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# WOMEN AND THE LAW

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## I INTRODUCTION

IF ONE were to document the tectonic shifts in the judicial discourse, the year 2018 would certainly be recorded as path-breaking. This year saw the Supreme Court of India emerge as a heroic enlightened institution, paving way for semantic innovations in law, expanding the scope of women's rights, gender-based justice, recognition and respect for multiple sexual identities and more generally, broadening the horizon of sexual freedoms. The Constitution and constitutional law became the canvas on which judges of the Supreme Court painted their own visions of rights, equality and justice.

This certainly was an important year from the perspective of gender. From the right of women to practise religion, decriminalisation of homosexuality and adultery to protection of inter-faith marriages, the court sought to transform the dominant understanding of social and structural institutions that shape our gendered selves.These cases, some running into several hundred pages, do make for delightful reading for (some) feminists, inundated as they are with ideas and sources drawn from feminist legal scholarship across the world. As if feminism has finally made inroads into the Supreme Court both in terms of language as well as reasoning. In this survey, while documenting the court's trajectory, I will attempt to critically read and analyse some of these decisions. The first part of the survey encapsulates Supreme Court's spree of "feminist activism" as it declared and concretised freedom of choice, right to love and responded to public interest litigations on sexual violence. The second part of the survey summarises cases of violence that arise within matrimony: homicide, cruelty, harassment, abetment of suicide *etc*. The third part deals with cases concerning sexual violence and concomitant issues. The fourth part briefly scrutinises judgments relating to civil law claims made by women. In lieu of a conclusion, I discuss a case of the High Court of Rajasthan which compels us to reflect on the larger and deeper implications of the seemingly feminist decisions.

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## II RIGHTS, FREEDOMS AND CHOICE: OF SEXUALITY, LOVE AND INTIMACIES

**Freedom from the fetters of parental authority and community diktats** *Shafin Jahan* v. *Asokan K.M.*[1] records the ordeal of an adult woman constrained from exercising the right to live her life on her own terms. This case demonstrates how family is no safe haven for women, instead, it is an institution that confines and constricts women in the name of love and security. A writ petition of *habeas corpus* was filed by Asokan K.M. before the High Court of Kerala to secure his daughter,[2] Akhila alias Hadiya's custody who, he believed, was forced to change her faith. Hadiya was impleaded before the court as a respondent and showed her reluctance to go to her parental house. She wanted to stay in "Satyasarani" institution and pursue her internship. The high court on January 1, 2016 declared that there were "no circumstances warranting interference for issuance of any writ of Habeas Corpus" as she was staying away from her family on her own free will.

A second writ petition was filed by the father stating his apprehension that his daughter will be transported to Syria. Hadiya denied this allegation in its entirety and stated that she wanted to stay at the place of her choice. While initially the high court allowed her to stay with one Saibala, in a later order it was directed that she "shifts her residence to a more acceptable place, without further delay."[3] On the next date of hearing, Hadiya appeared before the court and stated that she had married Shafin Jahan, the appellant in the present decision. Responding to this development, the court extended the *parens patriae* jurisdiction over 24-year old Hadiya. As if sharing the paternal anxiety, the court saw Hadiya as "weak and vulnerable, capable of being exploited in many ways."[4] It annulled her marriage and ensured that she was in the "safe hands" of her father. Further issuing directions amounting to infantilisation of Hadiya, the court prohibited her from possessing or using mobile phone and directed that "[s]he shall be cared for, permitted to complete her House Surgeoncy Course and *made* professionally qualified so that she would be in a position to stand independently on he own two legs. The marriage being the most important decision in her life, can also be taken only with the active involvement of her parents."[5] The high court further directed a police officer to escort her from the hostel (where she was then residing) to her father's house with an injunction of continuous surveillance. An investigation was ordered by the high court into the activities of the suspect organisations, to which

1 2018 (5) SCALE 422; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ. A comment on this case previously appeared in Latika Vashist, "Comment on *Shafin Jahan* v. *Asokan K.M.*" *ILI Newsletter* (Apr-Jun, 2018). Also see, 2018 (4) SCALE 400; 2018 (4) SCALE 401; 2018 (4) SCALE 402; 2018 (4) SCALE 404.

2 On how the writ of *habeas corpus* is routinely deployed within regimes of sexual governance, see Pratiksha Baxi, "Habeas Corpus: Juridical Narratives of Sexual Governance" Working Paper Series, Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi (Apr, 2009).

3 *Shafin Jahan*, *supra* note 1, para 12.

4 *Id*., para 58(2).

5 *Id*., para 14 (emphasis supplied).

reference was made during the case, and thus involving National Investigating Agency (NIA) in this matter.

Challenging the above decision of the high court, Shafin Jahan sought permission to file the special leave which was granted by the Supreme Court. When Hadiya appeared before the apex court, she expressed her desire to be taken to Salem so that she could pursue her internship. While NIA investigation was not stalled, the Supreme Court directed that she be taken to Salem and supported so that she can continue her studies. The State of Kerala was directed to bear the expenses.

On the question of the scope of *parens patriae* jurisdiction, Supreme Court's decision disrupted the network of *sexual governance* between the two men claiming Hadiya's custody and the state machinery that sought to protect and safeguard Hadiya apparently from herself. The court observed the exceptional nature of *parens patriae* jurisdiction. For instance, in case where a person is mentally unstable. Or, when a minor girl who has eloped with a person is produced before the court at the behest of her parents' habeas corpus petition but the girl expresses fear of her life in parents' custody, then the court may exercise the jurisdiction and send her to an appropriate shelter home. (It is interesting to note the silence of the court on the judicial complicity in regulating women's sexual agency. Over the years, it is the judiciary which allowed *habeas corpus* petitions as tools by parents to claim the custody of their minor daughters who had willingly eloped with their lovers).

While Hadiya was represented by feminist lawyer, Indira Jaising, amongst others, the patriarchal claims of the father were marshalled and argued by the lawyer well known as the champion of right to privacy, Shyam Divan along with Madhavi Divan. Shyam Divan, arguing for an expanded interpretation of the *parens patriae* doctrine, directed the court's attention to a range of international cases where the *parens patriae* jurisdiction was extended to cases relating to "vulnerable adults".[6] The court, rightly refused to extend the rationale of these cases to the present case. In the court's considered opinion (Dipak Misra CJI (for himself and A.M. Khanwilkar J)), "there [was] nothing to suggest that she suffers from any kind of mental incapacity or vulnerability."[7] In fact, "[s]he was absolutely categorical in her submissions and unequivocal in the expression of her choice."[8]

Setting aside the erroneous high court order, the court restated the law pertaining to habeas corpus: "the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law [...] The role of the Court is to see that the detenue is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint. The issue will be a different one when the detention is not illegal."[9] The court not only declared that the "[f]aith of a

6 Shyam Divan cited *DL* v. *A Local Authority,* 2012 (3) All ER 1064; *Re: SA (Vulnerable Adult with Capacity: Marriage*), 2005 EWHC 2942 (FAM); *A Local Authority* v. *Y*, 2017 EWHC 968 (FAM).

7 *Shafin Jahan*, *supra* note 1, para 52.

8 *Ibid.*

9 *Id*., para 27.

person is intrinsic to his/her meaningful existence"[10] but also emphasised that "[t]he adamantine attitude of the father, possibly impelled by obsessive parental love [...] cannot be allowed to fluster the right of choice of an adult in choosing a man to whom she gets married."[11]

In a concurring opinion, D.Y. Chandrachud J, categorically affirmed that the high court transgressed its jurisdiction in habeas corpus petitions by declaring the marriage null and void. In his words, "The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intricacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state."[12] The state must refrain from interfering in the matters of personal liberty of an individual for that would have pernicious "chilling effect" on others. It was clarified that even as the NIA continues its investigation, the validity of Hadiya's marriage would not form the subject of that investigation. Thus, the Supreme Court brought an end to one of the most controversial cases of the year which foregrounded the questions of faith, autonomy, sexual agency, parental authority and state control.

The question of an adult woman's right to choice appeared once again in *Nandakumar* v. *State of Kerala.*[13] The appellant, Nandakumar married one female named Thushara who was 19 years of age at the time of solemnisation of the marriage. After the marriage, the couple started living together. Thushara's father filed a habeas corpus petition in the High Court of Kerala and claimed that his daughter was in the illegal custody of the appellant. The high court observed that the appellant had not turned 21 at the time of marriage and there was no other proof of their marriage except the photographs. It thus concluded that Thushara was not the lawfully wedded wife of the appellant. On this basis, the court allowed the writ petition of her father.

The Supreme Court, in appeal,spurned the reasoning of the high court and observed that the marriage between the parties does not become null and void on account of the age of the appellant. Since the girl was above 18 years, she had the right to live wherever she wanted. Since both the parties are major, "they have right to live together even outside wedlock."[14] Quoting from *Shafin Jahan*, the court declared:[15]

> attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of parenspatriae. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation.

10 *Id*., para 53.
11 *Id*., para 28.
12 *Id*., para 78.
13 2018(7) SCALE 462; per, A.K. Sikri and Ashok Bhushan JJ.
14 *Id*., para 3.
15 *Id*., para 6.

The court eventually set aside the judgment of the high court with the final words that "the freedom of choice would be of Thushara as to with whom she wants to live."[16]

**Honour crimes**

A writ petition was filed under article 32 of the Constitution of India by the organization, Shakti Vahini[17] to seek directions for the central and state governments to take preventive steps to combat honour crimes, to submit national and state plans of action and to direct the state governments to constitute special cells in each district for their safety of couples who approach for help. It was also implored that a writ of mandamus be issued to the state governments to launch prosecutions in cases of honour killings and take appropriate measures to curb this crime. The actions which form the basis of honour based crimes are- (i) loss of virginity outside marriage; (ii) pre-marital pregnancy; (iii) infidelity; (iv) having unapproved relationships;[18] (v) refusing an arranged marriage; (vi) asking for divorce; (vii) demanding custody of children after divorce; (viii) leaving the family or marital home without permission; (ix) causing scandal or gossip in the community, and (x) falling victim to rape.

Various states filed affidavits underlining how they are addressing this issue. The Union of India referred to the "The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill", recommended in the 242nd Report of the Law Commission of India and stated that in consultation with the state governments a decision on the same would be taken soon. The petition had pointed out the involvement of Khap Panchayats – "the parallel law enforcement agency consists of leading men of a group having the same lineage or caste" – in the commission of crimes based on the misplaced notion of honour. An application for intervention was also filed on behalf of several Khap Panchayats by "Manushi Sanghatan". The *Sanghatan* (Collective) argued that they had "conducted a survey into the functioning of the Khap Panchayats, but they were unable to find any evidence to hold the Khap Panchayats responsible for honour killings occurring in the country." Further, they argued that "the proposed bill, "The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill", is a futile exercise in view of the ample existing penal provisions and [...] the powers that the said bill aims to stipulate may have the result of giving power to vested interests to harass well meant gatherings of local communities."[19]

Taking note of all the submissions, the Supreme Court observed that it "cannot choose the path of silence" as "[c]ommitment to the constitutional values requires

16 *Id*., para 8.

17 *Shakti Vahini* v. *Union of India* 2018(5) SCALE 51; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

18 It is not just the couple who is subjected to violence based on honour, see for instance, *Soyebbhai Yusugbhai Bharania* v. *State of Gujarat* 2018 (1) SCALE 337 where victim was killed because his brother married a woman from the community of the accused.

19 *Shakti Vahini*, *supra* note 17, para 20.

this Court to be sensitive" and act as "the guardian of the rights of the citizens" while "within the permissible boundaries and framework."[20] The court made a detailed study of the Law Commission Report as well as judicial pronouncements on this issue[21] and categorically affirmed:[22]

> the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock. Their consent has to be piously given primacy [...] a polity governed by 'Rule of Law' only accepts determination of rights and violation thereof by the formal institutions set up for dealing with such situations [...] Therefore, the Khap Panchayat or any Panchayat of any nomenclature cannot create a dent in exercise of the said right.

Further, the court emphasised that the right to choose one's life partner is protected under articles 19 and 21 of the Constitution of India and it "it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy."[23] The court also maintained that "choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice [...] The majority in the name of class or elevated honour of clan cannot [infringe the same]."[24] While observing that "an assembly or Panchayat committed to engage in any constructive work that does not offend the fundamental rights of an individual will not stand on the same footing of Khap Panchayat",[25] the court also came down heavily on illegal activities of Khap Panchayats and observed: "Their activities are to be stopped in entirety. There is no other alternative. What is illegal cannot commend recognition or acceptance."[26]

While urging the legislature to bring a law in this regard, the court gave directions to the state authorities which extended from *preventive*, *remedial* to *punitive* measures. The directions included preventing Khap Panchayats' illegal activities, extending adequate protection to inter-caste/ inter-religious couples, lodging criminal complaints against person(s) threatening the couple, initiating disciplinary enquiries against complacent police personnel/ public officials, creation of a 24-hour helpline in every district, institution of fast track courts for criminal cases pertaining to honour killing or violence to the couple, to mention a few.[27]

20 *Id*., para 22.

21 *Lata Singh* v. *State of U.P*. (2006) 5 SCC 475; *Arumugam Servai* v. *State of T.N*. (2011) 6 SCC 405; *Bhagwan Dass* v. *State (NCT of Delhi),* (2011 6 SCC 396); *In Re: India Woman says Gang-raped on Orders of Village Court published in Business & Financial News dated 23-1-2014*, (2014) 4 SCC 786; *Vikas Yadav* v. *State of Uttar Pradesh* (2016) 9 SCC 541; *Asha Ranjan* v. *State of Bihar* (2017) 4 SCC 397; *State of U.P.* v. *Krishna Master*, AIR 2010 SC 3071.

