every woman and every man to have access to quality education, healthcare and economic empowerment with gainful employment.

Everyone has the right to realize their full potential. Everyone must have the "freedom to choose and the right to excel", which is the motto of the Justice Sunanda Bhandare Foundation. Given the freedom of choice, girls can excel in their chosen field, be it science and technology, arts and music, law or any other profession.

[30] Mahatma Gandhi, *Speech at Bhagini Samaj, Bombay (February 20, 1918)*, in The Collected Works of Mahatma Gandhi 273, Vol. XVI (Publications Division, Government of India, 1999), *available at* http://www.gandhiashramsevagram.org/gandhi-literature/collected-works-of-mahatma-gandhi-volume-1-to-98.php.

Each one of my three granddaughters have made their mark in their chosen fields at a very young age. As a proud grandfather of three very capable young women, I cannot but help share a few of their achievements.

At the young age of 21, Shreya, my eldest granddaughter, filed a Public Interest Litigation in the Supreme Court challenging the validity of Section 66A of the Information Technology Act, 2000 ("IT Act"), which punished a person for putting his/her comments on a social networking website. Shreya succeeded in the case and it gave a huge impetus to the freedom of speech and expression guaranteed by our Constitution when the Supreme Court struck down Section 66A of the IT Act.[31] A pathbreaking ruling on the freedom of expression guaranteed under Article 19(1)(a) of our Constitution, the case was argued by Soli Sorabjee on behalf of the petitioner and the judgment was authored by Justice Rohinton Fali Nariman.

Teesta, my second granddaughter, wrote an outstanding thesis titled "Someone Else's Honor: Women as Repositories of Male Honor and Their Subsequent Vulnerability to Sexual Violence in India", which was adjudged the Best Thesis in Legal Studies in Scripps College, Claremont, California. My youngest granddaughter, Ananya, as a school girl, conceptualized a project for building 20 toilets in a slum in Delhi. The school team, of which she was the head, won the first prize in an all India competition conducted by the Confederation of Commerce and Industry (CCI) in Mumbai. The prize money of Rs 7 lakh was given to the school. I am confident, given an opportunity, girls can break the glass ceiling and excel in their chosen fields.

I will conclude with lyrics from a famous song by the celebrated American singer Whitney Houston. These were my wife, Sunanda's favourite lyrics:

I decided long ago, never to walk in anyone's shadows,
If I fail, if I succeed,
At least I'll live as I believe.
No matter what they take from me,
They can't take away my dignity.

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31 Shreya Singhal v. Union of India, (2015) 5 SCC 1.

Shattering Glass Ceilings on The Bar and on The Bench[*]

Justice Gautam Patel[†]

I should have known better than to venture out to write on something that I will never ever encounter or experience. I am not here to say anything at all about sexual assaults on women, individual incidents in the #Metoo movement, or even about this glass ceiling in any profession or field of work other than law.

In fact, in attempting a profile of the problem, I first want to get rid of this phrase altogether. It's not just dull, but I think it's become somewhat meaningless. And it's totally flat — glass, and ceiling, as if this is some sort of visible-invisible, but fixed and immutable. Reality is, I fear, much more convoluted, and far more sinister than this.

What is it really we're talking about in law? It's about a bias. And more: it's a cultural and social or a socio-cultural or sociological bias. And it's a very, very stubborn bias.

Does anyone here really need an illustration? I seriously doubt it, but let's see some of the more immediate manifestations: women lawyers told, often by white-haired gents in black who, presumably, and if only on account of their silvery locks should know better, that they should stay at home and mind the children. That a woman lawyer who is fierce in the defence or prosecution of her client's cause is 'shrewish', but when a male lawyer does exactly the same thing in the same way and in

[*] A version of this article was delivered as a speech titled 'Cracking the Glass Ceiling', before the Ladies' Wing- IMC Chamber of Commerce and Industry on October 11, 2018.

[†] Judge, Bombay High Court.

the same words, he is to be much admired for his 'tenacity' and 'grit'. That a woman in a trial in court or in an arbitration should be mocked and derided, constantly interrupted, met with long and weary groans; but when a male lawyer is introduced to 'lead' her, the same opposition retreats into a silence. That gives us another dimension to the problem. The incessant bullying of women, no matter how competent, *because they are women*: archetypal, nauseating patriarchy.

It's not just us. It happens everywhere. Earlier this very month, I read an article in 'The Atlantic' by a litigator named Lara Bazelon. It's title is this: 'What It Takes To Be a Trial Lawyer If You're Not A Man'. I want you to read the opening paragraphs of this article:

> Last year, Elizabeth Faiella took a case representing a man who alleged that a doctor had perforated his esophagus during a routine medical procedure. Before the trial began, she and the defense attorney, David O. Doyle Jr., were summoned to a courtroom in Brevard County, Florida, for a hearing. Doyle had filed a motion seeking to "preclude emotional displays" during the trial—not by the patient, but by Faiella.
>
> "Counsel for the Plaintiff, Elizabeth Faiella, has a proclivity for displays of anguish in the presence of the jury, including crying," Doyle wrote in his motion. Faiella's predicted flood of tears, he continued, could be nothing more than "a shrewdly calculated attempt to elicit a sympathetic response."
>
> Faiella told the trial judge, a man, that Doyle's allegations were sexist and untrue. The judge asked Doyle whether he had a basis for the motion. Faiella says that he replied that he did, but the information was privileged because it came from his client. (Doyle told me the information had in fact come from other defense attorneys.) Faiella called his reply "ridiculous." She told me: "I have never cried in a trial. Not once."
>
> As Faiella listened to Doyle press forward with his argument, her outrage mounted. But she had to take care not to let her

anger show, fearing it would only confirm what Doyle had insinuated—that she would use emotional displays to gain an advantage in the courtroom.

The judge denied Doyle's request, saying, in essence, "I expect both parties to behave themselves." Afterward, Faiella confronted Doyle in the hallway. "Why would you file such a thing?" she demanded, noting that it was unprofessional, sexist, and humiliating.

"I don't understand why you are getting so upset," she says Doyle replied. (Doyle denied that gender was the motivating factor behind filing the motion; he said he had filed such motions against male attorneys as well.)

When I asked Faiella for a copy of Doyle's motion, she said that she could send me examples from more than two dozen cases across her 30-year career. She said that at least 90 percent of her courtroom opponents are male, and that they file a "no-crying motion" as a matter of course. Judges always deny them, but the damage is done: The idea that she will unfairly deploy her feminine wiles to get what she wants has been planted in the judge's mind. Though Faiella has long since learned to expect the motions, every time one crosses her desk she feels sick to her stomach. "I cannot tell you how much it demeans me," she said. "Because I am a woman, I have to act like it doesn't bother me, but I tell you that it does. The arrow lands every time."

For the past two decades, law schools have enrolled roughly the same number of men and women. In 2016, for the first time, more women were admitted to law school than men. In the courtroom, however, women remain a minority, particularly in the high-profile role of first chair at trial.

In a landmark 2001 report on sexism in the courtroom, Deborah Rhode, a Stanford Law professor, wrote that women in the courtroom face what she described as a "double standard and a double bind." Women, she wrote, must avoid being seen as "too 'soft' or too 'strident,' too

> 'aggressive' or 'not aggressive enough.'?"
>
> The glass ceiling remains a reality in a host of white-collar industries, from Wall Street to Silicon Valley. If the courtroom were merely another place where the advancement of women has been checked, that would be troubling, if not entirely surprising. But the stakes in the courtroom aren't just a woman's career development and her earning potential. The interests — and, in the criminal context, the liberty — of her client are also on the line.
>
> What makes the issue especially vexing are the sources of the bias — judges, senior attorneys, juries, and even the clients themselves. Sexism infects every kind of courtroom encounter, from pretrial motions to closing arguments — a glum ubiquity that makes clear how difficult it will be to eradicate gender bias not just from the practice of law, but from society as a whole.[1]

And that, friends, is really what we must confront today. In a seminar this week, Justice Chandrachud, one of our own, made two or three comments that I think really hit the mark. The Constitution, he said, is at its heart a feminist treatise. Why? Because its essence is neutrality; including gender-neutrality.

At that conference, Justice Chandrachud also spoke about the in-built biases against, and obstructions facing women in the law. Appointments to the higher judiciary, for instance, and the quite absurd 'income criterion' to gauge a person's success. We all know how utterly vapid this is as a measure of anything. Lots of people have quite obscene amounts of money and flaunt it in all kinds of weird ways — building absurd single-family dwellings for instance. But there is no direct correlation between having or making money, and competence, ability, knowledge or skill. Justice Chandrachud spoke of an absolutely top-flight lawyer who appeared before him regularly; she didn't, he noted,

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[1] Lara Bazelon, *What It Takes to Be a Trial Lawyer If You're Not a Man*, The Atlantic, September 2018, https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/.

meet this ridiculous income barrier, though it was no reflection at all on her lawyering skills. Justice Prabha Sridevan, whom I know well, and admire very greatly indeed, spoke too and said this, as reported on *LiveLaw*:

> But 2:1 is the ratio of women coming (to the bench) from the bar ... You have to practice before the Chief Justice or he will not know you! And a family court lawyer would usually never come there ... even the district judges posted in family courts think it is a punishment ... if there are not many women, this profile will not change.[2]

Chief Justice Gita Mittal was there too and said that the success rate in the Delhi High Court was 60% in the subordinate judiciary. But then she said this, and though it is reported to have been 'in a lighter vein', as we have so often heard tell, and yes, there's a Latin maxim for anything under the sun as any lawyer will tell you — *in joco veritas* — in jest there is truth: "It is only when we come to places where men are making the decisions that we are falling out".[3]

These are, therefore, patriarchal slots, and they are devastating. Women should be confined to family matters. They are supposedly 'good' at it. I have no idea what that is supposed to mean, but what it does intend is plain: the systematic exclusion of women in commercial and criminal litigation, and therefore their relegation to the also-ran, to second-place. Never first chair.

What this tells me is that perhaps the single most significant obstacle is what I can only describe as the systemic patriarchy. By this I mean the patriarchy that is embedded — deeply, deeply embedded, and now ingrained — in our institutional structures. This extends to everything from appointments to promotions. I believe it is what Justice Gita Mittal meant when she said that the speed-bump is only when *men* are in the decision-making position.

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[2] Mehal Jain, *'Constitution Itself Is Feminist', Justice Chandrachud On Transformative Constitution & Feminism,* LiveLaw, October 7, 2018, https://www.livelaw.in/constitution-itself-is-feminist-justice-chandrachud-on-transformative-constitution-feminism/.

[3] *Id.*

This systemic patriarchy also infects almost everything in between: even what work is assigned, for there is more than a sniff of this patriarchy when a woman judge is assigned cases involving women, or offences against women. This is another kind of slotting: notice that the assignment of such work is not gender-agnostic. It is not gender-neutral. It is not the assignment to a judge of a class of cases. It is an assignment of work based entirely on gender; and it obliterates every other consideration, including ability, experience, acumen, temperament. A male judge who dares suggest an alternative distribution will be met with, at the very least, snide remarks and sniggers, and that's more systemic patriarchy in play again, yet more objectification of 'women' as a 'thing'. This typifying of women judges as 'best suited' to deal with a certain class of cases goes on for years, and it has the direct effect of limiting and confining the growth of that judge. Consider this: with the number of women judges today, and many of them heading High Courts, is it really being suggested that in nearly three quarters of a century since Independence, not one single woman was found fit to be the Chief Justice of the country? Seventy years with zero result? What kind of society is it that produces that kind of distortion? Heads of banks, financial institutions, multinationals, why, even a Prime Minister; but Chief Justice of India? Impossible! I would really like to see a cogent, coherent, compelling answer to this one day. Or, better still, the solution.

Then again, I am certain that the problem is not unique to our profession. In architecture, for instance, it is known to have been, in the recent memory, utterly vicious. There is the well-known episode of the entire exclusion of Denise Scott Brown, the long-time partner, spouse and collaborator of the celebrated American architect Robert Venturi. He himself acknowledged that the work his firm did, and which bore both their names, was as much hers as his. Only he received the Pritzker Prize, the sort of Nobel in architecture. Even later attempts to amend the citation failed, saying, disingenuously, that the prize was never given to a firm or jointly. Venturi died recently. The ignominy of

the exclusion of Scott Brown was never remedied.[4] In his introduction to the third volume of 'Makers of Modern Architecture', works that collect his writings from the New York Review of Books and elsewhere, Martin Filler writes of female architects being banned from client meetings and team photographers.[5] One, who was pregnant, was told that she had to deliver her baby before the building on which she had worked was inaugurated, or she could be no part of it.

But the fact that something this pernicious exists does not mean we should continue to feed the monster. But how do we dismantle these constructs? Perhaps we need to return to our definition, and our acceptance of it, and ask whether by accepting the definition we are in fact reinforcing; or, conversely, if a wholesale denial of it is simply to be an ostrich or is one step towards its removal. I want to couch this also in the context of what it is I perceive happening, of what is really being said by those who are now calling out the very many men who, persistently and over time, have been predatory in one fashion or the other. This is not, in my seeing of it, a demand for instant justice, or a lynching or a mob hanging. It is a statement that the legal redress system is itself a threat and a part of the oppression and the patriarchy. The common response, that the accuser should subject herself to the legal system, is weak-kneed, unthinking, and self-serving; the accused often speak of their 'reputations' being destroyed by 'mere allegations without proof'. Perhaps so, but surely not in all cases. Is it reasonable to ask that the victims bring forth a full-blown alternative redressal system? The very system that is meant to protect has so very often served only to oppress, and surely, therefore, it is entirely unreasonable to ask an accuser to subject herself to another manifestation of the very oppression she has called out? I see this as a time of transition; an essential transition, and for that reason, perhaps painful, certainly searing. It is a difficult time, and we, as a society, have no answers. But the challenge before us is

[4] Rose Etherington, *Denise Scott Brown petition for Pritzker recognition rejected*, Dezeen, June 14, 2013, https://www.dezeen.com/2013/06/14/pritzker-jury-rejects-denise-scott-brown-petition/.

[5] Martin Filler, Makers of Modern Architecture, Volume III: From Antoni Gaudí to Maya Lin (New York Review Books, 2018).

clear: to evolve a truly balanced, gender-neutral redressal system that works, instead of one that only pretends to.

There are four judges, all retired, whom I greatly admire. All are persons of integrity, of course, but most of all, I envy them their range and breadth of mind: from complex commercial and constitutional issues to literature, music, language, theology, and beyond. Of these four, only one is a man. To one of them — not the man — I have shamelessly said, "when I grow up, I want to be like you". I really do.

I don't want to be entirely negative. There is a problem, and it is severe, but there is also a definite push-back. More and more women lawyers at various levels — litigators, counsel, attorneys — are handling complicated commercial and other litigations. They refuse to confine themselves to the well-trodden, and they are willing to do what it takes, to face even hostile courts and judges to get there. Sometimes it is very difficult. There are judges who are patronising, and even downright misogynistic. But this push-back is a sort of unlabelled movement whose time has come.

My own experience as a judge has been this. That I must be prepared to step in, and step in hard, if I find a male lawyer trying to browbeat or intimidate a female lawyer opponent, to never allow it to happen. But it's a delicate balance. There's a sort of reverse patriarchy too in going too far the other way and giving extra leeway, cutting additional slack. That's not being even-handed, and that, really, is the key. There's another sort of patriarchy built into that, too. The effort must be to complete gender-neutrality.

There is then, of course, talk of recent trends where we see now far more women entering the legal profession than ever before. More women students in law school than during my years there, and certainly I have far many more women interns than men. One of them, not long ago, told me she wanted to specialize in asset reconstruction matters, and I just marvelled at her focus and determination. Not because it came from a woman — that was irrelevant — but because it's a fixity of purpose I am not often privileged to see among young students.

In one way, I suppose I have been more privileged than most to have spent my early years as a lawyer working with three outstanding lawyers, all women. Two are still with us, and I won't name them, but both have most emphatically cracked through this wretched glass ceiling. You can guess. The other has passed on, and while she did a large number of family matters — and I learned trial work from her in those matters — she was an absolute master of difficult commercial law subjects like the Negotiable Instruments Act: the difference between a cheque crossed generally and a cheque crossed specially, and one crossed specially more than once, the effect of an endorsement and so on. From each of them, I learned more than I can reckon, and this had nothing at all to do with they being women, and everything to do with their being outstanding lawyers.

Which brings me to my last point this evening. I find it incredibly offensive when people — men and women both — speak of a 'need for more women judges'. I think this is just plain wrong, and it does women an enormous disservice, as if to suggest that being a woman in law is itself such a disadvantage that we must have some sort of reservation policy for them in place. There should be no reservations in the judiciary, period. Like the armed forces, it should be entirely merit-driven, and entirely gender-neutral. We need more judges, and we need better judges and it should not matter in the least whether that the judges we appoint to gauge our affairs and our causes happen to be women. This insistence on women-judges has a built-in gender bias, and it frightens me that it so often comes from women themselves.

I want to end with one comment about a very recent event, the *Sabarimala* judgment of the Supreme Court and, specifically, Justice Indu Malhotra's dissent.[6] Whatever be the merits of the majority opinion and the dissent, the one thing that shines through for me is that in voicing her dissent, Justice Malhotra did the one thing that should always be done. She was utterly and totally gender-neutral. We know what the central issue was, but the fact of her own gender played

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[6] Indian Young Lawyers Association v. The State of Kerala, Writ Petition (Civil) No. 373 of 2006.

no role at all in the shaping of her dissent. That, to my mind, is in the finest tradition of judging. Her dissent was not a judgment by a woman-judge. It was a dissent by a fine judge. And it is when you see and read something like this that you realize that this glass ceiling is a set of fragile shards, one that exists only to be broken.

Representation of Women in Indian Cinema and Beyond*

Sharmila Tagore†

Even about seven decades after Independence, we find that India's progress towards establishing an equitable society has been slow and disappointing. Discrimination against women thrives and cuts across religion, caste, rich-poor, and urban-rural divides. Today, so many legal provisions later, things are arguably better than before; yet certain things remain unchanged. Secure in their solid economic and social foundation, men are men, and we are the other. Today, women realize that unless certain fundamental issues that affect gender equality and justice are addressed, women's empowerment will remain at the level of rhetoric.

While education, employment opportunities and social networks have given some women like us a voice, many women still continue to suffer injustice silently in the name of family, honour, tradition, religion, culture and community. So ingrained are certain modes of thinking that bias is not even perceived as bias, not even by women themselves.

As Uma Chakravarti says, all of us carry within us a sense of the past which we have absorbed over the years from mythology, popular

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† Actress, former Chairperson, Central Board for Film Certification, and Padma Bhushan awardee.

* A version of this article was delivered as a speech for the Nineteenth Justice Sunanda Bhandare Memorial Lecture on November 27, 2013 at the India International Centre, New Delhi. Published with permission from the Sunanda Bhandare Foundation.

beliefs, tales of heroism, folklore and oral history.[1] This medley of ideas, which is patriarchal in nature, has a strong hold on our collective consciousness and forms the basis of our understanding of the status of women in the past. These perceptions are also continuously brought forward and constituted and reconstituted anew. Centuries of imbibing such ideas probably resulted in preference for a son in the Indian family, particularly in the north. While reviewing the book *Religion, Patriarchy and Capitalism*, Rajesh Komath says,

> This entrenched mindset furthers the idea of female infanticide, considering girls as an economic burden. The dowry system and the notion of the girl child belonging to her husband (a kind of tying up of a woman to a man) treat women as an expensive commodity in her own family. Even at a time of societal progress in terms of science and technology, there seems to be no real benefit to the woman. Rather, what is observed is a reverse societal dimension.[2]

Traditionally, we as a nation have tended to view a woman either as a *devi* (goddess) or as property of man but never as an equal. Treating a woman as a *devi* is pretty ingenious because then she has to be on a pedestal and conduct herself according to the noble ideals a patriarchal society has set for her. Women seem to like being on that pedestal and despite their inner urges, cling to this ideal of being perfect at great personal cost. So, inspite of the outstanding advancement of both men and women, mindsets have been slow to change. And these mindsets have influenced our cultural spheres, and have been celebrated in festivals like *karva chauth, raksha bandhan,* and *shiv ratri*, appealing to a man's ego in protecting and indulging the women in his family. So, it is not surprising that a mass, popular, highly visible media like cinema, particularly Hindi cinema, has perpetuated these cultural myths.

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1 Uma Chakravarti, *Whatever Happened to the Vedic Dasi?- Orientalism, Nationalism, and a Script for the Past*, in Kumkum Sangari and Sudesh Vaid, Recasting Women: Essays in Colonial History (Zubaan, 2014).

2 Rajesh Komnath, *Religion as a barrier on women's empowerment*, The Hindu, November 18, 2013, https://www.thehindu.com/books/books-reviews/religion-as-a-barrier-in-womens-empowerment/article5364865.ece.

Before I talk about my own experience and views about how films have done so, let me give you an example that I think needs to be highlighted. I am not sure how many of you have seen the public service advertisement by Delhi Police which has Mr. Farhan Akhtar telling us: "Be a Man, Protect Women." This, in my view, is a glaring example of what makes gender equity very difficult. After all, what is the subtext of this message? It simply reinforces the thought that women are in some way inferior and need a man's protection. Not only does it claim that women are weak, but it also implies that all men are strong, which is a myth. What is needed is ensuring the safety of women as *equal* citizens and not because it is imagined that they are the weaker sex. The system should provide protection irrespective of gender. This advertisement is more likely to give men a further sense of entitlement. This cannot be very useful in a society where, from the time of *Manu*, women have been told that they should live by the dictates of men. Most other advertisements are no better. Every day we are bombarded with images reinforcing gender stereotypes: advertisements for banks, information technology, cars, anything to do with speed, intelligence and cognitive abilities are routinely geared to men; only when it comes to beauty, jewellery, household and care-giving do women feature. Insurance advertisements tell us over and over again to save money for a son's education and a daughter's marriage.

When I began my career, not only was the portrayal of women problematic but cinema itself was seen to be something of a disreputable profession. The father of Indian cinema, Dadasaheb Phalke, had to settle for a man to play the female lead in *Raja Harishchandra* in 1913, because no woman from any strata of society was prepared to work in such a lowly profession. Almost fifty years later in 1957, when I acted in *Apur Sansar,* I was asked to leave my school. The principal felt I would be a bad influence on the other girls. I vividly remember another incident during the shooting of *Kashmir Ki Kali* in 1963, when the daughter of a reputed industrial family visited the location. Photographs taken on the occasion found their way on the cover of *Filmfare*. The family, aghast at the thought of their daughter appearing with film stars in a film magazine, bought out the entire print run of the issue.

Since then, societal attitudes towards films have changed dramatically. Today we are the largest producers of films in the world. Our films have made undeniable progress in technical terms, in production values, but when it comes to the portrayal of women, I feel the changes are merely cosmetic. Sometimes I think that the phrase 'the more things change the more they remain the same' was coined precisely for this. Films continue to brandish an image of women which is largely decorative and secondary. Of course, there are exceptions. Parallel cinema and some regional cinema present women in an entirely different, more equal, and more realistic light. But it is mainstream Hindi cinema which is the dominant film industry in the country. It both reflects and influences social and cultural mores. So, in this paper, I shall focus largely on this particular stream.

The thirties were a progressive era when it came to women in cinema. We had Devika Rani. I cannot think of another comparable woman producer in the eighty years since. Fatima Begum was the first Indian woman director who made *Bulbul-e-Paristan*. There was Durga Khote, a Brahmin, who made the extraordinary decision of acting in films at a time when it was considered a dubious profession. In Mary Evans, popularly known as Fearless Nadia, we had a feminist much before the term gained currency.

In the forties, with the end of the studio era and the influx of those looking for quick profits without any commitment to quality, the ideological moorings of the thirties cinema were undone. Cinema changed from being a social forum to a commercial industry where entertainment was paramount. As men made up the majority of viewers, the economics of film-making became increasingly skewed in their favour. Further, with almost the entire spectrum of film-makers also being men, women came to be depicted in a way that would appeal to the masculine segment of the audience and reinforce a rather chauvinistic attitude towards women and their place in the family and society.

Still, the 1950s retained some sensibility in the depiction of women in cinema. Bimal Roy had strong and realistic women characters in his films *Sujata* and *Bandini*. In *Mother India*, Nargis essayed what is

probably the most iconic female role in the history of Indian cinema, while *Mughal-e-Azam* had another memorable woman, Madhubala, in the lead role.

However, the success of films like *Mother India* and *Mughal-e-Azam* also resulted in the stereotyping—and freezing—of women characters in the mould of glorified mothers or large-hearted courtesans who found their fulfillment only in forfeiting their happiness for the men around whom their lives revolved. Though apparently dealing with extraordinary women, the subtexts in these films, and those inspired by them, like *Pakeezah*, *Deewaar*, *Tapasya*, *Umrao Jaan* and others, were largely geared towards satisfying the male view of the woman. It is another matter that the actresses in these films, through their magnificent presence and histrionics, elevated the narrative and their roles to iconic status and became inspirational figures. Referring to the 'virtuous female stereotypes', Shyam Benegal—one of the few Indian film-makers who has created strong, individualistic women in his films—has said, "Her virtue is in being the good mother, wife, sister—a set of essential roles a woman has to play—which is a terrible kind of oppression; a glorification not allowing the woman any choice."

The decades after the 1950s have been particularly disappointing, with women being increasingly relegated to playing glamorous sweethearts who exist only for the amorous pleasure of the heroes and who are totally dependent on the male species to protect them and provide them with a sense of security and fulfillment. Things reached a nadir in the 1980s, a decade which saw unimaginable violence being perpetrated on women in films to such an extent that the inconsequential frivolity of the 1960s and 1970s seemed welcome. In the early sixties, two films, *Guide* and *Sahib Biwi Aur Ghulam*, shine brilliantly. Both had remarkable women protagonists.

Of course, there were sensible directors like Gulzar, Hrishikesh Mukherjee and Basu Chatterjee, whose portrayals of women were refreshingly different. The films of Shyam Benegal- *Ankur, Bhumika* and many others, have well-written female characters. But these were in the nature of exceptions and were no match for the huge blockbusters of mainstream cinema which kept reinforcing stereotypes of women as

young, beautiful, innocent yet sexy, pliable, obedient, always placing the family and others before the self.

I have seen firsthand how marriage and motherhood change a woman's status. On one particular occasion, just after the huge success of *Aradhana,* I found myself stranded at a railway station late at night with my three-month-old son. A crowd gathered almost instantly. I had been mobbed before and I was terrified. But this time things were different because now I was a mother. I realized then that to my audience, marriage and motherhood had given me substance; now I was worthy of respect. The same mob which would have whistled at me earlier was now eager to find a place for me to sit, ensure I was safe and that my son was comfortable. All because now I had a husband and was therefore a bonafide member of society, not just an actress. In this context, I should mention the huge amount of advice I received when I got married. It was predicted that my marriage wouldn't last a year if I continued working. In 1968, our society could accept a man, a feudal one at that, marrying an actress, but letting her continue to work was beyond their comprehension. My marriage exercised the imagination of the media and the public to a great extent. They had obviously bought into the arguments our films prescribed, namely that marriage and career were not compatible. Yet, in my case, the combination of marriage, motherhood and a successful film career did not seem to cause any friction. This resulted in immense surprise, speculation, curiosity and debate because this was contrary to what films churned out and society advocated.

These are the clichés that get reflected in and reinforced through our movies. Reason and emotion are considered incompatible. The first is associated with men and is valued positively and the second with women and is viewed negatively. Powerful decision-making roles go to men and goody-goody ones to women. A girl seldom gets to live life on her own terms. She has to be monitored and patrolled for her own good. *Khap* panchayats have taken this to another level in the way they dictate how their women should behave. It is dinned into a woman that her actions affect the honour of her family and community. Even at work she faces the same attitude. A woman who questions the system is seen as 'difficult'. Her need to find redressal is often overshadowed

by the collective concern of preserving the honour of the institution. Complaints pertaining to sexual harassment are often not reported or are hushed up. It is not surprising then that the woman often absorbs and internalizes what society imposes and dictates and seeks her definition in relation to men. It is very difficult, if not impossible, for her to break out of this patriarchal set-up.

The typecasting begins from childhood. Little boys are naughty, little girls are pretty. Boys are brave, girls are good. Women are caregivers and always subordinate to men. I remember telling my three-year-old son a bedtime story where I rescue him from a crocodile-infested river. His cynical response was, "You can't save me, you have no muscles, you are not strong. I love *Abba* because he is strong and I love you because you are good." Our films reinforce the same ideas. They also reduce modernity to a matter of packaging. A modern woman is defined by her westernized attire. She looks modern but when it comes to making informed choices, she chooses the conventional. The moment she is to be presented to society for marriage, her sartorial style undergoes a complete traditional overhaul, because now she is expected to become part of the collective, her individuality discarded for the sake of the community. It is implied that the modern woman who asserts herself and her independence can never bring happiness to anyone, nor find happiness herself. Often, in the first half of a film a lot of new and dynamic ideas are introduced, only to be diluted and compromised in the second half. We have celebrated women in films like *The Dirty Picture* and *Kahaani*, but come to think of it, with the protagonist becoming an alcoholic and committing suicide in *The Dirty Picture*, wasn't the audience being invited to view the character as a victim? Or for that matter, the protagonist in *Kahaani*, who says at the end that the only time she felt fulfilled and complete is when she was pretending to be carrying a child. Where was the need for the scene? Unless this and Amitabh Bachchan's voice-over likening her to Goddess Durga – again a traditional role-play enforced on a woman for centuries- were the director's insurance in the face of what, till then, had been decidedly a strong and unfeminine protagonist.

Another example of popular stereotyping is seen in the near-complete absence of working women in our mainstream cinema. In

this aspect too, the 1950s – with films like *Awara, Shri 420*, *Kaagaz Ke Phool-* appear progressive vis-à-vis what followed. Even in the films of Hrishikesh Mukherjee, who made such women-centric films as *Anupama, Anuradha, Guddi* and *Khoobsurat,* women seldom ventured out to work, barring of course *Abhimaan* which was a critique of male chauvinism. It can be argued that in the 1960s and 1970s, when Mukherjee made his films, although we had a powerful woman Prime Minister at the time, women rarely went out to work.

Applying the same logic, women's roles in films should have changed in the 90s, a period which saw women take to the workplace in large numbers. But a look at some of the films that defined the decade paints a different picture. In an era when more and more women ventured out of their homes to build a career, the more women in cinema stayed at home. The leading ladies in films like *Maine Pyar Kiya, Hum Aapke Hai Koun,* and *Dilwale Dulhania Le Jaayenge,* are all quite content to wait for their Prince Charming to come and carry them off to the fairy land of marital bliss. The common thread—running through all these films—is that a woman's place is in her home, looking after her man, because it is the man who is traditionally expected to be the breadwinner. Women venturing out to earn are a threat to centuries of male dominance. And film after film reinforces this stereotype through the absence of working women or in projecting one as a cause of marital strife. Even in one of our biggest hits in recent years, *3 Idiots*, the depiction of the woman is problematic. The woman here is supposed to be a successful and brilliant professional, she rides a scooter and is 'modern' for all practical purposes. But it takes the hero to make her realize the truth, namely, that she is not in love with the man she is marrying. Time and again, it is the supremacy of the man that is underlined.

In contrast, I remember a film called *Dor*, directed by Nagesh Kukunoor, which to my mind is a rare film because not only does it equate the woman with the marginalized man and shows the Muslim woman as more emancipated, but it also has the courage to portray a young Hindu Rajasthani widow who does not cry, who wants to dance, listen to music, and for whom life does not stop with the death of the husband. It is films like these that opt out of the patriarchal construct, even while operating from within the limitations imposed by

the system, which I hope will define the contours of women in popular cinema in the future.

The belief that it is the male star who brings in the audience is widespread. They are paid much more than their female colleagues. It is very difficult to find funding for a woman-oriented script unless a male star agrees to make a guest appearance. Barring a few exceptions, a heroine is given much less screen space than a hero. Also, a leading lady's career in cinema is substantially shorter than a man's. It is not uncommon to see heroes in their late-forties romancing women just out of their teens but the opposite is rarely the case. Scripts are specially written for an Amitabh Bachchan or even an Anupam Kher or Naseeruddin Shah, but the same is not true for an older actress. All this is possible because audiences, both men and women, endorse this line of thinking.

Few films have been able to break out of a traditional male view of a woman. And yet, the woman, whether on posters or on screen or in real life is always held responsible for inviting calamities to her doorstep. If it is not the provocatively dressed woman on the street who 'provokes' sexual assault, it is the item-girl on the screen who is to blame. The unrelenting gaze of society is always on women and very rarely on the behaviour, conduct and attitude of men.

While I am all for critiquing these images, I also ask: is it fair to single out one institution, cinema, when almost all institutions are equally, if not more, guilty of gender discrimination? Be it the law, the administration, the workplace, and indeed home, the very heart of the family? And what about the judiciary? If the judiciary, one of the few remaining institutions in the country that still inspire a measure of regard, is not gender sensitive, why blame cinema?

Today, television is a very popular mass media run almost entirely by women and yet what do we find there? One of the most successful formulas on TV is the on-going tensions of the *saas* and *bahu*. The root cause of the 'mother-in-law - daughter-in-law' problem lies in the fact that both see themselves in reference to the man. Captive at home, both work towards securing his affection and largesse, with the result that both lead an imperfect life. The emptiness of these women's lives

is blamed on everything else but the husband. In tell-tale escapism, relationships are often described and determined by external things like horoscopes.

The Constitution of India guarantees equal opportunity and status to women. The principle of adult franchise seeks to ensure women's full participation in the shaping and sharing of power. But time and again we have seen political expediency taking precedence over justice, for example, in the *Shah Bano* case,[3] or in the way the representation of women in Parliament was sought to be derailed by the largely male Ministers of Parliament cutting across party lines. And as we have seen many times over, the law is hardly a deterrent to criminals. Despite the public uproar after the December 16, 2012 murder and gang rape, the incidents of crimes against women have not come down. On the contrary, rape, acid attacks and violence against women have become endemic.

The then CBI director Ranjit Sinha is reported to have said, "If you cannot prevent rape, enjoy it".[4] The statement rightly drew flak, but one is surprised to see that the media mentioned only the reaction of feminist groups. Why hasn't the media bothered to check with the general public, or indeed how men have reacted to the statement? Isn't this something that should draw condemnation from people cutting across gender lines? Aren't persons heading institutions of the stature of the CBI meant to lead by example? This insensitivity is not the preserve of only men. Powerful women in influential positions have repeatedly made deleterious comments at critical junctures. A woman professional is killed while returning late from work, and we are told that women should not be adventurous enough to venture out at night. We constantly hear comments like 'painted and dented', '*par-kati*' etc. etc. from our esteemed male Parliamentarians, ridiculing

[3] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

[4] Reuters, *CBI chief Ranjit Sinha: If you can't prevent rape, you enjoy it,* Financial Express, November 13, 2013, https://www.financialexpress.com/archive/cbi-chief-ranjit-sinha-if-you-cant-prevent-rape-you-enjoy-it/1194453/.

modern women, thereby clearly exposing their regressive mindsets.[5] The harmful consequences of such utterances in a society like ours cannot be overestimated.

Today, in India, 'women's empowerment' is a government slogan; it is a feature of every party manifesto. Yet, in the second decade of the twenty-first century, Indian women, seemingly protected by law, celebrated by the media, and championed by activists, remain second-class citizens, most obviously in rural areas, but in some senses, everywhere.

The picture may appear dismal but much has happened of late. At least in the capital, the mood now is to listen. We will wait to see what happens next and hope the outcome will be positive for working women. Quality education alone is the way ahead. Foundations such as the Sunanda Bhandare Foundation are also doing yeomen service in this field and we need to build on these.

But what is of prime importance is what Anne Marie Slaughter points out- only when we give the twin pillars of human life- care-giving and bread-winning- equal value, will men and women attain parity at work and at home.[6] I taught my children that whenever I left on work, they wish me to get ten on ten. As more and more women venture out to work in areas traditionally dominated by men, their work, whether at home or outside, needs to be valued. The term 'working mothers' needs to be complemented with 'working dads'. And this requires sensitizing the population, more importantly the women themselves, to the needs of women and demands made on women. The rigid lines demarcating the perceived roles of a man and a woman in society need to be merged and muted. Today, there is a huge resistance and unwillingness on the part of men to get involved in what they perceive are domestic issues. It is a tough call and the journey ahead is not going to be easy.

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[5] Sabyasachi Dasgupta, *Delhi protests are by 'dented and painted' women: President Pranab's son*, NDTV, December 27, 2012, https://www.ndtv.com/india-news/delhi-protests-are-by-dented-and-painted-women-president-pranabs-son-508663.

[6] Anne Marie Slaughter, Address at TEDGlobal 2013 (June 11, 2013).

Shayara Bano v. Union of India: A Partial Victory

Mihir Desai†

The Supreme Court's decision in the case of triple *talaq* has been much debated and at the same time, been much misunderstood.[1] While the judgment needs to be welcomed for taking a small step in favour of women's rights, even the much-hailed opinion of Justices Nariman and Lalit is what I would call a 'safe' judgment. They struck down *talaq-e-biddat* on an extremely narrow constitutional ground when they had the opportunity to strike it down on a variety of grounds. It is a case of lost opportunity for gender justice.

There are of course, larger jurisdictional and political issues. From a human rights perspective, the central issue is the debate between universality of human rights versus cultural relativism. Even within this framework, there are other issues such as the question of whether a 'uniform civil code' (or 'gender-just code' as I would like to call it) should be legislatively imposed, or reforms within personal laws is the way to go.

This paper does not deal with these debates. However, I wish to make my position clear as some of the conclusions I reach are coloured by my opinion on these issues. I do believe that when it comes to gender equality, the constitutional courts should and do have the power to strike down laws, personal or otherwise, which are arbitrary or discriminatory, or against the broader framework of Article 21 i.e.,

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1 Shayara Bano v. Union of India, (2017) 9 SCC 1.

against the dignity of women. I am also firmly of the view, that no such discrimination, arbitrariness or erosion of dignity can be permitted on the ground that a particular practice or law is an 'essential' part of that religion. Once a provision of 'personal law' violates a constitutional mandate, more importantly Articles 14, 15 or 21- it needs to be struck down. All laws, personal or otherwise, need to be tested on the anvil of the Constitution, and not on the basis of whether they are based on a true interpretation of a particular religious text. I also believe that all 'personal' laws whether Hindu, Christian, Muslim or Parsi, discriminate against women in varied ways. When most of the political parties or fundamentalist groups speak about the 'uniform civil code', they are concerned with 'uniformity' and not with 'gender justice'. We can thus end up having a uniform civil code which is uniformly oppressive of women. I would be totally opposed to such a law. However, if at some stage a uniform law which removes all gender discrimination as well as discrimination on grounds of sexual orientation is brought in, I would welcome such a law. That I do not see such a model law being enacted even in the distant future is a separate issue. In any case, at present we are left with the issue of judicial intervention for striking down pernicious personal laws, and it is in this context that I am disappointed with the judgment in *Shayara Bano*.

I. Issues Before the Court

A Constitutional Bench of five judges decided the triple *talaq* case and three separate judgments were pronounced. One, by Justice Khehar and Justice Nazeer, another by Justice Nariman and Justice Lalit, and the third by Justice Kurian Joseph. As a result, there is no majority judgment and only those aspects of any of the judgments which have the affirmation in aggregate of at least three judges can be said to be laying down the law.

All the five judges agree that the only issue to be decided concerns the constitutional validity of *talaq-e-biddat*, or what is commonly known as instantaneous triple *talaq*. They do not venture into the legality or constitutionality of other forms of unilateral *talaq* or other aspects of Muslim personal law such as polygamy, etc. Now a case has been filed

in the Supreme Court concerning validity of polygamy and *halala* but the matter is still to be heard.[2]

The judgment in the triple *talaq* case was also a common meeting ground of all five judges (as well as all parties concerned) on the issue of whether personal laws can be challenged- they can, but only if they have been legislated on, and not if they are purely in the realm of non-legislated practices. It was also agreed by all sides that *talaq-e-biddat* was a pernicious practice. The question was whether it could be struck down by the Court.

II. Forms of *Talaq*

Talaq-e-biddat was practised only by Sunni Muslims, and that too only those Sunni Muslims who belong to what is known as the Hanafi School. Sunnis form the majority of Muslims in India and amongst them, the overwhelming majority belong to the Hanafi school. Crores of Muslims in India are consequently affected by this judgment.

Under Islamic law, two other methods of *talaq* are also recognised, namely *talaq ahsan* and *talaq hasan*. All three forms of *talaq* are unilateral (i.e., they do not require the consent of the wife) and are only available to Muslim men.[3] *Talaq hasan* and *talaq ahsan* however, are not instantaneous and require a certain time-frame for them to become effective. They are also revocable during this time period. *Talaq ahsan* consists of a single pronouncement of divorce made during the period between menstruations (*tuhr*), followed by abstinence during the period of *iddat.* Thus, it takes effect only at a future date. *Talaq hasan* consists of three pronouncements made during successive *tuhrs*, and no intercourse can take place during this period. *Talaq-e-biddat* consists of three pronouncements during a single *tuhr*, whether in one sentence, or in separate sentences. It takes effect immediately. *Talaq ahsan* and

[2] Sameena Begum v. Union of India, W.P.(C) No. 222 of 2018; Nafisa Khan v. Union of India, W.P.(C) No. 227 of 2018; Moullim Mohsin Bin Hussain Bin Abdad Al Kathiri, W.P.(C) No. 235 of 2018; Ashwini Kumar Upadhyay v. Union of India, W.P.(C) No. 202 of 2018.

[3] Muslim women on the other hand, have to take recourse under the Dissolution of Muslim Marriages Act, 1939, which requires them to approach the court for divorce.

talaq hasan are spread over time and are therefore both, revocable and subject to a process of reconciliation. But *talaq-e-biddat* is at one go, not revocable, and not subject to any reconciliation. *Talaq*, its forms and its legality and propriety, have been much discussed in India by Muslim scholars and for the last hundred-odd years by various courts.

III. Earlier views of the Supreme Court and High Courts

Initially, the courts were of the view that even though *talaq-e-biddat* was a pernicious practice, it was still legally valid. The argument was that "*talaq-e-biddat* was good in law but bad in theology."[4] The Supreme Court and various High Courts laid down strict conditions under which *talaq* can be held to be valid and this culminated in *Shamim Ara's* case in which the Supreme Court held *talaq-e-biddat* to be unlawful. The Court observed:

> 13. […] The correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and wife by two arbiters- one from the wife's family and the other from the husband's, if the attempts fail, *talaq* may be effected. In *Rukia Khatun* Case the Division Bench stated that the correct law of *talaq* as ordained by the Holy Quran is: (i) *talaq* must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other from the husband by his. If their attempts fail, *talaq* may be effected. […]
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> 14. We are in respectful agreement with the above said observations made by the learned Judges of the High Courts. […][5]

The Court also affirmed the earlier view of Justice Krishna Iyer when he was a High Court Judge, observing:

[4] Shamim Ara v. State of U.P., (2002) 7 SCC 518.

[5] *Id.* at paras 13 and 14.

> 12. […] The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions…It is a popular fallacy that a Muslim male enjoys, under the Qur'anic law, unbridled authority to liquidate the marriage.[6]

In *Shamim Ara's* case, the Supreme Court held that in instant *talaq* there is no scope for reconciliation, nor can reasons for such *talaq* be tested, therefore such *talaq* would be bad in law.[7] The law laid down in *Shamim Ara* has been followed by a number of High Court judgments.[8] Justice Khehar (alongwith Justice Nazeer) felt that *Shamim Ara* was not good law while the others agreed with *Shamim Ara's* observations.

All the judges agreed that though this form of *talaq* is not mentioned in the Quran, it has been practised across the world for the last 1400-odd years. Justice Khehar also relied on legislations in a number of countries (theocratic and otherwise) which ban instantaneous triple *talaq*. He drew two conclusions from this. First, that since a large number of countries had in fact prohibited *talaq-e-biddat*, it was proof of being a very widespread practice amongst the Sunnis.[9] Secondly, Justice Khehar (along with Justice Nazeer) also came to the conclusion that this also showed that it can only be prohibited by a legislation and not by judicial action.[10]

IV. Powers of Constitutional Courts

Article 13 of the Constitution provides that all existing laws before the commencement of the Constitution, which are inconsistent with the fundamental rights chapter (Part III) of the Constitution, shall be void to the extent of such inconsistency. Similarly, no law can be passed

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[6] Shamim Ara, *supra* note 3 at para 12, citing A.Yousuf Rawther v. Sowramma, AIR 1971 Ker 261 at para 7.

[7] Shamim Ara, *supra* note 3 at paras 13 and 14.

[8] Bibi Rahmat Khatoon v. State of Bihar, (2008) 56 (1) BLJR 51 (Patna); Farida Bano v. Kamruddin, (2006) 1 MP LJ 269; Riaz Fatima v. Mohd. Sharif, (2006) 135 DLT 205; Masroor Ahmed v. State (NCT of Delhi, (2008) 103 DRJ 137, among others.

[9] Shayara Bano, *supra* note 1, per Justice Kheharat paras. 318-319.

[10] Shayara Bano, *supra* note 1 at para. 391.

in the future which takes away or abridges any right conferred by Part III of the Constitution, which includes *inter alia* right to equality, right to non-discrimination, right to life and liberty, etc. The question still remains is that while a law in violation of fundamental rights can be declared as void, how does one define such a law? More particularly, can personal law be considered 'law' for the purpose of being tested on the anvil of fundamental rights. Article 13(3)(a) states that 'law' includes "any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law". Therefore, even a custom or usage which is in violation of the fundamental rights can be declared as void or unconstitutional.

At first blush, it would appear that personal laws which are essentially based on custom or usage would be 'law' and susceptible to the rigours of the fundamental rights chapter. Thus, any personal law which is discriminatory towards women should not only be subject to constitutional rigour, but must also be declared unconstitutional since discrimination against women is in violation of fundamental rights. Not just instantaneous triple *talaq*, any kind of unilateral *talaq*, polygamy, or even principles of other personal laws (including Hindu law) which discriminate against women should be declared unconstitutional. The right to pronounce *talaq,* instantaneous or otherwise, or to indulge in polygamy, are rights only conferred on men and not on women. Similarly, under Hindu law, the father is declared as a natural guardian and only after him is the mother declared a natural guardian. Take for instance, the Hindu Marriage Act, 1955 which allows a man to marry if he has completed 21 years of age but a woman to marry if she has completed 18 years of age. Discriminatory practices against women are spread across various personal laws.

While the Supreme Court is in no position to formulate a uniform civil code (gender-just or otherwise), one expects it to strike down the discriminatory aspects of personal or family laws. But by and large, the High Courts and the Supreme Court, despite giving regular homilies on the equality of women, have failed to declare such laws as unconstitutional. This opportunity has again been lost in the triple *talaq* case.

V. *Talaq* and *Shariat*

Since all judges agreed that personal laws which had not acquired a legislative flavour, i.e. those personal laws not recognised through a legislation cannot be tested on the anvil of fundamental rights, the first issue was whether Muslim personal law had at all been legislated or not. In effect, this required consideration as to whether the Muslim Personal Law (Shariat) Application Act, 1937 ("Shariat Act, 1937") amounted to Muslim personal law being metamorphosed into a legislation. If the answer is yes, then all aspects of Muslim personal law could be tested against the Constitution. If the answer is no, then they could not be. According to the Muslim Personal Law Board, the Shariat Act, 1937 was not meant for enforcing Muslim personal law, which was enforceable by itself in any case. But, it was enacted to do away with custom or usage which is contrary to Muslim personal law.[11] Section 2 of Shariat Act, 1937 reads:

> 2. Application of Personal law to Muslims. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, ila, zihar, lian, khula and mubarat, maintenance, dower and guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

Justice Khehar (alongwith Justice Nazeer) and Justice Kurian Joseph both held, that the Shariat Act, 1937 did not convert Muslim personal law into a legislated enactment.[12] Therefore, Muslim personal law remained uncodified and could not be tested on the ground of violation of the fundamental rights. Justice Khehar (with Justice Nazeer) and Justice Kurian Joseph held, that the Shariat Act, 1937 was enacted not

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[11] Shayara Bano, s*upra* note 1 at para 332.

[12] *Id.*

to codify Muslim personal law or to make it into a legislative fiat, but to clarify that non-Islamic customs and usages which had crept into Muslim law would no longer be held valid. On the other hand, Justice Nariman and Justice Lalit held, that all forms of *talaq* recognised and enforced by Muslim personal law are recognised and enforced by the Shariat Act, 1937.[13] The judges observed that,"[…] it is very difficult to accept the argument on behalf of the Muslim Personal Law Board that Section 2 does not recognise or enforce triple *talaq*. It clearly and obviously does both, because the Section makes triple *talaq* the rule of decision in cases where the parties are Muslims."[14] According to Justice Nariman, the Shariat Act, 1937 codified Muslim personal law and therefore the provisions of Muslim personal law were liable to be tested on constitutional grounds. If found to be in violation of the fundamental rights chapter, practices and tenets of Muslim personal law were liable to be struck down.

What is crucial here is that three judges have held that Muslim personal law did not get codified or to use their words, 'metamorphosed' into a legislation, and therefore, it could not be tested on the touchstone of the Constitution. Justice Khehar and Justice Nazeer concluded that in view of this, instant triple *talaq* which continued to be part of Muslim personal law could not be held unconstitutional.

Justice Kurian Joseph on the other hand, while agreeing with Justice Khehar that the Shariat Act, 1937 did not codify Muslim personal law, came to the conclusion that instant triple *talaq* was against the tenets of Quran and was thus not part of Muslim personal law at all.[15] He agrees on the fundamentals with the judgment of Justice Khehar, but disagrees on the details.

The logic used is that there are various sources of Islamic law but the Quran is the main source and all other sources are supplemental. If the Quran prohibits a practice, such a practice cannot become part of Islamic law merely because other sources permit it. According to Justice Kurian Joseph, the Quran prohibits or frowns upon instant triple *talaq*,

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[13] Shayara Bano, s*upra* note 1, per Justice Nariman at para at 47.

[14] *Id*.

[15] Shayara Bano, s*upra* note 1, per Justice Kurian Joseph at para 25.

therefore it cannot be considered as part of *Shariat*. Since the Shariat Act, 1937 states that *Shariat* is the rule of decision in enumerated matters including *talaq*, and given that instant triple *talaq* was never a part of *Shariat*, it has to be prohibited. The prohibition here flows from the reading of the Shariat Act, 1937 and not by the application of constitutional principles.

Justice Nariman, writing for Justice Lalit and himself concludes, that the Shariat Act, 1937 converts Muslim personal law into a legislated law. Thus, all provisions of the Act can be tested on the anvil of constitutionality.[16] Having thus held, he should have tested triple *talaq* to see whether it is discriminatory towards women or whether it is in violation of the dignity of women. However, he chooses to travel into uncharted territory. Triple *talaq* is not available to women and is on the face of it, discriminatory. Even *talaq* per se is violative of dignity of women for various reasons including the repeated observations of the Supreme Court over the years which imply that if a woman is not 'obedient' or 'docile' it may be a good ground for *talaq*. This is nothing else but a reaffirmation of patriarchal values. These issues should have been considered by Justice Nariman and Justice Lalit. The opportunity was however missed.

VI. The Doctrine of Arbitrariness

Justice Nariman treads a narrow but largely uncharted territory. The earlier approach of the Supreme Court was to hold that the fundamental right to equality is violated if the State discriminated against a group without valid reasons.[17] This interpretation was given an expanded meaning and at least since 1974, the Supreme Court has been holding that even arbitrary State action (without being necessarily discriminatory towards a group or section) would be antithetical to equality.[18] The Courts could strike down a State action as being in breach of Articles 14 or 15 not only if it was discriminatory but also if it is arbitrary. State action can be of varied kinds. In *McDowell's*

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16 Shayara Bano, s*upra* note 1, per Justice Nariman at para 48.
17 *See for example*, State of W.B. v. Anwar Ali Sarkar, (1952) SCR 284.
18 E.P. Royappa v. State of T.N., (1974) 4 SCC 3.

case, the Supreme Court held that while ordinary State action could be challenged as being arbitrary or discriminatory, a legislation can only be challenged under Articles 14 and 15 of the Constitution if it is discriminatory and not merely because it is arbitrary.[19]

In the triple *talaq* case, Justice Nariman (with Justice Lalit) took a constitutional stride by observing that *McDowell* was wrongly decided. It was held that a legislation could also be challenged as being manifestly arbitrary. The Court observed, "[M]anifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary".[20] On this aspect, Justice Kurian Joseph agrees with Justice Nariman. In terms of constitutional jurisprudence, this is a major breakthrough. Three of the five judges (and thus the majority) hold that a legislation can be challenged as being in violation of the equality clause even if it is not discriminatory, but as long as it is arbitrary.

