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WOMEN AND THE LAW

*Latika Vashist**

I INTRODUCTION

SOME PREFATORY remarks are necessary before proceeding with the survey of cases on women and the law in 2015. The survey on 'women and the law'- as it appears in the form of a distinct subfield in *ASIL*-takes us to the old (yet fundamental) question of feminism and feminist research. One school of thought would say that 'women and law' should be a separate field (and there should be separate courses under the rubric of gender and law). Others would contend that 'gender' should be central to all law courses without carving it as a separate, special category. Hitherto *ASIL*, it is clear, adopts the former approach. There is much to be deciphered from the nomenclature itself- 'women and law', and *not* 'gender and law'. The title in its present form remains methodologically constricted as it seeks to pose the feminist question only when women (dis)appear. However, it has been long established that women are not the only subject of enquiry for feminism because 'all reality is gendered'. As per this view, feminist methodology can be extended to all areas of law including constitutional law, administrative law, criminal law, tort law and so on, even when 'women' are not focal point of enquiry. In other words, all the surveys can be written from the feminist perspective, rather than marginalising the feminist question(s) only to 'women and the law'. This will require a critical shift from 'women' to 'gender' in our approach. The shift will "raise[s] the level of analysis and critique from (particular) cases to (general) concepts, from individual sexes to gendered institutions. It compels us to transform the ways of reading the law: we start reading cases not just for their ratio and precedential value, but also for how the judicial narrative constructs the legal subject."[1]

Nevertheless, with the above preliminary remarks as caution, we will be retaining the methodological frame of 'women and the law' in this survey. However, a serious

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1 Latika Vashist, "Feminist Methodology and Legal Education: Some Reflections" in Manoj Kumar Sinha and Deepa Kharb (eds.), *Legal Research Methodology* (The Indian Law Institute and Lexis Nexis, 2016).

attempt has been made not to remain constricted within the limitations and constraints of such a framework. A substantial part of this survey focuses on cases pertaining to crimes against women, discrimination against women, rights and entitlements of women, and matrimonial cases. The survey's primary focus is on the decisions of the apex court. The author, however, has attempted to highlight a few important decisions delivered by the high courts as well.

II VIOLENCE, WOMEN AND FAMILIAL SPACE

A preliminary glance at the cases involving violence against women reveals that family is not a safe haven that it is projected to be. Familial space is as much (if not more) constituted by coercions and violations as the 'outside world', the only difference being that the violence of the family is either condoned and ignored or it is erased. The nexus of family, community and state in and through law serves to normalise the brute power that shapes the gender relations and hierarchies within the space of the family.

Honour, love and sites of familial violence

In *State of Rajasthan* v. *Ramesh*,[2] the respondent (father of the deceased, Sheela) was charged with murder (section 302 of the Indian Penal Code, 1860 (hereinafter, IPC)) and tampering with evidence (section 201 of the IPC). The version of the defence was that the accused had scolded his daughter for meeting a boy (whom, the facts show, she wanted to marry) and after 20 minutes he discovered that she had hanged herself. The accused also stated that he had tried to save her but she died when she was being taken to the hospital (the court noted that there was nothing on record to support this). The testimony of the accused was rejected on account of the medical report which showed that the death occurred due to strangulation and not hanging.

After scrutinising the evidence on record, the court was "convinced that is proved beyond reasonable doubt…[that the accused] got suddenly provoked and lost his power of self-control, slapped her, took her inside the house, and caused death of his daughter by strangulation and throttling."[3] The court invoked the exception of provocation and convicted the accused for culpable homicide not amounting to murder under section 304 part I of the IPC. This case brings to the fore gendered aspects of law of homicide. While this was not seen as a case of "honour killing" which has been long established as murder,[4] one cannot overlook the net of sexual governance that the provocation exception, as applied in this case, is woven into. This case also makes it clear how the "reasonable man's test" which determines the contours of provocation law hides subjective outrage and anger of men (which drives them to kill the women related to them) behind its objectivity.[5]

2 2015(2) SCALE 550, per S.A. Bobde and Prafulla C. Pant JJ.

3 *Id.*, para 22.

4 *Bhagwan Das* v. *State of NCT of Delhi* (2011) 6 SCC 396.

5 It may be noted that this is not a stand-alone case. There is a tendency to adhere to honour-based norms in the judicial reasoning. Another such instance is *Raj Bala* v. *State of Haryana*,

In contrast to the above case of filicide, is the case of *Shabnam* v. *State of UP*,[6] where Shabnam, in collusion with her lover, killed all the members of her family including the father, mother, and brothers. The accused were involved in a love affair and Shabnam was pregnant at the time of the commission of the murders but her family was opposed to their relationship. It was contended that the accused persons hatched this plan in order to kill the whole family to secure the entire property belonging to the family for herself. Both the accused were convicted for murder. On the question of sentence, the mitigating circumstances argued on behalf of the appellants were that the appellants were young at the time of the incidence, they has undergone severe mental stress due to the opposition of their alliance from the family and that Shabnam was pregnant at the time of the offence. The apex court rejecting all these contentions classified this crime as 'rarest of rare' and awarded them death penalty. The court narrative in this regard is noteworthy:[7]

> Familial relations play a vital role in describing and highlighting the qualities of our society...Indian culture has been witness to for centuries, that daughters dutifully bear the burden of being the caregivers for her parents, even more than a son. Our experience has reflected that an adult daughter places greater emphasis on their relationships with their parents, and when those relationships go awry, it takes a worse toll on the adult daughters than the adult sons...Now, in an educated and civilized society, a daughter plays a multifaceted and indispensible role in the family, especially towards her parents. She is a caregiver and a supporter, a gentle hand and responsible voice, an embodiment of the cherished values of our society and in whom a parent places blind faith and trust.

The court's abhorrence for the act of parricide, it appears, is further intensified because it was a daughter who committed it:[8]

> influenced by the love and lust of her paramour [she] has committed this brutal parricide exterminating seven lives including that of an

2015 (9) SCALE 25 where both trial court and high court reduced the sentence of offence under s. 306 of the IPC to one already undergone (in this case it was 4 months and 20 days) because the deceased had teased the daughter of the accused. While the trial court's judgment cites this as an explicit reason for the reduction in quantum of sentence, the high court's reference to the same is rather indirect. The Supreme Court while reversing the high court decision on the point of sentencing made "anguished observations" regarding judicial sentencing- how "judicial discretion [seems] to be completely moving away from the objective parameters of law which clearly postulate that the prime objective of criminal law is the imposition of adequate, just and proportionate punishment…" *Id.*, para 4.

6 (2015) 6 SCC 632, per H.L. Dattu, S.A. Bobde and Arun Mishra JJ. The author would like to thank Jyoti Dogra Sood for bringing the gender aspect of this case to her notice.

7 *Id.*, para 32.

8 *Id.*, para 33.

> innocent child. Not only did she forget her love for and duty towards her family, but also perpetrated the multiple homicide in her own house so as to fulfil her desire to be with the co-accused Saleem and grab the property leaving no heir but herself...Both the appellant-accused wrench the heart of our society where family is an institution of love and trust, which they have disrespected and corrupted for the sake of their love affair.

It is clear that judicial wrath is invoked as much by Shabnam's "apathetic attitude" towards familial values as by the cold-blooded nature of the act. Her "depravity" and "remorselessness" stood in stark contrast to the judges' imagination of the figure of ideal, dutiful daughter "in whom a parent places blind faith and trust".

How the judicial discourse reinforces the whole framework of familial values is interesting. The honour codes and performance/ enactment of pre-determined responsibilities- father's reasonable anger and daughter's gentle love- are the foundations of legal reasoning. Here, the 'social' is so deeply entrenched with the 'legal' that law no longer appears the objective and neutral entity that it claims to be; it instead is a terrain which is in service of, and subservient to, the dominant normative framework of the society.

In *Rashmi Behal* v. *State of UP*,[9] the complicity between the institutional structures of family and state agencies emerges starkly. Rashmi Behal, a 22-year old woman, filed this writ petition under article 32 of the Constitution for the enforcement of her fundamental rights guaranteed under articles 14 and 21. The petitioner alleged that she was abducted (first from the house of the custodian and ex-teacher, Asha Madho and second time from the court premises with the active connivance of the police officials), repeatedly assaulted and raped by her own father and his accomplices for not accepting their demand to enter flesh trade in which her family was actively involved. Though, the FIR was registered on January 21, 2013, neither the statements of the petitioner and witnesses were recorded nor her medical examination was conducted, despite repeated notices and reminders sent to the authorities.

The petitioner was hiding in Delhi at the time of filing this petition. In a previous order of the Supreme Court, the petitioner was directed to appear before the Chief Judicial Magistrate, Saket Courts, New Delhi so that her statement could be recorded by the Chief Judicial Magistrate. In her statement, she made serious allegations not only against her father, extended family members, and other accomplices but also the police personnel who had colluded with the family in her harassment. The court noted that no action was taken against the persons who had allegedly committed the crime. In fact, the allegations made by the petitioner in the FIR were "never taken seriously by the police authorities and in a routine manner the investigation was entrusted to SI police one after another."[10] Instead, the police personnel tried to justify their conduct of not recording the statement of the victim under section 164 of the Cr PC as well as

9 2015 (2) SCALE 452, per M.Y. Eqbal, Shiva Kirti Singh JJ.

10 *Id.*, para 13.

their failure in getting the petitioner medically examined as required under section 164A of the CrPC. In the light of these facts, the court recorded that the "police has acted in a partisan manner to shield the real culprits and the investigation of the case is not being conducted in a proper and objective manner." To ensure fair and unbiased investigation, the court "direct(ed) the Central Bureau of Investigation to investigate the case independently and in an objective manner and to conclude the same in accordance with law."[11] Undoubtedly, the apex court's intervention in this regard is appreciable. However, the legal discourse was largely shaped by the lens of victimisation of women through coercive flesh trade that continues in tandem with police nexus. The sexual violence perpetrated on the girl by her own family was only a background fact, leaving unchecked the violence that goes on within the supposed safe bounds of the family. The facts of the case, however illustrate the violence of the familial space and puts into question the assumption of family being a safe space.

One aspect of familial violence finds due notice in apex court's recent orders *Voluntary Health Ass. of Punjab* v. *Union of India.*[12] Taking note of the dropping sex ratio and ineffective implementation of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994, (PCPNDT Act), the court reviewed the situation in various states and issued detailed directions whereby the states were directed to verify the figures so that the sex ratio could be ascertained. The court had directed that a meeting be convened under the auspices of National Inspection and Monitoring Committee and the states were required to produce registers/ records in that meeting. The data provided by Uttar Pradesh (UP), Haryana and NCT of Delhi was verified and found correct. Since there was no improvement in sex ratio in Delhi following directions were given:[13]

> (i) The state government should verify the antecedents of the members of the State Board constituted under PNDT Act, 1994 to ensure that these members do not have conflict of interest with the provisions of the Act.
> (ii) The state board to meet at least once in two months keeping in view the dismal sex ratio
> (iii) There should be proper and effective participation of all members.
> (iv) Any violations of the provisions of the Act must be strictly dealt with.
> (v) the appropriate authority (as defined u/s 28) to develop a system that anyone who comes to know of illegality being committed under the Act can send a complaint to the authority for action.

11 *Id.*, para 17.

12 (2015) 9 SCC 740, per Dipak Misra and Abhay Manohar Sapre JJ.

13 *Id.*, para 23 (order dated 15-4-2015).

(vi) The cases under the Act should be given priority. All the trial magistrates before whom the prosecution under the Act are pending should finalise the same by 30th September 2015.

It was also directed that the above order with the directions be translated, published and broadcasted in various states.[14]

The monitoring committee found that the reports submitted by Bihar and Himachal Pradesh (HP) were defective. In the rectified reports, it was found that the data provided by Bihar on prosecutions under the Act was "ambiguous and incomprehensible" and thus a member of the committee and an officer from the Ministry of Health was directed to visit the state and verify the records.[15] Bihar was also directed that the cases pending at trial stage be disposed of by the end of October.[16] The committee stressed the civil registration of births in the states so that real time data for ascertainment of sex ratio is also available. To ensure compliance of rule 18-A of the PCPNDT Rules, 1996, it was also directed that all appropriate authorities, including the state, districts and sub-districts notified under the Act shall submit quarterly progress report to the government of India through the state government.

Violence in marriage

In 2015, a whole range of cases of wife killing (for dowry or otherwise) and suicides by married women who were subjected to cruelty came before the apex court. These cases not only open up various issues pertaining to the application and interpretation of existing legal provisions but also pose the larger question of pervasive violence within marriage. This question, it is submitted, cannot be adequately addressed unless the violence *of* marriage is unpacked in legal discourse and otherwise. To what extent is violence inherent to the institution of marriage? What is the nature of that violence? Is it a product of the gender roles forced upon individuals? While it is not within the scope of this survey to attempt answers to these questions, it is imperative that the cases below are seen neither as stray instances of extremities nor as exceptional situations. In fact, they give us a glimpse into the *violence of ordinary times* that constitutes the everyday reality of marriage.

Distinguishing dowry death and murder

In *Vijay Pal Singh* v. *State of Uttarakhand*[17] the victim's partly burnt body was found in the forest. There had been many demands of dowry in the past. The high court convicted the appellants under section 304B read with sections 34 and 201 of the IPC. In this case, the court sought to clarify the distinction between dowry death

14 *Id*., para 29 (order dated 6-5-2015).

15 *Id*., para 43 (order dated 5-9-2015).

16 *Id*., para 32.

17 AIR 2015 SC 684.

and murder. Pointing out that "the (high) court has gone only on one tangent", the court observed that the present case was wrongly treated as dowry death while it was actually a case of homicide. It was clarified that section 304B of the IPC is not a substitute for section 302.[18] Mere fact that the ingredients of section 304B are satisfied does not mean that the case will automatically fall under this section. The court rightly remarked that "if there are definite indications of the death being homicide, the first approach of the prosecution and the court should be to find out as to who caused that murder."[19]

Tracing the genesis of section 304B to the 91st Report of the Law Commission of India, the court further observed:[20]

> If, in a particular incident of dowry death, the facts are such as to satisfy the legal ingredients of an offence already known to the law, and if those facts can be proved without much difficulty, the existing criminal law can be resorted to for bringing the offender to book. In practice, however, two main impediments arise-
>
> (i) either the facts do not fully fit into the pigeon-hole of any known offence; or
> (ii) the peculiarities of the situation are such that proof of directly incriminating facts is thereby rendered difficult.

In other words, if there is direct or circumstantial evidence to show that the offence falls under section 302, then the court should proceed under it; and section 304B can be put as an alternate charge. During the course of the trial, if the offense under section 302 cannot be proved beyond reasonable doubt, then the court should proceed under section 304B.

Presumptions under law

Section 113A of the Evidence Act, 1872 raises a presumption as to the abetment of suicide of a married woman against the husband and relatives, if it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty.

18 See *Ratnesh Kumar Pandey* v. *State of UP*, 2015 (12) SCALE 495, where the husband (appellent) was convicted under s. 302 of the IPC. At the time of sentencing, strangely his counsel contended that the offence can be modified to one under s. 304B and a lesser punishment be awarded (since the appellant has already suffered for more than 10 years, he got married and has children). The court, seemed to have found this argument "persuasive" but basing its decision on the brutal facts of the case, it did not show "any lenience to the appellant". It is submitted that the court erred in addressing the appellent's contention as a factual (and not a legal) issue. At the stage of sentencing the court cannot modify the offence to a lesser one, if the facts are such that accused deserved sympathy. The sentencing discretion is based on mitigating factors and in no case extends to transforming the nature of the offence!

19 *Supra* note 17, para 17.

