28

WOMEN AND THE LAW

*Latika Vashist**

I INTRODUCTION

THE YEAR 2017 took us back to the fundamental question of the role and importance, if any, of law for feminism. *In a moment, described* by some as the fourth wave of feminism, saw women across the world sharing their stories of sexual harassment at workplaces and violence in intimate settings. Social media became the connecting link through which victimised women reached out and sought solidarity with others who were hitherto silenced by the dominance of male sexual power in institutional as well as cultural settings. In this moment, law was characterised as a mute spectator of violence at best, and a suspect, complicit category, at worst.

Law by itself, enfolded as it is with violence, may not produce freedom from the regulating structures of family and community. It may in fact align with dominant norms and ideological frames to silence the voice of marginalised groups. But we are enfolded with law in such ways that we cannot give up our critical engagement with law. In this backdrop, this survey in its review of the judgments delivered in 2017, seeks to explore the potential and limitations of law in women's struggles for individual and social justice.

Due to paucity of space, only Supreme Court cases have been included in this year's survey (except one - the Delhi High Court verdict in *Mahmood Farooqui*'s case). The cases are classified under three broad heads: Rights and Freedoms; Violence, Women and Law; and Matrimonial Disputes. While exploring the implication of the judgments for women's lives, the survey also seeks to critically examine the application and interpretation of doctrinal law. In other words, an attempt is made to foreground the issues of feminist politics without giving up the commitment to explore the internal logics of law.

* Assistant Professor, The Indian Law Institute, New Delhi. I want to thank Ms. Avantika Tiwari, Assistant Research Officer, IIHED, O.P. Jindal Global University, for her substantive as well as editorial comments.

II RIGHTS AND FREEDOMS

The nine-judge bench decision in *K.S. Puttaswamy* v. *Union of India*[1] was one of the most important decisions of the Supreme Court of India in 2017. The court unanimously (through six concurring opinions) affirmed that right to privacy is an integral part of article 21 of the Constitution. Feminists have been critical of the concept of privacy which has been used "as a veneer for patriarchal domination and abuse of women".[2] The Court, while noting this feminist critique, affirmed:[3]

> [W]omen have an inviolable interest in privacy. Privacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state imposed sterilization programmes or mandatory state imposed drug testing for women. The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty.

These are important observations which, on the one hand, require the state to intervene in the private sphere to safeguard the women's integrity and dignity and on the other hand, protect women's privacy interests in both public as well as private sphere. This can be potentially path breaking for feminists as far as issues of criminalization of marital rape, reproductive rights, sexuality rights etc. are concerned. In this regard, court's observations that *Suresh K. Koushal* v. *NAZ Foundation*[4] did not deal with the privacy-dignity based claims of LGBT persons appropriately,[5] opened up the possibilities of visiting the question of sexuality rights afresh. The court also re-affirmed the women's right to reproductive choices within right to privacy. However, court's description of the scope of privacy and specific reference to "the notions of privacy surrounding the marriage relationship",[6] "the personal intimacies of the home, the family, marriage",[7] "the inner sanctum of a person, such as his/her family life [...] and home environment" again revive feminist fears on the future of privacy claims by women as against the institutions of family and marriage. Whether the court would be able to address these fears while crafting a well-grounded right to privacy for women, remains to be seen in future.

The Supreme Court also had the opportunity to specifically visit and adjudicate upon questions of women's constitutional rights *vis-a-vis* bodily autonomy, within

1 (2017) 10 SCC 1.
2 *Id*. at 198 (per, D.Y. Chandrachud J for himself, J.S. Kehar CJI, R.K. Agrawal and S.A. Nazeer JJ).
3 *Id*. at 199.
4 (2014) 1 SCC 1.
5 *Supra* note 1 at 125.
6 *Id.* at 145.
7 *Id.* at 149.

the institution of marriage and regulated by religious practices. A bench of Dipak Misra CJI, R. Bhanumati and Ashok Bhushan JJ, heard the arguments on the issue of women's entry in Sabarimala temple.[8] Since the matter involved constitutional interpretation and given its importance, the same was referred to a larger bench. In a petition challenging the constitutional validity of penal provision criminalizing adultery (section 497 of the Indian Peal Code (IPC)), notice was issued.[9]

The constitutional challenge to 'triple talaq' was another significant petition, as were a range of petitions filed by pregnant women seeking court's permission for termination of pregnancies in the wake of statutory constraints imposed by Medical Termination of Pregnancy Act. In analysing these cases, a question that is worthy of attention is whether rights bring more freedom in the lives of the petitioning women. We are aware how liberal rights attributed to abstract, individuated units often produce rightlessness and unfreedom in real lives. Then, the question is how a right, say against an old and accepted religious practice, be carved and crafted such that it is not only grounded in the lived realities and experiences of the right-seekers but also translates into *real* freedom. The next logical question is what does freedom *really* entail, and whether law or the language of rights can ever imagine freedom outside the liberal epistemic lens? These questions, though central to any writing on 'women and the law' will not be addressed directly in this survey of cases but they are set out in the beginning as insistent reminders for an urgent need for future research.

Triple talaq and the unheard voices of Muslim women

Shayara Bano v. *Union of India*[10] was one of the most important decisions of this year. Shayara Bano approached the court under article 32 of the Constitution to assail the talaq-e-biddat/triple talaq pronounced by her husband. While the Hanafi school has supported the practice of triple talaq amongst Sunni Muslims in India, the petitioner contended that talaq-e-biddat, purportedly under section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, is abrupt, unilateral and irrevocably terminates the ties of matrimony, and therefore it should be declared as violative of articles 14, 15 and 21 of the Constitution. It was also submitted that talaq-e-biddat is not a part of 'Shariat' (Muslim 'personal law') and cannot be treated as the "rule of decision" under the Shariat Act. It also cannot be protected under articles 25(1), 26(b) and 29 of the Constitution. Further, the practice is denounced internationally and is also forbidden in a large number of Muslim theocratic countries.

The court by a majority of 3:2 (Kurien Joseph, R.F. Nariman, U.U. Lalit JJ in majority; Jagdish Singh Kehar CJI and S. Abdul Nazeer J in minority) set aside the practice of triple talaq. R.F. Nariman J (for himself and U.U. Lalit J), rejecting the

8 *Indian Young Lawyer's Association* v. *State of Kerala,* (2017) 10 SCC 689.

9 *Joseph Shine* v. *Union of India*, 2017 SCC Online SC 1447, per Dipak Misra, C.J and A.M Khanwilkar and D.Y Chandrachud, JJ.

10 (2017) 9 SCC 1; per, J.S. Kehar CJI, Kurien Joseph, R.F. Nariman, U.U. Lalit and S. Abdul Nazeer JJ.

contention of Muslim Personal Board, held that all forms of talaq recognised and enforced by Muslim personal law (which includes triple talaq) are recognised and enforced by the 1937 Act. The Act being law made by the legislature falls within 'laws in force' under article 13(3)(b) and thus can be constitutionally tested. He further noted that triple talaq does not form part of any essential religious practice – though permissible in law by the Hanafi school, it is neither commanded nor recommended, rather is considered sinful. And thus, "Triple Talaq forms no part of article 25(1)" and the question of legislative action under article 25(2)(b) does not arise.[11] On the question of the practice being violative of article 14, the judge recorded that the test of manifest arbitrariness under article 14 applied to legislation as well as subordinate legislation and held triple talaq to be "manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation [...] the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq".[12]

J.S. Kehar CJI (for himself and S. Abdul Nazeer J) gave a 272 pages long dissent. The dissenting judgement can be summed up in the following points. First, even though the practice of talaq-e-biddat is considered sinful, it is accepted amongst Sunni Muslims belonging to the Hanafi school as valid in law. It is a matter of their faith and has been in practice for at least 1400 years. Second, "it would not be appropriate for this Court, to record a finding, whether the practice of 'talaq-e-biddat' is, or is not, affirmed by 'hadiths', in view of the enormous contradictions in the 'hadiths', relied upon by the rival parties".[13] Third, the dissent rejected the contention that the subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937, ceased to be 'personal law', and got transformed into 'statutory law'. Rather, it was held that triple talaq is a constituent part of the 'personal law' of Sunni Muslims of the Hanafi school. Fourth, it was affirmed that triple talaq does not violate article 25 of the Constitution as it is neither contrary to public order, morality and health nor does it violate articles 14, 15 and 21 of the Constitution (as, according to the court, these articles are limited to state actions only). Fifth, triple talaq being integral part of 'personal law' was conferred a stature equal to other fundamental rights, and thus could not be said to violate the concept of the constitutional morality, through judicial intervention. Sixth, it is for the legislature to introduce reforms to 'personal law' in India. Such legislative intervention is permissible under articles 25(2) and 44, read with entry 5 of the concurrent list, contained in the seventh schedule of the Constitution. To set aside triple talaq, the legislative route is to be followed. Seventh, international human rights law cannot be relied upon to set aside the practice of talaq-e-biddat, the latter being a component of 'personal law' with the protection of article 25 of the Constitution.

11 This raises the question if only essential practices of a religion are protected under art. 25(1).

12 *Supra* note 10, para 57 (Nariman J).

13 *Id.*, para 190 (Kehar CJI).

In a confounding "declaration" at the end of the judgment, the dissent reiterates that triple talaq has constitutional protection, but simultaneously observes that the case presented an opportunity "to assuage the cause of Muslim women",[14] leaving one to wonder whether the Constitution's protection of an arbitrary practice ought to be stronger than the protection of Muslim women's dignity. According to the judge, accepting the petitioners' contentions would have a "cascading effect" and many other "challenges would be raised by rationalists, assailing practices of different faiths on diverse grounds, based on all kinds of enlightened sensibilities".[15] Besides 'polygamy' and 'halala' which are already under challenge before the court, the court (wrongly)[16] thought that "'talaq-e-ahsan' and 'talaq-e-hasan' were also liable to be declared unconstitutional, for the same reasons as have been expressed with reference to 'talaq-e-biddat'".[17] On the one hand, it was concluded that matters of 'personal law' are beyond judicial examination and "the judiciary must therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity",[18] on the other hand, invoked its extraordinary jurisdiction under article 142 on the ground that the practice was "arbitrary" and "gender discriminatory".[19] And thus, directed the legislature to bring a law on triple talaq keeping in view the tenets of Shariat. Till the enactment of such law, judges injuncted the Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing the matrimonial relationship. This injunction was for a period of six months: if the legislative process was initiated in that period, the injunction would continue, alternatively, the injunction shall cease to operate.

Kehar's J dissent raises many questions: Is the scope of articles 15 and 21 restricted to state action alone? Do these articles not afford a horizontal application, bringing non-state actors within their fold? If triple talaq has the stature of fundamental rights, what do we make of the suggestions that it can be set aside through legislative action? Wouldn't such legislative action be unconstitutional? How can a constitutionally protected practice be curtailed under article 142? Can "complete justice" be beyond and outside the constitutional imagination of justice? How do we understand the six month injunction – does it not amount to restricting a fundamental right for six months, and even beyond, if the legislature takes a step in that direction?

A close reading of *Kurien Joseph's J. judgment*, which is the decisive one for majority, also leaves many doubts, confusions and questions.[20] Agreeing with Kehar CJI and disagreeing with Nariman J he stated that the Muslim Personal Law (Shariat) Application Act, 1937, is not a legislation regulating triple talaq and therefore triple

14 *Id*., para 195 (Kehar CJI).

15 *Id*., para 196 (Kehar CJI).

16 'Wrongly' because, despite being unilateral pronouncements of divorce by man on wife, unlike triple talaq, these forms of divorce afford opportunities of reconciliation.

17 *Supra* note 10, para 196 (Kehar CJI).

18 *Ibid*.

19 *Id*., para 197 (Kehar CJI).

20 For a critique of Joseph's J decision see, Furqan Ahmad, "Muslim Law" LII *Annual Survey of Indian Law* 793 (2016).

talaq cannot be tested on the touchstone of article 14 (implicitly agreeing with the proposition that personal laws are beyond fundamental rights). He sought to decide the question of validity of triple talaq by looking solely at the verses of Quran (to the exclusion of Hadith, Ijma and Qiyas). The judge observed that Quran permits talaq in exceptional situations; it calls for attempt for reconciliation which may revoke the talaq before it attains finality. This led the judge to conclude: "In triple talaq, this door [of reconciliation] is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat".[21] This position, he observed, has already been taken in *Shamin Ara* v. *State of Uttar Pradesh*[22] and followed by many high courts.

