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WOMEN AND THE LAW

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I INTRODUCTION

OVER THE years, the focus of this survey has been on reported cases of the Supreme Court on the theme of women and law. This year as well the survey only documents the reported Supreme Court cases[1] but I will begin by recalling the proceedings of an unreported "case", from media reports, which perhaps will soon fade away from public memory but will stay in the highest court's *institutional unconscious*.

On April 19, 2019, a former officer of the Supreme Court alleged that she was sexually harassed by the then Chief Justice of India, Ranjan Gogoi. The judge denied all the allegations and as a master of the roster convened an urgent hearing at the Supreme Court, of which he himself was a part, to deal with what was termed as a *matter of great public importance touching upon the independence of the judiciary.* On April 20, the Chief Justice (CJI), Arun Misra and Sanjiv Khanna JJ convened the hearing where the CJI refuted the allegations, stated that the judiciary was under a huge threat and *then* recused himself. No "judicial order" was passed but the bench asked the media to" show restraint, act responsibly [...] decide what should or should not be published as wild and scandalous allegations undermine and irreparably damage reputation and negate independence of judiciary."[2] In an unprecedented move, the CJI did not sign the order though he was a member of the bench.

On April 23, a bench comprising Arun Mishra, Rohinton Nariman and Deepak Gupta JJ began hearing the matter. On April 25, the bench directed retired judge, A.K. Patnaik to conduct an inquiry into the "conspiracy" behind the allegations, assisted by the Director of the Central Bureau of Investigation, the Chief of the Intelligence

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1 The cases discussed in this survey are all reported in Supreme Court Almanac (SCALE).

2 *In re Matter of Great Public Importance touching upon the Independence of the Judiciary*, *Suo Moto* Writ Petition (Civil) No. 1/2019 (Apr. 20, 2019).

Bureau (IB) and the Delhi Police Commissioner. Judge A.K. Patnaik was asked submit a report in a sealed cover documenting his findings. Simultaneously, an in-house panel of the Supreme Court comprising of S.A. Bobde, N.V. Ramana and Indira Banerjee JJ was constituted to conduct an investigation into the sexual harassment allegations against the CJI. Thus, the probe into sexual harassment complaint started alongside a probe into the conspiracy behind the sexual harassment complaint in consonance with the stereotypical presumption that the complaint was malicious and the woman was lying. On April 25, N.V. Ramana J recused himself from the panel, after the complainant expressed her objections and was replaced by Indu Malhotra J. On April 30, the complainant withdrew from the in-house inquiry. On May 6, Supreme Court Secretary General during a press release informed that the CJI was found not guilty by the panel. The contents of the report were never made public; all documents, testimonies, evidence and the reasons for final decision were sealed and concealed. In an abject denial of principles of natural justice, the report was not even shared with the complainant.

This "case" reveals the importance of digging into the suppressed (written and unwritten) archive of the unreported cases and judicial incidents to make sense of the streams of legal rhetoric about equality, justice and accountability that shape its "feminist" judgments running into several hundred pages. For now, let us proceed to analyse if, and how, the Supreme Court of India upheld for the cause of gender justice for women who posed their faith in the men and women of this institution.

II WOMEN, GENDER AND CONSTITUTION

This section includes cases where the constitutional validity of state laws and regulations has been challenged on the touchstone of violations of anti-discrimination and gender justice provisions present in the Constitution. Following *Joseph Shine* v. *Union of India,*[3] in *Col. Rajnish Bhandari, VSM* v. *Union of India*,[4] the court declared section 497 of the Ranbir Penal Code, which was *pari materia* with section 497 of the Indian Penal Code (IPC), unconstitutional. The court also responded to claims related to the right to freedom of expression and employment, right to life of female foetus, local women's right of democratic participation in various other cases some of which are discussed below.

Obscenity and bar dancing

Indian Hotel and Restaurant Association (AHAR) v. *The State of Maharashtra*[5] dealt with three writ petitions challenging certain provisions of the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (Working therein) Act, 2016 (hereafter, 'Act') and the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (Working therein) Rules, 2016 (hereafter, 'Rules') as violating the fundamental rights of the petitioners guaranteed under articles 14, 15, 19 (1)(a), 19 (1)(g) and 21 of the Constitution.

3 (2019) 3 SCC 39.

4 2019 (12) SCALE 804; per R.F. Nariman, Surya Kant JJ.

5 2019 (1) SCALE 433; per A. K. Sikri, Ashok Bhushan JJ.

As a background, the first petitioner, AHAR pointed out that sections 33A and 33B[6] (inserted by way of an amendment in 2005 to the Bombay Police Act, 1951, which were similar to the impugned provisions in the 'Act') had been struck down as unconstitutional by the Supreme Court as they contravened articles 14 and 19(1)(g) of the Constitution.[7] Despite this, the state did not grant licences to the petitioners. Instead, it re-introduced section 33A by amendment in 2014 which was exactly similar to the provision which was previously declared as unconstitutional. In 2014, another writ petition was filed before the apex court where constitutionality of this provision was challenged. The court stayed the operation of section 33A and directed licences to be granted within two weeks. But frustrating the court directions, the state came up with 26 new conditions for grant of licence which were again challenged by the petitioners. In 2016, the court passed orders modifying some of these 26 conditions, and granted one week's time to the respondents to comply with its directions. But again, to nullify the effect of the judgment of this court, the state passed the present Act and framed the contentious Rules.

The second petitioner, Bharatiya Bar Girls Union (comprising of 5000 women performers working in 'dance bars' in Maharashtra) contended that imposition of the ban for a prolonged period had resulted in rendering many of the women performers unemployed who were now living in extreme poverty. It was argued that the members of the petitioner union had voluntarily embraced professional dancing at dance bars out of their free will and choice to earn a decent livelihood and in exercise of their personal autonomy and dignity. The opportunity to work in dance bars also allowed some of them to transcend their hereditary/ caste professions. It was also contended that it had been customary for the performers to accept tips or rewards from their patrons and the provisions of the Act and the Rules, which prohibited these, reflected the deeply patriarchal attitude of the state towards women performers, not different from oppressive, moralistic and discriminatory treatment of the dancing communities during colonial times.

The court heard both the sides and allowed the writ petitions partly. The provisions in violation of the Constitution were struck down, but certain regulatory provisions were upheld. The reasoning of the court, with respect to the contested legal provisions, is encapsulated in the following paragraphs.

Section 2(8)(i) of the Act which defined 'obscene dance' as 'a dance which is designed only to arouse the prurient interest of the audience' was challenged on the grounds that expression 'prurient interest' is vague and will end up having a chilling effect on the dancers. The court rejected these arguments. Tracing Indian as well as foreign cases on obscenity, the court noted that the expression 'prurient interest' has been interpreted in many previous cases and thus it cannot be termed vague. "It is, more so, when Section 292 IPC particularly uses this expression in the deeming

6 S.33A prohibited performance of *all types of dance* in eating houses or permit rooms or beer bars. S. 33B permitted three star hotels and government associated places of entertainment to hold dance performances.

7 *State of Maharashtra* v. *Indian Hotel and Restaurants Association* (2013) 8 SCC 519.

provision relating to obscenity."[8] In aligning itself with the dominant judicial discourse on the question of obscenity which designates all that is sexual as deprave, the court missed an opportunity, yet again, to enrich its own narratives on sexual freedom and agency.[9] Instead it chose to suppress question of erotic (dance) forms which, following the standards of conservative public morality, are erroneously and unjustly labelled as obscene (and hence criminal).

Another provision of the Act under challenge was section 8(4) which stated that "[n]o person shall *throw* or *shower* coins, currency notes or any article or anything which can be monetized on the stage or *hand over personally* or through any means coins, currency notes or any article or anything which can be monetized, to a dancer or misbehave or indecently behave with the working women or touch her person, in any place." This provision was to be read with condition 6 of Part B: "Customer shall not be permitted to throw or shower coins, currency notes or any article or anything which can be monetized on the stage in the direction of the dancer. Customers may, however, make payment of a tip in appreciation of all the dancers by adding a sum to the amount of the bill. Such tip shall be paid by the licensee to the dancers of that evening and under no circumstances such sum shall be deducted from the monthly salary." In defense of these sections, the state argued that these provisions sought to preserve the moral code of section 354A of the IPC (criminalisation of sexual harassment). The petitioner on the other hand had argued that it has been customary for performers to accept tips or rewards from patrons and "[t]his decades old practice is akin to customary practices of Mujras, Lavani (traditional Marathi song and dance) or Tamasha (traditional Marathi theatre) who earn their living in the form of Bakshisi offered by audiences."[10] The court in this regard agreed with the state that the provision "aims at checking any untoward incident" since "throwing" or "showering" the coins and currencies has a "tendency to create a *situation of indecency*";[11] "handing" over money is not inappropriate. The court also set aside the condition requiring addition of tips to the bill as it may not go to the deserving performer. However, in so regulating the manner of giving tips, the legal reasoning rests on a slippery slope where the boundaries between consensual acts (of giving and receiving tips), morally acceptable conduct and sexual harassment are blurred. What is really discerned objectionable in the *manner* of tipping is the underlying eroticisation in the acts of showering or throwing money on the dancers but the state/court couched it as a provision intending to prevent situations of sexual harassment by fixating a cause-effect relationship between the two. The key concept of consent which distinguishes between acceptable and unacceptable conduct is again sacrificed at the altar of moral "decency".

Section 8(2) that provided punishment for contravening section 6(4) was upheld by the court. Petitioners had challenged it on the ground of violation of equality: for

8 *Supra* note 5, para 89.

9 See *eg*., *Joseph Shine* v. *Union of India* (2019) 3 SCC 39; *Navtej Singh Johar* v. *Union of India*, 2018 (1) SCALE 142. For a critique of empty rhetoric of these cases see, LatikaVashist, "Women and the Law" LIV *Annual Survey of Indian Law* (ILI, 2018).

10 *Supra* note 5, para 40.

11 *Id.*, para 93 (emphasis mine).

the same offence of obscenity, whereas the IPC prescribes imprisonment upto three months, the imprisonment is upto three years in section 8(2) of the Act. The court rejected this argument and agreed with the respondents that section 8(2) has to be read along with 8(1). Under section 8(1), where a hotel, restaurant, bar room or any place is used for staging dances without obtaining a licence under section 3 of the Act, that is made a punishable offence. Thus, the offence under section 8(2) is different from the offence that is stipulated in section 294 of the IPC.