But this is where the concurrence stops because Justice Kurian Joseph holds that in the present case, since Muslim personal law has not been given a legislative colour, there is no question of testing it on the grounds of arbitrariness.[21] Justice Nariman on the other hand proceeds to hold that triple *talaq* which is recognized by the Shariat Act, 1937 is arbitrary and thus needs to be struck down.

VII. Triple *Talaq* and Religious Freedom

It was also argued before the Bench that Article 25 of the Constitution, which protects religious freedom as a fundamental right, would in turn protect *talaq-e-biddat*. The Supreme Court has time and again held that 'essential religious practices' are protected under Article 25. However, Justice Nariman held that *talaq-e-biddat* is only a form of *talaq* and the Hanafi school itself treats it as sinful but to be tolerated. Justice Nariman therefore concluded that this form of

[19] State of A.P. v. Mc Dowell & Co. Ltd., (1996) SCC 3 709.

[20] Shayara Bano, s*upra* note 1, per Justice Nariman at para 101.

[21] Shayara Bano, s*upra* note 1, per Justice Kurian Joseph at para 5.

talaq cannot be treated in any case as an essential religious practice.[22] He further observed that in case of instant *talaq*, there is no scope for reconciliation, and such a pronouncement would be treated as valid even if it was not for any reasonable cause. In view of this he held that instant triple *talaq* is manifestly arbitrary and therefore bad.

The judgment through its majority holds that unlegislated personal law does not have to pass the constitutional test but is required to only pass the religious test. It is irrelevant whether such personal law is discriminatory or against the dignity of women. As long as it can be shown that the particular law flows from religious tenets, it is to be held as valid. This is a major impediment for future action especially against non-legislated personal law.

In light of the above holding, in the case of legislated personal law such as the Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Parsi Marriage Act, 1936 etc., the constitutional test can be applied. This judgment in fact adds an additional constitutional test, namely the doctrine arbitrariness for deciding the validity of such laws. Of course, we will have to see how this works out in future when such laws are challenged. The experience of Indian courts even in respect of challenges to legislated personal law has not been very encouraging.

VIII. A Missed Opportunity

While constitutionally it is a leap forward, in terms of Muslim personal law and gender justice, this hardly takes the case ahead. According to the majority, Muslim personal law has not been metamorphosed into legislation and thus it cannot be challenged as being unconstitutional. If polygamy or other forms of unilateral *talaq* are challenged and the Court feels that they are not against the Quran or *Hadith*, they will be held to be legally valid practices irrespective of whether they are arbitrary, discriminatory or against the dignity of women. Jurisprudentially, the present case does not advance the cause of Muslim women at all. In terms of *talaq-e-biddat* also, it only reiterates what the Supreme Court had already held in the case of *Shamim Ara*.

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22 *Supra*, note 11, para. 54 at 10.

Justice Khehar's opinion (supported by Justice Nazeer) is extremely curious to say the least. It also suffers from major contradictions. On one hand, it holds that instant *talaq* is part of Muslim personal law.[23] He further goes on to hold that personal laws are themselves fundamental rights.[24] Then, he proceeds to state that, of course a law should be made prohibiting instant triple *talaq*.[25] The problem is that if triple *talaq* (which as stated by him, is part of fundamental rights) is prohibited through legislation, such legislation itself can be challenged as being violative of fundamental rights. In fact, such legislation by his own logic would be bad in law as it would be in violation of fundamental rights. Further, he injuncts the exercise of a right, which according to him is a fundamental right, for six months so as to allow the Parliament time to legislate against it.[26] Such an opinion is jurisprudentially unprecedented and untenable.

A legislation criminalizing triple *talaq* is already on the anvil.[27] It has been hotly debated, as many individuals and organisations have argued that criminalization of the practice would work against the interests of women and children whose husbands would be in jail and will be unable to maintain them.

While the judgment does declare instantaneous triple *talaq* as unlawful, it neither declares *unilateral* triple *talaq* as unlawful, nor does it pave the way for doing so. Also, while the majority judgment declares instantaneous triple *talaq* as *unlawful* it does not declare it as *unconstitutional*– the difference being quite significant. Though the judgment does advance the cause of gender justice on the issue of instantaneous triple *talaq*, it does not open the doors of judicial review in other matters of Muslim personal law. While the opinion of Justice Nariman and Justice Lalit finds instantaneous triple *talaq* as being arbitrary and therefore violative of the constitutional guarantee

[23] Shayara Bano, s*upra* note 1, per Justice Khehar at para 383.2.
[24] Shayara Bano, s*upra* note 1, per Justice Khehar at para 332.
[25] Shayara Bano, s*upra* note 1, per Justice Nariman at para 392.
[26] *Id*. at para 393.
[27] On September 19, 2018, the President promulgated the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018.

of equality, it does not discuss the issue of instantaneous triple *talaq* being discriminatory towards women.

The judgment is still a partial victory for Muslim women for two reasons. First, five Muslim women facing all odds were able to take on the might of the fundamentalists up to the Supreme Court, and this by itself is a major success. Second, the amount of publicity and buzz the case and judgment generated, will go a long way in empowering Muslim women. Unlike the case of *Shamim Ara*, the present case has been discussed in every nook and corner of the country. A large number of Muslim women are now aware that instant triple *talaq* is not legal. There have been occurrences immediately after the judgment when Muslim women have approached police stations demanding action against their husbands for giving them instant triple *talaq*.[28] The issue is not whether approaching the police station is the right procedure to be adopted, but that women feel empowered by the knowledge that the highest court has recognised their rights, and declared a practice as pernicious.

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[28] *Gujarat woman files FIR against husband for triple talaq*, Times of India, July 19, 2018, https://timesofindia.indiatimes.com/city/ahmedabad/woman-files-fir-against-husband-for-triple-talaq/articleshow/65046173.cms; Advitya Bahl, *Triple talaq: Wife in Noida makes police complaint against husband*, DNA, August 31, 2017, https://www.dnaindia.com/delhi/report-triple-talaq-wife-in-noida-makes-police-complaint-against-husband-2541862; Yesha Kotak, *Mumbai woman files complaint against husband's triple talaq through letter*, Hindustan Times, August 28, 2018, https://www.hindustantimes.com/mumbai-news/mumbai-woman-files-complaint-against-husband-s-triple-talaq-through-letter/story-navkGEfLHHNlnCHpbLUpeN.html.

Female Genital Mutilation in India-
A Legal Overview*

Huzefa Ahmadi†

Female Genital Mutilation (hereinafter "FGM") comprises of all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons. These non-medical reasons are mostly social or cultural in nature and range from curbing sexual pleasure (there are some claims that it, in fact, enhances sexual fulfilment), to ensuring premarital virginity and marital fidelity. The World Health Organisation (WHO) broadly recognizes three types of such mutilation- the first being clitoridectomy, which is the partial or complete removal of the clitoris or its prepuce; the second being excision, which is the partial or complete removal of the clitoris and labia minora and/or the labia majora; the third being infibulation, which is the narrowing of the vaginal opening by creating a covering seal by cutting and stitching the labia majora and minora to reposition them over the vaginal opening.[1] The first type is widely practiced within certain communities in India. Reportedly, FGM is practiced among a few sects in India, including the Dawoodi, Suleimani and Alvi Bohras and a few Sunni sub-sects

* The author would like to thank Shahrukh Alam, Advocate, and Shreya Sreesankar, Student, Symbiosis Law School for their able assistance with this paper.

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1 World Health Organisation, *Fact Sheet on Female Genital Mutilation*, January 31, 2018, http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. External genitalia mentioned herein refers collectively to the clitoris, labia majora, labia minora, mons pubis, urethral and the vaginal opening.

in Kerala.[2] This cultural practice called *khafd* has been performed for generations in these communities and many consider it a necessary rite of passage towards becoming a 'good' woman. It must also be pointed out that supporters of *khafd* claim that what is practised in India, is not FGM at all, because "it is just a nick on the clitoral hood, which is just useless skin anyway".[3] The Dawoodi Bohra Women's Association for Religious Freedom asserts that *khafd* and FGM are "entirely different" practices.

While the WHO has labeled the practice of FGM as "mutilation" and therefore immoral, there is ambiguity surrounding the medical (physiological) effects of it, unlike in the case of male circumcision, for instance, where it is considered medically beneficial. In any case, since it is practiced in secrecy, there is always a greater chance of secondary infections. The process sometimes involves taking out young girls (between the ages of five and ten, i.e., before attainment of puberty) under the guise of a movie or ice cream. They are then taken instead to a midwife, who conducts the circumcision in an unscientific and unhygienic manner, without the administration of an anesthetic. Therefore, the practice has been deemed as illegal and immoral by the United Nations.[4]

Some women argue that if conducted in a medically controlled manner, and with informed consent, there is no medical reason to ban the practice. However, a minor child is incapable of giving informed consent, and in its present form, the practice is against established notions of morality.

After decades of silence, many women of the community have spoken in favour of a total ban on this practice in the form of an online petition

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2 Amant Khullar, *With Data, an Attempt to Lift the Veil of Secrecy Around Female Genital Mutilation*, The Wire, February 7, 2018, https://thewire.in/221323/data-attempt-lift-veil-secrecy-around-female-genital-mutilation/.

3 *Id.*

4 United Nations General Assembly, *Resolution-Intensifying global efforts for the elimination of female genital mutilations*, December 20, 2012, G.A Res 67/146, U.N. Doc A/RES/67/146, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/146.

with the aim of inviting government intervention.[5] In furtherance of this online petition, a public interest litigation is pending before the Supreme Court at the time of writing.[6] The petition seeks a complete ban on the practice of FGM, and its declaration as a cognizable, non-compoundable, and non-bailable criminal offence. A three-judge bench of the Supreme Court has termed described it as an "extremely important and sensitive issue" and has issued notices to four states- Maharashtra, Gujarat, Rajasthan, and Delhi, seeking a detailed reply.[7]

I. Cultural Relativism

FGM is practiced in diverse forms throughout Africa and parts of Asia. Studies show that the highest instances of FGM are found in countries like Somalia, Sierra Leone, Djibouti and Egypt where the estimated prevalence of FGM in women between the ages of 15 and 49 ranges from 90-98%.[8] In the context of Africa, FGM is mainly practised by tribal communities, sometimes on the basis of customary beliefs. The Venda tribe in South Africa for instance, follows a custom of cutting the mother's vaginal flesh post-partum, to make a poultice that they believe is the only remedy for the wound on a new born child's head.[9]

Over the passage of time, FGM has become a custom. Those attempting to justify the practice often attempt to do so on the basis that it is a cultural norm and its exercise is a matter of right. The

5 Petition to End Female Genital Mutilation in India, https://www.change.org/p/end-female-genital-mutilation-in-india.

6 Sunita Tiwari v. Union of India & Others, W.P (Civil) No. 286 of 2017 (Supreme Court).

7 Apoorva Mandhani, *SC issues notice on PIL seeking complete ban on Female Genital Mutilation*, Live Law, May 8, 2017, http://www.livelaw.in/sc-issues-notice-on-pil-seeking-complete-ban-on-female-genital-mutilation-read-petition/.

8 UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO, *Eliminating Female Genital Mutilation: An Interagency Statement*, (2008), www.un.org/.../daw/.../statements.../Interagency_Statement_on_Eliminating_FGM.pdf.

9 Barbara Kitui, *Female Genital Mutilation in South Africa*, AfricLaw, June 7, 2012, https://africlaw.com/2012/06/07/female-genital-mutilation-in-south-africa/.

custom was born of the belief that FGM increases marriageability, ensures virginity, and strengthens marital ties. These beliefs are a culmination of the strong association of FGM with the traditional stereotypes of attributes for a good wife.[10] Other forms of justification have been on the line of reasoning that the practice attempts to ensure cleanliness and genital hygiene by removing all external glandular organs.[11]

Although some religious leaders preach that the practice stems from religious mandate, no religious scriptures specifically prescribe the practice.[12] The dialogue on *khafd* is usually cloaked in ambiguity as the exact verse which supposedly mandates such practice does not form part of popular knowledge and discourse. The legal relevance of this is later explored under the sub-heading 'Constitutional Perspective'.

The movement against *khafd* gained momentum during the trial of a religious head belonging to the Dawoodi Bohra community in Australia, who was accused of perpetrating FGM. Eventually, the Supreme Court of New South Wales convicted the accused and sentenced him to 15 months' imprisonment.[13] Many factions of the community then passed resolutions mandating that members must not practise anything that is forbidden by the laws of the land where they reside, quoting religious texts to that effect.[14] Such resolutions brought waves of hope among Indian women. However, the practice appears to continue in countries like India, which do not have specific anti-FGM laws. The movement against the practice received impetus in recent

[10] World Health Organisation, *supra* note 1.

[11] TC Okeke, USB Anyaehie & CCK Ezenyeaku, *An Overview of Female Genital Mutilation in Nigeria*, Ann Med Health Sci Res., Vol. 2 Issue 1, January-June 2012, at 70–73, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3507121/.

[12] Masooma Ranalvi, *The Resistance Against Female Genital Mutilation in India is Growing*, The Wire, June 18, 2016, https://thewire.in/39127/the-resistance-against-female-genital-mutilation-is-growing/.

[13] R v. Vazir, (No. 2) (2015) NSWSC 1221.

[14] Mohua Das, *Clarifing His Stand - Circumcision a religious rite, but abide by law of country,* The Times of India, June 7, 2016, http://epaperbeta.timesofindia.com/Article.aspx?eid=31804&articlexml=CLARIFING-HIS-STAND-Circumcision-a-religious-rite-but-07062016008042.

months with the publication of a persuasive report by 'WeSpeakOut', the largest survivor-led movement to end FGM amongst Bohras.[15]

II. Constitutional Perspective

FGM is an internationally recognized instance of human rights violation, and is opposed to all notions of public morality. In its essence, the practice reflects a deep-rooted inequality in the societal and gender roles of men and women as is evidenced from the justifications of pre-marital purity. Hence, it constitutes an extreme form of discrimination against minor girls. The Constitution of India in this respect provides a guarantee against discrimination on the basis of sex under Article 15. Thus, the practice of FGM is prima facie violative of Article 15.

Human dignity is an integral part of the Constitution. Evidence of its relevance is found in different parts of the Constitution, right from the Preamble to Articles 14, 15, 19 and 21. In a catena of judgments, the Supreme Court has upheld the right to live a life of dignity as being intrinsic to the right to life and personal liberty.[16] Moreover a nine-judge bench of the Supreme Court in the historical judgment delivered in *Justice K.S. Puttaswamy* v. *Union of India*,[17] recognized an individual's right to privacy as being a facet of the right to life and personal liberty under Article 21. The Court held that the dignity and autonomy of citizens are basic constitutional values. Justice Chandrachud and Justice Kaul in their concurrent judgments have also laid down, that the rights to privacy and sexual orientation lie at the core of these constitutional values, thus re-opening the doors for consideration of the validity of Section 377 of the Indian Penal Code, 1860 (IPC), which denies citizens their sexual autonomy.[18]

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[15] Lakshmi Anantnarayan, Shabana Diler, Natasha Menon, *The Clitoral Hood: A Contested Site*, WeSpeakOut, January, 2018, http://wespeakout.org/site/assets/files/1439/fgmc_study_results_jan_2018.pdf.

[16] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161; Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545; National Legal Service Authority v. Union of India, (2014) 5 SCC 438; *see also* Shabnam v. Union of India, (2015) 6 SCC 702.

[17] (2017) 10 SCC 1.

[18] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

In the context of *khafd*, there are two facets that distinctly make the practice violative of Article 21. Firstly, *khafd* is practised on minor girls without their consent, effectively depriving them of their bodily and sexual autonomy, and their right to personal liberty. It may be noted that 'consent' in any case of a child is without relevance in law, as it is in constitutional morality. Secondly, since the practice is known to have left serious psychological damage on girls, and the fact that many of those who are subjected to it suffer from post-traumatic stress disorder, also makes it violative of their right to live with dignity.[19] Hence, a practice based on the need to restrict or enhance the sexual pleasure of an adolescent child and mutilating her body without her full and absolute consent is perceived to be a gross violation of the constitutional values guaranteed under Article 21 and confirmed by the Supreme Court.

Furthermore, the arguments for the cultural and religious relativism of FGM, couched under the right to freely profess, practise, and propagate one's religion are open to criticism. Article 25(1) of the Constitution guarantees the freedom of conscience and free profession, practice and propagation of religion, subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

The notion of *khafd* being a religiously mandated practice is factually questionable owing to the contradictory opinions and resolutions of Islamic thinkers and Islamic communities.[20] Courts in India have adopted the 'essential religious practice' test in order to decide through judicial enquiry whether a practice is inherent to a religious doctrine or not. The protection of a religious practice is dependent upon it being classified as an 'essential practice'.[21] The uncertainty regarding holy sanction to the practice of *khafd* establishes that it cannot be

[19] *Id.*

[20] Ali Gomma, *The Islamic View on Female Genital Mutilation*, African Journal of Urology, Vol. 19 Issue 3, September 2013, at 123-126, https://doi.org/10.1016/j.afju.2013.02.007.

[21] The Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Tirtha Swamiar, (1954) SCR. 1005; Mohammad Hanif Qureshi v. State of Bihar, (1959) SCR 629; Nikhil Soni v. Union of India, (2015) Cri. L.J. 4951 (Rajasthan H.C., delivered on 10.8.2015).

unambiguously categorized as an 'essential religious practice'. This finding is further strengthened by the fact that the practice is not universally followed within practitioners of the same religion. Hence, from a constitutional perspective it can be argued that the practice cannot be classified as a religious right in order to seek protection under Article 25 of the Constitution.

In *Shayara Bano* v. *Union of India*,[22] with regard to the constitutional validity of triple *talaq*, the respondents therein used a similar line of argument to establish that the source of such practice was religious edicts and personal laws. Although the arguments were not accepted, it is pertinent to note that there was a contention that the practice was religiously mandated/or had religious sanction. In the current context, there is neither uniform acceptance on the point of religious origin of *khafd*, nor is there any contention made by the community leaders that the practice is rooted in divine edicts.

In arguendo, even if it is assumed that *khafd* is a 'religious practice', then the existing legal framework suggests that such a 'religious practice' is not the subject of constitutional protection under Articles 25 or 26 of the Constitution. The courts have distinguished 'religious faith' or 'religious beliefs' from mere 'religious practices', the latter being more akin to a cultural practice and therefore not entitled to the protection guaranteed under Article 25.[23]

While defining the nature of the right to freedom of conscience and religion under Article 25, the Constitution categorically states that such right is not absolute and is subject to certain exceptions. The exceptions specified under Article 25(1) include public order, health and morality.[24] As has been discussed at length above, FGM is a practice that is adverse to public health, and therefore it becomes an exception to the right under Article 25.

Additionally, owing to the fact that *khafd* is always carried out on minors before the attainment of puberty, and thus without their consent, it is also violative of their rights as children. The World Health

[22] 2017 (9) SCC 1 .

[23] State of Bombay v. Narasu Appa Mali, AIR1952 Bom 84.

[24] *Id.*

Organisation has labeled the practice 'immoral', and thus it attracts the exception of 'morality' under Article 25.

Treaties such as the Convention on the Rights of the Child provide safeguards against all traditional cultural practices that are prejudicial to the health of children.[25] The Convention on the Elimination of All Forms of Discrimination against Women is another international document ratified by India that affirms women's reproductive rights and their right to dictate what happens to their bodies.[26] Together with their Optional Protocols, these treaties constitute an important contribution to the legal framework for the protection and promotion of the human rights of girls, which is violated by the perpetration of FGM. International Organizations such as WHO and the UN Economic and Social Council (ECOSOC) have also passed detailed resolutions that provide specific safeguards against FGM.[27] Therefore, the practice comprises an attack on public morality and for that reason too, the exception to Article 25 is attracted.

III. Criminal Perspective

FGM has been condemned by various international bodies and most nations have enacted specific legislation providing a comprehensive code criminalizing FGM. These include the United States of America and Australia. However, in the context of India, it is wrongly perceived that such practice has no criminal implications due to the absence of specific legislation.

In nations such as South Africa, FGM was punished under the general criminal law as an offence of assault when a dangerous wound is inflicted, until 2010, when a nation-wide ban was placed on it under the Promotion of Equality and Prevention of Unfair Discrimination

[25] Convention on the Rights of the Child, G.A. Res 44/25 U.N. Doc. A/RES/44/25 (20 November 1989).

[26] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (18 December 1979).

[27] United Nations Economic and Social Council (ECOSOC), Res E/2007/27 , *Report of the Commission on the Status of Women*, 51st Sess., February 26- 9 March, 2007, Supp. No. 7, U.N. Doc. E/CN.6/2007/L.3/Rev.1.

Act, 2000 ("Equality Act").[28] Similarly, it has been held by the Punjab and Haryana High Court in *Hans Raj Chauhan* v. *State of Haryana* that under sections, 320, 322 and 325 of the IPC, that define grievous hurt and provide for its punishment, emasculation or male genital mutilation is punishable as an actionable wrong.[29] Keeping with that line of reasoning, it can be reasonably ascertained that female genital mutilation too is punishable as the infliction of grievous hurt under the IPC.

Section 326A was introduced to the IPC in order to deal with the menace of acid throwing at young women by spurned lovers. But its ambit is wide enough to punish FGM. It states:

> Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine.

Thus, the practice of genital mutilation or deformation is a crime punishable with imprisonment for life.

When acts of physical violence that subjugate women are criminalized, it has to be understood that FGM is also a form of violence against women that has severe physical and psychological consequences. The Protection of Women from Domestic Violence Act, 2005 is a quasi-

[28] Research Directorate, *Immigration and Refugee Board of Canada, South Africa: Reports on female genital mutilation (FGM) and or female circumcision; where practiced (urban and/or rural areas); the tribes, religions and cultures that practice it, whether it is legal or not; the government's position and availability of state protection*, Doc. No. ZAF40553.E, March 14, 2003, http://www.refworld.org/docid/3f7d4e3e2a.html.

[29] Hans Raj Chauhan v. State of Haryana, (2014) SCC P&H 21812; *see also* Jatan Singh v. NCT Delhi, (2009) SCC Del 3016.

criminal law that was enacted for the purpose of providing effective protection to women from any kind of violence. Section 3 of this Act defines domestic violence and expressly includes within its ambit all instances of sexual abuse.[30] The first explanation to the section goes on to define sexual abuse as "any conduct of a sexual nature that abuses, humiliates and degrades or otherwise violates the dignity of women".[31] This definition is of great significance for a number of reasons. Firstly, it seeks to go beyond the confines of Section 376 of the IPC in defining forms of sexual abuse. Secondly, it recognizes sexual offences that are committed without a sexual intent. This is pertinent to note because the existing body of criminal law only recognizes those sexual crimes that are carried out with sexual intent, in furtherance of the abuser's sexual gratification or pleasure. Hence, offences such as FGM or *khafd* can be successfully categorized as sexual abuse within the meaning of this Act. Although the scope of recourse or remedy available under this Act is limited, it is nevertheless a step forward in legally recognizing and understanding the various forms of sexual violence prevalent in the world today.

It must be reiterated, however, that in order to ensure effective deterrence, a special law treating FGM as an offence should be enacted, following the example of Australia, UK, US, and also several African countries. At the same time, it is also important to find effective means of implementation and monitoring. For instance, the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 has been able to effectively regulate diagnostic tests that may be carried out to determine the sex of a foetus, often resulting in female foeticide.[32] Similarly, a law

[30] Under the Protection of Women from Domestic Violence Act, 2005, domestic violence may be perpetrated by anyone with whom the child is in a 'domestic relationship'. Such relationships are defined under Section 2(f) as "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

[31] The Protection of Women from Domestic Violence Act, 2005, No.43, Acts of Parliament, 2005, Section 3.

[32] Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, No. 57, Acts of Parliament, 1994.

could be enacted to bar all midwives from performing FGM, and to prohibit it on minor girls. It may only be performed with the informed, written consent of adult women by trained medical practitioners, and a record may be maintained of such cases.

Laws in Australia and in several African countries are matched with a strong policy for social outreach and monitoring. It encourages individual health practitioners, teachers, and community workers, to become agents of social change. It becomes their job to work at the community level to bring about behavioural change and to also report incidents of FGM. The law thus depends on community workers and NGOs for its dissemination and proper implementation. Policy frameworks against FGM also focus on education of children, especially young girls, about FGM and encourages them to report experiences at school.

The J.S. Verma Committee Report that submitted its recommendations to the Government in respect of the Criminal Law Amendment Bill, 2012, had specified the need to shift the object of focus in sexual crimes from aspects such as "outraging modesty of women" to deeper aspects such as "violating the sexual autonomy of women".[33] The Committee also endeavored to include within the ambit of Section 376A, the crime of FGM, but the same was unfortunately not accepted by the Government.[34] However, the Committee's Report is instrumental in understanding the need for criminal implications of acts such as FGM to effectively curb its practice.

IV. Conclusion

The documentation of experiences of women who have been subject to FGM shows that the practice constitutes not just a legal wrong, but also leads to long-lasting physical and psychological trauma. When practiced on children without their consent, it also stands as an impediment to their right to bodily autonomy and to a life of dignity.

[33] Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law*, January 23, 2013.

[34] *Id.*

At the same time, it must also be noted that since FGM is practised in smaller and marginalized communities, it is also used in popular discourse to "name and shame" those communities, without an effort to first fully integrate them into modern cultural contexts. The nations that provide for specific anti-FGM laws are Western states where the perpetrators are mainly marginalized communities formed of immigrants and religious minorities. On the other hand, states where instances of FGM are the most prevalent have no effective system of curbing such practices. In such a situation, the nature of the legislation is of paramount importance. The need of the hour is a more comprehensive social legislation that furthers the understanding of both discrimination and sexual abuse, and which aims to eradicate them.

Surrogacy: Towards A Legal Structure For India

Jaideep Gupta[†]

India's first In-Vitro Fertilization ("IVF") baby, and the world's second, Kanupriya alias Durga, was born in Kolkata on October 3, 1978. Kanupriya was born only about two months after the world's first IVF baby, Louise Joy Brown, born in Great Britain on July 25, 1978. The scientific technology behind IVF is known as Assisted Reproductive Technology (ART). This marvel of progress in medical science gave rise to a host of difficult legal issues.

In *Baby Manji Yamada* v. *Union of India*,[1] the Supreme Court defined 'surrogacy' as, "a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to the contracted party".[2] She may be the child's genetic mother (the more 'traditional' form for surrogacy) or she may, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo.[3] In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

There are four types of surrogacy: traditional, gestational, commercial, and altruistic. First, in 'traditional surrogacy', the surrogate is pregnant with her own biological child, but this child was conceived

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[1] (2008) 13 SCC 518.

[2] *Id*. at para 8, page 523.

[3] *Id*. at paras 10 to 11.

with the intention of relinquishing the child to be raised by others.[4] The child that results is therefore biologically related to the surrogate mother. Second, is 'gestational surrogacy', in which the surrogate is only a carrier or female host and is not genetically or biologically related to the child. The surrogate is implanted with an embryo that is not her own.[5] The third concept, is that of 'commercial surrogacy', in which a gestational carrier is paid to carry a child to maturity in her womb.[6] This procedure is legal in several countries including India at present. The fourth is altruistic surrogacy, where the surrogate receives no financial reward for her pregnancy and relinquishment.[7]

India has developed into a thriving ART market with an estimated valuation of over 2 billion US dollars per year, making India one of the principal destinations for surrogacy. Foreigners come to India in search of surrogate mothers, giving rise to commercial surrogacy, because unlike in Western countries, women in India from lower socio-economic backgrounds readily agree to become surrogate mothers in return for payment. Further, medical facilities in India continue to be inexpensive in comparison to foreign countries. It is estimated that the number of births through surrogacy doubled between2003-2006. Estimates range from 100-290 surrogate births each year to as many as 3000 in the last decade. So much so, that India is called the world capital of surrogacy.

Commercial surrogacy has to face many ethical questions. These include questions as to the status of the contract in case of miscarriage, or in case babies are born with serious disabilities. Disputes may arise regarding the nationality of the child, or if the commissioning couple changes its mind, or conceives a baby in the meantime. The rights and responsibilities of the parties concerned is also an important issue. For instance, would the commissioning couple bear any responsibility towards the surrogate if she dies during child birth?[8]

[4] Id. at para 10.
[5] *Id*. at para 11.
[6] *Id*. at para 13.
[7] *Id*. at para 12.
[8] Michael Kirby J., *Health, Law and Ethics*, (1997) 5 JLM 31.

Despite India being a hub of surrogacy, there is no legal framework to support it. Along with the rise of commercial surrogacy, the debate as to its regulation gathered momentum.

In 2005, the Indian Council of Medical Research (ICMR) published guidelines for accreditation, supervision, and regulation of ART clinics in India.[9] These guidelines emphasized, that surrogacy should normally only be an option for women for whom it would be physically or medically impossible, or undesirable to carry a baby to term. Payments should be well-documented and cover all genuine expenses. A surrogate mother should not be over 45 years of age, should be medically fit to go through a pregnancy, and repeated acts of surrogacy may not be resorted to.

In 2008, the issue received the attention of the Supreme Court of India. Baby Manji Yamada was born to a surrogate mother in Anand, Gujarat, to biological parents Dr. Yukie Yamada and Dr. Ikufumi Yamada. The surrogacy agreement was entered into between the biological father and mother on one side, and the surrogate mother on the other. A writ petition was filed by an NGO, 'Satya' before the Rajasthan High Court. The High Court passed directions for the production and custody of the child. These directions were challenged by way of a writ petition under Article 32, filed before the Supreme Court by Emiko Yamada, claiming to the grandmother of the child. After taking note of the different forms of surrogacy, the Supreme Court fashioned a remedy under the Commissions for Protection of Child Rights Act, 2005 and held that if any action has to be taken, it has to be taken by the Commission. The petition was disposed of with the direction that any grievance may be ventilated before the Commission constituted under the Act. Though the judgment does not record any finding in respect of the legality of commercial surrogacy, it has been interpreted to mean that the Supreme Court acknowledged that it was not illegal.

Around the same time, in 2008, a draft ART Bill was framed. It was reviewed and redrafted in 2010 and 2014 but never got passed as law.

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9 Indian Council of Medical Research, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India*, http://icmr.nic.in/guide/art.

In 2009, the Law Commission took suo moto notice of the need for legislation to regulate ART clinics as well as determine the rights and obligations of parties to surrogacy. Its findings were presented in the 228th Report of the Law Commission in 2009.[10] Significantly, the Commission in its report recommended that altruistic surrogacy be legalized, and commercial surrogacy be prohibited. It drew up a draft Bill to achieve these objectives.

Based on the report of the Law Commission, the Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha on November 21, 2016. It was referred to the department related Parliamentary Standing Committee on Health and Family Welfare by the Chairman, Rajya Sabha, in consultation with the Speaker, Lok Sabha on January 12, 2017 for examination and report. The Standing Committee published an exhaustive report on the Bill in August 2017.[11]

The Statement of Objects and Reasons to the Bill noted that "there have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes".[12] It further noted that commercial surrogacy had been widely condemned in the media. Further, due to lack of legislation, the practice of surrogacy was being misused by surrogacy clinics. The Statement reads,"[I]n light of the above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of the children born through surrogacy".[13] The main objectives of the Bill included the need to regulate surrogacy services in the country, to provide altruistic ethical

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[10] Law Commission of India, *Report No. 228- Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, August 2009, http://lawcommissionofindia.nic.in/reports/report228.pdf.

[11] Rajya Sabha- Department-Related Parliamentary Standing Committee on Health and Family Welfare, *102nd Report on The Surrogacy (Regulation) Bill, 2016*, August, 2017, http://www.prsindia.org/uploads/media/Surrogacy/SCR-%20 Surrogacy%20Bill,%202016.pdf.

[12] *Id*. at page 10.

[13] *Id*.

surrogacy to needy infertile Indian couples, to prohibit commercial surrogacy, to protect and prevent the exploitation of surrogate mothers, and to protect the rights of the children born through surrogacy.[14]

The regulatory framework established by the said Bill is premised on the setting up of 'National Surrogacy Boards' at the Central and State levels, and appropriate authorities in States and Union Territories.

The Parliamentary Standing Committee in the course of consultations found that surrogate mothers in India were compelled to provide surrogacy services because of economic necessity, and viewed surrogacy as a means of economically uplifting their families. It observed that, "their other economic options were equally, if not more exploited, and nowhere close to being as remunerative as surrogacy".[15] Therefore, in the Indian context, "permitting women to provide reproductive labour for free to another person but preventing them from being paid for their reproductive labour would be grossly unfair and arbitrary".[16] The Committee was of the view that to dismiss commercial surrogacy in a paternalistic manner would not be correct.

The Standing Committee further noted that altruistic surrogacy based on noble intentions and kindness was not a realistic outlook given that the commissioning couple gets a child, doctors, lawyers and hospitals get paid, but the surrogate mother was expected to practice altruism without a single penny.[17] Therefore, the proposal to permit only altruistic surrogacy would be another form of exploitation. The Committee observed that, "[G]iven the patriarchal family structure and power equations within families", "a close relative of the intending couple may be forced to become a surrogate which might become even more exploitative than commercial surrogacy".[18] Altruistic surrogacy by close relatives could degenerate into surrogacy because of compulsion and coercion, and not altruism. Therefore, a range of monetary

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[14] *Id*.
[15] *Id*. at page 27.
[16] *Id*.
[17] *Id*.
[18] *Id*.

payments to surrogate mothers must be made available by way of reasonable compensation even in the case of altruistic surrogacy.[19]

The Committee recommended that the quantum of compensation to surrogate mothers "should be fixed keeping in mind the surrogacy procedures and other necessary expenses related to and arising out of surrogacy process".[20] It should take into consideration loss of wages for the duration of the pregnancy, medical scrutiny and psychological counseling, child care support, dietary supplements and medication, maternity clothing and post-delivery care.[21] Additional compensation should also be provided to be given to the kin of the surrogate mother in the event of her death during the course of the pregnancy.[22] Private contract model is not adequate to guarantee complete protection to surrogate mothers as the bargaining power of the parties may be unequal.[23] It is, therefore, necessary to have a regulatory frame work to fix the amounts of compensation.

The Committee did not, however, favour the extension of surrogacy to foreign nationals, but held that persons of Indian origin, overseas citizens of India, and NRI's should be permitted to avail of surrogacy services in the country.[24]

The Committee report, revolutionary though it is in many respects, has, in my opinion, only partially dealt with the criticism levelled against the controversial provisions of the 2016 Bill. It still fails to address what is the single most important change in the law sought to be brought about by the said Bill, namely the complete ban on commercial surrogacy. In failing to address this issue, the Committee report falls short of providing a viable law to regulate surrogacy in India. In my opinion, the market for commercial surrogacy should be regulated, instead of being subjected to a blanket ban. A rights-based approach should be taken, addressing the concerns of the surrogate mother, children born out of surrogacy, and other stake holders. Failure

[19] *Id*. at page 29.
[20] *Id*.
[21] *Id*. at pages 29 and 30.
[22] *Id*. at page 30.
[23] *Id*.
[24] *Id*. at page 37.

to do so may lead to the enforcement of majoritarian cultural norms. It is possible that such a law would violate the basic fundamental rights enshrined in Articles 14, 19 and 21 of the Constitution. It may even infringe upon international covenants and obligations including Article 16 of the Universal Declaration of Human Rights that deals with the right to found a family,[25] and Article 16(1)(e) of the Convention on the Elimination of all forms of Discrimination against Women which requires States to ensure equality of right for men and women to decide freely and responsibly on the number and spacing of their children.[26] Indeed, the proposed legislative change may result in an impetus to a rising black market.

For the time being, it appears that the Government is moving forward with the Bill, after incorporating some of the changes suggested by the Standing Committee. In August 2018, the Union Cabinet cleared the Bill. It was listed as pending in the Lok Sabha for consideration.[27]

The proposed legislation is bound to be controversial, as it deals with reproductive rights as well as commercial interests. The next stage of development of the legal structure for surrogacy in India will be decided by the courts. Two cases in which these issues arise are already pending before the Supreme Court of India: a public interest litigation, *Jayashree Wad* v. *Union of India*,[28] and an appeal from a Gujarat High Court judgement, *Union of India* v. *Jan Balaz.*[29] In the latter, transitional arrangements are in place but the final disposal awaits the passing of the legislation. The future awaits.

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[25] Universal Declaration of Human Rights, United Nations, http://www.un.org/en/universal-declaration-human-rights/.

[26] Convention on the Elimination of All Forms of Discrimination against Women, General Assembly Resolution No. 34/180 of December 18, 1979, https://www.ohchr.org/documents/professionalinterest/cedaw.pdf.

[27] *The Surrogacy (Regulation) Bill, 2016*, PRS India, http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/.

[28] Writ Petition (Civil) No. 95 of 2015 (SC).

[29] Civil Appeal No. 8714 of 2010.

Creating a World of Gender Justice and Dignity

Meenakshi Arora[†]

The last seven decades have seen a proliferation of laws encapsulating human rights. There is a growing recognition of the importance of human rights and of laws that protect and foster them. The Universal Declaration of Human Rights, adopted in 1948, in the aftermath of World War II, emphasizes that "recognition of the inherent dignity rights and of the equal and inalienable rights of all members of the human family is foundation of freedom, justice and peace in the world".

Eleanor Roosevelt famously said:

> Where, after all, do universal human rights begin? In small places, close to home, so close and so small that they cannot be seen on any map of the world [...] Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity, without discrimination.[1]

Dignity is an intangible notion, difficult to accurately define within the constraints of language. It is more a sentiment to be experienced, rather than an idea which can be delineated by words. While various scholars have attempted to describe and explain this concept in different phrases and words, they all effectively lead to the same meaning. An excellent attempt at defining the notion of dignity is in these words: "[D]ignity is a concept which talks about a person's intrinsic worth – a

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1 Eleanor Roosevelt at the United Nations in New York on March 27, 1958.

value of all people which they are born with as human beings".[2] Also, "human dignity is considered to be the foundation of human rights".[3]

Efforts have been initiated at international, national and regional levels, to ensure confirmation of women's rights as part of basic human rights. Various laws and legal instruments have been issued worldwide seeking to 'grant' these rights to women, as if they are a benefit being conferred upon us. Given that such rights are inalienable, immutable and inherent in the warps and wefts of the very fabric of our existence, it is a pity that they are being endowed upon us, rather than being recognized as pre-existing. Whether it be the right to vote or the right to choose what happens to our bodies, the discourse, as and when it occurred, was geared towards 'allowing' or 'permitting' us to exercise these rights, rather than admitting that these rights had been unfairly taken away from us in the first instance. Further, the practical realities of actualization of these rights, and implementation of the duties corresponding to these rights are starkly different. The reluctant efforts made by a male-dominated society and government in this direction have yielded little result in empowerment through these rights.

It is hardly surprising given that laws 'granting' us rights often represent a man's version of what our rights and remedies ought to be and to what extent we are entitled to exercise them. This is an unfortunate corollary of the limited representation of women in law-making bodies, leading to a lack of understanding as well as concern about women-related issues.

It was in 1979, more than 30 years after the Universal Declaration coming into force, that the United Nations eventually enacted the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'). It took another decade and a half for the incontestable phrase "women's rights are human rights" to gain

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[2] South African History Archive, *Human Dignity- South Africa's Bill of Rights*, http://www.saha.org.za/billofrights/human_dignity.htm.

[3] Willy Moka-Mubelo, Reconciling Law and Morality in Human Rights Discourse 90, Springer, 2016.

popular acceptance in the United Nations Fourth World Conference on Women held in Beijing in 1995.[4]

As a matter of fact, the lack of equal suffrage has disabled women from electing representatives of their choice to their countries' legislative bodies. In 1906, the then republic of Finland became the first country to implement true universal suffrage,[5] while in Liechtenstein women remained disenfranchised till 1984.[6] India itself granted universal suffrage upon its independence in 1947 by recognizing through its Constitution universal legal suffrage. Even after the grant of universal suffrage, the representation of women in legislative bodies remains very low. Interestingly, the so called third-world and developing nations have the highest representation of women in their parliaments – with Rwanda having the highest representation at 61.3% in their Lower House and 38.5% in their Upper House.[7] Rwanda is followed by Cuba and Bolivia.[8] United Kingdom appears at the 41st rank while United States at 103 – having 19.4% women representatives in the Lower House and 23.0% in the Upper House.[9] India unfortunately appears only at the 148th rank.[10] We are attempting to secure greater representation by providing for a 33% quota for women through legislation – a measure which we have earlier used for the purposes of increasing representation in women in local self-government. This has resulted in 50% representation of women in the local self-governance

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4 First Lady Hillary Rodham Clinton, *Remarks for the United Nations Fourth World Conference on Women*, Beijing, China, September 5, 1995, United Nations Fourth World Conference on Women Secretariat in collaboration with the United Nations Development Programme, http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt.

5 *Finnish women won the right to vote a hundred years ago*, Embassy of Finland, The Hague, August 2, 2006, http://www.finlande.nl/public/default.aspx?contentid=112162.

6 László Trócsányi, *The Regulation of External Voting at National and International Level*, Minority Studies, 16: 13, at 13-24.

7 Inter-Parliamentary Union, *Women in national parliaments*, June 1, 2018, http://archive.ipu.org/wmn-e/classif.htm.

8 *Id*.

9 *Id*.

10 *Id*.

bodies of around 14 Indian states.[11] However, such reservation was achieved after overcoming stiff resistance from male politicians.

Inadequate representation of women in legislative bodies of nations results in issues pertaining to the rights of women taking a back seat, thereby not translating into effective domestic legislation, despite commitments under international treaties.

One important milestone in the struggle for dignity of women is the enactment of a law for protection of women against sexual harassment at the workplace. The journey began with the landmark judgment in *Vishakha* v. *State of Rajasthan*,[12] and I am proud to have been involved in that journey.

The *Vishakha* judgment arose out of the gang-rape of a young woman belonging to a lower caste. She had been engaged by an NGO funded by the State Government to eradicate child marriages. In retaliation, male members of a higher caste family gang-raped her. The State initially resisted registering a criminal complaint, and even when it did, it was conducting a slow and shoddy investigation. The case gathered media attention and divided the State, including the law enforcement agencies, on caste lines. Fearing a biased investigation by the State, a group of NGOs – 'Vishakha' included – approached the Supreme Court, praying that the investigation be transferred to an independent agency. While we debated the strategy, I strongly believed that a post-incident remedy was mere lip service to the malady, and that preventive measures needed to be put in place. This was 1992 when India had no law in this regard. Since the main thrust of the case was transfer of the investigation, we could only include a lone paragraph in the petition praying for formulation of such protective measures. Before the hearing, the State, on its own, transferred the investigation to an independent agency, rendering our main prayer infructuous, and the lone paragraph for protective measures was all that I was left with

[11] *No decision yet on legislation for 50% women's reservation in ULBs: Govt.*, Economic Times, March 27, 2018, https://economictimes.indiatimes.com/news/politics-and-nation/no-decision-yet-on-legislation-for-50-womens-reservation-in-ulbs-govt/articleshow/63487060.cms.

[12] (1997) 6 SCC 241.

in the petition. As I stood hesitantly before the Court that morning, the judge peered down through his glasses at me and said: "Well your main case does not survive, but we would still like to consider this case on the plea of protection of women in discharge of their work". And we had a foot in!

As we debated the Court's power to foray into the legislative domain in the absence of a statute, India ratified the CEDAW and the Beijing Declaration of 1995, reiterating women's rights to equality and dignity. Noting the failure of Parliament to frame any domestic law in furtherance of India's international obligations, the Court relied upon the CEDAW to frame guidelines for protection of women from sexual harassment at the workplace. This path-breaking judgment held that the right to work is an invaluable right, and that women are entitled to protection of health and safety in their working conditions, and that each incident of sexual harassment at the work place results in violation of a woman's right to gender equality, right to life and liberty and, more particularly, a violation of her right to work freely and with dignity. The guidelines laid down by the Court not only held the field for 16 long years, until a law was enacted in 2013, but also formed the bedrock of the legislation titled, Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013. That said, having a law, whether one created by the Legislature or the Judiciary is one side of the story. The flip side is enforcement of the law.

After *Vishakha*, I had the opportunity to interact with working women from all strata of society, engaged in different fields of work. They unanimously complained that sexual harassment in diverse forms had always been a reality. However, after the judgment, they could label the conduct as wrongful and demand that it be stopped. Consequently, the reporting of such incidents increased, and women started successfully suing their employers and co-workers for sexual harassment.

Women took up sexual harassment complaints at a significant cost to their careers. To elucidate, a senior bureaucrat successfully fought a case of sexual harassment against her superior officer. Subsequently, when she returned to her posting, her co-workers refused to have closed

door/one-on-one meetings with her – openly stating their reservation that she may make an allegation against them. This not only belittled her allegations of sexual harassment but also made it difficult for her to discharge her duties. It is often a Hobson's choice between dignity and career for a woman, and the choice is anything but easy. As a result, a number of incidents of sexual harassment still continue to be suppressed.

I have been following the '#Metoo' campaign that gained traction last year. Today it represents the empowerment of women – speaking up, standing together, and denouncing sexual harassment at the workplace. But I wonder if '#Metoo' has arrived a little late – given the years of harassment that even powerful women in the world have endured, which only bolstered the confidence of men to perpetrate and perpetuate such behaviour. Possibly, the negative implications on the complainant's life – the ridicule, denial and stigma, not to mention the setback in her career – would have dissuaded any disclosure or complaint.

A few years ago, a former judge of the Supreme Court was accused of having sexually harassed an intern. While the courage of the young student, in leveling allegations against a retired judge was commendable, the incident caused the male professionals to close rank, as well as their offices, to women in general, resulting in a huge set back to them. There were instances where judges expressly (but unofficially) directed that no woman lawyer be allowed to clerk with them – thus denying many bright and meritorious young women this coveted opportunity. Individual male lawyers refused to hire female juniors under the pretext of protecting their reputation from potential future allegations of sexual harassment. Even practising women lawyers found it difficult to obtain any one-on-one meetings with their male colleagues or former judges – they were instructed to bring any other person with them – so that there is a witness to the entire interaction. The legal profession in India continues to be fairly male-dominated. While this is changing, as the number of women judges and lawyers is increasing, there is a long way to go before a semblance of some balance is attained. Therefore, the attitude and outlook of the men in the profession can have a far-reaching effect on the progress of women in the profession. Hence, it

is all the more important that men not only encourage and offer work to women but also treat them with respect. I can only hope that with time, men are less afraid of their reputations being sullied, and more concerned about protecting women from harassment.

It must be borne in mind that the process of seeking justice for victims of sexual offences can be as traumatic as the act of violence itself. While an individual may lose her life due to physical violence, a survivor of sexual violence, who suffers the trauma throughout her life, dies many deaths. While the violence of a sexual assault is itself demeaning and affects the survivor's dignity, the trials and tribulations of the criminal justice system, which require her to repeatedly narrate the incident in the presence of the judge, lawyers and the accused, and be subjected to cross-examination, often compound the problem. An audience comprising psychologists is perhaps best placed to understand this.

Though the trial process is under debate in many jurisdictions, the right of an accused to have a free and fair trial often overrides the right and need of a survivor to be protected against the trauma of going through the rigours of such a trial. There is an impelling need for reform in the system of trials for crimes against women and children in a manner which would do justice both to the survivor and the accused. I believe that psychologists, who have a strong insight into the survivor's ordeal and how best to assuage it, are key to such reforms. The International Council of Psychologists, an august body with representatives across the globe, is well placed to assist with the formulation of best practices to be followed in such trials. These can then be implemented by its members in their domestic jurisdictions by liasoning with the department of law and justice. I would regard this as a constructive way forward.

Apart from trial reform, gender sensitization is also crucial. The Indian judiciary acknowledged this as far back as in the 1980s, when Justice Krishna Iyer noted that "a socially sensitized Judge is a better statutory armour against gender outrage than long clauses of a complex

section with all the protections written into it".[13] However, given the limited representation of women in the judiciary, the issue remained on the backburner.

Efforts for sensitization of the judiciary while dealing with cases involving crimes against women, especially rape and other forms of sexual assault, were finally made in the mid-1990s. A few women lawyers approached the then Chief Justice of the Supreme Court of India with a request to undertake a confidential survey of the judges to determine the need for gender sensitization. The request was accepted, and the results of the survey were an eye-opener. Consequently, we were soon able to organize a programme for the judges, which culminated in the first Asia-Pacific Gender Sensitization Programme, conducted by judges of the Canadian Supreme Court, which I am privileged to have been directly involved with.

Through some interesting activities, the programme was able to bring home the errors in the manner in which judges, mostly male, were habituated to dealing with gender-based violence trials. Here are a couple of examples for illustration:

- The attendees were divided into random pairs and were instructed to disclose to the other the details of their first date. During the interaction, most people felt inhibited from discussing such personal and private information with a stranger. The lesson learnt was that when it is hard for us to discuss a wonderful private moment with a stranger, how difficult it must be for a victim of sexual violence to recount and re-live the worst in an open court. Elicitation of truth in such circumstances needs care and sensitivity so as to preserve the survivor's intrinsic worth, dignity, as well as credibility.
- In another segment, footage of the statement of a man who was mugged late in the evening while walking through Central Park (which was notorious then for mugging) was shown, followed by his cross examination. His cross-examination included questions on whether he was aware that Central Park was unsafe in the

[13] Krishan Lal v. State of Haryana, (1980) 3 SCC 159.

> evening, why he took a dimly lit route knowing well that the area was unsafe, why he had been so well dressed for a walk through Central Park in the evening, and why he was wearing expensive accessories which could have lured the accused to mug him. In the discussion thereafter, the attendees almost unanimously felt that the cross-examination was out of line as the man was the victim of a crime. However, when they were shown footage of a victim of sexual violence, a similar line of cross-examination, which a victim of sexual assault is unfortunately routinely put through, was thought to be acceptable.

This comparison brought home the disparity in the judges' treatment of victims of sexual violence (mostly women) and those of other crimes. We found this programme, and the subsequent programmes that followed, to be highly effective in the sensitization of the judiciary and the law enforcement agencies. Having said that, there are miles to go before we can rest.

Children are the building blocks of a society. It is of utmost importance that from a young age, they are taught to oppose, rather than perpetuate gender stereotypes. It is important for us to be good role models for our children, as the environment in which they are nurtured goes a long way in shaping them as adults.

One possible way of achieving this is to include material pertaining to gender equality in school curricula. Psychologists, who work closely with schools as guidance counsellors or otherwise, can take the initiative of commencing and carrying forward this discourse with the school management, education departments as well as parents.

With our combined efforts, we can leave behind a fairer and more egalitarian world for our daughters – a world where treating women with respect and dignity is ingrained into the societal fabric, rather than being an obligation of the law.

The Rights of Muslim Women and 'Faith' in the Supreme Court*

Ratna Kapur†

Five Muslim women brought a fundamental rights challenge to the practice of triple *talaq* that confers a right on Muslim men to unilaterally and instantaneously divorce their wives. In August 2017, the Supreme Court set aside the practice.[1] At about the same time, the marriage of Hadiya (alias Akhila Asokan), a Hindu woman who converted to Islam and subsequently married a Muslim man, was targeted by her family as being a case of 'love *jihad*', a forced marriage that was designed to recruit her into terror activities. In March 2018, the Supreme Court upheld the marriage and the absolute autonomy of a woman's right to choose whom she wants to marry.[2] Both decisions have been hailed as landmark victories in the advancement of women's equality rights more generally, and Muslim women's rights more specifically. In this article, I unpack the reasoning on which these decisions are based, critically analyzing the normative and majoritarian underpinnings of these decisions, and how they harbour implications that are not necessarily progressive nor emancipating for Muslim women.