20 *Ibid.*

Section 113B, on the other hand, raises a presumption as to dowry death if it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry. In the context of section 113A, the death of the woman may not be connected to dowry- the only requirement is to show that she was subjected to cruelty (which is defined in section 498 A of the IPC). However, in section 113B, the death should have a connection with the demand for dowry. Another crucial distinction in these sections is one of degree of presumption. This was brought out in *Bhim Singh* v. *State of Uttarakhand*:[21]

> …under Section 113A of the Indian evidence Act, onus is shifted on the accused to dislodge the presumption of having committed abetment of suicide by a married woman. Unlike as in Section 304-B where the court "shall presume" dowry death, when the prosecution has established the ingredients, under Section 113A of the Evidence Act, discretion has been conferred upon the Court wherein it has been provided that the Court may presume abetment of suicide. Therefore the onus lies on the accused to rebut the presumption, and in case of Section 113-B of the Evidence Act relatable to Section 304B of IPC, the onus to prove shifts exclusively and heavily on the accused.

These distinctions brought out in the degree of proof are crucial. Presumption as to dowry death is stronger and thus according to the court, the onus on the accused is shifted "exclusively and heavily". It is important to decipher the meaning of "exclusively and heavily" and this takes us to the next two cases which talk about the standard of proof in cruelty and dowry death cases.

Standard of proof

Sher Singh @ Partapa v. *State of Haryana*[22] records the story of Harjinder Kaur who committed suicide by consuming some poisonous substance at her matrimonial house. Two months prior to her death, she had informed her brothers about the cruelty meted out to her by her husband and in-laws for not fulfilling their demand of a fridge and a motorcycle. The accused persons were convicted under sections 304B and 498A of the IPC. Interpreting sections 304B of the IPC along with section 113 B of the Evidence Act, the court observed:[23]

21 2015 (2) SCALE 280, per M.Y. Eqbal, Pinaki Chandra Ghose JJ. Also see *M. Narayan* v. *State of Karnataka*, 2015(5) SCALE 292 wherein it was affirmed that "[s]ection 304B, IPC, and Section 113B of the Indian Evidence Act, 1872, do supplement each other to effectuate the legislative mandate of statutory presumption of guilt, the contingencies warranted being present".

22 2015(1) SCALE 250, per Vikramajit Sen, Kurian Joseph JJ.

23 *Id.*, para 17. The same view is taken in *Maya Devi* v. *State of Haryana*, 2015 (13) SCALE 336, wherein the court observed that "[s]ection 113B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her. In the case in hand, accused persons *failed to prove beyond reasonable doubt* that the deceased died a natural death."

> the burden of proof weighs on the husband to prove his innocence by dislodging his deemed culpability… The other facet is that the husband has indeed a heavy burden cast on his shoulders in that his deemed culpability would have to be displaced and overturned beyond reasonable doubt.

In court's opinion, the husband must prove his innocence beyond reasonable doubt and not merely based on the preponderance of probability. The court based this interpretation on the deemed guilt expressed in section 304B. In *Ramakant Mishra @ Lalu* v. *UP*, the ratio of *Sher Singh* was reaffirmed in the following terms:[24]

> the use of word 'shown' instead of 'proved' in Section 304B indicates that the onus cast on the prosecution would stand satisfied on the anvil of a mere preponderance of probability. In other words, 'shown' will have to be read up to mean 'proved' but only to the extent of preponderance of probability. Thereafter, the word 'deemed' used in that Section is to be read down to require an accused to prove his innocence, but beyond reasonable doubt. The 'deemed' culpability of the accused leaving no room for the accused to prove innocence was, accordingly, read down to a strong 'presumption' of his culpability. However, the accused is required to dislodge this presumption by proving his innocence beyond reasonable doubt as distinct from preponderance of possibility.

It is submitted that this interpretation is not in consonance with the law of evidence. Section 4 of the Evidence Act which defines the expression "shall presume" has no reference to such a higher burden of proof. The deeming clause in section 304B *i.e*., "shall be deemed to have caused her death" only intends to ease the proof of the causal connection between the acts of the husband and the death. The prosecution is only required to show that (i) the death of a woman in abnormal circumstances (ii) within seven years of her marriage, and (iii) soon before her death she was subjected to cruelty or har-assment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Once these three factors are established, it shall be presumed that the death is caused by the husband or the relative. This deeming provision has no bearing on the standard of proof that the defence is required to discharge.

Meaning of "soon before her death"

Two important issues were settled in *Rajinder Singh* v. *State of Punjab*:[25] the scope of section 2 of the Dowry Prohibition Act and the meaning of "soon before her

24 (2015) 8 SCC 299, per Vikramajit Sen, R.K. Agrawal JJ.

25 (2015) 6 SCC 477 per T.S. Thakur, R.F. Nariman and Prafulla C. Pant JJ.

death" in section 304B of the IPC. This case pertained to the death of Salwinder Kaur in 1993. An FIR was lodged against her husband, his older brother and his wife. The trial court convicted the husband (the other two were released) under section 304A and awarded him the minimum sentence which is seven years. The high court had upheld the conviction as well as the sentence. It was brought out in evidence by the deceased's father that his daughter was persistently harassed for dowry by her husband and in-laws. He had given in to some of their demands in the past and had promised to give them more money at the time of harvest. Before the Supreme Court, the appellant's contention was that no offence was made out under section 304B since "the link required between demand made being connected with the marriage was snapped" and the "complaints were made at long intervals."[26]

As per section 2 of the Dowry Prohibition Act, dowry is any property/ valuable security given "at or before or any time after the marriage in connection with the marriage of the said parties." Overruling *Appasaheb's* case,[27] the court held "that any money or property or valuable security demanded by any of the persons mentioned in section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise."[28] In arriving at this conclusion, the court observed that though all penal statutes should be construed strictly, provisions intended to combat social evils of alarming proportions require a liberal construction.[29] The rule of "strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to escape."[30]

On the meaning of "soon before", the court observed that every instance of cruelty and harassment has a different impact on a woman's mind. Some of them may remain etched in her memory for very long time. Relying on *Surinder Singh* v. *State of Haryana*,[31] it was held: "soon before" is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death."[32] While "soon before" should not be treated synonymous with "immediately before" (the court thus overruled

26 *Id*., para 6.

27 *Appasaheb* v. *State of Maharashtra*, AIR 2007 SC 763, where the court had construed the word dowry strictly. In this case the court said that "[a] demand for money on account of some financial exigency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry."

28 *Supra* note 25, para 20.

29 The court favourably cited *M. Narayanan Nambiar* v. *State of Kerala*, AIR 1963 SC 1116 and *Standard Chartered Bank* v. *Directorate of Enforcement*, AIR 2005 SC 2622; *Reema Aggarwal* v. *Anupam*, AIR 2004 SC 1418 to arrive at this point.

30 *Supra* note 25, para 16.

31 AIR 2014 SC 817.

32 *Supra* note 25, para 22.

Dinesh v. *State of Haryana*[33]), there must be a proximate nexus between the demand of dowry and cruelty or harassment based upon such demand on the one hand, and the date of death, on the other. This test of proximity is not rigid and calls for fair and pragmatic approach depending upon facts and circumstances of every case:[34]

> Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304B.

Missing details in the First Information Report (FIR)

In *V.K. Mishra* v. *State of Uttarakhand* [35] the argument of the defence was that there were no allegations of cruelty in connection with dowry demand or any such conduct of the appellants which could have driven the deceased to commit suicide either in the FIR or in the statement under section 161 of the CrPC. The court, however, rightly observed that "FIR is not meant to be an encyclopedia nor is it expected to contain all the details of the prosecution case. It may be sufficient if the broad facts of the prosecution case are stated in the FIR."[36] In the present case, complaint was lodged within a few hours after the tragic event. The court observed that the impact of death of daughter within a few days of her marriage, on the mind of the father cannot be measured by any yardstick. While lodging the report, he must have been in great

33 2014 (5) SCALE 641. In this case the court stated thus: "The expression "soon before" is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straight jacket formula can be laid down by fixing any time of allotment. It can be said that the term "soon before" is synonymous with the term "immediately before". The determination of the period which can come within term "soon before" is left to be determined by courts depending upon the facts and circumstances of each case."*Id.*, at 646. These observations in *Dinesh* were starkly opposed to *Kans Raj* v. *State of Punjab* (2000) 5 SCC 207 wherein it was held that "[t]he term 'soon before' is not synonymous with the term 'immediately before'…. These words would imply that the interval should not be too long between the time of making the statement and the death."

34 *Supra* note 25, para 24. In *Major Singh* v. *Punjab* (2015) 5 SCC 201, the court reiterated this interpretation of 'soon before' and emphasised upon the importance of proximity test both for the proof of an offence of dowry death as well as for raising a presumption under section 113-B of the Evidence Act. Also see, *Maya Devi* v. *State of Haryana*, 2015 (13) SCALE 336.

35 AIR 2015 SC 3043, per T.S. Thakur, R.K. Agrawal, R. Banumathi JJ. "There must be in existence a proximate live link between the facts of cruelty in connection with the demand of dowry and the death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned it would be of no consequence." *Id.*, para 7.

36 *Id.*, para 12.

shock and may not have narrated all the details of payment of money and the dowry related harassment meted out to his daughter. It was affirmed that "[u]nless there are indications of fabrication, prosecution version cannot be doubted, merely on the ground that FIR does not contain the details."[37]

Dying declarations

In *State of Maharashtra* v. *Pravin Mahadeo Gadekar*[38] the deceased, Sadhana was subjected to cruelty by her husband, and in-laws owing to which she had lodged a complaint against them. However, the dispute was settled and she started cohabiting with her husband. On November 6, 1995, she sustained severe burn injuries and died. In her statement to the police, she stated that her brother-in-law, had attempted to commit rape on her few days back and when she narrated this to her husband, he poured kerosene on her and set her ablaze. After investigation the police filed charge-sheet against the husband, brother-in-law and mother-in-law for offences under sections 498A, 302 read with section 34 of the IPC. The brother-in-law was additionally charged under section 354 of the IPC.

The trial court held the husband guilty under sections 302 and 498A. The brother-in-law was held under section 354, while the mother was acquitted of all charges. When the matter came before high court, both the accused were acquitted on account of "inconsistencies and difference in conversations referred to in such declarations" which "according to the high court made all dying declarations unreliable."[39] The high court also observed that the husband had also sustained burn injuries in the same transaction which were not explained at all. The Supreme Court, however, found the dying declaration "absolutely reliable". The court observed that Sandhya was mentally fit while making the declaration and there was no inconsistency in any of the dying declarations on the question of how she was set ablaze by her husband.[40] The court thus held that the charges under sections 302 and 354 against the two accused stand fully proved. However, for reasons unexplained in the judgment, the husband was acquitted with regard to charge under section 498A of the IPC.

In *Santosh* v. *State of Maharashtra*[41] the accused was charged under section 302 of the IPC for killing his wife. The prosecution version was that the accused suspected his wife of infidelity and picking up fight over it, he set her on fire. In the dying

37 *Id.*, para 12.

38 (2015) 8 SCC 489, per Pinaki Chandra Ghose, Uday Umesh Lalit JJ.

39 *Id.*, para 9.

40 *Id.*, para11. In *Sandeep* v. *State of Haryana*, 2015 (7) SCALE 10, it was observed that in case of two dying declarations, the one recorded by judicial magistrate would stand on a higher footing. Also see, *State of Maharashtra* v. *Hemant Kawadu Chauriwal*, 2015 (13) SCALE 830 wherein it was observed that "dying declaration must be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence." The accused in this case were acquitted since the veracity of the dying declaration could not be established.

41 AIR 2015 SC 3789: 2015(5) SCALE 424, per T.S. Thakur, Adarsh Kumar Goel and R. Banumathi JJ.

declaration, the deceased had categorically stated so. The counsel for the appellant, on the other hand, unsuccessfully argued that there was no premeditation as he had tried to extinguish the fire by throwing water and he himself got burnt in the process. The court held that since there is clear evidence that the accused set her on fire, absence of premeditation or the accused's act of pouring water would not reduce the offence from murder to culpable homicide. The court also emphasized that a "stern view" needs to be taken by the court in the cases of bride burning.

Suicides by wives and ascertainment of liability of husband and in-laws

Shanti Roy who was carrying eight months old foetus committed suicide by pouring kerosene over herself.[42]After investigations the husband, mother-in-law (who passed away during pendency of the trial), sisters-in-law and brother-in-law of the deceased were sent for trial. They were all sentenced for ten years rigorous imprisonment (RI) under sections 498A, 306 and 304B of the IPC. While the husband did not prefer an appeal, the other accused appealed against their conviction. Relying on *Kans Raj* v. *State of Punjab*,[43] it was argued on their behalf that the court should be cautious in accepting the "omnibus allegation against all the family members, having regard to the well known tendency of naming all the family members by the family of an unfortunate victim."[44] It was also averred that no independent corroboration has been made of appellants' individual roles in the harassment of the deceased (the witnesses were close relatives of the deceased).[45]

The court accepted this contention and observed that under section 304B apart from the demand of dowry, 'cruelty and harassment' for or in connection with the demand for dowry is also to be established, which was not done in the present case. According to the court, a "pragmatic view" is to be adopted since:[46]

> Normally, it is the husband or parents of the husband who may be benefitted by the dowry and may be in a position to harass and not all other relatives, though no hard or fast rule can be laid down in that regard.

While this decision may be correct on its own facts, in separating the demand of dowry from cruelty and harassment, it raises grave conceptual issues. This takes us

42 *Monju Roy* v. *State of West Bengal,* 2015 (5) SCALE 288, per T.S. Thakur and Adarsh Kumar Goel JJ.

43 (2000) 5 SCC 207.

44 *Supra* note 42, para 5.

45 Also see, *Rajinder Kumar* v. *State of Haryana,* 2015 (1) SCALE 354 where the court observed that in case of dowry death the statement of the family members of the deceased cannot be discarded on the ground that they are close relatives and are therefore interested, till a contradiction is shown in their deposition or cross examination. This is so because the demands for dowry are within four corners of the house and seldom do the neighbours get to know of such demands.

46 *Supra* note 42, para 12.

to our understanding of familial spaces, especially the violent form they assume for women in the matrimonial home. Does the law want to overlook the complicity of those members who only demand dowry but themselves do not harass, while the harassment happens at the hands of others? It is the trauma faced by married women surrounded by perpetrators and silent spectators of cruelty and harassment that forces them to end their lives. This is not to suggest an expanded regime of criminal law but it may be instructive to deeply reflect on how the principles of criminal responsibility ascertained the culpability of those who 'caused' the death of the woman.

In *Ghusabhai Raisangbhai Chorasiya* v. *State of Gujarat*,[47] the husband of the deceased was involved in an illicit relationship owing to which the harmony of family life had disrupted. The deceased Biniben, was driven out by her husband and she came to her parental home. After intervention, a settlement was done and she had returned to her in-laws house. However, owing to husband's extra-marital affair, marital discord and bitterness were an ever present part of their relationship. It was established that she was divorced by the husband and was compelled to stay on the terrace of the house where she committed suicide. Her body was cremated without even informing her parents. When they learnt about her death, criminal law machinery was set in motion and the accused were charged under sections 498A, 306 and section 201 read with section 114 of the IPC. The trial judge and the high court held the father-in-law, husband, mother-in-law and the woman with whom the husband was having an illicit relationship, guilty of the aforementioned offences. Since there was no demand for dowry, the accused were held guilty as per the first limb of section 498A of the IPC.[48]

The apex court was required to ascertain whether there was such cruelty by the husband and his relations that could have driven the deceased to commit suicide. The court found that the deceased was already divorced by her husband and because of that reason she was staying on the terrace of their house. Her sister's testimony also established the factum of divorce and that she was contemplating to return to her parent's house. Since the court found no evidence of physical or economic abuse of the deceased, the moot question was: whether husband's illicit relationship could have constituted such mental cruelty that it would have driven her to commit suicide?