Then the judge stated that except the conditions mentioned in article 25, the freedom of religion is absolute but, as against the view taken by Kehar CJI, triple talaq cannot be treated as an integral part of the religious practice since 1937 Act explicitly declared anti-Shariat practices to be invalid. Thus, for Joseph J, triple talaq being an anti-Quranic practice and thus outlawed by the 1937 Act is not protected under article 25 as personal law. He also expressed doubt on the invocation of article 142 for injuncting a fundamental right. While conceding that it is for the legislature to reconcile religion with constitutional rights, he refrained from directing the legislature to make a law in this regard.

A close reading of the judgment (both majority and minority) reveals how the issue of triple talaq was addressed by completely bypassing the gender equality claims of Muslim women. The scriptural authority (even in its superficial invocation) again became the foundation of adjudicating the issue which was essentially about equality of dignity and respect. One wonders if the apex court in its confused pronouncement and the legislature in its carceral politics,[23] yet again reduced the Muslim woman to a subaltern subject. From *Shah Bano*[24] to *Shayara Bano*, there is not much interpretive evolution in the court's jurisprudence of Muslim women's rights and freedoms as subjects of the Indian Constitution without being torn from their community.

Forgotten widows of Vrindavan

Environment and Consumer Protection Foundation v. *Union of India*[25] brings to fore, yet again, the violence of religious practices and diktats on women's lives. This time the issue however, was the religious/cultural apathy towards Hindu widows – how the 'tolerant' Hindu religion almost sanctions the abandonment and destitution of widows in Vrindavan. This petition was filed by the Environment and Consumer Protection Foundation, a registered charitable society and a non-political body, in

21 *Supra* note 10, para 10 (Joseph J).

22 (2002) 7 SCC 518.

23 Muslim Women (Protection of fights on Marriage) Bill, 2017 was passed by Lok Sabha on Dec. 28, 2017. The bill makes instant triple talaq illegal and void, with up to three years in jail for the husband. For a critique of the Bill see, Ahmad, *supra* note 20.

24 AIR 1985 SC 945.

25 (2017) 16 SCC 780.

2007 under article 32 for an appropriate writ requiring the Union of India and the State of Uttar Pradesh to take steps to rehabilitate the widows of Vrindavan and ensure them a life of dignity. Over the years, the court passed significant directions to this effect including directing the National Commission for Women (NCW) to prepare a comprehensive report on the widows and Ministry of Women and Child Development (MWCD) to constitute a special committee to identify the destitutes in Vrindavan and collect complete data of the widows.[26]

An "agreed action plan" was prepared with the directions proposed by the NCW, action plan of the MWCD and the comments of the apex court.[27] The action plan pertained to preparation of a comprehensive database, pensions, structure and functioning of shelters, health and nutrition, coverage of legal fees and expenses, vocational training, grant of sanctions, periodic review of the homes and creation of awareness.[28] The court constituted a committee to study all the reports and generate a common working plan. The committee was also required to deliberate on the need of encouraging widow remarriage which "might enable our society to give up the stereotype view of widows".[29] In the contemporary moment which is marked by a suspicion of the potential of PILs, the court stressed upon "the power of public interest litigation" and "its efficacy in providing social justice".[30] In the court's words:[31]

> It is to give voice to these hapless widows that it became necessary for this Court to intervene as a part of its constitutional duty and for reasons of social justice to issue appropriate directions.

Here, judicial action seeks to offer some respite to the destitute widows of Vrindavan against their religiously sanctioned abandonment.

The question of abortion and (limits of) reproductive rights

That women have the right to reproductive choice has been categorically affirmed by the Supreme Court, and high courts in many decisions. Obviously, this right is not absolute and would not extend to aborting a female fetus, opening the feminist question on 'choice' – what if women, in their exercise of right to reproductive freedom, choose to abort a female fetus? While the law is clear that such a choice is outside the scope of the right (and there are concerted judicial efforts for strict implementation of the law in this regard),[32] much interpretive labour needs to be spent to resolve the

26 (2017) 16 SCC 784(2).
27 (2017) 16 SCC 787(2).
28 *Id.* at 791-797.
29 *Id.* at 798.
30 *Id.* at 798.
31 *Id.* at 800.
32 *Sabu Mathew George* v. *Union of India,* (2017 (4) SCALE 556; (2018) 3 SCC 229) was a writ petition filed to prohibit online companies from displaying advertisements promoting sex determination or sex selection on their websites as they contravene the provisions of PCPNDT

contradictions that arise when 'reproductive choice' is to be exercised in the wake of statutory constraints as well as competing claims of disability activists who challenge the 'right' to abort a fetus with abnormalities.

In 2017, many women approached the Supreme Court to enforce their right to reproductive autonomy, seeking termination of their pregnancies. They all had crossed the 20 weeks limit of the Medical Termination of Pregnancy Act and that is why the permission from the court was required for terminations. Many of these cases came before the bench of S.A. Bobde and L. Nageswara Rao JJ.[33] In *Savita Sachin Patil* v. *Union of India*, the petitioner was not given the permission to terminate the pregnancy.[34]

Act, 1994. The court in addition to the directions given in its previous orders (also see, 2016 (12) SCALE 75; 2016 (9) SCALE 19; 2016 (9) SCALE 17) stated that no one's right to be informed should be curtailed and therefore no prohibition on online search should be made unless it contravenes the provisions of s. 22 of PCPNDT Act. The court disposed of the petition with the direction that the Expert Committee (constituted through the court orders) and the search engine owners need to arrive at a constructive approach so that the ends of 1994 Act are not defeated.

33 In *Meera Santosh Pal* v. *Union of India,* (2017 (1) SCALE 556; per S.A. Bobde and Nageswara Rao JJ), the petitioner was granted the permission to terminate her 24 week old pregnancy as the condition of the fetus was not compatible with extra-uterine life. The medical report also stated that continuation of the pregnancy posed a risk to the life of the woman and a grave danger to her mental and physical health. While the court couched the decision in terms of woman's right to reproductive freedom, relying on *Suchitra Srivastava* v. *Chandigarh* Administration, (2009) 9 SCC 1, the scope of the right were determined by the fact that the fetus could not survive outside the womb and therefore termination was a viable choice. In *X* v. *Union of India*, 2017 (2) SCALE 262; per S.A. Bobde and Nageswara Rao JJ, 22 year old petitioner's fetus (who was in her 22 week of pregnancy fetus) had a condition known as bilateral renal agenesis which means the fetus has no kidneys and anhydramnios which meant that there was an absence of amniotic fluid in the womb. The Medical Board opined that the condition of the fetus was incompatible with extra-uterine life and "continuation of pregnancy can endanger her physical and mental health". The court allowed the termination. In *Mamta Verma* v. *Union of India*, 2017 (8) SCALE 601, per S.A. Bobde and Nageswara Rao JJ, the petitioner was allowed to terminate her 25 weeks 1 day pregnancy as "her fetus was diagnosed with Anencephaly, a defect that leaves fetal skull bones unformed and is both untreatable and certain to cause the infant's death during or shortly after birth. This condition is also known to endanger the mother's life". The medical board had opined that the "continuation of pregnancy shall pose severe mental injury to her". Also see, *Ms. X* v. *Union of India*, AIR 2016 SC 3525.

34 2017 (7) SCALE 295, per S.A. Bobde and Nageswara Rao JJ. Also see, *Sheetal Shankar Salvi* v. *Union of India*, 2017 (5) SCALE 428; per S.A. Bobde and Nageswara Rao JJ where the petitioner's fetus, in 27 weeks of pregnancy, was "diagnosed with polyhydramnios with Arnold Chairi malformation Type 2 severe hydrocephalus with lumbosacral meningomyelocele and spina bifida with tethered cord." This condition, according to the medical board, would have "compromised post-natal quality of life" and the child "[would] have severe physical and mental morbidity on survival". This posed no risk to the mother but she was anxious about the birth of the child with such severe anamolies. The doctors also pointed out that at this stage the "the baby may be born alive and may survive for variable period of time". In the light of these observations, the court held that the petitioner being anxious cannot be the only ground of termination and "in the interest of justice" pregnancy should be continued. This decision may be contrasted with *Tapasya Umesh Pisal* v. *Union of India,* (2018) 12 SCC 57; per S.A. Bobde and Nageswara Rao JJ, where the fetus was diagnosed with tricuspid and pulmonary atresia, a cadiac anamoly. The medical board stated that such babies have to undergo multiple surgeries associated with high morbidity and mortality. It also appeared that the baby would not grow into an adult. The court "in the interest of justice" permitted the termination of pregnancy.

37 year old Savita, into 26 weeks of pregnancy, went to the court seeking the permission to terminate the pregnancy. The fetus was diagnosed with trisomy 21/down's syndrome. The court noted that in all such cases where the 20 week limit is crossed, permission to terminate is granted when "two important considerations are involved- (i) danger to the life of the mother, and (ii) danger to the life of the fetus". The second consideration, it may be noted, is not provided in the MTP Act but is evolved through judicial decisions.

In the present case, the court perused the medical report and found that none of the two considerations were applicable. The medical board stated that there was no risk to mother's life but it is likely that the fetus, if born would have mental and physical challenges. In the light of this expert evidence the court denied the permission to terminate the pregnancy since there was no danger to the life of the woman. Moreover, the court observed that not every child with down's syndrome has low intelligence, rather "intelligence among people with Down Syndrome is variable and a large proportion may have an intelligent quotient less than 50 (severe mental retardation)".

This case may appear a significant development in the struggle of disability rights activists who have expressed concerns about the technological advancements in imaging and testing which are leading to reproductive choices which seek to eliminate the diversity of humankind. Their argument is that the right to self-determination in the context of disability would include their right not to be eliminated before being born. However, the court missed an opportunity to conceptually address the core issue at the heart of this case: to what extent should a woman's right to reproductive autonomy be affected/ curtailed by the diversity argument?

In strictly following the black letter of law, the court displayed complete judicial apathy towards the woman. The order gives us no insight on who this woman was? Why did she discover about the condition of trisomy 21 so late in the pregnancy, when ordinarily the 12 week ultrasound detects this? Did she not have access to these medical tests? Did she receive any counseling by the medical practitioners after the diagnoses where meaning, implications and possibilities of a decent life with down's syndrome were explained to her? Did the court direct her for any such counseling once she was denied the right to her reproductive choice? Was an attempt made to engage with the woman (and her family) in order to make the diagnosis bearable? Did the court try to ascertain whether the family has support systems to raise a child with down's syndrome? Was the family guided in any manner by directing them to state support in this regard?

The judges- both male- might say it is not for them to ask these questions; the job of the court is to apply the law, whatever the law is. But the fact that the order does not consider these issues as significant explains a lot about how juristic techniques erase women's subjectivity from the law. We need to reimagine law and adjudication if *justice* is to speak to the life, experience, pain and suffering of the one who stands before the law.

The bench of Dipak Misra and A.M. Khanwilkar JJ in *Sarmishtha Chakraborty* v. *Union of India Secretary*[35] seemed to have struck a different cord. The fetus (20 weeks, 5 days) was found to have complex congenital cyanotic heart disease. The medical report notes that if the pregnancy is continued, the mother will need delivery in a highly equipped centre with facility of neonatal cardiac intervention and surgical facility. The baby will need multiple staged cardiac surgical operation and on each occasion, it will have high morbidity and mortality risk. The medical report also said, "we, the two Gynaecologists, in good faith like to opine that the patient is at the threat of severe mental injury, if the pregnancy is continued. Therefore, if the patient wants termination of this pregnancy, she may be allowed with prior informed consent of inherent risk of her health for procedural inventions, because there is additional risk of termination of the pregnancy once it is beyond 20 weeks as the present case is. However, this is a special case and conclusion has been drawn on its individual merits".

While the counsel for the petitioners relied on *Meera Santosh Pal* v. *Union of India*[36] and *Mrs. X.* v. *Union of India*, the state counsel cited *Savita Sachin Patil.* v. *Union of India*[37] and *Sheetal Shankar Salvi* v. *Union of India,*[38] where the permission to terminate was not granted. The court refused to be bound by the cases cited by the state counsel as they rested on their own facts. The court rightly remarked that "cases of this nature have to rest on their own facts because it shall depend upon the nature of the report of the Medical Board and also the requisite consent as engrafted under the Medical Termination of Pregnancy Act, 1971".[39] The court, refusing to be tied to the restrictive provisions of the Act, instead relied on the opinion of the medical board that saw the present case as a "special case" where pregnancy should be terminated after 20 weeks since the medical report clearly revealed that "the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive".[40] One can say that this was perhaps the first case where the court, did not merely state the woman's right of reproductive choices in abstraction, but actually applied and enforced it in concrete terms.