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* This article draws in part on a much larger contribution: Ratna Kapur, *'Belief' in Law and Hindu Majoritarianism: The Rise of the Hindu Nation*, in Christophe Jaffrelot & Angana Chaterjee, The Majoritarian State (Hurst, 2019) (forthcoming).

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1 Shayara Bano v. Union of India, (2017) 9 SCC 1.

2 Shafin Jahan v. K.M. Asokan, (2018) 4 SCALE 404.

My central argument is that in each instance it is 'faith' - *of* the Muslim community as well as *in* the Court – that is on trial together and that in fact, the decisions reflect the brittleness of the Court's gender credentials and commitment to gender equality. Both cases are based on the implicit assumption that Muslim women are less able, more vulnerable and more in need of protection from Muslim men. This is manifest in the Court's paternalism as well as failure to develop a robust jurisprudence on gender equality in either case.

I. The Triple *Talaq* Verdict

The triple *talaq* case involved a constitutional challenge to the practice by a Muslim man of pronouncing divorce to legally separate from his wife by thrice uttering the word '*talaq*', thus immediately bringing an end to their marriage.[3] The issue before the Supreme Court was whether this practice was 'fundamental to religion' and part of an enforceable fundamental right to freedom of religion. The practice has been opposed not only by women's organisations, but more importantly by Muslim women, who are not allowed a similar right and suffer disadvantage resulting from this unilateral and abrupt pronouncement.[4] The practice was backed by the All India Muslim Personal Law Board (AIMPLB), which argued that triple *talaq* was a legitimate way to end a marriage and any interference with the practice would constitute an interference in the right to religious freedom and expression guaranteed under Article 25 of the Constitution.

The AIMPLB is a non-statutory, non-governmental organization that was established in 1972. The Board monitors the application of Muslim personal law, in particular, the Muslim Personal Law (Shariat) Application Act, 1937 ("the 1937 Shariat Act"). It is a Board which has been heavily criticized for presenting itself as *the* authority on Muslim personal law (Sunni law), for being a largely male, neo-conservative, and non-consultative body whose views tend to fossilize Islamic religious practices, and for failing to address contemporary

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[3] *Supra* note 1.

[4] Jyoti Punwani, *Muslim Women: Historic Demand for Change*, Economic and Political Weekly,Vol. 51, No. 42, October 15, 2016, http://www.epw.in/journal/2016/42/commentary/muslim-women.html.\

issues such as the rights of women, transgender persons and other minority members within the community in a progressive way.[5] The Board has been challenged in some of its edicts by the All India Muslim Women's Personal Law Board (AIMWPLB) established in 2005, and more recently by the Bharatiya Muslim Mahila Andolan (The Indian Muslim Women's Movement) that spear-headed the challenge to triple *talaq* in the Supreme Court.[6]

The triple *talaq* case became politicised with the Bharatiya Janata Party (BJP) supporting a ban of the practice, a position that is consistent with its Hindutva ideological agenda, being partly pursued in and through the discourse of rights and law. This ideology includes denigrating the Muslim community, specifically Muslim men, while also, in the process, brandishing the Hindu Right's liberal credentials in supporting the rights of Muslim women.[7] The Muslim woman is placed in the awkward and risky position of choosing either between her right to formal equality (backed by the Hindu Right) or religious freedom (attached to conservative Muslim and male control of religious institutions). This tension is contrary to the central objective of the petitioners who, as Muslim women, painstakingly sought to steer the case in the direction of the right to gender equality while at the same time preserve their right to religious identity and expression.

In August 2017, the Supreme Court set aside the practice of triple *talaq*. There was euphoria on the streets, with Muslim women celebrating the decision. At one level, the intervention by Muslim women becomes an example of resistance to the dominance and consolidation efforts of both Hindu and Muslim men. It simultaneously marks a successful bid to be included within the terms of gender equality, while at the same time affirming cultural difference. At another level, a closer reading

[5] Aziza Ahmed, *No Way Out: Dual Subordination of Muslim women in Indian Legal Culture,* in Chitra Raghavan & James P. Levine, Self-Determination and Women's Rights in Muslim Societies 71-92 (Brandeis University Press, 2012).

[6] For an argument on how personal laws harm religious freedom, *see* Farrah Ahmed, Religious Freedom under the Personal Law System (Oxford University Press, 2016).

[7] Ratna Kapur & Brenda Crossman, Subversive Sites: Feminist Engagements with Law in India 232-283 (SAGE, 1996).

of the case puts into question the hailing of this decision as a major victory for gender justice and women's equality. The Muslim man not only retains the unilateral right to pronounce *talaq* against his wife over a period of a few months, but the 395-page rambling and unwieldy decision offers little sound jurisprudential grounds to advance women's rights to equality. Claims in favour of gender equality under Article 14 of the Constitution, as well as India's international legal obligations to uphold women's equality rights, are ultimately either shrugged off or simply not addressed by any of the five judges. Instead, we are presented with a laboriously lengthy and impotent decision which sadly reflects the judges' lack of knowledge on feminist jurisprudence.

The triple *talaq* decision begins somewhat oddly by inexplicably foregrounding the dissenting opinion of Chief Justice Khehar, with the concurrence of Justice S. Abdul Nazeer. In over 272 pages of dissent, the former Chief Justice confirms that as the practice of instant triple *talaq* has been in vogue for 1400 years and is a component of the personal law of the community, it has the protection of Article 25(1), the freedom of religion clause, and does not in any way violate constitutional morality. There is no further elaboration of the reasoning or analysis of these views. Instead, the dissent simply sets out in agonizing and unnecessary detail, the verbatim legal arguments presented before the Court.

The concurring majority opinions set out by Justices Kurian Joseph, Rohinton Fali Nariman and Uday U. Lalit are similarly woefully inadequate on providing any useful guidance on gender equality. Justice Kurian simply asserts that anything "bad in theology is bad in law". Upon finding that the provisions of the Quran on triple *talaq* are unambiguous and that it is against the tenets of the holy text, he concludes that the practice violates the 1937 Shariat Act. Women's claims to equality are relegated to the side-line, and yet again, the opportunity to build a robust jurisprudence on gender equality slips away without notice.

Justice Nariman's opinion confines itself to the very narrow issue of the validity of instantaneous triple *talaq*. He not only rules that triple *talaq* is not a religious practice covered under Article 25, but

also that the doctrine of arbitrariness can determine if a law or provision violates the equality clause. He concludes that the practice of instant triple *talaq* is arbitrary, but remains silent on the issue of gender. Justice Nariman's implicit concern is not with women's rights, but with the preservation of marriage. He asserts that the practice of instantaneous triple *talaq* enables the marital tie to be "broken capriciously and whimsically by a Muslim man without any attempt at reconciliation to save it". Despite the ruling being noteworthy for referring to constitutional protections in the private arena, there is little effort to elaborate on this as sound legal jurisprudence. Indeed, a good deal of Justice Nariman's opinion is taken up in developing the doctrine of arbitrariness in relation to a case on the consumption of whiskey that he personally argued as a lead counsel and lost. Justice Nariman declares that the case was wrongly decided.

Throughout the judgment, the Muslim woman is repeatedly reduced to a suffering victim, mute and/or without agency. In casting her as a victim, the judges simply affirmed the prevailing position that Muslim women require to be rescued from Muslim men. In the process, the historical, cultural and political causes of the Muslim woman's exclusion and discrimination remain unaddressed. Abu-Lughod discusses a similar concern in relation to women in the Arab world, arguing that the focus on rescuing women from the practice of veiling is informed by a savior mentality that obscures the political and historical explanations for Muslim women's oppression and discrimination.[8]

The arguments of the petitioners, which were based on both their rights to gender equality and religious freedom, remain largely unaddressed. Instead, the judges constantly reiterate the subordinate position of all women vis-a-vis men, by casting them as vulnerable, weak and in need of protection and assistance. This protectionist approach is acutely evident in the dissent of Justice J. S. Khehar, who was in favour of upholding the practice of triple *talaq*. He offers his interpretation of a line in the Quran that compares the relationship between a husband and wife to a man's tilth or fertile soil. According to

[8] Lila Abu-Lughod, Do Muslim Women Need Saving? 31 (Harvard University Press, 2013).

the judge, this verse refers to the solemnity of sex between a husband and wife. He interprets with approval several verses from the Quran that analogise marital sex with a man sowing his fields in order to reap a harvest, by choosing his own time and mode of cultivation, by ensuring that he does not sow out of season, or cultivate in a manner which will injure or exhaust the soil.[9] Such judicial pronouncements are not only woefully inadequate in providing any sensible or useful guidance on gender discrimination, they also reflect the Court's continued inability to comprehend women, Muslim and non-Muslim, as bearers of rights entitled to full equality as Indian citizens.[10]

By confining its reasoning to the terrain of faith and religion, the Court's analysis remains blunted and myopic. Not only does faith emerge as rigid, fossilised and static, gender continues to be understood within a protectionist framework. While the framing of gender within a protectionist discourse in judicial decisions is not anomalous, it is acutely evident in the context of the Muslim woman. The implicit approval and interpretation of the then Chief Justice that the Quran declares men as protectors and casts a duty on them to maintain their women, coincides neatly with the position of the Hindu Right on women more generally as in need of protection, but also how that saviour in the context of Muslim women, can only be a Hindu man.

The Court's decision in the triple *talaq* case encouraged the BJP government to propose a Bill outlawing the practice and treating it as a criminal act that carries a punitive sentence. While the Court issued no direction to Parliament to enact legislation, the decision afforded an opportunity to the Hindu Right to further its agenda in presenting Muslim men as intolerant, discriminatory and dangerous. The Government hurriedly drafted a Bill prescribing a fine and imprisonment of a husband for up to three years if he pronounced a triple *talaq*.[11] This Bill makes the practice of triple *talaq* a cognizable

[9] *Supra* note 1 at para 18(i), page 18.

[10] For an analysis of the different positions of the judges, *see* Ratna Kapur, *Triple Talaq Verdict: Wherein Lies the Much Hailed Victory,* The Wire, August 28, 2017, https://thewire.in/171234/triple-talaq-verdict-wherein-lies-the-much-hailed-victory/.

[11] The Muslim Woman (Protection of Rights on Marriage) Bill 2017, No. 24 of 2017, Section 4.

and non-bailable offence under Section 7. According to Section 5 and 6, the complaint can be made by anyone, not just the wife, and the husband is to provide a subsistence allowance for the wife and dependent children (presumably and somewhat incomprehensibly while he is in jail). The Bill was passed by the Lok Sabha but has not cleared the Rajya Sabha due to the demands by opposition parties to refer it to a select committee. At the time of writing, the BJP government has announced its intention to move an Ordinance to implement the new legislation to by-pass the current deadlock.[12]

The celebration by Muslim women of the Supreme Court case is not misplaced, but the very fact that the case has encouraged the criminalising of the Muslim man is cause for concern. The issue is no longer about the contest between equality rights and the right to freedom of religion, but the (Hindu) State's use of criminal law to advance its agenda and further persecute Muslim men.

II. The Right to Choose and Absolute Autonomy

The protectionist approach and saviour mentality adopted in relation to Muslim women was also evident in the case of Hadiya (alias Akhila), a 24-year-old medical student from Kerala, who in 2014 converted to Islam of her own volition. Her parents were unsuccessful in their efforts to challenge before the High Court of Kerala, what they believed was her 'forcible' conversion. Two years after her conversion, her parents once again filed a habeas corpus petition before the High Court of Kerala, reasserting that Hadiya had been forced to convert, and fearing that she was likely to be taken out of India. During the pendency of this writ petition, Hadiya married Shafin Jahan, a Muslim man. Her parents contended that the marriage was a sham, alleging that she was being recruited by the Islamic State in Syria to be taken out of India. In May 2017, the Kerala High Court ruled that Hadiya, a girl aged 24 years, was 'weak and vulnerable' and easily exploited. Given her vulnerability and the Court's conclusion that Shafin Jahan was associated with persons having extremist links, it held the marriage

[12] Editor's Note: At the time of writing this article, the President had not promulgated the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018. The Ordinance received the President's assent on September 19, 2018.

to be a sham.[13] The Court annulled the marriage and handed custody of Hadiya to her parents. Even though there was a finding that Hadiya (who the Court referred to by her Hindu name, 'Akhila' throughout the judgment) had converted to Islam of her own free will, the Court held that there was a serious apprehension of Hadiya crossing over to Syria and joining the Islamic State. The Court directed that Hadiya be placed in the protective custody of her parents. Her husband, Shafin, promptly moved the Supreme Court of India against the lower court's order primarily because it violated the autonomy of an adult woman and was 'an insult to the independence of women in India.'[14]

Through a series of subsequent orders, the Supreme Court directed the National Investigation Agency (NIA), the main mechanism established by the Central Government in 2008 to combat terror in India, to launch an investigation into the Hadiya case. The Agency was to assess if Hadiya had been brainwashed, and whether her marriage was an isolated case or part of a larger operation to force Hindu women to convert and marry Muslim men with the intention of recruiting them for terror operations. Hadiya remained confined to her parents' home. Civil rights activists, expressed their alarm at the Supreme Court's order for a NIA probe into the case, arguing that the Court had gone beyond its jurisdiction and expanded the proceedings by ordering such a probe.[15]

Hadiya was eventually produced before the Supreme Court where she declared that her marriage was consensual and asserted that she

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[13] Asokan K.M v. The Superintendent of Police, Kerala HC, (2017) 2 KLJ 974.

[14] Shafin Jahan v. Asokan K.M., SLP(Crl.) No. 5777 of 2017, arising out of the final judgment and order dated May 24, 2017 passed by the Kerala High Court in WP (Crl) No. 297 of 2016; *See also* Lata Singh's case, upholding the individual autonomy of an adult woman who had left home to marry a man of her choice: Lata Singh v. State of Uttar Pradesh, (2006) 5 SCC 475.

[15] *Activists Write to Kerala CM, Women's Commission on Hadiya Case*, The Wire, October 7, 2017, https://thewire.in/gender/kerala-women-activists-hadiya-case; Nidheesh M.K., *Activists meet women's commission to investigate rights violation of Hadiya*, LiveMint, September 10, 2017, https://www.livemint.com/Politics/pHvCrvVpXTNAUUn2yZbN2H/Activists-meet-womens-commission-to-investigate-rights-viol.html.

wanted her freedom.[16] The Court permitted Hadiya to continue her medical studies and directed her to reside in the university hostel as opposed to with her husband or even on her own. The Court ordered that the NIA probe continue, though it was barred from inquiring into the legitimacy of the marriage. Ultimately, in its final ruling, the Court set aside the Kerala High Court judgment and upheld the validity of the marriage. Not only did it hold that Hadiya had the right to choose whom she wished to marry, and that such a choice could not be affected by matters of faith, but also that the right to choose what to wear, what to eat, what to believe, and whom to marry was essential to an individual's autonomy as well as right to life.[17] Justice Chandrachud, in a concurring though separate decision, specifically held that Hadiya had absolute autonomy over her person and that the strength of the Constitution lay in the plurality and diversity of culture that the Court was duty bound to uphold. The broader implications of this judgment have the potential to push back the tides of Hindu majoritarianism, as well as against the Hindu Right's broader homogenising efforts in law to construct the faith of both the majority and minority community as oppositional.[18] However, the question remains why, throughout the legal proceedings, the Supreme Court continuously treated Hadiya either as a victim, acting under false consciousness, or infantilised

16 Press Trust of India, *I Was Not Forced to Marry or Convert to Islam, Want to Be With Husband, Shouts Hadiya*, Indian Express, November 25, 2017, http://www.newindianexpress.com/states/kerala/2017/nov/25/i-was-not-forced-to-marry-or-convert-to-islam-want-to-be-with-husband-shouts-hadiya-1710813.html.

17 Apoorva Mandhani, *SC Sets aside Kerala HC judgment Annulling Marriage between Hadiya and Shafin Jahan*, LiveLaw, March 8, 2018, http://www.livelaw.in/breaking-sc-sets-aside-kerala-hc-judgment-annulling-marriage-hadiya-shafin-jahan/;*See* preliminary order of the Supreme Court, dated March 8, 2018, upholding the marriage in Shafin Jahan v. Asokan K.M. &Ors., Criminal Appeal No. 366 of 2018, arising out of SLP No. 5777 of 2017; G. Ananthakrishnan, *Right to Marry Person of one's choice integral to Right to Life and Liberty: SC on Hadiya Case*, Indian Express, April 10, 2018, http://indianexpress.com/article/india/right-to-marry-supreme-court-hadiya-case-5131055/.

18 Gary J. Jacobson, The Wheel of Law: India's Secularism in Comparative Constitutional Context (Princeton University Press, 2003); Ratna Kapur & Brenda Cossman, Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law (Oxford University Press, 2001).

her, depicting her as incapable of making informed decisions about her marriage, faith and future? There is a troubling paradox in this result, where the Supreme Court came to its conclusion only after dragging Hadiya through endless legal detours and subjecting her to State surveillance as well as incarceration in her parental home that continuously undermined the very autonomy that they ultimately upheld. Shortly after the decision upholding her marriage, Hadiya was clearly of the view that she was subjected to intense legal and social scrutiny simply because she had embraced Islam.[19]

The final judgment in the Hadiya case introduced a counter-hegemonic wobble that has the potential to push back the tides of Hindu majoritarianism that has become increasingly evident in the legal arena. At the same time, the language of paternalism evident in the triple *talaq* judgment and throughout the Hadiya proceedings circumscribes the judicial respect for women's personal and sexual autonomy more generally, and the capacity of a Muslim woman to exercise her right to choose, more specifically. The fact that the Supreme Court ordered the intelligence probe by the NIA in the Hadiya case to continue to determine if there was any criminality involved, even after declaring that she had full freedom to marry the person of her choice, is indicative of the greater scrutiny to which a Muslim woman's choices are subjected. The saviour mentality that seeks to save Muslim women from the injustices of Muslim men persists. Thus, the Court's interventions and intense scrutiny of the choices of a Muslim woman, especially of a Hindu woman who has converted to Islam, through the intelligence and surveillance apparatus of the State, ultimately serves to reinforce the myth of 'love *jihad*'. The term, manufactured and propagated by the extreme elements of the Hindu Right wing, has been deployed in the hope of generating fear over an unsubstantiated claim that hordes of Hindu women are converting to Islam and being

[19] All this happened because I embraced Islam: Hadiya, Economic Times, March 10,2018, https://economictimes.indiatimes.com/news/politics-and-nation/all-this-happened-because-i-embraced-islam-hadiya/articleshow/63243834.cms.

duped into marriage to Muslim men by feigned declarations of love.[20]

With Muslim women at the helm of both the cases discussed, an important opportunity was lost by the Court to develop a robust jurisprudence on gender equality based on the intersectionality of gender and religious (as well as class, ethnic or racial) identity. Not only do these decisions remain tentative in their commitment to women's agency and their claims as rights-bearing subjects, in both cases the Court reinforces the position being advanced by the Hindu Right on faith and gender. In the triple *talaq* case, the subordination of Muslim women by Muslim men remains pervasive, while in Hadiya's case, the capacity of a Hindu woman to convert to Islam and marry a Muslim man, remains suspect and subject to heightened scrutiny.

These cases cast a spotlight on how Muslim women's rights are a site on which secular judges are determining the legitimate content and parameters of religion - Hinduism as well as Islam. In the period immediately after Independence, the Supreme Court initially tended to offer a broader understanding of religion as including rituals and what were deemed to be 'superstitious practices'. *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*,[21] is one of the first cases where a wide definition was given to religion as including rituals and practices. Gradually, however, the Court whittled down the scope of what constitutes an authentic Hindu religion, by introducing a requirement that the practice must have a scriptural or textual basis. The emergence of the doctrine of 'essential practices' is specifically articulated in the rulings of the Chief Justice of the Supreme Court, P. B. Gajendragadkar, in the early 1960's in *Durgah Committee* v. *Hussain Al*,[22] and *Shri Govindlalji* v. *State of Rajasthan*.[23]

[20] Saif Khalid, *The Hadiya case and the Myth of 'Love Jihad' in India*, Al Jazeera, August 24, 2017, http://www.aljazeera.com/indepth/features/2017/08/hadiya-case-myth-love-jihad-india-170823181612279.html; Siddhartha Mahanta, *India's Fake 'Love Jihad'*, Foreign Policy, September 4, 2014, https://foreignpolicy.com/2014/09/04/indias-fake-love-jihad/.

[21] (1954) SCR 1005.

[22] AIR (1961) SC 1402.

[23] AIR (1963) SC 1638.

Both these cases involved upholding the right of the State to regulate religious institutions. In the process, a juridically constructed 'rational Hinduism' has come to define the parameters of legitimate faith. In articulating a common Hindu culture and belief, the Court has cast Hinduism in the framework of Abrahamic traditions, all of which have foundational scriptures and centralized doctrinal schools of interpretation.[24] Similar sorts of scriptural reification in the context of both Islam and Christianity in the modern period have also been enacted and such a turn appears to be a development that is internal to the 'secularization' of world religions.[25] In relation to Muslims, the Supreme Court restricted the protection of Article 25 that deals with religious freedom to the Quran in the few decisions that it has delivered, and over time tended to reject practices that were not specifically stated in the Quran as not being essential to Islam and therefore, not within the protective sphere of Article25.[26]

These decisions have helped to reinforce Hindu majoritarianism and Hindu male supremacy that is being aggressively pursued by the Hindu Right in and through the discourse of equality, as well as criminal law - a move that continues to construct the identity of India as a Hindu Nation, Muslims as outsiders or 'primitive' as claimed to be demonstrated in their treatment of women, and Hindu men as ultimate saviours. Muslims are called upon to either assimilate into the normative nationalized subject imagined by Hindutva that seeks to establish India as a Hindu *Rashtra*, or be demonised as backward, anti-national and insufficiently modern in gender relations.[27] The rush to criminalise Muslim men after the Supreme Court's holding on triple

[24] Ronojoy Sen, Articles of Faith: Religion, Secularism, and the Indian Supreme Court (Sage, 2010).

[25] Talal Asad, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam (John Hopkins University Press, 1993).

[26] *See* Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 (This case states that there is no greater authority for judging religious obligations for Muslims than the Quran; *see also* Mohd. Qureshi v. State of Bihar, (1958) AIR 731).

[27] Jyotirmaya Sharma, Hindutva: Exploring the Idea of Hindu Nationalism (Penguin Books, 2011).

talaq is indicative of how the Hindu Right intends to pursue its agenda through coercive means and simultaneously, to further stigmatise and criminalize Muslim men.

Unfortunately, the Supreme Court's interventions have served to reinforce this ideological agenda. And in the process, gender equality in law has become a central casualty.

Banishing the Victorian Ghost from the Bedroom

Sanjay Hegde & Pranjal Kishore[†]

"Adultery is nothing new".[1] The history of humankind indicates that when it created the institution of marriage, adultery followed closely behind.[2] One of the earliest and most well-known warnings against adultery is found in the Ten Commandments - "Thou shalt not commit adultery".[3] Every other religion condemns it. Unfortunately, this condemnation was reflected in the penal laws of a number of countries. Section 497 of the Indian Penal Code, 1860 ("IPC") criminalized adultery in India till it was struck down by a Constitutional Bench of the Supreme Court in *Joseph Shine* v. *Union of India*.[4] There were two features to the definition of adultery under section 497:

a. A man was guilty of adultery if he had sexual intercourse with the wife of another man, without his 'consent or connivance';

b. Only a man could be guilty of adultery. A married man who had sexual intercourse with an unmarried woman was not guilty.

Under section 198(2) of the Code of Criminal Procedure, 1973 ("CrPC"), prosecution for adultery could only be initiated by the aggrieved husband. On December 8, 2017, the Supreme Court issued

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1 Brenda Cossman, *The New Politics of Adultery*, 15 Colum. J. Gender & L. 274, (2006).

2 De Murray, *Ancient Laws on Adultery - A Synopsis,* 89 Journal Of Family Law 104 (1961).

3 Deuteronomy 5:18 (King James); Exodus 20:14 (King James).

4 Writ Petition (Crl.) No. 194 of 2017 (decided on 27.9.2018).

notice in a writ petition challenging the vires of these provisions. In the order issuing notice, the Court observed that section 497 was "quite archaic","treated the woman as a victim" and "tantamounts to subordination of women, when the Constitution confers equal status". The matter was referred to a Constitution Bench.[5] The Bench struck down the provisions in a unanimous verdict.

I. Historical Origins

All ancient cultures punished infidelity in some form. In Babylon and Egypt, only a woman who had sexual intercourse outside her marriage was deemed guilty. Her lover was not criminally liable. Greek law provided that a husband committed adultery only if he were intimate with the wife, sister, or mother of another citizen.[6] A wife was guilty of the offence if she had sexual intercourse with anyone other than her husband. In Rome, a married woman committed adultery by having sexual relations with anyone other than her husband. A husband, however, transgressed the law only if he had carnal relations with another man's wife.[7]

Closer home, the *Manusmriti* did not deem infidelity on the part of a husband to be an offence. However, any such transgression by a woman was considered to be an offence against her master (husband).[8] The laws in other civilizations of the time were similarly more tolerant of a deceitful husband, than an unfaithful wife.[9]

With the advent and spread of Christianity, "adultery became a sin as well as a wrong against the husband".[10] It is important to note here that Victorian era laws considered a woman to be the property of her

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5 Joseph Shine v. Union of India, (2018) 2 SCC 189 (Reference order).

6 Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 Journal of Family Law 45, 47–48 (1991).

7 Marvin M. Moore, *The Diverse Definitions of Criminal Adultery*, **30 U. Kan.** City L. Rev. 219 (1962).

8 Albert Swindlehurst, *Hindu Law and Its Influence*, 27 Yale Law Journal 857 (1918).

9 Moore, *supra* note 7.

10 Jeremy D. Weinstein, *Note - Adultery, Law, and the State: A History*, 38 Hastings L.J. 195, 203–04 (1986).

husband.[11] Infidelity on the part of the wife was subject to much greater condemnation than a similar transgression by the husband. However, adultery was never a criminal offence. Any societal enforcement was left largely to the Church.[12]

II. Drafting of the Indian Penal Code

The Indian Penal Code, enacted in 1860, drew largely from existing English criminal law. It seems strange, that it would have a provision such as section 497 when English law itself never treated adultery as a crime. In fact, section 497 was left out of the first draft of the Code. After considering the material collected from the three presidencies, Lord Macaulay concluded that "no advantage is to be expected from providing a punishment for adultery".[13] The First Indian Law Commission comprising of Lord Macaulay, J. M. Macleod, G.W. Anderson, and F. Millet thought "it best to treat adultery merely as a civil injury".[14]

The Second Law Commission (headed by Sir John Romilly), was of the view that adultery should be a penal offence. However, "in deference to" the last remark in Note Q of Macaulay's Draft regarding the condition of women in the country, the Commission decided to "render the male offender alone liable to punishment".[15] It is important (for reasons that will be adverted to later), to understand the rationale behind the exemption to women. The observations of the Second Commission in this regard were as follows:

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[11] Abhinav Sekhri, *The Good, the Bad, and the Adulterous – Criminal Law and Adultery in India*, 10 Socio-Legal Rev. 47 (2014).

[12] Siegel, *supra* note 6.

[13] *Macaulay's Draft Penal Code* (1837), Note Q at 90-93; *cited* in Law Commission of India, Indian Penal Code, 324 (Government of India,1971).

[14] Law Commission of India, Indian Penal Code, 324 (Government of India,1971).

[15] *Second Report on the Draft Indian Penal Code* (1847) at 134-35; *cited* in Law Commission of India, Indian Penal Code, 365 (Government of India,1971), Note Q is reproduced in the opinion of Justice Indu Malhotra, *see* Joseph Shine v. Union of India, Writ Petition (Crl.) No. 194 of 2017 (decided on 27.9.2018), at para 236.

> Though we well know that the dearest interests of the human race are closely connected with the chastity of women and the sacredness of nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives.
>
> The condition of the women of this country is unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attentions of husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women is a course which we are most reluctant to adopt.
>
> We are not so visionary as to think of attacking, by law, an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law.[16]

From an analysis of the history of adultery law and the discussion on section 497, it is clear that the following assumptions seem to have played on the minds of the drafters:

a. Women are the property of their husbands. Sexual intercourse with a married woman would amount to criminal interference with a man's rights over his property;

b. Women have an 'unhappy position' in Indian society;

c. "… it is the man who is the seducer and not the woman".[17]

[16] *Cited* in Ratanlal & Dhirajlal, The Indian Penal Code 1011 (LexisNexis Butterworths India, 33rd edn., 2012).

[17] Sowmithri Vishnu v. Union of India**,** (1985) Supp. SCC 137 at para. 7.

As we shall discuss in the following sections, these assumptions could not pass constitutional muster.

III. Constitutionality of the Adultery Regime

Prior to the judgment in *Joseph Shine*, the constitutional validity of section 497 had been the subject of three decisions of the Supreme Court. In *Yusuf Abdul Aziz* v. *State of Bombay*,[18] the petitioner challenged the last sentence of section 497. This states that a wife shall not be punishable as an abettor. The judgment runs into seven short paragraphs and is singular for its lack of reasoning. Justice Vivian Bose speaking for the Constitution Bench held that the "provision complained of is a special provision and it is made for women, therefore it is saved by clause (3)[of Article 15]".[19]

The vires of section 497 was subsequently challenged in 1985. In *Sowmithri Vishnu* v. *Union of India*,[20] the provision was challenged on the grounds that it:

a. Did not confer a right on the wife to prosecute her husband or the woman with whom her husband had committed adultery;

b. Did not take into account cases where the husband has sexual relations with an unmarried woman.

The petitioner also argued that section 497 was "a kind of 'Romantic Paternalism', which stems from the assumption that women, like chattels, are the property of men". These arguments were rejected on the ground that they belonged to the realm of policy. The Court observed:

> [...] the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is.[21]

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18 1954 SCR 930.

19 *Id.* at 3.

20 (1985) Supp. SCC 137.

21 *Id.* at para 8.

Three years later, section 198(2) of the CrPC was challenged by one V. Revathi.[22] The petitioner asserted that section 198(2) was unconstitutional as it did not allow the wife to prosecute an adulterer husband. This challenge was rejected, with the Court holding:

> […] The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practised in circumscribing the scope of Section 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer.[23]

IV. Reports of the Law Commission

The suitability of retaining section 497 was considered by the 42nd and the 156th reports of the Law Commission. The 42nd report doubted the benefit of criminal sanction for adulterous behaviour. Some of the members were of the view that the provision should be done away with.[24] However, the Commission was of the view that "the time has not yet come for making such a radical change in the existing position".[25] Instead, the Commission recommended the removal of the provision which exempted women from liability. A similar recommendation was made by the Law Commission in its 156th report.

22 V. Revathi. v. Union of India, (1988) 2 SCC 72.

23 *Id*. at para 5.

24 See Note of Mrs. Anna Chandy in Law Commission of India, Indian Penal Code, Report No. 42, 324 (1971).

25 Law Commission of India, Indian Penal Code, Report No. 42, 324 (1971).

V. Arguments Against Constitutionality

The Petitioners challenging the adultery regime did so, primarily on three grounds–

a. It is violative of Articles 14 and 15 of the Constitution;

b. It infringes upon the right to sexual privacy guaranteed under the Constitution;

c. There was no basis for criminalization.

(a) Violation of Articles 14 and 15

The adultery regime was based on two postulates. First, that the wife is the property of the husband. Thus, any transgression by another man relating to the wife was to be punished. However, there were no corresponding punishments for a cheating husband. Second, adultery law was in some way beneficial to women in light of the exemption accorded to them.

All the decisions that had upheld the vires of section 497 of the IPC and section 198(2) of the CrPC, did so on the basis that these provisions stood to benefit women and were thus protected under Article 15(3). However, the perception that women are victims of adultery (and thus in need of some beneficial exemption) was backed by little empirical data. In fact, the only evidence of this sort came from the discussion of the original drafters who had noted that the condition of the women in the country was "depressed".

Thus, the rationale behind section 497 lay in the perception that British men had regarding the condition of Indian women almost two centuries ago. The rationale itself was based on gender stereotypes which were deeply discriminatory. Such legislations have been deemed to be unconstitutional in *Anuj Garg* v. *Hotel Association of India*.[26] There the Court was dealing with a pre-constitutional law "prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public."[27] The Court struck down the impugned provision, holding:

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[26] (2008) 3 SCC 1.

[27] S. 30, The Punjab Excise Act, Act No. 1 of 1914.

> It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. […] Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation in the present case suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.[28]

This would squarely apply to the case of adultery. Section 497 of the IPC and section 198(2) of the CrPC was deeply discriminatory, not towards men alone (as is often claimed) but also towards women. It was liable to be struck down on the basis of Articles 14 and 15 of the Constitution.

(b) Infringement of the Right to Sexual Privacy

The Constitution Bench in *KS Puttaswamy* v. *Union of India*,[29] reaffirmed the constitutional right to sexual privacy. Who a person chooses to have sexual intercourse with is entirely her private decision. This can only be impinged upon in cases where there is a compelling state interest. Section 497 reflects the colonial understanding of adultery as primarily an offence against morality. The Supreme Court in *Sowmithri Vishnu* observed that Section 497 ensures stability of marriage. The question thus arises – are morality and stability of marriage issues which involve compelling interest of the state? And if they are, is criminalization the least intrusive method of achieving the desired goals?

In *Gobind* v. *State of M.P.*,[30] observed that:

> […] if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance.[31]

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[28] Anuj Garg, *supra* note 26 at para 46.

[29] (2017) 8 SCC 1.

[30] (1975) 2 SCC 148.

[31] *Id*. at para 22.

However, in the ultimate analysis, it refrained from going into the question of whether morality was indeed a compelling state interest.

In the United States, in *Lawrence* v. *Texas*,[32] the Supreme Court held, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice". Justice Scalia in his dissent criticized the Court's holding as "the end of all morals legislation". *Lawrence* was cited with approval in *KS Puttaswamy*.

Under our constitutional scheme, moral indignation is not a valid basis for overriding the individual's fundamental right of privacy. Thus, any state interest in criminalizing adultery must necessarily give way to the right to sexual privacy of individuals.

The Supreme Court in *Sowmithri Vishnu* had fallen into an error in believing that section 497 ensures the stability of marriage. It does not. If it did, it would have given a wife an equal right to prosecute another woman in case of infidelity by her husband. In any event, stability of marriage does not seem to be a compelling interest of the state in India any longer. This is clear from the introduction of 'no-fault' divorces under section 13-B of the Hindu Marriage Act, 1955.

(c) No Ground for Criminalization

The third contention of the Petitioners before Court was that there was no ground made out to categorize adultery as a criminal offence. Two fundamental principles of criminal law are important in this regard- the harm principle and the principle of last resort.

i. Harm Principle

Every punishment that does not arise from absolute necessity, says Montesquieu, is tyrannical.[33] Legislatures across the world follow the 'harm principle' in order to decide what behaviour is to be criminalized.[34] This was propounded by John Stuart Mill as far back

[32] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[33] Cesare Becarria & Voltaire, An Essay on Crimes and Punishments (1767).

[34] Glanville L. Williams, *The Definition of a Crime, in* Current Legal Problems 8 (1955).

as 1859.[35] According to what has become the canonical formulation of 'the harm principle' – "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."[36] Adultery is not a victimless crime. One can argue that there is 'harm' caused to the husband or to the marital institution. However, law already provides a remedy for this, in the form of divorce. Thus, there appears to be no justification for accompanying criminal sanction.

ii. Principle of Criminalization as the Last Resort

Criminalization is the *ultima ratio* of legislative policy. It is employed where other means (e.g., civil litigation, administrative solutions, non-criminal sanctions, etc.) fail.[37] Thus, an act is declared to be a criminal offence, only as a last resort - as an "uttermost means in uttermost cases". It was hard to see how any of these requirements were met in the case of adultery. It was at best an offence between two individuals. There was no question of any societal interest being involved.

VI. The Judgment in *Joseph Shine* v. *Union of india*

In a unanimous verdict delivered on 27.09.2018, the Supreme Court struck down the 'legislative packet' dealing with adultery, as unconstitutional. Then Chief Justice Dipak Misra wrote the opinion for himself and Khanwilkar, J. Justices Nariman, Chandrachud and Malhotra penned separate, concurring opinions.

The judges unanimously held that the adultery regime treated women as 'chattel' of their husbands. It was based on a gender stereotype that treated women as subordinate to men. The provision was therefore 'manifestly arbitrary' and liable to be struck down as violative of Article

35 John Stuart Mill, On Liberty (Elizabeth Raport ed., 1978).

36 Dennis J. Baker, *The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalization*, 33 Aus. J. of Legal Phil. 66, 94-98 (2008).

37 Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio),*2 Ohio St. J. Crim. L. 521, 523 (2004).

14.[38] In addition, Justices Nariman, Chandrachud and Malhotra also held that the adultery regime was violative of Article 15(1).

The judges further held that the adultery regime is violative of the dignity of women. It therefore offends Article 21 of the Constitution.[39] An interesting observation is made by Chandrachud J. in this regard. He holds that the sexual autonomy of a person and their right to make "intimate personal choices" does not cease upon marriage.[40] Justice Malhotra however disagreed with this aspect. She held that the freedom to have a sexual relationship outside marriage did not warrant protection under Article 21. She however went on to hold:

> In the context of Article 21, an invasion of privacy by the State must be justified on the basis of a law that is reasonable and valid. Such an invasion must meet a three-fold requirement as set held in Justice K.S. Puttaswamy (Retd.) v. UOI (supra): (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. Section 497 as it stands today, fails to meet the three-fold requirement, and must therefore be struck down.[41]

These observations are likely to have a bearing on the outcome of the challenge to the petitions seeking criminalization of marital rape.

The third aspect before the judges was that of criminalization. Here too, the Court was unanimous in its verdict. The Chief Justice and Khanwilkar J. hold that treating adultery as a crime would lead to an

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[38] Joseph Shine v. Union of India, Writ Petition (Crl.) No. 194 of 2017 (decided on 27.9.2018). *See* Opinion of Misra, CJ and Khanwilkar J. at para 32; Opinion of Nariman J. at para 110; Opinion of Chandrachud J. at para 193 and 199; Opinion of Malhotra J. at para 286.

[39] *Id. See* Opinion of the Misra, CJ. and Khanwilkar J at para 53; Opinion of Nariman J. at para 114; Opinion of Chandrachud J. at paras 139, 161, 193, 199, 211 and 213.

[40] *Id*. at para 235.

[41] *Id*. at para 306.

intrusion into the private matrimonial sphere.[42] Nariman J. observed that the State had failed to show any deterrent effect, which may be a legitimate consideration for a State enacting criminal law.[43] The observations of Chandrachud J. are instructive in this regard:

> There is a fundamental reason which militates against criminalization of adultery. Its genesis lies in the fact that criminalizing an act is not a valid constitutional response to a sexual relationship outside the fold of marriage. Adultery in the course of a subsisting marital relationship may, and very often does question the commitment of the spouse to the relationship. In many cases, a sexual relationship of one of the spouses outside of the marriage may lead to the end of the marital relationship. But in other cases, such a relationship may not be the cause but the consequence of a pre-existing disruption of the marital tie. All too often, spouses who have drifted apart irrevocably may be compelled for reasons personal to them to continue with the veneer of a marriage which has ended for all intents and purposes. The interminably long delay of the law in the resolution of matrimonial conflicts is an aspect which cannot be ignored. The realities of human existence are too complex to place them in closed categories of right and wrong and to subject all that is considered wrong with the sanctions of penal law. Just as all conduct which is not criminal may not necessarily be ethically just, all conduct which is inappropriate does not justify being elevated to a criminal wrongdoing.

Malhotra J. also held that there is no public element, that would justify the criminalization of adultery.[44]

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[42] *Id*. at para 62.
[43] *Id*. at para 111.
[44] *Id*. at para 308-312.

VII. Conclusion

Family law and criminal law operate in different fields. Criminal law creates a system of regulation that is enforced by the threat of sanction. Family law involves the private sphere-the home, and family. Criminal law is seen as punitive and coercive. Family law on the other hand, is ameliorative and attentive to the well-being of individuals. The two only interact when there is compelling state interest involved e.g., domestic violence, or other cases where physical injury may be caused. The Indian experience with the interaction between these two fields has been an unhappy one.

The offence of adultery in India was based on outdated notions of morality and is deeply discriminatory towards women. Along with section 377 of the IPC,[45] it was amongst the last remaining vestiges of state involvement in consensual sexual conduct.

The last year has seen the Supreme Court take a firm stand in favour of gender equality. This started with the striking down of 'instant triple *talaq*' in *Shayara Bano* v. *Union of India*.[46] More recently, the Supreme Court affirmed the right to entry of all women at Sabrimala.[47] These judgments will go a long way towards the constitutional goal of an equal society. It must however be kept in mind, that in adjudicating on the rights of women, the Court is not taking on a paternalistic role and "granting" rights. It is merely interpreting the text of the Constitution to re-state what is already set in ink - women are equal citizens of this nation and entitled to the protection of the Constitution.

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[45] In Navtej Singh Johar v. Union of India, Writ Petition (Crl.) No. 76 of 2016 (pronounced on 6.9.2018), a Constitution Bench of the Supreme Court struck down Section 377, IPC to the extent that it criminalized consensual sexual acts of the nature described in the section.

[46] Shayara Bano v. Union of India, (2017) 9 SCC 1.

[47] Indian Young Lawyers Association v. State of Kerala, Writ Petition (Civil) No. 373 of 2008.

Women with Disabilities: The Promise of the RPD Act, 2016

Jayna Kothari[†]

With in the disabilities law framework in India, women with disabilities have always been ignored. In the previous Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("PWD Act"), there was no provision for addressing the concerns of women with disabilities. It was only when the UN Convention of Rights of Persons with Disabilities ("UNCRPD") came into force in 2006, that for the first time, it recognized that women and girls with disabilities are at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.[1]

The new Rights of Persons with Disabilities Act, 2016 ("RPD Act") comes with new promise because for the first time, disability law recognized the special discrimination faced by women with disabilities. However, is the law adequate? Will it be able to effectively protect the rights of women with disabilities? Is the RPD Act being implemented for women with disabilities?

To answer these questions in this article, I will first address the special discriminations faced by women with disabilities using the concept of intersectionality. I will move on to then analyzing the RPD Act to review the provisions included for protection of rights of women and give an

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1 Convention on the Rights of Persons with Disabilities, Preamble, Dec. 13, 2006, 3 U.N.T.S. 2515.

overview of its working. I conclude by making recommendations for the future.

I. Intersectionality

As per the Census 2011, the population of persons with disabilities is 2.68 crores, which is 2.21% of the total population.[2] Out of this, the number of women with disabilities is 1.18 crores. In the 2011 Census, information on only eight types of disabilities has been collected.[3] Thus, as per the definition of even persons with benchmark disabilities, which covers almost 19 disabilities, the number collected in the 2011 Census of women with disabilities would fall seriously short. Notwithstanding this, the number is by no means insignificant and it is important therefore, that we address the question of rights of women with disabilities. It is here that I would like to bring in the concept of intersectionality.

Intersectionality was first coined by Kimberle Crenshaw to describe the multiple forms of discrimination faced by black women, not only on account of gender but also on account of race, and how such experience of discrimination was intertwined.[4] Intersectionality as a concept helps us understand the unique experiences and perspectives at the intersection of two or more social or cultural categories and positions that intertwine as complex, overlapping, interacting, and often contradicting systems.[5]

Intersectionality in the field of disability law would take gender into account and other conditions such as class, poverty, caste etc., to see

2 Office of the Registrar General & Census Commissioner, India, Population Census of India (2011).

3 Disability in seeing, in hearing, in speech, in movement, mental retardation and mental illness and multiple disabilities.

4 Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stanford Law Review 1241 (1991).

5 Tina Goethals, Elisabeth De Schauwer & Geert Van Hove, *Weaving Intersectionality into Disability Studies Research: Inclusion, Reflexivity and Anti-Essentialism*, 2 Journal for Diversity and Gender Studies 75 (2015).

how women with disability experience discrimination. Women and girls with disabilities face additional discrimination and are excluded disproportionately from education, employment and public facilities. They also face higher levels of physical and sexual violence.[6]

At the intersectionality of disability and gender, if we were to examine additional layers of caste, class, sexuality and age, it would add further complexity in our understandingof the experiences of Dalit women with disabilities, women with disability living below the poverty line, and LGBT women with disabilities. These intersectionalities show that women with disabilities and those across all these groups are far more marginalized within the larger group of persons with disabilities.

II. The Rights of Persons with Disabilities Act, 2016

The RPD Act is a huge improvement to the PWD Act which did not have any reference to women with disabilities. A conscious effort was made during the drafting process for the RPD Act to specifically address discrimination against women with disabilities. This led to inclusion of women's concerns within the RPD Act. However, are these enough? In order to ascertain this, it would be useful to give an overview as to how women with disabilities have been included within the new law.

There are general provisions in the law on women with disabilities. Section 4(1) states that the Government and local authorities shall take measures to ensure that women and children with disabilities enjoy their rights equally with others. There are also specific provisions relating to women in respect of sexual and reproductive health rights, social security and welfare.

a) Reproductive Rights

Section 10 provides that the appropriate Government shall ensure that persons with disabilities have access to appropriate information regarding reproductive rights and family planning. It also states that

6 Human Rights Watch, *Invisible Victims of Sexual Violence*, April 3, 2018, https://www.hrw.org/report/2018/04/03/invisible-victims-sexual-violence/access-justice-women-and-girls-disabilities.

no person with disability shall be subject to any medical procedure which leads to infertility, without his or her free and informed consent. While this provision mentions 'person' and is applicable to people of all genders, the focus of this section would certainly be on women with disabilities. There has been a history of forced sterilization procedures carried out on women with disabilities, especially women with mental disabilities. This issue has also been addressed under the Mental Health Care Act, 2017, but it is important that it is addressed in the RPD Act as well.

In addition to Section 16, Section 25 mandates the Government to provide certain measures for healthcare including pre-natal, perinatal and post-natal care of mother and child, and also for sexual and reproductive healthcare for women with disabilities.

b) Social Security

Section 24(2) provides that the Government shall provide schemes keeping in mind diversity of gender, age, class etc. among persons with disabilities. These should include schemes to support women with disabilities so that they can make a livelihood and raise their children. In Section 37, the Government and the local authorities are mandated to create schemes in favour of persons with benchmark disabilities, and to provide for five per cent reservation in allotment of agricultural land, housing and development programmes, poverty alleviation schemes and such other programmes.

Therefore, the two main areas where women with disabilities are covered are reproductive and health rights, and social security and welfare measures. These are important. However, I argue that one of the main areas where women and girls with disabilities specifically bear the brunt of discrimination is violence and abuse.

III. Violence and Abuse- Lack of Access to Justice

Women with disabilities disproportionately face violence and abuse, and this is not addressed in the RPD Act at all. Women and girls with different disabilities face high risk of sexual violence in India and access to justice is one of the most pressing issues, which is not addressed under the RPD Act. Access to justice is particularly difficult for women

and girls with disabilities largely due to the stigma associated with their sexuality and disability. They often do not get the support they need at every stage of the justice process: reporting abuse to the police, getting appropriate medical care, and navigating the court system.[7]

Under the RPD Act, Section 7 refers to measures for prevention, and the protection of persons with disabilities from all forms of abuse, violence and exploitation. This section should have specifically referred to women and girls with disabilities and provided special remedies as they are disproportionately at the receiving end of violence. However, there is no special mention of women and girls here. This is a crucial gap, because although the Criminal Law (Amendment) Act, 2013 and the Protection of Children from Sexual Offenses Act, 2012 (POCSO) define rape and sexual assault of women and minors with disability as aggravated forms of sexual assault, there are no special measures put in place in those legislations to take cognizance of incidents of abuse, violence and exploitation against them. These legislations also do not provide legal remedies for such incidents, which although provided under Section 7 of the RPD Act, do not specially cover women and girls.

Article 16 of the UNCRPD on freedom from exploitation, violence and abuse, requires State Parties to put in place effective legislation and policies, including women-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

The RPD Act does not put into place any specific measures in Section 7 to ensure that women and girls with disabilities get access to justice or effective redressal of their complaints. The Act does not provide for accountability of authorities for not taking action on any complaint of violence or abuse. It has no provision for fast-tracking of cases of violence against women and girls with disabilities. These measures would be crucial if the law wants to adequately address the rights of women and girls with disabilities.

Article 6 of the UNCRPD also specifically addresses challenges of women with disabilities and recognizes that women and girls

7 *Id.*

with disabilities are subject to discrimination on multiple fronts. It mandates State Parties to take all appropriate measures to ensure the development, advancement and empowerment of women, for the purpose of guaranteeing to them the exercise and enjoyment of human rights and fundamental freedoms. Such an overarching provision would have enormously helped in giving priority to women and girls with disabilities in the RPD Act.

IV. Conclusion

The RPD Act is still new and its implementation has started at a snail's pace. We need to see how it fares on the ground and it will only be in a few years that we would be able to measure whether it is being implemented adequately, and if not, how the challenges can be met.

The limited coverage of reproductive and health rights of, and social security measures for women with disabilities would be easy to monitor. However, even these limited rights are currently not being implemented. Social security and welfare schemes need to be introduced at the state and central level where women and girls with disabilities are supported – in education, livelihood and employment. This is not being done adequately. In the area of reproductive and health rights, governments have not taken any steps yet to provide access to information regarding reproductive health for women and girls with disabilities. If reproductive and sexual health rights of women and girls with disabilities are to be recognized and protected, then it is imperative that there is protection from violence and sexual abuse. One way of going forward would be to broaden the scope of Section 7 to specifically provide remedies and access to justice for women and girls. This could be done through courts or through rules and government orders.

Finally, if we want the law to address the concerns of women and girls with disabilities and to address discrimination across not just gender, but also caste, sexuality, and age within disability, there is first the urgent need to collect data around these frameworks. This is currently lacking in India. There is also a paucity of academic work on intersectionality in India. Thus, we need to push for more writing on discrimination and equality of women and girls with disabilities so that their experiences take centerstage in disability debates.

Others v. Heterosexuality: Myths Surrounding Sabarimala*

MADHAVI MENON†

In the brouhaha surrounding the 4-1 majority verdict in *Indian Young Lawyers Association* v. *State of Kerala*,[1] one crucial fact has been missed. Ayyappan is a celibate god who enjoys the company of other men. His is not a patriarchal set-up in which women are oppressed in order to promote men. There is not a single mythological story to suggest that Ayyapan has anything against women, or that he considers menstruation unclean. The exclusion of menstruating women is an invention of priests who interpret male homosociality to sanction the worst strictures of patriarchy. So why is he being dragged into a battle about women?

Let us think more about this particular god's desires, and the settings in which his legends have been produced.

Ayyappan is a celibate god – this is the reason cited for not allowing women in the vicinity of his temple. This reason ties in with predictable and drearily misogynistic narratives about – (a) menstruating women being unclean, and (b) women more generally being seductresses. Clearly this is a symbolic ban – the keepers of the shrine cannot seriously fear that a god, materially made from sculpted stone, wood,

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[1] Indian Young Lawyers Association v. The State of Kerala, Writ Petition (Civil) No. 373 of 2006.

and metal, will be defiled by having menstruating women at his shrine. But Ayyappan's celibacy is such an oft-repeated theme that it is more than symbolic – not being around women seems to be integral to who Ayyappan is. So much so that all his male devotees too need to abstain from having sex (with women) for over a month before undertaking the pilgrimage. This allows them to become 'Ayyappans' themselves because celibacy is the single biggest identifying marker of the god.