Condition 2 of Part B which required that working women, dancers and waiters/ waitresses be employed under a written contract on a monthly salary, was set aside but the provision relating to the payment of remuneration in the bank accounts was upheld. The court held that the state cannot fix the terms of employment. The rights of workers who may be want to perform at more than one place, protected under article 19(1)(g), will also be impinged with such conditions. The employers as well as the workers cannot be dictated the terms of contract who may want to choose, say employment on a contract basis *i.e.* where the remuneration is fixed for each performance. While striking down condition 12 (no alcoholic beverage shall be served in the bar room where dances are staged), the court rightly observed that "[i]t seem[ed] that State is more influenced by moralistic overtones under wrong presumption that persons after consuming alcohol would misbehave with the dancers. If this is so, such a presumption would be equally applicable to bar rooms where the alcohol is served by women waitresses."[12] Condition 20 of Part B (the licensee shall ensure that the areas which fall under the definition of public place shall be covered by CCTV cameras and recording shall be preserved for 30 days) was held to be violative of articles 14, 19(1)(a) and 21 of the Constitution as held in *K.S. Puttaswamy case*.[13]

Broadly one can say that the court uncritically endorsed the notion of obscenity where sex is fixated as depraved, immoral and as a threat to women, outlawing everything else associated with the sexual and erasing all possibilities of imagining playfulness, agency and freedom in the realm of sexual (dance forms).[14]

12 *Id*., para 101.

13 2017 10 SCC 1. With respect to the other provisions, the court held as follows: rule 3(3)(i) whereby a person entitled to obtain or hold licence must possess a 'good character' and 'antecedents' and he should not have any history of 'criminal record' in the past ten years, was quashed on the ground that the provision is not definite and precise but has given liberty to the state in redefining the criminal records. Condition 16 of Part B incorporating a similar provision was also set aside. S. 6(4) which barred the grant of licence under the Act in respect of a place where licence for discotheque or orchestra is granted was held totally arbitrary and irrational and was stuck down as being unconstitutional. Condition 11 of Part A (dance bars should be at the distance of 1 km from the educational and religious institutions) was held to be arbitrary and unreasonable and was quashed, with liberty to the respondents to prescribe the distance from educational and religious institutions, which is reasonable and workable. Condition 2 of Part A (size of stage, segregation between hotel and room, partition between permit room and dance room) was also struck down as unreasonable. Condition 9 (bar room where dances were staged shall be open for public only between 6.00 P.M. to 11.30 P.M.) was upheld as the timings were not manifestly unreasonable.

14 For a critique of such fixation of the category of the sexual in law see, Latika Vashist, "Law, Feminism and Emotions: Working Through the 'Legal Unconscious'" (Unpublished doctoral dissertation, 2019), ch. 4.

Rights of democratic participation of local women

In *Vaishnorani Mahila Bachat Gat* v. *State of Maharashtra*,[15] the petitioners challenged the State of Maharashtra's decision of inviting tender for multilevel contract and for supply of ready to cook food to anganwadi centres as supplementary nutritional food for children, pregnant women and lactating mothers, adolescent girls under Integrated Child Development Scheme (ICDS scheme). It was argued that this was in violation of the decisions of the court in *PUCL* v. *Union of India*[16] and *Shagun Mahila Udyogik Sahakari Sanstha Maryadit* v. *State of Maharashtra*[17] wherein it was held that "contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals." The main issue before the court was whether the state should give contracts for the supply of such food for anganwadis to local *mahila mandals* that are run along democratic lines with local women participating or to large corporates and contractors under the guise of the conditions of the tender.

To understand the context of this case, it is important to mention a few background facts. The Government of Maharashtra passed a resolution which required a highly mechanized and automated process of extrusion and micronutrient fortification. The government then issued a tender notification based on these requirements, which laid onerous conditions on *mahila mandals* to have automated production units, a turnover of one crore or more *etc*. It was pointed out that by introducing the extrusion technology, three *mahila mandals* which were chosen in 2010, were found to be fake where women were projected merely on record but actually these they were managed by all male members acting as agents for big companies and industrialists.

Tracing the provisions of National Food Security Act, 2013, various nutritional programmes of the government, and its own orders, the apex court emphasised upon "complete decentralization of the feeding programme through local women's groups." To this end, the court noted that "it would be appropriate to form groups of the smaller area such as at panchayat or group of panchayats etc., within the District so that the real intention behind the policy is fulfilled in its real sense and supply should be decentralized as much as possible as it is not for the big players/industrialists in the field to cater to the needs of the Scheme as they have usurped in past."[18]

The court rightly noted that the government tender conditions have been arbitrarily fixed to benefit the private sector and large industrialists who are riding on the back of the ICDS "to a captive rural market with the help of government machinery in a naked display of crony capitalism."[19] The court thus disposed off the appeals by directing that fresh tenders be issued.

15 2019 (5) SCALE 1; per Arun Mishra and Deepak Gupta JJ.

16 W.P. (C) No.196 of 2001.

17 Civil Appeal No.7104/2011.

18 *Supra* note 15, para 52.

19 *Id*., para 27

Review of *Sabarimala case*

The Supreme Court's decision which upheld women's right to enter and offer prayers in the Sabarimala temple[20] was met with stiff resistance from right-leaning political parties as well as citizen groups. Despite the categorical verdict, women aged 10-50 years were not allowed to enter the temple and *Kantaru Rajeevaru* v. *Indian Young Lawyers Association,*[21] sought review of the *Sabarimala case*. The apex court, by 3:2 majority, decided to keep the review pending until a larger bench decides questions related to essential religious practices. The majority of Ranjan Gogoi CJI, Khanwilkar and Indu Malhotra JJ were of the opinion that the issue whether court can interfere in essential practises of religion needed examination by larger bench. Till then, the present review (and various other *sub judice* matters in relation to entry of Muslim women in a *dargah*/mosque; Parsi women married to non-Parsis and their entry into a fire temple; and issues relating to female genital mutilation in the Dawoodi Bohra community) would remain pending. D.Y. Chandrachud and R.F. Nariman JJ dissented with the majority decision and (rightly) proceeded to examine the arguments made in the review petition. Disposing off the petition, reiterating their reasons in *Sabarimala* case, they directed the state government to enforce women's constitutional right to worship with the following words:[22]

> The State of Kerala is directed to give wide publicity to this judgment through the medium of television, newspapers, etc. The government should take steps to secure the confidence of the community in order to ensure the fulfillment of constitutional values. The State government may have broad-based consultations with representatives of all affected interests so that the modalities devised for implementing the judgment of the Court meet the genuine concerns of all segments of the community. Organised acts of resistance to thwart the implementation of this judgment must be put down firmly.

Right to life of female foetus versus the burden of record keeping

A writ petition was filed by the Federation of Obstetrics and Gynaecological Societies of India (FOGSI)[23] highlighting problems faced by obstetricians and gynaecologists across the country under the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and thus challenging the constitutional validity of sections 23(1) and 23(2) of the said Act.They argued that the provisions of the Act violate articles 14, 19(1)(g) and 21 of the Constitution of India and sought directions in the nature of certiorari/mandamus for decriminalising anomalies in paperwork, record keeping, clerical errors in regard to the provisions of the Act. It was contended that in the inspections and raids conducted under the Act, even if there are mere anomalies in the paperwork, the authorities seal the sonography machine and file criminal cases. Contrary to the spirit of the Act, the doctors who do

20 *Indian Young Lawyers Association* v. *State of Kerala*, 2018 (13) SCALE 75.

21 2019 (15) SCALE 580.

22 *Id*., para 66.

not conduct sex determination and gender selection end up being targeted on the basis of just anomalies in paperwork as the punishment for any clerical error in Form 'F' is the same as if someone were to perform illegal sex determination. The Act thus fails to distinguish between the cases of presence and absence of *mens rea* and, because of the unreasonable sealing of the sonography machines, also ends up affecting the welfare of the women in need of critical medical care.

Specifically, it was argued that section 23(1) of the Act (which prescribes punishment for medical practitioners for contravention of any provisions of this Act or Rules framed therein) is vague owing to which members of the petitioner society have faced grave hardships and some have undergone criminal prosecution for acts, which cannot be equated with the acts of sex determination. Second, section 23(2) which empowers the state medical council to suspend the registration of any doctor (who is reported by the appropriate authority for necessary action) indefinitely during the pendency of trial presumes guilt of the alleged accused even before conviction by a competent court and hence violates article 21.

The respondents, on the other hand, argued that the appropriate authority conducts inspections pursuant to the directions issued in *Centre for Enquiry into Health & Allied Themes (CEHAT)* v. *Union of India*.[24] In the context of sex-determination and the broader aim of the law which is to ensure gender justice and save female foetus from selective abortion, they maintained that non-maintenance of records is not merely a technical or procedural lapse but the most significant piece of evidence for identifying the accused.

The court, after a close perusal of the provisions of the Act and also the templates forms (*eg*. Form 'F') and other records which need to be maintained by medical professionals under the Act, was categorical that any dilution of the Act or the Rules would only defeat its objective of prevention of female foeticide. The court further stated that what are designated as "clerical requirements" are in fact "pre-requisites for undertaking the procedure".[25] In the absence of the information required in Form 'F', there is no way to find out why the procedure was performed. Incomplete or vague information in the form "would defeat the very purpose of the Act and the safeguards provided thereunder and it would become impossible to check violation of provisions of the Act."[26]

The court further observed that record keeping for the purposes of this law "is not merely a technical or procedural lapse" but "is meant to track/monitor and regulate the use of technology that has potential of sex selection and sex determination."[27] For instance, record keeping provides information about individual patients who could have undergone sex selection or determination techniques, which is penalised under

23 *Federation of Obstetrics and Gynecological Societies of India (FOGSI)* v. *Union of India*, 2019 (7) SCALE 314; per Arun Mishra, Vineet Saran, JJ.

24 (2003) 8 SCC 398.

25 *Supra* note 23, para 59.

26 *Ibid*.

27 *Id.*, para 60.

this Act. Therefore, section 23 should not be read as a stand-alone provision as it is used in the enforcement of other provisions of the Act.

The court also rejected the argument that proviso of section 4(3) be read down. The proviso to section 4(3) mandates a person conducting ultrasonography on a pregnant woman to keep complete records of the same in the prescribed manner; any inaccuracy in the same is held to bein contravention of sections 5 or 6 of the Act, unless the contrary is proved by the person conducting the said ultrasonography. Upholding the provision, the court noted that many statutes enacted for prevention of violence against women and children contain similar provisions where there is a reversal of burden of proof (sections 29 and 30 of the Protection of Children from Sexual Offences Act) and presumptions regarding commission of an offence (sections 113-A and 113-B of the Indian Evidence Act) or the accused's mental state (section 114-A of the Indian Evidence Act). Therefore, there is nothing discriminatory about the reversal of burden of proof in case of PNDT Act which seeks to address a very grave concern of declining sex ratio.