22 *Shakti Vahini*, *supra* note 17, para 41.

23 *Id*., para 42.

24 *Id*., para 44.

25 *Id*., para 49.

26 *Id*., para 47.

27 *Id*. at 73-75.

**Decriminalization of consensual (homo)sexual intercourse in private**

After the Supreme Court's decision in *Suresh Kumar Koushal* v. *Naz Foundation*,[28] Navtej Johar and few other accompanying petitioners (claimed to be directly affected by section 377 of the IPC) approached the court again to challenge that part of the section 377 which pertained to consenting acts between two adults (and not carnal intercourse with animals).[29] They argued that the decision of the Supreme Court in *Suresh Koushal* is erroneous on several counts and requires reconsideration. It was argued that the decisions of the Supreme Court in *National Legal Services Authority (NALSA)* v. *Union of India*[30] (where the court emphasised that gender identity is one of the most essential aspects of life) and the nine-judge bench decision in *K.S. Puttaswamy (Retd.)* v. *Union of India*[31] (where sexual orientation is seen as an essential attribute of privacy), necessitate a re-examination of the previous Supreme Court decision on section 377. The matter was thus placed before the constitutional bench for final determination.

On September 6, 2018, the constitutional bench of the Supreme Court in *Navtej Johar* v. *Union of India*[32] overruled *Suresh Koushal*. The petitioners and interveners had contended that "homosexuality, bisexuality and other sexual orientations are equally natural *and* reflective of expression of choice and inclination."[33] The petitioners prayed that section 377 be read down qua the LGBT community so as to confine its application only to the offence of bestiality and non-consensual acts. Reference was also made to the Criminal Law (Amendment) Act, 2013 and the Protection of Children from Sexual Offences Act, 2012 which criminalise non-consensual sexual acts between children thereby plugging important gaps in the law governing sexual violence in India."[34] They further argued that sexual orientation is a natural corollary of gender identity and is an important facet of the right to privacy protected under article 21 of the Constitution. Moreover, sexual autonomy and the right to choose a partner of one's choice is an inherent aspect of the right to life and right to autonomy, right to dignity and right to freedom of expression.

The petitioners found no intelligible differentia between natural and unnatural sex so far as it is consensual: "Section 377 violates Article 15 of the Constitution since there is discrimination inherent in it based on the sex of the person's sexual partner as under Section 376 (c) to (e), a person can be prosecuted for acts done with an opposite sex partner without her consent, whereas the same acts if done with a same-sex partner are criminalized even if the partner consents." The argument of the provision leading to chilling effect on article 19(1)(a) was also advanced. It was further argued that the provision violates the rights of LGBT persons under article 19(1)(c)

28 2013 (15) SCALE 55.

29 *Navtej Singh Johar* v. *Union of India*, 2018 (1) SCALE 142; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

30 (2014) 5 SCC 438.

31 (2017) 10 SCC 1.

32 MANU/SC/0947/2018.

33 *Id.*, para 15 (emphasis mine).

34 *Id.*, para 18.

as it denies them the right to form associations and the right to reputation as well as shelter under article 21.

The Union left to the court's wisdom the final decision on the constitutional validity of section 377 IPC, to the extent it applies to consensual acts of adults in private. Trust God Ministries, an intervening non-government organisation (NGO) contended that there is no personal liberty to abuse one's organs and acts under 377 IPC are committed by abusing the organs. Such acts, as per the intervenor, are undignified and derogatory to the constitutional concept of dignity. They are more susceptible and vulnerable to contracting HIV/AIDS and that the institution of marriage will be detrimentally if section 377 is read down.

The decision of the Supreme Court, comprising of four separate concurring opinions[35] can be described as a 500 page long commentary on the idea of inclusive justice. Hailing the Constitution as an organic charter of progressive rights, the court recognised that, "[t]he role of the Court assumes further importance when the class or community whose rights are in question are those who have been the object of humiliation, discrimination, separation and violence by not only the State and the society at large but also at the hands of their very own family members."[36] The Supreme Court's discourse in *Navtej* opens a fresh gateway to read and interpret the Constitution through the lens of novel categories of "transformative constitutionalism" and "constitutional morality" on the one hand, and doctrine of "progressive realization" and "non-retrogression of rights", on the other.[37]

"The concept of transformative constitutionalism" writes Misra CJI, "has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution [...] the ability of the Constitution to adapt and transform with the changing needs of the times."[38] Further, constitutional morality "embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism."[39] And therefore, "[a]ny attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality."[40]

Extending the right to privacy, as affirmed in *Puttaswamy*, to matters of sexuality the court held that "[t]he way in which we give expression to our sexuality is at the core of this area of private intimacy."[41] The right to privacy ensures" a right to a sphere of private intimacy and autonomy which allows us to establish and nurture

35 Dipak Misra CJI for himself and A.M. Khanwilkar J; D.Y. Chandrachud J, R.F. Nariman J; Indu Malhotra J.

36 *Navtej*, *supra* note 32, para 89.

37 The comment on this case is confined to the opinion of Dipak Misra CJI.

38 *Navtej*, *supra* note 32, para 96.

39 *Id.*, para 111.

40 *Id.*, para 116.

41 *Id.*, para 159.

human relationships without interference from the outside community." Expounding the doctrine of progressive realization of rights, and its corollary doctrine of non-retrogression, the court held that "[t]he doctrine of non-retrogression sets forth the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise."[42] In other words, once a right is recognised, it cannot be taken back by the state. Thus, the state should strive to progressively realise social, economic and cultural rights, make its laws in consonance with the ethos of the ever-evolving, dynamic Constitution. The court's linear conception of temporal progress is evident in these doctrines, as it declares, once a step is taken in this direction, the state cannot go back.

The court invalidated that part of section 377 of IPC which remained wanting on the touchstone of articles 14, 19 and 21. The concurring judges put forward different, often diverging reasons, for arriving at this conclusion. Despite its progressive and desirable outcome, it is difficult to miss the cacophony of judicial voices in *Navtej*. A critical scrutiny of every opinion is needed urgently but in order to keep this survey within the prescribed word limit, I would not undertake the task of analysing all the opinions here. However, it needs to be stated that even as *Navtej* is a long-awaited decision in its delineation of right to sexual autonomy and choice of one's sexual partner, the text of the judgment is contradictory and confusing in its elaboration of gender identity, definition of sexual orientation as also its scope: decriminalization of homosexuality or constitutional affirmation of homosexual identity. In the words of LGBT rights activist, Ashley Tellis:[43]

> The judgement is quite at sea about how to define homosexuality – whether it is 'natural' or a matter of choice - and contradictions in the definition proliferate across all four opinions by Chief Justice DipakMisra (and Justice Khanwilkar), Justice F. Nariman, Justice Chandrachud and Justice Indu Malhotra and run through the judgement to its conclusion. Once again, this is far from a minor definitional quibble as Section 377 hinges on the idea of unnatural sex or 'sex against the order of nature.'

A superficial look at the opinion of Dipak Misra CJI(for himself and A.M. Khanwilkar J) would establish that the above claim deserves attention. Misra J particularly struggles in describing (homo)sexuality as an attribute of one's gender identity, oscillating between naturalness and choice. Consider the following assertions:

> The natural identity of an individual should be treated to be absolutely essential to his being. *What nature gives is natural. That is called nature within*. Thus, that part of the personality of a person has to be respected and not despised or looked down upon. The saidinherent nature and the associated natural impulses in that regard are to be accepted.[44]

42 *Id*., para 189.

43 Ashley Tellis, "The lack of honest toil" 721 *SEMINAR* (2019). *Available at*: http://www.india-seminar.com/2019/721/721_ashley_tellis.htm (last visited on Nov. 2, 2018).

44 *Navtej, supra* note 32, para 4.

> Sexual orientation is one of the many biological phenomena which is *natural and inherent in an individual and is controlled by neurological and biological factors.* The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to.[45]
>
> Whether one's sexual orientation is determined by genetic, hormonal, developmental, social and/or cultural influences (or a combination thereof), most people experience *little or no sense of choice about their sexual orientation*.[46]

While emphasising upon innateness, Misra J simultaneously proclaims "self-determination" and "individual autonomy" in matters of sexual identity:

> Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such an orientation or choice that reflects an individual's autonomy is innate to him/her [...] The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.[47]
>
> Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body whichmay involve *a freely chosen*, modification of bodilyappearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an *individual's self-identification* as a man, woman, transgender or other identified category.[48]

The question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another's choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy, as a seminal facet of Article 21, is not dented. *At the core of the concept of identity lies self-determination*.[49]

> ... [I]gnor[ing] the individual orientation, which is naturally natural, and disrobes the individual of his/her identity and the inherent dignity and choice attached to his/her being.[50]

45 *Id*., para 253.

46 *Id*., para 144.

47 *Id*., para 149.

48 *Id*., para 5. Endorsing Justice Radhakrishanan's formulation of gender identity in *NALSA*.

49 *Id.,* para 9.

50 *Id.,* para 109.

The judicial attempt to explain the meaning of "sexual orientation" is all the more frustrating and borders on complete incoherence. Consider, for instance, the judicially understood distinction between homosexuality, bisexuality and heterosexuality:[51]

> …[W]e shall focus on the aspect of sexual orientation. Every human being has certain basic biological characteristics and acquires or develops some facets under certain circumstances. The first can generally be termed as inherent orientation that is natural to his/her being. The second can be described as a demonstration of his/her choice which gradually becomes an inseparable quality of his/her being, for the individual also leans on a different expression because of the inclination to derive satisfaction. The third one has the proclivity which he/she maintains and does not express any other inclination. The first one is homosexuality, the second, bisexuality and third, heterosexuality. The third one is regarded as natural and the first one, by the same standard, is treated to be unnatural. When the second category exercises his/her choice of homosexuality and involves in such an act, the same is also not accepted. In sum, the 'act' is treated either in accord with nature or against the order of nature in terms of societal perception.

Another confusion that lingers through the judgement is the following: whether 377 is about 'acts' or 'identity'. It seems that the court remains entirely indecisive about this. The repeated reference to permissible carnal intercourse between heterosexuals (after 2013 Criminal Law Amendments) in order to adjudicate the constitutionality of section 377 brings this out clearly. "If any proclivity amongst the heterosexual population towards consensual carnal intercourse has been allowed due to the Criminal Law (Amendment) Act, 2013, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their most private and intimate spaces."[52] Decriminalising the private *acts* of carnal intercourse between homosexuals *because* the same have been permitted between heterosexuals by virtue of 2013 amendments is hardly a claim to *recognise*, *affirm and respect* homosexual identity which the judgment tries hard to do with its rhetorical flourish. In other words, if the judicial leap from act to identity had to be made, it was imperative to acknowledge the homophobia at the heart of section 377 and state in categorical terms that this penal provision was not only about non-procreative intercourse but abject dehumanization

51 *Id.,* para 140.

52 *Id., p*ara 221. ("Section 377, so far as it criminalises carnal intercourse between heterosexuals is legally unsustainable in its present form for the simple reason that Section 375 IPC clearly stipulates that carnal intercourse between a man and a woman with the willful and informed consent of the woman does not amount to rape and is not penal." *Id.*, para 219).

of those who fell outside the script of heterosexuality.[53] By drawing parallels between heterosexual and homosexual lives to achieve a neat constitutional gender equilibrium, "[t]he judgement repeats the silence of patriarchal, masculinist society on the question of sodomy in a bizarre enactment of society's codes of conservatism." Tellis called it "the lack of honest toil" as the court once again failed to do the hard work of documenting "different histories and contexts of sodomy between men"[54] which could have inaugurated the homosexual as a subject before the law.

**Decriminalisation of adultery**

*Joseph Shine* v. *Union of India,*[55] hailed as a historic decision from the perspective of women's rights, declared section 497 of the Indian Penal Code, 1860 as unconstitutional and decriminalised the offence of adultery. The five-judge bench overruled the earlier decision in *Sowmithri Vishnu* v. *Union of India* which had upheld the constitutionality of the provision under articles 14 and 15 of the Constitution. Like *Navtej*, this was a much-awaited decision since the criminal law provision was an embarrassing, obsolete and archaic law rooted in a deeply patriarchal morality treating wives as chattel and not women with sexual agency. While the court unanimously agreed on the section's unconstitutionality, the judges widely differed in their constitutional reasoning as well as the scope of rights they relied on in order to arrive at their respective decisions. Here, we will only engage with the judgment delivered by D.Y. Chandrachud J. Chandrachud's J wide, almost ostentatious, referencing and citation of feminist writings made this one of the most celebrated judicial texts of 2018 and thus demands a close reading in this survey.

The judgment opens with the work of postcolonial feminists Ratna Kapur and Brenda Cossman who read the law as a "site for discursive struggle." The judgment claims that "it becomes imperative to examine the institutions and structures within which legal discourse operates."[56] I will explore the extent to which the judgement has successfully and critically engaged with the foundational institutions (of marriage and family), the underlying values behind the adultery provision and feminism even while it foregrounds the rights of sexual autonomy and privacy.