Ayyappan is one of the few gods in the Hindu pantheon who actively refuses to have sex with women by turning down offers of marriage. The most famous of Ayyappan's suitors is Malikappuram who emerges from the body of the female Mahishi, after Ayyappan has slain the demon. Legend has it that Malikappuram begged Ayyappan to marry her, but he took refuge in his celibacy. She persisted, and was eventually told that he would marry her only when no new devotees come to visit his shrine. This entreaty for marriage followed by a rejection of the proposal is ritually repeated every year during the main pilgrimage to Sabarimala. Every year, Malikappuram's idol is removed from the shrine in which it resides, just a few metres away from the main shrine, and taken to see the number of wooden arrows – *sharakol* – deposited by first-time pilgrims to mark their attendance at Sabarimala. These arrows convince her that she will not be conjoined with Ayyappan and she returns disappointed to her role as the eternal consort-in-waiting.[2]

But even as Malikappuram's is set up as the shrine of disappointment, there are two more hopeful shrines en route to Ayyapan's. The first belongs to Kadutha, who helped to build the Ayyapan temple during Ayyapan's lifetime, and became so attached to the god that he refused to leave his side, choosing instead to spend the rest of his life with his lord. The second, in many ways even more remarkable, a shrine that a pilgrim worships at before approaching Ayyappan, is dedicated to Vavar, a Muslim saint whose mosque in Erumely is en route to Sabarimala. Such a custom of inter-religious faith is startling enough in these times

[2] Another famous celibate is Tirupati Venkatachalapathy, who refuses to marry Padmavati. In her case too, there is a temple dedicated to her, close to the shrine of the object of her affection. Every year she dresses up and waits for the lord but he never comes.

of communal strife. But there is more. Some legends say that Vavar was a pirate from Arabia, whom Ayyappan defeated in battle. Others say Vavar was a warrior who defeated Ayyappan in battle. Still others insist that these two men were so equally matched in bravery and valour that they acknowledged their mutuality before becoming boon companions. Many versions note that Vavar helped Ayyappan defeat the demoness Mahishi (from whose body Malikappuram emerged), which continues to be counted as Ayyappan's greatest feat of valour. No matter how many origin stories there are, though, they all seem agreed on the fact that Ayyappan and Vavar were inseparable in life, and closely connected after death. Legend has it that the Mahishi was finally killed at Erumely, which is now the starting point of the pilgrimage to Sabarimala, and the place at which Ayyappan asked his foster father, King Pandalam, to build a mosque for Vavar. This mosque is in addition to the shrine to Vavar in Sabarimala. Pilgrims believe they cannot approach Ayyappan without first praying to Vavar and making offerings of black pepper in honour of his pirate past. Like the two men buried together in many *dargahs*, Ayyappan and Vavar preside together in Sabarimala. Legend further has it that while explaining his attachment to Vavar, Ayyappan tells his father, "Consider Vavar as myself".

What might it mean to consider another as one's self, Vavar as Ayyappan? Certainly, such a statement points to the existence of a close friendship. But usually, this language of interchangeable mutuality is reserved for married couples, the two of whom are said to make up a 'whole' uniting 'two halves'. Ayyappan and Vavar are not married – remember that Ayyappan's existence is legendarily opposed to marriage. He is very clear that he can never fulfill Malikappuram's sexual desire for him. Equally, Ayyappan was emphatic in his lifetime – or so the legends go – that his male companion be accorded the same status as himself. Given Ayyappan's nearly all-male following, and his refusal of heterosexual union, his relationship with Vavar points to a reorientation of desire that is fascinating from a historical perspective. It is important to remember that the possibility of a male-male union is not alien to Ayyappan since he is himself the product of such a coupling between Shiva and Vishnu.

The tale of Ayyappan's two fathers is widely known to devotees, not only of Ayyappan, but also of Shiva and Vishnu. In addition to the conjoined body of Harihara, half Shiva and half Vishnu joined together as one entity; the two gods come up with yet another version of physical coupling between two men. Indeed, the legend of Shiva and Vishnu, in his avatar as Mohini, is a staple of the Hindu pantheon.[3] The Hindu pantheon is full of such shape- shifting gods; their malleability includes changing shape in pursuit of one another and also of humans. In such a landscape, Shiva and Vishnu are the prime examples of intra-divine desire.

As with all legends, the story of Shiva and Vishnu-as-Mohini has several versions. One version says that the demon Bhasmasura ('the ashes demon') performed severe austerities in order to please Shiva, who in turn granted the demon a boon, telling him to ask for whatever he wished. In a reversal of the Midas touch, in which the king asks for everything he touches to be turned into gold, Bhasmasura asks for the ability to turn into ashes anything that he touches, Shiva grants him this strange wish, at which point Bhasmasura immediately starts chasing Shiva in order to reduce the god to a pile of ashes and take over his power. Shiva hides himself in a tree and begs Vishnu for help. For reasons unclear to mere mortals, Vishnu decides to take on the form of Mohini, the enchantress, and seduces Bhasmasura into submission. The demon is so taken with Mohini's beauty that he gets side-tracked from his mission to incinerate Shiva and starts courting the enchantress instead. As part of their courtship routine, Mohini asks Bhasmasura to put his hand on his head and swear fidelity. The moment that the love-struck Bhasmasura does so, he is reduced to ashes.

Vishnu goes to tell Shiva of his success against the demon, and Shiva asks if he too can see Vishnu in drag as Mohini. When Vishnu obliges, Shiva is so flooded with passion that he spills his semen. The consequence of this encounter is Ayyappan.

3 This tale takes Hindu gods close also to their Roman peers who, in Ovid's legendary telling in the 1st-century AD Metamorphoses, are continually changing shape in order better to pursue their desires. Male gods change into swans and winds and seas and eagles in order to get their prey who are both female and male; the female gods are content with making other characters change shape while themselves remaining female.

A less lurid version of the tale focuses more on necessity than desire. The demon Mahishi is determined to take revenge for the murder of her brother, Mahishasura, at the hands of the goddess Durga (Mahishasura had been granted a boon saying he could not be killed by any man, so the gods sent a goddess to perform the deed). After undergoing a formidable set of penances, Mahishi is granted a boon by the creator Brahma. When she asks for invulnerability, Brahma has enough good sense to turn her down. But then she makes a second supplication, asking for invulnerability to everyone except the son of Shiva and Vishnu. Once she is granted this boon, she starts ravaging the world with impunity, secure in the knowledge that no one can vanquish her. The gods beseech Vishnu, the preserver, to attend to the situation. Vishnu decides to reprise an avatar he had taken on earlier. On that previous occasion, he had become Mohini in order to rescue the divine nectar (*amrit*) from the demons who were refusing to share it with the gods. In this avatar, Vishnu had seduced the demons into giving up their hold over the nectar so the gods could gain immortality by drinking it. In the second reprisal of this role, Shiva and Vishnu-as-Mohini come together to give birth to Dharmashasta, of whom Ayyappan is an avatar. And Ayyappan, as we already know, goes on to kill the demon Mahishi, with Vavar's help. This second telling of the tale focuses less on the burning desire between Shiva and Vishnu and more on the pragmatic need of begetting Ayyappan. Ayyappan is the son of two men, and himself the boon companion of one man. Such a lineage is unparalleled in the history of Indian Hinduism. Ayyappan is the god of men. The legends and rituals surrounding him might come across as misogynistic because of their insistence on male-male bonding. But the insistence on men is not necessarily a hatred of women. Instead, the embrace of men points us in the direction of a resistance to heterosexuality that is not misogynistic.

Here is another example of such resistance. Apparently once his shrine was built on Sabarimala – some date this to the 11th century, some say it is later – Ayyappan entered the sanctum sanctorum and promptly disappeared. The common belief is that he ascended to heaven, where he went to take his rightful place alongside the other gods, leaving behind a token that could be worshipped in his stead. Soon he became

such a powerful god that he replaced Brahma as the Creator of the world. With his two fathers occupying the other pre-eminent positions as the Preserver (Vishnu) and the Destroyer (Shiva), this arrangement must have appeared to some of the gods as a family dynasty ruling the heavens. So even as Ayyappan ascended to the heights of power, envy started brewing among the gods. The reason for this, we are told in a popular Kannada song about Ayyappan, was not so much the power amassed by the god as what he planned to do with it. In this song, Ayyappan proposes with his power to put an end to the power of gods. Perhaps predictably, the gods decide to mount a rebellion against him. The startling idea that Ayyappan wanted to put into practice was that henceforth, human beings would not die. This was a decree not only about death, but also about birth. After all, reproductive sex is closely related to the idea of the imminent death of the self; having children produces one's own replacements. If we reverse this train of thought, then it becomes apparent that if birth is meant to ward off death, then the promise of no death would in turn ward off birth. The order of the world as we know it would change if we were to get rid of both death and birth.

But having children is also the basis of heterosexuality. Or rather, the biologically deterministic argument goes that heterosexuality is 'natural' because a man and a woman can produce children through their sexual union. Quite apart from the fact that such sex is described in terms of necessity rather than pleasure, one could also point out that reproduction actually finds no place in relation to sexual pleasure in either ancient Hindu or medieval Islamic texts. The injunction to reproduce, for instance, does not exist in the *Kamasutra's* treatise on erotics, which specifically uncouples desire from reproduction. Several medieval Sufi mystics refused to have children because for them the prescribed path was an ecstatic union with god, not a biological reproduction of the self. The emphasis on sex for the sake of reproduction exists in the Bible, which enjoins us to 'be fruitful and multiply' but it does not occur in Vedic marriage rituals, for example, which do to not mention procreation even once. Ayyappan's plan, then, tapped into a deep vein of religious and spiritual mysticism in India, while being utterly distant from our current obsession with biological reproduction. Hitting

heterosexuality where it hurts the most, the god proposed doing away with both death and birth. This is an idea that seems shocking now, especially in the Indian context in which the injunction to have children is almost a sacred mantra. We now have blessings that extol a woman to be the mother of a hundred sons, but that blessing certainly does not come from Ayyappan.

The gods were alarmed by Ayyappan's idea that there should be no more death and no more birth because they feared a significant reduction in the number of offerings made to them. After all, the desire to stave off death – with all the attendant warding off of disease – and the desire to reproduce in order to metaphorically stave off death, account for a large portion of the sacrifices made to the gods. Eager to protect their jurisdiction and influence, the gods employed Narada, the heavenly trouble-maker, to find a way of stopping Ayyappan in his tracks, to prevent him from preventing death and birth.

According to the Kannada legend, this was how Ayyappan left heaven and came back down to earth. On the instigation of the other gods, Narada approached Ayyappan and, during the course of conversation, posed a seemingly innocuous question to him. How, Narada asked, was Ayyappan related to Shiva's wife, Parvati, and to Vishnu's wife, Lakshmi? After all, Shiva was Ayyappan's father and Vishnu was his mother, so what relation did he bear to his father's wife and his mother's wife? Ayyappan was so perplexed by this query that he left Brahma's throne and withdrew into the forest to ponder the question. He remains there to this day, atop a hill named Sabarimala.

This is the reason why Sabarimala is considered to be actually, rather than just metaphorically sacred. Ayyappan is there: he came there from heaven while pondering Narada's question, and continues to live there. And Narada's question, we presume, is unanswerable, which is why Ayyappan is still pondering it. How is the wife of his mother related to him? And, perhaps, the easier one, how is he related to the wife of his father? One presumes that the response to the latter question is that Parvati, by virtue of being his father's wife but not his mother, is his step-mother. But what of Lakshmi, the wife of his mother? What relationship can he draw for himself to the wife of his mother who is also

a man and a god? For one thing, the Mohini and Lakshmi relationship populates the landscape of divine desire with a female-female couple that vies for attention with the male-male couple of Vishnu and Shiva. Ayyappan is the son of one of these women who is married to another, but he is not directly related to Lakshmi at all. How does one describe this relation?

To be born of the physical union of two males is to interrupt the line that links sex with gender and reproduction. This seems to be the foundation upon which Ayyappan's thought is based. Having dispensed with heterosexuality even at the moment of his birth, Ayyappan is not initiated into the belief that differences between men and women should be arranged around the central idea of reproduction. If reproduction can take place between two men, or between one man and another man in drag as a woman, then our system of sex and gender can be slanted differently from its current organization; we can be freed from the need to enforce the distinction between the sexes in order to ensure reproduction. We already live in an age when men and women do not need to have sex with one another in order to reproduce – we have artificial insemination, surrogate mothers, egg donors, and IVF. In his questioning the link between heterosexuality and reproduction, then, Ayyappan seems to have been far ahead of his time. He opposed the idea that reproduction is the fulfillment and pinnacle of (hetero) sexual life.

Ayyappan's plan of getting rid of death marks a radical chapter in the history of desire. If children are symbols, not of our immortality but precisely of our mortality, then getting rid of death also frees us from the need to create conduits of immortality. Ayyappan refuses to get married to a woman by insisting on his celibacy. Not only does he not have any children of his own, but he also actively spurns relations with women and insists upon celibacy for his devotees. His intense closeness with Vavar is celebrated even today. He leaves heaven because he cannot make sense of the categories of sexual relations within which we live. How are you related to your mother's wife, Narada asks Ayyappan? This is a question he cannot answer because his mother is also sometimes a father. In inhabiting this state of expanded sexual possibilities,

Ayyappan can best be described as the god of non-reproductive and non-normative desire.

Let us return to the judgment. Rejecting the plea that the shrine at Sabarimala constitutes a separate denomination of Hinduism, and that menstruating women are unclean, the majority verdict instead upheld the plea that not allowing a menstruating woman to go on pilgrimage to Sabarimala whenever she wants is violative of her constitutional freedom to worship in addition to being violative of her privacy. It held that the restriction against menstruating women visiting the temple through the front steps is a sexist practice. And it likened this practice to the heinous social evil of untouchability.

But what supporters of the Supreme Court judgment also need to remember is that Ayyappan is pro-men rather than anti-women. What stands out in the myths about Ayyappan is his opposition to heterosexuality rather than his misogyny. His all-male milieu does not preclude women – it simply does not evince sexual interest in women, and in fact, stipulates that men should not be sexually interested in women.

It is true that such preference by a man for other men can be seen as an outcrop of patriarchal privilege – indeed, it is the basis of patriarchy that men conspire to keep women subordinated by not giving them equal access to opportunities. But there is a difference between an all-male club that supports and espouses heterosexuality, on the one hand, and that which commits to a decidedly non-heterosexual milieu, on the other. Seen from this perspective, Ayyappan in his headquarters in Sabarimala presides over the possibility of a community of devotees removed from the pressures of heterosexual copulation and reproduction. How has this been twisted by priests to mean that women should be shunned by men as being unclean?

Far from a heterosexist insistence on the uncleanness of women, then, Ayyappan's emphasis is on the non-heterosexual nature of (his) desire. What might it mean for men and women to live together non-sexually? Men mingling without fear of pregnancy? Women developing intimate bonds like the one between Mohini and Lakshmi? Four members of the bench that delivered the Sabarimala judgment were

also judges who earlier read down Section 377 of the Indian Penal Code, 1860, so one would hope they would be capable of thinking of desire in non-heterosexual contexts.

We need to stop thinking of sexual relations as occurring only between men and women (which is where the fear of a male god being seduced by a female devotee comes from). We need to remember that there is no mention of clean men and unclean women in the legends surrounding Ayyappan. He is the god who encourages all devotees, regardless of caste, religion and gender.

Women can be devotees of Ayyappan at all times and in all seasons. But women are not of sexual interest to the god. How liberating that is for women, especially in the age of #MeToo.

Unravelling Honour Killing

Aparajita Singh[†]

I. Spread of the Malaise

Honour killing is generally perceived as a social and cultural phenomenon confined to South Asian and Middle Eastern societies. However, it seems that the malaise is not confined to a particular region anymore and has become a global menace due to the migration of people across continents. According to United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, although honour killings are widely reported in regions throughout the Middle East and South Asia, these crimes against women occur in countries as varied as Bangladesh, Brazil, Ecuador, Egypt, India, Iran, Iraq, Israel, Italy, Jordan, Morocco, Pakistan, Sweden, Turkey, Uganda, United Kingdom, United States and Canada.[1]

It is estimated by the United Nations Population Fund that as many as 5,000 women and girls are killed by members of their families or relatives each year around the world for the sake of "honour".[2] But it is widely believed that 5000 is a gross undercount, and the actual figure is much higher. Due to the global nature of the problem, international

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1 Amnesty International, *Culture of Discrimination: A Fact Sheet on "Honor" Killings* (2012), https://www.amnestyusa.org/files/pdfs/honor_killings_fact_sheet_final_2012.doc.

2 United Nations Population Fund, *The State of the World Population* 2000 (2000), https://www.unfpa.org/sites/default/files/pub-pdf/swp2000_eng.pdf.

bodies like the United Nations,[3] the UN Commission on Human Rights,[4] and Parliamentary Assembly of the Council of Europe,[5] have taken up the issue of honour crimes vigorously and passed numerous resolutions calling for its elimination through the concerted effort of nations. As for India, according to the report of National Crime Records Bureau published in 2016, the number of honour killings in 2015 was 192, out of which 131 cases were reported from Uttar Pradesh.[6] However, studies conducted by various civil society organizations reveal that India stands in the category of worst affected nations. It is estimated that approximately 1000 people (both male and female) are killed every year in India owing to honour killings.[7] As per the report of the of Law Commission of India,[8] honour killings are mostly reported from the states of Haryana, Punjab, Rajasthan and Uttar Pradesh, although there are reports of cases in almost all parts of India.[9]

[3] G.A Res 55/66, U.N. Doc. A/RES/55/66 (January 31, 2001); G.A Res 55/68, U.N. Doc. A/RES/55/68 (January 31, 2001); G.A. Res 57/179, U.N. Doc. A/RES/57/179 (January 30, 2003); G.A. Res 57/181, U.N. Doc A/RES/57/181 (February 4, 2003); G.A. Res 59/165, U.N. Doc A/RES/59/165 (February 10, 2005).

[4] OHCHR Res 2000/45, U.N. Doc E/CN.4/RES/2000/45 (April 20, 2000); OHCHR Res 2001/49, U.N. Doc E/CN.4/RES/2001/49 (April 24, 2001); OHCHR Res 2003/45, U.N. Doc E/CN.4/RES/2003/45 (April 23, 2003); OHCHR Res 2004/46, U.N. Doc E/CN.4/RES/2004/46 (April 20, 2004); OHCHR Res 2005/41, U.N. Doc E/CN.4/RES/2005/41 (October 23, 2005).

[5] Eur. Parl. Ass. Deb. 16th Sitting (April 4, 2003).

[6] National Crime Records Bureau, *Crime in India, Statistics,* (2015).

[7] Satnam Singh Deol, *Honour Killings in India: A Study of the Punjab State*, International Research Journal of Social Sciences Vol. 3 Issue 6, June 2014, at 7-16; Satnam Singh Deol, *Honour Killings in Haryana State, India: A Content Analysis*, International Journal of Criminal Justice Sciences Vol. 9 Issue. 2, (July- December 2014), at 195.

[8] Law Commission of India: Two Hundred and Forty Second Report on the Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework,(2012).

[9] Vishwanath Jyothi & Srinivas C. Palakonda, *Patriarchal Ideology of Honour and Honour Crimes in India*, International Journal of Criminal Justice Sciences Vol. 6 Issue 1 & 2, 2011, at 387.

II. Definition of the Offence

Honour killings are an extreme form of honour-based violence, where community values and interests are imposed on individuals at the expense of their most basic human right: the right to life.[10] Honour killing is, by definition, a cultural crime, in the sense that it can only be committed by a person for whom issues of personal and familial honour are of pressing concern.[11] Murder is carried out in order to restore honour, not just for a single person, but for a collective.[12] Central to the notion is the idea that death can expunge a stain, especially if accomplished quickly.[13]

As honour killings do not constitute a separately defined offence in the Indian Penal Code, 1860 ("IPC") but merely a form of murder, the role of the courts in developing this area of law is of considerable significance. The social reality of avenging the family honour in cases of inter-caste relationships by the family through the act of honour killing, has also been noted by the Supreme Court. The Court has not treated honour killing as murder simpliciter, but a social evil which tramples on the fundamental rights of men and women to live with dignity and exercise the freedom of choice guaranteed under the Constitution. The feudal mindset which not only curbs these rights, but results in the cold-blooded killing of the persons exercising their rights in the name of honour, is a scourge on the entire nation and has been strongly deprecated by the Supreme Court.[14]

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[10] James Brandon and Salam Hafez, Crimes of the Community, Honour-Based Violence in the UK (2008).

[11] Roger Bollard, *Honour killing? Or Just Plain Homicide?,* in Livia Holden, Cultural Expertise and Litigation (Routledge, 2011).

[12] Unni Wikan, In Honor of Fadime: Murder and Shame (University of Chicago Press, 2008).

[13] Ursula Smartt, *Honour Killings,* Justice of the Peace, Vol. 170, (January 7 & 14, 2006).

[14] Bhagwan Dass v. State (N.C.T of Delhi), (2011) 6 SCC 396; Lata Singh v. State of U.P., (2006) 5 SCC 475.

The United Nations Entity for Gender Equality and the Empowerment of Women,[15] suggests that the definition of honour-based violence should reflect three basic elements:

i) Control, or a desire to exert control, over a woman's behaviour;
ii) A male's feeling of shame over his loss of control, or perceived loss of control, over her behaviour;
iii) Community or familial involvement in augmenting and addressing this shame.

Laws should describe honour crimes and killings as violence stemming from a perceived desire to safeguard family "honour". This in turn, is embodied in female behaviour that challenges men's control over women, including control exerted through sexual, familial and social roles and expectations assigned to women by traditional mindsets**.**

According to a report presented to the Department of Justice, Canada, honour killing is marked by the presence of following elements:

i) Planning- Honour killings are planned in advance, often at a family conference. The perpetrator's family may repeatedly threaten the victim with death if she dishonours her family;
ii) Family complicity -Honour killings can involve multiple family members in the killing, such as parents, brothers and cousins;
iii) Stigma- Perpetrators of honour killings often do not face negative stigma in their families or communities.[16]

The Crown Prosecution Service, UK, defines honour crimes as:

i) 'honour-based violence' is a crime or incident, which has or may have been committed to protect or defend the 'honour' of the family and/or community.
ii) 'honour crime' is a fundamental abuse of human rights.

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[15] UN Women, *Defining "Honour" Crimes and "Honour" Killings*, (May, 2011), http://www.endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html.

[16] A.A Muhammad, *Preliminary Examination of so-called "Honour Killings" in Canada*, (a report presented to the Department of Justice, Canada in 2010), http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/hk-ch/hk_eng.pdf.

iii) There is no honour in the commission of murder, rape, kidnapping and the many other acts, behavior, and conduct which constitute 'violence in the name of "honour"'.

iv) The simplicity of the above definition is not intended to minimize the levels of violence, harm, and hurt caused by such acts.

v) It is a collection of practices, which are used to control behaviour within families to protect perceived cultural and religious beliefs and honour. Such violence can occur when perpetrators perceive that a relative has shamed the family or community by breaking their honour code.

vi) Women are predominantly (but not exclusively) the victims of 'honour-based violence', which is used to assert male power in order to control female autonomy and sexuality.

vii) Honour crime can be distinguished from other forms of violence, as it is often committed with some degree of approval or collusion from family or community members.

viii) Examples may include murder, unexplained death (suicide), fear of or actual forced marriage, controlling sexual activity, domestic violence (including psychological, physical, sexual, financial or emotional abuse), child abuse, rape, kidnapping, false imprisonment, threats to kill, assault, harassment, forced abortion etc.

III. Cause of the Offence

The perceived dishonour is normally the result of one of the following behaviours, or the suspicion of such behaviour: dressing in a manner unacceptable to the family or community, wanting to terminate or prevent an arranged marriage or desiring to marry by one's own choice, especially if to a member of a social group deemed inappropriate.[17]

The cause of honour killings is not necessarily socio-economic deprivation or lack of education. The major causes include inter-caste

[17] Chintamani Rout, *Honour Killing: Descend and Dimensions*, International Journal of Political Science, Law and International Relations, Vol.2, Issue 1, June 2012, at 18-25.

or inter-religious marriages, opposition to pre-marital and extramarital relationships between men and women, restriction on females and denial of the right to select the spouse of their own choice. In a study of honour killings in Punjab and Haryana, it was found that that despite a reasonable literacy rate, modernization and urbanization, people still carry orthodox, medieval mindsets towards their own daughters and sisters. The study has disclosed prominent causes of honour killings in Punjab and Haryana; being, inter-caste relationships and the hostility of the woman's family to her relationship with any male.[18]

Usually, honour killings only take place when a woman's perceived failings become known to the wider community. Only when the family's loss of honour becomes public knowledge, does the family finally feel compelled to act. As in cases involving women, men are usually killed only once news of the affair becomes public knowledge and the woman's family feel they have exhausted all other options. Often the killing is an act of public revenge and an at least partial endorsement by the community sends out a strong warning message to men from other communities.[19]

IV. Perpetrators of the Offence

The responsibility to maintain the honour-based value system and code, including administering punishment for breach, is vested mainly in the male members of the family, although women may also be perpetrators.[20] The perpetrators of the killing are close family members usually fathers and brothers but may also include female relatives. The fathers, brothers, and even mothers murder young women and their partners.[21] In the case of male victims, the perpetrators are the family of their partner.

In Punjab, out of the 100 cases examined, in 64 cases, the father of the young woman is among the persons declared as prime accused.[22]

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[18] Satnam Singh Deol, *supra* note 7.
[19] James Brandon and Salam Hafez, *supra* note 10.
[20] Satnam Singh Deol, *supra* note 7.
[21] *Id*.
[22] *Id*.

Further, there is direct involvement of the brother in 36 cases. In 12 percent cases, the mothers of the young women are directly involved in the execution of the killings of their daughters and their paramours or even legal husbands. Besides that, parental or maternal uncles of the victims are involved in the incidents in 28 percent cases. Quite surprisingly, there are other associates i.e., family friends, friends of young women's brothers etc., who are found involved in executing honour killings.[23] In Haryana, the study shows that in 73 percent cases, the father of the young woman is personally involved in murdering his daughter or her paramour.[24] In 53 percent cases, the brothers of the deceased women are directly involved in honour killings. In 3 percent cases, the mothers are also involved in murdering their own daughters. In 47 percent cases, the paternal or maternal uncles are also involved in the murders. In 10 percent cases, other associates such as family friends, friends of the brothers of deceased women are involved in the killings. Professional contract killers are also found to be engaged in 3 percent cases.[25]

V. Honour Killings: Distinct From Crimes of Passion

It is important to emphasize that 'honour killing' is not a crime of passion but a conscious premeditated act to avenge the honour of the family. The perceived dishonour is the motive of the crime.

As per the Report of Rapporteur of the Council of Europe, Committee on Equal Opportunities for Women and Men, honour crimes should not be confused with 'crimes of passion'. Whereas the latter are normally limited to crimes committed by a partner (or husband and wife) who finds his or her partner in a relationship with another as a spontaneous (emotional or passionate) response (often citing a defence of 'sexual provocation'), the former involves the abuse or murder of (usually) women by one or more close family members (including partners) in the name of individual or family honour.

According to a preliminary examination of honour killings in Canada, honour killings are often erroneously equated with crimes

23 *Id.*

24 *Id.*

25 *Id.*

of passion, which are impulsive and unpremeditated acts of violence committed by persons who have come face-to-face with an incident unacceptable to them and who are rendered incapable of self-control for the duration of the act. In this context, while crimes of passion may be seen as premeditated to a certain extent, honour killings are usually deliberate, well planned, and premeditated acts. Hence, on the surface, honour killing is just like any premeditated murder and, in the absence of a diagnosed psychopathology, should meet the same punishment by a court of law.

Inthe case of *R.* v. *Humaid*,[26] where the accused murdered his wife under the belief that she was having an affair, the Court of Appeal for Ontario squarely rejected the defence of grave and sudden provocation raised by the accused on the ground that:

> […] Provocation does not shield an accused who has not lost self-control, but has instead acted out of a sense of revenge or a culturally driven sense of the appropriate response to someone else's misconduct**.** An accused who acts out of a sense of retribution fuelled by a belief system that entitles a husband to punish his wife's perceived infidelity has not lost control, but has taken action that, according to his belief system, is a justified response to the situation.[27]

In *R.* v. *Abdullah Yones*,[28] 16-year-old Heshu Yones, from a Kurdish family in London, was killed by her father. Though he attempted suicide after the murder, he eventually stood trial in 2003. At his trial, Abdullah Yones stated in his defence that Heshu's Western-style dress and Christian boyfriend provoked him to commit the murder. He also said that he was "forced to kill" Heshu as she had put him in an "untenable position" by bringing a "stain" on the family honour. The words of Judge Denison while sentencing Yones to life imprisonment are worth noting:

[26] (2006) CanLII 12287.

[27] *Id*. at para 85.

[28] Central Criminal Court, London, September 27, 2003.

> […]The killing and the manner of it was an appalling act. This is in any view a tragic story arising out of irreconcilable cultural difficulties between traditional Kurdish values and the values of Western society. It's plain that you strongly and genuinely disapproved of the lifestyle in this country of your daughter but it must not be an excuse to kill.[29]

In *R.* v. *Faqir Mohammed*,[30] the Court of Appeal (Criminal Division) rejected the defence of provocation by a man of violent disposition, who killed his daughter on finding her boyfriend in the house. The Court observed that, "a man cannot pray in aid his own violent disposition to bolster a defence of provocation". The Court cited the observation of Justice Coleridge in *R* v. *Kirkham* that:[31]

> […] [T]hough the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.[32]

The Court held that the test to be applied is a narrow and strict test of a man with ordinary powers of self-control, rather than the wider test of excludability.

VI. Deterrent Sentencing by the Supreme Court of India

Perceived as a social evil, honour killing has been severely condemned by the Supreme Court as a brutal, barbaric, and feudal practice deserving the harshest punishment in order to weed it out of the social fabric. In *Mahesh* v. *State of M.P*,[33] the family of an upper-caste woman hacked five members of the family of her husband, as he was a *dalit*. The Supreme Court awarded the death penalty, and observed:

> […] We also feel that it will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render

[29] As cited in Ursula Smartt, *supra* note 13.
[30] [2005] EWCA Crim. 1880.
[31] (1837) 8 CP 115.
[32] *Id*.
[33] (1987) 3 SCC 80.

> the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon. When we say this, we do not ignore the need for a reformative approach in the sentencing process. But here, we have no alternative but to confirm the death sentence. […][34]

In *Maya Kaur Baldevsingh Sardar* v. *State of Maharashtra*,[35] the Supreme Court observed that the time had come to deal with such offences harshly:

> […] We also notice that while judges tend to be extremely harsh in dealing with murders committed on account of religious factors they tend to become more conservative and almost apologetic in the case of murders arising out of caste on the premise (as in this very case) that society should be given time so that the necessary change comes about in the normal course. Has this hands-off approach led to the creation of the casteless utopia or even a perceptible movement in that direction? The answer is an emphatic "no" as would be clear from mushrooming caste-based organisations controlled and manipulated by self-appointed commissars who have arrogated to themselves the right to be the sole arbiters and defenders of their castes with the licence to kill and maim to enforce their diktats and bring in line those who dare to deviate. Resultantly the idyllic situation that we perceive is as distant as ever. In this background is it appropriate that we throw up our hands in despair waiting ad infinitum or optimistically a millennium or two for the day when good sense would prevail by a normal evolutionary process or is it our duty to help out by a push and a prod through the criminal justice system? We feel that there can be only one answer to this question.[36]

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[34] *Id*. at para 6.

[35] (2007) 12 SCC 654.

[36] *Id*. at para 26.

Similar observations have also been made in *Dilip Premnarayan Tiwari* v. *State of Maharashtra*,[37] *Gandi Doddabasappa* v. *State of Karnataka*,[38] and *Virupakshappa Gouda* v. *State of Karnataka.*[39]

In *Vikas Yadav* v. *State of U.P.*,[40] commonly known as the Nitish Katara murder case, the accused had murdered the deceased for wanting to marry his sister. The Supreme Court awarded a sentence of 25 years, observing:

> [...] One may feel 'my honour is my life' but that does not mean sustaining one's honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions.[41]

VII Deterrent Sentencing In Other Jurisdictions

Other jurisdictions also treat honour crime as a heinous crime against society and have awarded the harshest of punishments. In the UK, in *R* v. *Ibrahim and Iqbal*,[42] the Court of Appeal upheld the sentences of the two defendants (28 and 25 years minimum terms of imprisonment respectively). The President of the Queen's Bench Division, Sir John

37 (2010) 1 SCC 775.
38 (2017) 5 SCC 415.
39 (2017) 5 SCC 406.
40 (2016) 9 SCC 541.
41 *Id*. at para 75.
42 [2011] EWCA Crim. 3244 (CA (Crim.Div).

Thomas, stated that the sentencing judge had acted properly in imposing a lengthy sentence on the two defendants, and that "this kind of honour killing needed to be marked by a severe sentence". This is because "honour killings cannot be tolerated in this society and must be marked by severe deterrent sentences".[43]

R v. *Vakas*,[44] was a case of acid attack by the brother of the woman with whom the victim was in a relationship. Though the victim survived, he was permanently deformed and required a personal caretaker. The accused was sentenced to 30 years' imprisonment for conspiracy to murder. The Court of Appeal, reiterated the trial judge's observation that this was "a terrible crime involving no sort of honour at all".[45]

In *R* v. *Ahmed and Ahmed,*[46] the accused parents had suffocated their daughter with a plastic bag because they believed she had become too 'westernized'. The Crown Court imposed a minimum term of 25 years' imprisonment upon both parents, ruling that this was commensurate with the seriousness of the offence.

Honour killings are aggravating crimes not only because they harm actual victims, but also because they serve to spread fear amongst other intended (female) victims that they too will face violence if they defy cultural norms of expected behaviour.[47] Honour killings are carried out to control unwanted or undesired behaviour, whether it is sexual behaviour (including homosexuality, promiscuity, and pre-marital or extra-marital sex), or behaviour that is too 'westernized'. Honour killing is thus a tool that is used to terrorize other women and forces them into compliance with 'acceptable' norms of behaviour.

VIII. Conclusion

In the absence of a clear definition, honour killing is treated as murder under the IPC, and its classification as honour killing is left

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43 *Id.*

44 [2011] EWCA Crim. 875.

45 *Id.*

46 [2012] EWCA Crim. 391.

47 Mohammed Mazher Idriss, *Sentencing Guidelines for HBV and Honour Killings*, The Journal of Criminal Law. Vol. 79 Issue 3, 2015.

entirely to the subjective satisfaction of the judge. This leads to great variance in the final outcome of the case. It is time that the offence is defined separately in the statutory books in order to provide clear guidelines to the courts in arriving at a decision.

Secondly, there is a need for structured sentencing guidelines to assist the courts in determination of quantum of sentence in an offence. The guidelines can be developed either by the Legislature or the Judiciary. The system of sentencing guidelines has been successfully adopted by other jurisdictions to achieve transparency and consistency in sentencing.

In the final analysis, the core of the entire debate is the autonomy of women over their lives and life choices. However, the behaviour of women continues to be the barometer of family honour, and men are seen as the defenders of that honour. As long as this mindset subsists, the free will of women would remain subjugated by the collective will of the family and of society at large.

Equality in the time of Religion: Gender Justice in the Supreme Court

Siddharth Bhatnagar[†]

In his seminal work *Constitutional Law of India: a Critical Commentary*, H.M. Seervai wrote that no chapter gave him more anxious thoughts than the one on the "Right to Freedom of Religion".[1] Even after considerable expanse of time, the boundaries and extent of this freedom are still being judicially interpreted and determined, especially in relation to gender justice and equality. This article examines the contours of the rights guaranteed under Articles 25 and 26 of the Constitution, as well as the recent and prospective developments in this regard.

I. Articles 25 and 26 of the Constitution

Articles 25 and 26 of the Constitution read thus:

> Article 25 - Freedom of conscience and free profession, practice and propagation of religion—
>
> (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
>
> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

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1 H.M. Seervai, Constitutional Law of India: A Critical Commentary, Vol. 2, para. 12.20A at 1271 (N.M. Tripathi (P) Ltd., 4th ed., 1993).

(a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation – I: The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation – II: In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26 – Freedom to manage religious affairs—

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

a) To establish and maintain institutions for religious and charitable purposes;

b) To manage its own affairs in matters of religion;

c) To own and acquire movable and immovable property; and

d) To administer such property in accordance with law.

At the time of drafting the Constitution, there was considerable debate on Article 25 (numbered as Article 19 in the draft Constitution of February 1948). Some members of the Constituent Assembly questioned the right to freedom of religion itself on the ground that in a secular State, such practice and propagation of religion should not be permitted as a fundamental right.[2] Eventually, the Article was inserted, but circumscribed by certain conditions which the State would be

[2] Shri Loknath Misra in Constituent Assembly Debates Book No.2 Vol. VII, 823-824 (Lok Sabha Secretariat), December 6, 1948.

free to impose in the interests of "public order, morality and health", and also insofar as the right conferred did not conflict with the other provisions of Part III (Fundamental Rights).

Article 20 of the draft Constitution (which corresponds to Article 26 in the Constitution) initially did not contain the words "subject to public order, morality and health". Dr. B.R. Ambedkar, therefore, moved an amendment and explained its rationale in these words:

> That in the beginning of article 20, the words 'Subject to public order, morality and health', be inserted.
>
> Sir, it was just an omission. Honorable Members will see that these words also govern article 19; as a matter of fact, they should also have governed article 20 because it was not the purpose to give absolute rights in these matters relating to religion. The State may reserve to itself the right to regulate all these institutions and their affairs whenever public order, morality or health require it.[3]

Article 20 was passed with the above amendment and is now Article 26 of the Constitution.

Thus, the debates suggest that the fundamental right to religious freedom under Articles 25 and 26 was to be subject to and circumscribed by, only the conditions as would be imposed by the State (as defined under Article 12). It has also, so far, been the position that it ought not to be the role of a Court to interpret a religious practice as being in consonance or otherwise with "public order, morality or health", in the absence of conditions imposed by the State in that regard.[4] In fact, Part III is applicable to State actions, and Articles 14, 15 and 21 cast obligations on the State. Of course, once the State seeks to regulate any such religious practice, it must satisfy the requirements of Part III. However, both these propositions are likely to see an expansion in the near future, as discussed in this paper.

3 *Id*. at 859.

4 *See opinion of* Khehar, CJ in Shayara Bano v. Union of India, (2017) 9 SCC 1 at paras 325-333 and 341.

II. Article 13 and its interpretation

Article 13 is often relied upon in order to restrict the application of Articles 25 and 26 by arguing that 'personal laws' that are inconsistent with Article 13(1) are void. The scope of Article 13 is evident from the Constituent Assembly debates. Article 13 was numbered as Article 8 in the draft Constitution. It read:

> 8(1) All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:
>
> Provided that nothing in this clause shall prevent the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law.
>
> (3) In this article, the expression "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in territory of India or any part there of.

Since the draft Article did not define the phrase "laws in force", Dr. Ambedkar moved an amendment substituting clause 8(3):

> (3) In this article –
>
> (a) the expression 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom, or usage having the force of law in the territory of India or any part thereof;
>
> (b) the expression 'laws in force' includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding

> that any such law or any part thereof may not be then in operation either at all or in particular areas.[5]

The reason for the amendment was explained thus:

> Sir, the reason for bringing in this amendment is this: It will be noticed that in article 8 there are two expressions which occur. In sub-clause (1) of article 8, there occurs the phrase "laws in force", while in sub-clause (2), the words "any law" occur. In the original draft as submitted to this House, all that was done was to give the definition of the term "law" in sub-clause (3). The term "laws in force" were not defined. This amendment seeks to make good that lacuna. What we have done is to split sub-clause (3) into two parts (a) and (b). (a) contains the definition of the term "law" as embodied in the original sub-clause (3), and (b) gives the definition of the expression "laws in force" which occurs in sub-clause (1) of Article 8. I do not think that any more explanation is necessary.[6]

One member (Mr Naziruddin Ahmad) raised the issue that while the term "law" included "custom and usage", it would imply that the State was entitled to also make custom and usage having the force of law.[7] Dr. Ambedkar, in reply, pointed out that it was not possible to come to the conclusion that the State had the power to make custom as the proper construction of the Article was to use the term "law" distributively, so that for Article 8(1), law would include custom, while so far as Article 8(2) was concerned, law would not include custom.[8]

Ultimately, though, the Article was amended and the words "unless the context otherwise requires" were inserted at the beginning of Article 8(3). Dr. Ambedkar explained the reason thus:

> So, if the context in Article 8(1) requires the term law to be

5 26th November 1948 *in* Constituent Assembly Debates Book No.2 Vol. VII, 640 (Lok Sabha Secretariat).

6 *Id.*

7 *Id.* at 641.

8 *Id.* at 644-645.

> used so as to include custom, that construction would be possible. If in sub-clause (2) of Article 8, it is not necessary in the context to read the word law to include custom, it would not be possible to read the word 'law' to include custom.

The amendment moved by Mr. Mohd. Tahir, as borne out by the Constituent Assembly Debates, is significant:

> Mr Mohd Tahir: (Bihar: Muslim) : Sir, I beg to move :
>
> "That in clause (3) of article 8, for the words 'custom or usage' the words custom, usage or anything be substituted."
>
> I do not want to make a long speech. I only want to say that the word "anything" will be more comprehensive if it is used after the word "usage". It is legal phraseology to say "custom, usage or anything having the force of law". Dr Ambedkar has moved another amendment. If that amendment is accepted, I suggest that this amendment also may be accepted by the House. With these words, I move.[9] (emphasis supplied)

The amendment was, however, negatived.[10] The import of this is immediately clear. Had this amendment been adopted, Article 13 would have had an even wider application. In such an event, 'personal law' would have been subsumed under Article 13, as it would be possible to state that it would fall under the expression "anything having the force of law". However, since the amendment, though moved, was negatived, Article 13 can validly be given a more restricted meaning, so as to exclude 'personal law' from its ambit.

Article 13 reads as follows:

13. Laws inconsistent with or in derogation of the fundamental rights—

> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as

[9] *Id*. at 640-64.

[10] *Id*. at 645.

> they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this article, unless the context otherwise requires:
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law;
>
> (b) "laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
>
> (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

The judgment that deals with the issue is *State of Bombay* v. *Narasu Appa Mali,*[11] where one of the questions considered was whether 'personal laws' would be included in the expression "all laws in force" under Article 13. It was held to be not included as the expression "custom or usage" in Article 13(1) did not include 'personal laws'. Further, the expression referred to laws passed or made by a Legislature or other competent authority.

It is, of course, true that *Narasu Appa* has been criticized academically and doubted judicially,[12] but as noted in *Shayara Bano* v. *Union of India*,[13] it reflects the presently declared position of law. Thus, Article

[11] AIR 1952 Bom 84.

[12] *See* opinion of Nariman, J. in Shayara Bano v. Union of India, (2017) (9) SCC 1 at para 51 at 66.

[13] Shayara Bano v. Union of India, (2017) 9 SCC 1 at paras 336 at 256-257, following, inter alia, the judgments in Krishna Singh v. Mathura Ahir, (1981) 3 SCC 689; Maharshi Avadesh v. Union of India, (1994) Supp 1 SCC 713; Mohd.

13 would not include 'personal law' and such law cannot, accordingly be tested as being inconsistent with the provisions of Part III.

III. The Law as developed in the Supreme Court

The first case where the Supreme Court had occasion to consider issues of religious rights was *Commissioner, Hindu Religious Endowment, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*[14] A seven judge bench speaking through Mukherjea J. held that the right of a religious denomination to manage "its own affairs in the matters of religion" was a fundamental right and the guarantee under the Constitution protected not only the freedom of religious opinion, but also acts done in pursuance of a religion. Thus, freedom of religion was confined not to religious beliefs but also extended to religious practices. This fundamental right could not be taken away by legislation, except on grounds of public order, morality and health.[15] What constitutes the essential part of a religion is to be primarily ascertained with reference to the doctrines of that religion itself. It was also observed:

> Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.[16]

This statement of the law, though uncontested till date has been narrowed down subsequently.[17]

Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 and Daniel Latifi v. Union of India, (2001) 7 SCC 740.

14 1954 SCR 1005.

15 *See also*, Ratilal Panachand Gandhi v. State of Bombay, (1954) SCR 1055 at 1062-1063.

16 *Id.* at 1028-1029.

17 *See* Ada Saiva Sivachariyargal Nala Sangam v. Government of Tamil Nadu, (2016) 2 SCC 725 at para 49, page 755 (The Supreme Court stated that the observations in Shirur Mutt "with regard to complete autonomy of a denomination to decide as to what constitutes an essential religious practice" were subsequently echoed as a "minority view").

First, in *Sri Venkataramana Devaru* v. *State of Mysore*,[18] it was held that Articles 25 and 26 were required to be read harmoniously and thus, the right under Article 26(b) (to manage affairs in matters of religion) was nevertheless, subject to Article 25(2)(b) i.e., the right to make a law, inter alia, providing for social welfare and reform. The Supreme Court, in fact, held that though Article 25(1) deals with rights of individuals, Article 25(2) is much wider in its content and controls both Article 25(1) and Article 26(b).[19]

Next, in *Durgah Committee, Ajmer* v. *Syed Hussain Ali*, in the context of religious practices under Article 26(b), it was observed:

> Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.[20]

Incidentally, this dictum in the *Durgah Committee case* has been criticized by Seervai as "being wholly unnecessary" and as being directly counter to the judgment of Mukherjea J. in the *Shirur Mutt case* and substitutes the view of the Courtfor the view of the denomination on

[18] Sri Venkataramana Devaru v. State of Mysore, 1958 SCR 895.
[19] *Id.* at 917-918.
[20] Durgah Committee, Ajmer v. Syed Hussain Ali, 1962 (1) SCR 383, 411-412.

what is essentially a matter of religion.[21] However, this now appears to be the accepted view as will become clear hereinafter.

However, in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*,[22] the majority view of the five judge Constitution Bench was that invalidation of excommunication on religious grounds cannot be considered to promote social welfare and reform.Consequently the law (The Bombay Prevention of Excommunication Act, 1949) insofar as it invalidated excommunication on religious grounds could not be considered a measure of social welfare and reform under Article 25(2)(b).[23] The Act was, therefore, held to violate Article 26(b). It was also held that continuity of the denomination is only possible by maintaining the bonds of religious discipline, which includes the right of excommunicating those who deny the fundamental basis of the religion.[24]

Interestingly, in *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra* (wherein in a Writ Petition under Article 32, the petitioners sought reconsideration and overruling of the *Sardar Syedna case*), a five judge bench took the view that there was no reference by a Bench doubting the correctness of that case. Hence, the matter should be placed before a five judge Bench and not a larger Bench of seven judges, and only if doubted would the case be listed before a larger Bench.[25]

The judgment in *Sardar Syedna* can be looked at as being a protection to the fundamental right of religious freedom and no legislation which provides for 'social welfare and reform' is permitted to 'reform' a religion out of its existence or identity. Thus, the later cases where the Supreme Court has examined the concept of 'essential religious practice' as a constitutional necessity should not be seen as diluting this judgment.

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[21] *Id.* at 1267-1268.

[22] 1962 Supp (2) SCR 496.

[23] *See* opinion of Das, J. in Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 Supp. (2) SCR 496.

[24] *See* opinion of Rajagopala Ayyangar, J. in Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 Supp. (2) SCR 496.

[25] Central Board of Dawoodi Bohra Community v. State of Maharashtra, 2005 (2) SCC 673, paras 13-14 at 683.

In *Adi Saiva Sivachariyargal Nala Sangam* v. *Government of Tamil Nadu*,[26] the Supreme Court, after summarizing the law that the rights granted by Articles 25 and 26 are circumscribed and can be enjoyed only within constitutionally permissible parameters, took the view that it may become necessary on occasion to determine whether a belief or a practice is fundamental to that of the religious practice of a denomination. Such a determination was held to be the duty of the constitutional court following the view, inter alia, in the *Durgah Committee case*.[27]

The observations in *Shirur Mutt*, with regard to complete autonomy of a denomination to decide as to what constitutes an essential religious practice, were clarified as not being an indication that there is a bar to judicial determination of such issues. The exclusion of any 'outside authority' from deciding what is an essential religious practice must be viewed in the context of the limited role of the State in matters relating to religious freedom as envisaged in Articles 25 and 26 itself, and not of the courts as the arbiter of constitutional rights and principles.[28]

IV. Personal Laws and Fundamental Rights of Women

The challenge to personal laws being violative of fundamental rights of women was tested in *Ahmedabad Women Action Group (AWAG)* v. *Union of India*,[29] but the Court took the view (following, inter alia, the judgment in *Maharshi Avadhesh v. Union of India,*[30] that issues of State

26 (2016) 2 SCC 725.

27 *Supra* note 23.

28 *Supra* note 20, para 49 at 755. Such determination as to whether a given practice is integral or essential part of a religion has also been made by the Court in A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548 and by the majority in Commissioner of Police v. Acharya Jagadishwarananda Avadhuta, (2004) 12 SCC 770, though the dissent of Lakshmanan, J. held at para 57 that "…in the exercise of the power to regulate, the authorities cannot sit in judgment over the professed views of the adherents of the religion and to determine whether the practice is warranted by the religion or not. That is not their function."

29 (1997) 3 SCC 573.

30 1994 Supp(1) SCC 713.

policy would not ordinarily be entertained by courts.[31]

In *Valsamma Paul* v. *Cochin University*,[32] the Court (after quoting from the closing speech of Dr. Ambedkar on the Draft Constitution to the effect that our political democracy must be made a social democracy as well) stated that, social democracy means "a way of life which recognizes liberty, equality and fraternity as principles of life".[33] The Court held:

> Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth – cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.[34]

In *Shayara Bano* v. *Union of India*,[35] the challenge was to the practice of *talaq-e-biddat* (triple *talaq*). The Supreme Court, by majority, set aside the practice though the judgments took divergent views in reaching the same conclusion.[36]

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31 In Shayara Bano v. Union of India, (2017) 9 SCC 1, the judgment of Khehar, CJ and Nazeer, J expressly relied on the AWAG case, para. 337.4 at 261 & para. 389 at 296. On the other hand, the judgment of Nariman and Lalit, JJ holds that it is contrary to at least two Constitution Bench decisions and "…cannot possibly be good law".

32 (1996) 3 SCC 545.

33 *Id.*at para 6, pages 552-554.

34 *Id.*at para 26.

35 (2017) 9 SCC 1.

36 The judgments of the Court are analysed here not in the order in which they were delivered but, for convenience, on the law they lay down.

Nariman J. (Lalit, J. agreeing) took the view that the practice of triple *talaq* would be included under the Muslim Personal Law (Shariat) Application Act, 1937 ("the 1937 Act") and, being a pre-constitutional legislative measure, would fall within the expression of "laws in force" under Article 13(3)(b). Thus, it would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III, to the extent of such inconsistency.[37] It was held that Article 14 would apply in the context of constitutional invalidity of statutory law and such law can be struck down if found to be "arbitrary".[38] The judgment concluded that the practice of triple *talaq* is manifestly arbitrary, as the marital tie can be broken capriciously and whimsically without any attempt at reconciliation. The 1937 Act was, thus, struck down as being void to the extent that it recognizes and enforces triple *talaq*.[39]

Khehar, CJ (Nazeer J, agreeing) held that personal law had been elevated to the status of a fundamental right and was enforceable as it is.[40] Judicial interference with personal law could only be in a manner provided for under Article 25 and triple *talaq* was not contrary to "public order, health and morality", did not violate Articles 14, 15 and 21 (which are limited to State action alone),[41] and also was not based on State legislative action. It was also held that the 1937 Act was not a legislation regulating triple *talaq*,[42] and that the practice of *talaq-e-biddat* was considered integral to the religious denomination i.e., the Sunni Hanafi School.[43]

Kurian, J, on an interpretation of the verses, took the view that triple *talaq* is against the basic tenets of the Holy Quran and, consequently, violates Shariat.[44] Thus, there can be no constitutional protection for such practice.[45] On the questions of freedom of religion and whether

37 *Id.* at para 47, page 65; para 104, page 100.

38 *Id.*at paras 67-99, pages 75-99.

39 *Id.* at para 104, page 100.

40 *Id.*at para 352, page 274.

41 *Id.*at paras 383.6 and 383.8, page 294.

42 *Id.*at paras 322-333, pages 250-254.

43 *Id.*at paras 316-321, page 249-250, para 383.4, page 294.

44 *Id.*at para 12, page 47.