The plea of reading down section 20 - that cancellation or suspension of registration should be done after show cause notice and reasonable opportunity of being heard – was also rejected as section 20(2) provides reasonable opportunity of being heard. The court thus emphasised upon rigorous implementation of the Act which is "an edifice on which rests the task of saving the girl child."[28]

III VIOLENCE AGAINST WOMEN

This section is further divided into two sub sections. The first, on familial violence includes cases of violence in marriage and within matrimonial home (murder of wife, dowry death, cruelty, abetment of suicide). The second sub-section incorporates cases of violence against women outside family or in the public sphere (acid attack, sexual harassment, child marriage). In tracing these cases, I have tried to map the issues, pertaining to evidence, punishment, relevant factor in sentencing, procedure *etc*, which arose in these cases.

Violence in/of family

The most dangerous place for women across the world, concluded a 2018 global study on homicide conducted by United Nations Office on Drugs and Crime Study, is their home.[29] Around 58 percent of all female homicide was by intimate partners or family members dismantling all illusions, if there were left any, of family as a safe space for women. Familial violence – unrecognised, unacknowledged, unreported – continues unabated because of the sanctity attributed to the institutions of family and marriage. The cases in this sub-section seek to supplement the findings of the above mentioned study and support its conclusion that:

> Women need access to a comprehensive range of services provided by the police and justice system, health and social services, which need to be coordinated to be effective. Women also need access to specific

28 *Id.*, para 85.

> measures that enable them to leave a violent relationship [...] the involvement of men in combating intimate partner violence/family-related killings and developing cultural norms that move away from violent masculinity and gender stereotypes [is crucial].
>
> Gender-sensitive approaches that are women-centred rather than considering women as objects of protection and sources of evidence are more likely to build confidence and trust in criminal justice institutions and increase the number of women reporting violence and of perpetrators brought to justice.[30]

Murder of wife[31]

In *Jagdish* v. *State of Madhya Pradesh*,[32] the petitioner was convicted for murder of his wife and five children. He was sentenced to death by the trial court which was confirmed by the high court. His appeal challenging the sentence was set aside by the apex court which confirmed the death sentence in 2009. The petitioner had filed a mercy petition in 2009 which was rejected by the President in 2014. The petitioner filed a writ petition challenging the rejection of mercy petition on the ground that there was a delay of five years in deciding the petition. Correspondingly, he also filed a review petition seeking review of Supreme Court's earlier decision confirming conviction as well as sentence. Relying on *Sriharan's* case,[33] the court held that death should be commuted to life if there is an inordinate and unreasonable delay in execution of death sentence. In this case there was a delay of more than four years on the part of the state government in forwarding the mercy petition which led to the delay in its disposal. He was also incarcerated for almost 14 years, another factor on account of which the court commuted the sentence. However, keeping in view the nature of crime, the court directed that life imprisonment should be for entire remaining life of the petitioner.[34]

Dying declaration

Many cases are recorded in this year of husbands setting their wives on fire where dying declarations of the wives were the primary incriminating evidence.[35] In *Sampat Babso Kale* v. *State of Maharashtra*[36] the appellant and his sister were charged

29 UNODC, Global Study on Homicide: Gender-related killing of women and girls, 2018 (Vienna, 2018), *available at*: https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf (last accessed on Sep. 30, 2020).

30 *Id*. at 56.

31 Also see, *Kalu alias Laxminarayan*v. *State of M.P*., 2019 (16) SCALE 183; per NavinSinha, R.V. Gavai JJ.

32 2019 (3) SCALE 888; per Deepak Gupta, N.V. Ramana, Indira BanerjeeJJ.

33 (2014) 4 SCC 242.

34 Also see, *Sudam @ Rahul Kaniram Jadhav* v. *State of Maharashtra*, 2019 (13) SCALE 354, where the court commuted the death sentence of the appellant (who murdered his wife and four children) to life imprisonment without remission.

35 See for instance, *Jagbir Singh* v. *State of NCT of Delhi*, 2019 (12) SCALE 57; per Sanjay Kishan Kaul, K.M. Joseph JJ.

36 2019 (6) SCALE 58; per S.A. Bobde, Deepak Gupta JJ.

under sections 302 and 498A read with section 34 of the IPC for killing his wife by setting her on fire. The trial court passed an order of acquittal which was reversed by the high court. In appeal before the Supreme Court, the appellants contended that the deceased had committed suicide after an altercation with the appellant husband. The prosecution relied on two dying declarations made before the doctor and special magistrate respectively. Even though the dying declarations were proved, the court did not think it to be a fit case of sole reliance on dying declaration. One of the reasons for the same was the fact that the victim has suffered 98 percent burns. She perhaps was administered a sedative to ease her pain and therefore, according to the court, the "possibility of her being in a state of delusion cannot be ruled out."[37] The finding that the doctor recording the dying declaration had endorsed that the victim was in a fit state of mind was set aside by the apex court since the endorsement was made "not before the statement but after the statement was recorded." And as per the court, "[n]ormally it should be the other way round."[38] In the absence of any evidence denting the credibility of the doctor, it is not clear how the court dismissed the dying declaration endorsed by the doctor merely on the ground of the timing of endorsement of the statement.

The court also agreed with the defense version that since "the deceased died due to a fire in the kitchen of the house and not in the bedroom which clearly indicated that she had committed suicide."[39] The evidence that the deceased's ornaments were found below a pillow in the bed room was read in the following manner: "Mangalsutra, peinjan and even glass bangles are such ornaments which an Indian married woman would normally not remove. In Indian society these are normally worn by the ladies all the times."[40] And therefore, "the defence version that the deceased took off all these ornaments and then went to the kitchen and committed suicide cannot be totally

37 *Id*., para 13.*Cf*: *Kalabai*v. *State of M.P.*, 2018 (7) SCALE 132; per Ashok Bhushan, K.M. Joseph JJ, where the court accepted dying declaration of the victim who had suffered 94 percent burn injuries. In this case the victim and her husband were having an altercation when appellant (husband's sister) intervened and threw burning stove on the deceased, fatally injuring her. The appellant had argued that the deceased "was not in a fit physical condition to record her Statement [...] was restless, Afebrile, Pulse not palpable" and was "so feeble and so restless then [sic] she was not in a position to give the correct version of the incident." The court rejected this argument relying on the magistrate's evidence who had recorded the dying declaration'; in the absence of intention to kill, the appellant's conviction was reduced to s. 304 Part II. Also see, *Bhagwan*v. *State of Maharashtra*, 2019 (10) SCALE 459; per where the court stated that the fact that the deceased wife had suffered from 92% burn injuries and was given pain killers is not enough to challenge the dying declaration which otherwise inspires confidence of the court. *Id*., paras 19, 22.

38 *Id*., para 13. In *PoonamBai*v. *State of Chhattisgarh,* 2019 (7) SCALE 118; per M.M. Shantanagoudar, N.V. Ramana, S. Abdul Nazeer JJ, the appellant was tried for killing her aunt by pouring kerosene over her in a fight. The apex court acquitted the appellant since the dying declaration of the deceased was not reliable. The dying declaration recorded by the magistrate was neither verified by the doctor nor did the magistrate himself attempt to satisfy himself about the deceased's mental state.

39 *Id*., para 6.

40 *Id*., para 18.

ruled out."[41] Non-examination of neighbours who were important witnesses in this case also led to the non-corroboration of the dying declaration. The court thus gave benefit of doubt to the accused and restored the decision of the trial court.

Evidence of parents

In *Mahadevappa* v. *State of Karnataka*[42] the appellant husband, serving as a constable was convicted for killing his wife Rukmini Bai. Before her death, the deceased had told her father that her husband had poured kerosene oil on her and set her on fire. The sessions judge had acquitted the accused of all charges but the high court reversed the order of the sessions court and held him guilty under sections 498A and 302 of the IPC. The apex court dismissed the appeal after appreciating the evidence on record and the testimonies of the deceased's parents. Even though the parents are interested witnesses, the court rightly affirmed:[43]

> In our opinion, there is no reason to discard the evidence of the father and mother of the deceased who are the most natural and material witnesses to speak on such issues. Indeed, in such circumstances, the daughter - a newly married girl would always like to first disclose her domestic problems to her mother and father and then to her close relatives because they have access to her and are always helpful in solving her problems.

Excusing male rage in "sudden fights"

The judicial discourse with respect to the fourth exception of section 300 of the IPC which reduces culpability to culpable homicide not amounting to murder needs to be closely analysed for the way it normalises male murderous rage. Like provocation, a plethora of cases show how the exception of sudden fight also privileges male anger over women's safety within conjugal and domestic settings.[44]

In *Rambir* v. *State of NCT of Delhi*,[45] the appellant strangulated his wife with a *saria* which caused her death. The trial court and high court convicted him for murder. The high court had rejected the invocation of exception 4 on the ground that the case does not qualify the requirement of 'heat of passion' and it was an act of extreme cruelty. The apex court, however, thought it to be a fit case for exception 4 as the incident happened in a 'sudden fight' when the deceased wife had taken some money out of the appellant's wallet. The court noted that there was no pre-meditation and the

41 *Id.*, para 18.

42 2019 (1) SCALE 408; per Abhay Manohar Sapre, Indu Malhotra JJ.

43 *Id.*, para 31.

44 On the exception of sudden fight, also see *Govind Singh* v. *State of Chhattisgarh*, 2019 (7) SCALE 20; per R. Banumathi, R. Subhash Reddy JJ, the appellant father, in an altercation with her daughter regarding changing a bulb, threw burning chimney lamp on her daughter leading to her death. Applying exception 4 of section 300, the apex court reduced conviction from murder to culpable homicide not amounting to murder since the "occurrence was in a spur of moment [...] in sudden quarrel and there was no premeditation." The conviction was reduced to s. 304 Part II and sentence reduced to the period already undergone (eleven years).

45 2019 (7) SCALE 374; per R. Banumathi, R. Subhash Reddy JJ.

iron rod was picked up at the spur of the moment. This, according to the Supreme Court, was "nothing but an act committed by the appellant in a heat of passion". It could only be called "extremely cruel" if it was "barbaric, torturous and brutal, strangulation", which according to the court, was not the case.