The judgement addresses the central challenge to section 497 i.e. the understanding of marriage upon which it is based. Chandrachud J rightly points out

53 Consider the following assertion, as Misra CJI tests section 377 on the touchstone of article 14: "A perusal of Section 377 IPC reveals that it classifies and penalizes persons who indulge in carnal intercourse *with the object to protect women and children from being subjected to carnal intercourse* [...]the presence of this Section in its present form has resulted in a distasteful and objectionable collateral effect whereby even 'consensual acts', which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, have been woefully targeted." *Id*., para 237. Here it is important to state that section 377 was never meant to "protect women and children"; to make women and children the subject of this provision is to *once again* deny subjecthood to those whom this section to exclude, criminalise, punish.

54 Tellis, *supra* note 43.

55 (2019) 3 SCC 39. This comment appeared previously in Latika Vashist, "Comment on *Joseph Shine* v. *Union of India*" *ILI Newsletter* (Jul-Sep, 2018).

56 *Id.,*para 113.

how the section "has adopted a notion of marriage which does not regard the man and the woman as equal partners. It proceeds on the subjection of the woman to the will of her husband … [and] subordinates the woman to a position of inferiority thereby offending her dignity, which is the core of Article 21."[57]

Tracking the history of adultery laws, he points out how they were enacted to protect the property rights of the husband over the wife. Also, how these laws were never about women's bodily integrity but strengthened the husband's control over his wife's sexuality. Referring to long-standing feminist work on this issue, the judge recognises that the adultery provision, based as it is on sexual stereotypes that view women as passive and devoid of sexual agency, "fails to recognize them as equally autonomous individuals in society."[58] According to the judge, "[i]t is not the "common morality" of the State at any time in history, but rather constitutional morality, which must guide the law."[59] Constitutional morality is not based on 19th century "antiquated social and sexual mores" of "woman's 'purity' and a man's marital 'entitlement' to her exclusive sexual possession."[60]

Drawing upon transnational jurisprudence, the judge proceeds to frame the issue in terms of right to privacy, sexual self-determination and autonomy. Without explicitly confronting the question of the policy of criminalisation or the 'harm' constituted by adultery, the opinion relies on the 2015 decision of the South Korean Constitutional Court.[61] The judge, approvingly citing this decision, observes that "love and sexual life were intimate concerns, and they should not be made subject to criminal law."[62]

57 *Id.*, para 124.

58 *Id.,* para 142.

59 *Id.,* para 143.

60 *Id.,* para 143.

61 It may be noted that art. 241 of the (Korean) Criminal Act appeared in the chapter on "Crimes Concerning Sexual Morals". It was couched in gender neutral terms as:

"(1) A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant.

(2) The crime in the preceding paragraph shall be prosecuted only upon the complaint of the victimized spouse. If the victimized spouse condones or pardons the adultery, complaint can no longer be made."

The wide difference between the wording of this section and section 497 of the IPC is on account of the differences in the underlying logics and assumptions behind the criminalisation of adultery. The Korean court's reasoning needs to be situated in the specific context of Korean society and law. The Korean court recognised that the crime of adultery in the past was meant to protect women and operate as "psychological deterrence for men … and enabled female spouses to receive payment of compensation...[but] the changes of our society diluted the justification of criminal punishment of adultery. Above all, as women's earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples." Ironically Chandrachud J cited this part without realising that the analogy cannot be extended to India where the argument against adultery is that the law is discriminatory and sexist and in no way protected the women against the adulterous acts of the husband. Indeed, it did not see the woman as a subject at all and sees adulterous relations as having to be decided between men.

62 *Joseph Shine, supra* note 55, para 146.

He endorses the view that the legitimate state interests- of protecting the institution of marriage, enforcing monogamy and promoting marital fidelity- need to be balanced with the individual's fundamental right of sexual self-determination and privacy. Further, the judge couches adultery within the "right to marital choice" falling into the domain of "protected private choices", even though it may be an "unpopular choice". Thus, "the privacy protections afforded to marriage must extend to all choices made within the marriage."[63]

This interpretive leap - from adultery law as violation of equality and dignity (based upon paternalistic values and sexual stereotypes) to adultery "as a constitutionally protected marital choice […] protected by the freedom of association […] an action which is protected by sexual privacy"[64] – needs critical reflection. It appears that the judge extends his critique of the adultery provision to the very institution of marriage based as it is on monogamy and exclusivity. There is recognition of new kinds of marriages where sexual fidelity and monogamy are not the normative foundations. But we are left wondering if he is suggesting that the dominant conception and institution of marriage is itself against constitutional morality?

If this part of the judgment is to be taken seriously, then the logical corollary is that marriage in its current form itself is unconstitutional. While this may be the most radical feminist move, unfortunately the judge does *not* go that far and gets caught in contradictions on account of judicial verbosity. This weak feminist flourish in the judgment is further accentuated by the juxtaposition of contrary feminist positions at once and in one breadth in the judgment. To illustrate, the judgment relies on *sex-positive* feminist reasoning in its emphasis on sexual autonomy and foregrounds absolute sexuality rights of all women. However, it also falls back on Catherine MacKinnon's *sex-negative* position to critique family and heterosexual marriage. Such an alignment of contrary and contradictory feminist positions only indicates the superficial engagement with feminist scholarship in the judgment of the constitutional court.

On the one hand, we are invited to celebrate human sexuality and "consensual intimacies" without any fetters. On the other, the judge, reiterating *K.S. Puttaswamy,* extends privacy to the "sanctity of marriage, the liberty of procreation, the choice of a family life."[65] How does one reconcile these contradictory formations? Isn't marriage (in its current form, heterosexual and monogamous) in itself an infringement of freedom of human sexuality? Aren't "consensual intimacies" encroached upon and restricted when one agrees to be part of the institution of marriage?

In suggesting that the "intimacies of marriage lie within a core zone of privacy", it appears that the judge has forgotten that marriage, *conceptually*, restricts the scope of intimacies and constrains sexual autonomy. It may be one thing to say that consensual intimacies of all kinds (within or without marriage) should not be subject to criminal law to avoid coercive sexual regulation and disciplining of the subjects. But it is quite

63 *Id.,* para 154.
64 *Id.,* para 152.
65 *Id.,* para 204.

another to suggest that adultery is not a crime because human sexuality is to be celebrated and the institution of marriage cannot restrict the same.

Simply put, the judicial reasoning behind the declaration of adultery as unconstitutional is unsustainable unless we also understand the judgment as simultaneously suggesting that marriage in and of itself must be understood in non-monogamous terms.

Such rhetorical feminism arising out of judicial political correctness may enrich law as a *discursive* site but does little to acknowledge the strength of the sexual laws of the hegemonic order which sustain and strengthen heteronormative institutions. The disruption of the predominant, or what Jacques Lacan describes as "Symbolic Order", first and foremost requires acknowledgment of the cracks within legal system. The recognition, for instance, that constitutional morality itself is not an idea which is without any fissure. Conceptualising it as unified, inherently progressive and without internal contradictions is wishful thinking and wishful disavowal of its underside.[66] As we have noted, constitutional morality can simultaneously and with equal zeal protect sexual autonomy of individuals *and* the conservative ideologies of family, community and nation. Without thinking through these contradictions, we would only remain feminists in discourse and not necessarily in terms of the structures of our individual and collective desires.

**Right to temple entry**

In *Indian Young Lawyers Association* v. *State of Kerala*,[67] the petitioners challenged rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965. The rule allowed exclusion of women within the age group of 10 to 50 years from travelling and appearing before the deity Lord Ayyappa in Sabarimala temple. The respondents defended the exclusion based on the constitutional right of the religious denomination to "manage their own affairs" under article 26 (b). The exclusion of women from worship of Lord Ayyappa, they argued, was an essential aspect of their religious denomination as Lord himself was an ascetic and practiced celibacy. Since celibacy is the core of the Ayyappa sect, the exclusion of women during menstruation is not against the tenets of their religious faith.

The Supreme Court by majority of 4:1[68] held that the exclusionary practice violated the fundamental right to freedom of religion of female worshippers,it struck down rule 3(b) as unconstitutional and permitted the entry of women inside the temple. Dipak Misra CJI, speaking on behalf of Khanwilkar J and himself, observed that the rule denied women their freedom of worship guaranteed under article 25(1). The devotees of Ayyappa sect, Misra CJI said, were Hindus and thus, the temple's

66 I have come a long way from my own naive position on constitutional morality in Latika Vashist, "Re-thinking Criminalisable Harm in India: Constitutional Morality as a Restraint on Criminalisation" 55 *JILI* 73-93 (2013).

67 2018 (13) SCALE 75.

68 D.Y. Chandrachud J, R.F. Nariman J & Dipak Misra CJI and (for himself and A.M. Khanwilker JJ) wrote three separate majority opinion while Indu Malhotra J wrote the dissenting opinion for the court.

denominational right to manage its own affairs under article 26(b), was subject to article 25(2)(b). This is an important constitutional provision which permits the state to make laws to reform Hindu denominations and open temples and religious institutions to all '*classes and sections'* of Hindus, which would certainly include women. In a separate and concurring opinion, Chandrachud J held that the exclusion of women by the Sabarimala temple was contrary to constitutional morality. On the claim of exclusion of women as essential to the Ayyappa sect, the judge declared:[69]

> In any event, the practice of excluding women from the temple at Sabarimala is not an essential religious practice. The Court must decline to grant constitutional legitimacy to practices which derogate from the dignity of women and to their entitlement to an equal citizenship.

Chandrachud J also held that the exclusion of menstruating women was a form of "untouchability" prohibited under the Constitution:[70]

> The social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values. Notions of "purity and pollution", which stigmatize individuals, have no place in a constitutional order.

He reasoned that "[t]he Constitution uses the expression "untouchability" in inverted comas" but "[t]he use of a punctuation mark cannot be construed as intent to circumscribe the constitutional width of the expression."[71] The fallacy of this judicial adventurism needs to be called out despite the initial seduction of expanding horizons of constitutional interpretation. We need to ask, for instance, what would be the implications of this expansive interpretation. Since article 17 creates a penal offense, would that mandate creation of fresh punishable offences for all such "exclusions"? Is that desirable? Amit Bindal, in his critique of this case, aptly remarks:[72]

> It is one thing to use Article 17 as an analogical device to better understand constitutional aspirations, but it is quite another matter to literally expand its ambit to all classes of women excluded from entering places of worship. After all, it certainly is an attainable task to fight against patriarchy and the discriminatory exclusion of women on biologically essentialist grounds; a literal expansion and application of Article 17 is not required to achieve this purpose. Without clearly appreciating the dangerous repercussions, such an expansion borders on populist pronouncements based on rhetorical, supposedly feminist, proposals which would eventually be counterproductive to a progressive feminist struggle.

69 *Sabarimala*, Chandrachud J, para 119.

70 *Ibid.*

71 *Id.,* para 79. Malhotra J disagreed on this view.

72 Amit Bindal, "Sabarimala and the flattening of religious community" 721 *SEMINAR* (2019). *Available at*: http://www.india-seminar.com/2019/721/721_amit_bindal.htm (last visited on Nov. 5, 2019).

A cursory look at the above cases reveals how progressive, well-meaning decisions which speak of and for gender justice and women's equality lack robust and grounded feminist reasoning making the task of critical feminisms all the more challenging. With the Supreme Court now *speaking as a feminist*, we need *critical* feminist scholarship more urgently than ever before.

**Wither freedom of choice**

The court in *Sabu Mathew* v. *Union of India*,[73] disposed a writ petition filed for the effective implementation of the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. It specifically implored the court to ban 'advertisements' relating to pre-natal sex determination from search engines in India. The court applied the doctrine of auto-block' and listed roughly 40 search terms, stating that any attempt at looking up the banned search terms would be 'auto-blocked'.[74] The court in the course of this petition has also ordered the creation of a nodal agency that would provide search engines with details of websites to be blocked. In its final order the court ordered the parties involved to convene a meeting, along with the abovementioned nodal agency and a previously instituted expert committee to discuss the best possible technical solutions within six weeks.

While this judgment seeks to emphasise "dignity, right and freedom of choice of woman",[75] this decision raises serious concerns about free speech since the 'doctrine of auto-block' could block legitimate information relating to reproductive rights and sexual health. Moreover, the nodal agency created by the court also poses several issues since it circumvents the system of review which is instated by section 69A of the IT Act.

**Freedom of expression**

A writ petition was filed in the Supreme Court seeking ban on a novel titled, "Meesha" (meaning moustache) which appeared in a Malayalam weekly, *Mathrubhumi*, which was circulated in India and abroad.[76] It was argued that the book shows temple going women in bad light and has a disturbing effect on the community. The petitioner in this case, proceeding with unwarranted behalfism, contended that he has approached the court "singularly for the protection of the legitimate interests of the women community" since such writings "are not a manifestation of the freedom of expression but are collusive efforts aimed at dividing the society [...] which embodies within itself the virtues of pluralistic community, religion and gender balance."[77] He also contended that the publication can potentially "disturb the public order, decencyor morality and it defames the women community, all of whichare grounds for the State to impose reasonable restrictions under Article 19(2) on the fundamental right of

73 2018 (1) SCALE 16; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

74 *Id*., para 18.

75 *Id*., para 15.

76 *N. Radhakrishnan @ Radhakrishnan Verenickal* v. *Union of India* 2018 (10) SCALE 717; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

77 *Id*., para 7.

freedom of speech and expression."[78] He also called upon the court to issue guidelines to "regulate and prohibit" such publications. Specifically, the petitioner found the following extract derogatory to women:

> "Why do these girls take bath and put on their best when they go to the temple?" a friend who used to join the morning walk until six months ago once asked.
>
> "To Pray", I said.
>
> "No", he said. "Look carefully, why do they need to put their best clothes in the most beautiful way to pray? They are unconsciously proclaiming that they are ready to enter into sex", he said.
>
> I laughed.
>
> "Otherwise," he continued, "why do they not come to the temple four or five days a month? They are letting people know that they are not ready for it. Especially, informing those Thirumenis (Brahmin priests) in the temple. Were they not the masters in these matters in the past?"