Citing *Pinakin Mahipatray Rawal* v. *State of Gujarat*[49] on extra marital relationship, the court affirmed that "mere fact that the husband has developed some intimacy with another, during the subsistence of marriage and failed to discharge his marital obligations, as such would not amount to "cruelty". Cruelty "must be of such a nature as is likely to drive the spouse to commit suicide to fall within the explanation to section 498-A IPC." According to the court, "the accused may have been involved

47 AIR 2015 SC 2670, per Sudhansu Jyoti Mukhopadhaya, Dipak Misra JJ.

48 The first part of section 489A of IPC reads" "any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman."

49 (2013) 10 SCC 48.

in an illicit relationship with the appellant no.4, but in the absence of some other acceptable evidence on record that can establish *such high degree of mental cruelty*, the Explanation to Section 498A IPC which includes cruelty to drive a woman to commit suicide, would not be attracted."[50] Thus, the accused were acquitted of all the charges.

In *Bhanuben* v. *State of Gujarat*[51] the deceased was residing in her matrimonial home with her minor daughter. Within two years of marriage she was allegedly harassed by her husband and in-laws "for not bringing dowry and not working properly."[52] Undisputed facts of the case reveal that the deceased was beaten up and thrown out of the matrimonial home on many occasions. She had returned to the matrimonial home, sometimes persuaded by her native family to "compromise", and on other occasions on account of the "settlement made before the Court". However, none of these compromises or settlements put an end to the domestic violence. She died because of consumption of poison. A complaint was filed against the husband and the appellants (mother-in-law and sister-in-law) and the trial court held them liable under sections 498A and 306, read with section 114 of the IPC and acquitted them under section 304B of the IPC and section 4 of the Dowry Prohibition Act. In appeal, the high court upheld the conviction order. Since the husband had served the period of the sentence, the present appeal was filed by the mother-in-law and sister-in-law.

The question before the court was whether the courts below had rightly convicted the appellants for the offences punishable under sections 498A and 306, read with section 114 of the IPC? On a perusal of evidence, the apex court found that "the deceased was regularly taunted and mentally and physically harassed by the accused and she had complained about the same."[53] It was also established that she was compelled to spend "several days sleeping at odd places like empty buses etc. as she had nowhere else to go."[54] It was reported that the deceased had sought help, claiming her husband and in-laws had tried to kill her. In the light of these facts, the court held that the deceased was subjected to cruelty, and therefore the conviction under section 498A was upheld. On the question, whether the appellants should be liable under section 306, the court said that this could not be proved with conclusive evidence. The court relied on the dying declaration where the deceased has stated that she had consumed the poisonous tablets by mistake, as these were kept with other medicines. The court also mentioned that the moment the accused realized the gravity of the situation they took her to the hospital. In the light of this, the court concluded that though the cruelty meted to deceased is proved, the accused cannot be held culpable under section 306 because the deceased's death was on account of a mistake and was not a suicide.[55] As for the quantum of punishment for cruelty, the court reduced the

50 *Supra* note 47, para 21(emphasis supplied).

51 2015(9) SCALE 716, per T.S. Thakur and V. Gopala Gowda JJ.

52 *Id*., para 3.

53 *Id*., para 17.

54 *Id*., para 18.

55 *Id*., paras 23-24.

sentence to period undergone "[k]eeping in view the age of the appellants" the mother-in-law was around 60 years of age and the sister-in-law was 36 years old with a child to take care of. In this way, court dispensed justice in this case.

In *Amrutlal Liladhar Bhai Kotak* v. *State of Gujarat*[56] the complaint was filed by the father of the deceased, Truptiben under sections 498A, 304B and 306 read with 114 of the IPC. The appellants in this case were the in-laws and husband of Truptiben who had gone absconding for 36 days after her death. The witnesses in this case (relatives and friends of the deceased) testified that she was subjected to mental torture and harassment for bringing less dowry. Based on this evidence, the trial court convicted the accused under the aforementioned sections. The appellants' case before the high court was premised on the argument that the witnesses were interested parties and therefore, they could not be solely relied upon. The appeal was declined by the high court. Before the Supreme Court, the appellants contended that the state has failed to satisfy the requirements of section 304B and 306. It must be shown that the deceased was incited to commit suicide by the accused. Citing *Kishori Lal* v. *State of MP,*[57] it was argued that in cases of abetment of suicide and dowry death there must be proof of direct or indirect acts of incitement to suicide and mere cruelty by the husband is not enough. Further reliance was placed on the very problematic *Sushil Kumar Sharma* v. *UOI* [58] where the Supreme Court had observed that the object of section 498A is to get to the root of dowry menace "and its unleashing will lead to a legal terrorism." The provision, it was argued, is to be used as a shield and not an assassin's weapon. It was also argued[59] that the presumption under section 113B of the Indian Evidence Act can only be raised if there is a concrete proof of cruelty and harassment of the deceased at the hands of the accused.

The court responded to these assertions by clarifying the scope of the sections in question. With regard to section 498A and 304B of IPC, it was pointed out that these sections "are not mutually inclusive",[60] acquittal under one section would not automatically result in the acquittal under the other. Further, the presumption under section 113B of the Evidence Act arises when a woman has committed suicide within a period of seven years from the date of marriage, and it has been established that the deceased was subjected to cruel treatment before her death. Since these conditions were satisfied in the present case, the court upheld the conviction.

Domestic violence

In *Shalini* v. *Kishor*[61] the appellant and the respondent were living separately since 1992. After the enactment of the Domestic Violence Act, 2005 (DV Act), the

56 AIR 2015 SC 1355, per M.Y. Eqbal and Pinaki Chandra Ghosh JJ.

57 (2007) 10 SCC 797.

58 (2005) 6 SCC 281.

59 Relying on *M. Srinivasulu* v. *State of A.P*., AIR 2007 SC 3146.

60 *Supra* note 56, para 14.

61 AIR 2015 SC 2605: 2015 (6) SCALE 219.

appellant filed a complaint under the said Act, following which the respondent was directed to grant maintenance to his wife as well as son. This was contested by the respondent-husband on the ground that the appellant has attempted to raise the issue of desertion after a period of 15 years, the parties were not living together for a long period and thus there is no question of "shared household". Relying on *V.D. Bhanot* v. *Savita Bhanot*,[62] and *Saraswathy* v. *Babu*,[63] the court held that the appellant is entitled to the protection of DV Act since the domestic relationship between the appellant and respondent was established (*i.e.*, they formed a "shared household" at some point in time in the past), as was the factum of economic abuse under section 3 of the Act. Thus, absence of cohabitation for a long time would not deny relief.[64]

In *Krishna Bhatacharjee* v. *Sarathi Choudhary*,[65] the appellant filed an application under section 12 of the DV Act seeking seizure of her *stridhan* from her husband. However, her application was rejected on the ground that she had raised the claim after the decree of judicial separation. According to the magistrate, though she was an "aggrieved person" but no "domestic relationship" as defined under section 2(f) of the Act existed between the parties and therefore she was not entitled to relief. The appellant courts were of the view that the wife's application was also time-barred. Thus, the two issues that came before the Supreme Court were: *first*, whether the appellant has ceased to be an "aggrieved person" because of the decree of judicial separation; and *second*, whether the appellant's petition was barred by limitation?

The apex court rejecting both these grounds emphasised "the need of sensitive approach to these kind of cases."[66] The court referred to a string of cases and reiterated that a petition under the DV Act is maintainable even if the acts of domestic violence had been committed prior to the coming into force of the Act, notwithstanding the fact that the parties were no longer living together at the time when the Act came into force.[67] Further, addressing the first issue, the court observed that the decree of judicial separation does not dissolve the marriage and the legal relationship between the parties continues and therefore, the wife will not cease to be an "aggrieved person" after the decree of judicial separation. On the second issue, the court observed that the wife was compelled to file the application for *stridhan* as the husband had stopped paying the maintenance. It was held that "[t]he concept of "continuing offence" gets attracted

62 (2012) 3 SCC 183.

63 (2014) 3 SCC 712.

64 Also see, *Narayan Jangluji Thool* v. *Mala Chandan Wani*, AIR 2015 Bom 36. In this case it was held that a married woman in a relationship outside marriage cannot be said to be in a "domestic relationship" and thus cannot seek protection of the DV Act. It was emphasised that the applicant should be living together with another person in a relationship "which is akin to marriage" and "should also show that they otherwise legally qualified to marry" (*i.e.* should not have a subsisting marriage).

65 2015 (12) SCALE 521, per Dipak Misra and Prafulla C. Pant JJ.

66 *Id.*, para 9.

67 *Id.*, para 13.

from the date of deprivation of *stridhan*, for neither the husband nor any other family members can have any right over the *stridhan* and they remain only custodians."[68] Since it was a continuing offence; the application could not be treated as barred by limitation.

In *Chanchal Agrawal* v. *Jagdish Prasad Gupta*[69] the respondent filed a suit seeking injunction against the appellant (his daughter-in-law) restraining her from interfering with their peaceful living. The respondent argued that he was the exclusive owner of the property as he took no money from his son or wife. The present suit was filed because he contended that the appellant's behaviour towards them was highly objectionable and cruel. The trial court had granted the injunction and hence this appeal. The appellant's contention was that this was a collusive suit between her father-in-law and husband to deprive her from living in the matrimonial house. She pointed out that she had filed a case under the DV Act claiming that she has a right to stay in the said house because that is a 'shared household' under section 2(s) of the DV Act.

The court relying on *Batra* v. *Batra*,[70] held that the said house does not fall within the definition of "shared household". Under the DV Act, it was held that the daughter-in-law can only claim her right to live in a house belonging to her husband or a rented house of her husband or in a joint family house in which her husband has a share. She has no legal right in the self-acquired property of the parents-in-law. The reasoning of the court in this case is again deeply etched into familial ideology, surfacing how legal entitlements are contingent on the performance of gendered marital roles:[71]

> A child is bought up by his parents with utmost care, love and affection from the day the child puts his first appearance in the world till he becomes independent and intend to continue the same till their death. they marry their son with great enthusiasm and welcome their daughter-in-law in their house and intend to live with them happily and treat the daughter-in-law as a family member henceforth with the very little expectation…at the old age, the parents also have some legitimate expectations from their sons/ daughter-in-law that their son and daughter-in-law take care of them, they will look after them properly. It is the boundened and pious obligation and duty of every son/ daughter-in-law, which is not to be told, to take care of parents at their old

68 *Id*., para 31.

69 AIR 2015 All 28.

70 (2007) 3 SCC 169.

71 *Supra* note 69, para 15. Also note the observations of in *Smt. Praveena Tank* v. *Arvind Kumar Tank*, AIR 2015 Raj 7:"marriage is a scared relationship between husband and the wife. In a traditional society like ours, when a boy marries a girl, he not only brings a wife to his home, but also brings a daughter-in-law for the family. Thus, the behavior of a woman has to be seen both as a wife and as a daughter-in-law."

> age…The pain, which the parents suffer at their old age by the act and behaviour of their son/ daughter-in-law is a suffering which cannot be explained…

III RAPE

During the reform proposals for the 2013 Criminal Law Amendment Act, one pertinent question was whether terminology "rape" should be retained in law. While the Verma Committee suggested that rape should be replaced with 'sexual assault', the amendment act retained the expression rape, while expanding the definition from penile penetration to other types of sexual assaults. The debates around this issue illustrate how this change in phraseology is not merely a linguistic shift but is transformative of the way sexual violence is perceived in legal as well as popular imagination. However, it is not just the language that law employs, but also the language that law understands, which determines law's potential to do justice. What should be said, how it should be said in the courtroom, employing what kind of expressions, such that the experience of the aggrieved is translated into a code discernible by law, is a long awaited legal research issue. *State of Rajasthan* v. *Sri Chand*[72] is one illustration of this. The complainant in her testimony stated that the accused "got on to her and did bad work".[73] The court wanted her to explain what she meant by 'bad work' but "she kept quiet and bowed her head." The father stated that it meant rape, but the court did not accept his statement since he was not an eye witness. Based on this, the court held that it was not a case of attempt to rape but the much lesser offence under section 354 of the IPC.[74] In the light of Pratiksha Baxi's ethnographic study of rape trials in the trial courts of Gujarat[75]wherein the expression "*gandakaam*" (bad work) was a common descriptive term used by the survivors/ victims, the questions of huge linguistic gap between the court's understanding and the aggrieved's experiences and the judicial apathy it translated into,[76] remain pertinent.

72 2015(6) SCALE 224.

73 *Id*., para 8.

74 According to the court, "for the act to constitute offence of rape penetration is pre-requisite…and therefore for the offence of attempt to rape the accused must have so advanced in his actions that it would have resulted into rape had some extraneous factors not intervened….it should be shown that the accused was determined to have sexual connection (penetration) with the prosecutrix at all events inspite of all resistance." *Id*., para 8. (It may be noted that s. 375 of the IPC stands modified after 2013 criminal law amendments). The court further said that there are inconsistencies in her statement wherein she had said that she suffered injuries on her breast but the medical report did not corroborate the same. Also, an important eye witness was not produced as witness. The court refused to grant probation in this case since the offense committed by him was heinous in nature and sentenced him to two years imprisonment.

75 Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (OUP, 2013).

76 Also see, *State of MP* v. *Keshar Singh*, 2015 (7) SCALE 450 which shows how the process of law is framed within insensitivity and indifference towards the child witness.

Dangerous juvenile

Post December 16 rape case, the figure of the juvenile has emerged as a predator and a huge threat for women. In erroneously pitching the rights of women against the legal protection that juveniles deserve, the recent amendments to the juvenile justice law were founded on an irrational fear of the juvenile rapist.[77] This popular sentiment has not only pervaded the legislative spirit but also judicial reasoning as is evident in *Darga Ram alias Gunga* v. *State of Rajasthan.*[78] The appellant was convicted for the rape and murder of a seven year of girl. In the appeal before the Supreme Court, the appellant moved an application seeking to raise a plea of juvenility on the date of the commission of the crime. The accused was deaf and dumb and had never gone to school. Since there was no official record regarding his age, a medical board was constituted under rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, to determine his age. Based on the radiological findings and dental and clinical appearance, the age of the accused was placed in the range between 30 to 36 years. Taking the average, the board concluded that his age was 33 on the date of examination, or 17 years, 2 months and 7 days on the date of the occurrence. According to this finding, he was a juvenile on the date of occurrence and thus entitled to the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000. This finding however did not find favour with the Supreme Court:[79]

> We cannot help observing that we have not felt very comfortable with the Medical Board estimating the age of the appellant in a range of 30 to 36 years as on the date of the medical examination. The general rule about the age determination is that the age as determined can vary plus minus two years but the Board has in the case at hand spread over a period of six years and taken a mean to fix the age of the appellant at 33 years. We are not sure whether that is the correct way of estimating the age of the appellant.

This scepticism was set aside since the estimate was by the medical board comprising professors of anatomy, radio diagnosis and forensic medicine. However, the court noted that even if the present age was taken to be the maximum in this range *i.e*., 36, in the light of rule 12(3), the accused would be a juvenile.[80] Though the law was on the side of the juvenile, it appears that the court's own emotions could not align with the reason of law as strong judicial apathy for the accused became apparent:[81]

77 See generally, Ved Kumari, "The Juvenile Justice Act 2015- Critical Understanding" 58(1) *JILI* 83 (2016).

78 AIR 2015 SC 1016, per T.S. Thakur and R. Bhanumati JJ.

79 *Id.*, para15.

80 Rule 12(3) of the JJ rules requires that a benefit be tendered to the child by considering his/her age on the lower side within the margin of one year, in case exact assessment of the age cannot be done.

81 *Supra* note 78, para 16. For a critique of this judgment, see BB Pande, "Bad' Juveniles and the 'Worst' Juvenile Justice Law? The Second Challenge to Juvenile Justice Law in *Darga Ram* v. *State of Rajasthan*" 57(1) *JILI* 27 (2015).

> …but for the protection available to him under the Act the appellant may have deserved the severest punishment permissible under law. The fact that the appellant has been in jail for nearly 14 years is the *only cold comfort* for us to let out of jail one who has been found guilty of rape and murder of an innocent young child.