Dowry death

In *Jatinder Singh* v. *State of Haryana*,[46] the court upholding the conviction of appellant husband for dowry death and cruelty,[47] reiterated the law laid down in *Rajinder Singh's* case[48] on the meaning of 'dowry' and 'soon before' in section 304B of the IPC:

> [A]ny money or property or valuable security demanded by any of the persons mentioned in section 2 of the Dowry Prohibition Act, *at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage* unless, the facts of a given case clearly and unequivocally point otherwise.[49]
>
> Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of section 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that *the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under section 304B.*[50]

Abetment of suicide

In *Gurjit Singh* v. *State of Punjab*,[51] the question before the apex court was whether the conviction of the appellant husband as confirmed by the high court under section 498-A of the IPC and as recorded by it for the first time under section 306 of the IPC (since the charge against him was for section 304B and not section 306) would be sustainable. The court found that prosecution had successfully proved the case for cruelty. Then the question was: once cruelty under explanation (b) of section 498-A of the IPC is proven and the deceased committed suicide within seven years of the marriage, could the accused also be held guilty for the offence punishable under section 306 of the IPC with the aid of section 113-A of the Indian Evidence Act?

46 2019 (17) SCALE 772; per Deepak Gupta, Aniruddha Bose JJ.

47 Also see, *Jagdish Chand* v. *State of Haryana*, 2019 (1) SCALE 213; per Ranjan Gogoi CJI, R. Banumathi, NavinSinha JJ, where deceased's father-in-law and mother-in-law were convicted under ss. 498A and 304B as they failed to rebut the presumption of s. 113B of Indian Evidence Act.

48 *Rajinder Singh* v. *State of Punjab* (2015) 6 SCC 477. Overruling, *Appasaheb* **v.** *State of Maharashtra* (2007) 9 SCC 721.

49 *Id*., para 20 (emphasis mine).

50 *Id*., para 23 (emphasis mine).

51 2019 (17) SCALE 634; per B.R. Gavai, N.V Ramana, R. Subhash Reddy JJ.

The court clarified the law enshrined in section 113A of the Evidence Act. *Firstly*, the presumption is not mandatory; it is only permissive as the use of expression "may presume" suggests. *Secondly*, the existence of the circumstances mentioned in section would not mean that the presumption is to be necessarily drawn. Before the presumption may be applied, the court shall have to regard "all the other circumstances of the case". The expression "the other circumstances of the case" in section 113-A "suggests the need to reach a cause-and- effect relationship between the cruelty and the suicide for the purpose of raising a presumption."[52] Moreover, the presumption is not irrebuttable.

Coming to the question of abetment of suicide, the court observed that for conviction, the prosecution must establish some act or illegal omission by the accused which has driven the deceased to commit suicide. In the present case, the prosecution could not furnish any evidence to establish that any act or omission of the accused instigated his wife to commit suicide. There was no evidence to the effect that immediately prior to the suicide the deceased was treated with cruelty by the accused owing to which she took the decision of suicide. In other words, there was no cause and effect relationship between the cruelty and the suicide for raising the presumption. The court also clarified that in many other cases where conviction under section 306 of the IPC was held tenable even though charge was under section 304-B of the IPC, the charge had specifically stated that the deceased was driven to commit suicide on account of cruelty meted out to the deceased. In the present case, this was not so and hence the appellant was acquitted of section 306.

Cruelty

Section 498A of the IPC was the first criminal law provision that explicitly recognised how marriage is not a sacred zone of benign intimacy but potentially dangerous, and even life threatening institution for women. Despite the public rhetoric of its "misuse" (which has also influenced judicial attitude), the apex court has delivered important judgements giving a purposive interpretation of the scope and applicability of this provision. On the one hand, the court has countered bald allegations made by women,[53] it has expanded the jurisdiction of courts to entertain women's complaints under this provision, on the other.

Jurisdiction of courts

In *Rupali Devi* v. *State of U.P*.[54] the question before the court was: whether a woman who is forced to leave her matrimonial home on account of cruelty can initiate and access the legal process within the jurisdiction of courts where she is forced to take shelter with her parents or other family members.This was specifically asked in

52 *Id*., para 13.

53 Baseless allegations against extended family members who were not even residing with the complainant may lead to abuse of process of law. Such cases, the apex court has held, are fit for invocation of high court's power to do complete justice under s. 482 of CrPC to quash the proceedings. *Seenivasan* v. *The State by Inspector of Police*, 2019 (11) SCALE 425. Also see, *Tabrej Khan @ Guddu* v. *State of U.P.*, 2019 (5) SCALE 770; *Rashmi Chopra* v. *State of U.P.*, 2019 (7) SCALE 152.

54 2019 (6) SCALE 96; per Ranjan Gogoi CJI, L. Nageswara Rao, Sanjay Kishan Kaul JJ.

a situation where no overt act of cruelty or harassment was allegedly committed by the husband at the parental home of the wife. Taking note of the statement of objects of the Criminal Laws (second amendment) Act, 1983, which had inserted section 498A of the IPC, the court observed that the amendment sought "to combat the increasing cases of cruelty by the husband and the relatives of the husband on the wife." The court also observed that section 178 of the Criminal Procedure Code (CrPC) creates an exception to the "ordinary rule" engrafted in section 177 by permitting the courts in another local area where the offence is partly committed to take cognizance. Also, if the offence committed in one local area continues in another local area, the courts in the latter place would be competent to take cognizance of the matter. Under section 179, if by reason of the consequences emanating from a criminal act an offence is occasioned in another jurisdiction, the court in that jurisdiction would also be competent to take cognizance.

After reviewing the abovementioned sections, the court held that courts at wife's parental place or where she has taken shelter would have the jurisdiction to entertain complaint under section 489A of the IPC as the situation would fall within section 179 of the CrPC. In the words of the court:[55]

> The emotional stress or psychological effect on the wife, if not the physical injury, is bound to continue to traumatise the wife even after she leaves the matrimonial home and takes shelter at the parental home. Even if the acts of physical cruelty committed in the matrimonial house may have ceased and such acts do not occur at the parental home, there can be no doubt that the mental trauma and psychological distress cause [sic] by the acts of the husband, including verbal exchanges, if any, that had compelled the wife to leave the matrimonial home and take shelter with her parents would continue to persist at the parental home [...] The *consequences of the cruelty committed at the matrimonial home results in repeated offences* being committed at the parental home.

Violence in the public sphere

The public sphere – streets, public transport, workplace – historically marked as male, is still unsafe for women, limiting their freedom of movement, freedom of employment as well as freedom of choice. The imagination of women's safety in public sphere remains largely limited to protectionist policies. The focus of such a vision is not on transforming the public sphere in terms of gender equality, it is rather more about saving women by excluding them from participating in public life on their own terms or putting them under strict surveillance. This sub-section includes cases of violence faced by women in the public sphere.

Acid attack

The crime of acid attack in the Indian context is often motivated by unfulfilled expectations of disgruntled men who use acid as a weapon to destroy the identity of

55 *Id*., paras 14-15 (emphasis mine).

women under attack. Acid attack cases reveal the horrifying side of hetrosexual romance which normalises sexism and misogyny as passion, care and love.

In *Yogendra @ Jogendra* v. *State of Madhya Pradesh*,[56] the appellant had thrown acid on the deceased, his lover, a married woman, who could not continue her relationship with him. He had warned her, "though she doesn't want to live with him he is not going to let her live with anybody else". While escaping he also threw acid on other members of the family, burning and injuring all of them. The woman sustained fatal burn injuries and succumbed to her wounds. The appellant was convicted and sentenced under sections 302, 326A and 460 of the IPC and sentenced to death. The Supreme Court upheld the conviction for murder but reduced the sentence to life imprisonment. The court relied on guidelines for rarest of rare cases and found "no particular depravity or brutality" in the acts of the appellant.

In *State of H.P.* v. *Vijay Kumar Alias Pappu*,[57] the defendants threw acid on one Kumari Ishita who had suffered 16 percent burn injury. The trial court convicted them for attempt to murder (section 307 of the IPC) which was reduced to the offense of 'voluntarily causing grievous hurt by dangerous weapons or means' (section 326) by the high court. This appeal sought restoration of conviction under section 307 as it was a case of acid attack which does not deserve "misplaced sympathy". The respondents, on the other hand, submitted that they had accepted and already undergone the sentence imposed by the high court. Moreover, the chemical burns which the victim had suffered were only 16 percent and thus it was not a fit case of attempt to murder. Even as these defense arguments are misplaced as the ingredients of the crime (and *not* the injury suffered by the victim) decide if an offense is made out, the Supreme Court did not disturb the conviction under section 326. However, relying on section 357A of CrPC and various precedents, particularly *Laxmi*v. *Union of India*,[58] the court held that the accused shall pay an additional compensation of Rs 1,50,000/- each and the State of Himachal Pradesh. shall pay the compensation as admissible under the victim compensation scheme.

Abetment of suicide

In *Ude Singh* v. *State of Haryana*,[59] the appellants were convicted for abetment of suicide of the deceased girl. It was the case of the prosecution that the appellants (who were deceased's uncle and cousins) teased and taunted her by addressing her as "wife", "*chachi*" (aunt) and "*bohoria*" (younger brother's wife). The deceased had complained about the same to her family but "as it concerned the future and honour of an unmarried girl", she was advised to remain quiet and no complaint was filed. No panchayat was convened to address the issue of harassment by the girl's family" as it was believed that such a step would eventually affect the marriage prospects of the girl."[60] It was asserted by the girl's parents that she was "exhausted and disgusted of all the taunts and remarks she had to bear" and thus ended her life.

56 2019 (1) SCALE 495; per S.A. Bobde CJI, L. Nageswara Rao, R. Subhash Reddy JJ.

57 2019 (5) SCALE 92; per A. M. Khanwilkar, Ajay Rastogi JJ.

58 2014 (4) SCC 427.

59 2019 (9) SCALE 831; per Abhay Manohar Sapre, Dinesh Maheshwari JJ.

60 *Id*., para 3.

The appellants contended that even if the evidence against them were to be accepted, the offence of insulting the modesty of a woman by some utterances would be made out and thus they could only be held guilty under section 509, but not for abetment of suicide under section 306 IPC. The court rejected this argument stating that the taunting and humiliation of the deceased was "[not] a singular event or one-off affair but had been a continuous feature"[61] and in that sense she was instigated to commit suicide.[62] According to the court, the utterances were" not merely of teasing but of demeaning and destroying the self-esteem of the young girl whose engagement had broken and whose uncle [one of the appellants] was mocking her to join him in matrimony."[63] The court found it to be "the act of humiliation of highest order for the girl, who had personally suffered the set-back of broken engagement"[64] and "was being ridiculed and taunted for her broken engagement."[65]

The conduct of the appellants of "continuous and repeated acts and utterances [...] calculated to bring disgrace to the village girl and to destroy her self-esteem", pushing her to the "brink of helplessness and to the vanishing point of tolerance",[66] the court held, constituted instigation for the description of abetment of suicide. Even as one welcomes this decision as it took the issue of sexual harassment seriously, the judicial discourse remained embedded in patriarchal notions where the honour of a (rural) woman is lost because of her broken engagement) and her self-esteem is contingent on her marriageability. One wonders if the court could contexualise its decision without reinforcing such anti-feminist stereotypes about women's honour and self-esteem.