45 *Id.*at para 25, page 53. Also endorsed by Kurien J. in Shamim Ara v. Union of

the 1937 Act regulated the practice, this judgment agreed with the view of Khehar, CJ.[46] However, on the question of whether legislation can be challenged on the ground of arbitrariness, the judgment agreed with the view of Nariman, J.[47]

The Order of the Court (signed by all five judges) was that in view of different opinions recorded, by a majority of 3:2, the practice of *talaq-e-biddat* – triple *talaq* was set aside.[48]

Given the considerable divergence of views in *Shayara Bano*, an exercise to find a discernible ratio decidendi would have to be undertaken. The judgment of Lord Denning, MR in *Harper* v. *National Coal Board*,[49] provides an interesting insight into interpretation of a judgment when there is no discernible ratio decidendi common to the majority judgments. The Court of Appeal was considering a judgment of the House of Lords in the case of *Central Asbestos Co. Ltd.,* v. *Dodd,*[50] (a judgment by a majority of three to two and a "perplexing difference of view"). In *Dodd*, the question was as to when cause of action for a claim of damages would run under the Limitation Act. Two judges (Lord Reid and Lord Morris) opined that time would not run until the claimant knew he had a worthwhile cause of action. Two other judges (Lord Simon and Lord Salmon) took a different view and held that time would run as soon as all the material facts were known, even if the claimant did not know that he had a worthwhile cause of action. Lord Pearson ("the odd man out") agreed with Lord Reid and Lord Morris on the question that the claim was not barred. Lord Pearson also agreed with the opinion of Lord Simon and Lord Salmon on the proper construction of the statute.

In such a situation, Lord Denning held as follows:

> How then do we stand on the law? We have listened to a most helpful discussion by counsel for the proposed

India, (2002) 7 SCC 518.

[46] *Id.*at paras 4-5, page 40.

[47] *Id.*at para 5, page 40.

[48] *Id.*at para 395, page 298.

[49] (1974) 2 All ER 441.

[50] (1972) 2 All ER 1135.

> plaintiffs on the doctrine of precedent. One thing is clear. We can only accept a line of reasoning which supports the actual decision of the House of Lords. By no possibility can we accept any reasoning which would show the decision itself to be wrong. The second proposition is that, if we can discover the reasoning on which the majority based their decision, then we should accept that as binding on us. The third proposition is that, if we can discover the reasoning on which the minority base their decision, we should reject it. It must be wrong because it led them to the wrong result. The fourth proposition is that if we cannot discover the reasoning on which the majority based their decision we are not bound by it. We are free to adopt any reasoning which appears to us to be correct, so long as it supports the actual decision of the House.[51]

In the circumstances, the Court of Appeal held that the fourth proposition would apply, and the Court would be at liberty to adopt the reasoning which appears to it to be correct, namely the opinion of Lord Morris and Lord Reid.

In *Municipal Corporation of Delhi* v. *Birla Cotton Spinning and Weaving Mills*,[52] Section 150 of the Delhi Municipal Corporation (Validation of Electricity Tax) Act, 1966 was upheld by a majority of 5:2. There were three majority judgments, which agreed on the conclusion. The order of the Court was that "In accordance with the opinion of the majority, the appeals are allowed...."

According to Seervai, the three majority judgments must be examined to see if there is an agreement on any conclusions.[53] In that case, it was possible to discern a common view of three (out of five) judges in the majority. Seervai opines that where a judgement is subsequently interpreted by a Court and a ratio deduced therefrom, even though

51 *Id.*
52 1968 (3) SCR 261.
53 *Supra,* note 1 at paras 21.14 -21.15, pages 2248-2249.

in fact no ratio can be deduced, the subsequent judgment would be binding on courts of co-ordinate and subordinate jurisdiction.[54] It is submitted that a subsequent interpretation of the *Shayara Bano case* will be necessary as, after disregarding the minority view, there is no common thread of reasoning between the majority judgments, except that legislation can be challenged on the ground of arbitrariness. The practice of triple *talaq* has been declared as unconstitutional on wholly different grounds by the majority.

V. Further prospects for development of the law

In *Shayara Bano*,[55] the judgment of Nariman, J. developed the concept that the Court under Article 32 can decide an alleged breach of a fundamental right, without sending the matter back to the legislature to remedy such a wrong.[56] This is an important and interesting construct of the duty of a constitutional court to enforce fundamental rights.

Earlier, in *Manoj Narula* v. *Union of India,*[57] a Constitution Bench considered the principle of 'constitutional morality', after quoting from the following speech of Dr. B.R. Ambedkar:

> Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.

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[54] *Id.* at para 21.5, page 2243.

[55] *Supra* note 5.

[56] *Id.* at paras 56-60, pages 69-71. The judgment relied on Prem Chand Garg v. Excise Commissioner, (1963) 1 SCR 885 and also the judgment of the US Supreme Court in Obergefell v. Hodges, 135 S Ct 2584 (2015). The minority judgment of Khehar, CJ held at para 371, page 285 that reforms to 'personal law' and particularly, to issues of marriage and divorce for different religious communities reveals that all issues were only altered by way of legislation and, on account of the constitutional duty of the courts to preserve and protect 'personal law' as a fundamental right, any change thereof, can only be by legislation under Articles 25(2) read with Entry 5 of the Concurrent List.

[57] (2014) 9 SCC 1.

The Court held as follows:

> The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflect able of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality.[58]

In *Indian Young Lawyers Association* v. *State of Kerala*,[59] a case which deals with the entry of women between the age group 10 to 50 to the Lord Ayyappa Temple, Sabrimala (hitherto denied on the basis of certain custom and usage), the Court while referring the matter to a Constitution Bench framed, inter alia, the following questions:

> Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by "morality" as used in Articles 25 and 26 of the Constitution?
>
> Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?[60]

[58] *Id.*at para 75, page 49.

[59] (2017) 10 SCC 689.

[60] *Id.*at para. 30, pages 704–705.

The ground of 'constitutional morality'as a challenge to the practice of triple *talaq* was also considered in the minority judgment of Khehar CJ in *Shayara Bano* but was rejected.[61] It thus appears that the Supreme Court will again have to consider the larger question of 'constitutional morality', which would include rights under Articles 14 and 15 in relation to gender discrimination and the right to human dignity as an aspect of life under Article 21.

In this respect, the speech of Shri K. Santhanam in the Constituent Assembly (in respect of Article 25) may be quoted:

> [...] What are important are the governing words with which the article begins, viz., "Subject to public order morality and health".
>
> Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health. The full implications of this qualification are not easy to discover. Naturally, they will grow with the growing social and moral conscience of the people. For instance, I do not know if for a considerable period of time the people of India will think that purdah is consistent with the health of the people. Similarly, there are many institutions of Hindu religion which the future conscience of the Hindu community will consider as inconsistent with morality.[62]

Thus, it seems that 'morality' and 'health', as facets that qualify Articles 25 and 26 are also capable of being interpreted in consonance with changing times.[63]

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61 *Id.*at para 342-354, pages 265-274.

62 Shri K. Santhanam *in* Constituent Assembly Debates Vol. VII (Lok Sabha Secretariat), December 6, 1948, *available at* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C06121948.html.

63 *See* also Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.

VI. Conclusion

From a virtual carte-blanche granted to a religious denomination in *Shirur Mutt*, to the determination of 'essential religious practice' by a constitutional court, the fundamental right to religious freedom has seen considerable evolution. The next phase, apart from judicial interpretation of the judgment in *Shayara Bano*, could also include the development of principles of 'morality', as also on constitutional courts deciding on breaches of fundamental rights touching upon personal law, in the absence of 'State action'. As a corollary, this would necessarily have a pervading effect on all fundamental rights in Part III, which, in a broad sense, are traceable to the single central idea of liberty.[64]

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[64] *Per opinion* of Dwivedi, J. in Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717, 835, para 234.

The Hadiya Case: An Assertion of Decisional Autonomy

Liz Matthew & Sapna Khajuria[†]

> I will not have my life narrowed down. I will not bow down to somebody else's whim or to somebody else's ignorance.[1]

24-year old Hadiya Jahan had to spend more than two years of her adult life with her personal liberty curtailed, all due to the whims and ignorance of the legal system. In India, societal interference in a woman's desire to lead her life her way is quite common; but for the judiciary to be swayed by such restrictions and hinder a young woman's personal liberty is disquieting to say the least. Hadiya found herself in the eye of a national storm for the better part of the last two years. As the country watched the drama unfold on prime-time television, somewhere in the haze of an investigation by the National Investigation Agency (NIA), allegations of "indoctrination", and invocation of the supposed vulnerability of an unmarried woman, the simple issues - that of a woman's right to choose her religion and her life partner, and her right to privacy - seemed to have taken a backseat.

In the end, although the Supreme Court laudably set Hadiya at liberty, the judicial process that violated her constitutional right to life for two years has left a deep blot on the system.[2] While hearing multiple misplaced habeas corpus petitions, the High Court referred to Hadiya

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[1] Attributed to Gloria Jean Watkins, alias "bell hooks" (born September 25, 1952)- author and social activist.

[2] Shafin Jahan v. Ashokan K.M. and Ors., (2018) 4 SCALE 404.

as a detenue, ignoring her repeated and confident assertions that she was under no such illegal detention. Hadiya was denied the right to reside at a place of her choice, had to suffer the indignity of having her life's basic choices questioned, and above all, had to endure her infantilization by a judicial system that was of the belief that a 24-year old woman was a vulnerable person bereft of the right to consent.

Over the course of the proceedings, Hadiya had many aspects of her personal liberty chipped away, bit by bit, by successive court orders. Initially, the High Court permitted her to reside with her friend with a caveat to inform the jurisdictional Deputy Superintendent of Police of any change in residence.[3] Soon this became a full blown restriction on her freedom to reside at a place of her choice, when the High Court expressed "dissatisfaction" with her continued residence at the said place because the friend was according to the High Court, a "stranger", forcing Hadiya to shift to a hostel.[4] To add further insult to injury, the police were instructed by the High Court to ensure that she did not have access even to a mobile phone.[5] Following her marriage being declared null and void, an adult who was under no legal disability, and was well within her rights to marry a person of her choice, had to go undergo house arrest for nearly a year.

The High Court, invoking *parens patriae* jurisdiction, offered a paternalistic and highly patronising opinion that 24-year old Hadiya was capable enough to pursue her education (in fact, the Court lamented the fact that she had discontinued her studies). But when it came to choosing a spouse for herself, they felt, "…a girl aged 24 years (sic) is weak and vulnerable and capable of being exploited in many ways".[6] Thereafter, the Court, exercising *parens patriae* jurisdiction observed that it was "concerned with the welfare of a girl of her age".[7] The Court proceeded to invoke some regressive version of Indian "tradition" that

[3] Asokan K.M. v. Superintendent of Police, Malappuram, (2017) 2 KLJ 974
[4] *Id.* at para 13.
[5] *Supra* note 3 at para 17.
[6] *Supra* note 3 at para 56.
[7] *Id.*

supposedly bestows custody of an unmarried daughter with her parents until such time as she is "properly married".[8]

The Supreme Court set aside the High Court order which it appropriately described as a "sanctuary of errors",[9] and referred to the verdict as having been "erroneously guided by some kind of social phenomenon that was frescoed before it".[10] However, the fact that it took almost a year to uphold Hadiya's liberty is worrying. Justice Chandrachud penned a concurring judgment to express his anguish over this miscarriage of justice and to formulate principles so that such injustice does not occur again. He berated the fact that the time Hadiya lost in confinement cannot be brought back.[11]

During the hearings of the matter, the Supreme Court also ordered an investigation by the NIA, which resulted in further delays. Into the muddle of parental concern, the apprehension of national security was added. With an investigation brought into the mix, Hadiya remained in a state of suspended fundamental rights for six more months before the Bench interacted with her. It was owing to this interaction that the clouds of misplaced paternalism disappeared. As a spectator to that hearing, one of us noted the discomfiture with which the Court invited her to speak up. It did not acknowledge her presence in the front row of the courtroom for about two hours of the hearing during which long arguments about the necessity of having an 'in camera' hearing were advanced and countered. Yet again, the one question that needed to be investigated first- that of her choice- was not asked. However, once she was addressed, the Court sat up to take notice of the confident, self-assured, and dignified response of a woman who was sure of what she wanted. Her categorical submissions and unequivocal expression of choice was immediately acted upon by the Court, which thereafter took no time at all to direct her release from house arrest and immediately facilitated her desire to continue her studies.

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[8] *Supra* note 3 at para 16

[9] Shafin Jahan, *supra* note 2 at para 1.

[10] Shafin Jahan, *supra* note 2 at para 29.

[11] Shafin Jahan, *supra* note 2 at para 57.

The final judgment of the Hon'ble Supreme Court in *Shafin Jahan* v. *Asokan KM,*[12] is a thumping assertion of the absolute right of an individual to choose a life partner, affirming it as the essence of personal liberty under Article 21 of the Constitution. More importantly, it deprecates the misplaced paternalism shown by the High Court in taking the view that 24-year old Hadiya was "weak, vulnerable and capable of being exploited in many ways"and therefore her choice was of no relevance. The Supreme Court held, "The High Court, in the present case, has treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude".[13] The Court asserted that Hadiya was a major, capable of making her own decisions and entitled to the right recognized by the Constitution to lead her life exactly as she pleases. This thought echoes the judgment authored by Justice HR Khanna in 1976 in a *habeas corpus* petition filed by 18-year old Gian Devi who had been directed by the Magistrate to be kept at the Nari Niketan hostel after she had started living with the vice principal of her college against her parents' wishes.[14] It was observed,

> Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is *sui juris*, no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter. The fact that the petitioner has been cited as a witness in a case is no valid ground for her detention in Nari Niketan against her wishes. Since the petitioner has stated unequivocally that she does not want to stay in Nari Niketan, her detention therein cannot be

12 *Supra* note 2.
13 Shafin Jahan, *supra* note 2 at para 94.
14 Gian Devi v. Supdt, Nari Niketan, Delhi, (1976) 3 SCC 234.

> held to be in accordance with law. We accordingly direct that the petitioner be set at liberty.[15]

Justice Khanna's judgment is a simple one page pronouncement, yet it is so eloquent in declaring the importance of the personal choice of an 18-year old woman. No other consideration mattered, once the fundamental fact of the petitioner's age was established. It is unfortunate that the one fact that should have remained at the forefront of Hadiya's matter- the fact that as an adult she was legally entitled to marry whomever she chose- was cast aside by the inclusion of archaic societal norms and the NIA investigation. At every step, while her life and liberty were being dragged through the mud, extraneous concerns made their way into judicial proceedings and further delayed what could, and should have been a faster decision.

Highlighting the age of majority as the determining factor and refusing to in *parens patriae,* in *Soni Gerry* v. *Gerry Douglas*,[16] the Supreme Court upheld an adult woman's choice to live with her father, and observed:

> […] we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the Court cannot get into the aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.
>
> It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/he is entitled to make her/his choice. The Courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the Court should not assume the role of a super guardian being moved by any kind of sentiment […][17]

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[15] *Id*. at para 7.

[16] (2018) 2 SCC 197.

[17] *Id*. at paras 9 and 10.

The right to life and liberty has evolved over time, owing its evolution to a progressive judiciary that has interpreted fundamental rights in a way that empowers citizens. In *Justice K.S. Puttaswamy (Retd.)* v. *Union of India,*[18] a nine-judge Constitution Bench of the Supreme Court unanimously concluded, that the right to privacy was protected as an intrinsic part of the right to life and personal liberty under Article 21. The many facets of privacy, including "decisional privacy", were elaborated in separate opinions by many of the judges. Privacy was discussed in the context of choice by Dr. D.Y. Chandrachud, J. in his opinion (with which four other learned judges concurred) stating that liberty empowers one to have a choice on various aspects –what to eat, how to dress, which faith to follow, and countless other aspects where individual preferences require a choice to be made within the privacy of the mind. Chandrachud, J went on to elaborate, that the Constitution does not contain a separate provision declaring privacy as a fundamental right. He observed,

> Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised […]Privacy is the ultimate expression of the sanctity of the individual […] It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."[19]

R.F. Nariman, J. pointed out that in the Indian context, a fundamental right to privacy would cover various aspects, including the privacy of choice which protects an individual's autonomy over personal choice.[20]

In a similar case, *Dr Sangamitra Acharya* v. *State of NCT*, the Delhi High Court set at liberty a 23-year old woman who had been illegally detained in a mental health institution by her parents, also directed compensation to be paid by the parents for taking coercive steps and restricting the woman's personal life choices; thereby violating her

18 (2017) 10 SCC 1.

19 *Id*. at para 298.

20 *Supra* note 18 at para 521.

fundamental right to life, liberty, privacy and dignity under Article 21 of the Constitution.[21]

The two themes that emerge from Hadiya's case are:

(i) the right of consent and choice of an adult female to exercise her full right to life and liberty under the Constitution of India. Infantilising a woman results in the negation of her consent;

(ii) the exercise of *parens patriae* jurisdiction in matters where the adult (specifically a woman) is not in any manner incapacitated.

Not only has the Supreme Court given its imprimatur to an adult's right to privacy and choice, but it also rightly pointed out that the exercise of *parens patriae* jurisdiction by the High Court was not valid in Hadiya's case. While the *parens patriae* jurisdiction owes its origins in common law to a requirement of protection of the truly incapacitated or to the protection of property, the same cannot be invoked for an arbitrary deprivation of a person for non-criminal acts. The basis must be sound, coherent, and not a nebulous one. It has to be an attempt to mitigate circumstances of real vulnerability and oppression, not to perpetuate the traditional patriarchal mindset that continues to view women, even adult ones, as delicate ceramic dolls.

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21 Judgment dated 19.04.2018 in WP (Crl) 1804/2017.

The Firm Women -A Perspective on Indian Women Working in Law Firms

Nandini Khaitan[†]

On a recent visit to a district court in West Bengal, about an hour and a half from Kolkata, I had the pleasure of representing a client in an interesting land matter. I also had the displeasure of discovering that the court building did not have a women's bathroom. This came as a shock, for such basic facilities are taken for granted by city dwellers in today's day and age. My instinctive thought was, are there no women *vakeels* practising here? This of course was not the case, as our local advocate was a feisty woman who could face the senior male members of the Bar with calm and determination. When I asked her and others about the sanitary situation, they pointed to a small enclosure covered on three sides, outside the building but within the court complex (for which they were very thankful). A tarpaulin roof pitted with holes, and a tin door which did not lock, were arrangement enough for the women there. After all, there was a bull sitting outside keeping guard. The men believed there was a women's toilet in the building, but no one knew where. Usually courts, especially high courts, have a women's bathroom (to be used at one's own risk), but a complete absence was a first for me.

In 1916, the Calcutta High Court had refused the enrolment of Regina Guha as a pleader.[1] After a century and more, the situation has improved enough to have women lawyers, but the environment

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1 Regina Guha, In re, AIR 1917 Cal 161.

they work in is still not geared to accommodate gender diversity. As a litigator working in a law firm, this got me thinking- what are the challenges for women working in offices, which have the luxury of four walls, and a glass ceiling above?

Post liberalization, both the legal industry and legal education, have seen a sea of change. Some of the most tangible changes include an increase in the number of law students, the transition of family-run law firms to corporatized administration, as well as an exponential increase in women students/lawyers both in litigation and corporate law. Given how there were just a handful of women when I was at law school, it boggles my mind to read that in 2016, for the first time, the number of female enrolments surpassed the male in U.S. law schools.[2] Also, the number of Indian women graduating from the five-year law programme were equaling the number of men.[3] My experience in law school, just short of sticking out like a sore thumb, would have been different had it been a decade, perhaps, a decade and half later.

The above changes in the legal profession have also had a cross-effect. Women lawyers have been beneficiaries of the change in corporate law firm culture, which seeks to move from the old boys' network to a more open place to work within. On the face of it, such change has provided women lawyers with a more congenial work environment, with unheard of salaries (at least in the top dozen law firms), sophisticated clientele who are more restrained in gender discrimination, and a clean and separate sanitation setup where locks replace bovines. Safety, and a lucrative job are, therefore, the attractions. According to an article that quotes *Chambers & Partners*, there is a definite rise in women listings

[2] *Where Do Women Go to Law School?,* https://www.enjuris.com/students/ranking-universities.html.

[3] Sonal Makhija and Swagata Raha, *Challenges Faced by Indian Women Legal Professionals: A Report Based on the Study Conducted in Delhi, Mumbai and Bangalore among Working Mothers in the Legal Profession*, Rainmaker, 2012, https://www.scribd.com/document/102128508/Challenges-Faced-by-Indian-Women-Legal-Professionals-Full-Report.

across practices in India, from 12.5 per cent in 2010 to 17.34 per cent in 2015.[4]

With the increase in size and gender diversity in law firms, the concept of meritocracy should not only be applied, "but should manifestly and undoubtedly be seen" to be applied.[5] I say this because, according to a study entitled – *Challenges Faced by Indian Women Legal Professionals* ("the Study"),[6] a first of its kind study done on women in the legal profession in India, 50% of the women surveyed stated that were asked about their marital status, and 62% of them stated that had been asked if they had children at their job interviews at law firms, companies and NGOs.[7] The men, to the best of my knowledge, are not asked pointed questions about their children at least. The thought that more women law graduates should translate into more women senior advocates and partners of law firms is far from reality.[8] According to the Study, of the 397 advocates designated as Senior Advocates in the Supreme Court since 1962, only 5 are women and of the 1872 Advocates on Record, only 239 are women.[9] In law firms, as per an article on *Legally India*, a

4 Vyas and Devina Sengupta, *Demand for Women Lawyers at an All-Time High with India Inc Trying to Better Diversity Ratio,* The Economic Times, Oct. 6, 2015, https://economictimes.indiatimes.com/news/company/corporate-trends/demand-for-women-lawyers-at-an-all-time-high-with-india-inc-trying-to-better-diversity-ratio/articleshow/49238578.cms.

5 In R v. Sussex Justices, Ex parte McCarthy, 1 KB 256 (1924), Lord Chief Justice Hewart remarked, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done". I hope that Lord Hewart would have approved the use of artistic license on his iconic words, given that justice is to be imparted equally under our Constitution.

6 The survey contacted 150 women lawyers for the study. Of the 150, 81 completed the survey. It was an online survey across New Delhi, Bombay and Bangalore. Though the study is based on a small pool, it can be looked at as an indicator of the environment for women in the field. *See* Sonal Makhija and Swagata Raha, *Challenges Faced by Indian Women Legal Professionals: A Report Based on the Study Conducted in Delhi, Mumbai and Bangalore among Working Mothers in the Legal Profession*,Rainmaker, 2012, https://www.scribd.com/document/102128508/Challenges-Faced-by-Indian-Women-Legal-Professionals-Full-Report.

7 *Id.*

8 *Id.*

9 *Id.*

legal news website, women only make up 15% of the law firm's senior lawyers.[10] A recent hire at my firm was a woman who topped her law school and wanted to try her hand at litigation. However, the perils of late night conferences (Kolkata is infamous for its midnight conferences), and little work-life balance drove her to the more dignified practice of public policy. We lost a good resource. The good news here is that she is still in the work force. In this regard, a spate of women-centric laws in the last few decades, have somewhat helped society deal with the transition of a burgeoning women workforce. The Maternity Benefit Act, 1961 (along with its recent 2017 Amendment) and the Sexual Harassment of Women at Workplace (Prevention and Redressal) Act, 2013 are especially helpful to law firm women.

On a comparison with some of the developed countries, India's new amendment to the Maternity Benefit Act is one of the most progressive laws in the world.[11] The Act allows for 26 weeks of mandatory paid leave, whereas countries like USA allow for 12 weeks approximately with no pay. France permits 16 weeks, Italy permits about 21 weeks, Germany and Japan permit 14 weeks. Most of these countries do not have the provision for the leave to be fully paid and in some cases, it is social insurance or the Government which picks up the tab. For example, if the child is a Singapore citizen, it is the Government which pays for the leave and provides subsidies for child care.[12] Interestingly, most countries attempt to factor in some form paternity leave as well in their laws. Further, Section 11A of the Maternity Benefit Act mandates crèche facilities to be set up in establishments with fifty or more employees. There is a debate on whether the fifty should be read

[10] *Women Make Up Only 15% of Senior Law Firm Lawyers: Amarchand & Banking with Most Female Heavy-Hitters; JSA, Trilegal & Projects the Fewest*, LegallyIndia, February 21, 2014, https://www.legallyindia.com/201402214371/Law-firms/amarchand-most-gender-neutral.

[11] The Maternity Benefit (Amendment) Act, 2017, No. 6, Acts of Parliament, 2017.

[12] Jessica Lin, *Here's How Much Paid Leave New Mothers and Fathers Get in 11 Different Countries*, Business Insider, September 7, 2017, https://www.businessinsider.in/Heres-how-much-paid-leave-new-mothers-and-fathers-get-in-11-different-countries/Singapore-Mothers-get-16-weeks-leave-/slideshow/60412370.cms; OECD Social Policy Division, Directorate of Employment, Labour, and Social Affairs, *Parental Leave Systems*, October 26, 2017, https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf.

as "fifty women employees" or "fifty employees". The Supreme Court of India has taken the lead in setting an example of providing adequate crèche facilities for its women workers, lawyers included, by expanding the existing facility to a more spacious one from May 2018 onwards.[13] For independent litigation practice, there is no such luxury and women often have to take a career break. A study by the Associated Chambers of Commerce and Industry of India (ASSOCHAM), showed that about a quarter of the women do not return to work after childbirth.[14] It is hoped that with the new law, the number of women returning to work will increase.

Working from home and taking maternity breaks are flexibilities more suited to women in law firms and corporations than to independent litigation practice or for that matter, even litigation with a law firm. The Study estimates that about 62% of women in law firms and 52% of women working in companies had the flexibility to work in some form from home. Zia Mody, one of the most brilliant and successful women lawyers of our country says that her breakthrough came when she decided to slow down and switched from counsel practice to corporate practice.[15] Taking a deeper look at the corporate firm culture- banking and finance, insurance, and competition law, emerged as the most female-friendly practice areas.[16] I think the reason may be that these are relatively new areas of practice where women have had a chance to make their mark right from the beginning. The article also observed that women were hardly represented in the listings for practices such as capital markets, employment and shipping. My sense is that though considered as corporate practice, they are less women-friendly as they are established practices where men have had a head start. I have yet to come across any analysis on why certain fields are more women-friendly than others.

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[13] Supreme Court of India, Circular dated April 5, 2018, http://supremecourtofindia.nic.in/pdf/cir/Creche.pdf.

[14] *25% New Moms Give Up Career to Raise Kids: Survey*, May 9, 2015, http://assocham.org/newsdetail.php?id=4953.

[15] Zia Mody, *Storming a Male Bastion - Zia Mody*, Business Today, October 14, 2012, https://www.businesstoday.in/magazine/special/zia-mody-in-most-powerful-women-in-business-of-india/story/188361.html.

[16] *Id.*

However, flexibility itself is a double-edged sword as it could mean less pay and protracted growth for women working in law firms, where profit is God. In a cut-throat work environment, time spent in the office ("billable hours" as they are fondly called) is the currency to measure partner potential. These new laws may make the cost of hiring a woman higher. Women are therefore, less likely to be hired in situations where they are competing with men, all other things being equal. A corporate lawyer and a new mother at my firm was very apprehensive when she took the newly instated 26 weeks of maternity leave, on how her career graph would be perceived. Her first assignment on rejoining required long negotiations with foreign parties that meant returning home post 10pm every day for 3 days in a row. While she was happy with the support she received from her colleagues, what was unpleasant was the social stigma from outsiders including the foreign lawyer who implied that she was rushing through the documents so that she could go home to her child. This incident with my colleague reminds me of the incident Justice Leila Seth narrated in her autobiography, when she gave an opinion on a complicated tax matter at the start of her career. When the company got to know she had given it, the company got another "proper male opinion". The solicitor had taken the opinion of Justice Seth because he considered her a good barrister. So, he sent her opinion along with the brief to one of the best senior male barristers for his opinion. The senior barrister wrote only a short note at the end, "[A]fter due deliberation, the best I can do is to endorse the opinion given".[17] Decades later, a bias still exists despite the new laws and environment. Though a topic for a separate discussion, gender inclusion within the judiciary is a relevant enough topic for the following statistics to be shared. A World Bank report entitled –'Women, Business and the Law' finds that in 153 economies where there are constitutional courts, 122 have at least one female justice, and women are chief justices in 26 economies. India ranks the lowest in terms of the number of female judges, among countries which do have

[17] Leila Seth, On Balance: An Autobiography 192-193 (Penguin Viking 2003). (Incidentally, the solicitor who sought the opinion on behalf of the client is Mr Pradip (Pinto) Khaitan, the senior most partner of Khaitan & Co. – the firm where I work).

a female judge on a constitutional court.[18] Even so, it is better to have these laws, as their absence would result in both entry barriers as well abandonment of the profession mid-way.

According to the study, 75% of women working in law firms and 43% of women working in companies admitted that maternity breaks had had an adverse impact on their careers. For 21% of women in law firms, this included losing out on or delaying a promotion despite deserving the same.[19] My colleague is not in the minority as you can see - when she fears for her growth despite our firm having a pro-woman work ethic.

As far as the pay of men and women is concerned, most of the top law firms do not discriminate on the basis of gender between equally situated people. The Study showed that 71% of the women from law firms stated that there was a pay parity between men and women. What is affected is that the progress of the career graph moves slowly for the woman who takes leave or opts for a work-from-home flexibility. So, while she will get paid what any associate at her position is paid, her male colleague is likely to get promoted before her. The Study also showed, that of the women surveyed only 13.46%, earned Rs.50 lakh and upwards and was attributable to those who worked at corporate organizations and big law firms only. In contrast, independent litigation practice for women was less lucrative and clocked longer hours at least in the starting. The amenities in a law firm, most importantly safety and sanitation provide a big incentive as well. Thus, it is clear that the draw of joining a law firm or going in-house is a strong one. Having said that, there is still a huge gap that emerges on the career graph of men and women in law firms. Law firms would do well to remember that the efficiency of a woman cannot be undermined. She has the incentive to finish work early to be able to reach home in time for her homemaker duties. The fact that she avoids the rush hour traffic that way is just another smart move on her part.

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18 World Bank Group, *Women, Business, and the Law: Getting to Equal*, 2016, http://pubdocs.worldbank.org/en/810421519921949813/Women-Business-and-the-Law-2016.pdf.

19 *Supra,* note 2 at 70.

On speaking to many women lawyers at the time of writing this article, the common strain that emerged was that the women had accepted that their career may move slower and that is a sacrifice they knew they had to make. As a single woman in my thirties, I sometimes wonder whether I should lament my single status or celebrate the growth of my career which is at par with any male lawyer (or so I hope). At a recently held legal awards ceremony, there was a category – 'Woman Lawyer of The Year'. My dear friend Madhavi Divan who won it, rightly said, "I never saw myself as a 'woman lawyer'. I saw myself as just a lawyer. Hopefully, these tags will vanish before long. Men beware - there are many young women out there chipping away, and soon they will be walking away with awards in the general category."

Property Rights of Hindu Women in India –Striking at the Roots of Patriarchy

Aseem Chawla[†]

Indian society is predominantly patriarchal. Social customs govern, control, and restrict various facets of a woman's life, including property rights which, across communities, were mostly conferred on men. The statistics relating to property ownership and other ancillary rights paint a grim picture. Despite the fact that 17 crore women work in the agricultural sector producing about 75 percent of food grains, only 13 percent of women hold property rights.[1] This situation is not just in India but has been observed globally, as women in the world own less than 20% of land.[2] Ownership of land is an important requirement ina balanced society; it not only fulfills the need for shelter but may also be a source for a secure future. Ownership plays an important role in strengthening women's agency and giving them the ability to assert themselves.[3] In regions of conflict, the impact of unequal land rights has particularly severe consequences for women - often the only survivors.

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1 Sabita Parida & Savvy Soumya Misra, *100,000 women, 10 years, one demand: let us own our farmland,* Oxfam India, October 9, 2015, https://www.oxfamindia.org/100000-women-10-years-one-demand-let-us-own-our-farmland.

2 Monique Villa, *Women own less than 20% of the world's land. It's time to give them equal property rights,* World Economic Forum, January 1, 2017, https://www.weforum.org/agenda/2017/01/women-own-less-than-20-of-the-worlds-land-its-time-to-give-them-equal-property-rights/..

3 Shipra Deo, *Property rights are key to women's empowerment,* The Hindu, June 15, 2017, http://www.thehindu.com/thread/politics-and-policy/property-rights-are-key-to-womens-empowerment/article18699165.ece.

The Constitution of India was adopted on November 26, 1949 by the Constituent Assembly. It is the *grundnorm* of the Indian legal system, and all laws must strictly comply with values such as equality, which it enshrines. However, it is appalling to note that at times the legislature itself has created laws which provide an impetus to gender inequality.

The acknowledgement of the right of Hindu women to inherit, own, use, and dispose of property is a recent development. Up until 2005, Hindu women were not recognized as coparceners. As a result, unlike their male counterparts, they could not enjoy any inheritance rights. The Hindu Succession (Amendment) Act, 2005, altered this position. An analysis of the history of property rights of Hindu women reveals that though progressive steps have been taken towards recognizing the property rights of women, a complete eradication of past injustices may not have been effected. The evolution of law in this field may be studied by tracing the history of customary and modern laws in India.

I. Women's Property Rights in the Pre-Colonial Era

During the Vedic period, women were equal to men economically. However, under the laws of Manu, a man's wife, minor son, and his slaves had no right to property.[4] It was not only wives who were subject to this gender-based discrimination; daughters also faced many hardships when it came to claiming their proprietary interests. The situation of widows was no better in their matrimonial homes. Even in circumstances where women were given ownership of property, it was only a life interest, which reverted at the time of their death.

In ancient times, women were not deprived of their right to use property, irrespective of their marital status. During the times of eminent jurists like Yajnavalkya, Katyayana, and Narada, women's rights were improved and defined, as they greatly propounded the idea of recognizing the right to property of women.[5] The *Smritikars* coined

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4 Ayushi Singhal, *Right to Property of Hindu Women,*Lawctopus, (March 19, 2015), https://www.lawctopus.com/academike/right-property-hindu-women/..

5 Nisha Rai, *Married Hindu Women's Right to Adopt- A Legal Ananlysis in Light of the Indian Constitution* (2013) (unpublished Ph. D. dissertation, Hooghly Mohsin College-on file with author).

a term called '*stridhan*' which literally means women's wealth, to denote the exclusive property of women.[6] This suggests that women were not barred from owning property, but were given only a restricted control over it. Giving women absolute right to property would contribute immensely to their emancipation and independence, which was undesirable during the ancient era. Manu went to the extent of saying that:

> Three persons, a wife, a son and a slave are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong.[7]

A woman could never be the absolute owner of the property. This was because she always had a male guardian at every stage of her life, and did not enjoy autonomy. In this regard, the *Manusmriti* states,

> Her father protects her in childhood, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence.[8]

Stridhan

The concept of *stridhan* emerged as school of thoughts for Hindu Law developed. Two prominent schools amongst many were *Dayabhaga* and *Mitakshara*.[9]

The *Dayabhaga* School believed that a widow had no right to succeed to her deceased husband's share and enforce partition if there are no male descendants, while the *Mitakshara* School believed that a woman could never become a coparcener and the widow of a deceased coparcener could not enforce partition of her husband's share against his brothers.[10]

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6 *Supra* note 1.

7 *Id.*

8 Jeffrey Brodd, World Religions: A Voyage of Discovery 52 (Saint Mary's Press, 2003).

9 See Janki Nair, Women and Law in Colonial India: A Social History (Kali for Women, 1996).

10 *Id.*

The *Mitakshara* school specified nine categories of gifts that could be addressed as *stridhan*. These included, i) gifts and bequests from relations, ii) gifts and bequests from strangers, iii) self-acquired property, iv) property purchased with *stridhan*, v) property acquired by compromise, vi) property obtained by adverse possession, vii) property obtained in lieu of maintenance, viii) property obtained by inheritance, and ix) share obtained by partition. Out of the above nine categories of *stridhan*, the last two remained controversial until the early 20th century.

The Privy Council differed from Vedic law and ruled in favour of women's rights, concluding that the estate becomes the property of a women in two situations: i) when the property is inherited by a female from a male, and ii) when the property is inherited by a female from another female.[11] This was a positive leap from the Vedic age, where women were not considered to be owners even of *stridhan*.

The position of both schools in respect of the question of absolute ownership of property was unclear. The schools segregated *stridhan* into two categories (i) *sauadayika*, which consisted of gifts from relatives, and property which was self-acquired as an unmarried woman or a widow, over which she held absolute rights of disposal, and ii) *non-sauadayika*, which included gifts from strangers and property which was self-acquired as a married woman, over which she had no right of alienation without the consent of her husband. In case of both categories, the property would devolve in the name of the woman's heirs.

Again, the Privy Council concluded the confusion, and stated that women are care takers of the property and could alienate the property only in three situations: i) legal necessity, ii) benefit of estate, and iii) discharge of duties (marriage of daughter, funeral of husband and his salvation).[12] Therefore, ownership even in case of *stridhan* devolved solely when the husband expired, and was associated with fulfilling his duties or those towards him, and nothing more.

11 Sheo Shankar Lal v. Debi Sahai, (1902-03) 30 IA 202.

12 Bijoy Gopal Mukherji v. Krishna Debi, 34. I.A. 87(1907).

Dowry

For centuries, *stridhan* was provided by the bride's parents to her husband as dowry. It would then belong to the groom and his family.[13] This disturbing practice, though never supported by the ancient *srutikas*, became ingrained in society.[14] The situation was rectified by the legislature after Independence, which passed the Dowry Prohibition Act, 1961, making the exchange of dowry illegal.[15]

The practice of providing dowry to the groom coloured as *stridhan*, and performance of *sati* after the death of the husband, resulting in the transfer of the *stridhan* to the groom's parents, was a circle that evolved during colonial rule.[16] This vicious circle was a further blow to women's rights and individuality. The barbaric practice continued in the 18th and 19th centuries. Persuaded by social reformers like Raja Ram Mohan Roy and Lord Bentinck, the practice was abolished by the Bengal Sati Regulation, XVII of 1827.[17] However, the concept of dowry remained constant and continued to be transferred as *stridhan*.[18]

II. Laws in the Colonial Era

Customary laws continued to be practiced even after the introduction of black letter law. Hindu Women's Right to Property Act, 1937 ("Act of 1937") was introduced to uplift the position of women in society, however the society chose to follow *Mitakshara* and *Dayabhaga* laws till the beginning of the 20th century.[19] The Act of 1937 established limited rights for Hindu women in their intestate husband's property.

[13] *See* generally Srimati Basu, Dowry and Inheritance (Issues in Contemporary Indian Feminism) (Zed Books, 2005).

[14] *Id.*

[15] *Id.*

[16] Debarati Halder and K. Jaishankar, *Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval, and Modern India*, J. of Law and Religion, Vol. 24, No. 2, 2008, pp. 663–687.

[17] *Id.*

[18] *Id.*

[19] Narendra Subramaniam, *Family Law and Cultural Pluralism*, Encyclopedia of India (Thomson Gale, 2006), https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/family-law-and-cultural-pluralism.

Its biggest flaw was that it did not guarantee any rights to women successors when the deceased had disposed of his property by will. The Act did not mention anything about share of women in agricultural land as well.

III. Post-Independence

Dr. Ambedkar addressed the situation of bias, inequality, and limited rights of Hindu women in property during the Constituent Assembly of India. He introduced the Hindu Code Bill, which acknowledged the equal rights of women over property. Some of the salient features of the Bill were:

i) *Stridhan* can be inherited by sons.

ii) A woman's *stridhan* solely belongs to her, and can devolve upon her heirs after her death.

iii) Women do not hold limited rights to her deceased husband's estate. She is the owner, and not just a caretaker of the estate.

Based on the Hindu Code Bill, a uniform law of succession (for Hindus) was adopted as the Hindu Succession Act, 1956. Under Section 14 of the Hindu Succession Act, 1956, a Hindu woman's estate was converted into *stridhan*, clarifying that property received after 17 June, 1956 would be in absolute ownership of the woman.

The term 'property' according to Section 14 of the 1956 Act includes both, movable and immovable property. It may be received as a gift, through maintenance, inheritance, or it may be self-acquired. The Act covers an existing women's estate into *stridhan* or absolute ownership only when the following two conditions are fulfilled:

(i) Ownership of the property must vest in her and it is not limited in nature; and

(ii) She must be in possession of the estate when the Act came into force.

After the two pre-conditions were fulfilled, women held absolute ownership over the property.

The Act was silent on the issue of women's right to the property of their deceased husbands. It was established that women hold the right

to maintenance.[20] Importantly, Section 23 of the 1956 Act states that women cannot have right to ancestral property until and unless the male coparceners decide to partition the property.

IV. Hindu Succession (Amendment) Act, 2005

Before the amendment of the Hindu Succession Act, 1956 in 2005, the property rights of sons and daughters were distinct. While sons enjoyed rights over their father's property, daughters could only enjoy this right until they got married. After marriage, a daughter was considered a part of the husband's family. Once a daughter was married, she ceased to be part of her father's Hindu Undivided Family (HUF).

Section 6 of the 1956 Act, was highly unjust and discriminatory as it deprived women of their right to inherit ancestral property. Ancestral property devolved only on the male members of the family. Earlier it was believed that if women were given property rights it would fragment families. As a result, women were denied rights in the ancestral property of a HUF. Women were kept completely aloof from their right to inherit.

Many saw this as a hindrance to women's property rights. But on September 9, 2005, the Hindu Succession Act, 1956, which governed the devolution of property among Hindus, was amended. According to the Hindu Succession (Amendment) Act, 2005, every daughter, whether married or unmarried, is considered as a member of her father's HUF and can also be appointed as 'karta' (head of the family) of his HUF property. Under the new Act, both the son and the daughter have the same rights, duties, liabilities, and disabilities.

The daughter can only avail this benefit, based on the contingency that her father passed away post September 9, 2005. The daughter is eligible to be a co-sharer only if the father and the daughter were alive on September 9, 2005. The main motive behind this amendment was to strike at the root of patriarchy that perpetuated through the *Mitakshara* coparcenary.

[20] Surajmal v. Babulal, AIR 1985 Del 95.

Even after the commencement of the Indian Constitution, inequality continued to prevail. After years of struggle, the 2005 Amendment removed these inequalities in one stroke. Now, a woman of the family can also be a coparcener and has the right to demand partition of the property. Section 23 of the Hindu Succession Act, 1956 was omitted to confer daughters with the same rights as sons - to reside in, or seek partition of the parental dwelling house.

Another noteworthy amendment to the Act was the inclusion of married daughters as coparceners to the property. The Amendment Act of 2005 also did away with the inequalities that persisted between married and unmarried daughters. A divorced woman can now go back to her natal home as a matter of right and not at the mercy of her relatives.

The Amendment of 2005 also gave women inheritance rights over agricultural land by a simple omission of Section 4(2) of the 1956 Act. Certain widows, were barred from inheriting their predeceased son's property under Section 4 of the 1956 Act if they remarried. The Amendment Act of 2005 removed this disability by deleting Section 4.

Therefore, the Amendment of 2005 upholds the essence of Article 14 of the Constitution. The traditional concept of women breaking families and women being solely capable of managing the household, has been altered. The Amendment of 2005 is a progressive step towards a better society. Apart from this, Indian Courts have been progressive in their outlook, and have tackled issues relating to inheritance rights of women who may have converted to another religion, or who were born before the amendment of 2005.[21]

However, the Amendment has some drawbacks as well. Sections 8 and 9 of the Amendment Act, 2005, deal with the devolution of property in case of the death of a male. On the other hand, sections 15 and 16 deal with the devolution of property in case a woman dies. The order of succession in the event of a woman's death gives the heirs of her husband a preference over her own parents. But in case of a man,

[21] Balchand Jairamdas Lalwani v. Nazneen Khalid Qureshi, (2018) SCC Bom 307; Danamma Suman Surpur v. Amar, (2018) 3 SCC 343.

his relatives get to inherit the property. To empower women better, the laws need to be made gender-neutral, and there should be no distinction between the rules of succession for men and women. Further, women are still not entitled to agricultural land in various states.

It can be inferred that much has been achieved to bring women's property rights on the same footing as those of men. However, a lot more needs to be accomplished to be able to achieve the goal of making society non-discriminatory and gender just.

Gender Equality and Childcare*

Uttara Babbar†

A recent study of the World Bank shows that India is ranked 121st out of 131 countries in Female Labour Force Participation (FLFP),[1] and that the percentage of women in India's workforce has dropped from 35% in 1990 to 27% in 2017.[2] What is more disturbing is the fact that very few Indian women advance to leadership positions. Studies show that women represent only 19% of senior leadership positions in the Indian corporate sector.[3] A mere 2.5% of total executive directorship positions and 5% of directorships are held by women. 54% of companies have no women on their board of directors. Women represent only 11% of the Lok Sabha.

What is interesting to note is that 48% of working women drop out of the workforce before even reaching mid-career, and that a staggering 75% of women who quit their jobs did so for childcare reasons.[4] It appears that motherhood and childcare are significant barriers to a

* The author would like to acknowledge research assistance by Bhavana Duhoon, Advocate.

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1 Vidya Bhandarkar & Sourav Roy, *The curious case of vanishing women from India's workforce*, Yourstory, January 30, 2018, https://yourstory.com/2018/01/women-in-workforce/.

2 International Labour Organization, *Labor force participation rate, female (% of female population ages 15+) (modeled ILO estimate)*, ILOSTAT Database, retrieved November, 2017, https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS.

3 Catalyst Information Center, *First Step: India Overview*, Catalyst, June, 2013, https://www.catalyst.org/system/files/india_firststep_final_1.pdf.

4 *Id.* at 13.

woman's career progression. Women who may have overcome various other socially oppressive structures and entered the workforce, were unable to remain there once they became mothers. This is due to a variety of factors. However, I wish to emphasize two significant reasons for post maternity attrition. The first, is gender-stereotyping in society, where the mother is viewed as the primary care-giver. The pre-determined gender roles ascribed to women in society perpetuate the belief that the woman's role as a mother excludes her participation in the workforce. Society has perpetuated the myth that a working mother is not a good mother. Traditionally, the woman is seen as the primary caregiver, whereas the man is the main bread-winner of the family. In a typical family, upon the birth of a child, ordinarily it is the mother who modifies her professional commitments, sometimes by even leaving the workplace altogether, in order to stay at home and care for her child. The stereotype also affects the way an employer views a mother as an employee. As far as the legal profession is concerned, "[T]he ideal male lawyer has a supportive wife who cares for his home and children. The ideal female lawyer is unmarried and childless".[5] A mother of a small child is certainly not seen as an ideal employee/ professional. Former Chief Justice of the US Supreme Court, Justice Warren Burger, reportedly said that he would never hire a female law clerk because of her family responsibilities.[6] Air India enacted service regulations providing that the services of an air hostess would stand terminated on first pregnancy- a provision that was fortunately struck

5 S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. Rev. 1631, 1638 (1995); *cf* Catherine Schur, *Conspicuous by their Absence: How Childcare can Help Women Make it to the top*, 27 Geo.J.Legal Ethics 859, 864 (2014).

6 Martin H. Malin, *Fathers and Parental Leave,* 72 Tex.L.Rev. 1047, 1047 (1994). Significantly, the Burger Court, while holding that an employer may not, in the absence of business necessity, refuse to hire women with pre-school age children while hiring men with such children, also held that "The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703 (e) of the Act", *cf,* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

down by the Court.[7] Most employees and clients do not wish to engage women professionals, other things remaining the same.[8] A woman with a young child is seen as a liability in the workplace.

The role ascribed to the young mother by society, the way the employer views her as an avoidable employee, and the image the young mother has of herself, are all different sides of the same coin. The stereotype excludes many young mothers from full participation in the workforce. It also excludes many fathers from being equally involved parents. It is believed that good parenting is merely a question of practice.[9] Since an infant is usually cared for by the mother from the moment it is born, the mother ends up being the dominant parent – but only because she spends so much more time with her children and therefore has had more practice and better knowledge of the home and family. The maternal dominance in childcare becomes self-perpetuating, thereby excluding the father from parenting and the mother from the workforce. I believe many men would like to participate in the upbringing of their children. Just as there are barriers for women taking on greater challenges in the workforce, there are barriers for men to take on greater roles in parenting and in the home. I believe this barrier is common.

The other significant reason for post-maternity attrition is the lack of early childcare and parental benefits in our country. A substantial number of working women stop working due to pregnancy and child

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7 Air India v. Nergesh Meerza, (1981) 4 SCC 335. In this case, the Supreme Court struck down a provision in the Air India Employees Service Regulations, which stipulated that the services of an air hostess would stand terminated on first pregnancy. The Court observed that such a stipulation compelled air hostesses not to have children and interfered with the ordinary course of human nature. It held, that the provision in the Service Regulations was violative of Article 14 as it was not only unreasonable and arbitrary, but was also unfair and exhibited naked despotism.

8 "Most jobs in fact require that the person, gender neutral, who is qualified for them will be someone who is not the primary caretaker of a preschool child". Catharine MacKinnon, *Difference and Dominance, in* Feminism Unmodified: Discourses in Life and Law 37 (1987), *cf* Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 Harv. J. L. & Gender 1 (2008).

9 Malin, *supra* note 6, 1054-1056.

birth. A study in the European Union found, that countries with good early childcare and education programs had a much larger number of working mothers.[10] There is clearly a correlation between maternal attrition and childcare facilities. Childcare benefits ease the pressures on women and make it easier for them to move ahead professionally.

I. Towards A Gender-Neutral Conception of Parental Benefits

Indian laws provide maternity benefits, mostly in the form of maternity leave and childcare leave. Most of the laws provide these benefits only to mothers.[11] A few laws provide some benefits to fathers also, though the duration of the leave available to fathers is much shorter.[12] For instance, while All India Services (Leave) Rules, 1955 and the Central Civil Services (Leave) Rules, 1972 do provide for paternity leave, such leave is only 15 days, as compared to 180 days of maternity leave.

Since the Indian laws with regard to childcare and maternity benefits provide them primarily to the mother and not to the father, the law effectively perpetuates the gender stereotyping of women as primary care givers. Since the benefits are available only to the mothers, they continue to primarily care for the child and remain the dominant parent. Fathers, not being capacitated with maternity benefits, will continue to remain alienated from parenting. When fathers do not take parental leave following the birth of their child, they fall behind the wife in gaining experience with the child, and this results in eventually

[10] Catherine Schur, *Conspicuous by their Absence: How Childcare can Help Women Make it to the Top*, 27 Geo.J.Legal Ethics 859, 870 (2014), relying on the studies examined in Wolfgang Tietze & Debby Cryer, *Current Trends in European Early Child Care and Education*, 563 Annals Am.Acad.Pol.&Soc.Sci 175, 177-179 (1999).

[11] Enactments providing benefits only to mothers- The Maternity Benefit Act, 1961, The Employee State Insurance Act, 1948, The Factories Act, 1948, The Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (State welfare boards to make maternity benefit payments to female beneficiaries under Section 22 of the Act), etc.

[12] All India Services (Leave) Rules, 1955 and the Central Civil Services (Leave) Rules, 1972.

marginalizing the father's role in childcare.[13] Therefore, the absence of parental leave for fathers not only impedes the father's involvement in childcare but also proves to be an obstacle for the mother's participation at work.

While sameness cannot be a proxy for equality, at least some aspects of maternity benefits must be gender-neutral. Aspects such as the actual pregnancy, birthing process, and nursing of the newborns may be difficult to be considered gender-neutral since they are based on a woman's biological difference. However, a woman's perceived affinity towards caretaking cannot be deemed to be a biological difference.[14] The law aspires to make the workplace gender-neutral and hence, the benefits extended to parents for childcare, must be gender-neutral.[15] Maternity benefit laws have a practical aspect, namely the need to assist the caregiver, primarily the mother. However, such laws also have an aspirational element inasmuch as they ought to encourage greater participation of fathers in childcare. I believe that Indian laws relating to maternity benefits fail to meet the aspirational requirement.

Apart from the above, an unintended consequence of making the benefits gender-specific, is that employers will resist employing women

[13] Malin, *supra* note 6, p. 1057

[14] Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 Harv. J. L. & Gender 1 (2008), 6.