The bench of Dipak Misra CJI, Amitava Roy and Khanwilkar JJ was called to decide yet another unfortunate case where the functionaries of law displayed extraordinary insensitivity towards the pregnant woman who wanted to terminate the pregnancy. *Z* v. *State of Bihar*[41] is about a 35 year old, destitute woman, who was brought to a shelter home and found 13 weeks and 6 days pregnant. She revealed that she was raped and expressed her desire to terminate the pregnancy. After a few weeks she was taken to the hospital for termination, and strangely her father and husband

35 2017 (7) SCALE 289.
36 (2017) 3 SCC 462.
37 (2017) 13 SCC 436.
38 (2018) 11 SCC 606.
39 *Id.*, para 9.
40 *Id.*, para 10.
41 2017 (9) SCALE 85.

were called to sign a consent form, but the hospital did not proceed with the termination. In the meantime, the husband filed a divorce petition and the father expressed his inability to take care of her. The woman was again taken to the hospital but by this time she had reached 20 weeks. Tragically she was also diagnosed to be HIV+ve. At this juncture, she approached the high court seeking an order of termination. The high court constituted a medical board for her examination and permitted the victim's counsel to implead the husband and the father.

When the high court proceeded to examine the issue, the central point was not about the woman's reproductive rights and bodily integrity; the state's counsel opposed the plea for termination as "the victim was being provided with all facilities to survive in rehabilitation centre" and "the identity of the father of the victim was not established". How and why these totally irrelevant considerations were heard by the court is a matter of intrigue when the law asks for no such requirements. The issue is not merely one of infantilising an adult woman by making her exercise of reproductive right contingent on father's/husband's consent, the irony is also in the legal process's complete denial of her subjecthood by making her fate contingent on the decisions of those who had abandoned her.

The medical report which was placed before the high court stated that the fetus suffered from no abnormality and did not pose any risk to mother's life. It was also recorded that "there is likelihood that fetus may be HIV+ve" and also that the woman was suffering from mild mental retardation and would require prolonged psychiatric treatment. Based on these findings, the single judge of the high court held that "in the 'best interest' of the victim and the foetus", the pregnancy could not be terminated as sections 3 and 5 of the MTP Act were not applicable to the situation at hand. The judge (wrongly) placed reliance on *Suchitra Srivastava* v. *Chandigarh Administration's*[42] invocation of the doctrine of 'parenspatriae', 'compelling state interest' and the tests of 'best interest' and 'substituted judgment'. In a verdict that smacks of extraordinary judicial apathy, the judge noted that the medical report "does not suggest that the foetus has already been infected with HIV+ve status. It only predicts that any definite opinion can be given only when the child attains the age of 18 months". As a benevolent gesture, the court directed the hospital authorities to provide her with medical support, got the woman a bank account opened, and directed the father and husband to deposit money in that account and also visit her periodically. Thus the court completed its judicial task of ensuring that the state and the family save this woman from hard times that have befallen on her. What she wanted with her life, obviously, was not a concern for the court.

This decision was appealed before the Supreme Court where another medical board at AIIMS, Delhi was asked for its report. The board stated that the procedure involved in termination of the pregnancy was risky for the woman as well as the fetus. The board suggested that she should continue with HAART therapy (medications used to treat HIV infection) and routine antenatal care to reduce the risk of HIV

42 (2009) 9 SCC 1.

transmission to the fetus. In its order dated May 9, 2017, the apex court ordered the continuance of the pregnancy with the direction that the victim may be extended all medical support and ordered compensation under section 357A of the CrPC.

In the judgment under consideration the court was called to adjudicate on the compensation claim of the victim as a public law remedy since the authorities under the state acted with laxity and callousness. Vrinda Grover, appellant's counsel, argued that the hospital, by insisting on the father's consent when she was not suffering from any mental illness, caused her grave mental torture in not terminating the pregnancy timely. The appellant was suffering from mild mental retardation but she was stable and could take her own decision and therefore the stand taken by the state that consent of father or husband was necessary was not only in violation of statutory requirement but in total violation of her reproductive rights. The counsel also argued that the high court's approach was "wholly fallacious since it seeds [sic] more concerned with the future of the foetus but not the life of the victim [...] the High Court has completely failed to appreciate the spirit of the Act and has treated it as an adversarial litigation".[43]

The apex court conceded that there was a breach of statutory duty which has caused grave mental suffering to the appellant. The court, following *Suchitra Srivastava*, pointed out the distinction between 'mental illness' and 'mental retardation' and observed that a guardian can make decisions on behalf of a 'mentally ill person' but not on behalf of a person with 'mental retardation'. The court thus discarded the 'substituted judgment test', and agreeing with *Suchitra Srivastava,* held that "persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time".[44] The court also ruled out the 'state interest' doctrine, and instead emphasized the failure of the state in performance of its public duty to protect the fundamental rights of the citizen. Thus, in addition to the compensation under Victim Compensation Fund, the court also ordered compensation as public law remedy.

The closing lines of this decision are pertinent for all cases falling under the MTP Act, till the law itself is drastically amended and brought to conform with the right to reproductive autonomy:[45]

> It has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman is not hindered.

Compensation Claims

In *Laxmidhar Nayak* v. *Jugal Kishore Behera*[46] the children of deceased Chanchali Nayak, an agricultural worker who lost her life in an accident, pleaded for

43 *Supra* note 35, para 14.
44 *Id*., para 33.
45 *Id*., para 58.
46 (2018) 1 SCC 746; per Ranjan Gogoi and R. Bhanumati JJ.

an enhancement in the compensation paid under the Motor Vehicles Act. The tribunal while fixing the amount of compensation assessed her monthly income as too low on the reasoning that "a lady labourer may not get engagement daily"[47] and did not take into account various other considerations. The apex court rejecting the tribunal's assessment [tribunal had fixed her income at Rs. 25 per day] and enhancing the quantum of compensation, insisted that her contribution to the household as a care-giver should have been accounted for:[48]

> Deceased Chanchali Nayak, being a woman and mother of three children, would have also contributed her physical labour for maintenance of household and also taking care of her children. The High Court as well as the tribunal did not keep in view the contribution of the deceased in the household work, being a labourer and also maintaining her husband, her daily income should be fixed at Rs.150/- per day and Rs.4,500/- per month.

III VIOLENCE, WOMEN AND THE LAW

This section of the survey reviews cases of violence against women where the institutions of family and marriage emerge as significant sites. Besides cases of dowry deaths,[49] cruelty, honour killings, murders in rage and fights, we also record a case where a mother was tried for killing her child. Sexual violence cases form a significant part of this section where on the one hand, conceptual questions of consent and age are foregrounded, on the other hand, sentencing factors and the dynamics of love-revenge dyad are discussed.

Harassment is not same as cruelty

In *Heera Lal* v. *State of Rajasthan*[50] the parents-in-law of the deceased (who committed suicide by setting herself on fire) were charged under sections 498A and 306 of the IPC. They were acquitted under section 498A but were convicted for abetment to suicide. In appeal before the Supreme Court, it was argued that in the wake of acquittal under section 498A, no offence is made out under section 306. It was further argued that this is not a case of abetment as there is no evidence of any intention on the part of the in-laws to incite the deceased to commit suicide. The

47 *Id*., para 5.

48 *Ibid*.

49 *Bibi Parwana Khatoon* v. *State of Bihar*, 2017 (5) SCALE 773; per N.V. Ramana and Prafulla C. Pant JJ. The appellants (brother-in-law and sister-in-law of the deceased) were convicted under section 304A and 34 of the IPC, along with the husband, based on circumstantial evidence. In appeal they argued that they were residents of a separate village and were not even present in the house on the date of the occurrence. The apex court accepted their evidence and ordered acquittal as it could not be proved beyond reasonable doubt that they shared the common intention with the husband to kill the deceased or that they had tortured the victim for dowry.

50 2017 (6) SCALE 152; per, R.F. Nariman and Mohan M. Shantanagoudar JJ.

counsel for the state, on the other hand, invoked section 113A of the Evidence Act which calls for a presumption against the accused in situation of abetment of suicide by a married woman.

Rejecting the argument of the state, the court clarified that section 113A of the Evidence Act requires three ingredients: (i) that a woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage and (iii) the husband or his relatives who are charged had subjected her to cruelty. The explanation to the section states that "cruelty" shall have the same meaning as in section 498A of the IPC. The court thus concluded "that having absolved the Appellants of the charge of cruelty, which is the most basic ingredient for the offence made out under section 498A, the third ingredient for application of section 113A is missing".[51] Making a distinction between harassment and cruelty, it was noted that "harassment is something of a lesser degree than cruelty"[52] and "the mere fact that there is a finding of harassment would not lead to the conclusion that there is "abetment of suicide"."[53] It would have been useful for future cases had the court fleshed out the distinction between harassment and cruelty more clearly, not merely in terms of degree but also indicating the ingredients and elements of each.

Misuse of section 498A

Welfare legislations directed to empower marginalised sections - be it affirmative action for backward communities or the penal provisions designed to empower women/ 'backward castes' against male/upper caste violence - are often engulfed within the false rhetoric of misuse which turns the very subjects of these laws into suspects. Unfortunately many times the judicial system also uncritically accepts the myth of abuse and dilutes the letter and spirit of these laws, disempowering those whom the law sought to protect in the first place.

In *Rajesh Sharma* v. *State of Uttar Pradesh*[54] the question was whether any directions are required to prevent the misuse of section 498A of the IPC. In framing the issue, the court turned 'misuse' of section 498A into a fact that has been "acknowledged in certain studies and decisions" rather than a hypothesis that needs to be investigated. The question arose in a case where besides the husband, parents-in-law, brother-in-law and sister-in-law were also summoned by the additional sessions judge. The decision of the sessions court was appealed but the high court dismissed the same. In the appeal before the Supreme Court, the main contention was that the allegations against all family members should not be taken at face value and there should be clear supporting material if the relatives of husband are to be charged. It was argued that "there is a growing tendency to abuse the said provision to rope in all the relatives […] this results in harassment and even arrest of innocent family members,

51 *Id.*, para 8.
52 *Id.*, para 8.
53 *Id.*, para 9.
54 MANU/SC/0909/2017; per A.K. Goel and U.U. Lalit JJ.

including women and senior citizens. This may hamper any possible reconciliation and reunion of a couple".[55] Reliance was placed on statistics from Crime Records Bureau (CRB) which reported how a certain percentage of cases "were declared false on account of mistake of fact or law" and there were acquittals in large number of these cases. Pointing out that the "misuse of the provision is judicially acknowledged",[56] the court also took note of the guidelines issued by high courts[57] and the Supreme Court[58] itself in this regard. Reference was also made to the 243rd Report of the Law Commission of India which recommended that section 498A should be made compoundable.

There was no attempt to deconstruct the oft-use expression 'misuse' especially with respect to social welfare legislations directed at the protection of marginalised sections. Rather than uncritically buying into the rhetoric of misuse, it is important to ask what makes a case 'false'? Do high record of acquittals, settlements or no-convictions automatically imply that the allegation was false? Is there no need to judicially as well as academically examine how certain types of laws become suspect and get labelled as prone to abuse? The court, however, was not interested in these questions, and as a solution, gave sweeping guidelines in cases of section 489A. The guidelines, stated in paragraph 19, are reproduced as below:[59]

> i) (a) In every district one or more Family Welfare Committees be constituted by the District Legal Services Authorities preferably comprising of three members. The constitution and working of such committees may be reviewed from time to time and at least once in a year by the District and Sessions Judge of the district who is also the Chairman of the District Legal Services Authority.
> (b) The Committees may be constituted out of para legal volunteers/ social workers/retired persons/wives of working officers/other citizens who may be found suitable and willing.
> (c) The Committee members will not be called as witnesses.
> (d) Every complaint Under Section 498A received by the police or the Magistrate be referred to and looked into by such committee. Such committee may have interaction with the parties personally or by means of telephone or any other mode of communication including electronic communication.

55 *Id*., para 7.

56 *Id*., para 8. Following cases were cited to back this argument: *Sushil Kumar Sharma* v. *Union of India* (2005) 6 SCC 281, *Preeti Gupta* v. *State of Jharkhand* (2010) 7 SCC 667, *Ramgopal* v. *State of Madhya Pradesh* (2010) 13 SCC 540, *Savitri Devi* v. *Ramesh Chand*, ILR (2003) I Delhi 484.

57 *Chander Bhan* v. *State,* (2008) 151 DLT 691.