In *State of Madhya Pradesh* v. *Deepak*[67] the defendant was charged under section 306 of the IPC and section 3(2)(v) of the Scheduled Caste and Scheduled Tribes Prevention of Atrocities Act. On August 9, 2017, one Jyoti Sharma committed suicide and in her dying declaration stated that the accused had molested her and had been harassing her. The single judge of the high court directed that the respondent be discharged. In appeal, the state emphasised upon the fact that the deceased was an employee of a central bank and the defendant had forged her signature to obtain loan. The central bank had issued a notice against her for the repayment of the loan and eventually terminated her from employment. The defendant had even made her landlord evict her. It was also revealed that she had filed several complaints of harassment against the respondent. In his defense, the respondent argued that there was "no provocation, inducement or incitement" that would fall within the description of abetment to sustain a charge under section 306 of the IPC. The apex court rightly held that the high court had erroneously exercised its revisional jurisdiction in discharging

61 *Id*., para 21.
62 *Cf*: *State of West Bengal* v. *Indrajit Kundu*, 2019 (14) SCALE 109.
63 *Supra* note 57, para 21.
64 *Id*., para 21.
65 *Id*., para 21.
66 *Id*., para 22.
67 2019 (5) SCALE 545; per D.Y. Chandrachud, Hemant Gupta JJ.

the accused. At the stage of framing of charges the court has to consider if there is a "sufficient ground for proceeding against the accused" or "presuming" that the offense has been committed. In the present case, there was enough material to draw that conclusion which was ignored by the high court.

Sexual Harassment: procedure of inquiry

In *P.S. Malik* v. *High Court of Delhi,*[68] complaints alleging sexual harassment were filed against the petitioner, an additional district judge in Delhi, in 2016 by a junior judicial assistant. The complaints were addressed to the Chief Justice of the High Court of Delhi and heard before the full court which ordered suspension of the petitioner pending proceedings, filing of a police complaint and constitution of an internal complaints committee (ICC) consisting of five members to inquire into the sexual harassment allegations. The ICC interacted with both parties separately and submitted a preliminary inquiry report recommending initiation of disciplinary proceedings against the petitioner. To this end, an inquiry committee in terms of section 4 of the Sexual Harassment of Women at Workplace Prevention, Prohibition and Redressal) Act of 2013 (hereafter, 'SH Act') was constituted which submitted its report to the ICC. The report of the inquiry committee was shared with the petitioner so that he could submit his written submissions. It was also decided that certified copies of the minutes of the full court meetings would be shared with the petitioner. But, since the preliminary inquiry report was not relied on, it was decided by the high court, the same would be not supplied to the petitioner. After receipt of the inquiry report, the petitioner filed the present writ petition under article 32 of the Constitution seeking quashing of: 1) the resolutions of the high court passed in relation to this inquiry as arbitrary, without any jurisdiction and violative of the provisions of the SH Act; 2) the proceedings and the preliminary inquiry report of the ICC; 3) the charge sheet.

The petitioner's main argument was that the full court of the high court on receiving the complaint did not follow the procedure given in the SH Act. The court should have handed over the complaint to the ICC for inquiry but it instead, before an inquiry and without hearing the petitioner, suspended him and forwarded the complaint to the police. These orders, he contended, were passed by an authority, which had no legal competence to pass those directions under the Delhi Higher Judicial Service Rules, 1970 and the All India Services Rules. Also, there was blatant violation of the SH Act in this case, vitiating the entire procedure as the preliminary inquiry report of the ICC was also wrongly denied to the petitioner.

The apex court observed that in accordance with the settled law regarding article 235 of the Constitution, high court is the disciplinary authority with regard to judicial officers, including suspensions and imposing punishments, except decisions of dismissal, removal, reduction in rank or termination of services of judicial officers for which the Governor issues the orders. With regard to the argument that in view of the inquiry report by ICC as envisaged by sections 11 and 13 of the SH Act, the high

68 2019 (11) SCALE 242; per Ashok Bhushan, Navin Sinha JJ.

court could not have taken a decision to initiate the inquiry or to suspend the petitioner, the court held that there was no error in the decisions of the high court since:[69]

> The provisions of the Act, complaint mechanism and mechanism for constitution of the Internal Complaints Committee, mechanism to inquire the complaint are all for protection of dignity and welfare of women at workplace. The provisions of Sections 11 and 13 in no manner affect the control of the High Court under Article 235, which it has with respect to judicial officers.

Thus, the full court of the high court was within its powers to initiate disciplinary inquiry against the petitioner and suspend him. With regard to the contention that withholding of preliminary inquiry report vitiated the proceedings, the court took note of the provisions of the SH Act and clarified that the inquiry report, which has been referred to in section 13 of the SH Act is an inquiry report which has been submitted by the ICC after completion of the inquiry when it "arrives at the conclusion that the allegation against the respondent has been proved". The right of appeal under section 18 is given only when the report is submitted under section 13. Even under the second proviso of section 11(1), the requirement is to make available a copy of the "findings" to enable the parties to make a representation against the findings. The parties are not entitled to have the copy of the report in which there are no findings. In the present case, the preliminary inquiry report did not contain any findings on allegations made against the petitioner; it only stated that inquiry should be held. Thus, there was no violation of the SH Act and the appeal was dismissed.

Child marriage

In *Hardev Singh* v. *Harpreet Kaur*,[70] appellant and respondent married each other without the consent of their parents. It seems that the parents of the respondent were creating problems for the couple. Therefore the couple sought police protection. On an application filed by the girl's father, the high court recalled the protection order and directed registration of an FIR under section 9 of the Prohibition of Child Marriage Act, 2006 against the appellant. Section 9 prescribes punishment for male adult above 18 years of age who contracts a child marriage. It was alleged that the appellant was only 17 years of age at the time of marriage.

In this appeal, the apex court first and foremost called out the patent error in the high court's order in as much as section 9 is applicable only to *adult* males. And then proceeded to explain that even if it were believed that the appellant was 18 years old, then also he was not punishable under the said provision. The court looked at the scheme of the Act as well as the legislative intent to arrive at its decision. The Act, in section 2(a) defines child as a person who, if a male, has not completed 21 years of age, and if a female, has not completed 18years of age. Under section 2(b) of the Act, "child marriage" means a marriage to which either of the contracting parties is a child. Thus, even if the husband is between 18 and 21 years of age, it can be treated as

69 *Id*., para 22.

70 2019 (16) SCALE 416; per M.M. Shantanagoudar, Aniruddha Bose JJ.

a child marriage. It is to be noted that while section 9 punishes an adult male for contracting child marriage, the Act contains no provision for punishing a female adult who marries a male child.[71]A literal interpretation of the Act would imply that if a male aged between 18 to 21 contracts marriage with a female above 18 years of age, the female adult would not be punished, but the male himself would be punished for contracting a child marriage, as he is a "child". But this, the court clarified, will go against the legislative intent which was particularly to address the disproportionate impact of child marriage on child brides.

The court noted that though "both men and women are deemed to have attained majority at eighteen years of age under other laws, a differential metric has been adopted for the purposes of defining child marriage."[72] In court's understanding higher age is prescribed for men than women because of the "prevailing societal notions that the age of eighteen years is insufficient for a boy to attain the desired level of education and economic independence, and that an age gap ought to be maintained between the groom and the bride."[73] If we overlook the absurdity of this discriminatory reasoning (the presumption that girls reach the "desired level of education and economic independence" at 18 years is backed by the regressive notion that a man is the primary bread earner for the family, while a woman can marry early as she will be taken care of by the husband), the broad point is that the differential marriage age mentioned in the Act should not become a reason for criminalising a "male child" who has married an adult woman.

The Act definitely treats men who are above the age of 18 as having sufficient maturity to be held responsible for marrying a female child. The court observed:[74]

> [T]he intention behind punishing only male adults contracting child marriages is to protect minor young girls from the negative consequences thereof by creating *a deterrent effect for prospective grooms who, by virtue of being above eighteen years of age are deemed to have the capacity to opt out of such marriages*. Instead, the 2006 Act affords such a male, who is a child for the purposes of the Act, the remedy of getting the marriage annulled by proceeding under Section 3 of the 2006 Act. Hence, male adults between the age of eighteen and twenty-one years of age, who marry female adults cannot be brought under the ambit of Section 9, as this is not the mischief that the provision seeks to remedy.

In the present case, since the respondent was above 18 years at the time of marriage, the appellant was not held guilty.

71 The court noted that "an adult woman is exempt from punishment for marrying a male child as, in a society like ours, decisions regarding marriage are usually taken by the family members of the bride and groom, and women generally have little say in the matter. We hasten to emphasise that we do not wish to comment on the desirability of maintaining the aforesaid distinction in culpability. However, the context in which this distinction was considered appropriate by the legislature must be taken into account." *Id*., para 3.7.

72 *Id*., para 3.6.

73 *Id*., para 3.6.

74 *Id*., para 3.8 (emphasis mine).

IV SEXUAL VIOLENCE

Promise to marry

In *Anurag Soni* v. *State of Chhattisgarh*,[75] it was the case of the prosecution that the complainant and appellant were in love since 2009 and the appellant had proposed marriage, a fact which was known to both their families. In 2013, the appellant had sexual intercourse with the complainant on the pretext of marriage but instead of marrying her, he married someone else after which the complainant lodged an FIR against him. The trial court as well high court convicted him under section 376(1) of the IPC and sentenced him to ten years punishment. The argument of the complainant was that her consent was based on a misconception of fact that the accused will marry her, and was thus vitiated as per section 90 of the IPC. Also, it was not just a case of breach of promise but from the very beginning the accused's intention was not to marry her. The appellant however asserted that the complainant was in love with him and despite knowing that the accused were to marry another girl, she and her family continued to pressurise him for marriage.

The court rejected appellant's version and held this to be a case of rape where the accused made a false promise of marriage and obtained consent with false promise. For the court it was difficult to believe that "an educated girl studying in B. Pharmacy", would pressurise the accused to marry her knowing that he wanted to marry someone else or would give consent for physical relationship. Rather, the court said, she did not give her consent initially, but only after appellant's promise of marriage, she consented for physical relationship with the appellant. In a strange and erroneous reading of the presumption in evidence law regarding consent in rape cases (which only pertains to cases under section 376(2)), the court observed:[76]

> Even considering Section 114-A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her.