The court dismissed the petition and in categorical terms upheld the constitutional right to free speech and expression.[79] In the court's words:[80]

> It is perilous to obstruct free speech, expression, creativity and imagination, for it leads to a state of intellectual repression of literary freedom thereby blocking free thought and the fertile faculties of the human mind and eventually paving the path of literary pusillanimity. Ideas have wings. If the wings of free flow of ideas and imagination are clipped, no work of art can be created. The culture of banning books directly impacts the free flow of ideas and is an affront to the freedom of speech, thought and expression [...] we live not in a totalitarian regime but in a democratic nation which permits free exchange of ideas and liberty of thought and expression.

Sanjay Leela Bhansali's *Padmavat* was also at the centre of a huge controversy at the beginning of 2018. Based on Sufi poet, Malik Muhammad Jayasi's epic poem in Awadhi,(composed sometime in 1540), the film narrates the fictional story of Delhi Sultan Alauddin Khalji's desire for Padmavati, the Queen of Chittor and wife of Rajput King, Ratan Sen. Massive protests, led by Shri Rashtriya Rajput Karni Sena, sought banning of the film on the grounds that the film hurt the sentiments of the Rajput community, was offensive to their queen (which they claimed was a historical figure) and distorted history. The Central Board of Film Certification (CBFC), however, had issued a certificate under the Cinematograph Act, 1952, subject to the some modifications. These changes were duly carried out by the filmmaker: the film's name changed from "Padmavati" to "Padmavat", the disclaimers ran into several pages,

78 *Id*., para 9.

79 *Cf*:*Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra* (2015) 6 SCC 1.

80 *Supra* note 76, para 27.

including one which stated that the film in no manner subscribes to or glorifies the practice of Sati, the song was edited and the dancing queen's belly was photo-shopped and covered to "befit her character".

Despite the certificate issued by CBFC, in view of the protests, the states of Gujarat and Rajasthan banned the exhibition of the film. This led to a petition in the Supreme Court filed by Viacom 18 Media Private Limited.[81] It was argued that once a certificate is issued by CBFC, the states cannot issue notifications or orders prohibiting exhibition of films in theatres and that "the freedom of speech and expression and the creative potentiality through any medium including the medium of celluloid cannot be curtailed in this manner."[82] The additional solicitor general on the other hand argued that "the grant of certificate by the CBFC cannot denude the State of the power to prohibit the exhibition of a film."[83] Referring to section 7 of the Rajasthan Cinemas (Regulation) Act, 1952 (state government's power to suspend exhibition of films in certain cases), he contended that the "CBFC is not in a position to take all aspects into consideration as it does not have the inputs regarding the law and order situation."[84]

The court however relied on *Prakash Jha Productions* v. *Union of India*[85] and maintained that it is the duty of the state to maintain law and order whenever a film is exhibited. The state is also required to extend protection to those involved in the film as well as audience if required. The court clarified that once the power is conferred on statutory bodies by the Parliament (in this case CBFC), "non-exhibition of the film by the States would be contrary to the statutory provisions and infringe the fundamental right of the petitioners."[86]

**Kathua rape case**

In a writ petition under article 32 of the Constitution, the father of the abducted, raped and murdered an eight year old girl in Kathua, Jammu and Kashmir, sought protection for his family as well as the counsel representing them. It was averred that fair trial was in jeopardy on account of some unwarranted situations that occurred in and outside Kathua Bar Association and the locality of the episode and also the involvement of some groups.

The apex court ordered that the state security provided to the family members should continue, and their lawyer, her family and another person who was assisting the victim's family in the prosecution should be provided security. The court also ordered the state, in view of the spirit of Juvenile Justice Act, to strengthen security at the juvenile home where the alleged juvenile accused was lodged.[87] The court issued

81 *Viacom 18 Media Private Ltd.* v. *Union of India*, 2018(1) SCALE 382; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

82 *Id*., para 13.

83 *Id*., para 14.

84 *Ibid*.

85 (2011) 8 SCC 372.

86 *Viacom*, *supra* note 81, para 15.

many directions, including transferring the matter to District and Sessions Judge, Pathankot, Punjab (which was instructed to fast track the trial and take it on a day-to-day basis)[88] and instructing the states of Punjab and J & K to provide security to the trial judge and special public prosecutor respectively.[89]

**Sexual violence PIL(S)**

A public interest litigation (PIL) was filed by Alakh Alok Srivastava regarding sexual assault of an eight months old female child who had to be admitted in a children's hospital due to the injuries borne out of the violence.[90] The petitioner pleaded that the state must show concern in such cases and extend appropriate treatment to the child apart from the compensation. The court, recalled its decision in *Supreme Court Women Lawyers Association* v.*UOI*[91] and directed two competent doctors from All India Institute of Medical Science (AIIMS) to go to the concerned hospital and assess whether the child victim should be shifted to AIIMS for better treatment. The child was eventually shifted to AIIMS.

The petitioner also sought speedy trial and monitoring of trials under the POCSO Act such that the trials are conducted in a child-friendly manner. The court emphasised that the legislation seeks to protect the child at all stages of the trial. "The objective of the POCSO Act", the court noted, "is to protect the child from many an aspect [sic] so that he/she does not feel a sense of discomfort or fear or is reminded of the horrified experience."[92] The court then proceeded to issue the following directions:[93]

(i) The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the presiding officers of the said courts are sensitized in the matters of child protection and psychological response.

(ii) The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the POCSO Act.

(iii) The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner or within a specific time frame under the Act.

87 *Mohd. Akhtar* v. *State of J&K*, 2018 (6) SCALE 201; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

88 2018 (9) SCALE 181.

89 2018 (9) SCALE 189.

90 *Alakh Alok Srivastava* v. *UOI* 2018 (1) SCALE 589; per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

91 (2016) 3 SCC 680.

92 *Id.*, para 18.

93 *Id.*, para 23.

(iv) The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three Judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.

(v) The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.

(vi) Adequate steps shall be taken by the High Courts to provide child friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.

*In Re: Prajwala Letter dates 18.2.2015 Videos of Sexual Violence and Recommendations*,[94] the court took note of the status report filed by the additional solicitor general in this matter. The report states that the Ministry of Home Affairs has identified keywords for child pornography/rape and gang rape content search and the same have been circulated to content providers for further action. Further, online cyber-crime reporting portal has been developed and is expected to be operational soon.

**Blasphemy**

In *Priya Prakash Varrier* v. *State of Telangana*[95] a writ petition was filed under article 32 of the Constitution of India for quashing of a first information report (FIR) lodged for an offence under section 295A of the IPC. The FIR alleged that the song "Manikya Malaraya Poovi" in the film, "Oru Adaar Love" offends the sentiments of the Muslim community. The petitioners (actor, producer and director of the film) argued that it is a mappila folk song, a version of a traditional Muslim song from the Malabar region of Kerala. The complainant's grievance related not to the song per se but "to the manner of picturisation which involved the actress with a wink. The court, referring to the Constitution Bench decision in *Ramji Lal Modi* v. *State of U.P.*[96] correctly quashed the FIR and held that section 295A of the IPC would not be applicable to the present case. In the court's words:[97]

> the picturization of the said song solely because of the 'wink' would not tantamount to an insult or attempt to insult the religion or the religious beliefs of a class of citizens [...] [no] calculated tendency is adopted by the petitioners to insult or to disturb public order to invite the wrath of Section 295A of the IPC.

94 2018 (1) SCALE 545; 2018 (7) SCALE 719; 2018 (7) SCALE 720; per Madan B. Lokur and U.U. Lalit JJ.

95 2018(10) SCALE 614.

96 A.I.R. 1987 SC 620.

97 *Supra* note 95, para 10.

III VIOLENCE IN/ OF MARRIAGE

**Section 498A: *Rajesh Sharma* overruled**

In *Social Action Forum for Manav Adhikar* v. *Union of India, Ministry of Law and Justice*,[98] the petitioners filed applications under article 32 of the Constitution seeking directions for the government regarding cases of violence against women filed under section 498A of the IPC. A writ of mandamus was sought for the respondents for creating "an enabling environment for married women subjected to cruelty to make informed choices and to create a uniform system of monitoring and systematically reviewing incidents of violence against women under Section 498-A IPC including their prevention, investigation, prosecution and rehabilitation of the victims and their children at the Central, State and District levels."[99]

The detailed arguments of the petitioners were noteworthy and are thus reproduced below:[100]

i. Absence of a uniform system of monitoring and systematic review of incidents of violence against married women has led to many misgivings about section 498A which have resulted in its dilution by the courts, including *Rajesh Sharma and* v. *State of U.P.*[101] The "general complaint that Section 498-A IPC is subject to gross misuse" which is accepted by the courts to whittle down the section is unsubstantiated with concrete data.

ii. Absence of a monitoring mechanism to track cases registered under Section 498Aof the IPC with no systematic study of the reason of low convictions has ironically resulted in an increase in cases under section 498A IPC since "the deterrent effect of the said provision is getting diluted."

iii. Despite the fact that section 498A of the IPC is a non-bailable offence and section 41of the CrPC provides sufficient checks and balances in cases of arrest, the police is hesitant to arrest the accused on complaints of married women. The police inaction finds a justification through judicial precedents. Even the investigation by the police for the offence under section 498A "is often unprofessional and callous and the investigating officers perceptibly get influenced by both the parties which results in perpetrators escaping conviction."

iv. The courts in section 498A cases pay scant attention to mental cruelty and "do not look into a case if the evidence does not show that the woman was physically harassed." Many cases of mental cruelty have bypassed judicial scrutiny under this section which in turn has "led

98 2018(11) SCALE 191; Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

99 *Id*., para 6.

100 *Id*., paras 7- 14.

101 2017 (8) SCALE 313.

the courts to brand the woman on many occasions as hyper-sensitive or of low tolerance level."

v. The petitioners also argued that the "alleged abuse of the penal provision is mostly by well-educated women who know that the offence is both cognizable and non-bailable and impromptu works on the complaint of the woman by placing the man behind the bars, but this cannot be a ground for denying the poor and illiterate women the protection that is offered by Section 498-A IPC."[102] They further argued for a need to create awareness in the rural areas about the laws for protection of women and consequent available remedies in case of breach.

It may be noted that in a separate writ petition which required the court to implement the directions in *Rajesh Sharma*, the court through an order had appointed an *amicus curie* to assist the court.[103] The *amicus* stated that the decision in *Rajesh Sharma* required reconsideration since the court could not have issued the directions it did by the process of interpretation. It may be recalled that the judgment conferred powers on the family welfare committee (FWC to be constituted by the district legal services authority) which is an extra-judicial committee of paralegal volunteers/social workers/retired persons/wives of working officers/other citizens to look into the criminal complaints under section 498A. It was further directed by the court that till a report of the committee is received, no arrest should be made.

The *amicus* also urged, *inter alias,* that (1) the constitution of FWC to look into the criminal complaints is contrary to the procedure prescribed under the CrPC; (2) entrusting the power to dispose of the proceedings under section 498A by the district and sessions judge or any other senior judicial officer nominated by him in the district in cases where there is settlement, is impermissible, for an offence under section 498A is not compoundable; (3) the recovery of disputed dowry items may not itself be a ground for denial of bail which is the discretion of the court.

The court rehearsed statutory provisions and judgments in the field and instituted various modifications in the directions issued in *Rajesh Sharma*. The court held that "the directions pertaining to constitution of a Committee and conferment of power on the said Committee is erroneous."[104] However, the court found nothing erroneous in direction nos. 19 (iv) and (v): "the directions pertaining to Red Corner Notice, clubbing of cases and postulating that recovery of disputed dowry items may not by itself be a

102 From the text of the judgment it is not clear what is the source or data relied upon by the petitioners to advance such an argument. It rather appears that this absurd formulation stemmed from the dogmatic stereotypes of urban-rural/ educated-uneducated (read as manipulative-gullible) women which made way into their brief through this argument, denting their overall project of challenging the stereotypical notions about section 498A.

103 *Nyayadhar* v. *UOI*, 2018 (8) SCALE 469; Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ.

104 *Id*., para 35.

ground for denial of bail [...] on a different footing. They are protective in nature and do not sound a discordant note with the Code."[105]Regarding direction Nos. 19(vi) and 19(vii), "an application has to be filed either under Section 205CrPC or Section 317CrPC depending upon the stage at which the exemption is sought."[106]

The court also conceded that some of the directions issued in *Rajesh Sharma* "have the potential to enter into the legislative field."[107] Thus, the direction contained in paragraph 19(i) pertaining to FWC and its constitution by the district legal services authority and the power conferred on the committee were set aside.

The court implored and directed "the investigating officers [to] be careful and be guided by the principles stated in *Joginder Kumar*,[108] *D.K. Basu*,[109] *LalitaKumari*[110] and *Arnesh Kumar.*"[111] The Director General of Police of each state was also directed "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." Thus, direction issued in paragraph 19(ii) shall be read in conjunction with the above. Further, direction no. 19(iii) was 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*,[112] would dispose of the same.