It is submitted that such judicial zeal of punishing the juvenile rapist completely fails to contribute anything meaningful to the struggle against sexual violence. In framing the juvenile as a dangerous monster who deserves no mercy, no empathy, law completely fails to seriously reflect upon the causes of juuenile delinquency.

Age of consent

Statutory rape appears as a strange category in rape cases where judges' anxiety in giving the verdict of rape, despite presence of consent, becomes too apparent. In some cases accused appears as a luckless victim and judges go to all extent to protect him from penalty. In other cases, we find that concerns of sexual morality dominate the court's reasoning and despite the presence of girl's consent, the accused is painted as a monstrous rapist deserving judicial wrath.

The trial court in *State of M.P.* v. *Munna @ Shamboo Nath*[82] found the age of the complainant to be less than 16 years and the accused was sentenced to seven year rigorous imprisonment. However, the high court set aside the conviction. The medical evidence relied upon by the trial court was disbelieved by the high court as the doctor who conducted the ossification test was not examined. X-ray report containing the opinion of the doctor was also disbelieved by the high court as it was "merely technical opinion" and the doctor was not produced for examination by the trial court. The high court found that the school certificate was not proved without doubt. Further, the court examined the deposition of mother of the complainant (she stated that in the morning when she saw that the complainant was not lying with her, she and her elder daughter started looking for her and when they opened the door of the room, they found that the accused was standing with the complainant behind the bags), and concluded that it was a case of consensual intercourse. Here it is important to note that the court disregarded the medical evidence (ossification test, X-ray report) as well as school certificate (which stated that she was in class IX at the time of the incident). The doctor who was called to testify stated that "the girl could not have attained the age of 14 years, but further in her examination-in-chief and cross-examination, she stated that *she could not opine about the present intercourse*." It is really not clear what kind of opinion "about the present intercourse" was the court seeking from the doctor. From the x-ray report and the ossification test, the doctor had opined that the age of the prosecutrix could not be more than 14 years but, according to the court,"since the doctor was never examined, the X-ray report is not

82 2015 (9) SCALE 815, per Pinaki Chandra Ghose, R.K. Agrawal JJ.

sufficient to prove the age of the prosecutrix." While upholding the high court decision, the apex court observed that "the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident."

It appears that since the court found this to be a case of consensual intercourse, it felt compelled to protect the accused by establishing that the girl was above the age of consent. In not accepting the prosecution evidence on the age of the girl, the court has actually left us wondering about the nature of proof required to ascertain the age, if neither medical tests or doctor's opinion nor the school certificate is sufficient to prove the age beyond reasonable doubt.[83]

In contrast to this case is *Satish Kumar JayantiLal Dadgar* v. *Gujarat.*[84] In this case, the accused and the "victim" (who was established to be less than 16 years) had a love affair.[85] They had eloped and got married, before they were traced by the girl's family and the accused was charged with kidnapping and rape. The high court sentenced him to rigorous imprisonment for a period of four and a half years (instead of seven years) under section 376 of the IPC. The appellant's plea was that the sentence be reduced and accused accorded sympathetic treatment as it was a love affair, the act was consensual, both of them were married now (not to each other) and settled in their respective families. Also, he was a poor man, the only bread earner in his family and thus he should be shown some sympathy.

The Supreme Court rejected the plea and held that the appellant "is not entitled to any further mercy" since consent was immaterial in this case. She was a minor "incapable of thinking rationally…[she] can be easily lured into giving consent for such an act without understanding the implications thereof…."[86] Therefare, according to the court, even this consensual sex was "heinous crime" and "has to be abhorred". The court felt that if the consent of the minor is treated as a mitigating circumstance, it would lead to disastrous consequences.

The court's fear of minor girl's sexuality[87] is further manifested in the theoretical framework of punishment that underpins court's reasoning. Extensively quoting from

83 *State of MP* v. *Anoop Singh*, 2015 (7) SCALE 445. In this case the court held that only in the absence of documents listed under rule 12(3)(b) of JJ Rules 2007 (birth certificate and school certificate) should the court seek medical opinion.

84 2015 (3) SCALE 344, per A.K. Sikri and Dipak Misra JJ.

85 A recent study showed that of the cases fully tried, over 40% dealt with consensual sex, usually involving the elopement of a young couple and the girl's parents subsequently charging the boy with rape. Another 25% dealt with "breach of promise to marry". Rukmini S., "The many shades of rape cases in Delhi", *available at*: http://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece (last accessed on Apr. 10, 2016).

86 *Supra* note 84, para 15.

87 The objectivity of this decision and the strict reliance on rules seeks to hide law's fear of sexuality. See generally, Latika Vashist, "Law & the Obscene Image : Reading *Aveek Sarkar* v. *State of West Bengal*" 5 (Monsoon) *JILS* (2014).

Narinder Singh v. *State of Punjab*,[88] the court quite candidly acknowledges the emotional underbelly of law's reason:[89]

> At times it is to satisfy the element of "emotion" in law and retribution/ vengeance becomes the guiding factor.

The judges go on to ask: what is the role of mercy, forgiveness and compassion in law? And they give us the answer:[90]

> These are by no means comfortable questions and even the answers may not be comforting. There may be certain cases which are too obvious, namely, cases involving heinous crime with element of criminality against the society and not parties inter se. In such cases…even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same, as larger, and more important public policy of showing the iron hand of law to the wrongdoers is more important. Cases of murder, rape, or other sexual offences, etc. would clearly fall in this category.

In making the huge conceptual slip from statutory rape to rape, the court further contended that no undue mercy should be shown by the judiciary. The most glaring part of the decision is when the court spells out its retributive sentiment in the name of the "victim" (who in this case, we know, was the consenting girl). Further, drawing its reasoning from *Sumer Singh* v. *Surajbhan Singh and others*,[91] the court approvingly quotes:[92]

> the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot

88 (2014) 6 SCC 466. Here, it may be noted that this case not a case of statutory rape. It pertained to the question of compromise between parties in an attempt to murder case. Despite the aforementioned observations, the court had accepted compromise between the parties even though s. 307 IPC is a non-compoundable offence! Citing *NarinderSingh* in *Satish Kumar* is most curious because in the latter case of consensual act of love, the court refused to show mercy, even though for the act of violence (more specifically attempt to murder) the court left the parties to resolve the matter amicably! Law's fear of sexuality appears to be much more stark and pervasive than its fear of violence.

89 *Supra* note 84, para 17.

90 *Ibid.*

91 (2014) 7 SCC 323, per Sudhansu Jyoti Mukhopadhaya & Dipak Misra JJ. This reference again indicates the eclecticism in choice of legal references and the corpus of cases that form the relevant precedents in a given case. This was a case of attempt to murder where the crime was committed with extreme brutality. Perhaps this particular case did not deserve judicial mercy but to extend the reasoning to statutory rape case is beyond comprehension, unless one concludes that the brutal act of attempting to murder is legally and morally at par with the consensual sex with a minor girl.

92 *Supra* note 84, para 18.

> be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice…..for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society.

This case leaves many questions for us: what do the *imagined* victim's cry for justice actually suppress/ conceal? Who was the *real* victim in this case whose injury was so grave that retributive and vengeful justice was the only apt legal response as per the judicial wisdom of the learned judges? Was it the minor girl whose sexual agency is completely erased under this rhetoric of victimisation? Was it the girl's family who was victimised by the accused who dismantled the familial regime of sexual governance? Or was the victim law itself, threatened by the rupture of normative sexual framework that determines its contours? Whose feelings of agony and anguish did the court respond to? Whose cry for justice was it?

Compromise in rape

The Supreme Court of India has evolved a novel jurisprudence of compromise in rape cases in the recent years. Rape, despite being a non-compoundable offense under the CrPC is negotiated and settled through 'compromise,' if the parties to the case agree. *Ravindra* v. *State of MP*[93] is the most recent illustration of this trend. The case pertains to a complaint filed in 1994 wherein the appellant was charged with committing rape. The trial court had convicted the appellant under section 376(1) of the IPC and sentenced him to 10 years rigorous imprisonment with fine. The High Court of Madhya Pradesh confirmed the same. The Supreme Court, however, reduced the sentence to 'the period already undergone by the appellant', while upholding the conviction (no part of the judgment indicates the extent of this period undergone). In reducing the sentence, the court relied on the proviso of section 376(2)(g) of IPC whereby the court can award a sentence lesser than the mandatory minimum in case of 'adequate and special reasons'. It may be apt to quote from the judgment here:[94]

> we are of the opinion that the case of the appellant is a fit case for invoking the proviso to Section 376(2)(g) of IPC for awarding lesser sentence, as *the incident is 20 years old* and the fact that *the parties are married* and have *entered into a compromise*, are the adequate and special reasons.

Even if one overlooks the technical error of evoking section 376(2) in place of section 376(1), it is difficult to fathom the reasoning of the court. In invoking the proviso (now repealed by 2013 criminal law amendments), the court leaves one

93 2015 (2) SCALE 693, per Pinaki Chandra Ghose and M.Y. Eqbal JJ. The comment on this case previously appeared in Latika Vashist, "Comment on *Ravindra* v. *State of MP*" XVII(I) *ILI Newsletter* (Jan.- Mar., 2015).

94 *Id.*, para 18 (emphasis supplied).

wondering how judicial delay, matrimonial status of the parties and the compromise affected by them could amount to 'adequate and special reasons'. It is not clear by what judicial logic the court has carved an exception to the framework of non-compoundable offenses in the CrPC? Further, the failure of the court to work as an institution gravely surfaces in this case when justice is made contingent on cherry-picked precedents and there are unexplained departures from the court's previous rulings. There is no other way to explain the sole reliance on the much critiqued *Baldev Singh* v. *State of Punjab*,[95] while ignoring various other judgments where the court held that the proviso ought to be strictly interpreted.[96]

Feminist researchers have shown how 'compromise' is the not a free choice of the rape survivor but a hidden secret of law where justice is reduced to a bargain between the victims' kin, state authorities and the accused.[97] Much has been written about how compromises in rape cases are achieved in and through the process of law: lawyers, police and community men all come together to effectuate compromise, as witnesses willingly turn hostile and prosecution story is left with gaps and holes.[98] Is it a surprise then that even in the present case the two maternal uncles of the complainant had turned hostile? Unfortunately, there is no discussion whatsoever in the judgment of the context of this compromise? Was the complainant under any (individual or social) pressure when this compromise was entered into? Or was she forced into this settlement, to protect the 'honour' of the matrimonial family!

State of M.P. v. *Madan Lal*[99] elicited popular media coverage as it made a categorical assertion relating to the issue of compromise in rape cases.[100] The accused sexually assaulted a seven year old girl after misguiding her to a secluded place. The trial court convicted him for attempted rape and sentenced him for rigorous imprisonment of five years. On appeal, the high court converted the charge of attempt to rape to that of outraging the modesty under section 354 of IPC. With the change in conviction from attempted rape to far lesser offence of outraging the modesty of woman, the punishment awarded was also mitigated to already undergone- which was a little more than one year.[101] The issue of compromise, as an alternative argument,

95 (2011) 13 SCC 705.

96 See for instance, *Shimbhu* v. *State of Haryana*, AIR 2014 SC 739; *State of Andhra Pradesh* v. *Bodem Sundra Rao*, AIR 1996 SC 530.

97 Pratiksha Baxi, *supra* note 75, ch. 4.

98 Kalpana Kannabiran, "Compromise in rape Cases: Whither Constitutional Morality?" *available at*: http://weblogrs.com/post.php?87=7175 (last visited on Sep. 15, 2016).

99 (2015) 7 SCC 681, per Dipak Misra and Prafulla Pant JJ.

100 "Supreme Court says no to compromise, mediation in rape cases" *The Indian Express*, July 8, 2015; "No *Compromise* to Be Allowed in Rape Cases, Supreme Court Says" *The Wire*, July 1, 2015.

101 The maximum punishment u/s 354 of the IPC at the time when the case was decided was up to two years.

had come before the trial judge who had rejected it.[102] The high court in the official discourse merely noticed this fact but on facts converted the charge altogether.

The Supreme Court however pointed out the "learned Single Judge [of the high court] has not at all referred to the evidence that has been adduced during the trial."[104] Curiously, the Supreme Court also observed that "it seems to us the learned Single Judge [of the high court] has *been influenced by the compromise* that has been entered into between the accused and the parents of the victim as the victim were a minor."[104] Reaffirming *Shimbhu* v. *State of Haryana*,[105] the court held "that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of."[106] Unfortunately, the court failed to explicitly state the illegality of *Baldev Singh*[107] and *Ravindra*.[108] By noting that these cases "are not to be regarded as binding precedents", the court continued with the strange jurisprudence of exceptions which sustains these 'illegal' decisions as the obscene underbelly of the rule of law.

In *Bhavanbhai Bhayabhai Panella* v. *State of Gujarat*[109] the trial court and high court convicted the appellant under section 376 (2)(f) of the IPC[110] and sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000.The accused was also directed to award compensation of Rs.1,00,000/- to the victim under section 357(3) who was 11 years old at the time of the incident. Observing that "the appellant has already undergone the sentence of about ten years", the Supreme Court reduced the sentence to rigorous imprisonment for 10 years. In the words of the court: "Having regard to the *totality of circumstances*, we are of the view that *ends of justice* will be met if the sentence awarded to the appellant is reduced." One is left guessing what these "totality of circumstances" were? Was it court's empathy for a man who had already spent ten years in jail or was it some other factor which the court could not expand upon. The judgment itself has clues to these questions:[111]

> Learned counsel for the appellant points out that the prosecutrix in cross-examination stated that the *matter had been compromised* and that her mother PW-2 also stated at one stage in her statement that *an unidentified person had harassed her*. *These aspects have been duly*

102 A petition seeking leave to compromise was filed before the learned trial judge, but it did not find favour with him on the ground that the offence in question was non-compoundable.

103 *Supra* note 99, para 15.

104 *Id*., para 16 (emphasis supplied).

105 (2014) 13 SCC 318.

106 *Supra* note 99, para 18.

107 (2011) 13 SCC 705.

108 2015 (2) SCALE 693.

109 2015 (2) SCALE 189, per T.S. Thakur, Adarsh Kumar Goel JJ.

110 When rape is committed on a woman when she is under 12 years of age, punishment pre-2013 was a mandatory minimum of 10 years unless special and adequate reasons existed.

111 *Supra* note 109, para 4 (emphasis supplied).

> *considered* by the courts below and it has been held that from the totality of evidence, the offence stood proved. We find adequate evidence on record to justify conviction of the appellant. Thus, conviction of the appellant is upheld.

It is submitted that the only rationale for these aspects to feature in the judgment is that these constitute "totality of circumstances" based on which the court reduced the sentence.

Grave mis-readings of law to do 'justice'

In *Deepak* v. *State of Haryana*[112] the appellant was convicted for committing rape on the complainant and was sentenced to undergo seven years rigorous imprisonment with a fine amount of Rs.5000/- and in default to undergo further rigorous imprisonment for six months. In appeal before the Supreme Court, he made three submissions: *first*, there was inordinate delay in filing the FIR of the incident and thus the conviction becomes unsustainable in law. *Second*, since the age of the complainant was above 16, it should have been held to be a case of consent given voluntarily by the complainant and *lastly*, the ingredients of rape were not proved against the appellant. The court rejected all these arguments and upheld the conviction and the sentence. On the issue of delay in FIR, the court rightly relying on the principle laid down in *State of Punjab* v. *Gurmit Singh* [113] held that there was no delay, in lodging the FIR by her mother and even if there was some delay, then it was on account of victim's fear of the accused.[114]

On the second issue of consent being voluntarily given, the court erroneously invoked section 114A of the Evidence Act. Section 114A which was inserted by the Criminal Law Amendment Act, 1983, creates a statutory presumption as to the absence of consent. However, this statutory presumption is not to be made in all rape cases but is only applicable for prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376.[115]Since the

112 (2015) 4 SCC 762, per Fakkir Mohamed Kalifulla, Abhay Manohar Sapre JJ.