The court concluded with the following offensive remarks:[77]

> "a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life [...] Rape leaves a permanent scar on the life of the victim [...]Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity.

The question of promise to marry again came before the bench of D.Y. Chandrachud and Indira Banerjee JJ in *Pramod Suryabhan Pawar* v. *State of Maharashtra.*[78] The complainant and the accused were in a relationship for over six years but when the accused did not marry her citing the reason of their different

75 2019 (6) SCALE 211; per L. Nageswara Rao, M.R. Shah JJ.

76 *Id*., para 14.

77 *Id*., para 15.

78 2019 (11) SCALE 209.

castes, the complainant filed an FIR under section 376 of the IPC and for offences under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Specifically, on facts the court held:[79]

> [F]ailure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter.

Thus, it was difficult to accept that the complainant was under the "misconception" of marriage when she continued her relationship with the appellant.[80] Citing the settled law, the court reiterated:[81]

> The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

The court emphasised that consent given by the complainant to have sexual intercourse with whom she was in love, on a promise of marriage in future, cannot be considered as given under "misconception of fact".

The question of consent in promise to marry cases is fraught with conceptual difficulties. It takes us to the question of why and under what circumstances someone consents to the sexual act. In cases where the basis of consent is clearly fraudulent with respect to the sexual act (*eg*: if a woman consented to safe sex with condom but the accused punctured holes in condom), it is clearly rape. But when consent is based on attraction, love, promises, then the sexual wrong is connected with the (untheorised) realm of desire where the terms of consent cannot be laid down in strict contractual terms. The Indian Supreme Court has attempted to resolve the conundrums of agency in these cases by making a separation between false promise (which is rape) and breach of promise (which is not an offense). Where the man did not want to marry from the very beginning and was using marriage as a trope, this would be false promise; where the woman said yes out of love, passion, attraction, this will not be rape even if there was an unfulfilled promise of marriage. But what if the girl said yes out of love but the boy did not want to *marry from the beginning*? Here, would the court focus on girl's sexual agency at the time of consenting or boy's deception? What if in a given case the promise was not of marriage, but an expensive (material) gift? If the man failed to buy the promised object after the sexual act, would that be called rape too? Little probing into the promise to marry category reveals how the law is enmeshed

79 *Id*., para 20.

80 Also see, *Dr.Dhruvaram Sonar* v. *State of Maharshtra*, 2019 (1) SCALE 64; per S. Abdul Nazeer, A.K. Sikri JJ, where, on facts, the court quashed the FIR filed for rape as the complainant admitted that she being a widow needed a companion and the couple was in a love affair for a long time.

81 *Supra* note 79, para 18.

with social and moral expectations that regulate sexuality. At the heart of all this remains the construct of a "good woman" who resisted but yielded with the promise of marriage, not a carefree lover but a future wife.

One may also reflect upon the collapse of "rape because of false promise" and "cheating and deception".[82] While the court forecloses the question of possible differences between cheating and rape in promise to marry cases, those for whom the question of sexual agency and freedom is significant equating bad relationships with criminal sexual violence is a dangerous proposition.

Attempt to rape

In *Chaitu Lal* v. *State of Uttarakhand*,[83] the appellant challenged his conviction for the offence of outraging a woman's modesty and attempt to rape. In order to attract culpability under section 354 of the IPC, the prosecution has to prove that the accused applied 'criminal force' on the victim with the intention of outraging her modesty. In the present case, the appellant had forcibly entered the house of the complainant in a drunken state, being aware of her husband's absence. He exerted criminal force on her, pounced upon her and forcibly lifted her petticoat. His conviction for the offense of outraging the modesty of a woman was upheld. On the charge of attempt to rape, it had to be shown that the appellant had the intention of committing rape and would have executed the same if he were not stopped. In the present case, there was evidence to the effect that the complainant and her daughter had pleaded with him to let go of her, but he did not show any reluctance that he was going to stop from committing the aforesaid offence. His conduct was indicative of his definite intention to commit the offence. Had there been no intervention, the appellant would have succeeded in executing his criminal design. He was thus also convicted under section 376 read with section 511 of the IPC.

Gang rape: framing of charges

In *Thongam Tarun Singh* v. *State of Manipur*,[84] the appellants were convicted of gang rape. Their appeal challenging conviction was rejected by the apex court in a previous order. Now the quantum of sentence was under consideration. The appellants argued that the courts below had erred in convicting them under section 376(2)(g) of the (pre 2013) IPC since charges were not framed under the said provision and this aspect should be considered while deciding the sentence. The court rejected this argument, relying on section 464 of the CrPC (no order shall be deemed invalid on the ground that no charge was framed unless it has led to failure of justice).[85] In the present case, both the accused had jointly raped the complainant and were rightly convicted under section 376(2)(g). The court however reduced the sentence as they had no criminal antecedents, belonged to a backward area and their conduct in jail was satisfactory.

82 *Supra* note 76, para 15.

83 2019 (16) SCALE 471; per N.V. Ramana, Ajay Rastogi JJ.

84 2019 (7) SCALE 435; per R. Banumathi, S. Abdul Nazeer JJ.

85 *Cf*: *Smt. Chitambaramma*v. *State of Karnataka*, 2019 (11) SCALE 300; per Hemant Gupta, L. Nageswara Rao JJ, where the court found that conviction for murder, when the charge was one of conspiracy, caused failure of justice and was thus unsustainable.

Rape and murder of minor

In *Vijay Raikwar* v. *State of Madhya Pradesh*,[86] the appellant was tried under sections 376 (2) (f) and 201 of the IPC as well as sections 5(i), 5(m), 5(r) of POCSO Act for rape and murder of a girl aged seven and a half years. The sessions court sentenced him to death which was confirmed by the high court.[87] In appeal before the apex court, the appellant challenged the conviction as there was no eye witness and the prosecution's case was entirely based on circumstantial evidence. Alternatively, he pleaded that the sentence be commuted to life imprisonment. On the question of conviction, the Supreme Court rejected the plea since the victim was last seen with the appellant and undisputed incriminating evidence was found against the accused in his own house. However, the court commuted the death sentence since the case, though "brutal", did not fall in the rarest of rare category.[88] The appellant's young age (19 years) at the time of commission of the crime, no previous criminal history and good conduct in jail were the mitigating circumstances noted by the court.[89]

In *Dattatraya @ Datta Ambo Rokade*v. *State of Maharashtra*,[90] where the appellant was convicted for rape and murder of a five year old, the court commuted the death penalty to life imprisonment without remission advancing several reasons like ineffective legal representation, absence of any finding that he continued to pose a threat to the society, and that he did not have the intention to cause the death of the child (though he could be presumed to know that rape of such a young girl could lead to such injuries that in all probability would lead to death).

In *Md. Mannan @ Abdul Mannan* v. *State of Bihar*,[91] the Supreme Court reopened and heard in open court the petitioner's application for review which had been dismissed by circulation. The question before the court was whether death sentence imposed on the petitioner for rape and murder of an eight year old girl should be commuted to life imprisonment. The petitioner's counsel argued that despite the mandate of section 235(2) of the CrPC, the trial court did not give opportunity to the

86 2019 (3) SCALE 221; per A.K. Sikri, S. Abdul Nazeer, M.R. Shah JJ.

87 *Cf*: *Baiju Kumar* v. *State of Jharkhand,* 2019 (11) SCALE 6; per U.U. Lalit, Vineet Saran JJ, where appellants were acquitted of the charges of kidnapping and murder of a three and half year old girl since the circumstantial evidence against them could not establish guilt beyond reasonable doubt.

88 Relying on *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684 and *Shyam Singh Alias Bhima* v. *State of Madhya Pradesh* (2017) 11 SCC 265. Also see, *Ravishankar @ Baba Vishwakarma*v. *State of M.P*., 2019 (13) SCALE 375; per R.F. Nariman, R. Subhash Reddy, Surya Kant JJ.

89 Also see, *Sachin Kumar Singhraha* v. *State of M.P*., 2019 (5) SCALE 39; per N.V. Ramana, M.M. Shantanagoudar, Indira Banerjee JJ (25 years without remission); *Raju Jagdish Paswan* v. *The State of Maharashtra*, 2019 (1) SCALE 735 (30 years without remission); per S.A. Bobde, L. Nageswara Rao, R. Subhash Reddy JJ; *Nand Kishore* v. *State of M.P*., 2019 (1) SCALE 500; per S.A. Bobde, L. Nageswara Rao, R. Subhash Reddy JJ (25 years without remission). Even from a close perusal of these cases, it is not clear on what sentencing principles guide the court in arriving at the exact term of life imprisonment.

90 2019 (13) SCALE 187; per Indira Banerjee, Deepak Gupta, N.V. Ramana JJ.

91 2019 (7) SCALE 468; per Indira Banerjee, M.M. Shantanagoudar, N.V. Ramana JJ.

petitioner to show mitigating circumstances; the quality of evidence against the accused, which is a factor relevant in sentencing, was weak (no forensic evidence was available, conviction was on circumstantial evidence); he was not given adequate legal aid at any stage of the trial, including sentencing; and he had developed mental illness during his confinement in the prison. Relying on its death penalty jurisprudence, the importance of opportunity of fair hearing to the convict under section 235(2), and taking into account all the above factors and his socio-economic background of extreme deprivation, the court commuted the death sentence to life imprisonment till his natural death, without reprieve or remission.

Rarest of Rare

In *Manoharan* v. *State by Inspector of Police*, *Variety Hall Police Station, Coimbatore*,[92] the court was called to decide upon the sentence of death penalty awarded to the appellant for the offences of rape and murder. The facts of this case give a chilling account of the events that led to the murder of a girl aged 10 years and her seven year old brother. The children were kidnapped by appellant's accomplice (who was later killed in a police encounter), the girl was raped and sodomised by the two and then the children were thrown alive into a water body where they died by drowning. R.F. Nariman and Surya Kant JJ dismissed the appeal of commutation of sentence, taking note of the rarest of rare guidelines and also the legislative intent expressed in amendments made to POCSO wherein death penalty was introduced for aggravated sexual assault. The judges noted that the appellant had shown no remorse and "given the nature of the crime [...] it is unlikely that the Appellant, if set free, would not be capable of committing such a crime yet again."[93] His confessional statement, they added, could not be read as an expression of remorse since he had falsely retracted those parts of the statement which implicated him.