58 *Arnesh Kumar* v. *State of Bihar,* (2014) 8 SCC 273.

59 *Supra* note 54, para 19.

(e) Report of such committee be given to the Authority by whom the complaint is referred to it latest within one month from the date of receipt of complaint.

(f) The committee may give its brief report about the factual aspects and its opinion in the matter.

(g) Till report of the committee is received, no arrest should normally be effected.

(h) The report may be then considered by the Investigating Officer or the Magistrate on its own merit.

(i) Members of the committee may be given such basic minimum training as may be considered necessary by the Legal Services Authority from time to time.

(j) The Members of the committee may be given such honorarium as may be considered viable.

(k) It will be open to the District and Sessions Judge to utilize the cost fund wherever considered necessary and proper.

ii) Complaints Under Section 498A and other connected offences may be investigated only by a designated Investigating Officer of the area. Such designations may be made within one month from today. Such designated officer may be required to undergo training for such duration (not less than one week) as may be considered appropriate. The training may be completed within four months from today;

iii) In cases where a settlement is reached, it will be open to the District and Sessions Judge or any other senior Judicial Officer nominated by him in the district to dispose of the proceedings including closing of the criminal case if dispute primarily relates to matrimonial discord;

iv) If a bail application is filed with at least one clear day's notice to the Public Prosecutor/complainant, the same may be decided as far as possible on the same day. Recovery of disputed dowry items may not by itself be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected. Needless to say that in dealing with bail matters, individual roles, prima facie truth of the allegations, requirement of further arrest/custody and interest of justice must be carefully weighed;

v) In respect of persons ordinarily residing out of India impounding of passports or issuance of Red Corner Notice should not be a routine;

vi) It will be open to the District Judge or a designated senior judicial officer nominated by the District Judge to club all connected cases between the parties arising out of matrimonial disputes so that a holistic view is taken by the Court to whom all such cases are entrusted; and

vii) Personal appearance of all family members and particularly outstation members may not be required and the trial court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial.

viii) These directions will not apply to the offences involving tangible physical injuries or death.

An NGO, Social Action Forum for Manav Adhikar moved the Supreme Court[60] for reconsideration of the court's orders in *Rajesh Sharma*. According to the court, the previous order in diluting section 498A was an encroachment of the jurisdiction of the legislature.[61] The court revised and modified the directions of *Rajesh Sharma* (as set out in paragraph 19) in the following manner:[62]

> 35. […] we do not find anything erroneous in direction Nos. 19(iv) and (v). So far as direction No. 19(vi) and 19(vii) are concerned, an application has to be filed either under section 205 CrPC or section 317 CrPC depending upon the stage at which the exemption is sought […]
> 38. […] the directions pertaining to Family Welfare Committee and its constitution by the District Legal Services Authority and the power conferred on the Committee is impermissible. Therefore, we think it appropriate to direct that the investigating officers be careful and be guided by the principles stated in Joginder Kumar (supra), D.K. Basu (supra), Lalita Kumari (supra) and Arnesh Kumar (supra). It will also be appropriate to direct the Director General of Police of each State to ensure that investigating officers who are in charge of investigation of cases of offences under section 498-A IPC should be imparted rigorous training with regard to the principles stated by this Court relating to arrest.
> 39. In view of the aforesaid premises, the direction contained in paragraph 19(i) as a whole is not in accord with the statutory framework and the direction issued in paragraph 19(ii) shall be read in conjunction with the direction given hereinabove.
> 40. Direction No. 19(iii) is modified to the extent that if a settlement is arrived at, the parties can approach the High Court under section 482 of the Code of Criminal Procedure and the High Court, keeping in view the law laid down in Gian Singh (supra), shall dispose of the same.

Murder of Wives

In *Devendra Nath Srivastava* v. *State of U.P.*,[63] the appellant was convicted under section 302 of the IPC for murdering his wife. The high court set aside the

60 *Social Action Forum for Manav Adhikar* v. *Union of India (UOI), Ministry of Law and Justice*, MANU/SC/0987/2018; per Dipak Misra CJI, A.M. Khanwilkar and Dr. D.Y. Chandrachud JJ.

61 *Id*., paras 36-37.

62 *Id*., paras 35, 38-40.

63 2017 (4) SCALE 261; per, N.V. Ramana and Prafulla C. Pant JJ.

conviction by trial court and held that the incident took place after altercations between the husband and wife and the husband was in a drunken state. On this reasoning the court changed the conviction to section 304 Part I of the IPC. On appeal, the apex court agreed with the view taken by the high court. In court's words:[64]

> [I]t is clearly established from the evidence on record that the Appellant caused homicidal death of his wife, after quarrel between the two. It is established on the record that the Appellant was a drunkard [...] Considering the facts and circumstances of the case, it appears that the Appellant acted in a fit of anger [...]
> As to whether the act on the part of the Appellant constitutes the offence punishable under section 302 Indian Penal Code or section 304 Part I Indian Penal Code, we are of the view that the incident has occurred after quarrel between the Appellant and the deceased which is not a planned act. It is also established that the Appellant was a drunkard. In our opinion, in the facts and circumstances of the case, the view taken by the High Court, that the Appellant has committed offence punishable under section 304 Part I Indian Penal Code, requires no interference.

In arriving at this conclusion, the court relied on *State of Andhra Pradesh* v. *Rauavarapu Punnayya*[65] and elucidated the scheme of the IPC with respect to culpable homicide not amounting to murder and murder. The court rightly affirmed that in case one of the exceptions to section 300 of the IPC apply in a given case, the sentence would be determined under section 304, Part I.[66] In this case it appears the court applied exception 4 (sudden fight) to mitigate culpability. However, in the absence of

64 *Id*., paras 17-18.

65 AIR 1977 SC 45.

66 It may be useful to refer to *Madanayya* v. *State of Maharashtra*, 2017 (7) SCALE 1; per, Ashok Bhushan and Deepak Gupta JJ, to point out the judicial confusion as to culpability and sentencing in cases of homicide/ death. In this case, the appellant was tried for killing his wife's sister, who was also living with her as his wife. The facts on record state that the accused beat up the deceased the whole night. In the morning, she told her sister that the accused had beaten her and that she had severe abdomen pain. On the same day she died. The appellant was convicted under s. 302. In appeal, the apex court, affirmed that the victim died "due to injuries caused on her person by the Appellant-accused" but the facts do not prove that the appellant had the intention to cause her death: "there is no doubt that there were number of injuries on the body of the deceased. None of the injuries by itself was sufficient for causing death. *The cumulative effect of the injuries is that the deceased died*. The issue that arises is whether the Accused had the intention of causing death of the deceased. We cannot ignore the fact that the deceased woke up in the morning and narrated the incident to her sister PW-3, and she survived till 5.00 p.m. in the evening. The postmortem report also shows that she died within a couple of hours after partaking a heavy meal. In this view of the matter, it is difficult to impute the intention to kill to the Appellant. Therefore, we convert the conviction of the accused from one under s. 302 to s. 304 Part-II". In these very unclear observations, the court does not explain why could the case not fall under s. 299 (second clause)/ s. 300 (3). The accused had caused the injuries intentionally; even though "none of the injuries by itself was sufficient for causing death", the court conceded that "t*he cumulative effect of the injuries is*

a thorough engagement with the essential ingredients of the exception, the court's reasoning appears to be informed by gendered account of emotion of anger and matrimonial quarrels. Naturalizing male anger and excusing the husband's violence because he was a drunkard are discursive techniques through which court implicitly concluded that the husband neither took "undue advantage" nor "acted in a cruel or unusual manner" and thus could avail of the exception.

Killings in the name of family honour

In *Gandi Doddabasappa* v. *State of Karnataka*[67] the high court convicted the appellant for the murder of his nine month pregnant daughter and sentenced him under section 304 Part I. Shilpa (deceased daughter) was from Lingayat community. She fell in love with Ravi who was from Naik community and they both eloped and got married. This outraged the appellant who accused the two of bringing "down the honour of his family" and often said that "he would "finish" his daughter for marrying into a lower caste". While awarding punishment under section 304 Part I of the IPC, the high court observed:

> We notice that the accused is a frustrated father. The deceased is none other than his daughter. The father brings up his daughter with all love and affection. But however, one fine morning she leaves him to marry another person. It is no doubt true that every grown up daughter is required to go out of the house after marriage. But however, the way, how it is down or performed is one factor, which is required to be taken into consideration [...]
>
> In the case on hand both the deceased as well as PW16 were in love since their school days. She elopes and gets married before a Sub-Registrar. Indeed, any father would certainly be frustrated with such a situation and the emotions and the turmoil, which he undergoes, are bottled up. Thus, we are of the view that all those bottled up emotions have erupted on the day of the incident and he took the extreme step of killing his daughter. We are of the view that the case of the prosecution can be brought under section 304 Part I of Indian Penal Code.

that the deceased died." How did the court arrive at the conclusion that the injuries, taken together, were neither "likely" nor "sufficient" to cause death? Further, it is also not clear how the court established, in punishing under s. 304 Part II, that the appellant had the "knowledge that his act was likely to cause death"? The most ironical part of the decision is when the court notes that the accused has already served 16 years behind bars, while the maximum punishment under s. 304 Part II is 10 years. Rather than seeing the long incarceration as tragic, the court stoically notes: "the Appellant has been behind bars for sixteen years, in our view, this is sufficient punishment for his crime and therefore, we reduce the sentence after altering the sentence as aforesaid to the period of incarceration already undergone by the Appellant-accused".

67 2017 (3) SCALE 236; per, Kurien Joseph and A.M. Khanwilkar JJ.

The high court, without explicitly stating so, followed the judicial reasoning that mitigates honour-based crimes relying on exception of provocation.[68] But the Supreme Court did not find favour with the high court. While upholding the high court's conviction based on the sole testimony of the deceased's mother-in-law and circumstantial evidence (other witnesses had turned hostile), the court noted the error in sentencing. The court rightly observed that if this was established as a case of intentional killing, the sentence should have been awarded under section 302. According to the Supreme Court and rightly so, none of the exceptions to section 300 were applicable in this case and thus sentenced the accused for life under section 302 of the IPC.[69]

When women are killers

The courts have always found it difficult to assess the blameworthiness of mothers who are accused of killing their children. The observations of the court in *Kokaiyabai Yadav* v. *State of Chhattisgarh*[70] are noteworthy in this regard. The

68 See *State of Rajasthan* v. *Ramesh,* 2015(2) SCALE 550.

69 While arriving at this conclusion the court, relying on *Harendra Nath Mandal* v. *State of Bihar*, MANU/SC/0309/1993, remarked that "Unless the case falls under one of the specified exception, it cannot be brought under first part or second part of s. 304 of Indian Penal Code". In *Harendra Nath*, it was held: "It is well-known that if a death is caused and the case is covered by any one of the five exceptions of s.300 then such culpable homicide shall not amount to murder. S. 304 provides punishment for culpable homicide not amounting to murder and draws a distinction in the penalty to be inflicted in cases covered by one of the five exceptions, where an intention to kill is present and where there is only knowledge that death will be a likely result, but intention to cause death or such bodily injury which is likely to cause death is absent. To put it otherwise if the act of the accused falls within any of the clauses 1, 2 and 3 of s.300 but is covered by any of the five exceptions it will be punishable under the first part of s.304. If, however, the act comes under clause 4 of s.300 i.e. the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death but without any intention to cause death and is covered by any of the exceptions, it will be punishable under the second part. The first part of s.304 applies where there is guilty intention whereas the second part applies where there is guilty knowledge. But before an accused is held guilty and punished under first part or second part of s.304, a death must have been caused by him under any of the circumstances mentioned in the five exceptions to s.300, which include death caused while deprived of power of self-control under grave and sudden provocation, while exercising in good faith the right of private defence of person or property, and in a sudden fight in the heat of passion without premeditation". It is submitted that this is a technically wrong deduction. Under the scheme of the IPC, if one of the five exceptions are applicable in a given case, then the liability is one of culpable homicide not amounting to murder, punishable under s. 304 Part I. Irrespective of which clause of s. 300 a case falls under, if any of the exceptions apply, the punishment will be under s. 304 Part I. This is because the degree of *mens rea* for all clauses of s. 300 is the same; even though clause (3) and (4) do not talk about intention to kill, but the objective liability in clause (3) and knowledge in clause (4) should be of such high degree, as if the offender had the intention. Punishment under s. 304 part II is for cases that fall under the third clause of s. 299, and never qualify for s. 300(4). See the discussion in *Devendra Nath Srivastava* v. *State of U.P.*, 2017 (4) SCALE 261. Sentence under s. 304 part I or II could be awarded in case of intentional homicide only in situations falling under one of the exceptions to s. 300 which was not the case.