In another case of section 498A,[113] the court quashed proceedings, *inter alias*, under sections 498A, 120B against the appellants (maternal uncles of the complainant's husband). The allegation was that the appellants "supported" the complainant's husband as he harassed her for dowry and also "conspired" with him when he took their child from the custody of the complainant. Since there was nothing else to indicate their involvement in the crime except the "bald statement" of their support, the court allowed the appeal. It was emphasised that "[t]he relatives of the husband should not be roped in on the basis of omnibus allegations unless specific instances of their involvement in the crime are made out."[114]

105 *Ibid*. For details, refer to *Rajesh Sharma*, *supra* note 101.

106 *Ibid.*

107 *Id*., para 36.

108 (1994) 4 SCC 260.

109 (1997) 1 SCC 416.

110 (2014) 2 SCC 1.

111 (2014) 8 SCC 273.

112 (2012) 10 SCC 303.

113 *K. Subba Rao* v. *State of Telangana* 2018 (10) SCALE 12; per S.A. Bobde and L. Nageswara Rao JJ. Also see, *Mohammad Miyan* v. *State of U.P.*, 2018 (10) SCALE 676; per S.A. Bobde and L. Nageswara Rao JJ, wherein the court held that prosecution of the appellants for cruelty and dowry demands was not tenable as the complainant had taken divorce four years before filing of the FIR.

114 *Id*., para 5.

**Wife killing**

Year after year cases of wife killing (for not only dowry related demands) illustrate the gendered violence in/of matrimony and the unequal power hierarchies in the matrimonial home which oppressively turn against women.[115] In this sub-section we will see how judicial minds too become complicit in gender-based violence of these cases as male rage is normalised, if not totally condoned.

Shakuben was married to the appellant, Laughanbai Devjibhai Vasava, for around eight years.[116] Both contributed to the household by doing manual labour. On the date of the incident, Shakuben returned home around noon after performing labour work in an agricultural field, and was preparing lunch, when her husband struck her head with the leg of a cot. She succumbed to her injuries after ten days. The reason for his violent act was the delay in cooking lunch. The trial court convicted the appellant under section 302 of the IPC and was sentenced to undergo life imprisonment. The decision was upheld by the high court.

In appeal before the apex court, the question was whether conviction should be under section 302 (murder) or section 304 (culpable homicide not amounting to murder) of the IPC. The court taking note of the circumstances of the death deemed it fit to reduce the guilt to culpable homicide under 299 (c) read with section 304 Part II (act done with the "knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death"). In so reducing the guilt the court emphasised that that "incident took place in the spur of the moment",[117] "the appellant got furious and [acted] in a rush of moment",[118] there was a "sudden altercation" and "the incident took place due to sudden provocation and in a heat of passion [...] without taking any undue advantage"[119] (thus invoking at least two exceptions to murder, exception 1 and exception 4). The court also emphasised that only a "single blow" was inflicted, "not much force was used" (implicitly stating that it was not a case of section 300 thirdly) and noted that there was nothing to suggest that their relationship "was not cordial, *otherwise*."[120]

115 See *Chandra Bhawan Singh* v. *State of U.P.*, 2018 (6) SCALE 498; per R.K. Agrawal and A.M. Sapre JJ. The court rejected the appeal where the appellants (husband and brother-in-law of the deceased, Satyawati) challenged their conviction under section 302/34 of the IPC. Satyawati was found dead in her in-laws' house with gunshot injuries on her person. The appellants defended themselves by saying it was a suicide which the court rightly found totally impossible given seven gunshot wounds on her body from a double barrel breach loading (DBBL) gun. There was also evidence of demands of dowry and ensuing harassment which she had suffered after her marriage.

116 *Laughanbai Devjibhai Vasava* v. *The State of Gujarat* 2018(3) SCALE 309; per A.K. Sikri and Ashok Bhushan JJ.

117 *Id*., para 7.

118 *Ibid*.

119 *Id*., para 9.

120 *Ibid* (emphasis supplied).

Besides a confusion of legal categories – how did the court manage to interpret this as a case of section 299 clause 3 (knowledge) when it simultaneously invoked exceptions that come into play only if murder is established under one of the four parts of section 300; why did the case not fall under section 299 clause 2 (intention to cause bodily injury), to mention a few areas requiring clarity[121] – this case cements the suspicion that law understands male/husband rage in the event of non-performance of wifely duties and how a man can get justifiably provoked, in the eyes of law, to the extent of fatally wounding the wife, at any delay in preparation of meals which is her paramount duty (after she has contributed her share of labour to earn for the family).[122]

The apex court's approach in *State of M.P.* v. *Abdul Latif*[123] also points to the continuing trend of absurd misapplication of the defence of "sudden fight" as an exception to murder. It appears, yet again, that law's reasoning is stained by structural stereotypes. For the court, a "sudden fight" in the conjugal home, even when it turns fatal for the woman, is not "cruel or unusual". It is not a situation where "undue advantage" has been taken.The accused in this case caused multiple injuries to his wife that led to her death: he kicked her by which she was hit by the flagstone of almirah, further pushed her and caused multiple injuries and finally strangled her by an artificial plait, as a consequence of which she died. The incident was witnessed by his minor children, aged 8 and 12, who were terrorized by him to keep these facts to themselves. The children testified against their father and revealed the brutal and traumatic details of their mother's death. Despite all this, the apex court saw this to be a fit case for invoking the exception to murder and the liability was reduced to section 304 Part I of the IPC. Here is what the court said:[124]

> Suddenly, quarrel took place between them. It is clear from the evidence of PW-1 that the death occurred due to injury Nos. 11 and 12. The other injuries were simple in nature. The evidence of PW-1 [doctor] shows that the death occurred on account of Asphyxia. The evidence

121 Also refer to the decision of the court in *State of Karnataka* v. *Srinivasa*, 2018 (9) SCALE 674; per R. Banumathi and Vineet Saran JJ, where the court acquitted the husband of the charge of murdering his wife on the ground that "the doctor has given opinion that the suicide cannot be ruled out" and "medical evidence does not conclusively establish that it is a case of homicidal death". This case gives the wrong appearance that medical evidence is paramount in assessment of guilt, when the courts are required to undertake a broad-based appraisal of the evidence to arrive at any decision. While in this particular case, other evidence could not establish the guilt, the legal reasoning which solely focused on medical evidence was not in accordance with the requirements of determination of culpability. For a useful critique of over reliance on medical opinion, see, B.B. Pande, "Limits on Objective Liability for Murder", 16(3) *JILI* 469-482 (1974).

122 The plea of provocation is regularly taken by husbands. In *Ashwani Kumar* v. *State of Punjab,* 2018 (15) SCALE 252; per Ranjan Gogoi CJI and K.M. Jospeh J, where the police officials had witnessed the appellant murdering his wife, the appellant had unsuccessfully tried to defend himself by saying that "he suspected that somebody was present in his house along with his wife and the doors were closed and out of sudden provocation, he had killed his wife" (para 7).

123 2018 (4) SCALE 441; per N.V. Ramana and S. Abdul Nazeer JJ.

124 *Id*., para 12.

> of PW-5 and PW-6 [children] coupled with evidence of PW-1 makes it clear that the incident had occurred all of a sudden, without any premeditation. It is evident that the accused had not taken undue advantage or acted in a cruel or unusual manner.

In *Seema Singh* v. *CBI*,[125] a husband (respondent no. 2) was charged under sections 498A, 302 and 120B of the IPC with respect to his wife's death. The case of prosecution was that the husband had killed his wife on a trip to Leh and passed it off as a car accident. The case was transferred to Central Bureau of Investigation (CBI) from the state government.The respondent was arrested based on reports from AIIMS, Central Forensic Science Laboratory (CFSL) etc. which proved that she was strangulated. The high court had granted bail (with strict conditions and giving liberty to the prosecution to apply for cancellation of bail in case of any breach of the bail conditions) noting that there was no eye witness account that the deceased was tortured and the AIIMS report was based on photographs alone. The apex court upholding the high court's decision affirmed that the grant of bail as a general rule. The court reiterated the fundamental principle of presumption of innocence and held that the accused cannot be denied bail merely because he is charged with a serious offense.

**Murder of husband**

Reena Hazarika was convicted and sentenced to life imprisonment under section 302 of the IPC for killing her husband.[126] The case of the prosecution was that she assaulted her husband owing to which he got fatal head injuries. Their landlords rushed to their house to find the husband wounded but could not take him to the hospital due to rains. The trial court and the high court convicted the accused wife based on circumstantial evidence, the "last seen together theory" and her "unnatural conduct" as she was not crying.

While the law claims to remain unaffected by presence of emotions, this case shows how even the absence of emotions *moves* the law considerably. How can a (good) wife not cry on the death of her husband? This unnatural wifely conduct became so pronounced in judicial reasoning that the material facts about the case – the nature of injuries, the kind of weapon available with the accused, her testimony under section 313 of the CrPC, the fact that the woman could not have legal representation of her choice- were blatantly ignored by the two tiers of the judicial hierarchy.[127]

The court noted that drawing an inference of guilt based on circumstantial evidence requires the prosecution, "to establish the continuity in the links of the chain

125 2018 (6) SCALE 76; per A.K. Sikri and Ashok Bhushan JJ.

126 *Reena Hazarika* v. *State of Assam*, 2018(14) SCALE 509; per R.F. Nariman and Navin Sinha JJ.

127 The appeal was preferred before the Supreme Court under article 136 of the Constitution. On the scope of appellate jurisdiction under article 136, the court noted that normally the apex court "would be reluctant in appeal to interfere with the concurrent findings of two courts by re-appreciating the facts and evidence" but if "there has been erroneous consideration and appreciation of facts and evidence, leading to miscarriage of justice, this court is duty bound to ensure that ultimately justice prevails." The present case was one such instance.

of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused."[128] Even the last seen theory cannot be invoked to impute liability unless the prosecution first establishes a *prima facie* case based on facts and evidence. While appreciating the evidence on record, the court noted (i) several inconsistencies in the testimonies of the witnesses, (ii) the injuries on the person of the deceased could not have been inflicted by the knife which was recovered from the house (iii) they could not have been inflicted by one person and not by the accused (iv) and that it is difficult to believe "the appellant being a woman, could have made such severe and repeated assault on the deceased, who was her husband, with a small knife, without any resistance and suffered no injury herself."[129]

The court also observed that "a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under section 313 Cr PC and to either accept or reject the same for reasons specified in writing" (the landlords were implicated by the accused in her statement). Unfortunately, the courts below had paid no attention whatsoever to the statement under section 313. Further, on the question of her "unnatural conduct" which led the lower courts to infer guilt, the court reasoned how the absence of tears may in fact be natural for some in dire circumstances. In a move that de-gendered the emotional imagery of grief, the court noted: "The appellant being in a helpless situation may have been stunned into a shock of disbelief by the death of her husband. It is not uncommon human behaviour that on the death of a near relative, or upon witnessing a murderous assault, a person goes into complete silence and stupor showing no reaction or sensibility."[130]

Thus, the court held the appellant entitled to acquittal on the benefit of doubt since "the possibility that the occurrence may have taken place in some other manner [could] not be completely ruled out."[131]

**Abetment of suicide**

Delays and pendency end up becoming mitigating factors when it comes to sentencing in criminal cases. *Mst. Anusuiya @ Saraswatibai* v. *State of Madhya Pradesh*[132] is a case of abetment of suicide where it was established that domestic cruelty and dowry demands led to Rekhabai's unnatural death in 1989.The apex court upheld the conviction of the deceased's mother-in-law and husband under sections 306 and 498A of the IPC but significantly reduced the sentence. The trial court (in 1992) had awarded punishment of rigorous imprisonment of seven years under section 306 and three years under section 498A (to run consecutively); the high court reduced the sentence to five years under section 306 and two years under section 498A (to run

128 *Supra* note 126, para 8.

129 *Id.*, para 12.

130 *Id.*, para 13.

131 *Id.*, para 18.

132 2018(1) SCALE 487; per R.K. Agrawal and Abhay Manohar Sapre JJ.

consecutively). The apex court reduced the sentence for mother-in-law to the period already undergone. The reasons for the same were: she had undergone nine months jail sentence, she was around 75 years old now, was not keeping well and was on bail. The sentence for the husband was reduced to two years under section 306 (while upholding two years under section 498A, sentences to run concurrently) since he had remarried a girl from the deceased's family (deceased's aunt's daughter) and "since then the relations between the two families have become quite cordial."[133]

In *Siddaling* v. *The State, through Kalagi Police Station*[134] the court dismissed the appeal of appellant-husband who was convicted under sections 498A and 306 of the IPC. The appellant was in a relationship with another woman which caused severe mental agony to his wife who committed suicide. His argument was that for conviction under section 306, "there ought to be active or direct act leading to the deceased to commit suicide, which is lacking in the present case."[135] The court rejected this argument and decided against any leniency in the matter of quantum of sentence and stated that the appellant's "illicit relation with another woman would have definitely created the psychological imbalance to the deceased which led her to take the extreme step of committing suicide."

**Presumption under section 113A of Evidence Act**

In *State of M.P.* v. *Shriram*[136] the court clarified the applicability of section 113A of the Evidence Act. Sarita Bai had committed suicide at her in-laws' (respondents') house. The trial court had held the respondents guilty under sections 498A and 306 read with section 34 of the IPC which was set aside by the high court as there was no evidence on record to prove that the deceased was subjected to torture which forced her to commit suicide. The high court observed that presumption under section 113A of Evidence Act could not be drawn against them in the absence of any evidence. The state appealed the high court decision. The apex court dismissed the appeal on the ground that the mere fact of the suicide taking place at the in-laws place is not sufficient to establish that the deceased was subjected to cruelty so as to force her to commit suicide. In the absence of such evidence, section 113A cannot be invoked.[137]

133 *Id.*, para 24.