[15] *Id.* at 3. Pamela Laufer-Ukeles describes the possible ways in which gender differences can be treated in law. Firstly, the law can ignore such differences and aim to be rid of all difference. The traditional view however is that gender makes all the difference. Since gender has been the basis of excluding women from various rights, there must be protections and special concern for women's issues. The women's rights movement that began in the 1960s developed the theory that gender does not matter for the purposes of the law. Another perspective is that the emphasis should be on the child or the family. Laufer-Ukeles presents another possibility- that gender difference should be recognized, but only where such recognition promotes specific societal interests, for instance caretaking. She argues that in divorce related custody and alimony cases, the law should recognize the contributions of primary caregivers. However, in my view, the said position is not analogous to providing childcare benefits in the context of making the workplace more gender-neutral.

and this would lead to women losing jobs defeating the very purpose of the legislation.[16] A survey has found that the Maternity Benefit (Amendment) Act, 2017 which provides benefits to new mothers,[17] would lead to a resistance in small and medium sized companies towards hiring women.[18]

The role of the caretaker needs to be evaluated so that it is gender-neutral. Also, the law needs to adopt a broader conception of a 'caretaker' and ought to include adopting parents, commissioning couples and couples of the same sex. In a significant judgment, the Delhi High Court has extended the provision of maternity leave under the Central Civil Services (Leave) Rules, 1972 to those female employees who have adopted the surrogacy route to procreate.[19]

II. Childcare: Private v. Public

Maternity leave and maternity benefits under Indian law have their limitations. One of the main negative effects of these benefits is that they make women less attractive to employers and also provide further impetus to existing gender stereotypes requiring mothers to primarily care for their child. Also, these benefits are not available to women working in unorganized sectors, or even to professionals and self-employed women. India has adopted an employer-centric model of providing parental benefits which leaves out a large number of women who may not have a strict "employer" or who may have many employers. There is information to show that women in the unorganized sector and those who are self-employed might face even graver gender-discrimination. For instance, the gender pay gap amongst the self-

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[16] Anirban Nag, *India's Maternity Law May Cost 1.8 Million Women their Jobs*, ET Rise-The Economic Times, June 27, 2018, https://economictimes.indiatimes.com/small-biz/sme-sector/indias-maternity-law-may-cost-1-8-million-women-their-jobs/articleshow/64758044.cms.

[17] For example, it extends the benefits under the Act even to commissioning mothers, namely a biological woman who uses her egg to create an embryo planted in another woman. It mandates the installation of a crèche for any establishment having 50 or more employees, and permits a mother to visit the crèche four times in a day, etc.

[18] Nag, *supra* note 16.

[19] Rama Pandey v. Union of India, (2015) 221 DLT 756.

employed shows that they have far lower earnings than their male counterparts.[20] Such women are also largely left out by the maternity benefits laws in our country.

One of the primary reasons for this is that in India, childcare is viewed as a private issue. It is something that is expected to be addressed by the mother, father or the family. Some legal initiatives have expanded this sphere to the employer. However, it is not considered a problem large enough to be a public issue, requiring active State participation. In contrast, in most European countries, childcare benefits and initiatives are publicly funded.

The 2017 amendment to the Maternity Benefit Act, 1961, by way of the new Section 11-A, provides that every establishment having fifty or more employees shall have a crèche. Interestingly the requirement is based on the number of employees and not "female employees", which would indicate that crèches are required irrespective of the gender of the employee. However, the statutory obligation is imposed on the establishment. This fails to address the childcare needs of a substantial number of working women who are not covered under any establishment.

Crèches, or childcare centers therefore become vital, gender-neutral mechanisms to ensure that women in the unorganized sector, as well as those who are self-employed, or professionals without any specific employer, continue to remain in the workforce. Unlike maternity or childcare leave, in which the parents are absent from work, crèches ensure that parents remain at work while their children are cared for.

Good quality childcare centres enable parents to take on the dual responsibility of caring for their child and meeting their workplace commitments with greater ease. However, unless the childcare is high-quality, affordable and flexible, it would not serve this purpose. The care needs to be high-quality because unless the parents are satisfied that their child is in an environment conducive to its growth, they

[20] Leanna Lawter, Tuvana Rua, Jeanine Andreassi, *The glass cage: The gender pay gap and self-employment in the United States*, New England Journal of Entrepreneurship, Vol. 19, Issue 1, 24-39 (2016).

would prefer to let the child remain at home, probably with the mother looking after it. It needs to be affordable, because if the mother's earnings are not much more than childcare expenses, the mother would prefer to stay at home. It also needs to be flexible so that women in careers which do not have fixed hours, can effectively avail of childcare facilities and continue to discharge their professional commitments.

A legal system that views childcare primarily as a private issue would fail to facilitate development of a childcare system that is affordable and accessible. The Maternity Protection Convention, 2000, adopted by the International Labour Organization, recognizes that maternity rights are a shared responsibility of the government and society.[21] In India, crèches are mandated only for women engaged in the organized sector. This is highly inadequate and leaves out a large chunk of women, who being in the unorganized sector, face even more harsh working conditions and invidious discrimination.

There is another aspect of the matter- the rights of the child to early childhood development (ECD). Article 45 of the Constitution of India recognizes this right as a Directive Principle, providing that, "the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years". The Law Commission of India in its 259th Report recommends that this right of children below the age of 6 years ought to be recognized as a fundamental right.

It has been noticed that countries with good daycare facilities have the maximum participation of new mothers in their workforce. Finland places an obligation on the State to provide for daycare for children. Under the Act on Children's Day Care of 1973, Finland gives an unconditional right of daycare to parents, either as municipal daycare or as a home care allowance.[22] Significantly, Finland also has amongst the smallest differences in the participation rates of men and women

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21 The Preamble to the Convention observes, "Taking into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society".

22 *Early Childhood Education and Care Policy in Finland*, OECD, May 2000, http://www.oecd.org/finland/2476019.pdf.

in the workforce, being just around 4%.[23] More mothers in Finland are able to work due to the highly developed childcare regime in that country.

Whichever way we look at it - either as the right of working parents, or as the right of the child to ECD - good quality childcare, accessible to all parents, is the need of the hour. Further, this task cannot simply be brushed off by the State as requiring private intervention. The State, in the interest of encouraging women to remain in the workforce, and in order to fulfill the early development needs of its future generations, needs to develop a vibrant early childcare development programme. The State could examine the possibility of graded daycare centers. The first grade could be entirely state sponsored for women with basic wages. The second could be partly funded by the State and partly private/employer funded. The third could be one which is primarily privately run, where the parents with deeper pockets contribute for the facilities, while the State provides the land and buildings, with specific earmarked slots in the master plan of the city.

III. Conclusion

At a broader level, policies aimed at ensuring that working mothers do not exit the workforce need to be sensitive to the needs of working mothers. Perhaps school timings can be made more in sync with working hours, so that mothers can work during the hours their children are in school. Perhaps the State can use tax incentives creatively- a complete deduction of childcare expenses, or income tax waiver for all working mothers for the first three years after child birth. Low interest loans for women entrepreneurs immediately following child birth can be explored. Service tax benefits can be provided when the service is provided by a woman professional who has recently become a mother. Since the tax incentives would come from the State, employers would be less likely to discriminate against women employees, as opposed to laws requiring provision of maternity benefits to women employees.

[23] Joseph Chamie, *Despite Growing Gender Equality, More Women Stay at Home than Men*, YaleGlobal Online, January 25, 2018, https://yaleglobal.yale.edu/content/despite-growing-gender-equality-more-women-stay-home-men.

Laws can be enacted requiring real estate developers to allocate space for crèches/daycare centres, and require that spaces be compulsorily earmarked for crèches in the master plans of cities. The State can mandate on-site nursing facilities. The requirements of parents of children with special needs must be recognized and addressed.

I strongly believe that we need to move away from a discourse on 'maternity' rights and benefits and move on to a regime of 'parental' rights and childcare. Working mothers have dreams too, and they can make powerful contributions in any workplace. However, laws that focus only on the mothers may be missing the point. In fact, such laws may even harm the interest of working mothers. Men also have a right to fatherhood and to work-life balance. Law and society cannot relegate men only to the workplace.

Finally, the State cannot take a hands-off approach when it comes to the question of childcare. Childcare is not an issue that concerns only the mother or father of the child. There is a vital State interest in ensuring, firstly, that both parents are able to contribute to the workplace and fulfill themselves as individuals, and secondly, that each child is able to access his or her right to early childhood development. The notion of the ideal worker who has no familial obligations needs to change. It is unrealistic when applied to either gender. The ideal employee, whatever the gender, is also a caregiver.

From *Naz* to *Navtej*: Queer Women and The Transformative Potential of the Constitution

Amritananda Chakravorty[†]

On September 6, 2018, in *Navtej Singh Johar* v. *Union of India*,[1], the Supreme Court struck down the archaic law of section 377 of the Indian Penal Code, 1860 ('IPC'), which criminalised certain sexual acts between consenting adults. Legal and social opprobrium of homosexuality or gender non-conformity created a socio-political order, where there existed deafening silence of alternate sexuality, blackmail and extortion of hapless gay men and women, lives lived in secret and in perennial fear of prosecution. In case of violations or sexual assault, no legal remedy existed, and fear of the law prohibited members of the queer community from approaching the police or courts. All this changed on September 6, 2018. The arc of justice and freedom finally came into queer lives, into the law, and hopefully will soon penetrate into their families, work spaces, public places, and private domains.

In a judgment with four concurrent opinions from Chief Justice Dipak Misra, Justice Rohinton Nariman, Justice D.Y. Chandrachud, and Justice Indu Malhotra, the Supreme Court unequivocally upheld the constitutional rights of equality, non-discrimination, freedom of expression, privacy, autonomy, dignity, and health of LGBT persons guaranteed under Articles 14, 15, 19 (1), and 21 of the Constitution.

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1 Writ Petition (Criminal) 76 of 2016.

The Court expressly overruled its own judgment in *Suresh Kumar Koushal* v. *Naz Foundation*.[2] There, the Court had overturned the landmark Delhi High Court judgment in *Naz Foundation (India) Trust* v. *NCT of Delhi*,[3] decriminalizing consensual sexual acts between adults in private, and thus reinstated section 377 of the IPC. The march of constitutionalism that began with *Naz Foundation* in the Delhi High Court recognizing the rights and dignity of LGBT persons, was brutally halted in *Suresh Kumar Koushal* by the Supreme Court. But the same court passed the historic judgment recognizing transgender identity in *National Legal Services Authority* v. *Union of India* (*NALSA*),[4] reiterated in *K.S. Puttaswamy* v. *Union of India*,[5] and has finally found its anchor in *Navtej Singh Johar*. There is no going back now. As Justice Chandrachud beautifully puts it, "Does the Constitution allow a quiver of fear to become the quilt around the bodies of her citizens, in the intimacies which define their identities?"[6] The Supreme Court emphatically replied in the negative.

Although section 377 was used mostly against gay men and transgender persons, its effect on queer women and their desires has been pernicious to say the least. The fear of criminalisation was ever present, and directly and indirectly impeded their lives, choices, and rights. Even when women do form intimate relations, despite many obstacles, their choices are frequently thwarted by their families through forced marriages, threats and violence, including corrective rape, emotional blackmail, and filing false cases of kidnapping against the partner. The police and their families threatened to invoke section 377 against one of the partners, even though technically speaking, the provision did not apply to acts between two women. The law acted as a chilling effect on any discussion on same sex desires or relations, thereby imposing a pervasive culture of silence, stifling individual choices and freedoms. Women have been doubly oppressed, owing to their gender and their sexuality. Often, in issues pertaining to domestic violence,

2 (2014) 1 SCC 1.
3 (2009) 111 DRJ 1.
4 (2014) 5 SCC 438.
5 (2017) 10 SCC 1.
6 *Supra* note 1, at para 4.

sexual harassment, or sexual assault and rape, the 'queer' identity is often subsumed in the larger identity of a 'woman', or is deliberately erased from public conversations, including in the judiciary. Even in the recent hearings of *Navtej Singh Johar* in the Supreme Court in July, 2018, although some of the petitioners were lesbian women themselves, the challenges of queer women were never specifically addressed. This silence resonates in the *Navtej Singh Johar* decision, where specific concerns of queer women remain absent in the judicial enunciation, in an otherwise empathetic judgment on LGBT rights.

At the same time, *Navtej Singh Johar* has enough ammunition to protect and further recognise same-sex relations, especially amongst women. In one of the most far-reaching interpretations of the principle of non-discrimination under Article 15(1) of the Constitution, the Supreme Court reiterated *Naz Foundation*'s interpretation that 'sex' in Article 15(1) includes 'sexual orientation'. Accordingly, no individual can be discriminated on the ground of 'sexual orientation' under Article 15(1). In doing so, the Court embarked on a path-breaking analysis, recognizing the intersectional nature of identities, and how discrimination operates at multiple levels, which needs to be proscribed under Article 15(1).

It is well established that without understanding and making intersectional connections, any meaningful discussion on equality and non-discrimination is pointless. In this regard, the Court's decision in *Air India* v. *Nergesh Meerza*,[7] which holds that Article 15(1) prohibits discrimination 'only' on the ground of 'sex', but if the discrimination is based on 'sex' and 'any other' ground, then it is constitutionally permissible, stood out like a sore thumb. In *Navtej Singh Johar*, the Court has finally corrected this anomaly in gender justice jurisprudence, holding that "this narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context."

[7] (1981) 4 SCC 335.

This advancement is hugely important from a constitutional perspective, since it applies to all intersectional identities, i.e., a *dalit* or Muslim woman, or a queer *dalit* woman. This was best summed up in the classic decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*,[8] which noted that "the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places, and their communities." The natural corollary is that people live in their multiple identities, and this intersectionality ought to animate our judicial decisions.

Instead of the incorrect 'sex only' test, in *Navtej Singh Johar* the Supreme Court applied the principle of 'sex stereotyping' in examining whether section 377 violates the constitutional guarantee of non-discrimination under Article 15(1). This was first referred to in *Anuj Garg* v. *Hotel Association of India*,[9] where the Supreme Court struck down section 30 of Punjab Excise Act, 1914, which prohibited the employment of women in establishments serving liquor to customers on the ground that traditional cultural norms on gender roles cannot dictate government policy, and ought to be superseded by the fundamental rights of women. Reiterating it in *NALSA*, the Supreme Court held that Articles 15 and 16 seek to prevent the direct or indirect differential treatment of people, for reason of non-conformity with stereotypical generalisations of binary genders, i.e., the stereotypical notions of 'masculinity' and 'femininity'. In *Navtej Singh Johar*, the wheel has come full circle, as the Court recognised that prohibition of sex discrimination includes discrimination based on stereotypical notions of sex and gender, which is essentially what discrimination on sexual orientation does. There are many cases of queer women being sexually assaulted or physically abused owing to their gender non-conformity, i.e., they did not look or behave 'feminine' enough, or desired not men, but women. The Supreme Court categorically held

8 (1999) 1 SA 6 (CC).

9 (2008) 3 SCC 1.

that "a criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1)".

Intrinsically connected to the inclusion of gender stereotyping as part of prohibited grounds of discrimination of 'sex' under Article 15(1) is the expansion of the freedom of expression under Article 19(1)(a) of the Constitution. Most judicial pronouncements on the fundamental right to freedom of speech and expression have remained confined to 'speech' in Article 19(1)(a), which changed in *NALSA*. In *NALSA*, the Supreme Court held that the freedom of expression in Article 19(1)(a) includes freedom of gender expression, i.e., expressing one's gender identity, through dressing, words or behavior. This has been now been extended to the freedom of sexual expression in *Navtej Singh Johar*. It is now recognized that a person has the right to express one's sexual identity, and to choose one's partner in exercise of the fundamental right to expression and choice. In this regard, it implies expressing one's identity, intimacy, intellect, interests, and personality in public, as well as in private. *Navtej Singh Johar* holds that "Section 377 IPC amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence which is manifestly not only overbroad and vague, but also has a chilling effect on an individual's freedom of choice."

Another critical aspect of *Navtej Singh Johar* is its debunking of the public-private divide, with regard to sexual identity. Often, it is argued that sexuality is only manifested in the private sphere, and thus granted the protection of the right to privacy, but its public expression fails to merit a similar protective cloak. In fact, many even pointed out the alleged limited nature of declaration granted in *Naz Foundation*, which decriminalized certain sexual acts between consenting adults in 'private'. This 'limitation' has been expressly dealt with in *Navtej Singh Johar*, which recognises that though protection of intimate sexual conduct is intrinsic to the right to privacy, expressions of sexual identity have public manifestations, which ought to be protected. The Court rightly held that "the choice of sexuality is at the core of privacy. But equally, our constitutional jurisprudence must recognise that the public

assertion of identity founded in sexual orientation is crucial to the exercise of freedoms."

While acknowledging that LGBT persons are most vulnerable to harassment and violence in public places, and subject to gross social derision, *Navtej Singh Johar* categorically states that they are entitled to navigate public spaces on their own terms, devoid of state interference. This constitutes a significant advancement in the history of constitutional jurisprudence on sexual orientation, which is mostly grounded in privacy-dignity claims, even in international law. For the highest constitutional court of India to recognise that sexual identity has equal private and public aspects, requiring protection and non-interference, would go a long way in advancing the rights of other marginalised groups. Queer women often find their access to public spaces limited, and are at severe risk of harassment. They also face discrimination and violence in their families, their so-called 'safe private zones', owing to their sexuality. In fact, queer women have been among the first people to envisage 'alternate families' comprising their partners, friends, or theirs or their partners' children, or to creatively navigate public places, which affirm their dignity and choice.

The Court's emphasis on choice of romantic and sexual partner, or expression of romantic/sexual desire as being integral aspects of autonomy and self-determination guaranteed under Article 21 bodes well for queer women. One of the worst forms of violence against same-sex desiring women remains their forced marriages, after the families come to know of their sexual orientation or relations. This is evident from the spate of lesbian suicides from different parts of India, the most recent in Ahmedabad, Gujarat, in June, 2018.[10] Most women lack even the basic decision-making power over their education or employment choices, whether to marry or not, or over the choice of partner. The absence of decisional autonomy gets amplified in the case of same-sex desiring women. The judicial entrenchment of personal and sexual autonomy and self-determination as part of Articles 19 and

[10] Annie Banerji, *Lesbian couple's suicide note reveal stigma they face in India*, Reuters, June 13, 2018, https://in.reuters.com/article/india-women-lesbian/lesbian-couples-suicide-notes-reveal-stigma-they-face-in-india-idINKBN1J90VE.

21 would go a long way in advancing gender justice for women and empowerment, both within and outside the family.

Another recurring theme in *Navtej Singh Johar* is the transformative potential of the Constitution grounded in constitutional morality, and not on social or public morality. The concept of constitutional morality, first articulated by Dr. B.R. Ambedkar in the Constituent Assembly debates,[11] and then reiterated in *Naz Foundation*, has fully blossomed in *Navtej Singh Johar*. Recognising the critical role of the Supreme Court in protecting minority rights, *Navtej Singh Johar* held that "constitutional morality requires that this Court must act as a counter majoritarian institution, which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe".

Having constitutional morality as an underlying test in the examination of legislations for their validity will serve to dent the oft-repeated argument that the 'legislature knows the will of the people', as a justification for problematic laws. The same principle can be now applied in all gender discriminatory laws, including exemption of marital rape in section 375 of the IPC, since it is constitutional morality, which will hold primacy, and not the mere 'sanctity' of the institution of marriage. At the same time, the claims of queer women to partnership and other civil rights can be articulated in the same vein.

Navtej Singh Johar emphatically overrules *Suresh Kumar Koushal* in all the four concurring opinions. First in *Puttaswamy*, and now in *Navtej Singh Johar*, the Supreme Court recognised how *Suresh Kumar Koushal* was legally and constitutionally wrong, and constituted an affront to fundamental rights jurisprudence so well developed in India. *Suresh Kumar Koushal* was wrong in 2013 and in 2018. Similarly, section 377 is overruled not only because it has lost its 'purpose' or 'reason' in 2018, but also because even in 1860, the purpose of criminalizing non-procreative sexual acts, and therefore non-heterosexual identities, was irrational and arbitrary.

In conclusion, *Navtej Singh Johar* is a seminal decision in the history

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[11] Constituent Assembly Debates, Vol. 7, November 4, 1948.

of the Supreme Court, and would be echoed not just in the rest of South Asia, where section 377 exists, i.e., in Pakistan, Bangladesh, Sri Lanka, etc., but in all Commonwealth countries, where anti-sodomy law still prevails. At the same time, it is a moment of introspection for the entire country and its polity that it took more than 71 years after independence to remove an archaic law of British vintage, which denuded the LGBT persons of their most basic rights and citizenship entitlements. Some queer women just did not know how to react or process the development, since to express and live freely, without fear is unknown to most of them. The oft-repeated phrase 'unapprehended felon' fails to capture the sheer impact of section 377 on the rights of queer women, with lives destroyed, bodies brutalized, and minds scarred forever. Will it change now?

It must also be recognised that decriminalization was always the first step in the struggle for equal rights for LGBT persons, and *Navtej Singh Johar* has provided the platform on which the pillars of an inclusive and just legal and social order can be constructed for them. Both literally and figuratively, India has finally become a 'rainbow' nation, comprising diverse people, identities, and love.

Female Foeticide: Scourge of our Times

Sarita Kapur[†]

In the late 1970's, ultrasound techniques were introduced in India as a diagnostic tool for healthcare during pregnancy. What started as a breakthrough for the care of pregnant women, soon turned into a horrendous tool to commit and perpetuate female foeticide and female infanticide in the hands of unscrupulous healthcare professionals. They were fed and fuelled by a regressive patriarchal mindset. The conversion of the use of a helpful tool into a weapon of mass destruction, was driven by the desire for a son to carry on the family name, and a means to avoid paying dowry. Recognising this avenue for profit, clinics mushroomed all over India offering to exploit this technology to determine the sex of the foetus.

Sex determination and selective sex abortion by unscrupulous medical professionals was reported to have grown to a Rs. 1,000 crore industry.[1] Alarmed by the rampant abuse of availability of sex-screening technologies in urban (and even in semi-rural and rural) India, the Parliament enacted a law aimed at preventing such practice. This was the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (the "Principal Act"). The stated objectives of the Principal Act, were to prohibit misuse of pre-natal diagnostic techniques for determination of the sex of the foetus leading to female foeticide; prohibition of advertisement for such determination; permission and regulation of such techniques for the purpose of detection of genetic

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1 Alka Gupta, *Press Release-Female Foeticide in India*, Unicef India, http://unicef.in/PressReleases/227/Female-foeticide-in-India.

abnormalities or disorders; permission for use of such techniques only under certain conditions by registered institutions; and penalties for violation.

Regrettably the law did not stem the distressing tide of female infanticide. In May, 2001, the Supreme Court noted with anguish:

> 1.It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby the female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advanced medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.
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> 3. […] Prima facie it appears that despite the PNDT Act being enacted by Parliament five years back, neither the State Governments nor the Central Government has taken appropriate action for its implementation.[2]

The Supreme Court issued detailed directions for the proper implementation of the Principal Act, to the Central Government, Central Supervisory Board, State Governments/UT Administrations, and appropriate authorities. The thrust was in creating public awareness

[2] Centre for Enquiry into Health & Allied Themes (CEHAT) v. Union of India, (2001) 5 SCC 577 at paras 1, 3.

against the practice of pre-natal determination of sex and female foeticide, and to strictly implement the mechanism for registration, surveys and enforcement action, and the Principal Act and Rules framed there under, “with all vigour and zeal”.

The Supreme Court had to kick-start governments into action under the Principal Act through detailed orders passed during the pendency of the said petition between September and December 2001. This led to an amendment of the Principal Act on 14.2.2003 through the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.The Statement of Objects and Reasons of the Amendment Act stated that while the Principal Act had sought to prohibit pre-natal diagnostic techniques for determination of the sex of the foetus leading to female foeticide, certain inadequacies and practical differences in the administration of the Principal Act had come to the notice of the Government, which necessitated amendments. It was acknowledged that aminocentesis and sonography were being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. Techniques were also being developed to select the sex of the child before conception. These practices and techniques were not only discriminatory to females but also not conducive to the dignity of women.Such development, it was acknowledged, could precipitate ademographic catastrophe, in the form of imbalance in the male-female ratio.

The Principal Act was renamed “the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994”(the “PNDT Act”), to prohibit sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for purposes of detecting genetic abnormalities, metabolic disorders, chromosomal abnormalities, congenital malformations, or sex-linked disorders, and for the prevention of their misuse for sex determination leading to female foeticide.

Notwithstanding the amendment, the apathy of law enforcers and civil society persisted. This led the Supreme Court to declare that, “[…] female foeticide is the worst type of dehumanisation of the human

race”,[3] while giving detailed directions to shake government agencies out of their inertia. It was observed that,

> 6. [...] The 2011 Census of India, published by the Office of the Registrar General and Census Commissioner of India, would show a decline in female child sex ratio in many States of India from 2001-2011. … the provisions of the Act are not properly and effectively being implemented. There has been no effective supervision or follow-up action so as to achieve the object and purpose of the Act. Mushrooming of various sonography centres, genetic clinics, genetic counselling centres, genetic laboratories, ultrasonic clinics, imaging centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide.[4]

The failure to effectively implement the PNDT Act has once again been taken note of by the Supreme Court in 2016:

> 40. It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. […]The question of any kind of condescension or patronisation does not arise.
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> 41. When a female foetus is destroyed through artificial means which is legally impermissible, the dignity of life of a woman to be born is extinguished. It corrodes the human

3 Voluntary Health Association of Punjab v. Union of India, (2013) 4 SCC 1 at para 35.

4 *Id*. at para 6.

> values. The legislature has brought a complete code and it subserves the constitutional purpose […]
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> 43. […] the dropping of sex ratio still remains a social affliction and a disease.[5]

The Supreme Court once again issued additional detailed directions to all States and Union Territories to maintain a centralised database from all registration units so that information can be made available from the website indicating the number of boys and girls being born; to ensure effective functioning of the statutory authorities as envisaged under the PNDT Act. The Union of India was directed to constitute a 'Nodal Agency' and adequately publicise in the mass media, the need to report sex selection or advertisements thereof.

The 22-year old legislative framework (the PNDT Act and Rules made there under) repeatedly galvanized by successive directions of the Supreme Court, ought to have resulted in a positive impact in restoring the female-male ratio in India. Yet the statistics issued by the Niti Ayog reflect an exacerbated fall in the ratio for the 0-6 years age bracket in some states (except for states like, Karnataka, Kerala, Odisha and West Bengal) while remaining static over the past decade at about 900 females to 1000 males.[6]

According to a press release dated 15.06.2016 by the Press Information Bureau, Ministry of Health and Family Welfare, the National Crime Records Bureau has finally started collecting data on female foeticide in 2014.[7] Fifty cases were reported in 2014 (in the then estimated population of over 1,261,527,930). According to this press release, several measures are being taken by the Government for implementation of the PNDT Act. It is a start in what is a long journey towards protection of the precious right to life of the girl child.

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5 Voluntary Health Association of Punjab v. Union of India, (2016) 10 SCC 265 at paras 40-41, 43.

6 National Institution for Transforming India, Govt. of India, *State Statistics Sex Ratio*, http://niti.gov.in/content/sex-ratio-females-1000-males.

7 Press Information Bureau, Govt. of India, *Press Release*, Ministry of Health and Family Welfare, March 15, 2016, http://pib.nic.in/newsite/PrintRelease.aspx?relid=137946.

As the Supreme Court observed in *Voluntary Health Association of Punjab* v. *Union of India*,[8]

> 45. […] let it be stated with certitude and without allowing any room for any kind of equivocation or ambiguity, the perception of any individual or group or organisation or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial. Female foeticide is conceived by the society that definitely includes the parents because of unethical perception of life and nonchalant attitude towards law. […] Decrease in the sex ratio is a sign of colossal calamity and it cannot be allowed to happen. Concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society. The present generation is expected to be responsible to the posterity and not to take such steps to sterilise the birth rate in violation of law. The societal perception has to be metamorphosed having respect to legal postulates.[9]

The younger generation has a big role to play in not only changing the regressive mindset of the people, but also in taking positive steps that may help in the proper implementation of the PNDT Act. In this regard, the stellar invention that engineers at the Indian Institute of Technology have been trying to come up with, requires a special mention.[10] A new ultrasound machine digitally masks genitals, making it impossible to carry out sex determination, even if it were at the request of the parents. The machine features a GPS tracker so its whereabouts are known at all times. It is the first step, they say, in eradicating sex determination, using handheld and portable ultrasound machines.

[8] (2016) 10 SCC 265.

[9] *Id*. at para 45.

[10] Murali Krishnan, *Will GPS and biometrics on ultrasound machines end sex determination in India?* (December 3, 2014), https://www.dw.com/en/will-gps-and-biometrics-on-ultrasound-machines-end-sex-determination-in-india/a-18107738.

Evidently, enacting reformist laws will be of little consequence unless there is a change in the collective morality of: (i) parents who do not hesitate to undergo a test for prenatal sex determination and female foeticide or infanticide; (ii) unscrupulous doctors and technicians who carry out sex determination tests for a profit motive; and (iii) officials and authorities who renege from their duties to ensure the effective implementation of the PNDT Act. The dehumanisation of women in the form of female foeticide must stop. Mindsets need to be transformed through education in schools and colleges so that the impact is felt in each individual home.

The Pioneer from Travancore- Justice Anna Chandy*

K Parameshwar & Medha Damojipurapu†

> It would be ambitious beyond my daring, I thought, looking about the shelves for books that were not there, to suggest to the students of those famous colleges that they should rewrite history, though I own that it often seems a little queer as it is, unreal, lop-sided; but why should they not add a supplement to history, calling it, of course, by some inconspicuous name so that women might figure there without impropriety?[1]

Historical narratives are seldom objective. They are often written from a position of power, from above.[2] The recollection of Indian legal history and the *dramatis personae* involved, mirrors the male-dominated, colonially rooted legal system. The chartered courts, and their history, disproportionally dominate the recollection of historical subjects that have influenced our legal system. As a result of such selective and biased recollection, many lawyers who have been pioneers in their own right are rendered invisible. Justice Anna Chandy, is one such personality- the first female judge in India, the first woman to become a judge of

* The authors are grateful to Mythili Vijayakumar Thallam and Mukunda Mamidipudi for their valuable comments and inputs.

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1 Virginia Woolf, *A Room of One's Own*, in Selected Works of Virginia Woolf 591 (Wordsworth Editions, 2005).

2 Jim Sharpe, *History from Below*, in New Perspectives on Historical Writing, 74(Peter Burke ed., University Park, Pa., 1992).

a High Court, and perhaps the first woman to become a judge in the Anglo-Saxon world.[3] She was sworn in as a judge of the High Court of Kerala on 9th February 1959 and held office upto 5th April 1967, for over eight years.

Chandy belonged to a Syrian Christian family in Travancore. Having lost her father at an early age, she was raised in a family of women and was probably influenced by the matrilineal traditions followed by the Nair community in the Travancore state. Under the reign of Maharani Sethu Lakshmi Bayi, the regent of Travancore state, women's education was given great impetus.[4] Benefitting from this changed state of affairs which allowed women to enroll in the Government Law College, Anna Chandy enrolled for a post-graduate degree in law, graduating with distinction in 1926.

Anna Chandy was a well-known "first-generation feminist" of Kerala and championed the cause of women's rights in the social, political and economic spheres, especially through the publication titled *Shrimati*, which she founded and edited.[5] On entering the male-dominated field of politics in 1931, she provoked the ire of the Nair newspaper titled *Malayalarajyam* despite being supported by the Christian *Nazrani Deepika* which recognized her as a "Syrian Christian candidate".[6] Often, her views on women's rights were far ahead of her time and were opposed by vast sections of society, including women themselves. However, she held her own in the face of constant criticism and opposition and publicly and candidly expressed her views.

Chandy was the first woman in Kerala to earn a degree in law. She joined the bar in 1929. She was a member of the Shree Mulam Popular Assembly between 1932-34 and was appointed First Grade Munsiff in 1937, the first Malayalee woman to hold that position. In 1948, she

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[3] Rupsha Bhadra and Debroop Basu, *Manu and the "muse"*, The Telegraph, June 17, 2018, http://www.telegraphindia.com/1160604/jsp/t2/story_89159.jsp.

[4] Aditi Shah, *India's First Woman Judge*, Live History India, June 17, 2018, http://www.livehistoryindia.com/herstory/2017/09/26/indias-first-woman-judge.

[5] J. Devika, Her-Self: Gender and Early Writings of Malayalee Women (2005).

[6] J. Devika & Binitha V. Thampi, New Lamps for Old?: Gender Paradoxes of Political Decentralisation in Kerala (2012).

became a District judge and went on to become a High Court judge in 1959. During her tenure as a judge of the Kerala High Court, she passed a number of important judgments, which reflected a profound understanding of the law as well as an unwavering emphasis on the dignity of the individual and the rights of the accused. Chandy retired from the Bench in 1967. After an illustrious career as a lawyer and a judge, she strove to bring about reforms in society through her service as a member of the Kerala Law Commission. Her biography titled *Atmakatha* was published in 1973.

Being the first woman to enroll in law college in Travancore, Anna Chandy faced much mockery and opposition from male students and professors. Despite this animosity, she completed her degree with distinction. Anna Chandy's strong views were often met with shock and outrage by members of society, including public intellectuals and women. Through her periodical titled *Shrimati*, Anna Chandy argued for women's status as a distinct group and actively campaigned for reservation.[7]

I. A Vociferous Champion of Women's Rights

Chandy actively advocated for equality of women and women's reproductive rights. At the core of her articulation of equality for women were the twin concepts of autonomy and dignity, almost three quarters of a century ahead of the Supreme Court judgment in *KS Puttaswamy* v. *Union of India*.[8] She initially recommended birth control through self-control.[9] In defense of women's rights to work and earn outside of the home, she recommended 'ascetic self-control' to those women who wished to enter the public domain. Given that women's agency over reproductive rights remains a contentious issue even today, these arguments were well ahead of the times in which she articulated them. In her work in this area, Anna Chandy made a resolution at the All India Women's Congress meeting held in Trivandrum in 1935, asking the Government to establish birth control clinics throughout

[7] *Id.*
[8] (2017) 10 SCC 1.
[9] Anna Chandy, *Streeswatantryathe Patti (On the Liberation of Women)*, Sahodaran, Special Issue (1929).

the country.[10] She also asked that necessary information be supplied to those seeking contraceptive advice through municipalities and other institutions. There was a considerable furore over a Christian woman advocating such a resolution.[11] She was one of the few persons to support contraceptives based on feminist arguments of women's control over their bodies and reproductive autonomy. She challenged the idea that women's bodies were merely instruments for men's pleasure.[12] She argued for the removal of the exemption of women from the death penalty in Travancore law. She also campaigned against anti-women provisions in the Travancore Civil Procedure such as the husband's right to file for restitution of conjugal rights. Yet again, she was well ahead of her times, arguing full agency and responsibility for women. The assumed lack of agency of women, their treatment as chattel, and the notion that they are incapable of assuming criminal responsibility continue to haunt courtrooms today. She was a woman to be reckoned with, steadfast in her convictions, and her opinions hold relevance in contemporary society.

Chandy is most famously known for her scathing speech at the Vidyabhivardhini Sabha at Trivandrum, chaired by a High Court judge, where she systematically responded to Velu Pillai, a well-known legislator, intellectual, and writer in Travancore, who argued against government employment for women. Pillai argued that employment should only be given to unmarried women, if at all, so as not to disturb the duties of married women; that employment to married women would concentrate wealth in the hands of a few families unfairly and that giving employment to married women would affect the self-respect of husbands. Chandy replied that as a result of Pillai's suggestions, women would remain unmarried in order to work and this would cause more stigmatization. To the second argument, she responded that allowing married women to work, especially in situations where their husbands were too old or ill to work, would only benefit the family. She rubbished

[10] Robin Jeffrey, Politics, Women and Well Being: How Kerala Became a Model 196 (Oxford University Press 2001).

[11] J.Devika, Her Self: Gender and Early writings of Malayalee Women 128 (1898-1938) (2005).

[12] Devika & Thampi, *supra* note 6.

the contention that women's income would affect the self-respect of their husbands, arguing that both men and women were entitled to equal respect. She treated the matter as a petition filed against 'women' and systematically rebutted the arguments point-by-point, being the trained lawyer that she was. The debate between Pillai and Chandy continued for a while in the *Samadarishi*. It is to be noted that Chandy did not enjoy the unreserved support of her own gender while making this argument, many of whom sided with Pillai.[13]

Justice Chandy's continued interest in women's rights is also reflected in a dissenting note circulated by her in the 42nd Report of the Law Commission, in which she served as a member. In respect of section 497 of the Indian Penal Code, 1860, punishing only a man for the offence of adultery, Chandy yet again demonstrated considerable foresight to argue that a woman must be equally made culpable for engaging in adultery. Justice Chandy held very strong and peculiarly conservative views on the preservation of family as a basic unit of societal life. It is perhaps for this reason that while advocating that women must be made equally culpable for the offense of adultery, she defended the criminalization of adultery on the ground that the public at large has an interest in securing the institution of family. Her view on the importance of familial values is underscored by her opposition in the same note, to conferring an expansive right on a woman to abort. She opined, "it would be difficult to justify such latitude unless we consider the 12 weeks-old foetus in the mother's womb not as an incipient human life but merely as a 'uterine tumour'. I do not think such disrespect for human life is compatible with our social values". This contrast in her approach to women's rights, perhaps can only be explained by the fact that she was brought up in a conservative Christian family in Kerala.

II. The Judge

As an advocate and eventually as a judge, Anna Chandy was well known for her grasp on criminal law. But as a member of the Bench of the Kerala High Court, her judgments spanned a wide breadth of topics and her ability to critically analyze diverse areas of law and

[13] Devika, *supra* note 5.

deliver well-reasoned judgments is commendable. Despite being the first woman judge in the Kerala High Court, she held her own among her brethren and went on to author many important decisions. The language of her judgments was characterized by pithy articulation and her understanding of cases by infallible logic.

Chandy's knowledge of criminal law led to some fine decision-making in criminal matters during her tenure as judge of the Kerala High Court. She judged matters on the weight of the evidence and the strength of the case of the prosecution, and was not swayed to convict merely because the crime was a serious one or one that aroused indignation. In one instance, she observed that while the medical report of the deceased stated that the injuries were sufficient to cause death within moments of their infliction, the witnesses had concocted a story about a dying declaration of the deceased about the body being dragged. She observed,

> 31. […] It also looks strange why the accused who achieved their object in safety by stabbing Alavi in the uninhabited cashew forest should court ready recognition by carrying the body along the widely used foot-path in bright moonlight unless it be to give P.W. 3 a chance to see the fast stage of the incident and the handing over of the knife by accused 1 to accused 2 for safe keeping. All things point to the conclusion that Alavi was found dead or almost dying by the witnesses on the foot-path and the rest of the story was re-constructed so as to fit in with the appearances at the place.
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> 32. In short the prosecution has only bundled up some suspicious circumstances against the accused. Not an iota of legal evidence is let in to fix the guilt on the accused. The motive is inadequate and capable only of prompting the prosecution to make a false implication. There is an abundance of impossibilities in the case as put forward by the prosecution. The evidence brought against the accused is absolutely unconvincing and inherently improbable. There is no certainty either at the [*sic*] or at the end much

> less all along the way. Doubts and nothing but doubts assail us, however much the method of murder arouses our indignation."[14]

Her approach to criminal law sought to balance the principles of natural justice with the need to prosecute and punish criminal offenders. She believed in ensuring that the rights of the accused were respected at all times and emphasized a humanitarian approach. She warned against the practice of sessions judges appointing junior and inexperienced lawyers to defend accused in capital cases. In a legal system where accused are overwhelmingly under-privileged, she sought to affirm not only their right to counsel but also to a competent one. She observed,

> 33. […] If however such inexperienced advocates alone are available to defend such unfortunate accused, the court has a primary duty to come to the aid of the accused by putting timely and useful questions and warning the advocates from treading on dangerous grounds. In this case it is really unfortunate that the court has instead, freely made use of the defects resulting from the inexperience of the advocates to built [*sic*] up the case against the accused.[15]

Greatly concerned about the processes of a free and fair trial beyond mere rhetoric, Chandy emphasized the right of the accused to know the charges against him. In *Kesavan Moosad* v. *State of Kerala*, she observed that,

> 8. […] In all cases where the appellate court applies a different penal provision, there is one factor to be guarded against. An accused has a right to know the charge against him and he should be given an opportunity to defend himself. Therefore, it is only in those cases, where there is no reasonable possibility of prejudice being caused to an offender, that the appellate court can alter the conviction under Section 237 Criminal Procedure Code. […][16]

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[14] Kunnummal Mohammed v. State of Kerala, AIR 1963 Ker 54 at paras 31 and 32.
[15] *Id*. at para 33.
[16] Kesavan Moosad v. State of Kerala, 1963 KLJ 342 at para 8.

In yet another case she observed,

> The burden of proof to establish the guilt of the accused is ever on the prosecution and no plausible criticism of the defence evidence or the failure of the accused to establish his innocence should be deemed as sufficient evidence to discharge that burden.[17]

She was sensitive to those who have a different or innately suspicious relationship with law enforcement. By not counting merely fleeing as a sign of guilt, but insisting that every case must be adjudged on its own merits, she showed yet again her knowledge of the breadth of human experience and her commitment to the maxim "innocent until proven guilty". She pertinently observed, in *Kuttan Pillai alias Kuttappan* v. *State of Kerala* that,

> An absconder can be described as one who intentionally takes himself beyond the due process of law or one who conceals oneself to escape arrest by the police. The Primary meaning of the word abscond is to hide and a person who hides even in his place of residence is said to be absconding. He must have been available at or about the time of the commission of the offence and must have ceased to be available after the occurrence. Subsequent disappearance of the accused is admissible as conduct under Section 8 of the Indian Evidence Act. In the latest Supreme Court decision reported in (1960) 2 S.C.R. 460, Anant Chintaman Lagu v. The State of Bombay, the evidence of the accused's conduct both prior and subsequent has been utilised to its fullest extent. However as some timid persons even if they are absolutely innocent, deliberately abscond, absconding by itself cannot be considered as proof of guilt. When there is other believable evidence to establish the prosecution case, absconding may be used as furnishing further proof of the correctness of the conclusions. Each case must be determined on its own facts and the truth or otherwise of

[17] Raman Pillai v. State of Kerala, 1964 KLJ 1103 at para 15.

> the explanation of the accused must be the deciding factor in any case."[18]

During her tenure, she adjudged criminal cases wherein the defence of intoxication was taken to establish the absence of *mens rea*. She observed,

> The degree of intoxication is the criterion. "Was the man besides his mind altogether for the time being? If so it would not be possible to fix him with the requisite intention". In the present case, the accused though drunk has not gone so "deep in drinking" as not to know what he was about. When P.W. 1 pacified him by promising to settle the matter next day, he made no protest and betrayed no sign of excessive drunkenness. His conduct all along clearly shows that he could form correct decisions in matters that affected him. At best the intoxication has only touched his mind so that "he more readily gave way to some violent passion". It is not possible to reduce the offence from murder to one of culpable homicide not amounting to murder because of the accused's voluntary drunkenness.[19]

She found that "[…] as the degree of the accused's intoxication falls short of a proved incapacity in the accused to form the necessary intent to commit murder, the offence is murder. […][20]

Chandy also pronounced judgments dealing with important legal concepts such as the prerequisites for establishing common intention under section 34 of the Indian Penal Code of 1860;[21] the threshold of intoxication that would preclude *mens rea*, and in one instance, she found that in the absence of premeditation, the penalty of death in case of murder would be excessive.[22]

However, the breadth of her expertise was in no way limited to this particular area of law. In an important decision pertaining to company

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18 Kuttan Pillai alias Kuttappan v. State of Kerala, 1960 KLJ 1273 at para 16.
19 Narayanan v. State of Kerala, 1959 KLJ 623 at para 5.
20 Kunhooty alias Ulahannan v. State, 1959 KLJ 940 at para 7.
21 State of Kerala v. Raghavan,1959 KLJ 785 at para 11.
22 Balakrishna v. The State, 1959 KLJ 13 05 at para 11.

law, Justice Chandy examined the charge against directors for offences under sections 32(5) and 134(4) of the Companies Act, 1913. She interpreted the meaning and import of the phrase "knowingly and willfully authorizes or permits the default", and distinguished between the liability of a company and that of its officers in the following manner:

> "[…] The company's liability is absolute while that of its officers is made dependent on whether they were knowingly or willfully parties to the default. No doubt a company has to act through its officers and the officers may be presumed to know the duties cast on the company by law, but if that alone were, sufficient to saddle the officers with liability for every default of the company, then it is quite unlikely that the section would have made express mention of the element of knowledge and willfulness as the requisite condition for making the officers liable for the default of the company. Indeed, the object of these qualifying words seems to be to distinguish between innocent defaulters and those who consciously and intentionally become parties to the default and in our opinion unless there is some evidence to show that the officers were involved in the default "knowingly and willfully" they do not become liable to be punished for every default of the company."[23]

She concluded that,"[…] It therefore seems that the words "knowingly and willfully authorizes or permits the default" signify that the gist of the crime is conscious and deliberate action (or omission). Defaults caused unintentionally or by inadvertence have to be excluded."[24]

Chandy also adjudicated upon matters relating to food adulteration. She held that section 2(1)(j) of the Prevention of Food Adulteration Act, 1954 would be attracted if an article of food contained a colouring matter other than the one prescribed under the rules and if it was not within the prescribed limits of variability, it would be punishable

23 Registrar of Companies, Kerala v. Gopala Pillai,1961 KLJ 490 at para 11.

24 *Id*. at para 14.

under section 7(i) read with section 16(1)(a) of the Prevention of Food Adulteration Act.[25] She observed that it is not up to the seller to contend that despite not conforming to the standards under the Act, the food article was not adulterated.[26]

III. Conclusion

Anna Chandy, a woman of great conviction, overcame all odds to become one of the pioneers of the women's rights movement in Kerala. Her ideas were well ahead of her time, with great emphasis on a rights-based approach. The judgments, articles and positions she articulated throughout her life reflect a vision that was perhaps only understood much later. History, sadly, has not been kind to her as she has been barely remembered among the other woman stalwarts in India. It is to this memory of her that this paper is dedicated.

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[25] Food Inspector, Trichur v. O.D. Paul, AIR 1965 Ker 96.

[26] Food Inspector v. Indian Medical Practitioners Co-operative Pharmacy Stores Ltd., 1962 CriLJ 433.

'#MeToo' - A Twitter Revolution[*]

Govind Manoharan[†]

2017 was a momentous year in the history of the feminist movement. The convergence of the movement and social media resulted in one of the year's most significant agitations. This revolution was not televised. Instead, as was foretold sometime in 2010 by the author Malcolm Gladwell with dismay, the revolution was tweeted.[1]

Since Twitter was launched,[2] and Chris Messina, a technology evangelist, first proposed 'hashtags',[3] a decade had to pass for the birth of such a revolution. Possibly the largest global movement against sexual harassment and assault went viral on almost every social media platform, prompted with this tweet by the actor, Alyssa Milano:

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1 Malcolm Gladwell, *Small Change – Why the revolution will not be tweeted*, The New Yorker, October 4, 2010, https://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell.

2 Twitter was released in July, 2016. *See* Michael Arrington, *Odeo Releases Twttr*, TechCrunch, July 16, 2006, https://techcrunch.com/2006/07/15/is-twttr-interesting/.

3 "Hashtags, words or phrases preceded by the # symbol, have been popularised on Twitter as a way for users to organize and search messages." For more on the origins of the hashtag, *see* Ashley Parker, *Twitter's Secret Handshake*, The New York Times, June 10, 2011, https://www.nytimes.com/2011/06/12/fashion/hashtags-a-new-way-for-tweets-cultural-studies.html?_r=1&pagewanted=all.

> If all the women who have been sexually harassed or assaulted wrote 'Me too' as a status, we might give people a sense of the magnitude of the problem.[4]

Although civil rights activist, Tarana Burke, coined the phrase "Me Too" in 2006 (even prior to Twitter),[5] it was Milano's tweet that gave birth to the revolution. Women across the world responded to the cry for solidarity, including many eminent members of Hollywood, resulting in the '#MeToo' movement going viral. The movement spread across industries and borders, and was picked up within minutes by the Indian social media space. An American news channel put the number of tweets with this hashtag at 1.7 million across 85 countries as early as on October 26, 2017, only 11 days after the first tweet by Milano.[6]

Apart from highlighting the ubiquity of sexual harassment and assault, the '#MeToo' movement has been a catalyst for debate on the 'real world' relevance of an online movement, especially considering the ephemeral nature of social media. These debates came to a head when the movement resulted in a campaign and demanded real consequences for the men accused of sexual harassment. The lead case in point is that of Hollywood film producer, Harvey Weinstein, who was recently indicted by a grand jury and subsequently pleaded 'not guilty' in relation to the rape and sexual assault charges levelled against him.[7]

Recent India-centric women's rights online movements mirroring '#MeToo' may be analysed in the context of reactions to the horrific

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[4] Tweet by Alyssa Milano, October 15, 2017, accessible at https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

[5] Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It- 10 years ago*, The Washington Post, https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.b30b5ec059ad.

[6] Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS News, October 24, 2017, https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/.

[7] James C. McKinley Jr, *Harvey Weinstein Pleads not Guilty to Sexual Assault Charges*, The New York Times, June 5, 2018, https://www.nytimes.com/2018/06/05/nyregion/harvey-weinstein-manhattan-court.html.

December 2012 gang-rape,[8] and the case of Mahmood Farooqui.[9] India reacted with widespread protests in the aftermath of the Delhi gang-rape incident. Throngs of people took to the streets, demanding action against the perpetrators. The Justice J.S. Verma Committee, constituted as a result of such public indignation, suggested amendments to the provisions relating to rape.[10] What followed was the significant enactment of the Criminal Law (Amendment) Act, 2013 ("2013 Amendment"), by which Explanation 2 was inserted to Section 375 of the Indian Penal Code, 1860, introducing a definition of 'consent' in the context of sexual acts. The Delhi High Court missed an opportunity to correctly interpret this Explanation in the case of Mahmood Farooqui.[11] In September 2017, four years after the epoch-making 2013 Amendment, the High Court, while reversing the conviction awarded by the trial court, delivered a problematic judgment on consent and the communication of consent.[12] The judgment caused great uproar on social media. Subsequently, an appeal filed by the victim before the Supreme Court of India came to be dismissed *in limine*, and the Delhi High Court decision stood confirmed.

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[8] Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1. In this case, the Supreme Court affirmed the conviction and death sentence of the accused in what is more commonly known as the 'Nirbhaya rape case'. A review petition was filed against the above judgment, which was dismissed by the Supreme Court in Mukesh v. (NCT of Delhi), Review Petition (Crl.) No. 570 of 2017.

[9] Mahmood Farooqui v. Govt. of NCT Delhi, Crl. App. 944/2016.

[10] Report of the Committee on Amendments to Criminal Law, January 23, 2013, http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.

[11] Mahmood Farooqui, *supra* note 9.

[12] *Id*. The correctness of the Delhi High Court judgment is not being dealt with in this article. However, the debate around the same as it appeared on popular media is contextually relevant. For opposing views on the legality of the judgement of the Delhi HC *see* Rupali Samuel, *The Acquittal in the Mahmood Farooqui Case: A Mirror to Us All*, Bar & Bench, September 30, 2017, https://barandbench.com/acquittal-mahmood-farooqui-case/; Madhavi Goradia Divan, *For No to Be No*, The Indian Express, October 4, 2017, https://indianexpress.com/article/opinion/columns/for-no-to-be-no-consent-consensual-physical-relationship-intimacy-rape-sexual-assault-mahmood-farooqui-case-4873167/.

Within the above socio-juridical context, I assess the '#MeToo' movement as it developed in India, taking the example of two significant events that were either a direct result of the movement, or drew strength from it. The first is the formation of the Women in Cinema Collective ("WCC") in Kerala in the wake of the sexual assault on a member of the Malayalam film fraternity, allegedly by a male colleague. The second is a controversial 'List' published by two activists on Facebook that featured the names of almost 70 male South Asian academics, alleging them to be perpetrators of sexual assault or harassment in some form.