113 (1996) 2 SCC 384.

114 *Contra*, *Mohammad Ali @ Guddu* v. *State of UP* (2015) 7 SCC 272, per Dipak Misra, N.V. Ramana JJ, where the delay in FIR was taken seriously by the court because of the peculiar facts of the case: "The obtaining factual matrix has to be appreciated on the touchstone of the aforesaid parameters. Be it clearly stated here delay in lodging FIR in cases under Section 376 IPC would depend upon facts of each case and this Court has given immense allowance to such delay, regard being had to the trauma suffered by the prosecutrix and various other factors, but a significant one, in the present case, it has to be appreciated from a different perspective. The prosecutrix was missing from home. In such a situation, it was a normal expectation that either the mother or the brother would have lodged a missing report at the police station. The same was not done. This action of PW-2 really throws a great challenge to common sense. No explanation has been offered for such delay."

115 In 2013, s. 114A has been amended and expanded as per the amendments made to s. 376(2) of the IPC.

present case does not fall in any of these categories, the invocation of section 114A is an unfortunate instance of judicial illegality shrouded in the zeal to do 'justice' by punishing the rapist! The following excerpt from the judgment proves how the court is applying the law, without any understanding whatsoever:[116]

> In order to enable the court to draw presumption as contained in Section 114-A against the accused, it is necessary to first prove the commission of sexual intercourse by the accused on the prosecutrix *and second, it should be proved that it was done without the consent of the prosecutrix*. Once the prosecutrix states in her evidence that she did not consent to act of sexual intercourse done by the accused on her which, as per her statement, was committed by the accused against her will and the accused failed to give any satisfactory explanation in his defence evidence on this issue, the court will be entitled to draw the presumption under Section 114-A of the Indian Evidence Act against the accused holding that he committed the act of sexual intercourse on the prosecutrix against her will and without her consent. *The question as to whether the sexual intercourse was done with or without consent being a question of fact has to be proved by the evidence in every case before invoking the rigour of* Section 114-A *of the Indian Evidence Act*.

Section 114A is clear: in prosecution of certain specific situations, once the sexual intercourse between the accused and complainant is established, and if the complainant says that she had not consented, absence of consent will be presumed. In other words, the onus will not be on the complainant to show the absence of consent, instead it would be for the accused to show that she had in fact consented. The court is profoundly wrong in extending this provision to all rape cases, and then in imposing a convoluted interpretation on it. The court is misplaced in suggesting that to draw presumption of section 114A "it should be proved that it was done without the consent of the prosecutrix." If it had to be proved, why the presumption?! Again, it is a gross misreading of law to suggest that "*[t]he question as to whether the sexual intercourse was done with or without consent being a question of fact has to be proved by the evidence in every case before invoking the rigour of Section 114-A of the Indian Evidence Act.*"[117] Again, if this 'question of fact' is proved by way of evidence, what is the need to invoke section 114A?

By applying section114A to this case and expecting the accused to rebut the presumption made against him, the court completely dismantled the due process guarantees available to every accused till proven guilty. The accused's submission on consent had to be responded to by looking at the available evidence which suggested

116 *Supra* note 112, para 24 (emphasis supplied).

117 *Ibid* (emphasis supplied).

absence of consent. There have been many cases earlier where the courts have relied on the sole testimony of the complainant, in the absence of other evidence. The court could have done the same in this case- in fact, the court says that the complainant "is a reliable and truthful witness and her testimony suffers no infirmity or blemish whatsoever."[118] Drawing statutory presumption against the accused in this case is not just unfair but totally illegal.

The appellant's plea for reduction of sentence (on the grounds of his young age, being first time offender, and already having spent more than three years in jail), was also rejected. In court's own words: "the appellant should feel fortunate that he was awarded only 7 years' sentence else it could have been even more."[119]

Death or life

In the cases of rape and murder, the apex court often awards death sentence to the accused person(s). In *Purushottam Dashrath Borate* v. *State of Maharashtra*[120] in which the victim, an employee of a BPO, was raped and murdered by her cab driver and another accompanying person, the court confirmed the death sentence imposed by the high court. The mitigating circumstances put forward by the defence- age of the accused, lack of criminal antecedents and that the accused were capable of reformation- were rejected by the court. The court observed that "the manner in which the commission of the offence was so meticulously and carefully planned coupled with the sheer brutality and apathy for humanity in the execution of the offence, in every probability they have potency to commit similar offence in future."[121]According to the court, the "extreme depravity" and the "calculated and remorseless conduct of the accused" made this case fall within the "rarest of rare category". While the court believed that the "stricter yardstick" is to be adopted "to act as a deterrent", there is little evidence on ground that death penalty has any deterrence value. It might definitely satisfy the "collective conscience" of the society but sometimes the work of law and courts is to transform the collective conscience, rather than succumbing to it.

In contrast, in *Kalu Khan* v. *State of Rajasthan*,[122] wherein the accused was convicted for raping and murdering a four year old girl, the court reduced the punishment to life imprisonment stating that the four main objectives which the state

118 *Id*., para 27. The court, however, has deeply problematic, honour-based reasons to rely on the testimony of the complainant : "no self- respecting woman would ever come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. The testimony of the prosecutrix in such cases is vital and unless there are compelling reasons, which necessitate looking for corroboration of her statement or where there are compelling reasons for rejecting of her testimony, there is no justification on the part of the court to reject her testimony." *Id*., para 26.

119 *Id*., para 31.

120 2015 (6) SCALE 204, per H.L. Dattu, S.A. Bobde and Arun Mishra JJ.

121 *Id*., para 36.

122 2015 (7) SCALE 195.

intends to achieve namely deterrence, prevention, retribution and reformation can be achieved by life imprisonment.

IV HARASSMENT

Sexual harassment in judiciary

Additional District and Sessions Judge 'X' v. *Registrar General, High Court of Madhya Pradesh*[123] is a writ petition by a former additional district and sessions judge of the Madhya Pradesh Higher Judicial Service (referred to as 'X') alleging sexual harassment at the behest of a sitting judge of the High Court of Madhya Pradesh (referred to as 'A'). The petitioner described various instances of harassment, including her receiving messages through the district registrar that A wanted to meet her at his residence, A's "abnormally high interest in her work" and "sexually coloured remarks [directed] at her" and many inappropriate statements and gestures made by A towards her. In his counter affidavit, A denied all these charges and asserted that he "had never inter-acted with the petitioner personally, except when the petitioner had herself made three calls to him for her own problems."[124]

The petitioner further contented that she had to suffer immensely for not responding to A's advances. A started subjecting the petitioner to intense surveillance and harassment, in his capacity as administrative judge of sessions division of Gwalior. She also stated that she was subjected to unceremonious mid-session transfer to a remote place in Madhya Pradesh which was against the policy and guidelines of the high court. The petitioner also brought this to the attention of a senior judge of high court who assured her that he would intervene in the matter. She also stated that she spoke to the private secretary to the chief justice of the high court, for seeking an audience with the chief justice but that did not materialise. After a detailed description of various such instances, the petitioner claimed that she had no option but to resign from service.

After her resignation, the petitioner sent a representation to the President of India, the Chief Justice of India and the chief justice of the high court on August 1, 2014 seeking relief. Thereafter, the chief justice of the high court constituted a two-member senior judges enquiry committee (one of whom was a woman), to make a confidential and discreet inquiry, and to submit a report. A senior lady additional district and sessions judge, was nominated by the chief justice of the high court, for secretarial assistance of the two-judge committee. The petitioner was called before this two-judge committee for a preliminary enquiry.

The main contention of the petitioner was that "the proceedings being conducted in the matter, are not in consonance with the "in-house procedure" adopted by this court for taking suitable remedial action against judges, who by their acts of omission

123 AIR 2015 SC 645, per Jagdish Singh Khehar, Arun Mishra JJ.

124 *Id.*, para 6.

or commission, do not follow the accepted values of judicial life."[125] The constitution of the two-judge committee, to be assisted for secretarial purposes, by a senior lady additional district judge, was clearly beyond the authority and jurisdiction of the chief justice of the high court, and that the same was in complete violation and derogation of the in-house procedure approved by the full court of the Supreme Court. The in-house procedure pertaining to complaint against a sitting high court judge, the petitioner contended, does not contemplate, holding of a full fledged inquiry. The jurisdiction vested in the chief justice of the high court, under the in- house procedure, is limited to seeking the response of the concerned judge, and thereupon, in case the allegations contained in the complaint require a deeper probe, the chief justice of the high court, is to forward the complaint along with the response of the concerned high court judge, as well as his own comments, to the Chief Justice of India. She also averred that the action of the two-judge committee constituted by the chief justice of the high court, requiring the petitioner to appear before the committee, along with relevant documents in relation to the imputations levelled by her, was also impermissible.

The court gave a detailed account of the in-house procedure relating to sitting high court judges:[126]

> Step one: (i) A complaint may be received, against a sitting Judge of a High Court, by the Chief Justice of that High Court;
>
> (ii) A complaint may also be received, against a sitting Judge of a High Court, by the Chief Justice of India;
>
> (iii) A complaint may even be received against a sitting Judge of a High Court, by the President of India. Such a complaint is then forwarded to the Chief Justice of India;
>
> In case of (i) above, the Chief Justice of the High Court shall examine the contents of the complaint, at his own, and if the same are found to be frivolous, he shall file the same.
>
> In case of (ii) and (iii) above, the Chief Justice of India shall similarly examine the contents of the complaint, by himself, and if the same are found to be frivolous, he shall file the same.
>
> Step two: (i) The Chief Justice of the High Court, after having examined a complaint, may entertain a feeling, that the complaint contains serious allegations, involving misconduct or impropriety, which require a further probe;
>
> (ii) The Chief Justice of India, on examining the contents of a complaint, may likewise entertain a feeling, that the complaint contains serious allegations, involving misconduct or impropriety, which require a further probe;

125 *Id.*, Para 16.

126 *Id.*, para 37. The court reiterated its decision in *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee* (1995) 5 SCC 457.

In case of (i) above, the Chief Justice of the High Court, shall seek a response from the concerned Judge, and nothing more. In case of (ii) above, the Chief Justice of India, shall forward the complaint to the Chief Justice of the High Court. The Chief Justice of the High Court, shall then seek a response from the concerned Judge, and nothing more.

Step three: The Chief Justice of the High Court, shall consider the veracity of the allegations contained in the complaint, by taking into consideration the response of the concerned Judge. The above consideration will lead the Chief Justice of the High Court, to either of the below mentioned inferences:

(i) The Chief Justice of the High Court, may arrive at the inference, that the allegations are frivolous. In the instant eventuality, the Chief Justice of the High Court shall forward his opinion to the Chief Justice of India.

(ii) Or alternatively, the Chief Justice of the High Court, may arrive at the opinion, that the complaint requires a deeper probe. In the instant eventuality, the Chief Justice of the High Court, shall forward the complaint, along with the response of the Judge concerned, as also his own consideration, to the Chief Justice of India.

Step four: The Chief Justice of India shall then examine, the allegations contained in the complaint, the response of the concerned Judge, along with the consideration of the Chief Justice of the High Court. If on such examination, the Chief Justice of India, concurs with the opinion of the Chief Justice of the High Court (that a deeper probe is required, into the allegations contained in the complaint), the Chief Justice of India, shall constitute a "three-member Committee", comprising of two Chief Justices of High Courts (other than the High Court, to which the Judge belongs), and one High Court Judge, to hold an inquiry, into the allegations contained in the complaint.

Step five: The "three-member Committee" constituted by the Chief Justice of India, shall conduct an inquiry, by devising its own procedure, consistent with the rules of natural justice. On the culmination of the inquiry, conducted by the "three-member Committee", it shall record its conclusions. The report of the "three-member Committee", will be furnished, to the Chief Justice of India. The report could lead to one of the following conclusions:

That, there is no substance in the allegations levelled against the concerned Judge; or that there is sufficient substance in the allegations levelled against the concerned Judge. In such eventuality, the "three-member Committee", must further opine, whether the misconduct levelled against the concerned Judge is so serious, that it requires initiation of proceedings for removal of the concerned Judge; or that,

> the allegations contained in the complaint are not serious enough to require initiation of proceedings for the removal of the concerned Judge.
>
> In case of (i) above, the Chief Justice of India, shall file the complaint.
>
> In case of (ii) above, the report of the "three-member Committee", shall also be furnished (by the Committee) to the concerned Judge.
>
> Step six: If the "three-member Committee" constituted by the Chief Justice of India, arrives at the conclusion, that the misconduct is not serious enough, for initiation of proceedings for the removal of the concerned Judge, the Chief Justice of India shall advise the concerned Judge, and may also direct, that the report of the "three-member Committee" be placed on record. If the "three-member Committee" has concluded, that there is substance in the allegations, for initiation of proceedings, for the removal of the concerned Judge, the Chief Justice of India shall proceed as under:-
>
> (i) The concerned judge will be advised, by the Chief Justice of India, to resign or to seek voluntary retirement.
>
> (ii) In case the concerned Judge does not accept the advice of the Chief Justice of India, the Chief Justice of India, would require the Chief Justice of the concerned High Court, not to allocate any judicial work, to the concerned Judge.
>
> Step seven: In the eventuality of the concerned Judge, not abiding by the advice of the Chief Justice of India, the Chief Justice of India, as indicated in step six above, the Chief Justice of India, shall intimate the President of India, and the Prime Minister of India, of the findings of the "three-member Committee", warranting initiation of proceedings, for removal of the concerned judge.

In light of the above, the court affirmed that since the role of the chief justice of the high court is limited to the first stage of the investigative process (*i.e.*, determination whether a *prima facie* case is made out, requiring a deeper probe), the chief justice of the high court in this case had exceeded the authority vested in him under the in-house procedure. The breach of the in-house procedure introduced many infirmities in the investigation process. For instance, the first stage of the in-house procedure (steps one to three) which contemplates the implied exclusion of colleague judges, from the same high court was completed violated as the chief justice of the high court "consciously involved colleague Judges, of the same High Court."[127] Moreover, the chief justice of the high court embarked upon steps four to seven (which constitute the second stage of the in-house procedure) which "envisage[s] a deeper probe, which is to be monitored by the Chief Justice of India himself."[128]

127 *Id.*, para 39.
128 *Ibid.*

The court further clarified that under the second stage, the inquiry is to be conducted by two sitting chief justices of high courts, and one judge of a high court. An inquiry conducted by the three-member Committee, in terms of the in-house procedure, would not only reassure the concerned parties that justice would be done, but "even the public at large would be confident, that the outcome would be fair and without any prejudices."[129]

In response to two more contentions of the petitioner- prejudicial influence of the administrative control of A over the witnesses and other officers involved in the investigative procedure and the impropriety of reinitiating the process expressed in the in-house procedure, through the chief justice of the high court– the court *first*, directed the chief justice of the high court to divest A of his administrative and supervisory authority and control over witnesses, to be produced either on behalf of the complainant, or on behalf of the concerned judge himself. And *second*, recognizing that the chief justice of the high court assumed a firm position in respect of certain facts contained in the complaint filed by the petitioner, the court held that he "ought not to be associated with the "in-house procedure" in the present case...the Chief Justice of India may reinitiate the investigative process, under the "in-house procedure", by vesting the authority required to be discharged by the Chief Justice of the concerned High Court, to a Chief Justice of some other High Court, or alternatively, the Chief Justice of India may himself assume the said role."[130]

Thus, it was established that "[e]ven though the said procedure, should ordinarily be followed in letter and spirit, the Chief Justice of India, would have the authority to mould the same, in the facts and circumstances of a given case, to ensure that the investigative process affords safeguards, against favouritism, prejudice or bias."[131] To ensure transparency, the court also directed the registry of the Supreme Court to bring the in-house procedure into the public domain by placing it on the official website of the Supreme Court of India.