70 (2017) 13 SCC 449: MANU/SC/1724/2016; per, A.K. Sikri and R.K. Agrawal JJ.

appellant, praying for remission of her sentence, having already spent 13 years in prison, was found guilty of killing her four year old daughter. Since the appellant was not suffering from any mental disorder at the time of this petition and there were no evidence on record to show what made her commit the crime, the court appointed an amicus curie who could visit and interact with the appellant in the jail. The amicus reported that the appellant did not remember anything about the incident. It was also reported, through their interactions with other inmates who were present when she was brought to the jail that the appellant was not in a sound mental condition when she was first brought to the jail. She had to be force-fed, given bath etc. She did not interact with anybody and was oblivious of her surroundings. The jail authorities had sent her to a mental asylum where she was treated (though the authorities did not show the past medical record of the appellant). It was observed that with passage of time her condition improved and now she was cured. She had assumed many responsibilities as an inmate and was involved with many activities.

In the light of these observations, the court got "an impression that even if it is to be presumed that the Appellant had committed the murder of her daughter, who was four years of age at that time, in all likelihood, she was not in a proper mental condition at that time and, therefore, was unaware as to what she was doing".[71] The court reached this conclusion not only on the basis of the report of the amicus but also on account of "the inconceivable nature of the crime, of a mother, who seemingly without any reason took the life of her child".[72] In the court's words:[73]

> The ordeal stirring in the mind of a mother that would compel her to kill her own child is beyond comprehension for most people. Such a crime has the capacity of shaking us to the core as for it is unfathomable to think that someone who gives life, shelter and protects is the same person who for no justification can end that same life thereby shattering a part of her soul. Some psychologists have accounted for extreme depression, a psychotic breakdown or even violence at home. A mother who finds herself in extreme social adversity incapable of providing for her children may also be driven by unknown circumstances thinking that such a drastic step is her only viable option. In this case, however, the reason that made a mother take such a course is overlaid with a thick blanket of mystery.

For the court, a mother can take the life of her child if she is either depressed, suffering from some mental infirmity (mad) or a victim of violence (sad). The judicial way to understand this woman's actions is not through intentionality but by designating

71 *Id*., para 2.
72 *Id*., para 2.
73 *Id*., para 3.

her as one who could not be an agent of her actions because of her mental or social condition.[74]

This decision is intriguing for another reason: the apex court, on the one hand, acknowledges the failure on the part of the trial court that did not show "due diligence" by not calling the medical evidence and thereby incarcerated a woman who should have otherwise got the defense of unsoundness of mind, and on the hand, refrains from treating this case as one of wrongful conviction of the appellant, where she should have been duly compensated. Instead, the court goes back to view it only as a remission issue, and in a benevolent judicial gesture, given the appellant's "exemplary conduct [...] she has built her character moulding it by educating herself and learning the ways of life", held that it is a fit case for remission by competent authorities.

In *Padmini Mahendrabhai Gadda* v. *State of Gujarat*[75] the appellant's husband was murdered by her paramour (accused 1). While the paramour was sentenced for murder and distortion of evidence, the appellant was only convicted under section 201 of the IPC. She was exonerated from criminal liability for murder as the prosecution could not establish that she shared common intention to murder with her lover. The trial court punished her under section 201 of the IPC and sentenced her to undergo rigorous imprisonment for 2 years and imposed fine of Rs. 5,000/-, in default to further suffer rigorous imprisonment for 3 months. When she preferred an appeal with the high court, the high court initiated *suo motu* proceedings for enhancement of sentence and enhanced the sentence to rigorous imprisonment for seven years and imposed fine of Rs. 7,000/- failing which she had to further suffer rigorous imprisonment for two years. The high court was of the view that that the appellant was involved actively in committing the murder, but since the state had not preferred any appeal against acquittal, it was not in a position to deal with the same.

Before the Supreme Court, the appellant's contention was that the courts below have erred in appreciating the evidences against her and wrongly convicted her under section 201. The appellant, it was argued, "had never been part of the crime and the reason behind her keeping silence when Accused No. 1 made entry into her house and committed the heinous crime of brutally murdering her husband was that as a matter of fact, on the fateful day at the time of occurrence, the Appellant was sleeping with her children. Accused No. 1 subjected her to remain under great fear that if she raises

74 See Matthew Rollinson, "Re-reading Criminal Law: Gendering the Mental Element" in Donald Nicolson and Lois Bibbings (eds.), *Feminist Perspectives on Criminal Law* 101 (Cavendish Publishing Limited, London, 2000): "Criminal Law, through *mens rea*, creates subjectivity without contexualisation for men, and contextualization without subjectivity for women. For the male defendant, this has equated to an enquiry based on intentionality. The female defendant, in contrast, has been subjected to a behaviorist analysis of her actions. This has meant the criminal law excluded male motive in the context of his actions whilst, at the same time, eroding notions of female agency. Amongst this plethora of inadequacy, both men and women have found no refuge, either as victims or defendants. For the male defendant, this lack of refuge works out as 'penalty'; for the female defendant as 'patronisation'".

75 2017 (8) SCALE 20; per, N.V. Ramana and Prafulla C. Pant JJ.

any alarm, her children may also be assaulted by the intruder, which drove her to be a silent spectator to the incident". It was also contended that after the commission of the murder, the appellant had not wilfully eloped with accused but was forcefully taken to various places and kept under fictitious names. She was forced to stay silent all through "because of her apprehension that police and family members would first of all find fault with her due to her illicit relationship with the main accused". In the light of the above, the judges were to decide on her conviction and sentence under section 201 of the IPC.

In the view of N.V. Ramana J, the prosecution was not able to prove the guilt of the appellant under section 201 of the IPC. Thus, he set aside the high court judgment in full, noting that "the High Court in a prejudiced manner has enhanced the sentence". According to the judge, "her mere silence cannot give rise to a presumption that she has committed the offence [under section 201]".[76] He noted: "Generally, in an appeal against conviction, where concurrent findings were recorded by both the Courts below, this Court will not interfere. But, this is a case where both the Courts below, without satisfying the ingredients of section 201 of Indian Penal Code, have convicted Accused No. 2/Appellant more on surmises and conjectures, which invited interference of this Court".[77]

In a striking contrast, Prafulla C. Pant J found no error in law on the part of courts below and upheld the conviction under section 201 of the IPC but reduced the sentence to two years as was awarded by the trial court, given the appellant had already served more than two years imprisonment during the period of trial/appeal, she was 60 years old, and 23 years have passed from the date of incident. In the light of the disagreement between the two judges the matter was placed before the Chief Justice of India to constitute an appropriate bench for the same.

Female offenders and sentencing

In *State of H.P.* v. *Nirmala Devi*[78] the respondent was convicted and sentenced under sections 328, 392 and 307 read with section 34 of the IPC. The trial court sentenced her to simple imprisonment of two years with fine, but the high court, while affirming the conviction, set aside the punishment of imprisonment and enhanced the fine on the ground that she was a young lady of 40 years, looking after her three minor sons, two of whom are mentally unsound. The issues before the apex court were twofold: whether the high court was permitted, in law, to do away with the punishment of imprisonment altogether and substitute the same with fine? And, whether the mitigating circumstances pleaded by the respondent (she being a woman and having three minor children) were so mitigating that the punishment of mere fine was justified?

76 *Id.*, para 45.
77 *Id.*, para 47.
78 (2017) 7 SCC 262; per A.K. Sikri and Ashok Bhushan JJ.

The court answered both the questions in negative. First, it was clarified that sections 307, 328 and 392 are all serious offences and provide for imprisonment "and" fine. Therefore imprisonment in no situation can be substituted by fine only. Even though these provisions do not prescribe a minimum sentence and there is a wide range of judicial discretion in matters of sentencing, the court affirmed that the same must be exercised fairly in view of the established principles and theories of punishment. On the specific issue of gender as a mitigating circumstance, the judge observed:[79]

> In many countries of the world, gender is not a mitigating factor. Some jurists also stress that in this world of gender equality, women should be treated on a par [sic] with men even as regards equal offences committed by them. Women are competing with men in the criminal world; they are emulating them in all the crimes; and even surpassing men at times. Therefore, concept of criminal justice is not necessarily synonymous with social justice. Eugene Mc Laughlin shows a middle path. She finds that predominant thinking is that 'paper justice' would demand giving similar penalty for similar offences. However, when it comes to doing 'real justice', element of taking the consequences of a penalty cannot be ignored. Here, while doing 'real justice' consequences of awarding punishment to a female offender are to be seen. According to her, 'real justice' would consider the likelihood that a child might suffer more from a mother's imprisonment than that of his father's. Insofar as Indian judicial mind is concerned, I find that in certain decisions of this Court, gender is taken as the relevant circumstance while fixing the quantum of sentence. I may add that it would depend upon the facts of each case, whether it should be treated as a relevant consideration and no hard and fast rule can be laid down. For example, where a woman has committed a crime being a part of a terrorist group, mercy or compassion may not be shown.

In other words, the nature of crime, when too serious weighs over the life circumstances and gender of the offender. Balancing the mitigating circumstances in this case with the crime committed by the respondent, the court could not agree with the high court and restored the trial court's judgment. Bhushan J, in a separate and concurring judgment, explained that the mitigating circumstances of the present case were already taken into account by the trial court in awarding sentence of simple imprisonment of two years (even when section 392 of the IPC warrants rigorous imprisonment).

79 *Id*., para 20 (Sikri J).

Sexual Consent

The Delhi high court decision in *Mahmood Farooqui* v. *State (Govt of NCT of Delhi)*[80] completely negated the objective and intent of the definition of sexual consent in section 375. In overruling the trial court decision delivered last year (which radically recognised rape as loss of control over one's sexuality), and in complete violation of the letter and spirit of the present rape law, the high court took us back to the "no means yes" standard, leaving us with the same old stereotypes of an ideal rape victim, real rape, real resistance and true consent. The verdict reinstituted the man as the subject of law. At the heart of the court's reasoning was not what the woman said, but what the man understood: "even if the act was not with her consent, she actually communicated something which was *taken as a consent by the appellant*".[81]

The decision thus marked an erasure of the woman's voice in matters concerning her sexuality. Even the questions raised by the court were framed from the point of view of the man: "whether the appellant mistakenly accepted the moves of the prosecutrix as consent; whether the feelings of the prosecutrix could be effectively communicated to the appellant and whether mistaking all this for consent by the appellant is genuine".[82] Further, according to the court, "the unwillingness of the prosecutrix was only in her own mind and heart but she communicated something different to the appellant […] At what point of time, during the act, did she not give the consent for the same, thus, remains unknown and it can safely be said that the appellant had no idea at all that the prosecutrix was unwilling. It is not unknown that during sexual acts, one of the partners may be a little less willing or, it can be said unwilling but when there is an assumed consent, it matters not if one of the partners to the act is a bit hesitant. Such feeble hesitation can never be understood as a positive negation of any advances by the other partner".[83] In creating the category of "assumed consent", the verdict, contrary to the intention of the 2013 reforms, re-inscribed male subjectivity in the domain of sexual consent. It reinforced the male privilege to assume consent based on dominant perceptions of the woman's behaviour and reactions. Aren't such assumptions about consent nothing but a reckless disregard of the other?

In its shocking endorsement of the misogynistic and sexist idea that "no" may mean a "yes", the court completely failed to appreciate the model of consent introduced in 2013. Describing sexual interactions as "act of passion, actuated by libido", the court in a regressive and reductive move almost characterises sexuality as a racy affair of confused desires which becomes all the more difficult to grasp on account of differences in gender relations. In this framework, a disproportionate burden is placed on women (particularly, "intellectually/ academically proficient" women) to be loud (not feeble), assertive (not hesitant) and display "real resistance" (not feeble

80 MANU/DE/2901/2017. The comment on this case earlier published as "The terms of Consent: on the Farooqui verdict" *The Hindu* (Oct., 2017).

81 *Id*., para 43 (emphasis supplied).

82 *Id*., para 83.

83 *Id.*, para 47.

disinclination). But it is never asked why and how the man is left to make assumptions? Why is he never required to be certain, clear and sure about his belief and understanding of the woman's verbal and non-verbal communications? Why is the man not expected to ask, understand, hear (not assume) and respect consent?