134 2018 (10) SCALE 216; per R. Banumathi and Vineet Saran JJ.

135 *Id*., para 7.

136 2018 (15) SCALE 73; per N.V. Ramana and Mohan M. Shantanagoudar JJ.

137 *Cf*, *Jagjit Singh* v. *State of Punjab* [2018 (14) SCALE 73; per Ranjan Gogoi, Navin Sinha and K.M. Joseph JJ] where the appellant appealed his conviction under section 304B of the IPC. His wife and daughter died by drowning in a river. Their bodies were recovered, tied together with a piece of cloth. The court rejecting his appeal, reiterated the legal principles in the following words: "A reading of Section 304-B of the IPC along with Section 113-B of the Evidence Act would establish that once the prosecution shows that soon before the death of the wife, she has been subjected to cruelty or harassment for or in connection with any demand for dowry, the court shall presume that such person caused the dowry death within the meaning of Section 304-B IPC. The words 'shall presume' in Section 113-B of the Evidence Act, while it mandates that the Court is duty bound to proceed on the basis that the person has caused the dowry death, the presumption is rebuttable and it is open to the relative to prove that the ingredients of Section 304-B IPC are not satisfied." (para 24).

**State's duty to appeal wrongful acquittals**

It is an established legal principle that dying declaration is a credible piece of evidence[138] and can form the sole basis for conviction. However, courts "must exercise great caution while considering the weight to be given to a dying declaration, particularly when there are more than one dying declarations."[139] In *Kanailal Sarkar* v. *State of W.B.*[140] the deceased had stated in her dying declaration, recorded by executive magistrate, that her father-in-law, the appellant, had poured kerosene on her and set her on fire. The high court, however, setting aside trial court verdict of conviction under section 302 of the IPC, held the case to be one of suicide and the appellant was found guilty under section 306 of the IPC. The accused appellant challenged the decision of the high court. In a strange reasoning, the apex court while accepting the credibility of the dying declaration believed the case to fall under section 302, but "[did] not propose to go into this aspect any further" as "the State has not preferred any appeal against the acquittal of the appellant under Section 302 I.P.C. and since occurrence was of the year 1986."[141] Thus, in a bizarre re-formulation of facts, the woman's murder was changed into suicide and the murderer was charged with abetment of her suicide. One is left wondering what is the duty of the apex court, the ultimate guardian of justice, when the state fails to do its own duty of standing by and for the victims till justice is secured.

**Giving false evidence**

In *Dinesh Kumar Kalidas Patel* v. *State of Gujarat*,[142] the question before the court was whether conviction under section 201 of the IPC could be maintained in case the accused is acquitted of the main offense under section 498A. The accused was charged under sections 304B, 206, 498A and 201 read with section 120B of the IPC and section 4 of the Dowry Prohibition Act. He was acquitted of all the charges except section 201 (causing disappearance of evidence of offence, or giving false information to screen offender). The high court held that "there [was] nothing on record to substantiate the case of the prosecution qua cruelty" but liability under section 201 stands since it was an unnatural death and he neither informed the police nor got post-mortem conducted.

Tracing case law on section 201, the apex court discussed its ingredients and observed that "a charge under section 201 of the IPC can be *independently* laid and conviction maintained [...] Mere suspicion is not sufficient, it must be proved that the accused knew or had a reason to believe that the offence has been committed and yet he caused the evidence to disappear so as to screen the offender. The offender may be

138 *See generally, Bhagwat* v. *State of Maharashtra*, 2018 (15) SCALE 69.

139 *State of Rajasthan* v. *Mst. Ganwara*, 2018 (11) 261; per N.V. Ramana and Mohan M. Shantanagoudar JJ.

140 2018 (15) SCALE 52; per R. Banumathi and Indira Banerjee JJ.

141 *Id.*, para 6.

142 2018 (2) SCALE 425; per Kurien Joseph and Amitava Roy JJ.

either himself or any other person."[143] However, on facts the Supreme Court acquitted the accused under section 201 "only on the ground that no communication was given to the police and that the post-mortem had not been performed."[144] Moreover, it could not be established that there was "any intentional omission" to intimate the police, "the last rites of the deceased were performed in the presence of the members of her family" and there was "no suspicion at that time of the commission of any offence."[145]

**Harassment of husband**

In *Mushiram* v. *State of Rajasthan*,[146] the appellant approached the apex court through a special leave petition as the high court had quashed the FIR filed by him under section 306 of the IPC against his deceased son's wife and her family. The appellant's son, Brajesh Singh committed suicide leaving behind two suicide notes alleging how his wife and her family have been threatening and harassing him with multiple false cases of dowry and domestic violence. In response to a petition filed by the accused under section 482 of the CrPC, the high court quashed the FIR on the ground that no case of abetment was made out. The Supreme Court set aside the high court order and observed that the settled jurisprudence of section 482 of CrPC mandates that the section "has to be utilized cautiously while quashing the FIR."[147] The FIR can only be quashed if the court "comes to a conclusion that continuing investigation [...] would amount to abuse of the process."[148] In this case, the high court erred by quashing the FIR[149] and not allowing the investigation to proceed, and hence the apex court rightly restored the criminal complaint and instructed the authorities to complete the investigation.

**Maintenance under section 125 CrPC**

Pratima Das approached the Supreme Court[150] aggrieved by the decision of High Court of Gauhati in which her maintenance of Rs. 4000 per month under section 125 of the CrPC was set aside on the ground that she had failed to prove that she was the wife of the respondent or that her three children were fathered by the respondent. The court ordered DNA test of the parties and the DNA report found that the respondent was in fact the father of the children. The order of the trial court was thus restored to

143 *Id*., para 15 (emphasis supplied).

144 *Id*., para 20.

145 *Id*., para 22.

146 2018 (5) SCALE 402; per N.V. Ramana and S. Abdul Nazeer JJ.

147 *Id*., para 11.

148 *Ibid*.

149 Contrast, *Geeta* v. *State of U.P*., 2018 (15) SCALE 399; *Sangeeta Agrawal* v. *State of U.P*., 2018 (15) SCALE 401; *Jagdish Prasad* v. *State of U.P*., 2018 (15) SCALE 403; *Omveer Singh* v. *State of U.P*., 2018 (15) SCALE 405.

150 *Pratima Das* v. *Subodh Das*, 2018 (3) SCALE 154; per Kurien Joseph and Mohan M. Shantanagoudar JJ.

secure the maintenance under a legal provision that seeks to save women and their children from destitution triggered by callous masculinity.[151]

*Presumption in favour of marriage under section 125 of the CrPC*

In *Kamala* v. *M.R. Mohan Kumar*,[152] the respondent was resisting the maintenance claim of the appellants contending that he never married appellant no.1 and that appellants no.2 and 3 were not born out to them. The family court had relied upon the evidence of appellant 1, birth certificates of appellants 2 and 3, other documentary evidence, oral evidence of appellant no.1's co-worker and the landlord, all of which showed that the appellant and the respondent were staying together as a married couple. The high court set aside the order of the family court on the ground that the appellant was unable to prove that she was legally wedded to the respondent and was thus not entitled to maintenance under section 125 of the CrPC.

The apex court restored the family court order and clarified that section 125 of the CrPC is summary in nature and is meant to prevent vagrancy. Therefore, unlike matrimonial proceedings where strict proof of marriage is required, under section 125 CrPC, the courts should not insist on a strict standard of proof to establish marriage between the parties. The apex court restated the settled position of law as set out in *Chanmuniya* v. *Virendra Kumar Singh Kushwaha*[153] and held that in section 125,[154] a broad and expansive interpretation should be given to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a precondition for maintenance under section 125 CrPC, so as to fulfil the true spirit and essence of this beneficial provision.

**Compounding of offences**

In *Bitan Sengupta* v. *State of W.B*.[155] the appellant was convicted by the trial court under section 498A of the IPC and the subsequent appeals were dismissed. The question before the court was whether the high court should have accepted the compromise between the parties where the wife withdrew the complaints of dowry and cruelty against the husband after their mutual divorce under section 28 of the Special Marriage Act.[156] The court, citing *B.S. Joshi* v. *State of Haryana*,[157] answered

151 In *Reema Salkan* v. *Sumer Singh Salkan*, 2018 (13) SCALE 33 (per Dipak Misra CJI, A.M. Khanwilkar and D.Y. Chandrachud JJ), the court enhanced the amount of maintenance keeping in view the respondent was an able-bodied person with decent living standard, his unsubstantiated plea of being unemployed while being highly qualified (also he earned a good salary in Canada till 2010), inflation rate and high cost of living index. The apex court agreed with the high court that "[t]he husband being an able-bodied person is duty bound to maintain his wife who is unable to maintain herself under the personal law arising out of the marital status" even when the wife is well-qualified and capable of taking employment.

152 2018(14) SCALE 257; per Indira Banerjee, R. Banumathi JJ.

153 (2011) 1 SCC 141.

154 *Id.*, para 42.

155 2018 (9) SCALE 45; per A.K. Sikri and Ashok Bhushan JJ.

156 Also see, *Priti Patel* v. *Nalin Satyakam Kohli,* 2018 (1) SCALE 457; per Kurien Joseph and R. Banumathi JJ.

157 AIR 2003 SC 1386.

the question in the affirmative. This trend of judicial settlement of cases involving non-compoundable offences, especially section 498A, needs critical scrutiny to navigate through the discourse of its "abuse" by women.[158]

## III SEXUAL OFFENCES

**Rape or breach of promise to marry?**

In *Dhruvaram Murlidhar Sonar* v. *State of Maharashtra*,[159] the appellant was charged under sections 376 (2)(b), 420 read with section 34 of the IPC and under section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act). In the FIR filed by the complainant, she alleged that she had fallen in love with the appellant and was living with him. She was a widow and "needed a companion". She also alleged that the appellant told her that he was planning to divorce his wife and needed a month to register their marriage "since they belong to different communities". When she got to know that the appellant had married someone else, she filed a complaint against him (and his brother).[160] The appellant filed an application under section 482 of the CrPC for quashing of the FIR which was dismissed.

Responding to his appeal, the apex court observed that it is important to ascertain whether the accused "actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust."[161] Relying on earlier precedents, that court made a distinction between mere breach of a promise and not fulfilling a false promise:[162]

> If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently.

But if, the accused "had any mala fide intention and if he had clandestine motives, it is a clear case of rape."[163] In this case, it was clear from the own complaint that there was a "tacit consent" which was "not the result of a misconception created

158 See in this regard Srimati Basu, *The Trouble with Marriage: Feminists Confront Law and Violence in India* (University of California Press, 2015).

159 (2019) 1 SCALE 64; per A.K. Sikri and Abdul Nazeer JJ (judgment dated November 22, 2018).

160 It is averred that when the appellant failed to marry her, his brother had married her. From a bare reading of the case, it is not clear why a complaint against the brother was filed.

161 *Supra* note 159, para 20.

162 *Ibid.*

163 *Ibid.*

in her mind."[164] In fact, "she had taken a conscious decision after active application of mind", she was well aware that the appellant was married and "agreed to his proposal" since she "was also in need of a companion."[165] Thus, the court, rightly, quashed the FIR.

In *Prabhu @ Kulandaivelu* v. *State of Tamil Nadu*[166] the appellant contested his conviction under sections 313 and 417 of the IPC. The prosecution's case was that the appellant had sexual intercourse with the complainant on several occasions with the promise of marrying her. When she became pregnant, he got her foetus aborted against her wishes. He was charged under sections 376, 417, 313 and 506(ii) of the IPC. The trial court convicted the appellant for all the offences. On appeal, the high court acquitted him under section 376 but affirmed the conviction and sentence of imprisonment under sections 417 and 313. (The high court also acquitted the father of the appellant who was also charged under the above sections).

On the question of section 313 *i.e.* causing miscarriage without the woman's consent, the court relied on the evidence of the doctor who had terminated the pregnancy. According to the doctor's evidence, she was already bleeding and had lower abdominal pain and pregnancy was terminated with her consent in order to save her life. Moreover, the court found that "there was nothing in evidence to connect that act with the appellant-accused" and thus conviction under section 313 was set aside. However, the apex court upheld the conviction under section 417 of the IPC *i.e*. cheating. There was no discussion whatsoever on the issue whether an offense against property can be stretched to include sexual offense cases which fall under 'offenses against body'.

**Protection of identity of the victims of rape and sexual offences**

In *Nipun Saxena* v. *Union of India*[167] the court discussed in detail section 228A of the IPC (prohibition on the disclosure of identity of the victim of certain offences), section 327(2) of the CrPC (in camera trial in rape cases), various provisions of the POCSO Act *viz*., section 24(5) (protecting the identity of child victim), section 33(7) (in camera trial), section 37 (procedure and power of special court), section 23 (procedure for media) and section 74 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (prohibition on disclosure of identity of children) and issued the following directions for the protection of the identity of victims of rape and sexual offences:[168]

i. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.

164 *Id*., para 21.

165 *Ibid.*

166 2018(15) SCALE 349; per Indira Banerjee, R. Banumathi JJ.

167 2018 (15) SCALE 769; per Madan B. Lokur and Deepak Gupta JJ.