Before parting with this case, it may be useful to note how the argumentation in this case was a "matter of learning" for the court on how everyday sexism goes unnoticed, by lay-men as well as law-men: [132]

> Every day is a matter of learning. Hearing of submissions in this case, we may say, was a matter of further understanding the sensitivities involved in a controversy of the present nature. We may venture to demonstrate this, by noticing a verbal exchange, during the course of hearing, between the counsel for the petitioner and that for the High Court. While the learned counsel representing the High Court was on "his" legs, learned counsel for the petitioner interjected to express "her"

129 *Ibid.*
130 *Id.*, para 46.
131 *Id.*, para 45.
132 *Id.*, para 17.

> point of view. All through, during the process of hearing, submissions were advanced in a lively and respectful manner, and pointedly on the subject under consideration. Feeling that the thought being projected by the learned counsel was being disturbed by the intervention, the Bench accordingly exhorted learned counsel, to go on unmindful of the interruption. Learned counsel for the High Court, well-meaning and deferential as he always is, responded by observing, "The interjections by the learned senior counsel for the petitioner, are always delightful". Learned senior counsel for the petitioner, had serious objection to the term, ''delightful'' used, with reference to "her". She questioned, the use of the term, ''delightful" by posing to the learned senior counsel, whether similar interjections by men, were also considered by him as delightful. Why then, she questioned, should "her" interjection be found ''delightful''. In expressing her view, she went on to describe the response of the learned senior counsel as "sexually coloured". Having given our thoughtful consideration to the response, of the learned counsel for the petitioner, we may only say, that she may well be right. There is a lot to be learnt, from what she innocuously conveyed. Her sensitivity to the issue, one may confess, brought out to us, a wholly different understanding on the subject. It is, therefore, that we have remarked above, that the evaluation of a charge of sexual harassment, would depend on the manner in which it is perceived. Each case will have to be decided on its own merits. Whether the perception of the harassed individual, was conveyed to the person accused, would be very material, in a case falling in the realm of over-sensitivity. In that, it would not be open to him thereafter, to defend himself by projecting that he had not sexually harassed the person concerned, because in his understanding the alleged action was unoffending.

No undue sympathy

In *State of MP* v. *Bablu*[133] the respondent was convicted under sections 323 and 354 of the IPC and sentenced to six months punishment by the trial court. The high court reduced the sentence to already undergone which was 21 days. It was argued before the Supreme Court that "the trial court has already taken lenient view by awarding sentence of six months rigorous imprisonment and reduction of sentence to the period of 21 days with respect to the offences which deal with the aspect of outraging the modesty of the woman, would reduce the deterrent effect of the punishment provided under the Code for such offences."

The counsel for the respondent argued that he was only 19 years old at the time of incident and has already undergone physical incarceration for 24 days and suffered

133 AIR 2015 SC 102.

"mental incarceration…for last 10 years"; he has two children and no criminal antecedent before or after the alleged incident. It was argued that he was also entitled to the benefit of section 360 of the CrPC. Moreover, no minimum sentence was prescribed under section 354 of the IPC.[134]

Observing that the high court acted in very "casual manner" in reducing the sentence and restoring the trial court sentence, the court affirmed:[135]

> imposition of sentence without considering its effect on the social order… may be lity a futile exercise. The social impact of the crime where it relates to offences against women involving moral turpitude or moral delinquency, which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Liberal attitude by imposing meagre sentences or taking sympathetic view merely on account of lapse of time in respect of such offences will be counter-productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence in built in the sentencing system.

Further:[136]

> We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society.

V RIGHTS, ENTITLEMENTS AND EMPOWERING MEASURES

Daughter's rights in HUF property

In *Sujata Sharma* v. *Shri Manu Gupta*[137] the plaintiff asserted her right to be the *karta* of Hindu undivided family (HUF). Giving a restrictive reading to section 6 of

134 This position has changed now. After the Criminal Law Amendment, 2013, s. 354 provides a mandatory minimum sentence of one year which may extend to five years.

135 *Supra* note 133, para 18.

136 *Supra* note 133, para 19.

137 2015 SCC Online Del. 14424, per Najmi Waziri J.

the Hindu Succession Act, the defendants argued that section 6 defines the rights only with respect to inheritance of property and not its management. Therefore, though she was a coparcener after 2005 (being the daughter), she could not be conferred the rights of being *karta* since section 6 did not confer any rights in the management of the estate. Further, they contended that limitation apropos under section 4 is not comprehensive and "the undefined rights will have to be gleaned from customs as well as from the interpretation of ancient texts regarding Hindu religion."[138] The plaintiff, on the other hand, relying on Mulla's *Principles on Hindu Law* and the 174th Report of the Law Commission of India, argued that section 6 covers all aspects of succession to a coparcener which are available to a male coparcener. The court accepted the averments of the plaintiff and held that the equal rights of inheritance in HUF property conferred by section 6 could not be curtailed when it came to the management of the same. In the court's words:[139]

> the impediment which prevented a female member of a HUF from becoming its Karta was that she did not possess the necessary qualification of coparcenership. Section 6 of the Hindu Succession Act is a socially beneficial legislation; it gives equal rights of inheritance to Hindu males and females. Its objective is to recognise the rights of female Hindus as co-parceners and to enhance their right to equality apropos succession. Therefore, Courts would be extremely vigilant apropos any endeavour to curtail or fetter the statutory guarantee of enhancement of their rights. Now that this disqualification has been removed by the 2005 Amendment, there is no reason why Hindu women should be denied the position of a Karta. If a male member of an HUF, by virtue of his being the first born eldest, can be a Karta, so can a female member. The Court finds no restriction in the law preventing the eldest female coparcener of an HUF, from being its Karta.

In *Prakash* v. *Phulavati*[140] the court was called upon to decide whether Hindu Succession (Amendment) Act, 2005 has retrospective effect. The suit was instituted by Phulavati in 1992, four years after the death of her father, for the partition and separate possession of her share in the father's property. During the pendency of this suit, she amended the plaint to claim her share as per 2005 Act in the entire property

138 *Id*., para 19.

139 *Id*., para 30. However, the Hindu widow is not a coparcener in the HUF of her husband and therefore cannot be the *karta* after the death of the husband. The Hindu widow can act as the "manager" of the HUF in her capacity as the guardian of the minor coparcener(s). See *Shreya Vidyarthi* v. *Ashok Vidyarthi*, 2015 (13) SCALE 643, per Ranjan Gogoi and N.V. Ramana JJ.

140 2015 (11) SCALE 643, per Anil R. Dave and Adarsh Kumar Goel JJ. The comment on this case previously appeared in Latika Vashist, "Comment on *Prakash* v. *Phulavati"* XVII(IV) *ILI Newsletter* (Oct.-Dec., 2015).

of her father, and not merely his self-acquired property. While the trial court limited her right to only father's self acquired property, the high court held that the 2005 Act applied to the pending proceedings, even if the amendments are not taken as retrospective in application.[141] Commenting on the high court decision, legal scholar, Poonam Pradhan Saxena had observed that "a female presently introduced as a coparcener is entitled to the same share as a male in the joint family property irrespective of the fact that she had filed a partition suit much earlier. The conclusions are appropriate and within the legal framework."[142]

The Supreme Court, however, did not find the conclusions appropriate and overruled the high court decision in the present case. According to the court:[143]

> In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective.

Relying on sections 6(1) and 6(3) of the Act, the court concluded that: (1) daughters became coparceners "on and from the commencement of Hindu Succession (Amendment) Act, 2005" (*i.e.* September 9, 2005) and not before that, and (2) daughter can claim as coparceners if their father died on or after the commencement of the Act. The "apparent conflict" raised by the proviso to section 6(1) and the explanation was suppressed by giving the amendments a "rational" and "harmonious" meaning,[144] leading the court to conclude "that the rights under the amendment are applicable to living *daughters of living coparceners* as on 9th September, 2005 irrespective of when such daughters are born."[145]

It is humbly submitted that such rationality and harmonious construction have only served to strengthen the harmony of patriarchal familial relations, making the interpretive exercise patently against the vision and objective of the 2005 Act. A purposive interpretation of the statute would have mandated the court into recognising the Act as a social welfare legislation enacted for women. And therefore, for all purposes, it should have been interpreted *in favour and not against* the interests of women.[146] It was important to bear in mind the language used in the statute to create coparcenary rights for daughters: a daughter shall "*by birth* become a coparcener *in her own right*". Thus, the right is created from her birth, and is not contingent on the time of father's death. In this backdrop, proviso to section 6(1) and the explanation should be understood as provisions that are conferring finality to partitions, prior to December 20, 2004, which were either registered or effected by a decree of the court.

141 AIR 2011 Kar. 78.

142 Poonam Pradhan Saxena, "Hindu Law" XLVII *ASIL* 479-526 (2011).

143 *Supra* note 140, para 17.

144 *Id.*, para 19.

145 *Id*., para 23 (emphasis supplied).

146 Constitution of India, art.15(3).

Any partition which was neither registered nor obtained through a decree of court was not exempted from the applicability of the new Act.

In this regard, it may also be pertinent to note an earlier decision of the Supreme Court in *Ganduri Koteswaramma* v. *Chakiri*.[147] In this case, the father had died in 1993 during the pendency of the suit and a preliminary decree was passed by the trial court in 1999 and later amended in 2003. The question before the court was: whether a preliminary decree passed by the trial court would deprive the daughters of the coparcenary rights created by 2005 Act, even though the final decree for partition was not passed. Answering this question in the negative, and thereby applying the 2005 Act retrospectively to the pending partition suits, the court observed:[148]

> In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non- applicability of the Section, what is relevant is to find out whether the partition has been effected before December 20, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court…. The legal position is settled that partition of a Joint Hindu family can be effected by various modes, inter-alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before December 20, 2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by the respondent no.1 is the determination of shares vide preliminary decree dated March 19, 1999 which came to be amended on September 27, 2003 and the receipt of the report of the Commissioner.

Ganduri and other similar earlier Supreme Court decisions were in fact brought to the notice of the court but the court distinguished these cases in following terms:[149]

> Many of these decisions deal with situations where change in law is held to be applicable to pending proceedings having regard to intention of legislature in a particular law. There is no dispute with the propositions laid down in the said decisions. Question is of application of the said principle in the light of a particular amending law. The decisions relied upon do not apply to the present case to support the stand of the respondents.

These observations of the court do not clarify the conceptual distinction between *Ganduri* and the present case. The court has not been able to lucidly illustrate on what

147 (2011) 9 SCC 788, per R.M. Lodha and J.S Kehar JJ.

148 *Id*., paras 12-13.

149 *Supra* note 140, para 25.

legal basis it has classified the present case as one "where shares of the parties stood already crystalised by operation of law to which the amending law had no application."[150] Apart from diluting the effect of 2005 Act, this case has added to the legal incoherence in the realm of succession of property.[151]

What is astonishing is that while restricting the property rights for Hindu women, the court expressed concerns about Muslim women who have "no safeguard against arbitrary divorce and second marriage by her husband".[152] Thus, in the zeal of saving the Muslim women from the Muslim men, the court echoed the judicial call for uniform civil code (one may recall similar observations made in *Sarla Mudgal's* case[153]) and unwittingly gave into the rhetoric of uniformity.

Married daughter's claim to compassionate appointment

In *Vijaya Ukarda Athor (Athawale)* v. *State of Maharashtra*[154] the issue related to compassionate appointment[155] on the death of the father who was working as a clerk in the municipal corporation. The rival claimants were the deceased's married daughter from the first wife (appellant) and son from the second wife. As per succession rules, the appellant and her mother, being the legal heirs, received the pension and other funds of the deceased. Deceased's son from the second wife moved an application seeking compassionate appointment, which was objected by the applicant. On September 18, 2012, the municipal corporation, however, appointed the respondent, declaring the appellant ineligible since she had got married. Aggrieved by this order, the appellant filed a writ petition before the Bombay High Court. The same was dismissed on the ground that "the appellant was a married daughter and the policy decision was taken by the State Government on 26.2.2013 for grant of compassionate appointment to married daughter and before the said date the appellant was not eligible for any appointment."[156] The 2013 resolution changed the terms of the 1994 resolution wherein only unmarried daughters were eligible for compassionate appointment.

150 *Id.*, para 25.6.

151 *Phulavati*'s precedential value will affect the rights of many female claimants. See *Jayendra Awad* v. *Nivedita Sharma*, 2015 (13) SCALE 138; *M. Narayana* v. *Ramakka (D) by LRs*, 2015 (13) SCALE 486.

152 *Supra* note 140, para 28.

153 (1995) 3 SCC 635.

154 2015 (1) SCALE 432, per R. Bhanumati and V. Gopala Gowda JJ.

155 It may be worth noting that the policy of compassionate appointment has undergone substantial change and can no longer be claimed as a matter of right. In *Chief Engineer (Naval Works)* v. *A.P. Asha*, 2015 (12) SCALE 342, the respondent made a request to the appellant, for appointment on compassionate ground after the death of her husband. As per the appellant's policy, the claimants who are more deserving for appointment on compassionate grounds are given appointment; and there were other claimants who were more needy than the claimant. The view was upheld by the apex court.

156 *Id.*, para 4.

The Supreme Court considered the fact that the appellant had previously applied for compassionate appointment but the same was kept pending for a long time without any justifiable reason. Remitting the case back to the high court for fresh consideration, the apex court asked the high court to revisit the questions raised by the case: whether the respondent was eligible for appointment in 2012; what would the effect of 2013 resolution on the eligibility of married daughter be, amongst others.

Inheritance of husband's pension

In Rajkumari v. *Krishna*[157] the question was one of inheritance of late husband's movable and immovable properties. The husband had bequeathed all his movable and immovable properties in favour of his second wife and daughter he begot from her. However, it was held that despite the will, the pension and other retirement benefits of the husband would be inherited by the legal heirs, according to the Succession Act. Since the second wife is not a legal heir, she would not be entitled to the pension and other retirement benefits.

Maternity leave to a commissioning mother[158]

In *Dr. Hema Vijay Menon* v. *State of Maharashtra*[159] the question before the High Court of Bombay was whether a mother is entitled to maternity leave if she begets the child through surrogacy. The petitioner, who begot a child through the surrogacy provision, was denied maternity leave by her employer (a government college) on the ground that there was no such provision in the government resolution dated July 28, 1995 (this government resolution provides that maternity leave is available to adoptive mothers as the natural mothers).

The court rejected the arguments of the state and declared that since the right to life includes the right to motherhood and the right of every child to full development, the action of the respondents was arbitrary, discriminatory and in violation of articles 14 and 21 of the Constitution. It was established that no distinction can be made between an adoptive mother and a mother that begets a child through surrogacy.[160] In the words of the court:[161]

157 AIR 2015 SC 2697.

158 The woman who carries a child for another as the result of an agreement which is made before conception that the child should be handed over after birth is called the host mother or surrogate mother. The woman wishing to have the child is called the commissioning mother.

159 2015 SCC Online Bom 6127.

160 The court went on to say: "In our view, the case of the mother who begets a child through surrogacy procedure, by implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother, would stand on a better footing than the case of an adoptive mother. At least, there cannot be any distinction between the two." This, it is submitted, is an unfortunate comparison wherein the court created a completely unwarranted hierarchy between the biologically related child and the adoptive child.

161 *Supra* note 159, para 7.

> Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the child through surrogacy…A newly born child cannot be left at the mercy of others…A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. Also, the bond of affection has to be developed.

No doubt this is a very significant decision in the realm of women's rights in the wake of changing reproductive technologies. However, in order to restructure the familial space on more egalitarian terms, the judicial discourse needs to free itself from the ideology of motherhood and reimagine child rearing as a social function instead of it being the exclusive and primary function of the mother.