Rape and murder: death penalty as punishment

In the infamous Delhi gang rape case, *Mukesh* v. *State of NCT of Delhi,*[84] the Supreme Court confirmed the death sentence of the four convicts. The detailed decision (in two separate, concurring opinions by Dipak Misra J (for himself and Ashok Bhushan J) and R. Banumathi J) addresses all aspects of the appeal raised to contest the conviction as well as the sentence. The court relied on the victim's dying declarations (made through signs, gestures and nods made first before the doctor, then sub-divisional magistrate and the third before the metropolitan magistrate), corroborated with oral, documentary as well as medical evidence. In reaching its decision, the court also extensively relied on forensic evidence, DNA, fingerprints, bite marks (this survey will not discuss these aspects of the judgment).

The court found that the aggravating circumstances ("the brutal, barbaric and diabolic nature of the crime") outweighed the mitigating circumstances (convicts' social strata, aged parents, marital status, young children, conduct in custody, young age and the possibility of reformation and rehabilitation) and confirmed the death sentence.[85]The following observations of the court reveal how the crime of rape and the figure of the rapist is understood by the judges:[86]

> It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome bestiality of passion ruled the mind-set of the appellants to commit a crime which can summon with immediacy tsunami of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.

The dominant tropes of human-beast and civilized-barbaric inform judicial understanding of rape as well as the psyche of the rapist. Besides the othering of the rapist as someone "from a different world" which characterises "us" as humane, civilised and innocent, rape in the judicial discourse is understood as a crime of "wanton lust", "unchained carnal desire" and "bestiality of passion". This not only individualises

84 2017 (5) SCALE 506; per, Dipak Misra CJI, R. Bhanumati and Ashok Bhushan JJ.

85 Bhanumathi J in her concurring opinion completely agreed with her brother judges on the question of sentence.

86 *Supra* note 84, para 356 (Misra CJI).

the blame of rape - never posing the question of complicity of the "collective" in the rampant rape culture, never asking how do young men *become* capable of inflicting extraordinary violence upon women without a speck of guilt – but also reduces rape to violent, bad sex. Delhi gang rape (for that matter any act of sexual violence) cannot be reduced to an act arose from "appetite for sex", it rather needs to be approached from the coordinates of class, gender, caste as well as(male) anxieties. We need to ask where "the hunger for violence" comes from? Is it because all men occupy "the position of the empowered" or it is because violence against women serves to hide what Hannah Arendt called "the impotence of bigness"?

Vasanta Sampat Dupare v. *State of Maharashtra*[87] was a review petition against the decision of the apex court in awarding death sentence to the petitioner, listed in view of *Mohd. Arif @ Ashfaq* v. *Registrar, Supreme Court of India.*[88] The petitioner was sentenced for rape and murder of a 4 year old girl. His contention was that "in the light of principles laid down in *Bachan Singh* and *Machhi Singh* mitigating factors ought to have been taken into account and that proper and effective hearing in that behalf was not extended to the Petitioner". The petitioner placed before court evidence relating to the educational and other activities undertaken by him in jail which showed that he was on the path of reformation. It was also argued that "sub-section (2) of section 235 of Code of Criminal Procedure obliges the Court to hear the Accused on the question of sentence and normally it is expected that after recording the conviction, the matter be adjourned to a future date calling upon both the prosecution as well as the defence to place relevant material having bearing on the question of sentence". Moreover, it was contended that the burden was on the state to prove that the accused could not possibly be reformed and this burden was not discharged by the state in the present case.

The court rejecting all the above contentions upheld the death penalty. According to the court, "merely because no separate date was given for hearing on sentence, we cannot find the entire exercise to be flawed or vitiated".[89] Also, the court observed that "it was the cumulative effect of the mitigating circumstances on one hand and the aggravating facts on the other, which would be weighed to come to the final conclusion whether the case satisfied the requirement of being "rarest of rare". It is not as if mere failure on part of the State to lead such evidence would clinch the issue in favour of the accused".[90] The court considered the mitigating factors which showed the accused's conduct in jail - he completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study, he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition, activities which was generally undertaken in prisons to reform and rehabilitate the offenders – but found that "the aggravating circumstances namely the

87 2017 (5) SCALE 724; per Dipak Misra CJI, R.F. Nariman and U.U. Lalit JJ.
88 (2014) 9 SCC 737.
89 *Supra* note 87, para 15.
90 *Id.*, para 16.

extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record".[91]

This decision leaves one wondering if in cases of brutal crimes, there can ever be any mitigating circumstances in favour of the accused. Can the reformation and rehabilitation programmes offered in the prison in the form of educational and other activities will ever be sufficient mitigating factors when the offender's past was tainted with a brutal crime? How do we think about reformation programmes which can give the convicts of brutal crimes another chance to live, feel remorseful, grieve, repent?

Defective investigation and "reasonable doubt"

Suresh Chandra Jana v. *State of West Bengal*[92] brings to light how unprofessionalism of stakeholders in the criminal justice system severely comprises the rights of the victims. The victim/deceased was allegedly raped by the accused. Facts illustrate that during the pendency of the rape trial, the accused threw acid on the victim to teach her a lesson. She was hospitalised with severe burn injuries, after 26 days succumbed to the injuries. During this period no written complaint was filed with the police, the doctor did not allow recording of dying declaration and even the subsequent investigation by the police was callous and defective. The victim, while in the hospital, asked a stranger to post her complaint to the police, stating that she was attacked with acid and her family was threatened by the accused, but even that was not taken as dying declaration by the police. The trial court sentenced the accused for murder but in the death reference, the high court gave an order of acquittal.

Before the apex court the argument of the accused was that there was a long delay in filing of FIR, there were lapses in investigation and prosecution and therefore the benefit of doubt should go to the accused. The court, rejecting the same, recorded how this case is an example of "complete insensitiveness on the part of the police, the doctors and the system towards the victim".[93] Prafulla Pant J, in his judgment, also clarified that "it is not every doubt but only reasonable doubt of which benefit can be given to the Accused. A doubt of a timid mind which is afraid of logical consequences, cannot be said to be reasonable doubt [...] The Accused is entitled to get benefit of only reasonable doubt, i.e. the doubt which rational thinking man would reasonably, honestly and conscientiously entertain and not the doubt of a vacillating mind that has no moral courage and prefers to take shelter itself in a vain and idle scepticism. The administration of justice has to protect the society and the victim altogether who has died and cannot cry before it".[94] In the light of the above, the court convicted the first accused for murder but acquitted the second accused in the absence of an established 'common intention'.

91 *Id*., para 20.
92 2017 (8) SCALE 697; per N.V. Ramana and Prafulla Pant JJ.
93 *Id*., para 23 (per Prafulla Pant J).
94 *Id*., para 26 (per Prafulla Pant J).

The question of age

In *Ms. Eera through Dr. Manjula Krippendorf* v. *State (Govt. Of Delhi)*[95] the issue before the court was whether section 2(d) of the Protection of Children from Sexual Offences Act, 2012 (POCSO), which defines 'child' as any person who is below the age of 18 years, can be interpreted broadly to include the concept of 'mental age' of a person or the age determined by psychiatry such that a mentally retarded person or an intellectually challenged person who has crossed the age of 18 years can also be included within the ambit of this section.

The appellant, represented by her mother, was suffering from cerebral palsy. Though biologically she was 38 years old, her mental age was approximated to six to eight years. It was argued on her behalf that the trial for her rape should be held by the special court set up under POCSO, keeping in mind her mental age. Under POCSO, she would be governed by a different procedure and would also be entitled to compensation. It was further contended that purposive construction requires that the word 'age' includes biological as well as mental age since the law which is meant "to protect the class, that is, child, leaves out a part of it though they are worse than the children of the age that is defined under the POCSO Act". Many statutes, including the IPC, depart from chronological age "by laying stress on capacity to understand the nature and consequence of the act". It was further submitted that a mentally retarded person "is incapable of understanding what is happening to her" and is therefore "equal to a child".

It, what I believe, is an important decision in the disability rights discourse, the court rightly rejected the above contentions. Dipak Misra CJI observed that the intention of the legislature must be respected in this regard. The Parliament, it was noted, has always maintained a difference between 'mental illness' and 'mental retardation'. Relying on *Suchitra Srivastava's case*, the court observed that there cannot be any dilution of the consent of persons with 'mental retardation': "if a victim is mentally retarded, definitely the court trying the case shall take into account consideration whether there is a consent or not. In certain circumstances, it would depend upon the degree of retardation or degree of understanding. It should never be put in a straight jacket formula. It is difficult to say in absolute terms".[96]

In a separate and concurring judgment R.F. Nariman J, relying on the doctrine of separation of powers, noted that "we would be doing violence both to the intent and the language of Parliament" if the word 'mental' was read into section 2(1)(d) of POCSO. He provided a close reading of various provisions of the POCSO (sections 5(f), 13(a), 27(3), 39) to categorically conclude that "the Act's reach is only towards the protection of children, as ordinarily understood".[97] He also referred to Medical

95 AIR2017SC3457; per Dipak Misra and R.F. Nariman JJ. This comment appeared in ILI Newsletter: "Case comment on *Ms. Eera through Dr. Manjula Krippendorf* v. *State (Govt. Of Delhi)*" *ILI Newsletter* (Jul- Sep., 2017).

96 *Id*., para 83.

97 *Id*., para 30.

Termination of Pregnancy Act (sections 2(b), 2(c), 3(4)(a)) as well as the Mental healthcare Act, 2017 (sections 2(s), 2(t), 14, 15) to foreground the distinction between a woman who is a minor and an adult woman who is mentally ill. Similarly, the Rights of Persons with Disabilities Act, 2016 (sections 2(s), 4, 9, 18, 31) maintains that children with disabilities are treated differently from persons (above 18 years of age) with disabilities. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 also makes it clear that "whatever is the physical age of the person affected, such person would be a "person with disability" ...Conspicuous by its absence is the reference to any age when it comes to protecting persons with disabilities".[98]

Affirming the distinction between women suffering from cerebral palsy and children, this decision refuses to infantilize women with mental disabilities under the pretext of state protection. It rather emphasises upon legal agency and choice-making capacity of persons with disabilities. Treating them as children within the framework of POCSO would have resulted in an erasure of their capacity to consent as well as their right to sexual agency.

Rape of child wife

On October 17, 2017, the Supreme Court of India, in *Independent Thought* v. *Union of India*[99] held that sexual intercourse between a man and his wife aged between 15 to 18 years is rape. The judgment which was prospective in effect read down the marital rape exception. The state had defended the exception on the grounds that child marriage, though illegal vide Prohibition of Child Marriage Act (PCMA), continues to be a stark reality and the sanctity of the institution of marriage needs to be preserved. Rightly rejecting both these arguments, the court declared the exception arbitrary and discriminatory and thus violating articles 14, 15 and 21 of the Constitution.

It is interesting to note that the court refrained from making any comments on the marital rape exception. The court instead framed the issue in reference to the ill-effects of the practice of child marriage. It was emphasized that child marriage violates the human rights of a child and is particularly detrimental to the rights of the girl child, the right to bodily integrity, reproductive choice and "the right to develop into a mature woman" amongst others.

The court through this decision sought to address a glaring anomaly in the age of consent law: while the Prevention of Children from Sexual Offences Act (POCSO), 2012, prescribes the age of consent as 18 years for both male and female, the rape law provision in the IPC postulated 15 years as the age of consent for married girls. Thus, in law, consensual sex by an unmarried girl below 18 years is deemed to be without consent, but if a girl is married, even when she does not consent to sexual acts with her husbands, it will be presumed to be consensual.

98 *Id*., para 41.
99 MANU/SC/1298/2017.

In other words, a girl below 18 years, otherwise unable to give consent, is presumed to have consented to her husband for all sexual acts, at all times. This discrepancy, the court held, is preposterous given the "interest of the child", especially the girl child. Moreover, such inconsistency cannot stand especially in view of section 42A of the POCSO which provides that in case of any inconsistency, the provisions of POCSO would override other laws.

According to the court, the law is categorical and unambiguous that anyone below the age of 18 years is a child. The increase in the age of consent to 18 years in the 2013 criminal law amendments is in tune with various other enactments such as the POCSO, the Juvenile Justice (Care and Protection) Act, the Protection of Women from Domestic Violence Act, the Majority Act, the Prohibition of Child Marriage Act, the Guardians and Wards Act, the Indian Contract Act and many other laws.

While this decision has been applauded and seen as a dent in the marital exception, it remains embedded in the larger objective of the regulation of female sexuality. It is important to note that in all its talk of the rights of the girl child, there is no mention at all of the right to sexual agency, within or outside marriage. In fact, the court uncritically buys into and consolidates the notion of a child/adolescent as an asexual being, also problematically encoded in POCSO, and the girl/woman as a mere object of male sexuality and not the subject of one.