I. The Women in Cinema Collective (Kerala)

The Malayalam film industry is a pioneering presence in Indian cinema, set apart by its quality of story-telling; particularly in the treatment of subjects that are way ahead of its time. Having a strong trade-unionist political backdrop, it did not come as a surprise when the Association of Malayalam Movie Artists (AMMA) was formed with the stated objective of fostering the interests and welfare of the artists associated with the industry. The bye-laws of AMMA served as a template for similar associations constituted in other regional film industries.

However, by the mid-2000s, the industry that boasted of multiple national award-winning thespians, fell prey to what is popularly known as 'super-star culture'. Thematically, this meant that films were produced with a singular focus on the 'superstar', anchoring on the 'star-power' of an actor (inevitably male), and accentuating his toxic masculinity with the sole objective of satisfying loyal fans' associations. Despite havinga multitude of extremely talented female actors, women in these films were often reduced to playing characters who were mere plot devices meant to fuel the messianic image of the uber-masculine male super-star. Notably, this formula found decades of commercial success, catering to a deeply patriarchal and regressive society in Kerala (which has a problematic history *qua* the treatment of its women).

The late 2000s saw the rise of a 'new wave' in Malayalam cinema, as younger artists created a place for themselves on and off camera. However, films with leading female characters were still not considered

commercially viable. This situation is not so different from other industries in India, Bollywood being no exception. Not so long ago, Cate Blanchett, in her speech while accepting her Oscar for best actress in 2014, gave a wake-up call to Hollywood: "[…] films with women at the center […] earn money".[13]

The 'super-star culture' crept into the functioning of the AMMA. This was especially problematic as major decisions in the industry were taken by a handful of these 'super-stars', despite the structure of the association and its bye-laws providing an image of an egalitarian community. One such power centre in the association was the actor Dileep. A widely successful commercial presence in the industry, he loomed over various associations in an acting career spanning almost two decades.

Five months before '#MeToo' 'broke' the internet, the industry witnessed a grim episode where a leading actress was abducted and assaulted by her driver in a moving car.[14] Days after the incident, a public rally was held under the aegis of the AMMA to express their solidarity. Almost all AMMA members participated- super-stars, starlets, planets and their moons. Dileep was also present. In the coming days, investigations would reveal that the incident was orchestrated by Dileep, leading to his arrest and detention for more than two months.

As a direct response to this incident, an informal association of around 20 female artists working in the Malayalam Film Industry formed the 'Women in Cinema Collective' (WCC). Initially an unregistered organization, the WCC was registered as a society on November 1, 2017, within days of the '#MeToo' movement.

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[13] Jenn Selby, *Cate Blanchett's Best Actress Oscars 2014 Acceptance Speech*, The Independent, March 3, 2014, https://www.independent.co.uk/arts-entertainment/films/news/oscars-2014-cate-blanchett-s-best-actress-acceptance-speech-in-full-9164895.html.

[14] *Dileep in Jail: From Denial to Arrest, Timeline of His Alleged Involvement in Malayalam Actor Abduction*, The News Minute, July 20, 2017, https://www.thenewsminute.com/article/denial-arrest-timeline-dileeps-involvement-abduction-and-sexual-assault-malayalam-actor.

Dileep's alleged involvement in the incident sparked the usual reactions from the media and society, with the victim-blaming narrative taking centre-stage. At this point, the formation of the WCC, and their collective call for absolute solidarity with the actress involved, helped shape a narrative that is unusual in any discussion surrounding sexual assault and harassment - 'her's'. For an association that operates primarily on social media, it helped build a strong support base in favour of due process, forcing the Chief Minister of the State to set up a commission headed by a former judge of the Kerala High Court to look into the working conditions of women in the Malayalam Film Industry.[15]

One of the significant demands of the WCC is the setting up of an Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("SHW Act, 2013") for every film unit. Apart from this demand, which is directly related to the ill-treatment of women during the production process, more basic demands like proper sanitation facilities on a film-set have also been raised by the WCC.

Much has already been written about the toxic nature of misogynistic online trolls, with innumerable instances of cyber-bullying, often involving rape and death threats directed at mostly women celebrities, particularly if they 'dare' to have an opinion.[16] WCC is one of its kind and its birth was not treated with the aplomb and celebration it deserved. Members of the WCC and its members were subjected to cyber-bullying and even rape threats, as in the case of the actor Parvathy Thiruvothu.[17] Nonetheless, WCC has embraced an online presence to

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[15] Megha Varier, *Is Hema Commission Set up by Kerala Govt to Study Gender gap in Cinema in Limbo?*, The News Minute, April 11, 2018, https://www.thenewsminute.com/article/hema-commission-set-kerala-govt-study-gender-gap-cinema-limbo-79387.

[16] U. Hiran, *Online Abuse of Women Tops Cybercrime Cases in State*, The Hindu, April 17, 2017, https://www.thehindu.com/news/cities/Kochi/online-abuse-of-women-tops-cybercrime-cases-in-state/article18074937.ece.

[17] *'We're Planning to Rape You': Man Who Sent Threat to Parvathy Picked up by Kerala Cops*, The News Minute, December 28, 2017, https://www.thenewsminute.com/article/we-re-planning-rape-you-man-who-sent-threat-parvathy-picked-kerala-cops-73869.

voice their concerns regarding the treatment of women, without losing its focus on the on-going trial of the accused in the abduction case. WCC's protests also found support from the younger male members ('new wave') of the Malayalam film industry. Finding its hands forced, the AMMA expelled Dileep from the organization in November 2017.

Informally, WCC was announced in May 2017, but registered only in November 2017. It thus completed a year of existence in May 2018. However, the attitude towards them from society and the industry seems to have seen little change. As this piece is written, prominent members of the WCC (who are also members of the AMMA) submitted their resignation to AMMA in protest of its decision to reinstate Dileep while he is still arrayed as an accused in the trial (where a charge-sheet has been filed).[18] Objecting to the closed-door nature of the decision-making process without even a proper agenda on the issue, the WCC took to social media to ask pertinent questions to AMMA as well as the public in relation to its treatment of the survivor.

The formation of the WCC was necessitated by the continuing impunity of the male-dominated industry, with AMMA at its helm. When apparently democratic structures are subverted to proliferate and fuel patriarchy in a systemic manner, the WCC's resort to social media to create a political statement and giving voice to the Indian feminist movement is significant. In the context of the '#MeToo' movement, it is only appropriate that the WCC has sought to make its dissent and protests heard and seen through social media. Similar movements such as the 'Time's Up' movement,[19] founded by Hollywood celebrities in

[18] As of July 19, 2018, Dileep has refused to accept membership until his innocence is proven giving a rest to the controversy for now. *Dileep row: AMMA sets date to meet WCC members*, The Indian Express, July 19, 2018, https://indianexpress.com/article/entertainment/malayalam/dileep-row-amma-sets-date-to-meet-wcc-members-5266513/.

[19] Alex Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements- And How They're Alike*, Time, March 22, 2018, http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/.

response to '#MeToo', and the 'Weinstein effect',[20] mirror the impact of women standing up against rising sexual harassment in their industry. Even though it comprises leading female actors and technicians, as long as organizations like the AMMA, which operate like a fiefdom, continue to exercise significant control, the virtual protests of the WCC may not result in immediate consequences in the industry. However, the work of the WCC as an integral part of the Indian feminist movement is beyond its members, and with supporting voices of prominent members in media and politics, a long-term effect is inevitable in the general discourse around the portrayal of women and cinema in the industry.

II. The 'List'

While the '#MeToo' movement was taking over the internet, a slightly discordant note was sought to be struck by a renowned academic, C. Christine Fair. Ostensibly, the purpose of'#MeToo' was to strengthen individuals to use their agency to do what they wished with their story of sexual harassment—whether it be to avail of due process or not. Christine Fair, on the other hand disagreed with '#MeToo' putting the onus on the victim to stand up and be counted, yet again. With an open letter to "to some of the men in her life who abused, assaulted, or harassed her and the women who enabled them", entitled '#HimToo: A Reckoning', Fair proceeded to detail her experiences of abuse and harassment at the hands of various men (many belonging to the academia) under a section "Wall of Shame".[21]

Soon after, Raya Sarkar, a student of law, published a list of 60-odd names of South Asian academics on her Facebook wall. This was accompanied with a call that read as follows:

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[20] Gene Maddaus, *'Weinstein Effect' Leads to Jump in Sexual Harassment Complaints*, Variety, June 18, 2018, https://variety.com/2018/biz/news/weinstein-effect-sexual-harassment-california-1202849718/.

[21] C. Christine Fair, *#HimToo: A Reckoning*, Buzzfeed, October 25, 2017, https://www.buzzfeed.com/christinefair/himtoo-a-reckoning?utm_term=.fu2xqDGKq#.ipqDLJy6L. Initially published on Huffington Post, Buzzfeed published the article once Huffington Post took it down.

> If anyone knows of academics who have sexually harassed/ were sexually predatory to them or have seen it first-hand, PM me and I'll add them to the list.

The 'List', unlike Fair's detailed account of her various horrid experiences, merely named these academics and the institutions they belonged to. Despite its lack of detail, the 'List' was widely shared on various social media platforms and soon enough, picked up by traditional media. However, criticism was to first come in the form of astatement issued by prominent Indian feminists on the blog, *Kafila*.[22] Signed by many seasoned feminists such as Ayesha Kidwai, Nivedita Menon, and Vrinda Grover to name a few, the statement highlighted the importance of due process and the need to strengthen institutions, while disapproving the politics of 'name and shame' lists, calling for its immediate withdrawal. This statement in turn received great criticism for its somewhat patronising tone. Debate, which regressed into sheer mud-slinging, ensued between the so-called 'establishment feminists' and 'millennial feminists'. Bonafides of both sides came in question. On the other hand, Tarana Burke was one of the first to endorse the politics of naming and shaming, giving express support to Sarkar.

The ephemeral nature of social media ought to have guaranteed a quick and immediate burial to the 'List' in public memory—or at least, some would have hoped. However, that was not to be so. The 'List' for all its failings, successfully managed to bring to the fore a very important conversation about due process.[23] The efficacy of

[22] Nivedita Menon, *Statement by Feminists on Facebook Campaign to 'Name and Shame'*, Kafila, October 24, 2017, https://kafila.online/2017/10/24/statement-by-feminists-on-facebook-campaign-to-name-and-shame/.

[23] Interestingly, the 'List' emboldened a woman to file a complaint with the Internal Complaints Committee of Ambedkar University, Delhi, against academic Lawrence Liang (whose name appeared on the 'List', for an incident which took place prior to Liang's tenure at the University. The Committee broadened its jurisdiction to third-party complaints, and after a preliminary inquiry, found Liang guilty of sexual harassment. This is an example of how the 'List' actually culminated into justice being done through due process. *In Finding Dean Guilty, University Panel Expands Jurisdiction Over Sexual Harassment*, The Wire, March 13, 2018, https://thewire.in/gender/in-finding-dean-guilty-university-expands-jurisdiction-over-sexual-harassment.

the institutions that were in place to address complaints of sexual harassment were questioned, yet again. Technicalities of jurisdiction and limitation, among other failings, inevitably rendered the process unfavourable to the complainant.

The SHW Act, 2013 has been subjected to much criticism, primarily for how it departed from the *Vishakha* guidelines.[24] In the University context, further guidelines were also issued by the University Grants Commission(UGC) in accordance with the SAKSHAM committee recommendations.[25] However, the adoption of the Act and the UGC guidelines by universities has also resulted, in some cases, in weakening the existing structure put in place prior to the Act. For instance, the GSCASH (Gender Sensitization Committee against Sexual Harassment) in Jawaharlal Nehru University, set up in 1998, served as a model for a strong, inclusive institution to deal with sexual harassment related complaints.[26] It was replaced by the administration of JNU with a weaker body, ostensibly to bring it in accord with the regime of the 2013 Act.[27]

In a larger context, a discussion on the politics of feminism in social media was inevitable. Supporters of the 'List' called it a radical move to challenge belief in the victim's narrative, when the narration is by a proxy and not directly by the person affected. In attacking Sarkar and her bonafides, the critics faltered in having no real justification to question her process in the first place. Sarkar was carrying out this exercise at immense personal risk, based on narratives that were recounted to her. Equally, the section that called to rally behind 'due process' and to endeavour to strengthen institutional frameworks, were

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[24] The Vishakha Guidelines were a set of procedural guidelines for use in India in cases of sexual harassment promulgated by the Supreme Court in Vishakha v. State of Rajasthan, (1997) 6 SCC 241. The guidelines were by the SHW Act, 2013.

[25] UGC (Prevention, prohibition and redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015, Reg. L-33004/99.

[26] The JNU GSCASH Archive, https://www.jnu-gscash-archive.org/.

[27] The action of the administration is subject matter of a challenge pending in the High Court of Delhi.

quite unfairly attacked for their past associations with certain names on the 'List'.[28] If the narrative-based recourse was to be the heartbeat of the 'List' movement, it failed to achieve any purpose by choosing a proxy. Even while meeting the challenge to believe the proxy, the lack of context and a narrative in a list-format betrays the narrative-driven recourse. In that sense, it is starkly different from Fair's act of naming the sexual offenders in her life.

Ten months after the publication of the 'List', it has emboldened an affected person to come forward and lodge a complaint against a member of the faculty at the Asian College of Journalism, who was named in the 'List'.[29] Ironically, the complaint was rejected on issues of jurisdiction and limitation.[30]

The 'List' remains on Sarkar's Facebook wall. However, it may be about time the writing on the wall about due process received some attention.

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According to a recent report, India has the dismal distinction of being the most dangerous country in the world for women.[31] Last year in July 2017, India also had the most number of Facebook users.[32]

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[28] Ayesha Kidwai has been on the forefront of the JNU GSCASH struggle right from its inception and through the legal battles in the Courts.

[29] Neerja Dasani, *Raya Sarkar's List, and How it Empowered Me to tell my Story*, The News Minute, January 8, 2018, https://www.thenewsminute.com/article/raya-sarkar-s-list-and-how-it-empowered-me-tell-my-story-74357; *see* also Manasi Karthik, *Lessons from ACJ: Why ICCs Are Inadequate to Deal with Cases of Sexual Harassment*, The Caravan, July 14, 2018, http://www.caravanmagazine.in/society/gender-sexuality/lessons-from-acj-icc-inadequate-sexual-harassment.

[30] *ACJ Statement on Sexual Harassment Allegations: Sadanand Menon not to Teach Next Year*, The News Minute, May 9, 2018, https://www.thenewsminute.com/article/acj-statement-sexual-harassment-allegations-sadanand-menon-not-teach-next-year-80979.

[31] *Is India Really the Most Dangerous Country for Women*?,BBC News, June 28, 2018, https://www.bbc.co.uk/news/world-asia-india-42436817.

[32] *India Now Has highest Number of Facebook Users, Beats US:* Report, July 14, 2017, https://www.livemint.com/Consumer/CyEKdaltF64YycZsU72oEK/Indians-largest-audience-country-for-Facebook-Report.html?utm_source=scroll&utm_medium=referral&utm_campaign=scroll.

'#MeToo' could not have hit the Indian landscape at a more relevant time. Like in most other countries, the spread of the '#MeToo' movement spurred contextualised debates and has resulted in tremors in patriarchal structures in multiple industries—media, cinema, politics, comedy etc. To consider the movement as a short-lived spurt or fad is to ignore what lies at its core – the fact that women are disproportionately disadvantaged based on their gender. It also ignores the mushrooming of conversations and debates that are a direct result of it.

The plurality of social media as a platform in contrast with civil society resulted in this movement being inclusive at its core. The movement was also inter-sectional, as feminism ought to be. It cut across differences of race, religion, caste and class. Several manifestations of the movement were birthed ('#himtoo', '#mentoo' etc), depending on how the message was perceived. '#MeToo' has in a short span of time, evolved into a movement layered with varying contexts and participants.

Alyssa Milano testified before the US Congress in June this year in support of the Equal Rights Amendment (ERA) after the ERA movement received a renewed push with '#MeToo'.[33] The movement has ushered in a new era for the Indian feminist movement and it has stepped outside of virtual platforms. Post '#MeToo', a narrative-based recourse must be encouraged, and for that, our institutions must be strengthened. Due process and natural justice must be facilitators, not impediments.

[*Disclaimer*: The Editors wish to clarify that this article was written and submitted for publication before the emergence of the #MeToo India movement, which gained steam some time in October, 2018. To that extent, this article is limited to an analysis of events preceding the #MeToo India movement.]

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[33] Judy Kurtz, *Alyssa Milano visits Capitol Hill to advocate for Equal Rights Amendment*, The Hill, June 6, 2018, http://thehill.com/blogs/in-the-know/in-the-know/391025-alyssa-milano-visits-capitol-hill-to-advocate-for-equal-rights.

Fetal Impairment & Reproductive Justice*

Meher Dev†

In *Dr. Nikhil D. Datar* v. *Union of India*,[1] the Bombay High Court did not allow a woman to terminate her 26 weeks' pregnancy, even though she discovered that her fetus suffered from 'substantial heart abnormalities' only in the 24th week of her pregnancy. The Court constituted a committee of medical experts to review the situation. The committee opined that "there are very least chances that the child will be born incapacitated and handicapped to survive" and concluded that the pregnancy should not be terminated. The Court noted that the committee referred to the possibility of a "substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped". Based on the committee's report, the Court observed that the committee even suggested the possible treatment required to overcome any problems that the child may face in life. Finally, it held that after 20 weeks of pregnancy, termination is permissible only if there is danger to the pregnant woman's life as stipulated under section 5 of the Medical Termination of Pregnancy

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[1] (2008) Vol. 110(9) Bom.L.R. 3293.

Act 1971 ("MTP Act"). The Court rejected the challenge to the constitutionality of section 5(1) of the MTP Act, which prohibits termination of pregnancies on account of fetal impairment.

Unfortunately, the woman miscarried a week after this decision. Dr. Nikhil Datar, the petitioner, filed an appeal against the Bombay High Court decision in the Supreme Court,[2] challenging the constitutionality of the 20-week limit prescribed under section 3(2)(b) of the MTP Act on the ground that it violates a woman's right to life, health, and dignified existence guaranteed under Article 21 of the Constitution of India. His petition seeks an order from the Court directing the Government of India to revise the MTP Act so as to permit abortions in cases of fetal impairment throughout the term of a pregnancy. His petition seeks to include grounds for termination due to fetal impairment, and extend the health of the child exception in section 3(2)(ii) to match the mother's risk to life exception in section 3(2)(i) which does not have a time limit in accordance with section 5 of the MTP Act.[3]

Like the *Nikhil Datar* case, it has been the trend of courts in India to reject or allow termination requests of women on the basis of the chances of survival of the fetus, depending on the nature of the fetal impairment. It is the gradation of fetal impairment and the fetal survivability that play a determining role in whether a woman can terminate her pregnancy. In other jurisdictions, including United States, such a judicial trend of according greater weight age to the fetus' interests over a women's right to make decisions about her body, has been criticized in so far as it conflicts with women's constitutional rights to liberty, privacy and equality.[4]

In this paper, I advocate for broadening of the current reproductive rights-based framework and for adoption of a reproductive justice approach that takes into account the concerns of disability rights

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2 Dr. Nikhil D. Datar v. Union of India, C.A. No. 007702/2014.

3 Centre for Reproductive Rights & HRLN, *Datar v. Union of India*, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar_v_India.pdf.

4 Dawn E. Johnsen, *Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L.J. 599 (1986)

advocates. Sarah London explains the meaning of reproductive justice as follows:

> Reproductive justice is not interchangeable with reproductive rights, but rather reflects a fundamentally different approach to social change. Reproductive justice is rooted in a rich history of organizing among women of color within movements for social justice and women's health. Additionally, reproductive justice is about shifting resources-in addition to extending rights-to those who lack the information and means to achieve self-determination in reproduction. Reproductive justice activists recognize that "reproductive choice" does not occur in a vacuum, but in the context of all other facets of a woman's life, including barriers that stem from poverty, racism, immigration status, sexual orientation and disability. To achieve reproductive justice, according to movement leaders, oppressed communities must build power through organizing, education and political mobilization.[5]

In the context of reproductive rights in United States, she notes that the historical reliance of the reproductive rights movement on a more individual rights centric framework has proved to be inadequate in addressing barriers to access and to shift resources and power to communities.[6] She further notes that prioritization of litigation over other non-legal tactics has had disempowering effects, as women lacking the resources to engage lawyers have not been able to seek relief from courts.[7] Similarly, for women in India, only a limited number of women having access to resources have been able to approach courts for relief in cases of termination of pregnancies. Courts have assessed cases of women seeking termination of pregnancy on an individual

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5 Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 Berkeley J. Afr.-Am. L. & Pol'y 71, 102 (2011) at 72; *see* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L. J. 1394 (2009).

6 *Id*. at 87.

7 *Id*. at 86.

basis thereby not providing a solution for all women but only to those who can approach courts.

Part I of this article -'MTP Framework', discusses the legal framework provided under the MTP Act for abortion on grounds of a substantial risk of fetal 'physical or mental abnormalities' which may result in a child being 'seriously handicapped'. Instead of using the language used in the MTP Act, "there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped", the phrase 'substantial risk of physical or mental impairment as to be seriously impaired' will be used in this paper.

In part II– 'Fetal Impairment Cases', this paper analyses the gradation of fetal impairment created by courts and the impact of such gradation in deciding whether a pregnancy shall be allowed to be terminated or not. It is argued that courts focus on gradation of fetal impairment unless the fetal impairment causes danger to a pregnant woman's life.

In part III – 'Need to integrate a 'Reproductive Justice' approach with a 'Disability Justice'perspective', based on the outcomes of court cases discussed in part II, this paper concludes by suggesting that while reproductive rights-based litigation has at times provided relief to some women, a reproductive justice approach should be adopted to include concerns of disability rights advocates, of women who cannot approach courts for termination, and of those whose request for termination has been rejected by courts. A reproductive justice approach will be in consonance with India's constitutional framework. India as a welfare State should create an environment that enables all women to make reproductive choices and realize the right to reproductive self-determination. This includes women who wish to terminate their pregnancy due to fetal impairment or those who wish to give birth with fetal impairment.

I. MTP Framework

Prior to 1971, abortion could not be performed except in cases where the life of the mother was in danger. The Indian Penal Code, 1860 ("IPC") criminalized abortions undertaken for any other reason.

The MTP Act was enacted in 1971 to liberalize the law on abortion and to provide for termination of pregnancies by registered medical practitioners. Its object was to eliminate abortions performed by untrained persons in unhygienic conditions, and to reduce maternal morbidity and mortality. The Statement of Objects and Reasons of the MTP Act reads as follows:

> […] The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy has been received (1) as a health measure—when there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds—such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and (3) eugenic grounds—where there is substantial risk that the child, if born, would suffer from deformities and diseases. (emphasis supplied)

Section 3(2)(ii) of the MTP Act recognizes the reproductive right to terminate a pregnancy with fetal impairment as a special circumstance of abortion. It reads as follows:

> Section 3 - When pregnancies may be terminated by registered medical practitioners
>
> (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,--
>
> (a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
>
> (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are,

of opinion formed in good faith, that—

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

<u>(ii) there is a substantial risk that if the child were born, it would suffer form such physical or mental abnormalities as to be seriously handicapped.</u>

Explanation 1.--Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant <u>woman's actual or reasonably foreseeable environment</u>.

(4)(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman. (emphasis supplied)

While courts have seen the MTP Act as a legislation that advances women's fundamental rights to life, personal autonomy, bodily integrity

and dignity guaranteed under Article 21 of the Indian Constitution,[8] the provisions permitting abortions on grounds of fetal impairment have been criticized by disability rights advocates as they argue that such provisions treat impaired persons as sub-humans, and encourage eugenics.[9] Even in the United States, the reproductive rights movement's early tolerance of eugenics in legal fights for abortion excluded people with disabilities, leaving goals of reproductive and disability justice advocates vulnerable to divisive tactics by anti-abortion advocates.[10] Others have criticized the provision for permitting abortions on grounds of fetal impairment only up to 20 weeks, as fetal impairments are more likely to be discovered only after 20 weeks of pregnancy.[11]

Section 5 of the MTP Act does not explicitly refer to abortion on grounds of fetal impairment but it comes into play in cases where fetal impairment is of a nature that causes danger to a pregnant woman's life. The section removes any time limit within which abortion on such a ground may be permitted. The relevant sub-section 5(1) of the MTP Act reads as follows:

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8 A public interest petition was filed in the Rajasthan High Court titled Nand Kishore Sharma v. Union of India, AIR 2006 Raj 166, challenging the constitutional validity of section 3(2) of the MTP Act on the grounds that it violates the fundamental right to life of an unborn child. The Court dismissed the challenge and held that section 3(2) is in furtherance of the fundamental right to life of pregnant woman guaranteed under Article 21. The Supreme Court in Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1, has also held that a woman's right to make reproductive choices including the choice to abstain from procreating is a part of her personal liberty under Article 21 of the Constitution.

9 *See* Sathya Narayan, *Disabled — do they have the right to be born?*, The Hindu, April 12, 2005, http://www.thehindu.com/op/2005/04/12/stories/2005041200181500.htm.

10 *Shifting the Frame on Disability Rights*, Centre for Reproductive Rights, 2017 at 27-28, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf.

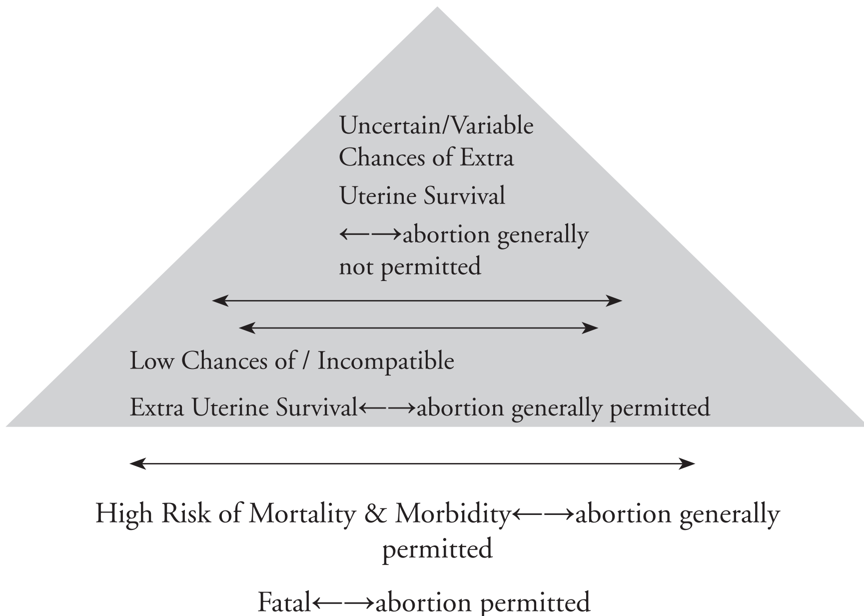
11 Satvik Varma, *Not Just a Question of Weeks,* The Hindu, July 29, 2017, http://www.thehindu.com/todays-paper/tp-opinion/not-just-a-question-of-weeks/article19382088.ece.

Section 5 - Sections 3 and 4 when not to apply

(1) The provisions of section 4, and so much of the provisions of sub section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

II. Fetal Impairment Cases

Section 3(2)(ii) of the MTP Act, which allows for termination of pregnancy if "there is a substantial risk" for the child to "suffer from such physical or mental abnormalities as to be seriously handicapped" if born, has been interpreted by courts to refer to the chances of extra-uterine survival of the fetus. It is on the basis of the survivability of the fetus, which in turn is linked with the nature of fetal impairment, that the courts decide whether to allow termination of pregnancy or not.



It is interesting to compare and see the impact of the nature of, and gradations of fetal impairment on courts' decisions to allow or not allow termination of pregnancies. On a review and analysis of courts decisions, it is seen that fetal impairments cases can be categorized as follows: fatal fetal impairment, fetal impairment with high risk of mortality and morbidity, fetal impairment causing low chances of extra-uterine survival, and fetal impairment causing uncertain or variable chances of extra-uterine survival.

There is a direct correlation between the nature of fetal impairment and the court's decision to allow termination of pregnancy. The courts usually rely on medical opinions to ascertain the nature of the fetal impairment.

While dealing with 'fetal impairment cases with certain fatality of the fetus', the courts have allowed medical termination of pregnancies beyond the 20 weeks gestational limit prescribed under section 3(2)(b) of the MTP Act in view of the for see able danger to a woman's life and for the reason that continuation of pregnancy will have a grave impact on the woman's physical and/or mental health.

Similarly, while dealing with 'fetal impairment cases with high risk of mortality and morbidity', and those of 'fetal impairment causing low chances of extra-uterine survival', the trend of the courts has been to allow medical termination of pregnancy beyond 20 weeks if continuation of pregnancy will cause physical and/or mental injury to the woman by applying section 5 of the MTP Act, which permits terminations beyond 20 weeks if necessary to save the life of the woman or girl.

On the other hand, while dealing with 'fetal impairment cases causing uncertain and variable chances of extra-uterine survival', the courts have not allowed termination of pregnancy on the grounds that there is no danger to the woman's life and no certainty of consequences of impairment.

Fatal Fetal Impairment

In *Meera Santosh Pal* v. *Union of India*,[12] the Supreme Court allowed

[12] (2017) 3 SCC 462.

a medical termination of a 24 weeks' pregnancy of a 22-year old woman who carried a fetus suffering from 'anencephaly', an incurable defect that leaves fetal skull bones unformed and is certain to lead to death of the born child shortly after birth. The Court based its decision on: (i) the fatal nature of the fetal impairment as confirmed by the medical opinion, and (ii) the grave impact of continuation of the pregnancy on the physical and mental health of the woman and for see able danger to her life as confirmed by the medical opinion, (iii) risks of terminating pregnancy being within acceptable limits as confirmed by the medical opinion, (iv) right to bodily integrity under Article 21 of the Indian Constitution, and (v) medical opinion that the pregnancy should be terminated.

In *Mamta Verma* v. *Union of India*,[13] the Supreme Court allowed medical termination of a 25 weeks' pregnancy of a woman carrying a fetus with 'anencephaly'. The medical board opined that continuation of pregnancy with a fetus incompatible with extra-uterine life was causing "immense mental agony" to the woman. The Court relied on the medical board's opinion and allowed termination since termination could be carried out within acceptable risk limits.

Fetal Impairment with High Risk of Mortality and Morbidity

In *X* v. *Union of India*,[14] the Supreme Court allowed medical termination of a 24 weeks' pregnancy of a woman who carried a fetus diagnosed with incurable 'bilateral renal agenesis' (no kidneys) and 'anhydroamnios' (absence of amniotic fluid in the womb). The Court reasoned that the fetus was incompatible with long term post-natal extra uterine life, there existed a risk of intra-uterine fetal death, and continuation of the pregnancy can endanger the woman's physical and mental health, as confirmed by the medical board that recommended termination of pregnancy.

In *Sarmishtha Chakrabortty* v. *Union of India*,[15] the Supreme Court allowed medical termination of a 26 weeks' pregnancy in view of cardiac

13 W.P. (C) No. 627/2017.
14 (2017) 3 SCC 458.
15 W.P. (C) No. 431/2017.

defects of the fetus that carried high risk of morbidity and mortality. It also based its decision on the recommendation of the medical board which opined that the continuation of the pregnancy could lead to mental injury to the woman.

High Courts too tread on the footsteps of the Supreme Court. In *Priti Mahendra Singh Rawal* v. *Union of India*,[16] the Bombay High Court allowed the termination of a 26-weeks pregnancy of a woman carrying a fetus with severe multiple neurological and skeletal abnormalities. The Court took into account medical opinion that indicated substantial risk of serious physical handicap of the fetus and high chances of morbidity, mortality and mental retardation. It referred to Article 21 of Indian Constitution to supplement its decision to allow the woman to avoid a "life of misery".

In *Sonali Sandeep Jadhav* v. *Union of India*,[17] the Supreme Court allowed the medical termination of a 22 weeks' pregnancy of a woman carrying a fetus diagnosed with 'aqueductal stenosis and hydrocephalus', a disease with a very high probability of brain damage and possible cognitive impairment. After birth, surgical treatment offered to the child entailed risk of mortality and morbidity. The Court based its decision on the medical board's opinion that continuation of pregnancy will pose "severe mental injury" to the woman who wants to terminate her pregnancy since there is substantial risk of mortality and morbidity in the fetus if born.

Fetal Impairment causing Low Chances of or Incompatible Extra-uterine Survival

In *Geeta Devi* v. *State of Himachal Pradesh*,[18] the Himachal Pradesh High Court allowed premature delivery with surgical intervention of a 32 weeks' pregnancy of a woman with a hole in her heart and moderate mental retardation who carried a fetus with abnormal head growth. The medical opinion indicated that there were low chances of survival of the fetus and high chances of physical and mental injury to the woman due to abnormal head-growth of fetus.

[16] W.P. (C) No. 11940/2017.

[17] W.P. (C) No. 551/2017.

[18] W.P. (C) No. 2250/2017.

In *Shaikh Ayesha Khatoon* v. *Union of India*,[19] the Bombay High Court allowed the termination of a 27 weeks' pregnancy of a woman carrying a fetus with several congenital cardiac, bowel, and neurological malformations. It applied Section 5 of the MTP Act that permits termination of pregnancy if immediately necessary to save the life of the pregnant woman by accepting the argument that in cases of fetal abnormalities, mental injury caused to the woman (a condition under Section 3(2)(b)(i)) shall be sufficient to meet the requirement of Section 5. The Court based its decision on the medical opinion that indicated severe fetal malformations, substantial risk of serious physical handicap, and low chances of independent neo-natal survival of the fetus.

In *X* v. *Union of India*,[20] the Supreme Court allowed the termination of a 23-24 weeks' pregnancy based on the opinion of the Court-constituted medical board and by applying Section 5 of the MTP Act. The medical board opined that due to severe multiple congenital anomalies, the fetus was incompatible with extra-uterine life and that the woman should not continue with the pregnancy as it could endanger her physical and mental health gravely.

Fetal Impairment with Uncertain or Variable Chances of Extra Uterine Survival

In *Sheetal Shankar Salvi* v. *Union of India*,[21] the Supreme Court did not allow the termination of a 27 weeks' pregnancy of a woman who carried a fetus diagnosed with 'polyhydramnios with Arnold Chairi malformation Type 2 severe hydrocephalus, and lumbosacral meingo myelocele and spina bifida with tethered cord'. It based its decision on two main factors: (i) that despite the severe physical and mental morbidity of the fetus, the fetus may be born alive and may survive for a variable period, (ii) continuation of the pregnancy causes no danger to the woman's life, and (iii) medical opinion that the pregnancy should not be terminated.

19 Writ Petition (ST) No. 36727/2017.
20 W.P. (C) No. 593/2016.
21 W.P. (C) No.174/2017.

In *Savita Sachin Patil* v. *Union of India*,[22] the Supreme Court did not allow medical termination of a 26 weeks' pregnancy of a woman carrying a fetus diagnosed with 'trisomy 21' commonly known as 'Down's syndrome'. The Court noted that in cases of Section 3(2) of the MTP Act, two factors are relevant – danger to the woman's life, and danger to fetus' life. It disallowed termination of the pregnancy since the medical opinion stated that there is no physical risk to mother's life and that the fetus if born is likely to have mental and physical challenges. This case was tagged with the *Nikhil Datar case* for consideration of other issues raised about the constitutionality of the 20-week gestational limit.

Most scientific medical opinions are in probabilities. The courts have used the uncertain or variable chances of extra-uterine survivability as a factor to disallow medical termination of pregnancy in spite of the choice of women to terminate pregnancy. It is also interesting to note that in the uncertain or variable chances of extra-uterine survivability cases, the courts have not emphasized or taken into account the mental health of the woman while disallowing termination as opposed to the earlier set of cases of fatal fetal impairment, fetal impairment with high risk of mortality and morbidity, fetal impairment causing low chances of extra uterine survival where the courts while allowing termination have taken note of impact of the pregnancy on the mental health of the woman. This trend is yet another indicator of the direct correlation between the courts' decision of allowing termination and of the survivability of the fetus.

III. Need to integrate a 'Reproductive Justice' approach with a 'Disability Justice' perspective

Feminist discourses on reproductive rights need to understand the complexity of decision making in cases of fetal impairment and need to focus on the creation of an environment where people with disabilities can grow and develop to their fullest potential.[23] It is important to have a disability supportive environment for women to be truly able to make

[22] (2017) 13 SCC 436.

[23] Alison Piepmeier, *The Inadequacy of 'Choice': Disability and What's Wrong with Feminist Framings of Reproduction*, Feminist Studies, Vol. 39, No. 1 (2013) at 159-186.

the choice of whether to terminate a pregnancy with fetal impairment or to carry it to term.[24]

In the context of the Indian feminist movement, Professor Nivedita Menon, has stated that although abortion is a decision taken by individual women, a woman's decision is shaped by public and social arrangements and limitations.[25] She also argues that an ideal feminist world would not be one in which abortions are free and common, but one in which women have greater control over pregnancy, and in which the circumstances that make pregnancies unwanted, have been transformed.

Fetal impairment cases discussed above indicate the shortfalls of a reproductive rights-driven approach where there is unnecessary focus on the survivability of the fetus and not the woman's choice and her own assessment of the impact of the pregnancy on her. A reproductive justice approach can help fulfill these shortfalls by assigning different roles to reproductive rights advocates, lawyers, courts, doctors, and the State.

Role of reproductive rights and disability rights advocates

Collaborations between disability rights and reproductive rights advocates can help in achieving common goals. The reproductive rights movement can indicate its commitment to disability rights by integrating disability rights perspectives into their work,[26] for example, by advocating for the reproductive rights of women and girls with disabilities, by avoiding reinforcement of disability stigma in their advocacy, and instead focusing on a pregnant woman's right to make an informed, autonomous decision about what is best for herself and

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[24] Helen Meekosha, *The Complex Balancing Act of Choice, Autonomy, Valued Life, and Rights: Bringing a Feminist Disability Perspective to Bioethics*, INTERNATIONAL JOURNAL OF FEMINIST APPROACHES TO BIOETHICS, Vol. 3, No. 2, Special Issue: Disability Studies in Feminist Bioethics (Fall 2010) at 1-8.

[25] *See* Nivedita Menon, *Abortion As A Feminist Issue*, OUTLOOK, May 12, 2012, https://www.outlookindia.com/website/story/abortion-as-a-feminist-issue/280902; Nivedita Menon, *Abortion and the Law: Questions for Feminism*, 6 CAN. J. WOMEN & L. 103 (1993).

[26] *Supra* note 12 at 39-40.

her family.[27] Proactive support to policies that eradicate disability discrimination including supporting policy reform enabling access of people with disability to assisted reproductive technologies would go a long way towards the integration agenda.[28]

Another instrumental step in bridging the differences between disability rights and reproductive rights advocates can be the focus of the call by reproductive rights advocates for a broader health exception that conforms with the World Health Organization's definition of health as, "a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity", instead of focusing on fetal impairment.[29] This approach would require taking into account a woman's social and economic circumstances and her mental well-being in any assessment of a health risk.

Role of Courts

Focus by courts on the survivability of the fetus is at odds with concerns of disability rights advocates who hold the State accountable for failure to provide a disability friendly environment. There is a strong case for criticizing this interpretation of courts and their reliance on the factor of survivability of the fetus instead of only the extent and risk of impairment as required by the language of Section 3(2)(ii) which talks about the "substantial risk" of "seriously (being) handicapped". A reproductive justice approach would require the courts to not delve into the survivability of the fetus but instead look into the economic and social circumstances of the woman (who in all probability is the primary care giver) including the availability of public facilities provided by the State to support women raising children with impairments. This approach will be in consonance with India's welfare state mandate. Some courts have moved towards adopting this approach by widely interpreting Section 5 of the MTP Act to allow termination of pregnancies beyond 20 weeks based on the surrounding circumstances of the pregnant woman.[30]

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27 *Id.* at 34.

28 *Id.* at 44.

29 *Id.* at 43.

30 Shaikh Ayesha Khatoon v. Union of India, Writ Petition (ST) 36727/2017;X v. Union of India, Writ Petition (Civil) No. 593 of 2016.

Role of State

A reproductive justice approach will be in consonance with India's constitutional framework and will focus on India's welfare State mandate which in the context of reproductive rights will include creating an environment that enables all women to make reproductive choices including women who wish to terminate due to fetal impairment and those who wish to give birth with fetal impairment. The State is constitutionally mandated to provide access to reproductive health government services and maternity relief to all women, and to provide for early childhood care and education to all children below the age of six years.[31]

Role of Lawyers

Reproductive rights lawyers can adopt a more integrative form of lawyering where movement building is prioritized over legal battles and each legal step is contextualized within the movement's goals.[32] While integrative lawyering may look similar to the current approach of lawyers, it is very different in the sense that it is contextualized and "owned by the movement, ensuring that the movement builds power, rather than relies on lawyers for direction and methodology".[33]

Lawyers can assist in movement building by providing strategic advice, translating movement goals into legal claims,[34] engaging in negotiations with community stakeholders, lobbying decision-makers, promoting legal education,[35] and drafting legislation, or filing court cases challenging discrimination in the provision of reproductive health care.[36]

Role of Doctors

The MTP Act through its section 3(3), has vested discretion in registered medical practitioners to take into account a pregnant woman's

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31 Articles 21, 42, 45, the Constitution of India.

32 *Supra* note 7, at 96.

33 *Id.* at p. 99.

34 *Id.* at 97.

35 *Id.* at 96.

36 *Id.* at 99.

actual or reasonably for seeable environment while forming an opinion on whether to terminate her pregnancy or not. Section 3(3) reads :

> Section 3 - When pregnancies may be terminated by registered medical practitioners
>
> […]
>
> (3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment. […]

In *Sri. Bhatou Boro* v. *State of Assam*,[37] the Assam High Court directed a medical board to explore the possibility of terminating a 11-year old girl's pregnancy of 26 weeks on account of rape. The medical board had refused to terminate her pregnancy on grounds that her pregnancy exceeded 20 weeks, without evaluating the medical possibility of termination of pregnancy, the risks thereof and without taking into account the trauma of minor survivor. The minor thus approached the Court, which directed the medical board to assess whether the risk to terminate pregnancy is within acceptable limits and to take a decision to terminate the pregnancy keeping in mind the interest of the minor who has suffered trauma due to the unwanted pregnancy.

Doctors should make use of section 3(3) of the MTP Act to take into account the woman's choice and of section 5 of the MTP Act to terminate pregnancies beyond 20 weeks if the same is immediately necessary to save the life of the pregnant woman. Adopting the WHO definition of 'health', the right to life under Article 21 ought to be interpreted in a broader sense to mean both physical, as well as mental health.

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[37] W.P. (C) No. 6307/2017.

Marital Rape and Legal Privacy: Bringing Equality Home

Rupali Francesca Samuel[†]

> While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.[1]

The Indian Penal Code, 1860 ("IPC"), drafted by Lord Macaulay in the 19th century, was a product of the social mores of its time. It incorporated several aspects of Victorian morality. One such rule was the notion of coverture that stipulated that married women were the property of their husbands and had no individual identity in law. This was granted shape in an exception to the definition of rape that excluded all married men from prosecution for rape when forcible sexual intercourse was performed by them on their spouses. Exception 2 to Section 375 of the IPC was introduced, which stipulates that sexual intercourse, which includes forcible sexual intercourse, would not be rape when performed by a man upon his own wife. The Exception reads:

> Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

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1 Naz Foundation v. Govt. of NCT of Delhi, 2010 Cri LJ 94.

The exception is premised on the notional fact that all women in marital relationships sign off their consent forms for any form of sexual intercourse with their spouse at the time of marriage. According to this exception, the withdrawal of consent at any time during the subsistence of the marital relationship is impossible and unrecognisable in law. The consent now extends to a range of sexual acts.[2]

In this piece, I argue that the expanded notion of the right to privacy and the right to non-discrimination espoused by a nine-judge bench in *Justice K.S. Puttaswamy* v. *Union of India*,[3] and a Constitution Bench in *Navtej Singh Johar* v. *Union of India*,[4] requires that the marital rape exception be struck down as unconstitutional.

I. Equality

Equality jurisprudence under the Indian Constitution has undergone significant advancement in the Supreme Court's recent decision upholding the rights of LGBT persons in *Navtej Singh Johar*. Building on progressive readings of Articles 14 and 15 of the Constitution,[5] and the transformative jurisprudence of the Delhi High Court in *Naz Foundation* v. *Govt. of NCT of Delhi*, *Navtej Singh Johar* opens the doors for judicial review of many provisions of penal law rooted in oppressive Victorian morality. In this segment, I argue that the marital rape exception violates Articles 14 and 15(1) of the Constitution.

Article 15

Gendered stereotypes as discrimination

Legislation on the basis of stereotypical notions of gender roles is now recognised to be explicitly prohibited as discriminatory on the

[2] The Criminal Law (Amendment) Act, 2013 amended Exception 2 to include the phrase 'sexual acts'.

[3] (2017) 10 SCC 1.

[4] Judgment dated 6th September, 2018 in Writ Petition (Criminal) No. 76 of 2016 reported in 2018 SCC OnLine SC 1350.

[5] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for all the Minorities*, (2009) 2 NUJS Law Rev.419; *see* also Gautam Bhatia, *Equal Moral Membership: Naz Foundation and the refashioning of equality under a transformative constitution*, (2017) 1(2) In. Law Rev. 115.

ground of sex under Article 15(1) of the Indian Constitution.[6] In *Navtej Singh Johar,* Justice DY Chandrachud articulated the test as follows:

> A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.[7] [emphasis supplied]

The marital rape exception has its root in the notion of indirect consent which is founded on a particular understanding of the role of a wife as obedient and submissive to the will of her husband. It is legislation in furtherance of a stereotype based on traditional gender roles ascribed to married women. Thus, Exception 2 is prima facie discriminatory and violative of Article 15(1).

Strict Scrutiny

In *Anuj Garg* v. *Hotel Association of India*,[8] followed in both *Puttaswamy* and *Navtej Johar*, the Supreme Court held that laws which encoded "oppressive cultural norms that especially target minorities and vulnerable groups" must be subject to a heightened standard of judicial scrutiny or strict scrutiny.[9]

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6 For a detailed history and analysis of this principle see: Gautam Bhatia, *Sex Discrimination and the Anti-Stereotyping Principle: Anuj Garg vs. Hotel Association of India,* September 3, 2017, https://ssrn.com/abstract=3031374.

7 Navtej Singh Johar, *supra* note 4, at para 393.

8 (2008) 3 SCC 1.

9 Anuj Garg, *Id. See* paragraph 45: "No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until unless there is a compelling state purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases." [emphasis supplied]

Strict scrutiny is a standard of review in American equality jurisprudence that comprises a two-tier test: first, that the challenged law is in furtherance of a compelling state interest, and second, that the measure is the most narrowly tailored method of achieving that state interest.[10] While *Anuj Garg* uses the phrase 'strict scrutiny' review and invokes the standard of 'compelling state interest', it describes the second limb of the test in terms of proportionality review, which has its origin in the jurisprudence of Canadian and European courts.[11] Thus, strict scrutiny in Indian discrimination law is a modified test: first, that the suspect classification must be in furtherance of a compelling state interest, and second, that the measure is proportionate.[12] The result of this test, the Court clarified, is that classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.[13] This position was followed by the Delhi High Court in *Naz Foundation*, which *Navtej Singh Johar* reinstated as good law after overruling the Supreme Court judgment in *Suresh Kumar Koushal*v. *Naz Foundation*.[14]

10 This standard has been used by the US Supreme Court to test the constitutionality of race based classification. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995). Sex based classification, however, attracts the lower 'intermediate scrutiny' standard in American constitutional law. To pass intermediate scrutiny, the challenged law must, further an important government interest, and, must do so by means that are substantially related to that interest. *See* Craig v. Boren, 429 U.S. 190 (1976). The content of each of these standards is highly contested judicially. For a detailed discussion on the doctrine and its applicability to Indian law *see*, Tarunabh Khaitan, *Beyond Reasonableness — A Rigorous Standard of Review for Art. 15 Infringement*, 50(2) J. Ind. L. Inst. 177 (2008).

11 Anuj Garg, *supra* note 8, at paragraph 48.

12 *Id.*; Strict scrutiny as a judicial test has been held as inapplicable to the review of affirmative action policies by a Constitution Bench in Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 and hence its invocation in equality cases involving a challenging to a reservation/quota based laws is debatable. *See* Raag Yadava, *Taking Rights Seriously—The Supreme Court on Strict Scrutiny*, 22 NLSI Rev. 147 (2010).

13 Anui Garg, *supra* note 8, at paragraph 50, quoting with approval from United States v. Virginia, 518 U.S. 515, 532-33 (1996), per Ginsburg J.

14 (2014) 1 SCC 1. Suresh Kumar Koushal v. Naz Foundation, is the Supreme Court case that overturned Naz Foundation v. Govt. of NCT of Delhi, *supra* note 1, and reinstated Section 377 of the IPC in its full scope so as to include the criminalisation of consensual sexual acts between adults.

The encoding of a wife's subordination to, and ownership by her husband in the marital rape exception fails the strict scrutiny standard. The justifications offered for retaining the exception – preserving marital sanctity– is not a compelling state interest when seen in proportion with the rights at stake. Proportionality review also requires that the law be just, fair and reasonable.[15] In *Anuj Garg*, the Supreme Court held that the standard of judging 'proportionality' should be such that it is capable of being called reasonable in a modern democratic society.[16] Thus, the marital rape exception resoundingly fails the strict scrutiny test and is in violation of Article 15(1) of the Indian Constitution.

Marital status as a protected ground

Marital status is based on an intrinsically personal choice that speaks to the core of intimate life and must be considered a 'protected ground' for the purpose of judicial review. This would be in line with international human rights law. The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW), which India signed on July 30, 1980 and ratified on July 9, 1993, outlaws discrimination on the basis of marital status. India is bound by her commitments to international law and cannot legislate in explicit violation of international human rights treaties signed and ratified by India.[17]

Naz Foundation has been interpreted to argue that a combined reading of Articles 14 and 15 would mean that any classification that is based on personal characteristics not among the five named in Article 15(1), but which also had the potential to impinge upon personal autonomy, would invite the deeper scrutiny standard espoused in *Anuj Garg*. This argument finds endorsement in the opinion of Justice Indu Malhotra in *Navtej Singh Johar* where she holds that,"where legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia."[18] [emphasis supplied]

[15] K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1; Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[16] Anuj Garg, *supra* note 8, at paragraph 36.

[17] Independent Thought v. Union of India, (2017) 10 SCC 800.

[18] Navtej Singh Johar, *supra* note 4, at para 520.

Thus, marital status ought to be read as analogous to the grounds enlisted under Article 15(1) and must also be brought within the guarantee against non-discrimination embodied by a combined reading of Articles 14 and 15(1).[19] Since the marital rape exception denies a remedy under criminal law to women on the basis of the marital status of the victim, it violates the right to equality and is unconstitutional.

Article 14

Rational basis review, while being a much weaker test than proportionality review, requires that the classification of women on the basis of marital status must have a legitimate State purpose that would bear a rational nexus to the differentia. A discriminatory purpose has been held to not be a legitimate purpose.[20] If the object of the classification is illogical, unfair, and unjust, the classification will have to be held as unreasonable and cannot be considered a legitimate public purpose.[21]

In *Navtej Johar,* in his concurring opinion, Justice D Y Chandrachud, invalidates section 377 on the ground that its object is discriminatory and cannot be held to be a legitimate purpose. Further, Justice Chandrachud states that the enforcement of Victorian morality cannot qualify as a legitimate purpose. He observes:

> The object sought to be achieved by the provision, namely to enforce Victorian mores upon the citizenry of India,

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19 Marital status has been recognized as a protected ground, inter alia, in the United States, UK, Australia, Canada, South Africa and New Zealand.