Guardianship rights

Roxann Sharma v. *Arun Sharma*[162] opened up an important discussion on the guardianship and custody rights of the mother. Commenting on section 6 of the Hindu Minority and Guardianship Act, 1956 (HMG Act) the court affirmed that the custody of a minor who has not completed the age of five years shall "ordinarily" be with the mother:[163]

> The use of the word "ordinarily" cannot be over-emphasised. It ordains a presumption, albeit a rebuttable one, in favour of the mother…The proviso places the onus on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

Thus, the custody of a child less than five years of age should be given to his/her mother unless the father discloses cogent reasons that indicate that the welfare and interest of the child will be jeopardised if the custody is retained by the mother. In other words, father's suitability to custody is not relevant where the child whose custody is in dispute is below five years "since the mother is *per se best* suited to care for the infant during his tender age."[164]

162 2015 (2) SCALE 488; per Vikramajit Sen, C. Nagappan JJ.

163 *Id.*, para 12.

164 *Id.*, para 13 (emphasis supplied). Here, once again one notices how child rearing is seen as the domain of the mother.

Only when the father has created doubts about mother's suitability will the father's character and background will become relevant for the court in order to ascertain his suitability. The court, thus, set aside the order that incorrectly shifted the burden on the mother to show her suitability for temporary custody of the infant. Nothing was presented by the father or placed on the record which disclosed that the mother was so unfit to care for the infant that it justified departure from the statutory postulation in section 6 of the HMG Act.

In *ABC* v. *State (NCT of Delhi)*[165] the issue was whether it is imperative for an unwed mother to specifically notify the putative father of the child whom she has given birth to, of her petition for appointment as the guardian of her child.

The appellant (whose name was withheld) gave birth to her son in 2010, and raised him without any involvement of his putative father. She wanted to make her son the nominee in all her savings and other insurance policies but was asked to either declare the name of the father or get a guardianship/adoption certificate from the court. The appellant, a Christian by faith, filed an application under section 7 of the Guardians and Wards Act, 1890 for declaring her the sole guardian of her son. Since section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed, the appellant published a notice of the petition in a daily newspaper but did not name the father. Despite filing an affidavit to the effect that if, in the future, the father of her son raises any objections, the guardianship may be revoked or altered, the guardian court dismissed her guardianship application. The appeal before the high court was also dismissed "on the reasoning that her allegation that she is a single mother could only be decided after notice is issued to the father; that a natural father could have an interest in the welfare and custody of his child even if there is no marriage; and that no case can be decided in the absence of a necessary party."[166] In the Supreme Court, the appellant's contention was that according to section 7 of the Act, the interest of the minor is the only relevant factor for appointment of a guardian. Guardianship is not to be decided according to the rights of the father. Further, it was contended that appellant's own fundamental right to privacy will be violated, if she is compelled to disclose the name of the father of her child.

The court also perused the law of guardianship relating to "illegitimate children" in the HMG Act, the Indian Succession Act and Mohammedan law to note that "priority, preference and pre- eminence is given to the mother over the father of the concerned child."[167] Examining the legal position in various jurisdictions, the court concluded that the unwed mother possesses primary custodial and guardianship rights with regard to her children. The father is not conferred with an equal position merely by virtue of his having fathered the child. "Avowedly," the court writes, "the mother is best suited

165 AIR 2015 SC 2569, per Vikramajit Sen, Abhay Manohar Sapre JJ.

166 *Id.*, para 3.

167 *Id.*, para 7.

to care for her offspring, so aptly and comprehensively conveyed in Hindi by the word 'mamta'… a man who has chosen to forsake his duties and responsibilities are not a necessary constituent for the wellbeing of the child."[168]

The move of judicial secularization (conservatively and problematically framed within the populist discourse around uniform civil code)[169] is quite apparent in the court's clarification that the idea of analysing the law of various jurisdictions "was not…to understand the tenets of Christian law. India is a secular nation and it is a cardinal necessity that religion be distanced from law. Therefore, the task before us is to interpret the law of the land, not in light of the tenets of the parties' religion but in keeping with legislative intent and prevailing case law."[170]

Interpreting section 11 (which prescribes procedure on admission of application) of Guardians and Wards Act, 1980, the court emphasised that the welfare of the child takes precedence even above the rights of the parents. Therefore, the appellant should not be compelled to disclose the identity of the father for it may result in social stigma and uncalled for controversy for the child. In the case of "illegitimate children" whose caregiver is one of his/her parents, the court interpreted the expression 'parent' to refer to that parent alone. However, the uninvolved parent may approach the guardians court to modify its orders, if the best interest of the child so requires. Thus, the court held that there is no mandatory procedural requirement of notice to be served to the putative father in connection with a guardianship or custody petition preferred by the natural mother of the child of whom she is the sole caregiver.

And finally, though this was not an issue in the appellant's plaint, the court noted that appellant had not secured a birth certificate for the child. In this regard the court directed the authorities that if a single parent/unwed mother applies for the issuance of a birth certificate for a child born from her, the authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the birth certificate, unless there is a court direction to the contrary. Thus, the authorities should not insist that the name of the father be mandatorily disclosed for the procurement of the birth certificate.

Head of the household

In *Ashish Kumar Misra* v. *Bharat Sankar through Sachiv Khadhya&Prasanskarn Mantralaya*[171] the issue related to the validity of section 13 (which falls under chapter VI on empowerment of women) of the National Food Security Act, 2013. Section 13 made the eldest woman who is not less than 18 years of age, in every eligible household, the head of the household for the purpose of issue of ration cards. Sub-section (2) of section 13 contemplates the situation where a household did not have a woman or a

168 *Id.*, para 9. One cannot miss how motherhood is naturalized, while fatherhood is made an option which one can "choose" to forsake.

169 *Id.*, para 11.

170 *Id.*, para 10.

171 AIR 2015 All 124.

woman of 18 years of age or above, but has a female member below the age of 18 years, then, the eldest male member of the household would be the head of the household for the purposes of the issue of ration card till the female member attains the age of 18 years.

It was contended that this provision while recognizing the eldest woman member as the head of the household does not contemplate a situation where there may be no woman in the family. It was also argued that the Act also excludes transgenders from the purview of food security.Setting aside the first contention the court observed that the said provision "intend[s] to recognize and strengthen the dignity, role and status of women." This provision accords a statutory status to the roles and responsibilities discharged by women. Recognizing that "[s]ome of the worst forms of discrimination against women originate in the home and the kitchen", the court observed:[172]

> For too long in our history and even today, women have been burdened with the obligation of maintaining home and family without a corresponding recognition or acceptance of their role as decision makers. Subjected to discrimination and domestic violence, a woman is left with no social security. Something as primary as the equal distribution of food within the family for male and female members of the family is a casualty. Recognizing the central role of the woman in issues of food security is an integral part of the constitutional right to gender equality.

Moreover, sub-section 2 of section 13 takes into account the situation where there are no female members in the family. Regarding the argument pertaining to the availability of food security for transgenders, the court recalled the decision in *National Legal Services Authority* v. *Union of India*[173] wherein the transgenders' fundamental right to live in dignity under article 21 of the Constitution was affirmed. The court held that this right is not only one of non-discrimination but it casts "an affirmative obligation of the State to provide access to social security" which includes food security. It was noted that though the application form prescribed under the Act requires disclosure of the name of the woman who is the head of the household, this should in itself not be construed as excluding the transgender. An entry in the form requires disclosure of the gender of the applicant which is construed to mean 'female/male/other'. The expression 'other' includes a transgender and thus the form recognises that a transgender can avail the status of the head of the household. Even though section 13 did not exclude transgender, in view of *NALSA* judgment, the court submitted that "Parliament, may…consider the appropriateness of a suitable provision to meet the situation" such that the right of a transgender to be recognized as the head of an eligible household can be explicitly recognized.

172 *Id.*, para 3.

173 (2014) 5 SCC 438.

Provisions for acid attack victims

In *Laxmi* v. *Union of India*[174] the court observed that despite its directions,[175] the minimum compensation of Rs.3,00,000/- per acid attack victim was not fixed in some of the states/union territories. The court noted that these do not pose excessive financial implication on the state government/union territories and thus these directions should be complied with forthwith. While directing the member secretary of the state legal services authority to widely publicise the victim compensation scheme, the court observed that full medical assistance should be provided to the acid attack victims (free medical treatment, the court clarified, is not only provision of physical treatment to the victim of acid attack but also availability of medicines, bed and food in the concerned hospital). In this regard the court issued the following directions:

1. Private hospitals should also provide free medical treatment to the victims of acid attack including food, bedding and reconstructive surgeries. In case of any reluctance on their part, the state governments need to take up this matter with them.
2. All authorities to comply with the decisions taken in the meeting on March 14, 2015, convened by the secretary in the Ministry of Home Affairs and the secretary in the Ministry of Health and Family Welfare with all the chief secretaries/ their counterparts in the states/ union territories. In this meeting, amongst other things, it was decided that no hospital/clinic should refuse treatment citing lack of specialized facilities, first-aid must be administered to the victim and after stabilization, the victim/patient could be shifted to a specialized facility for further treatment, wherever required; action may be taken against hospital/clinic for refusal to treat victims of acid attacks and other crimes in contravention of the provisions of Section 357C of CrPC.
3. The hospital where the victim of acid attack is first treated should give a certificate that the individual is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the state government/union territories.
4. To effectuate the ban of sale of acid across the counter, the secretary in the Ministry of Home Affairs and secretary in the Ministry of Health and Family Welfare were directed to take up the matter with the state governments/union territories in order to ensure that an appropriate notification to this effect is issued within a period of three months..
5. The District Legal Services Authority to work as the Criminal Injuries Compensation Board for all purposes.

174 AIR 2015 SC 3662: 2015 (5) SCALE 77, per Madan B. Lokur and UdayUmesh Lalit JJ.

175 *Laxmi* v. *Union of India* (2014) 4 SCC 427.

6. The Ministry of Home Affairs and the Secretary in the Ministry of Health and Family Welfare to effectuate dissemination of the order by sending it to the Chief Secretary or their counterparts in the UTs. The Chief Secretary was directed to ensure that it is sent to all District Magistrates, member secretaries of NALSA and state legal service authority who in turn forward it to member secretaries of district legal service authorities for due publicity.

On the issue of compensation and rehabilitation of the acid attack victims, *Parivartan Kendra*, a registered NGO also filed a public interest litigation under article 32 of the Constitution.[176] The petitioner highlighted the acid attack instance in Bihar where two sisters, dalits from Bihar were attacked by the assailants. It was placed on record that the family has spent more than five lakhs on their treatment, while they were only given Rs. 2,42,000/- from the government. No proper medical treatment was given to the victims in the Patna hospital, even the statements of the victims were not recorded by the police. It was contended that despite Supreme Court's orders in *Laxmi's* case, acid is still freely available, and the victims are living without basic care or services. It was also contended that the failure of the states to provide compensation under the survivor compensation schemes have caused the survivor to be isolated from all sections of the society as their disfigurements cause them immense hardships. The compensation amount of three lakhs does not cover all expenses and there is a need to develop a comprehensive rehabilitation scheme for the survivors. In this regard the petitioner prayed for a writ of *mandamus* to the state of Bihar to reimburse five lakh to the victim's family for the amount spent by them and provide an additional compensation of 10 lakhs for pain and suffering caused to them. *Inter alias*, the petitioner also sought a writ of *mandamus* to develop a standard treatment and management guidelines for treatment and handling of acid attack victims. It was also contended that acid attacks should be included in the SC/ST Act.

Referring to the directions issued to the state and union territories in *Laxmi* v. *UOI*, the court observed that *Laxmi's* case "is a general mandate to the State and Union Territory and is the minimum amount which the State shall make available to each victim of acid attack...Laxmi's case nowhere restricts the Court from giving more compensation to the victim of acid attack."[177] The court also called the state to take strict action against those erring persons who are supplying acid without proper authorization. The court recorded the urgent need to implement *Laxmi's* guidelines and enhance the amount of compensation. Enhancement of compensation would "help the victim in rehabilitation" and it will also ensure that the state will comply with the guidelines in their true spirit and seek to prevent the crime of acid attack.[178] For the instant case, the court enhanced the compensation amount to 13 lakhs for both the victims and directed the state government to award the same.

176 *Parivartan Kendra* v. *UOI*, 2015 (13) SCALE 325, per M.Y. Eqbal and C. Nagappan JJ.

177 *Id.*, para 12.

178 *Id.*, para 19.

Deployment of women constables

Directing the states of Delhi, Himachal Pradesh, Mizoram, Arunachal Pradesh, Meghalaya, Tripura and Nagaland, to set up state human rights commissions in their respective territories with or without resort to provisions of section 21(6) of the Protection of Human Rights Act, 1993, in *Dilip K. Basu* v. *State of West Bengal* [179] the court also made some observations regarding the deployment of "at least two women constables in each district." In this regard, it may be interesting to unpack court's reasoning:[180]

> As regards deployment of women constables all that we need say is that the States concerned would consider the desirability of posting women constables in the police stations wherever it is found that over a period of past two years women were detained in connection with any criminal case or investigation. Needless to say that in case women constables are needed in such police stations for interrogation or detention, the State shall provide such infrastructural facilities for such constables as are required.

The judicial framing of state's "desirability" of posting women constables in the police stations in terms of the number of women detained in connection with a criminal case or investigation belies the logic of expanding the representation of women in public sphere. Women constables are not just needed for interrogating women, they are needed to make police stations more accessible for all women. They are required to transform the gender of police machinery as well as the relation between the police and the citizen subject. Unfortunately, court's view on gendering the police force could not surpass empty tokenism.[181]

Hostel facilities for scheduled caste girls

Akhil Bhartyra Vidyarthi Parishad v. *UOI*[182] pertains to the implementation of the Babu Jagjivan Ram Chhatravas Yojana. The primary objective of the scheme is to undertake hostel construction programme, especially for schedule caste girls with the broader vision of reducing their drop out rate. Under this scheme 433 hostels were to be completed by March 31, 2012 but as per the report of the steering committee only 227 were in fact completed and these too were in poor conditions. The Central Government directed a survey to verify the physical condition of the hostels and to

179 AIR 2015 SC 2887, per T.S. Thakur, R. Banumathi JJ.

180 *Id.*, para 31.

181 Here it is pertinent to note that the increase in the mere numerical strength of women constables would not necessarily make the police force gender sensitive. The court's suo moto action in *In Re: Indian Express Newspaper Report Dated 10/04/2013 Titled Women Cops Put Minor Rape Victim in Lock-UP*, 2015 (12) SCALE 568, per Madan B. Lokur and Uday Umesh Lalit, JJ) illustrates this fact. (Women constables had put a minor rape victim into lock up).

182 2015 (2) SCALE 225: 2015 (2) SCALE 226.

provide basic minimum facilities to the residents of the hostels. Four months were granted to carry out this survey. It was also directed that the pace of construction should be expedited.

VI MATRIMONIAL DISPUTES

Divorce

Discovery of truth and DNA evidence

In *Dipanwita Roy* v. *Ronobroto Roy*[183] the respondent was seeking divorce based on the alleged adulterous life style of the petitioner-wife. Amongst other things, he alleged that his wife was living in adulterous relationship with some other man and had also begotten a son from that union. To prove the adultery of the wife, he filed an application for conducting his own DNA test as well as DNA test of the male child born to his wife. While the family court dismissed the application, the same was accepted by the high court. Aggrieved by the high order's order the wife filed a SLP with the Supreme Court and relying on section 112 of the Evidence Act, argued that the DNA test could not be ordered. *Goutam Kundu* v. *State of West Bengal*[184] and *Kamti Devi and another* v. *Poshi Ram*[185] have established that section 112 raises a very strong presumption in favour of legitimacy of the child. Characterized as "conclusive proof," this presumption cannot be easily rebutted by ordering blood tests as a matter of course and because "[i]t is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents."[186] In *Kamti Devi* it was held that even the negative DNA result "is not enough to escape from the conclusiveness of section 112 of the Act, e.g., if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable."[187]

Despite the aforementioned cases which clearly state the law on presumption of paternity, the court allowed the DNA test in this case. According to the court, the issue at hand is the infidelity of the wife and not the legitimacy of the child. And therefore, even though "the issue of legitimacy will also be incidentally involved…Section 112 of the Indian Evidence Act would not strictly come into play."[188]

Dazzled by DNA technology, the court completely destroyed the jurisprudence that sustained the logic of section 112. Approvingly citing *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*,[189] it was held that "proof based on a DNA test would be

183 AIR 2015 SC 418, per Jagdish Singh Kehar, R.K. Agrawal JJ.

184 (1993) 3 SCC 418.