The slippages and contradictions in the court's understanding of the figure of the (girl) child are too glaring to be overlooked: while Madan Lokur J approvingly cited a study by the Government of India on child sexual abuse stating that "minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality",[100] concurring Deepak Gupta J emphasized that "the girl child must not be deprived of her right of choice…[and] her right to develop into a mature woman".[101]

Both the judges subscribe to the age of sexual consent as postulated in POCSO. In the zeal to save the girl child from the oppression of marital sex, the court side tracked the issue of familial violence, through age of consent laws, on adolescents who sexually express themselves. The slippages in lacking "the ability to control their sexuality" (which admits to sexual desires below 18) and the question of "choice" (which does not specify choice to what and surely must include the right to sexual expression before and outside marriage) are papered over with the rhetoric of victimisation with no serious thought to the sexual agency of the young and further strengthens the idea that a girl below the age of 18 years is incapable of consent.

It is clear that for the court, there is no space for sexuality outside marriage. Consider the following observations:[102]

100 *Id.*, para 16 (Lokur J).
101 *Id.*, para 70 (Gupta J).
102 *Id.*, paras 25, 26 (Lokur J).

> 25. …There is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being and her social standing- all of which should ordinarily be of paramount importance to everybody, particularly the State.
>
> 26. The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is itself quite enormous and in the long run might not even be worth it. This is in addition to the economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly…

By collapsing all sexual intercourse into intercourse within heterosexual marriage, the court left no space for non-procreative, out-of-marriage sex between young people which, interestingly is seen as a threat to the state. Moreover, in reducing sexual intercourse even within marriage to the economistic logic of a burden on the nation, the court neatly sidesteps both the issue of the mental and physical costs of marital rape that are borne by women above 18, in the artificial distinction they endorse between marital rape victims above 18 years and those less than 18 but, more importantly, of any sexual agency both within and outside of heterosexual marriage and certainly below the age of 18.

At best, this decision is a step towards the abolition of heterosexual child marriage (the court calls upon all state legislatures to follow the example of Karnataka and declare child marriages to be void *ab initio*). However, it would be fallacious to conclude that it has created a dent in the marital rape exception, even though the marital rape exception in criminal law is read down in the specific case of child marriages.

The reading down is not because minor wives are accorded equal rights as subjects or in the marriage but because the minor wives were not *really* wives in the first place (Gupta J always used the terms wife and husband in quotation marks to refer to marriages of girls less than 18 years, suggesting they are not really wives and husbands). They are sexless children on whom sexual intercourse will be an act of violence with the possible unfortunate effect of malnourished children. Despite the language of choice, this is not about choices before the girl as an independent subject at all. She is merely the object of male sexuality, not ready for sexual activity and the reproducing of children just yet. What the court naively termed as mere inconsistencies in different legislations on the age of consent and marriage, is actually reflective of the state's overt interest in the preservation of the institution of heterosexual marriage as the only vocation for the girl/woman, on the one hand, and the regulation of all young, especially female, sexuality on the other.

While the marital exception (even for child marriages) is crafted to safeguard the patriarchal and sexist logic of the institution of heterosexual marriage, the increased age of consent only reflects the anxiety of the state around adolescent and child

sexuality not any concern for the choices or sexual agency of the young, especially girls/women. Throughout the judgment, the discussion on the age of consent has been tied to adulthood in relation to marriage, completely erasing questions of the sexual agency of the young, especially girls and women who are, once again, mere objects of the law, both within and outside marriage.

Elopement and age of consent

In *Mahendra Subhashbhai Vankhede* v. *State of Gujarat*[103] the appellant (19 years old) was in a consensual love/sexual relationship with the complainant's daughter who was less than 16 years old. According to the facts, the girl had voluntarily left with the appellant and the two had consensually stayed together for a few days till the appellant was arrested. The father of the girl registered an FIR under sections 363, 366, 376, 114, 377, 397 and 401 of the IPC. Subsequently, the Additional Sessions Judge took cognizance of the case under sections 363, 366, 376 and 114. The trial court found the accused guilty under sections 363, 366 and 376. The court sentenced him to simple imprisonment of two years and nine months and fine since "this case was a love affair involving young adolescents, therefore severe punishment would not be feasible". The high court further enhanced the punishment of imprisonment to seven years and ordered additional fine. Upholding the appeal against the enhanced sentence by the high court, the Supreme Court made the following observations:[104]

> In this case at hand, there is no dispute as to the fact that the Accused was nineteen years of age at the time of the incident. Additionally it is borne out of the record that the Accused and the girl had a love affair and she had left her parent's house voluntarily without any force. Further it is pointed out that both of them stayed together for around ten days and the nature of sexual intercourse was consensual.

It is worth recalling that post 2013 criminal law amendments, such judicial discretion cannot be exercised even in consensual cases of statutory rape. In the name of protecting young girls, the amendment has tightened the noose of sexual governance by family and the state, stripping minor girls off all sexual agency, and turning young boys in consensual sexual relationships with minor girls into rapists who deserve no mercy.[105]

Woman's right to love and reject

Pawan Kumar v. *State of HP*[106] brings to fore the ugly side of romantic love – how it can slip from affection to hatred to violence. The appellant was charged under

103 2017 (9) SCALE 79; per, N.V. Ramana and Prafulla C. Pant JJ.

104 *Id.*, para 8.

105 Here *Satish Kumar Jayanti Lal Dadgar* v. *Gujarat,* 2015 (3) SCALE 344, may be recalled where the apex court refused to exercise discretion to satisfy the retributive aspect of law.

106 2017 (5) SCALE 443; per, Dipak Misra CJI, A.M. Khanwilkar and Mohan M. Shantanagoudar JJ.

section 306 of the IPC for driving a young girl to commit suicide. The deceased and the appellant had fallen in love and eloped; and the appellant was earlier charged under sections 363, 366 and 376 of the IPC. He, however, was acquitted as the girl supported him throughout. After the acquittal, the appellant harbours deep resentment towards her former lover as he felt that he was prosecuted because of her and "gets obsessed with the idea of threatening the girl and that continues and eventually eve teasing becomes a matter of routine". When the situation became insufferable for the girl, she sets herself ablaze. While he was acquitted by the trial court, the high court convicted him under section 306 of the IPC. In the appeal before the apex court, the appellant challenged the high court's reliance on the dying declaration and he also contested the evidence and testimonies of the other witnesses. The court categorically rejected these averments and on the question of abetment of suicide observed:[107]

> [While] mere allegation of harassment without any positive action in proximity to the time of occurrence on the part of the Accused [does not amount to abetment] ... A mere reprimand or a word in a fit of anger will not earn the status of abetment [...]
>
> In the instant case, the Accused had by his acts and by his continuous course of conduct created such a situation as a consequence of which the deceased was left with no other option except to commit suicide [...] the Accused has played active role in tarnishing the self-esteem and self-respect of the victim which drive the victim girl to commit suicide.

The court also made important remarks on the psychological harassment caused by "eve-teasing" and observed how it affects women's constitutional rights safeguarded under articles 14, 15 and 21. In an attempt to refigure love in terms of woman's choices and outside male privilege, the court said:[108]

> A woman has a right to life and entitled to love according to her choice. She has an individual choice which has been legally recognized. It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject [...]
>
> In a civilized society male chauvinism has no room [...] A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law.

While the importance of these observations cannot be side-tracked, it remains a question for future exploration whether the liberal language of rights can capture the

107 *Id.*, para 41-42.
108 *Id.*, paras 45-46.

constitutive ambivalence of love–how love turns into hatred, resentment and even violence.

Acid attack

In *Ravada Sasikala* v. *State of Andhra Pradesh*[109] the appellant, driven by revenge, poured acid over the victim when his proposal of marriage to her was rejected. He was convicted and sentenced under sections 326 and 448 of the IPC. He pleaded for mercy on the grounds that he had to support his old parents, his economic status and social strata and certain other factors. The trial judge sentenced him to rigorous imprisonment for one year and directed him to pay a fine of Rs. 5,000/- with a default clause under section 326 of the IPC and a fine of Rs. 1000/- for the offence under section 448 of the IPC with a default clause. The high court while maintaining conviction under both the sections reduced the sentence to period already undergone (one month) and the already imposed fine.

The issue before the court was whether the imposition of sentence was proportionate to the crime in question. Referring to various authorities on the issue of sentencing, the court held:[110]

> [Punishment] shall depend upon the nature of crime, the manner in which it is committed, the propensity shown and the brutality reflected. The case at hand is an example of uncivilized and heartless crime [...] It is completely unacceptable that concept of leniency can be conceived of in such a crime. A crime of this nature does not deserve any kind of clemency. It is individually as well as collectively intolerable. The Respondent No. 2 might have felt that his ego had been hurt by such a denial to the proposal or he might have suffered a sense of hollowness to his exaggerated sense of honour or might have been guided by the idea that revenge is the sweetest thing that one can be wedded to when there is no response to the unrequited love but, whatever may be the situation, the criminal act, by no stretch of imagination, deserves any leniency or mercy. The Respondent No. 2 might not have suffered emotional distress by the denial, yet the said feeling could not to be converted into vengeance to have the licence to act in a manner like he has done [...]
>
> We are at a loss to understand whether the learned Judge has been guided by some unknown notion of mercy or remaining oblivious of the precedents relating to sentence or for that matter, not careful about the expectation of the collective from the court, for the society at large eagerly waits for justice to be done in accordance with law, has reduced

109 2017 (3) SCALE 179; per Dipak Misra CJI and R. Bhanumati J.
110 *Id.*, paras 21-22.

> the sentence. When a substantive sentence of thirty days is imposed, in the crime of present nature, that is, acid attack on a young girl, the sense of justice, if we allow ourselves to say so, is not only ostracized, but also is unceremoniously sent to "Vanaprastha". It is wholly impermissible.

The court thus restored the trial court decision and also directed the accused to pay a compensation of Rs. 50,000/- and the state to pay a compensation of Rs. 3 lakhs. It was also held that if the accused does not pay the compensation amount within six months, he shall suffer further rigorous imprisonment of six months, in addition to what has been imposed by the trial court.

Caste based gendered violence

In 2009, Manju Devi filed a complaint in the Court of Chief Judicial Magistrate (CJM) under sections 323, 354 and 452 of the IPC and section 3(1)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the SC/ST Act).[111] She stated how the respondents "entered into her quarter and caught hold of her in order to outrage her modesty". When she managed to escape, they abused her and her family members, calling them "Harijans and Dhobis" and threatened them with dire consequences in case the incident was reported. The complaint resulted in the registration of FIR, but after investigation the police filed a closure report. The CJM, however, took cognizance of the offence and process was initiated under IPC as well as SC/ST Act. This was affirmed by the Additional Sessions Judge as well as the high court. Thereafter the respondents applied for anticipatory bail which was granted by the high court. The appellant challenged the granting of anticipatory bail before the apex court.

In this regard, the court noted that section 18 of the SC/ST Act explicitly excludes the application of section 438 of the Criminal Procedure Code. The exclusion of anticipatory bail needs to be situated in the context of the objective and specificity of SC/ST Act. In the court's words:[112]

> The exclusion of the section 438 of the Code in connection with offences under the SC/ST Act has to be viewed in the context of the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail.

111 *Manju Devi* v. *Onkarjit Singh Ahluwalia,* (2017) 13 SCC 439; per R.K. Agrawal and Ashok Bhushan JJ.

112 *Id*. at 445.

The court also rejected the respondents' plea that the complaint was false and malicious by stating that this allegation "cannot be looked into at the stage of taking cognizance and issue of process and the mala fides or bona fides of a case can only be taken into consideration at the time of trial".[113] Thus, the high court order which granted the anticipatory bail was set aside.

IV MATRIMONIAL DISPUTES

This section comments on cases pertaining to disputes within matrimony ranging from divorce, maintenance, child custody and domestic violence.

Cruelty

In *Raj Talreja* v. *Kavita Talreja*[114] the husband's petition for divorce was met with a series of false allegations and complaints by the wife. On investigation, it was found that the respondent had even self-inflicted some injuries in the process to charge her husband for the same. This led to initiation of proceedings under section 182 of the IPC against the wife. The husband moved an amendment application in the divorce petition alleging that due to filing of the false complaints he had been subjected to cruelty by the wife. Both the trial judge and the high court dismissed the petition. On appeal before the Supreme Court, the court observed that the wife had made "reckless, defamatory and false accusations against her husband, his family members and colleagues, which would definitely have the effect of lowering his reputation in the eyes of his peers". The court also clarified that "[m]ere filing of complaints is not cruelty, if there are justifiable reasons to file the complaints", however, "if it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse levelling false accusations against the other spouse would be an act of cruelty".[115] In this case since wife's allegations were found to be false, the court granted divorce. Despite the cruelty, the court took note of the wife's basic needs and directed the husband to make permanent arrangement for her alimony and residence.