168 *Id*., para 43.

ii. In cases where the victim is dead or of unsound mind the name of the victim or her identity should not be disclosed even under the authorization of the next of the kin, unless circumstances justifying the disclosure of her identity exist, which shall be decided by the competent authority, which at present is the Sessions Judge.

iii. FIRs relating to offences under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of 39 IPC and offences under POCSO shall not be put in the public domain.

iv. In case a victim files an appeal under Section 372 CrPC, it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner laid down by law.

v. The police officials should keep all the documents in which the name of the victim is disclosed, as far as possible, in a sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised in the public domain.

vi. All the authorities to which the name of the victim is disclosed by the investigating agency or the court are also duty bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the court.

vii. An application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under Section 228A(2)(c) of IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228A(1)(c) and lays down a criteria as per our directions for identifying such social welfare institutions or organisations.

viii. In case of minor victims under POCSO, disclosure of their identity can only be permitted by the Special Court, if such disclosure is in the interest of the child.

ix. All the States/Union Territories are requested to set up at least one 'one stop centre' in every district within one year from today.

**Stereotypes affecting the law**

In *State (Govt. of NCT of Delhi)* v. *Pankaj Chaudhary*,[169] the appellant police officers appealed the high court decision of acquitting the accused for gang rape, and issuing directions to charge the appellants under sections 193 and 195 of the IPC. The present appeal emerged from a case of gang rape where the accused defended themselves by asserting, "that PW-1-Prosecutrix was of bad character and she was indulging in prostitution and they have lodged complaint against her and therefore, they have been falsely implicated in the rape case."[170] The trial court convicted them for rape but the high court, considering "additional evidence", acquitted them. The

169 2018 (14) SCALE 423; per R. Banumathi and Indira Banerjee JJ.

170 *Id*., para 5.

high court said that the complainant, with other ladies, was arrested and was in the police station regarding a complaint about a quarrel involving sex workers, and the alleged rape could not have taken place at the time stated by the complainant. The high court also directed prosecution of the appellant police officers.

The apex court examined the evidence on record – complainant's mother's evidence, medical evidence, FSL report, and other circumstances - which pointed to the occurrence of rape. The court also noted that the complainant woman had no motive to falsely implicate the accused since there was "nothing on record to suggest that the accused were in any way involved in making such complaints against the prosecutrix and other women" due to which they could befalsely implicated in the case.[171]While there were complaints against the complainant, the apex court rightly remarked that, the "High Court was not right in taking into consideration those complaints produced at the time of arguments in the appeal."[172] The court in categorical terms affirmed:[173]

> Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference like the victim being a woman of 'loose moral character" is permissible to be drawn from that circumstance alone. A woman of easy virtue also could not be raped by a person for that reason […] [and thus] the High Court erred in placing reliance upon the complaints allegedly made against the prosecutrix to doubt her version and to hold that a false case has been foisted against the accused.

The court thus restored conviction under section 376(2)(g) of the pre-2013 IPC. The directions issued against the police officers were also set aside.[174]

The apex court in *Ajay @ Neetu* v. *State of Haryana*[175] uncritically reiterated (and endorsed) stereotypical views about rape survivors. While upholding the conviction for rape, the court observed:[176]

171 *Id*., para 20.

172 *Id*., para 21.

173 *Id*., para 23.

174 The apex court observed that "the High Court has failed to bear in mind the well settled principles of law that should govern the courts before making disparaging remarks. Any disparaging remarks and direction to initiate departmental action/prosecution against the persons whose conduct comes into consideration before the court would have serious impact on their official career" (*Id*., para 35). Further, the court also agreed with the appellants that "[b]efore directing the prosecution to be initiated under Section 195 Cr.P.C., the court has to follow the procedure under Section 340 Cr.P.C. and record a finding that "it is expedient in the interest of justice...". Though wide discretion is given to court under Section 340 Cr.P.C., the same has to be exercised with care and caution. To initiate prosecution under Section 195 Cr.P.C too readily that too against the police officials who were conducting the investigation may not be a correct approach" (para 38).

175 2018 (8) SCALE 1; per A.M. Khanwilkar and Navin Sinha JJ.

176 *Id*., paras 2, 3.

> In Indian Society no lady of virtue is supposed to invite unnecessary criticism for herself by alleging forcible rape upon herself. The status of the victim of rape is down-graded in the society and no lady of virtue would like rape upon her body unless the offense actually has been committed or if the victim is to take revenge of any other bigger enmity with the accused. (quoting trial court)
>
> Had it been a case of consent, in that case, there would not have been injuries on the person of prosecutrix. (quoting high court)

Thus, even when convictions are secured, dominant perceptions about "good" and "bad" women continue to persist in rape cases, reaffirming the imagery of real rape, real victims, real injuries.

**Hostile witness**

In *Hemudan Nanbha Gadhvi* v. *State of Gujarat*,[177] the complainant (who was nine years old at the time of sexual assault) had turned hostile during the trial, even as her mother had filed the FIR, her medical examination established sexual assault and she had identified the accused in test identification parade (TIP). The trial court, on her turning hostile, had acquitted the appellant. The high court, however, convicted him under section 376(2)(f) of pre-2013 IPC. The apex court dismissed the appeal since "overwhelming evidence" (medical report, semen found on her clothes, serologist report) was available to establish guilt even though "the prosecutrix turned hostile and failed to identify the appellant in the dock".[178] The court was clear that "[d]ispensation of justice [...]" cannot be allowed to become a mockery by simply allowing prime prosecution witnesses to turn hostile."[179] The court sympathetically assessed the circumstances of her turning hostile: she was from a poor family, one of five siblings and could have been influenced by the accused "by a settlement through coercion, intimidation, persuasion and undue influence."[180] While the court could have directed the prosecution of the complainant under section 344 of the CrPC for false evidence, the court refrained from doing so as this could have disrupted her present life completely.

**Commuting death penalty**

In *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*,[181] the appellant was convicted and sentenced to death for the rape and murder of a three year old girl. The high court had confirmed the sentence. The appeal before the apex court as well as the review petitions were dismissed in 2012 and 2013 respectively. However, following *Mohd. Arif* v. *Registrar, Supreme Court of India*,[182] the review petitions were restored and came before the court again.

177 2018 (13) SCALE 649; per Ranjan Gogoi, Navin Sinha and K.M. Joseph JJ.

178 *Id*., para 10.

179 *Id*., para 9.

180 *Id*., para 8.

181 2018 (15) SCALE 794; per Madan B. Lokur, S. Abdul Nazeer and Deepak Gupta JJ.

182 2014 (9) SCC 737.

The submission of the appellant was that the death sentence should be commuted since the conviction was based on circumstantial evidence, probability of reform of the appellant was not considered by the courts below, DNA evidence of the accused was not placed before the trial court contrary to sections 53A and 164A of the CrPC and there was unwarranted reference to the past history of the appellant (the trial court had taken into account two pending cases against the accused for similar offenses). The court considered each of these submissions. On the question of circumstantial evidence, the court analysed its previous decisions and held:[183]

> *ordinarily*, it would not be advisable to award death punishment in a case of circumstantial evidence. But there is no hard and fast rule that death sentence should not be awarded in a case of circumstantial evidence. The precautions that must be taken by all the courts in cases of circumstantial evidence is this: if the court has some doubt, on the circumstantial evidence on record, that the accused might not have committed the offence, then a case for acquittal would be made out; if the court has no doubt, on the circumstantial evidence, that the accused is guilty, then of course a conviction must follow. If the court is inclined to award the death penalty then there must be some exceptional circumstances warranting the imposition of the extreme penalty. Even in such cases, the court must follow the dictum laid down in Bachan Singh that it is not only the crime, but also the criminal that must be kept in mind and any alternative option of punishment is unquestionably foreclosed. The reason for the second precaution is that the death sentence, upon execution, is irrevocable and irretrievable.

On the issue of possibility of reform, the court emphasised:[184]

> …[T]he probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354(3) of the Cr.P.C. and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.
>
> ...If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the

183 *Supra* note 181, para 29.

184 *Id*., para 45, 46 (emphasis mine).

> date of conviction and the date of awarding sentence would be quite prolonged to enable the parties to gather and lead evidence which could assist the Trial Court in taking an informed decision on the sentence. But, *there is no hurry in this regard*, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

The court also emphasised that it is the court's responsibility to determine whether the convict can be rehabilitated. In cases where social re-integration of the convict looks difficult, the courts should consider the option of long imprisonment as an alternative to death penalty.

On the issue of DNA evidence as per section 53A of the CrPC, the court was of the opinion that the prosecution should produce DNA evidence in the view of section 53A of the CrPC, especially when the facility of DNA profiling is available. This is not to suggest that the prosecution case cannot be proved in case DNA profiling is not done, but "an adverse consequence would follow for the prosecution" where DNA profiling is not done or is held back from the trial court.[185] In the present case, samples from accused's body were taken for DNA profiling but not produced before the trial court. Since there was no explanation for the same, the court thought it dangerous to uphold the death sentence.

Finally, on the issue of prior history, the court was clear that "[t]he history of the convict, including recidivism cannot, by itself, be a ground for awarding the death sentence."[186] While there are exceptions to the rule of prohibition on reliance of previous history, *eg.*, section 376E of the IPC, section 16(2) of the Prevention of Food Adulteration Act, section 75 of the IPC, these provisions "deal with instances where there is a prior conviction and do not deal with the pending trial of a case involving an offense."[187] Further, according to the court, "while it is possible to grant an enhanced sentence, as provided by statute, for a recurrence of the same offence after conviction, the possibility of granting an enhanced sentence where the statute is silent does not arise."[188] (This is also the import of section 54 of the Evidence Act.) The court, after going through various decisions on this issue, settled the issue thus: "mere pendency of one or more criminal cases against a convict cannot be a factor for consideration while awarding a sentence. Not only is it statutorily impermissible (except in some cases) but even otherwise it violates the fundamental presumption of innocence – a human right - that everyone is entitled to."[189] The court thus commuted the sentence to life imprisonment but directed that he should not be released from custody for the rest of his life.[190]

185 *Id*., para 54.

186 *Id*., para 58.

187 *Id*., para 64.

188 *Ibid*.

189 *Id*., para 73.

190 It was brought to the notice of the court that three other cases were pending against the appellant and he was convicted in at least one of them. The court proceeded to dispose this appeal by presuming that the appellant was awarded life imprisonment in the other three cases.

In *Ambadas Laxman Shinde* v. *State of Maharashtra*,[191] criminal miscellaneous petitions were filed for re-opening the review petitions regarding death sentences of the appellants for the offense of rape and murder. Following the constitutional bench decision in *Mohd. Arif* v. *Registrar, Supreme Court of India*,[192] the court re-opened the review petitions and listed the matter for hearing in open court. The court noted, regarding three of the accused, that they were not given the opportunity of engaging any counsel and advancing their response to the state's plea of enhancement of the punishment to death. The death sentence was thus set aside. For the other accused also, the court noted that their appeal against the death sentence imposed by the high court was dismissed by the court through a common judgment since the appeals were linked. The apex court recalled its judgment in entirety, since "evidence was common and the offences relate to the same incident", and suspended the execution for the remaining accused pending the disposal of appeals.

The court in another case of kidnapping, rape and murder commuted the death sentence to life (no representation for remission till 20 years)[193] as the court did not think the case fell in rarest of rare category, there was no history of any criminal activity and also there was a possibility of reform given the convict showed no blameworthy conduct in jail.[194]

**Meaning of reasonable doubt in criminal jurisprudence**

In *State of Himachal Pradesh* v. *Manga Singh*,[195] the complainant, a nine year old girl used to stay at her aunt's house with her brother. One day after school she refused to go home and told her teachers how her aunt's son made her sleep with him at night, took off her clothes and committed sexual intercourse with her. This was happening for about three years. A complaint was lodged by one of the teachers and an F.I.R. was registered against the accused under section 376 of the IPC. In the medical examination it was found that there was no injury on her private parts; the doctor stated that "in case of slightest or small penetration, hymen will not rupture". The trial court convicted the accused and sentenced him to undergo sentence of ten years of rigorous imprisonment and also imposed a fine of Rs.25,000/-. In appeal, the high court reversed the verdict of conviction.

191 2018 (14) SCALE 71.

192 2014 (9) SCC 737.

193 *Jitendra @ Jeetu* v. *State of M.P.*, 2018 (15) SCALE 333; per A.K. Sikri, Ashok Bhushan and Indira Banerjee JJ. Also see, *Babasaheb Maruti Kamble* v. *State of Maharashtra*, 2018 (15) SCALE 235.

194 Also see, *Viran Gyanlal Rajput* v. *State of Maharashtra*, 2018 (15) SCALE 619; per N.V. Ramana, Mohan M. Shantanagoudar and Hemant Gupta JJ. In this case of kidnapping, rape and murder of a 13 year old (under sections 4 and 10 of the POCSO Act), the court commuted sentence of death to life imprisonment of 20 years since "the prosecution did not establish that the appellant was beyond reform, especially given his young age" (para 10). The court noted that his "lack of criminal antecedents prior to the commission of this crime, and of his post incarceration conduct, which in no way suggests the impossibility of his reform" (para 10).

195 2018(15) SCALE 895; per Indira Banerjee, R. Banumathi JJ.

The high court gave the benefit of doubt to the accused on two grounds. *First*, that the evidence of the complainant did not inspire confidence; and *second*, that the medical evidence of the doctors was inconclusive to hold that the girl was subjected to forcible sex. The apex court, however, was unconvinced with both the reasons of the high court. Reiterating the established law on the question of corroboration in rape cases, the court observed that "[t]he conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement."[196] In this case, the victim was a nine year old who has no motive for falsely implicating her cousin. On the issue of the evidence of the complainant, the apex court rightly pointed out:[197]

> The Trial Court, which had the opportunity of observing and hearing the prosecutrix (PW-4), recorded a finding of fact that the evidence of prosecutrix (PW-4) is convincing and inspires the confidence of the court. When the Trial Court which had the opportunity of seeing and hearing the witness has held that the evidence of the prosecutrix (PW-4) inspires confidence of the court, in our considered view, in the absence of any convincing reason, the High Court ought not to have interfered with such finding of fact.