185 AIR 2001 SC 2226.

186 *Supra* note 183, para 10.

187 *Supra* note 185, para 11.

188 *Supra* note 183, para 9.

189 (2014) 2 SCC 576.

sufficient to dislodge, a presumption under section 112 of the Indian Evidence Act."[190] Two points are striking about this case: celebration of scientific technology as "most authentic, rightful and correct means" and dangerous possibilities of violent invasions into the lives of women[191] and children.

Divorce from "hysterical", "moody" wife

Vidhya Viswanathan v. *Kartik Balakrishnan*[192] is an appeal against the divorce order passed by the high court in favour of the husband on the ground of cruelty inflicted by the wife. The husband's statement enumerates many instances of "cruelty" which he suffered in the wedlock with the appellant: how the wife "was very moody" and "did not speak at all throughout the wedding day", how she "was not even interested to pose for photographs, along with [him], how she "had to be convinced to sit next to [him] to have lunch", how "[e]ven during the Honeymoon, [she] was very moody, emotionless and abnormally quiet", how "all [his] dreams to lead a very happy married life… were shattered by the intolerable behavior", how he "took [her]…to various places so as to make her to become a normal woman, but was taken aback by her sarcastic remarks about the London city itself."[193] She was not just "very lethargic, disinterested and showering lack of interest in any of the events" but "was not interested in solemnizing the marriage itself."[194]

Husband's statements go on to further describe how she "was always moody, throwing tantrums, showing faces openly, showing anger and hatred" and "reacted violently by getting aggressive and making sarcast (sic) remarks or locking herself in the room and stopped talking for days together without any reason." She "used to get even more aggressive and shout hysterically and thereafter would start crying. This behaviour became more and more frequent over the time and made it impossible to handle the respondent during such violent outbursts of anger and hatred." This attitude left him with such a "deep sense of anguish and material agony" that living with her "became a nightmare."[195] Despite his "unconditional love", she continued to act "irrationally".

The wife denied these allegations but accepted that the marriage was not consummated. According to her, husband's frequent thyroid infection, his work pressure and the desire to not begot children for next few years, and the discovery of her own illness (tuberculosis) were the reasons for non-consummation of marriage. The court did not find much truth in the reasons for non-consummation and approvingly cited high court's reasoning to advice that the couple could have used contraceptives

190 *Supra* note 183, para 19.

191 In case the wife declined to comply with the high court order, a presumption of the nature contemplated in s. 114 of the Indian Evidence Act could be drawn against her.

192 AIR 2015 SC 285, per Sudhansu Jyoti Mukhopadhaya, Prafulla Chandra Pant JJ.

193 *Id.*, para 9.

194 *Ibid.*

195 *Ibid.*

to prevent unwanted pregnancy. Further, the court held that "not allowing a spouse for a long time, to have sexual intercourse by his or her partner, without sufficient reason, itself amounts mental cruelty to such spouse."[196] The court thus affirmed the decree of divorce granted by the high court and dissolved the marriage between the parties. The decree was supplemented with the direction under section 25 of the Hindu Marriage Act, 1955 that the respondent shall pay to the appellant 40 lakhs as a lump sum amount of permanent alimony. The court fixed this amount keeping in view that fact that the wife was working before her marriage and also the economic status of the parties.

While the primary reason for the grant of divorce on ground of mental cruelty was non-consummation of marriage, it may be noted that the court was influenced by wife's "hysterical" and "aggressive" conduct. It is interesting to note that despite such exaggerated claims made by the husband, the court never sought to enquire into them. Even if these claims were considered true, the court seems uninterested to ask why would a woman behave in such extreme manner? Interestingly, these claims about the woman are not made to indicate a "mental health issue" or that she was insane but only to show establish her "abominable attitude".[197] Perhaps law demands such extreme descriptions of behaviour and hyperbolic allegations, otherwise the marriage cannot be dissolved. The party seeking divorce must show not "[m]ere trivial irritations, quarrels, normal wear and tear of the married life" but the "conduct must be *much more than* jealousy, selfishness, possessiveness", of the order of "sustained reprehensible conduct, studied neglect…[or] sadistic pleasure".[198] This is the standard laid down in law and the husband successfully complied with it in this case.

Bigamy

In *Khursheed Ahmad Khan* v. *State of UP*[199] the appellant was removed from service for violation of rule 29(1) of the U.P. Government Servant Conduct Rules, 1956. The contention was that he had contracted second marriage during existence of the first without the permission of the government and had furnished misleading information to the authorities. He denied the charge and stated that he had divorced his first wife before he entered into the subsequent wedlock but could not get the name of his wife changed in the service record. The high court had upheld the conviction which was contested by the appellant. Taking into account the deposition of the first wife to the effect that the marriage was never dissolved, the appellant's

196 *Id.*, para 12.

197 Here it may be important to note that the ground for divorce relied on was cruelty (s. 13(1)(ia) and not mental disorder of the spouse (s. 13(1) (c)). Mental cruelty as per *Vinita Saxena* v. *PankajPandit* (2006) 3 SCC 778 requires "*wilful* treatment of the party which caused suffering in body or mind". Therefore, the husband was arguing that the wife was behaving in this fashion wilfully to cause him pain, and not on account of any mental disorder.

198 *Samar Ghosh* v. *Jaya Ghosh* (2007) 4 SCC 511.

199 AIR 2015 SC 1429, per T.S. Thakur and Adarsh Kumar Goel JJ.

own statements before National Human Rights Commission (that his first marriage had continued) and absence of any record of the alleged divorce, the apex court upheld the view of the high court.

On the question, whether the impugned conduct rule violated article 25 of the Constitution, the court relied upon *Javed* v. *State of Haryana*,[200] and reaffirmed that article 25 protects religious faith and "not a practice which may run counter to public order, health or morality."[201] The court further clarified that even in Islam bigamy is neither a religious mandate nor an injunction, and monogamy was a state-instituted reform under article 25. And thus, there was nothing in the conduct rules that violated the Constitution.

Before ending this section, it is important to mention a case which, though not directly a matrimonial dispute, is nevertheless significant for it raises an entangled question of state's responsibility and property concerns arising out of marital discord. Though matrimonial disputes largely form the subject of private law- a matter between two rival parties- the legal framework within which these are raised, contested and settled is governed by the state's policy on marriage. The origins of marriage, family, we know are tied to the modern state, and all three are invested in the notion of private property, to the exclusion of women. In *Sk. Abdul Matleb* v. *Haldia Dock Complex*[202] the petitioner was allotted the official accommodation/quarter, by Haldia Dock Complex, where he resided with his wife. On his voluntary retirement, he vacated the premises but his wife continued to stay in the quarter. The petitioner and his wife were estranged and matrimonial proceedings were pending. The wife had initiated a civil suit against her husband as well as the authorities of the Port Trust/Haldia Dock Complex in respect of the quarter. The court in this regard held that "[a] spouse's right to enjoy occupation of an official accommodation/quarter and even calling it his/her matrimonial home coexists with the right of the allottee spouse to enjoy occupation of such accommodation/quarter, but cannot travel beyond the allottee spouse's entitlement or right to enjoy occupation of the official accommodation/ quarter." The Kolkata Port Trust was directed on the one hand, to release all retirement dues of the petitioner and on the other hand, initiate action against the wife under the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971, in the event she does not vacate and/or shift within three weeks from date.

Though this decision appears rational and logical since the right over official accommodation ought to be limited to the allotee, it is submitted that there is a strange indifference in the court's attitude towards the condition of the wife. In ordering the port authorities to initiate proceedings against her, in utter disregard to her economic status, the court displays a commitment first and foremost to secure the property to its rightful claim owner. The possibility of rendering the wife homeless is not even considered by the state, the responsibility of the husband in this regard is not given

200 (2003) 8 SCC 369.

201 *Supra* note 199, para 14.

even a passing reference, while directing the authorities to evict her. In adopting such a skewed approach in settling the issue, the court may have protected the property interests, but failed to grasp the implications of its decision for the evictee.

VII DISCRIMINATION

In *Rajbala* v. *State of Haryana*[203] the constitutional validity of the Haryana Panchayati Raj (Amendment) Act, 2015 (Act 8 of 2015) was challenged. Under the impugned Act, the disqualifications from contesting elections were expanded which was challenged as violative of article 14 of the Constitution. Matriculation was prescribed as the minimum educational qualification for anybody seeking to contest an election to the offices of *sarpanch or a panch* of a gram panchayat or a member of a panchayat samiti or zila parishad (section 175(1)(v)). However, the minimum educational qualification was lowered to 'middle pass' for women and candidates belonging to scheduled castes, whereas a further relaxation ('5thpass') was granted in favour of the scheduled caste woman insofar as they sought to contest for the office of *panch*.

It was argued before the court that the stipulation of minimum educational qualification would have the effect of disqualifying more than 50% of persons (and more than 50% of the otherwise eligible women) who otherwise would have been qualified to contest elections to panchayats under the law prior to the impugned Act. It was further contended that poorer sections of the society, women and scheduled castes would be worst hit by the impugned stipulation as they are most unlikely to possess the minimum educational qualification prescribed in the impugned act. From the available records it was also discerned that about 68% of the scheduled caste women would be disqualified for contesting any election. On the other hand, the attorney general argued that in the light of the responsibilities to be discharged by the members elected to the gram panchayat, the legislature in its wisdom thought it fit to prescribe a minimum educational qualification. In agreement with this contention, the court observed:[204]

> The impugned provision creates two classes of voters - those who are qualified by virtue of their educational accomplishment to contest the elections to the PANCHAYATS and those who are not. The proclaimed object of such classification is to ensure that those who seek election to PANCHAYATS have some basic education which enables them to more effectively discharge various duties which befall the elected representatives of the PANCHAYATS. The object sought to be achieved

202 AIR 2015 Cal 205.

203 2015 (13) SCALE 424, per Jasti Chelameswar, Abhay Manohar Sapre JJ.

204 *Id.*, para 85.

> cannot be said to be irrational or illegal or unconnected with the scheme and purpose of THE ACT or provisions of Part IX of the Constitution. It is only education which gives a human being the power to discriminate between right and wrong, good and bad. Therefore, prescription of an educational qualification is not irrelevant for better administration of the PANCHAYATS. The classification in our view cannot be said either based on no intelligible differentia unreasonable or without a reasonable nexus with the object sought to be achieved.

Completely missing the import and spirit of petitioners' argument, the court stated:[205]

> When the Constitution stipulates un discharged insolvents or persons of unsound mind as ineligible to contest to Parliament and Legislatures of the States, it certainly disqualifies some citizens to contest the said elections. May be, such persons are small in number. Question is not their number but a constitutional assessment about suitability of persons belonging to those classes to hold constitutional offices.

The question certainly is not one of numbers, but if the impact of the disqualification criteria is such that it will impact fair representation, then the court was bound to take the numerical dimension seriously. Missing the woods for the trees, the court instead stated:[206]

> If it is constitutionally permissible to debar certain classes of people from seeking to occupy the constitutional offices, numerical dimension of such classes, in our opinion should make no difference for determining whether prescription of such disqualification is constitutionally permissible unless the prescription is of such nature as would frustrate the constitutional scheme by resulting in a situation where holding of elections to these various bodies becomes completely impossible.

The fact that more than 50% of the women were straight away disqualified did not seem to affect the manner in which the court approached the question of representation.

In a concurring judgment Abhay Manohar Sapre J while upholding the constitutional validity of impugned provision remarked that "education is must for both men and women as both together make a healthy and educated society. It is an essential tool for a bright future and plays an important role in the development and progress of the country."[207] Such rhetoric is bound to take a meaningless turn when in

205 *Id.*, para 86.
206 *Id.*, para 87.
207 *Id.*, para 105(9).

effect the court ended up excluding a vast section of the population from the opportunity of participating in the decision-making processes of the country.

VIII COMPENSATION

In *Rajan* v. *Joseph*[208] the appellant was the husband of the deceased Ammini, who was working as a maid in the house of the respondents. Ammini died due to electric shock sustained by her while working on a washing machine in the house of the respondents. Initially, the case was registered as "unnatural death" under section 174 of the Cr P C, but after investigation it was modified to "death caused by rash and negligent act" under section 304A of the IPC. The high court quashed the proceedings under section 304A and hence this appeal. Relying on the report of the electric inspector which ruled out any negligence on the part of respondents and the fact that the respondents immediately rushed the deceased to the hospital, the Supreme Court held that no case is made out under section 304A of the IPC. However, since the deceased was working in the house of the respondents for almost five years, the court held that the respondents are required to compensate the family of the deceased for the loss of her life. Since the deceased belonged to a lower strata of the society, exercising its extraordinary jurisdiction under article 142 of the Constitution of India, the court ordered the respondents to pay one lakh as compensation to the deceased's family in addition to the compensation declared by the state government from the chief minister's distress relief fund.

In *Jitendra Khimshankar Trivedi* v. *Kasam Daud Kumbhar*[209] the court was calculating the quantum of compensation on account Jayvantiben's death in a motor accident. It was submitted by the claimants that the deceased was self-employed apart from being a homemaker and therefore the high court erred in calculating the compensation and the rate of interest. The apex court observed that it is obligatory on the part of courts/tribunals to award just and reasonable compensation, and held that it is imperative to recognize the services of the home maker in terms of money:

> Even assuming Jayvantiben Jitendra Trivedi was not self-employed doing embroidery and tailoring work, the fact remains that she was a housewife and a home maker. It is hard to monetise work done by a house-mother. The services of the mother/wife is available 24 hours and her duties are never fixed. Courts have recognized the contribution made by the wife to the house is invaluable and that it cannot be computed in terms of money. A house-wife/home-maker does not work by the clock and she is in constant attendance kept in view while calculating the loss of dependency.

208 AIR 2015 SC 2359, per T.S. Thakur, Kurian Joseph and R. Bhanumati JJ.
209 2015 (2) SCALE 172.

In view of this principle, the court exercised its jurisdiction under article 142 and enhanced the quantum of compensation.

IX CONCLUSION

Every case in this *survey* conceals a life history. The 'facts' specific to each case, while being narrations of individual lives- each distinct and different- also surface the similarities in the stories, the commonality of violent structures that, notwithstanding the rhetoric of women's rights, reduce women's lives to 'bare lives'. While many feminists stress the need to shift the focus from violence (for this essentialises women as mere victims, possessing no agency of their own), this survey of cases makes it clear that violence continues to be a dominant reality in women's lives-familial violence being the most pervasive. It is the fathers, husbands, in-laws, and many times the whole extended families who are complicit in killing the daughters, wives, daughters-in-law. Violence is not inflicted by individual (male) perpetrators; the individual perpetrators enforce and embody the logic of patriarchal institutions and ideologies that form the foundation of the 'social': motherhood, fatherhood, marriage, family.

Law reinforces the strength of these institutions by providing discursive strength to pre-assigned duties and roles, and delineating acceptable affective responses and normative conduct. This leaves one wondering about the nature of law: since the force of law is also in en-forcing the dominant socio-cultural ordering of the human relations, does law, despite its promise of equality and freedom, remain (willfully) blind to the larger issues of structural violence raised by the patriarchal ordering of the world? There is no other way to understand the repeated construction of family as a safe space of love and affection, and marriage as the ultimate union. It is not strangers who killed Sheela, drove Harjinder and Shanti to commit suicide, raped and sold off Rashmi- it were their "own people", "own family". The familial and the familiar had turned *uncanny* for them. The point being that it is imperative that Law reads these 'facts' as facts not only about deviant individuals, but also about larger structures which govern our lives.