113 *Id*. at 447. On Mar. 20, 2018, the bench of A.K. Goel and U.U. Lalit JJ in *Dr. Subhash Kashinath Mahajan* v. *State of Maharshtra*, AIR 2018 SC 1498, observed that "there is a need to safeguard innocent citizens against false implication and unnecessary arrest" and held that "s. 18 does not apply where there is no prima facie case or to cases of patent false implication or when the allegation id motivated for extraneous reasons". The court was also of the opinion that a preliminary enquiry should be conducted before registration of FIR in the cases falling SC/ST Act; arrest of a public servant should only be after the approval of the appointing authority and of a non-public servant after the approval of the Senior Superintendent of Police. This decision was overruled by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018. At the time of writing the survey, the 2018 amendments are under challenge before the apex court.

114 (2017) 14 SCC 194; per A.K. Goel and Dipak Gupta JJ.

115 *Id*., para 10.

Divorce by mutual consent

In *Amardeep Singh* v. *Harveen Kaur*[116] the question before the court was whether the minimum period of six months stipulated under section 13B(2) of the Hindu Marriage Act, 1955 for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations. The apex court was faced with a conflict of judicial opinions on whether the power under article 142 of the Constitution could be exercised to waive the statutory period of six months. While reading a statutory provision, the court noted, it is importance to pay attention to the context, the subject matter and the object of the provision[117] in order to ascertain whether the provision is mandatory or directory.

Making a significant move towards liberalization of divorce, the court importantly clarified that the statutory period under section 13B(2) is not mandatory but directory and can be waived after taking into consideration the following:[118]

i) the statutory period of six months specified in section 13B(2), in addition to the statutory period of one year under section 13B(1) of separation of parties is already over before the first motion itself;
ii) all efforts for mediation/conciliation including efforts in terms of order XXXIIA rule 3 CPC/section 23(2) of the Act/section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;
iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;
iv) the waiting period will only prolong their agony.

Custody of child

The courts work with the presumption of maternal custody as sound child welfare policy. In *Vivek Singh* v. *Romani Singh*,[119] the respondent was forcibly and violently deprived of the custody and company of her 21 month old daughter by her husband who in a drunken state had pushed her out of the house. Respondent's petition claiming custody was rejected by the trial court, and since then the daughter could get no opportunity to stay and live with her mother. The apex court, agreeing with the high court, granted the custody of eight year old daughter (who had been living with the father since she was 21 months old and had expressed the desire of continuing to stay with him) to the mother. The court observed:[120]

> [A] child's primary need is for the care and love of its mother, where she has been its primary care giving parent, is supported by a vast body

116 AIR 2017 SC 4417; per, Adarsh Kumar Goel and U.U. Lalit JJ.
117 *Id*., para 17.
118 *Id*., para 19.
119 2017 (2) SCALE 681: MANU/SC/0156/2017; per, J. Chamleshwar and A.K. Sikri JJ.
120 *Id*., para 17.

> of psychological literature. Empirical studies show that mother infant "bonding" begins at the child's birth and that infants as young as two months old frequently show signs of distress when the mother is replaced by a substitute caregiver. An infant typically responds preferentially to the sound of its mother's voice by four weeks, actively demands her presence and protests her absence by eight months, and within the first year has formed a profound and enduring attachment to her. Psychological theory hypothesizes that the mother is the center of an infant's small world, his psychological home base, and that she "must continue to be so for some years to come". Developmental psychologists believe that the quality and strength of this original bond largely determines the child's later capacity to fulfill her individual potential and to form attachments to other individuals and to the human community.

In this case, no doubt, the child's preference of staying with the father was determined by the fact that she never lived with the mother and had no regular contact with her and therefore the court wanted the girl to also live with her mother so that her preferences are determined by experiencing life with both her parents. The decision may be appropriate in the present case, given the mother was forced out of the house by her husband and deprived her natural right of care and company of her child of her young daughter, but the question is to what extent should the principle of welfare of the child be made contingent on naturalised and essentialised role of mothers as caregivers?[121]

In *Nithya Anand Raghavan* v. *State of NCT of Delhi,*[122] the appellant, earlier residing in the UK with her husband, returned to India with her seven year daughter who was diagnosed with a cardiac disorder. On her complaint, the Crime Against Women Cell issued a notice to her husband to appear before it. The husband did not appear before the CAWC but filed a custody petition in the UK court which was decided in his favour and the appellant was required to return to the UK with her daughter and attend the hearing there. He also filed a habeas corpus petition in Delhi

121 This case may be contrasted with *Jitender Arora* v. *Sukriti Arora*, 2017 (3) SCALE 7; per A.K. Sikri and R.K. Agrawal JJ, where the mother was denied the custody of the 15 year old daughter who categorically expressed her willingness to stay with the father in India, rather than go to UK with the mother. Rejecting the high court's decision, the court opined: "The High Court in the impugned judgment had stated that since Vaishali [daughter] was a minor girl, she needed company of her mother more to understand girly things. The High Court mentioned about the bond between girl child and mother in abstract and from there only the High Court came to the conclusion that it would be better to give the custody to the mother. The High Court did not go into the specific situation and circumstances of this case and did not make any objective assessment about the welfare of Vaishali".

122 2017 (7) SCALE 183; per, Dipak Misra CJ, A.M. Khanwilkar and Mohan M. Shantanagoudar JJ.

High Court seeking to have her daughter produced before the court and directing the appellant to comply with the UK court order. The present appeal arose from the decision of the high court. The apex court granted the custody of the minor child to the mother till she attains majority, when she can exercise her choice to stay with her father. While this decision is crucial for family law in so far as it settles that the best interest and welfare of child outweighs the principle of comity of courts,[123] court's gendered reasoning is hard to ignore given its naturalisation of the mother-daughter bond:[124]

> Being a girl child, the guardianship of the mother is of utmost significance. Ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in custody of her mother.

Maintenance

In *Manish Jain* v. *Akanksha Jain*[125] the parties were involved in a series of claims and counter-claims. The issue before the court in this specific order was wife's entitlement to maintenance *pendente lite*. The husband's argument was that the wife was an educated lady and that she had completed her one year course of fashion designing and that she was capable of earning monthly salary of Rs. 50,000/- and thus was not entitled to maintenance. On evidence, the court found that the wife did not have any permanent employment or source of income. In view of the same, the court upheld the high court order of granting maintenance *pendent lite* under section 24 of the Hindu Marriage Act (while reducing the quantum of maintenance). The court clarified the scope and applicability of section 24 as follows:[126]

> An order for maintenance *pendente lite* or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wife's parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual

123 Also see, *Prateek Gupta* v. *Shilpi Gupta,* (2018) 2 SCC 309; per Dipak Misra CJ and Amitava Roy J.

124 *Supra* note 122, para 34.

125 2017 (4) SCALE 152; per, Kurien Joseph and R. Bhanumathi JJ.

126 *Id*., para 15.

> situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.

Video-conferencing in matrimonial proceedings

In *Santhini* v. *Vijaya Venketesh*[127] the Supreme Court with a 2:1 majority overruled *Krishna Veni Nagam* v. *Harish Nagam*[128] which had permitted the use of videoconferencing as an alternative to the transfer of proceedings. According to majority judges (Dipak Misra CJI and A.M. Khanwilkar J), use of videoconferencing is contrary to section 11 of the Family Courts Act, 1984 (proceedings may be held in-camera) and would scuttle the rights of women:[129]

> In a case where the wife does not give consent for videoconferencing, it would be contrary to section 11 of the 1984 Act. To say that if one party makes the request, the proceedings may be conducted by videoconferencing mode or system would be contrary to the language employed in section 11 of the 1984 Act. The said provision, as is evincible to us, is in consonance with the constitutional provision which confers affirmative rights on women that cannot be negative by the Court.

They were also of the view that since the objective is to strive for reconciliation between the parties, reliance on video conferencing "will distant the possibility of reconciliation because the Family Court Judge would not be in a position to interact with the parties in the manner as the law commands." Further:[130]

> There is no provision that the matter can be dealt with by the Family Court Judge by taking recourse to videoconferencing. When a matter is not transferred and settlement proceedings take place which is in the nature of reconciliation, it will be well-nigh impossible to bridge the gap. What one party can communicate with other, if they are left alone for some time, is not possible in video conferencing and if possible, it is very doubtful whether the emotional bond can be established in a virtual meeting during videoconferencing. Videoconferencing may create a dent in the process of settlement.

For the court, this interpretation is in consonance with article 15(3) of the Constitution and thus, "when most of the time, a case is filed for transfer relating to

127 (2018) 1 SCC 1.
128 (2017) 4 SCC 150.
129 *Supra* note 127, para 44.
130 *Id.*, para 49.

matrimonial disputes governed by the 1984 Act, the statutory right of a woman cannot be nullified by taking route to technological advancement and destroying her right under a law, more so, when it relates to family matters".[131] The majority however did not exclude the possibility of using videoconferencing once the settlement process has concluded.

D.Y. Chandrachud J in his dissent rightly noted that "videoconferencing is gender neutral".[132] The majority's overemphasis on reconciliation and tying the issue to women's rights loses sight of the "asymmetries of power" in matrimonial relationships where any one of the spouses can cause undue delays to the prejudice of the other.

Domestic Violence

In *Samir Vidyasagar Bhardwaj* v. *Nandita Samir Bhardwaj*,[133] the wife had filed for divorce against the husband on the ground of cruelty and sought for various other reliefs including an application under section 19(1)(b) of the Protection of Women from Domestic Violence Act, 2005 asking for issuance of mandatory injunction against the husband to move out of the matrimonial house and handing over the vacant and peaceful possession of the house. The family court (affirmed by high court) directed the husband to remove himself out of the matrimonial house and not to visit the same till the decision of the divorce petition. This was challenged by the husband on the grounds that he was a co-owner of the premises, and thus could not be evicted from the premises as that would amount to his virtual dispossession of the premises of which he was an equal co-owner. He also urged that there is no independent/ corroborative evidence to support the claim of domestic violence and the order of his eviction is harsher than temporary injunction.

Dismissing husband's appeal, the apex court concluded that the Family Court exercised its discretion under section 19(1)(b) of the Domestic Violence Act based on the prima facie material that was available on record to accept the allegation of the wife on domestic violence. Since the exercise of discretion could not be termed perverse, the order did not warrant any interference.

In *Vaishali Abhimanyu Joshi* v. *Nanasaheb Gopal Joshi*[134] the Court was called upon to interpret section 26 of the Domestic Violence Act qua the Provincial Small Cause Courts Act, 1887 as amended in Maharashtra. The issue was: whether counter claim by the appellant seeking remedy under section 19 of the Domestic Violence Act (residence orders) can be entertained in a suit filed against her by the respondent (father-in-law) under section 26 of the 1887 Act seeking a mandatory injunction directing her to stop using the suit premises. The apex court in allowing the appeal held that the Domestic Violence Act was enacted to achieve a special purpose and

131 *Id*., para 50.
132 *Id*., para 8 (Chandrachud J).
133 (2017) 14 SCC 583; per, Kurien Joseph and R. Bhanumathi JJ.
134 (2017) 14 SCC 373.

that the counter claim filed by the appellant was fully entertainable. In the court's words:[135]

> When the suit filed by the plaintiff for determination or enforcement of his right as a licensor can be taken cognizance by the Judge, Small Causes Court we fail to see that why the relief claimed by the appellant in the Court of Small Causes within the meaning of section 26 of the [Domestic Violence Act] cannot be considered by the Judge, Small Causes Court.

V CONCLUSION

Despite some path breaking judicial pronouncements of this year, it would be hard to say that the Supreme Court of India was committed to the cause of feminist politics even when it claimed to speak for the women. The silenced Muslim women in triple talaq decision, the rejected pleas of pregnant women seeking enforcement of their reproductive rights in the wake of a callous legislation, award of death sentences in the name of gender justice, are but a few illustrations of how far removed we are from feminist adjudication. The declarations on right to privacy, right to love and reject, however, emerge as a glimmer of hope for the aspired feminist future. It remains to be seen whether the possibilities created by "progressive" decisions and declarations will turn into actualities.

135 *Id*. para 30.