Sanjeev Khanna J dissenting, commuted the death sentence to life imprisonment till his natural life without remission. Following *Bacchan Singh*[94] and *Machhi Singh*,[95] he emphasised that death penalty should be awarded if there is no possibility of reform and rehabilitation, the accused continues to pose a danger to the community in future and despite the mitigating circumstances, there is no alternative to death penalty. Referring to *V. Sriharan*[96] while commuting the sentence, he reiterated that when life imprisonment is considered disproportionate or inadequate, the court may direct sentence for life imprisonment without any right to remission *i.e*. imprisonment for the entire course of life with no recourse to remission, subject to the power that may be exercised under articles 72 and 161 of the Constitution. In the present case, besides mitigating circumstances like poverty, young age at the time of commission and absence of criminal antecedents, Khanna J was of the opinion, confession by the appellant

92 2019 (10) SCALE 284.
93 *Id*., para 25.
94 AIR 1980 SC 898.
95 AIR 1983 SC 957.
96 (2016) 7 SCC 191.

was an expression of remorse and this should be taken into account while deciding the punishment. In the words of the judge:[97]

> Confession of guilt is an acceptance of one's sin. Though psychologists are not clear as to how precisely guilt operates to produce confession, one possibility is that it tends to cure self hostility. Pangs of conscience following the committal of an offence would normally have a role to play when the person confesses, for *if a person does not feel the guilt, he would normally not confess to an act which is regarded as evil*. By confessing, as an act of penance, a person *may seek and beg for forgiveness*. However, to make a confession can be a degrading and humiliating experience, yet the psychoanalytic models suggest that this is the first step back into society. (See *'The Value of Confession and Forgiveness'*, Carl Jung).

Further:[98]

> [T]o confess to such acts of crime and misdeeds before all and everyone, including the Magistrate could only mean that *the appellant had felt shame, remorse and alienation from the society*. It is probable, among other reasons, that the *appellant had confessed his guilt in order to seek forgiveness.* Otherwise, I do not see any cause for him to appear before the Magistrate and on oath, disclose in detail and accept his direct involvement in the crime.

The judicial narrative, *contra* majority opinion, focussed on the criminal and *his* emotions and saw him as one capable of reform. His confession was read as an acceptance of guilt, expression of remorse and a plea for forgiveness. The judge also believed:[99]

> [R]etraction by itself [...] should not be treated as absence of remorse or repentance, *albeit* an afterthought or on advice propelled by fear that the appellant in view of his admission may face the gallows, and that the earlier confession made seeking forgiveness would be the cause of his death. Athought of doubt and attempt to retract had surfaced on account of belief that the sense of remorse, repentance and forgiveness would not be appreciated and given due regard,cannot be ruled out. Benefit in this regard must go to the appellant.

Review petition was filed against the above decision,[100] raising several grounds including the confirmation of death penalty by way of 2:1 split decision.[101] The court rejected this contention with the following words: "dissenting opinions have little precedential value and that there is no difference in operation between decisions

97 *Supra* note 93, para 34.

98 *Id.*, para 35. Relying on *Bishnu Prasad Sinha and Gurdeep Singh alias Deep* v. *State (Delhi Admn.)* (2000) 1 SCC 498; *Mohd. Maqbool Tantray* v. *State of Jammu and Kashmir* (2010) 12 SCC 421.

99 *Id.*, para 38.

100 *Manoharan* v. *State of Inspector of Police*, 2019 (14) SCALE 800.

rendered unanimously or those tendered by majority, albeit with minority dissenting views."[102] Rejecting "mere young age and presence of aged parents" as reasons for commutation, the majority judges, in a strange interpretive turn, flipped young age into a reason *for* awarding death sentence: "One may view that such *young age poses a continuous burden on the State* and presents a longer risk to society, hence warranting more serious intervention by Courts."[103] Dismissing the review, they insisted:[104]

> [T]he attempted retraction of the statement shows how the petitioner was in fact remorseless. Such belated retractions further lay rise to the fear that any remorse or repentance being shown by the petitioner now may be temporary and that he can relapse to his old ways. Irrespective of the underlying reasons behind such retraction, whether it be the fear of death or feeling that he was not getting any benefit of his earlier confession, but the possibility of recidivism has only been heightened and we can no longer look at the initial confession in a vacuum.

This case has opened up a series of questions on the relevance and importance of emotions in criminal sentencing. The contrasting majority and minority views point to competing understandings of psyche of a person who has committed a horrific crime and has confessed to it. The enquiry about the criminal – who s/he was before and at the time of the commission of the crime and what s/he has *become* after the commission,whether s/he is capable of reform, whether s/he has recidivist tendencies, and how does one find these recidivist tendencies – is not about reproducing legal templates of mitigating factors but requires a long and continuous one-on-one engagement with the convict during the course of the trial.

Mental illness as a mitigating factor

In *Accused 'X'* v. *State of Maharashtra*,[105] the question before the Supreme Court was whether post--conviction mental illness is a mitigating factor for converting death sentence to life imprisonment. The appellant, sentenced to death for rape and murder of two minor girls, sought a fresh review of the sentence on the ground of post-conviction mental illness. At the time of the review, the appellant had been on death row for almost 17 years. While relying on longstanding judicial precedents as well as prison rules which recognise post-conviction mental illness as a ground for

101 Also see, *Ravi* v. *State of Maharashtra*, 2019 (13) SCALE 412, where the court was again split on the question of death sentence. Surya Kant, R.F. Nariman JJ upheld the death sentence, while R. Subhash Reddy J commuted it to life imprisonment without remission. "The appellant instead of showing fatherly love, affection and protection to the child against the evils of the society, rather made her the victim of lust. Its a case where trust has been betrayed and social values are impaired. The unnatural sex with a two-year old toddler exhibits a dirty and perverted mind, showcasing a horrifying tale of brutality." *Id*., para 61 (majority opinion).

102 *Supra* note 101, para 60.

103 *Id*., para 65.

104 *Id.*, para 66.

105 2019 (6) SCALE 407; per N.V. Ramana, M.M. Shantanagoudar, Indira Banerjee JJ. In accordance with s. 23 (1) of the Mental Healthcare Act, 2017 and the right to privacy, the name of the accused was not disclosed.

mitigation of sentence and clemency respectively, the court clarified that "the normative justification [of mental illness as a mitigating factor] is founded in the Constitution as well as the jurisprudence of the 'rarest of the rare' doctrine."[106] However, for the court, accused's mental instability ought to be *severe* to warrant mitigation and therefore "this ground needs to be utilized *only in extreme cases* of mental illness *considering the element of marginal retribution which survives*."[107] The court thus held that a 'test of severity' be relied on to recognize that mental illness which may qualify as mitigating:[108]

> the test envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment.

"The assessment of such disability", the court held, "should be conducted by a multi-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc.), including professional with expertise in accused's particular mental illness."[109] The distinction between severe and mild mental illness, to be determined by medical practitioners and diagnostic annuals, takes judicial mercy into the domain of medical experts who would now decide who is entitled to live. In so bestowing its own powers on medical experts, the court failed to recognise the import of its own observation that prison conditions *lead to* mental illness: "multiple circumstances [in a prison] such as overcrowding, various forms of violence, enforced solitude, lack of privacy, inadequate health care facilities, concerns about family etc, can take a toll on the mental health of the prisoners."[110] If it is the prison system that is causing the convicts to lose their rational faculties, can they be denied merciful treatment in sentencing merely because they were not (yet) "severely" affected?

In the present case, while the court was not satisfied with the assessment of the doctors that the appellant suffering from a "severe mental illness", it refrained from reconstituting a panel of medical experts for reassessment of his mental state. Thus, it bypassed the procedure that it sought to put in place by focussing on other considerations for the ends of justice, highlighting the importance of judicial mercy in death penalty cases. Since the appellant was on death row for almost 17 years and "has been reeling under bouts of some form of mental irritability since 1994",[111] his death sentence was commuted to life imprisonment without remission. The state government was directed to consider this case under appropriate provisions of the Mental Healthcare Act, 2017 and to provide for his rights under that Act.

106 *Id.*, para 55.
107 *Id.*, para 64 (emphasis mine).
108 *Id.*, para 68.
109 *Id.*, para 69.
110 *Id.*, para 45.
111 *Id.*, para 72.

Delay in FIR

In *Parkash Chand* v. *State of Himachal Pradesh*,[112] a special leave petition was filed challenging conviction under sections 376 and 509 of the IPC. The court allowed the appeal as there was a delay of seven months in lodging of FIR and several inconsistencies in the evidence of prosecution witnesses with respect to extra judicial confession made by the accused. The court did not find the complainant a credible witness on many counts *viz.*, the place where the alleged occurrence took place was a "common path" and it was unlikely that no one would have heard her screams of resistance and the time gap between the complaint and the alleged incidents.[113] Unfortunately, the court also relied on an unwarranted observation made in medical examination report that the complainant was "used to habitual sexual intercourse" to arrive at its decision even though past sexual experience of the victim is not relevant.[114]

V VIOLENCE BY WOMEN

In *Nawaz* v. *The State represented by Public Prosecutor*[115] a woman with her paramour assaulted and killed her husband conjointly. After the killing, they burned the corpse and tried to hide the evidence. The lower court and high court convicted them under sections 302 and 201 read with section 34 of the IPC. The Supreme Court confirmed their conviction though the only evidence was an extra judicial confession made to the teacher of the village. But the court reduced the guilt from section 302 to section 304 (Part I) by giving the benefit of exception 1 of section 300 (which the two judge bench of the Supreme Court described as "explanation 1 of Section 300").[116] The terse reasoning of the court for allowing the defence of grave and sudden provocation was that the deceased called his daughter a "prostitute" as he suspected his wife's paramour to have slept with both his wife and his daughter. The word "prostitute" was accepted as so "grave" in judicial imagination that it (partially) exculpated a wife from the guilt of murdering her husband along with her paramour. For the court, the case satisfied the twin tests of provocation – the appellants were subjectively provoked hearing this word (even as they violated the moral rules of monogamy and marriage themselves) and the provocation was also objectively grave: "In our society, no lady would like to hear such a word from her husband. Most importantly, she would not be ready to hear such a word against her daughters. The

112 2019 (3) SCALE 289; per Ranjan Gogoi CJI, Sanjay Kishan Kaul, K.M. Joseph JJ.

113 *Id*., para 17. Also see, *Ganga Prasad Mahto* v. *State of Bihar*, 2019 (5) SCALE 305; per Abhay Manohar Sapre, Dinesh Maheshwari JJ, where the court acquitted the accused of the charge of rape since the complainant was not examined by any doctor after the alleged incident, there was evidence of similar false allegations made by the complainant and the absence of any witnesses to corroborate the prosecution story.