As far as the medical evidence was concerned, the apex court pointed out the erroneous interpretation of the doctor's report by the high court. The doctor had "categorically stated that merely because there was no injury marks it cannot be said that there was no question of sexual intercourse." The court affirmed that it is a well settled position that the presence of external injury or rupture of hymen is not necessary to prove the case of rape.[198] While the court was correct in asserting that "[i]n the absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix", judicial narrative slipped to construct the child victim into an asexual being without any agency:[199] "The prosecutrix being a small child of about nine years of age, there could be no question of her giving consent to sexual intercourse."

196 *Id*., para 11.

197 *Id*., para 15.

198 Also see, *State of Madhya Pradesh* v. *Preetam*, 2018(11) SCALE 120; per R. Banumathi and Vineet Saran JJ. The high court had reversed the conviction of accused charged for rape on account of delay of two days in filing the FIR and absence of external injury which was seen as "indicative of her consent for the sexual intercourse." The Supreme Court noted "even in the absence of external injury, the oral testimony of the prosecutrix that she was subjected to rape, cannot be ignored." The court also found the complainant to be less than 16 years old in which case it became a case of statutory rape.

199 On the question of child's sexual agency, see Latika Vashist, "Age of consent and the impossibility of child sexuality" 721 *SEMINAR* (Sep., 2019), *available at*:https://www.india-seminar.com/2019/721/721_latika_vashist.htm (last visited on Oct. 7, 2019).

Clarifying the meaning of reasonable doubt in criminal jurisprudence, the apex court quoted the following extract from *State of Rajasthan* v. *N.K. The Accused*:[200]

> A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. *It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists.* The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women.

With these important observations highlighting the societal cost of "unmerited acquittal", the court set aside the high court decision and upheld the trial court verdict.

The above case may be contrasted with *Sham Singh* v. *State of Haryana*[201] where the accused was charged for rape of a 15 year old girl. The court acquitted the accused for lack of reliable evidence, non-examination of crucial witnesses by the prosecution, gaps and infirmities in the testimony of the complainant, inconclusive medical evidence and credible testimonies of the defense witnesses. While the decision of acquittal in this case emanates from the absence of proof beyond reasonable doubt, the court's narrative is disturbing at two levels.

*First*, is with regard to the observations made while discussing the medical evidence: "The vagina of the victim permitted two fingers. However, the doctor observed the absence of hymen and did not mention the age of tear of the hymen because the tear was old."[202] When the two-finger test has been declared illegal in categorical terms, what does one make of these remarks? Though there were other gaps in the medical evidence, the mention of the two-finger test and the age of hymen tear gives an impression that the court was still guided by concerns of girl's virginity in its assessment of the charge of rape. *Another* questionable part of the court's narrative is its endorsement of the defense claim that the rape complaint was made to take revenge against the accused's family: "there is every possibility of false implication of the accused in this matter to take revenge against the family of the accused because of the longstanding disputes inter se between the two families."[203]

In this case, for instance, there is evidence that there was a discord between the accused and the complainant (the defense version, accepted by the court, was that the complainant was slapped by one of the accused for "objectionable activities" in relation to sexual matters for which he had consequently apologised before the panchayat), but besides this, the judgment furnishes no other evidence to establish vengeful motives of the complainant. While there may be instances of 'false' cases with some ulterior motives, the populist appeal of the idea of rape case as a powerful revenge tool in the

200 (2000) 5 SCC 30.

201 2018(10) SCALE 119; per N.V. Ramana and Mohan M. Shantanagoudar JJ.

202 *Id*., para 9.

203 *Id*., para 22.

hands of 'bad women' requires the judiciary to be overly cautious in putting its stamp on such defense pleas. In the absence of clear evidence establishing vengeful motives, the judiciary should refrain from making such observations while acquitting the accused.[204]

**POCSO: Mandatory disclosure, compensation**

In *Sr. Tessy Jose* v. *State of Kerala*[205] the appellants who were doctors were charged under section 19(1) of the POCSO Act *i.e*., requirement of providing information to relevant authorities in case of an apprehension that an offense under POCSO Act has been committed. The appellants had delivered and attended to the child of a girl who was less than 18 years old. The contention was that the "appellants could have gathered that at the time of conception she was less than 18 years and was, this, a minor and, therefore, the appellants should have taken due care in finding as to how the victim became pregnant." The court dismissed this argument, and proceedings against the hospital staff were quashed, since it was not the case that the appellants were informed by the victim herself or her mother who had brought her to the hospital about the rape. Moreover, section 19(1) uses the expression "knowledge" which means that the person should have known about the crime; "[t]here is no obligation on this person to investigate and gather knowledge."[206]

This case exposes the limits of mandatory reporting in such cases. As the court also recorded that "[a]ppellant did not know that the victim was a minor when she had sexual intercourse" meaning thereby all cases – consensual as well as non-consensual – need to be reported. Such mandatory reporting puts the girls, who want to terminate unwanted pregnancies, at risk who would fear scared to seek medical assistance for the fear of being reported to police. Many such may be of consensual sexual relationships, unknown to even the couple's family, where the couple will be exposed to unwanted harassment from the family, doctors, police, or the girl will be forced to take recourse to unsafe abortion practices.

In *Nipun Saxena* v. *Union of India*,[207] the court directed that the "NALSA Compensation Scheme should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 [of POCSO Rules, 2012] until the Rules are finalized by the Central Government."[208]The Special

204 *Cf*: *Dola @ Dolagobinda Pradhan* v. *State of Odisha* (2018 (10) SCALE 282; per N.V. Ramana and Mohan M. Shantanagoudar JJ) where the court acquitted the accused because the medical evidence did not support the complainant's version (no evidence of semen on her clothes, her clothes were not soiled, no injuries which belied her statement that she was raped in the field), her husband turned hostile during trial, she could not identify faces of the accused persons, there were material contradictions in her testimony. The court held that "her testimony is a result of seeking revenge against the accused" and "her evidence is not free from blemish" (para 21). The court found evidence which suggested that she had lodged "false allegations to extract revenge from the appellants, who had uncovered the theft of forest produce by the informant and her husband" (para 22).

205 2018 (9) SCALE 629; per A.K. Sikri and Ashok Bhushan JJ.

206 *Id*., para 9.

207 2018 (11) SCALE 350; per Madan Lokur, Abdul Nazeer and Deepak Gupta JJ.

Judge was directed to "take the provisions of the POCSO Act into consideration as well as any circumstances that are special to the victim while passing an appropriate order."[209] Further, the Special Judge may "pass appropriate orders regarding actual physical payment of the compensation or the interim compensation so that it is not misused or mis-utilized and is actually available for the benefit of the child victim."[210]

## V CIVIL LAW

**Rights as equal coparceners**

In *Danamma @ Suman Surpur* v. *Amar*[211] a suit for partition was filed by the respondent (brother of the appellants) in the year 2002. However, during the pendency of this suit, section 6 of the Hindu Succession Act was amended. The appellants claimed their share in the joint family property which was rejected by the trial court as well as high court. The decree for partition, denying the appellants any share as per section 6, was passed by the trial court in the year 2007. The question before the apex court was whether, with the passing of Hindu Succession (Amendment) Act, 2005, the appellants would become coparcener "by birth" in their "own right in the same manner as the son" and are, therefore, entitled to equal share as that of a son?

The court reiterated the law laid down in the decision of *Prakash* v. *Phulavati*[212] wherein it was held that section 6 will cover living daughters of living coparceners as on September 9, 2005 irrespective of when the daughters were born (as per *Phulavati*, the section will not be applicable retrospectively *i.e.* transactions which have taken place prior to December 20, 2004 will be excluded).[213] In the court's words:[214]

> Section 6, as amended, stipulates that on and from the commencement of the amended Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth. The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth.

It was held that the rights of daughters in the coparcenary property are not lost merely on account of a preliminary decree in the partition suit. The partition would

208 *Id*., para 9.

209 *Id*., para 10.

210 *Id*., para 12.

211 2018 (1) SCALE 657; per A.K. Sikri and Ashok Bhushan JJ.

212 (2016) 2 SCC 36.

213 For a critique of this position see Latika Vashist, "Woman and the Law" LI *Annual Survey of Indian Law* 1057 (2015).

214 *Supra* note 211, para 24.

become final only with the final decree. Therefore, the preliminary decree would have to be amended in accordance with the 2005 amendment.[215]

In *Mangammal @ Thulasi* v. *T.B. Raju*,[216] the appellants averred that on his death their father left three properties consisting of agriculture land and a dwelling house. Due to their brother's (respondent 1) irresponsible behaviour, their mother had leased out the properties to respondent nos. 2 to 4. On the expiry of said lease deed and after mother's demise, the appellants approached respondent nos. 2 to 4 to deliver the vacant possession of leased properties to them to discover that the land was sold to them by their brother. Being aggrieved, they instituted a suit for the partition and separate possession of the suit properties which consisted of three items, namely, agriculture land (Item Nos. 1 and 2) and building site with constructed building (Item No. 3). The lower courts dismissed their petition and they finally approached the apex court by way of special leave. The question before the court was whether the appellants were entitled to claim partition in ancestral property in view of section 29A of the Hindu Succession (Tamil Nadu Amendment) Act, 1989. This provision gave equal rights to daughters in coparcenary property.

The court noted that in view of clause (iv) of the section 29-A of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, appellants could not institute the suit for partition and separate possession at first instance as they had got married prior to the commencement of the Act and hence were not coparceners. While the court could have concluded this case with this legislative command, it went on to draw upon the unfortunate decision of *Prakash* v. *Phulavati*,[217] to observe that under section 29-A of the Act, legislature has used the word "the daughter of a coparcener" which means that "both the coparcener as well as daughter should be alive to reap the benefits of this provision at the time of commencement of the Amendment of 1989."[218] Thus, it was held that the appellants were not entitled to any share in the coparcenary property and could only get the shares that would accrue to them through succession from their parents.

**Termination from service**

In *Sunita Singh* v. *State of U.P.*[219] the appellant was terminated from service on the ground that she had wrongly procured the caste certificate. She was born in "Agarwal" family and married a person belonging to "Jatav" community (one of the Scheduled Castes). Based on her qualifications and the caste certificate, she was appointed in Kendriya Vidyalaya and served there for 21 years. The court clarified that "caste is determined by birth" and "cannot be changed by marriage with a person of scheduled caste."[220] Thus the caste certificate should not have been issued to the appellant. The court however took a lenient view, since she had an impeccable service

215 *Id*., para 27.

216 2018 (6) SCALE 331; per R.K. Agrawal and A.M. Sapre JJ.

217 (2016) 2 SCC 36.

218 *Mangammal*, *supra* note 216, para 10.

219 2018 (1) SCALE 379; per Arun Mishra and Mohan M. Shantanagoudar JJ.

record and her conduct was not fraudulent, and ordered for compulsory retirement and not termination.

## VI IN LIEU OF A CONCLUSION

Though this survey does not discuss cases decided by the high courts in India, *Kumari Chandra* v. *State*[221] decided by the High Court of Rajasthan on August 1, 2018 deserves attention. The high court in this case held that women can plead the defence of insanity while experiencing premenstrual syndrome (PMS**)**. The appellant was charged for murder, attempt to murder and abduction. As per the accepted facts, she had pushed children of tender age into a well, one of whom died and two survived with minor injuries. While the prosecution alleged enmity with the children's parents as the motive of the crime, the defense pleaded that there was no such motive. Instead, the defence version was that she at the relevant time was suffering from "an unusual mental ailment" (PMS) owing to which she would "become violent" and "have no control over her emotions." In her own testimony, the appellant stated that "before marriage whenever she approached the period of menstruation she used to become *almost mad*." Many witnesses, including her teacher, testified that she had "fits of madness" when "she would tear her clothes and would start behaving abnormally with other girls." One of the doctors deposed that he had "*read in medical jurisprudence that few females do not remain normal* in the days preceding to menstrual and may even become aggressive and violent" and that the appellant herself "would become aggressive and violent to the extent of reaching the stage of madness."

The court accepted the testimony of the witnesses including the doctors who had treated the appellant. The court while granting the defence of unsoundness of mind to the appellant observed: "It is not every mental derangement that exempts an accused person from criminal responsibility for his acts, but it must be such which impairs the cognitive faculties of understanding the nature of his act on the victim or in relation to himself." In other words, her condition of PMS was such that it had completely impaired her cognitive faculties and thus she was exonerated from criminal liability.

While the court may be justified to reach this conclusion based on the facts and testimonies of the witnesses, this case is paradigmatic of how women offenders appear before the law. As 'mad, bad or sad', never subjects in their own right; deserving mitigation/ exoneration as they lack agency/responsibility; they are prisoners of their body. Reason eludes them as they act out of uncontrollable, emotional outbursts.

This case sums up the year 2018 for us: how (feminist) justice continues to elude gendered subjects of law, even as more rights are proclaimed for sexual subalterns. We know by now that mere enunciation and declaration of more rights cannot overhaul gendered instituitions or pierce the circuits of sexual power. What is required is a complete re-imagination of feminist vocabulary in order to re-claim a more critical, more grounded, more courageous feminism.

220 *Id*., para 5.

221 2018 SCC OnLine Raj 1899; per Mohammad Rafiq, Goverdhan Bardhar JJ.