20 Anuj Garg, *supra* note 8, at paragraph 51. *See* also Subramanian Swamy v. Director, CBI, (2014) 8 SCC 682. In this case, the Court considered a challenge to the constitutionality of Section 6A of the Prevention of Corruption Act, 1988 which required prior sanction for investigation of corruption by when committed by senior government officers. It was held that by dividing offenders into two groups, one of which was accorded protection from criminal investigation and the other that was not, "the object itself is discriminatory", and "the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved." *See also*, State of Maharashtra v. Indian Hotel & Restaurants Association, (2013) 8 SCC 519 (popularly known as the 'dance bar' case).

21 Dipak Sibal v. Punjab University, 1989 (2) SCC 145.

> would be out of tune with the march of constitutional events that has since taken place, rendering the said object itself discriminatory when it seeks to single out same-sex couples and transgenders for punishment.[22]

In *Shayara Bano* v. *Union of India*,[23] it has been held that a statutory provision can be struck down on the ground of manifest arbitrariness, when the provision is capricious, irrational and without adequate determining principle, as also if it is excessive or disproportionate.[24] By this test, the marital rape exception is manifestly arbitrary and fails the test of proportionality and is unconstitutional.

II. Privacy

While affirming and upholding the fundamental right to privacy, a nine-judge bench of the Supreme Court in *K.S. Puttaswamy* recognised autonomy, that is, the exercise of personal choice by an individual, as the heart of legal privacy. Privacy, it was held, attaches to the person and is an essential facet of the dignity of a human being. Justice Chandrachud held:

> Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.[25]

Legal privacy is thus not simply about the zone of state interference in a person's life, but encapsulates the right of self-determination as fundamental to the dignity and liberty of an individual. The right to privacy has been recognised as a fundamental right protected collectively under Articles 14, 19 and 21. Any law that interferes with the privacy of an individual must pass a three-fold test to survive: first, it must be validly passed, second, it must be towards a legitimate state aim, and third, it must be proportional, that is, have a rational nexus between

22 Navtej Singh Johar, *supra* note 4, at para 82.
23 (2017) 9 SCC 1.
24 *Id*. at para 101. Followed in Navtej Singh Johar, *supra* note at para 82.
25 K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1, at para 323

the object and the means adopted to achieve it, and, be just, fair and reasonable.[26]

This notion of 'privacy of choice' was followed in *Common Cause* v. *Union of India*,[27] which explicitly recognised that the right to privacy protects autonomy in making decisions related to the intimate domain of bodily integrity. It was also affirmed that choices and decisions on matters such as procreation, contraception, and marriage are protected under the right to privacy.[28]

In *Shafin Jahan* v. *Asokan K.M.*,[29] the right to privacy was applied to explicitly affirm that societal norms cannot override individual exercise of choice. This was reiterated in *Navtej Singh Johar*, which emphatically recognises that sexual choices are an essential attribute of autonomy.[30]

The marital rape exception, built as it is on the perpetual consent of a woman to any form of sexual acts with her husband, denies the individual choice of a woman to control her own sexuality. In legislating away the autonomy of a person to exercise the choice to participate or refrain from sexual acts, is to completely decimate any notion of self-determination. Such a rule, to survive judicial review, must pass the test laid down in *K.S.Puttaswamy*, that it, be shown to be towards a legitimate state purpose, and must pass the standard of proportionality review. In the earlier segment on equality, I have argued that the marital rape exception, being an all-encompassing exclusion and being a classification that is discriminatory in effect, cannot pass this standard.

III. Legislative Will

A popular criticism to striking down the marital rape exception as unconstitutional is that it would render the court as a trespasser to legislative will. Both *K.S. Puttaswamy* and *Navtej Johar* respond to this critique by pointing out the role of a constitutional court as a counter

26 *Id*. at para 325.

27 (2018) 5 SCC 1.

28 *Id*. at para 84.

29 2018 (5) SCALE 422.

30 Navtej Singh Johar, *supra* note 4, at para 65.

majoritarian institution for the safeguard of fundamental rights. In *K.S. Puttaswamy*, Justice Chandrachud held:

> The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.[31]

This was buttressed Justice Chandrachud in *Navtej Singh Johar*, where he held:

> The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities.[32]

The constitutional court, far from overstepping its constitutional purpose, would be fulfilling its sacred role under the Constitution to uphold Part III rights of all individuals who lack the social power to resist oppression and fight majoritarian impulses.

Navtej Singh Johar provides another plank of attack against the marital rape exception by holding (per Nariman J.) that no such presumption of constitutionality attaches to a pre-constitutional statute like the IPC. He holds this by reasoning that the presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is aware of its limitations in enacting laws – it can only enact laws which do not fall within List II of Schedule VII of the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature

[31] K.S. Puttaswamy, *supra* note 25 at 144.
[32] Navtej Singh Johar, *supra* note 4, para 335.

or body, none of these parameters are applicable. This strengthens the argument that deference to the will of the legislature ought not to be given precedence to the protection of fundamental rights in the context of reviewing the marital rape exception.

IV. Constitutional Morality

In *Navtej Singh Johar*, the Supreme Court endorses the latin maxim 'cessant ratione legis, cessat ipsa lex', meaning when the reason for a law ceases, the law itself ceases.[33] The Court then resoundingly adopted the notion of constitutional morality first espoused by the Delhi High Court in *Naz Foundation*. In *Navtej Singh Johar*, Justice Chandrachud, held:

> Victorian morality must give way to constitutional morality as has been recognized in many of our judgments. Constitutional morality is the soul of the Constitution, which is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in Part III of the Constitution, particularly with respect to those provisions which assure the dignity of the individual. The rationale for Section 377, namely Victorian morality, has long gone and there is no reason to continue with - as Justice Holmes said in the lines quoted above in this judgment - a law merely for the sake of continuing with the law when the rationale of such law has long since disappeared.[34]

This renders impermissible any justification for a law founded on a Victorian notion of women as chattel or any social more that regards women as subordinate. Women have always been equal citizens under our Constitution. The Victorian era morality that denied women legal capacity (including the right to vote) and saw married women as the property of their husbands through the laws of coverture, has no relevance in our modern constitutional democracy. The stated purpose of protecting traditional family values or the unity of the family must

[33] Navtej Singh Johar, *supra* note 4, para 332.
[34] *Id*.

pass the test under Part III. It does not protect the marital rape exception from being struck down as unconstitutional.

V. Critiques

The most widely accepted criticism voiced by practitioners is that the removal of the marital rape exception will result in Section 375 being added to the arsenal of criminal charges that are routinely slapped against husbands in the already imbalanced playing field of marital litigation. Section 377 is already invoked against men for committing non-consensual sexual acts upon women within a marital relationship. There are many facets to addressing this concern. I want to deal with two aspects. The first is what I see as a need for serious introspection for the legal profession in terms of the legal advice we as practitioners mete out to clients. It requires detailed surveying to examine the extent to which the use of standard form pleadings in matrimonial cases with stylised invocation of heinous offences is a practice that is enabled and encouraged as 'strategic' by lawyers. Advocates must be held accountable for pleadings prepared on their advice in accordance with the code of ethics.

The second aspect that troubles me is the ease with which we declare that our criminal justice system cannot work. The entire purpose of criminal trial as a process is to have a mechanism to test the veracity of a complaint. Evidence under criminal law is an elaborate process that is meant to be designed to sift out truth from falsities. Guilt in criminal cases is only proved on the standard of 'beyond reasonable doubt' which when correctly applied is a very high threshold of proof. While the use of presumptions in law is meant to address severe power imbalances in case of aggravated rape, rape simpliciter does not carry any evidentiary presumption. The statement of a victim is tested by the rigours of cross examination and only those facts spoken of that are not contradicted, or, rendered unreliable or improbable, stand proved. The Supreme Court has already devised a mechanism for safeguards in the investigation and trial of matrimonial cases.[35] If required, rules of

[35] See Lalita Kumari v. Govt of U.P., (2014) 2 SCC 1, and Rajesh Sharma v. State of UP 2017 SCC OnLine SC 821, decided on 27.07.2017.

evidence and investigation related safeguards can be innovated to deal with specific issues that are found to apply to a matrimonial context if borne out by extensive data to support the same. Neither can the declared shortcomings in the working of the criminal justice system in India, nor the threat of false cases, be a basis for the denial of the constitutional rights to privacy, equality, non-discrimination, and liberty.

VI. Conclusion

The marital rape exception is a blot on our constitutional democracy that has no place in a society built upon equal concern, equal treatment, and equal respect of all persons. In denying personal autonomy, perpetuating harmful stereotypes of gender, discriminating against married women, and infringing legal privacy, the provision is violative of the most basic values of our Constitution. That marriage is a central organising institution in Indian society is even more reason to treat any deemed consent or notional consent in law with grave concern. This provision impacts the lives of millions of women across the country and has a chilling effect on autonomy in all other aspects of a married woman's life. A rights-bearing individual exists as an embodied member of her community which, as Ambedkar stated, can be deeply undemocratic in the hierarchies that exist *inter se* individuals. Our Constitution represents our collective commitment to altering these inequalities and marching on into a new phase of social justice under a transformative constitution. The removal of the marital rape exception will be one more giant step towards that vision.

The Curious Case of Akhila (Hadiya): The Complexities of Decisional Autonomy

Shubhendu Anand & Shivam Singhania†

The law and the justice system in India have made significant strides in addressing the sensitivities of women, both in the letter of the law and its impact. Those strides started with the Vishakha guidelines,[1] moved on to the amendment of provisions relating to rape,[2] and to the recent striking down of adultery law.[3] Yet, we have a long way to go and this is borne out from the fact that not only are women disproportionally the victims of gender neutral crimes under the Indian Penal Code, 1860, but numbers show that they are also less likely to get justice compared with similarly placed male victims. Data from the National Crime Records Bureau shows that for 2016, for victims of kidnapping and abduction between ages 18-30, 79% are women.[4] Two out of every three such reported incidents are for reasons of marriage or related issues.[5]

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1 Vishakha v. State of Rajasthan, (1997) 6 SCC 241.

2 *See* The Criminal Law (Amendment) Act, 2013.

3 Joseph Shine v. Union of India, Writ Petition (Criminal) No. 194 of 2017.

4 National Crime Records Bureau, Ministry of Home Affairs, *Crimes in India Statistics*, 2016, at 113, http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf

5 *Id.*

Akhila, a 24-year old woman, moved from Kottayam to Salem to undertake a professional course in homeopathy. Over time, after contact with Islamic cultural and academic institutions, she decided to convert to Islam.[6] She came to be known by multiple names,[7] and sought the shelter and guardianship of a woman by the name of Sainaba, a stranger, who she described as a 'senior psychologist' who had committed her life to carrying out religious conversions. Sainaba was also deeply entrenched with a known radical organisation and was its women's wing president.[8] Akhila evinced interest in leaving for Syria while under the self-described 'guardianship' of Sainaba, soon after groups of neo-converts from Kerala had left their homes for a self-declared mission to join the ISIS. She also implored her parents to convert in order to seek heaven and avoid damnation in hell. Her devastated atheist father, confounded by the turn of events moved the High Court on two occasions expressing concerns that his adult daughter was being manipulated by radical organizations. The second time, he panicked because Akhila (by then known as Hadiya), in a recorded conversation, said she wanted to go to Syria to pursue 'sheep farming'. He feared that unless he acted, his daughter would meet the fate of several young persons from Kerala, both men and women, all highly educated and professionally qualified, but who had been sucked into the lure of radical elements by the very organizations that were 'sheltering' Hadiya. These young persons had escaped their homes in Kerala, gone overseas and were untraceable by their families. Among them was a young woman called Nimisha. Her widowed mother, alarmed by her links with radical organisations and sensing that she would be taken overseas, moved the High Court in a habeas corpus petition. The High Court rejected it, finding that Nimisha, by then known as Fathima, appeared in Court and asserted that she had married a man belonging to her new faith of her own free will. Soon after,

[6] Asokan K.M. v. Superintendent of Police, Malappuram, (2017) 2 KLJ 974 at paras 4 and 9.

[7] *Id*. at paras 31 and 32.

[8] *Id*. at para 9.

Nimisha left India with about twenty others. She was last heard to be in ISIS controlled Khorasan in Afghanistan and currently untraceable.[9]

In Akhila's (alias Hadiya) case, the High Court passed a series of protective orders finding the unusual interest of Sainaba and the organisation supporting her financially, suspect. The Court repeatedly suggested to Akhila that if she did not wish to stay with her family, she could always reside in an independent hostel. During the course of the proceedings, the Court had been vocal about its discomfort with persons who were complete strangers to Akhila, taking what appeared to be an uncommon interest in housing her, financing her and taking over her religious instruction. At the same time, the Court observed that Akhila described herself with multiple names at different times,[10] and as a 24-year-old woman stated on affidavit that Sainaba was her 'guardian' and would 'look after' her along with her own children.[11] Why did she go by so many different names after conversion? Why did she want a guardian?

On one occasion, the Court indicated that it was going to arrange for Akhila (Hadiya) to reside in a hostel.[12] Two days later, when the matter came up, Hadiya showed up in court with a young man she introduced as her newly wed husband, who she said she had recently been introduced to through an online portal for arranged marriages. The proposal was approved by Sainaba and the marriage took place on the very evening the Court had expressed its desire to have Hadiya housed in an independent hostel. Never before on any occasion was the Court informed of any impending marriage plans, nor was there, admittedly, any presence of any young man in her life, let alone the groom till this time. Was it a mere coincidence, that Shafin Jahan declared his plans to take his bride almost immediately to the Middle

[9] Vijaita Singh, *Kerala IS recruit 'texts' mother*, The Hindu, October 3, 2017,https://www.thehindu.com/news/national/kerala-is-recruit-texts-mother/article19791863.ece.

[10] *Supra* note 6 at para 46. Akhila called herself by different names during the course of the proceedings including, 'Aasiya', 'Adhya', 'Aadhiya', 'Adhiya', finally 'Hadiya'.

[11] Volume II, SLP (Crl.) No. 5777 of 2017, Supreme Court of India at 369-372.

[12] Order dated 19.12.2016 of the High Court of Kerala in WP (Crl.) No. 297 of 2016.

East, where he claimed he had just landed a job?

But for the Court's intervention at the time, Akhila might have met the same fate as Nimisha. The Kerala Police records at least three attempts to take Akhila overseas, to Syria, to Yemen,[13] and finally to Oman with Shafin Jahan. It was no coincidence that Shafin Jahan was (and possibly still is), a member of Popular Front of India/Social Democratic Party of India, a radical organization and reincarnation of the banned organization SIMI (Students Islamic Movement of India).

After the Kerala High Court's judgment, this case took a turn with issues involving an adult woman's right to choice of a partner, paternalistic overtures on decisions of a female adult, and the less talked about possibility of indoctrination and fraud on the court through marriage in the backdrop of potential trafficking of a woman.

It is pertinent to mention that our rights jurisprudence has served as a benchmark for multiple foreign jurisdictions. Freedom over personal spheres of one's life goes to the core of Article 21, and its preservation is of utmost importance. It is also a recognized position of law that the State is constitutionally obligated to ensure and secure to the citizens fundamental rights guaranteed by the Constitution. In effectively discharging such obligation, it may be required of the State to deprive an individual of some rights and privileges in order to protect their contesting rights better and further.[14] The court will naturally be at unease when the issues in a case revolve around the choices of a 24-year old woman pursuing a professional degree. But, whether this question alone can be the basis of determining the need of court intervention, independent and irrespective of the peculiar circumstances of the case is the bone of contention.

For the court to fulfil its mandate of protecting our cherished constitutional freedoms, it is legally and logically untenable to expect the court to take only the word of the individual concerned as the true expression of her free choice, when the circumstances are shrouded in

[13] Volume I, SLP (Crl.) No. 5777 of 2017, Supreme Court of India at 272 (263-273).

[14] Aruna Ramchandra Shanbaug v. Union of India, (2011) 4 SCC 454 at para 127.

the activities and influence of radical organizations. When the question is squarely on how freely is individual autonomy being exercised, the court ought to tread cautiously, with regard to the external factors surrounding the individual and her decisions. Personal choice of an individual (such as marriage here) justified by a façade of free will may in turn eventually jeopardise the same Article 21 rights of the individual that is being sought to be protected.

Another issue that warrants deliberation is the constitutional promise of the State to ensure the equal protection of law. The obligation of the institutions of the State to ensure equal protection of law is non-negotiable. To many, the continued supervision of the daily life of Akhila by the High Court, and a direction by the Supreme Court for an investigation by the National Investigation Agency (NIA), was understood as a needless intrusion in the private affairs of two individuals. However, when the Court is called upon to determine issues on individual rights guaranteed under Part III, in cases such as this where a possibility of fraud on the court is not entirely remote, the court ought not to perceive the case merely from the perspective of the individual, but should also keep in mind the possible ramifications that its decision may have on her other rights in the future, as also the possibility of disregarding the obstruction of justice.

The Supreme Court was conscious of the involvement of radical organisations in this case. It is for that reason the NIA was appointed to carry out an investigation. Otherwise, what part did the NIA have in a marriage between two consenting independent adults? Repeated attempts by Shafin Jahan to dislodge the order appointing NIA failed. There was obviously enough material on record to persuade the Court to appoint NIA suo moto. However, the Court ought to have explained its reasons for doing so. Was the Court swayed by the gust of public opinion that surrounded the case? Why did it fight shy of even adverting to the material which pointed to the hand of a systematic well-funded criminal network? That had become further obvious when Hadiya and Shafin Jahan went to express their gratitude to the PFI Chief

immediately after the Supreme Court order.[15] It was also obvious from the public advertisements the organisation issued thanking people for their contributions for the case.

The Kerala High Court and the Supreme Court judgments also give rise to the need of a larger debate on the contours of the *parens patriae* doctrine. The High Court and the Supreme Court came to conflicting findings on the invocation of *parens patriae* jurisdiction. *Parens patriae* is the inherent power of the State (and the courts) to provide protection to persons with disabilities, minors, the elderly, or persons who are mentally ill.[16] Essentially, it regards the State as the protector and guardian of vulnerable individuals who may not have the capacity to protect their own interests. The Supreme Court found the condition of incapacity missing in the present case of an adult woman, undertaking a professional course, and refused to invoke its *parens patriae* jurisdiction.[17] Undoubtedly, in a vibrant democracy which emphasizes individual freedoms, the guardian-like role of the State should be limited. However, the need for the State to step into the shoes of a guardian should depend on the facts and circumstances of every case, so as to ensure the ends of justice are met.

Pertinently, the *parens patriae* doctrine has been expanded over the years, moving away from inherent incapacity to situational incapacity. Numerous cases to that effect are recorded in the judgment of the Supreme Court which were eventually not accepted as applicable to the facts of the case. For instance, one such case was about a son's coercive control over the movements of his parents.[18] The England and Wales High Court has discussed an expansive understanding of *parens patriae* and held that vulnerability includes incapacity to make an informed, free choice, or expressing genuine consent.[19] Therefore, the applicability of

[15] Via Onmanorama, *Hadiya, husband visit Popular Front chief to thank him*, The Week, March 10, 2018 https://www.theweek.in/news/india/2018/03/10/hadiya-husband-visit-popular-front-chief-to-thank-him-marriage-supreme-court-love-jihad.html

[16] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 at para 35.

[17] Shafin Jahan v. Asokan K.M., (2018) 4 SCALE 404, per Misra J. at para 52.

[18] DL v. A Local Authority & Ors. [2012] 3 All ER 1064.

[19] Re: SA (Vulnerable Adult with capacity: marriage), [2005] EWHC 2942 (Fam), per Munby J. at para 79.

the doctrine may not be limited to individuals who may be inherently incapacitated, and may extend to a fully capacitated individual, whose decisional autonomy is impaired by undue influence.[20]

In another case strikingly similar to the facts of the present case, the English court intervened to prevent the possibility of radicalisation of a young adult. It observed:

> I have not heard any evidence in this case which suggests that Y lacks capacity, in any sphere, in his decision making. It is however important, at very least, to contemplate that children and young adults in radicalised homes may have had their will overborne to such a degree that their capacity to make decisions concerning their own safety may have become distorted. I, for my part, am not prepared to exclude such a possibility. More significantly however, there remains the scope of the inherent jurisdiction to protect a class of vulnerable adults who whilst vulnerable, nonetheless retain capacity […][21]

Akhila left for Salem to begin a four and a half year course in homeopathy. Soon after joining college, she befriended a few classmates, including two sisters Jaseena and Faseena, and rented a private accommodation near the college with them. She also began visiting the sisters' home at Mallapuram, where she met their father Aboobacker.[22] Aboobacker later took Akhila to a registered conversion centre for Islam at Khozikode called KIM.[23] He also enrolled her in an Islamic Sabha, and assisted her in making an affidavit affirming her desire to convert to Islam,[24] which she eventually did in January 2016. Later, she was taken by him to a centre called Sathyasarini,[25] which purports to be a cultural Islamic centre, and has subsequently

[20] *Id.*

[21] A Local Authority v. Y, [2017] EWHC 968 (Fam), at para 36.

[22] *Supra* note 6, at para 2.

[23] *Supra* note 6, at para 4.

[24] *Id.*

[25] *Supra* note 6, at para 5.

been embroiled in sting operations detailing their expansive activities of radicalisation, indoctrination, and conversions.[26]

Akhila's dependence on complete strangers despite asserting independence from her parents was inexplicable. It is not surprising that an independent, educated, adult woman desires to live separately from her parents and on her own terms. However, Akhila was not asserting 'independence'. The inconsistency in her statements found by the High Court including her multiple names, her inexplicable surrender to strangers and dependence on them for housing, shelter, legal help, and every facet of daily living which encompasses financial security and emotional dependence did not fit in with the image of an 'independent woman'.

PFI (People's Front of India) is widely known for its extremist activities and radicalisation of youth. Former members of SIMI are included in its ranks. Multiple active members have been convicted for possession of arms, explosives, training, kidnap for ransom, and murder. Of late, members of PFI have also been arrested owing to their links with terror organisations in West Asia, as reported widely.[27] Additionally, Shafin Jahan was also an active member of SDPI Keralam, another organization known for its links with terror organizations. He was a member of the SDPI's core committee through an online group, a co-member of which had been arrested for links with ISIS.[28] His extremist views on social platforms were well known, including claims of touring border areas of Yemen and seeking an opportunity as an ISIS recruiting agent, asking how much he would earn for a recruit. Generally very expressive on Facebook, he made no mention of his marriage to Hadiya till several days later and only after suspicions were raised by the Court. At the outset, criminal antecedents do not bar a free

[26] Sushant Pathak, *Operation Conversion Mafia: Kerala's conversion factories unmasked*, India Today, October 31, 2017, https://www.indiatoday.in/india/story/love-jihad-kerala-conversion-factory-islamic-state-1078518-2017-10-31.

[27] PS Gopikrishnan Unnithan, *Kerala: 2 more arrested for suspected ISIS links, police calls it a 'big catch'*, India Today, October 26, 2017, https://www.indiatoday.in/india/kerala/story/kerala-isis-links-suspected-people-arrested-kannur-1070791-2017-10-26.

[28] *Supra* note 6, at para 46.

exercise of marital decisions, but a background to an identity is sought to be made out only as a final bead in the thread of secretive methods of indoctrination and control. Finally, the marriage was orchestrated as a ploy to defeat the pending proceedings of the Court and to ensure that Akhila is not freed from persons into whose clutches and influence she had fallen.

Lastly, the conflict between liberty and security is an enduring conflict. Here there was a 'clear and present' danger of her being trafficked out of the country by a radical group which was possibly linked to international terrorism. It is the duty of the State to protect its citizens from harm, even if it may be self-perpetrated. The failure of the court to highlight this compels the question as to whether the court is giving in continuously to its libertarian impulses, and thereby compromising the genuine security interest of the State. In an increasingly complicated world that we live in today, where innocent persons are increasingly being 'used' by international terrorist organizations as pawns against democratic societies, such a judicial decision acts as a slippery slope. The Supreme Court's judgment begets the question as to whether refusing to interfere in the self-destructive actions of a person (whether man or woman) can really be justified on the ground of upholding "free will". While many may hail this judgment as one that upholds gender justice, but does it really serve the cause of gender justice to expose a woman to the dangers of international trafficking in these highly radicalised times? It is our view that the State attempting to protect its citizens and women from being manipulated through the use of faith to harm themselves is merely acting within its *parens patriae* jurisdiction, which it is duty bound to do so in such facts and circumstances. Here was a case where a woman's 'decisional autonomy' was used to shield the nefarious activities of a radical network.

Book Review
Veil (Object Lessons)*

ROHAN PANKAJ KOTHARI†

This thin paperback is, in the author's own words, a *meditation* on the veil as an object. Written with the hand of a journalist, this book reads less like a fully fleshed out thesis on its subject, and more as a primer meant for speedy consumption. The author however succeeds in putting forward diverse perspectives on a rather controversial item of clothing in a manner that is honest, and to some extent, impetuous. One is left thinking, but not exactly moved by the text; and presumably that is the point of the short format- enough to allude to the presence of an argument, without actually making one. Zakaria's writing on the veil is interspersed with personal and popular anecdotes about veil-wearing (and shedding) women, deployed with the intention of anchoring her short, sometimes strained bursts of political commentary.

Overall the essay, as it may best be called, provides just enough heft to be taken more seriously among the several other publications in the 'Object Lessons Series', of which 'Veil' is one. The collection, published by Bloomsbury, is about the "hidden lives of ordinary things", and has incredulously clubbed objects such as the 'burger', 'blanket' and 'luggage', with something as portentous and polarizing as the 'veil'. To millions, the veil is indeed very ordinary, but the proportions it assumes as a symbol for conflict and more simply, as a signifier of identity, take it out of the realm of the mundane, and imbue it with a deeply political, ideological character. So, to have included the veil in such a series itself

* RAFIA ZAKARIA, VEIL (OBJECT LESSONS) (BLOOMSBURY ACADEMIC, 2017).

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may, to some, qualify as a misstep. But, there is value in what Zakaria has to offer- and it may very well be thanks to the format in which her writing appears. By situating the veil in an everyday reality, she has given greater access to the political, cultural, and emotional reactions that the veil and its wearers are subjected to. This access is, however, subject to the author's interpretation of these reactions, which can at times, seem intemperate.

Zakaria's inspiration for 'Veil' is described at its beginning. In the quiet waiting room of a Pakistani hospital, the author is perplexed and amused by the presence of a woman clad in full-body *burqa*. The woman is loud and boisterous as she uses her cell phone, and has a confident swagger about herself. It is an incongruous image. The veil, instead of accentuating its wearer's modesty and diffidence, has become a means through which those very attributes are shed. Zakaria posits that it is because of the anonymity that her veil provides, that this woman is able let go of the culturally (and religiously) imposed burden of her gender. Placing this anecdote in the context of a data and internet-driven society, where most physical and virtual movements and actions are recorded and observed, Zakaria rightly points out how the veil can help provide some much-needed solace in invisibility. Such invisibility becomes crucial in contexts where physical identification is fraught with pressures that can potentially rid individuals of agency.

This aspect of veil-wearing gives way to a discussion on the distinctiveness of its wearers. Veiled sex-workers, according to the author, are a common sight in several Islamic countries. Karachi's busy intersections have allegedly been witness to transactions between veiled sex workers and men during the day, and such vignettes run contrary to the popular imagination of the veil-wearer's virtuousness and purity. There exists a similar dissonance in the donning of a veil and the automatic presumption of piety. Zakaria speaks of experiences where her Muslim-ness has been questioned because she has chosen to keep her face and head uncovered. However, Zakaria fails to provide any historical perspectives on the manifestation of the veiled woman as the Islamic ideal. Even a fleeting reference to doctrine would have served to substantiate the discussion on the veiling of Muslim women, and its absence is glaring.

'Veil' moves on to familiar territory with descriptions of European judicial and legislative decisions directly affecting the presence of *burqas* in public spaces. A tone is set with the passing of a referendum on prohibition of minaret construction in Switzerland in 2009. This homogenization of the Swiss cityscape is in line with the objectives of its euro-centric, nativist (and Islamophobic) majority. Zakaria does well to place this decision as a precursor to the *burqa*-bans that now exist in several European nations. According to her, wearing of a *burqa* in such a context, now becomes "a form of protest or subversion of a mainstream aesthetic ideal that excludes the minority *other*". At various times in the recent past, Western liberal democracies have justified prohibitions on the wearing of veils in public on the plank of security. Underlying such connections is a majoritarian mindset that is unwilling to recognize the cultural individuality of Muslim women. Subtler, is the regulation of the *burqa* that is premised on provisions of human rights and dignity. France's *burqa* ban, in particular, went a step further and rationalized such a ban on the basis of 'republican values', that includes fraternity and the importance of bonding with fellow citizens. Besides narrating how concealing of the full face in public could be a security threat, and how it was violative of women's equality and dignity, the French Bill that sought to ban full-face veils in public stated in its preamble that, "[T]he voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of 'living together' in French society."[1] The law was eventually upheld by the European Court of Human Rights ('ECHR') as not violative of the European Convention on Human Rights.[2] Oddly enough, this ruling, which has been the subject of much academic scrutiny, is not discussed by Zakaria. The ECHR observed that a State could not invoke gender equality to ban a practice that was defended by women. It further held that the ban was not proportionate to the objective of achieving public safety. It however, controversially,

[1] LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law n ° 2010-1192 of October 11, 2010 prohibiting the dissimulation of the face in the public space], Journal Officiel de la République Française [J.O.] [Official gazette of France], Sept. 14, 2010.

[2] S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R. July (2014).

did determine that the ban was proportionate and legitimate as a means to preserve conditions of "living together" as an element of the "protection of the rights and freedoms of others". For a book that is hinged on the veil as an everyday object, it is surprising in its neglect of the judgment that arguably cemented the *burqa's* position as opposed to ideals of an ordinary life in a Western society.

What Zakaria seems to be after is authenticity. Throughout the text of 'Veil', there seems to be a nagging doubt about what represents the most authentic account of a veil-wearer's life in an increasingly connected and transforming world. This motif finds voice in her personal narrative that has peppered the book, as well as in the manner in which she interprets events that have had an impact on lives of veil-wearing women: from school-going girls in modern Pakistan, to courtesans in Algeria photographed by Frenchmen in the heydays of imperial colonialism. She is ambivalent about her own relationship with this piece of clothing. At times, a cloak of deserved invisibility, and at others, a danger to public order. And while this preoccupation with zeroing in on the most authentic has taken much away from what 'Veil' could have offered in terms of critical thought, it has brought to bear on its reader the enormity of the enterprise that Zakaria has sought to undertake. The bullish pace of her book is testament to the vastness of a quake, the epicentre of which she is unable to find. But there cannot be any single truly authentic experience, or even one immutable trait that defines all veil-wearing and shedding women. And in completing this short monograph, the author has, perhaps unwittingly, brought home this important point.

In an India that is reportedly increasingly unsafe for women, and increasingly polarized along lines of religion, Zakaria's perspectives on the veil are of immense relevance, especially in light of recent debates on the specific issue of the objects that purportedly symbolize religious intolerance. In a column for the *Indian Express*, noted historian and liberal thinker, Ramachandra Guha, wrote:

> Many people, this writer among them, object to Hindus flaunting saffron robes and trishuls at rallies. While a burka may not be a weapon, in a symbolic sense it is akin to a

> trishul. It represents the most reactionary, antediluvian aspects of the faith. To object to its display in public is a mark not of intolerance, but of liberalism and emancipation.[3]

This comparison of the *trishul* (a weapon) to the *burqa* (an item of clothing) drew intense criticism from several quarters. Following this, Guha wrote another article in the *Express*, apologizing for his flawed comparison, but qualifying the same by saying "If you hide your face from me, how can we be partners in a shared political project? The burka (*sic*) is deeply inimical to fraternity, a quality that Ambedkar emphasised was vital to the creation of a democratic society."[4] This statement resonates unmistakably with the 'republican values' that France successfully imposed through its total *burqa*-ban in 2010. The ECHR's decision to allow the ban on the basis of France's value-based justification was criticized as inconsistent with the Court's own jurisprudence- which required detailed analysis of what it means to "live together" in French society.[5] Guha's catchall conclusion that the *burqa* is inimical to fraternity seems similarly inconsistent with the shared political project that the Indian democracy constitutes. Nowhere has the Supreme Court of India (or any legislation) defined fraternity on the basis of lack of facial concealment, and it seems odd to suggest that concealment of faces is unsuitable to the needs of Indian democracy, especially when there are so many Indian communities that practice some form of such concealment. Zakaria's book therefore serves the purpose of keeping in check the spread of one-dimensional views on what the veil represents. Though this is a task that has been pursued by many before Zakaria, it is one that evidently still needs to be completed.

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[3] Ramachandra Guha, *Liberals, sadly*, The Indian Express, March 24, 2018, https://indianexpress.com/article/opinion/columns/liberals-sadly-indias-liberals-must-take-on-both-hindu-and-muslim-communalists-5103729/.

[4] Ramchandra Guha, *Burdens of the past,* The Indian Express, April 10, 2018, https://indianexpress.com/article/opinion/columns/hindu-muslims-in-india-the-minority-space-minorities-burka-debate-caste-system-5130833/.

[5] Hilal Elver, *The French Burqa ban*, OUP blog, Aug. 17, 2014, https://blog.oup.com/2014/08/european-human-rights-burqa-ban/.

BAR EVENTS

Bar Association of India Activities

Compiled by Anindita Pujari

14th December, 2017

Master Class on Managing Joint Venture Building long-term & sustainable partnership

The Bar Association of India was a supporting partner for the prestigious Master Class on Managing Joint Venture Building long-term & sustainable partnership, organized by the Economic Times at Mumbai.

19th December, 2017

Reception in honor of a delegation from Shanghai Bar Association

The Bar Association of India organized a reception at Hotel Lalit, New Delhi in honor of a high profile delegation of members of the Shanghai Bar Association who were visiting New Delhi. The purpose of the visit was to strengthen the relationship between the Shanghai Bar Association and the legal profession in India. The Chinese delegation was led by Ms. Zou, Vice President of the Shanghai Bar Association. Dr. Lalit Bhasin, President, BAI addressed them on behalf of the Association. Mr. Rupinder Singh Suri and Mr. Rajiv Dutta addressed the delegates. Mementos were presented to all the foreign delegates by Dr. Bhasin and other members of BAI.

8th – 11th February, 2018

Jessup International Moot Court Competition

The Bar Association of India collaborated with the Amity Law School, Noida for organizing the prestigious Jessup International Moot

Court Competition. On behalf of the Bar Association of India Dr. Pinky Anand, Vice President, BAI attended the event.

15th January, 2018

Resolution passed by the Executive Committee of The Bar Association of India in the emergent meeting held on 15th January, 2018.

An emergent meeting of The Bar Association of India was called by the President, BAI in view of the unprecedented press conference held by four senior judges of the Supreme Court of India. In the said meeting it was resolved that since certain issues of fundamental importance have been raised regarding functioning of the Supreme Court, these issues need to be addressed. In this backdrop it was resolved that it is imperative to leave it to the collective wisdom of the judges of the Supreme Court to look into these issues and arrive at a consensus keeping in mind the well recognised principles/norms/conventions of the allocation of matters to different benches of the Court by the CJI and it is for the judiciary itself to amicably and effectively lay down the future course of action without any external influences of any nature whatsoever.

In order to discuss the overall issue of judicial reforms in a constructive manner BAI called a National Rule of Law - Judicial Reforms Convention from 9th till 11th February 2018 at New Delhi inviting Bar Council of India, State Bar Councils, Supreme Court Bar Association, Bar Associations of all the High Courts and District Courts of the country to participate and give their valuable inputs and suggestions.

9th - 11th February, 2018

BAI Rule of Law Convention 2018 on Judicial Reforms

The BAI Rule of Law Convention 2018 on judicial reforms was held on 9th – 11th February, 2018 at India Habitat Centre, Lodhi Road, New Delhi on the theme “Restoring Country’s Confidence in Rule of Law – The Way Forward” in which bar leaders, representing various Bar Associations, Bar Councils, Advocates from 21 States and Union Territories, including President of the SCBA participated.

The topics on which the deliberation took place include acute shortage of judges, appointment, transfer and posting of judges in higher judiciary, How to ensure speedy justice, Collegium System – is there a need to have a relook?

13th February, 2018

An Interactive Session on Union Budget 2018

The Bar Association of India supported an Interactive Session on Union Budget 2018 : A Change Agent for Reforming India organized by Indo American Chamber of Commerce at Regency Ballroom, Hotel Hyatt Regency, Bhikaji Cama Place, New Delhi.

23rd February, 2018

The CXO + GC Leadership Summit and Excellence Awards

Dr. Lalit Bhasin, President, Bar Association of India was honoured for his Distinguished Service and Contribution to Law and the Legal Profession at an award function organized by CXO + GC Leadership Summit.

30th – 31st March, 2018

BAI All India Conference on Judicial Reforms

Bar Association of India organized an All India Conference on Judicial Reforms at Hyderabad, Telangana from 30th & 31st March, 2018. The Conference was organized in collaboration with Koka Raghava Rao Law Foundation. This conference was a sequel to the three-day Convention on the Rule of Law with the focus on Judicial Reforms held from 9th to 11th February, 2018 at New Delhi.

Justice P. Venkatarama Reddi, former Judge of the Supreme Court of India, former Chairman Law Commission and the Chairman of the IInd National Judicial Pay Commission was the Chief Guest at the Inaugural Session. Dr. Lalit Bhasin, President, Bar Association of India gave his Presidential Address.

All the sessions were chaired by former High Court Judges namely, Mr. Justice Y. Bhaskar Rao, Mr. Justice L. Narasimha Reddy, Mr. Justice B. Subhashan Reddy, and Ms. Justice G. Rohini.

The conference was addressed & attended by large number of members of the BAI, including Mr. Shyam Divan, Vice President, BAI, Dr. Koka Raghava Rao, Senior Advocate, Chairman Organizing Committee, Member Executive Committee, BAI & Founder Trustee, Koka Raghava Rao Law Foundation, Mr. M.S. Prasaad, Senior Advocate & Ex-Co Member, BAI, Dr. H.C. Upadhyay, Joint General Secretary, BAI, Mr. Yakesh Anand, Hony. General Secretary, BAI, Dr. Jai Prakash Gupta, Ex-Co Member, BAI, Mr. Tapeshwar Nath Mishra, Member, BAI ,Mr. Aditya Sanghi, Member, BAI, Mr. Dipak Bhattacharyya, Advocate, & Hony. Director, IEM, Calcutta, Mr. D.K. Yousuf, Member Governing Council, BAI.

The themes on which the deliberation took place include Appointment, Transfer and Posting of Judges in higher judiciary, How to ensure speedy justice, Need to Reform Collegium System, Substantial Non Utilisation of Financial allocations for the Key Justice Delivery Improvement Projects: Role Bar Can Play to Push the System?, Transparency in the higher judiciary, Tribunalization of Justice – With Special Reference to Corporate Law Administration, Empowerment of Women in Rule of Law.

7th April, 2018

A Symposium on Skill Development of Law Graduates

A Symposium on Skill Development of Law Graduates was organised by KIIT University in Association with the Bar Association of India at Bhubhaneswar, on 7th April 2018. The function was held at the campus of School of Law, KIIT University.

On behalf of BAI, lectures were delivered by Dr. Lalit Bhasin, President, BAI, Mr. V. Shekhar, Mr. Yakesh Anand, Dr. Aman Hingorani, Dr. H.C. Upadhyay, Ms. Triveni Poteker, Dr. Akash Kaushik, Mr. Aurush Khanna, Ms. Rachana Srivastava, and Ms. Radhika Gupta.

21st April, 2018

Seminar on Business Restructuring – Evolving Legal Issues and Imperatives

A Seminar on Business Restructuring – Evolving Legal Issues and Imperatives was organised by PHD Chamber of Commerce in Association with The Bar Association of India.

The topics for discussion were, Laws relating to Corporate Restructuring and Business Turnaround, Taxation Laws; and, Insolvency, Bankruptcy, Judicial Interference in reasonable situations, Approach of NCLT/NCLAT.

28th – 29th April, 2018

National Seminar on Restructuring Legal Education for Advancing Development, Access to Justice and Professional Competitiveness

A National Seminar on Restructuring Legal Education for Advancing Development, Access to Justice and Professional Competitiveness was organised by the Indian Law Foundation in Association with The Bar Association of India and PHD Chamber of Commerce at PHD House, New Delhi.

Mr. Ashok H. Desai, Former Attorney General for India was the Chief Guest and Mr. P.K. Malhotra, Former Law Secretary, Union of India was the Guest of Honor. Dr. Lalit Bhasin made his Presidential Address, Mr. Prashant Kumar, President-Elect, BAI gave Concluding Remarks and Ms. Rachana Srivastava gave her Welcome Address at the Inaugural Session.

At the two day Seminar, many eminent speakers such as Mr. Sidharth Luthra, Senior Advocate, Mr. V. Lakshmikumaran, Advocate, Mr. Jyoti Sagar, Advocate, and others made presentations.

2nd May, 2018

Resolution passed by the Executive Committee of The Bar Association of India in the meeting held on 2nd May, 2018 to discuss recent developments in the Judiciary.

The Executive Committee of The Bar Association of India discussed the prevailing situation concerning the judiciary and expressed their

views. After discussions, the following resolution was unanimously passed :

"The country is facing a grave crisis. The Rule of Law is imperilled. The Judiciary is under public scrutiny for wrong and right reasons.

Four Hon'ble Judges of the Supreme Court had taken the extreme step of going public on matters of internal working and functioning of the Supreme Court of India. The Bar Association of India (BAI) in its meeting held on January 15, 2018 expressed concern over the manner in which certain issues were raised by the Hon'ble four Judges of the Apex Court. At the same time it was felt that the issues raised needed to be addressed. The Executive Committee of the Bar Association of India in the said meeting resolved that the issues raised have to be internally addressed by the judiciary itself without any external or other institution's interference.

The fond hope expressed in the meeting held on January 15, 2018, it seems, has not materialized in any meaningful way.

The Bar Association of India continues to nurture the hope that differences on procedural matters can be effectively resolved by the judiciary internally. The Association strongly believes that with the participation of all the Judges of the Supreme Court, the apex judiciary will be able to put in place robust institutional mechanisms to deal with the fundamental issues of internal governance of judiciary. It is an individual centric model of governance and lack of institutionalization of judicial governance that seems to be the root cause of the present turbulence the institution is facing.

BAI humbly is of the view that:-

(i) All the Hon'ble Justices of the Supreme Court should collectively evolve institutional structure for the internal governance of the judiciary. To create an environment of collegiality the Hon'ble Judges may go for a "Retreat" to National Judicial Academy of Bhopal or some other convenient place and deliberate upon the issues in a cordial informal manner as mutual confidence building exercise.

(ii) Like the judiciaries world over, such exercise is to be carried out with the full strength of the court to bring about the institutional norm setting.

(iii) The Collegium System cannot be and should never be a substitute for the Court making key decisions affecting its functioning through the collectivity of judiciary which is represented by the Full Court, the voice of the Court when deliberations take place with participation of all the Judges and decisions taken there on.

(iv) That the Chief Justice undoubtedly remains the Master of the Roster.

The Motion for impeachment of Chief Justice of India in the facts and circumstances was unwarranted and was an assault on the institution of judiciary."

11th May, 2018

Seminar on Evolution of An Advocate As A Lawyer

The Bar Association of India in collaboration with National Company Law Tribunal and PHD Chambers of Commerce organized a seminar on Evolution of An Advocate As A Lawyer. The Seminar was Chaired by Mr. Justice S.J. Mukhopadhaya, former Judge of the Hon'ble Supreme Court of India and presently Chairperson, National Company Law Appellate Tribunal. Speakers on the occasion included Hon'ble Chief Justice (Rtd) M.M. Kumar, President, National Comany Law Tribunal, Dr. Lalit Bhasin, President, Bar Association of India, Mr. Virender Ganda, President, NCLT and Appellate Tribunal Bar Association.

15th – 19th May, 2018

Invitation to the VIII St. Petersburg International Legal Forum – at St. Petersburg, Russia

The Bar Association of India was invited to participate in the VIII St. Petersburg International Legal Forum- 2018 at St. Petersburg, Russia on May 15 – 19, 2018. Mr. Prashant Kumar, President Elect, Bar Association of India represented the Bar Association of India and made a presentation.

24th – 25th May, 2018

Legal Era Conclave - at New York

The 7th Edition of Legal Era Conclave 2018 was organised from 24th -25th May, 2019 at New York, U.S.A. The Conference was organised in association with The Bar Association of India, Society of Indian Law Firms & US India Business Council. Many eminent lawyers from India and U.S.A addressed the Conference. Dr. Jai Prakash Gupta attended the Conference on behalf of The Bar Association of India. The Conference witnessed a gathering of the best minds in the business and legal community. The conversations at the Conference revolved around relevant Business - Legal topics in the ever-changing global market scenario.

31st May, 2018

Seminar on Sexual Harassment of Women at Workplace and Contract Labour including Fixed Term Employment – Issues and Concerns

The Bar Association of India supported a Seminar on Sexual Harassment of Women at Workplace and Contract Labour including Fixed Term Employment held on 31st May, 2018 at Delhi organised by PHD Cambers of Commerce in assoication with Konrad Adenauer Stiftung. The keynote address was given by Dr. Lalit Bhasin, President, The Bar Association of India. Technical Sessions were delivered by Mr. Alok Bhasin, Ms. Priya Khanna and Mr. Harvender Singh.

6th – 8th June, 2018

LAWASIA 7th Family Law and Children's Rights Conference

A Seminar on LAWASIA 7th Family Law and Children's Rights Conference – was held on 6th – 8th June, 2018 in Vientiane, Laos. Mr. Prashant Kumar, Immediate Past President, LAWASIA and Persident Elect, BAI attended the Conference.

2nd July, 2018

A Webinar on Resolving Insolvency in India – a year in review of the practitioner's perspective

The Bar Association of India supported a Webinar on Resolving Insolvency in India – a year in review of the practitioner's perspective, organised by International Bar Association.

26th July, 2018

6th M.C. Setalvad Memorial Lecture at Hotel Hyatt Regency, New Delhi

The Bar Association of India organised the 6th M.C. Setalvad Memorial Lecture. The lecture was delivered by the Hon'ble Chief Justice of India Shri Dipak Misra on "Dynamic Ascendance of Constitutional Rights – A Progressive Approach" on 26th July, 2018 at Hotel Hyatt Regency, Bhikaji Cama Place, New Delhi.

Hon'ble Justice Ms. Gita Mittal, Acting Chief Justice of Delhi High Court had presided over the function. Dr. Lalit Bhasin, President, BAI gave introductory remarks and concluding remarks were given by Mr. Prashant Kumar, President – Elect, BAI.

2nd – 3rd August, 2018

29th Presidents of Law Associations in Asia (POLA) Conference held at Canberra, Australia

The Bar Association of India participated in the 29th POLA Conference held at Canberra, Australia on 2nd & 3rd August, 2018. A country report on behalf of the Bar Association of India was presented by Mr. Yakesh Anand, Hony. General Secretary, BAI. Delegates from about 22 countries including representatives from IBA, IPBA, and LAWASIA were present.

23rd – 24th August, 2018

Vth BRICS Legal Forum

The Bar Association of India participated in the Vth BRICS Legal Forum held on 23rd – 24th August, 2018 at Cape Town, South

Africa. Mr. Prashant Kumar, President – Elect, BAI, Mr. Amarjit Singh Chandhiok, Vice President, BAI, Ms. Pinky Anand, Vice President, BAI and Mr. V. Lakshmikumaran had attended the Legal Forum on behalf of the Association.

A concept note developed by Bar Association of India elucidating the roadmap on commercial dispute resolution was agreed upon in principle by the participants at the Conference.

1st September, 2018

10th Law Teachers Day

The Bar Association of India supported the 10th Law Teachers Day Symposium on Role of Law Schools in Nation Building organized by Society of Indian Law Firms and Menon Insitute of Legal Advocacy Training.

The Symposium was inaugurated by Hon'ble the Chief Justice of India, Shri Dipak Misra. Dr. Lalit Bhasin, President, BAI, Prof. N.R. Madhava Menon, Prof. S. Sivakumar, Prof. R. Venkata Rao and Mr. Manoj Kumar made their presentations in the symposium.

In the Felicitation & Awards Presentation Ceremony his Excellency Shri M. Venkaiah Naidu, Hon'ble Vice President of India was the Chief Guest. The best law teachers & two best law students sellected by a panel were felicitated and presented awards. Delegates from India, Bangaldesh, Nepal and Sri Lanka were present.

29th September, 2018

Annual General Meeting of the 20th Governing Council of the Bar Association of India

The Annual General Meeting of the 20th Governing Council of The Bar Association of India was held at New Delhi. Elections of the office bearers and members of the Executive Committee **were** held. Dr. Lalit Bhasin was elected as the President of the Association. Mr. Prashant Kumar was elected as the President-Elect. Dr. Anindita Pujari was elected as the Hony. General Secretary and Ms. Triveni Poteker was elected as the Treasurer.

The full list of office bearers and the members of the Executive Committee of The Bar Association of India elected for the terms of 2018-2020 appears later in this issue.

29th - 30th September, 2018

3rd CARTAL Conference on International Arbitration

The Bar Association of India was an Institutional Partner in the 3rd CARTAL Conference on International Arbitration organised by National Law University, Jodhpur.

6th October, 2018

7th Lala Amarchand Sood Memorial Lecture

The 7th Lala Amarchand Sood Memorial Lecture was organised by the Bar Association of India on 6th October, 2018 at H.P. High Court Auditorium, Shimla. The lecture was delivered by Hon'ble Mr. Justice Dr. A.K. Sikri, Judge, Supreme Court of India on Balancing Human Rights on The Doctrine of Proportionality. Hon'ble Chief Justice of High Court of Himachal Pradesh Shri Surya Kant, and Hon'ble Mr. Justice Sanjay Karol, Judge, High Court of Himachal Pradesh also graced the occasion.

On behalf of the Bar Association of India Mr. V. Shekhar, Senior Advocate, and Governing Council Member, BAI, Mr. Yakesh Anand, Governing Council Member, BAI, and Mr. Mukesh Kumar Singh, Joint General Secretary, BAI attended the lecture.

7th – 12th October, 2018

IBA Annual Conference in Rome, Italy

The IBA Annual Conference was held at Rome, Italy on 7th – 12th October, 2018. Mr. Rajiv Dutta, Senior Advocate and Vice President, BAI attended the conference on behalf of The Bar Association of India.

20th – 21st October, 2018

ILNU-SILF-BAI Academia Conclave Series 2.0

ILNU-SILF-BAI Academia Conclave Series 2.0 was organised at Insitute of Law, Nirma University, Ahmedabad, Gujarat. The conclave

was inaugurated by Shri Tushar Mehta, Solicitor General of India. The conclave discussed on issues such as Towards a New Era of Academia – Legal Industry Collaboration, Business and Commercial Laws and Constitutional Law and Human Rights. Keynote address was delivered by Dr. Lalit Bhasin, President, BAI and presentations were made by Mr. K.V. Vishwanathan, Senior Advocate, Dr. Anindita Pujari, Hony. General Secretary, BAI, Dr. Akash Kaushik, Joint General Secretary, BAI, Mr. Yakesh Anand, Advocate, Ms. Rachana Srivastava, Advocate, Mr. Arush Khanna, Advocate, Ms. Swati Mehta, Advocate and Ms. Radhika Gupta, Advocate.

2nd November, 2018

Mr. Shyam Divan, Elected as Vice President of LAWASIA

The Bar Association of India Vice President and its nominee Mr. Shyam Divan was elected Vice President of LAWASIA 2018-2019 on 2nd November, 2018 at LAWASIA Council Meeting held at Siemp Reap, Cambodia.

2nd – 5th November, 2018

31st LAWASIA Conference, Siem Reap, Cambodia

The 31st LAWASIA Conference took place at Siem Reap, Cambodia from 2nd – 5th November, 2018. A high level delegation led by Mr. Prashant Kumar, President-Elect, BAI and Immediate Past President, LAWASIA attended the conference alongwith Dr. Pinky Anand, Additional Solicitor General of India and Vice President, BAI, Mr. Shyam Divan, Senior Advocate and Vice President, BAI, Ms. Geeta Luthra, Senior Advocate and others.

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I, SD Sharma, Administrative Manager, The Bar Association of India, New Delhi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/- SD Sharma
Publisher

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