114 The Indian Evidence Act, s. 53A.

115 2019 (1) SCALE 718; per Mohan M. Shantanagoudar, Dinesh Maheshwari JJ. Also see, *Vidyalakshmi @ Vidya* v. *State of Kerala*, 2019 (3) SCALE 504; per M.R. Shah, U.U. Lalit JJ, where a woman and her paramour conspired and killed the woman's husband.

116 *Id*., para 12.

incident is a result of a sudden and grave provocation by the deceased."[117] But one may ask, what is so degrading and provocative about the mere utterance of this word? Why was this considered such a big insult?[118] This surveyor has been arguing against reading exception 1 as honour-based defense that justifies male rage. This case compels one to extend the argument of excluding from the ambit of provocation law even the misplaced notions of (female) honour that invoke retributive rage in women.

In another case[119] one Gargi was tried for the killing her husband by strangulation with the help of her brothers and staging it as suicide. The trial court convicted all the accused relying on circumstantial evidence. The high court however acquitted the brothers, maintaining the conviction of the appellant. In appeal before the Supreme Court, the appellant contended that with the acquittal of her brothers, the chain in the circumstantial evidence was broken as she could not have executed the crime alone. It was also pointed out that the prosecution story was based on unsubstantiated allegations like the appellant ill-treating her husband who was in fear of his death at the hands of his wife. In fact, it was asserted that the complainant (deceased's brother) had falsely implicated the appellant to grab the property of the deceased. The apex court, after minutely examining the evidence on record, found glaring gaps in the investigation, non-examination of important witnesses by the prosecution and baseless conjectures in its version. The absurd application of last seen theory – that the deceased husband was last seen with his wife - to presume appellant's guilt was called out by the apex court as there was enough time gap between the point when they were seen together and the discovery of death. Thus, for want of proof beyond reasonable doubt, the appellant was acquitted.

VI CLAIMS OF MAINTENANCE, COMPENSATION, PENSION

In *Ajay Kumar* v. *Lata @ Sharuti*,[120] the respondent had filed a petition for maintenance under section 12 of the Domestic Violence Act. She asserted that after her marriage, she and her husband resided on the ground floor of a house which was the ancestral Hindu joint family property. After the death of her husband she gave birth to a child and was then driven out of the matrimonial home. She contended that the appellant (deceased husband's brother) and her husband had jointly carried on a business from which each had an income of about Rs 30,000 per month. The trial court and the high court directed the appellant to pay interim maintenance to the

117 *Id*., para 13.

118 One may recall the words of Nivedita Menon in this regard: "The feminist response to being called whores or chhinaal should not be to protest fruitlessly, 'We are not whores!' but to turn the insult around and ask, 'What makes you think this is an insult? We refuse the terms of this insult.' What if all women were to say we are 'loose'—we are not tightly controlled—and if that makes us whores, then we are all whores. If we are all bad women, then patriarchy had better watch out. Or, as Archana Verma puts it: 'One day, I will hear hurled at me the words, loose woman, chhinaal, prostitute … And I will turn around and say, "Thank you for the compliment". That day will come. And it will be a day of feminist celebration." Nivedita Menon, *Seeing Like a Feminist* (Zubaan and Penguin Books, 2012).

119 *Smt Gargi* v. *State of Haryana*, 2019 (12) SCALE 617; per A.M. Khanwilkar, Dinesh Maheshwari JJ.

120 2019 (7) SCALE 193; per D.Y. Chandrachud JJ.

respondent and her child which was challenged by the appellant. The apex court allowed the payment of interim maintenance (subject to final adjudication on the merits of the complaint) by the appellant since the two brothers had jointly run the family business and lived in a joint family house.

Shoda Devi v. *DDU/RIPON Hospital Shimla*[121] was a special leave petition against the judgement and order passed by the National Consumer Disputes Redressal Commission regarding the quantum of compensation for medical negligence and deficiency in service. Shoda Devi was diagnosed with fibroid and endometrial hyperplasia and was advised to undergo a minor operation. The respondent doctor at DDU hospital administered intravenous injection in the right arm of the appellant before the procedure. Later, complications arose and she was shifted to another hospital in a taxi arranged by her husband. There she was diagnosed with "acute arterial occlusion with ischemia of limb caused by intra arterial injection" which eventually resulted in amputating her right arm. On examination of evidence, the national commission stated that the onset gangrene could have been avoided if proper measures were taken and enhanced the compensation to two lakhs. In the present appeal, the appellant argued that the compensation amount should be re-evaluated.

The apex court upheld national commission's finding of medical negligence, but found the quantum of compensation "too restrictive". Taking note of appellant's poor and rural background, the court justly enhanced the compensation to ten lakhs over and above the compensation fixed by the state and national commissions. This, according to the court, will serve dual purpose: "one, to provide some succour and support to the appellant against the hardship and disadvantage due to amputation of right arm; and second, to send the message to the professionals that their responsiveness and diligence has to be equi-balanced for *all* their consumers and *all* the human beings deserve to be treated with equal respect and sensitivity."[122] The court particularly made these remarks in the light of evidence which showed the health attendants' prejudicial conduct towards the appellant on account of her social status.

BilkisYakub Rasool,[123] a victim of 2002 Gujarat riots had petitioned the apex court against the meagre compensation granted to her by the trial court. The court recalled that she was 21 years and pregnant at that time of her gang rape. In the riots, she had lost all members of her family, including her three and a half year old daughter who was killed in front of her. The court noted that she was barely able to sustain herself and her second daughter who was born after the riots and had been living on the mercy of NGOs. Even as the court ruled that compensation of 50,00,000/- along with provision of state employment and accommodation by the state government "would meet the ends of justice", the tragic impossibility of "compensating" her loss, and many others like her, is bound to haunt the legal system.

121 2019 (4) SCALE 482; per Abhay Manohar Sapre, Dinesh Maheshwari JJ.

122 *Id*., para 16.3 (emphasis mine).

123 *Bilkis Yakub Rasool* v. *State of Gujarat*, 2019 (6) SCALE 815; per Ranjan Gogoi CJI, Deepak Gupta, Sanjiv Khanna JJ.

In *Union of India* v. *Junu Gayary*,[124] the appellant filed a writ petition at the High Court of Gauhatiseeking enquiry into her husband's death and compensation for her family. Her husband was taken away by the personnel of 8th Madras Military Regiment to Bhabanipur army camp after which his whereabouts were not known till she got the news that he was killed in an encounter with the army. The high court directed the district and sessions judge to hold an enquiry into the incident who submitted a report stating that the deceased was in the custody of army since he was picked up and till his dead body was produced. The district and sessions judge specifically observed that the death of the deceased "was in the hands of army" and it was staged as an encounter. Based on this report, the high court ordered the CBI to undertake further investigation in the matter for which a criminal case under section 302 of the IPC was filed. The high court also ordered a compensation of three lakhs. Junu Gayary filed an appeal against the judgement and order of the high court. The apex court did not interfere with the registration of criminal case and direction to the CBI. However, noting the grave violation of article 21, enhanced the amount of compensation to five lakhs.

In a claim for pension, Renu Devi, widow of Late Sepoy Vikas who was serving in the Indian army filed a petition seeking special family pension (SFP).[125] Her husband had died in a road accident while on casual leave (which was counted as "on duty"). Her prayer was rejected by the armed forces tribunal and hence this appeal. The apex court also rejected this appeal applying the pension regulations of army, according to which SFP can only be awarded when death is attributable to military service or is aggravated by military service. In the present case, though the deceased was "on duty", his family was not entitled to the SFP as his death was neither attributable nor aggravated by military service.

VII EMOTIONAL MASCULINITIES

Although this last section is not *directly* about the woman's question, I seek to raise a broader question of gendered ideologies of honour, love and nationalism that shape our subjectivity. In this regard the case worthy of discussion is *Dalbir Singh* v. *Union of India*.[126] The appellant was enrolled in the Indian army and was serving in Rashtriya Rifles Battalion in 2006. He was dismissed from service and sentenced to six months imprisonment under section 34(c) of the Army Act by an order of the Summary General Court Martial. Section 34 provides "offences in relation to the enemy and punishable with death" and sub-section (c) criminalises an army personnel who "in the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice." The appellant appealed the decision of the court martial before the apex court.

The charge on the appellant was that during a cordon and search operation of a village in J&K which erupted in an exchange of fire with militants, he had left his

124 2019 (10) SCALE 197; per M.R. Shah, A.S. Bopanna JJ.

125 *Renu Devi* v. *Union of India*, 2019 (12) SCALE 730; per Ashok Bhushan, Navin Sinha JJ.

126 2019 (8) SCALE 583; per A.S. Bopanna, M.R. Shah JJ.

post, jumped across the stone wall and failed to retaliate against the militants: "He failed to use his AK-47 and a pistol which was with him due to which the militants broke the cordon, killed Sapper Gurmail Singh and took away the LMG."[127] While jumping over the wall, he was hit by a bullet in the leg. The appellant's contention was that he had become unconscious for 10 seconds during which the militants escaped with the weapon; that "[he] himself was injured in the incident and in such circumstance, it cannot be concluded that he had abandoned the post and cannot be branded as a coward."[128]

The court held that "the appellant did not rise to the occasion [...] when his colleague was attacked and killed [...] there is no reasonable explanation as to why he had not used the weapons which were with him when the attack from the militants had already taken place and his colleague was injured."[129] Even if one were to believe that he was unconscious for about 10 to 12 seconds," the same was not of such a long duration which could have prevented him from taking any action even thereafter and that too in a situation when the militants had killed a soldier and had taken away the LMG."[130] Responding to the appellant's argument that his past record showed that he was a "good soldier" and was "not scared to take part in the operation",[131] the court observed: "in the matter of protecting the border, a soldier cannot live merely on past glory but should rise to the occasion on every occasion to defend the integrity of the nation since such is the trust reposed in a soldier."[132]

Differentiating between service in army from other professions, the court noted:[133]

> Though in service matters the past conduct, both positive and negative will be relevant not only while referring to the misconduct but also in deciding the proportionality of the punishment, the Court should be cautious while considering the case of an officer/soldier/employee of a disciplined force and the same yardstick or sympathetic consideration as in other cases cannot be applied. The resources of the country are spent on training a soldier to retaliate and fight when the integrity of the nation is threatened and there is aggression. In such grave situation if a soldier turns his back to the challenge, it will certainly amount to cowardice.

Thus, the court upheld the order of dismissal but, in the light of the fact that the appellant "had also received a gunshot injury in the incident" set aside the order of imprisonment. One may argue that the court, despite its own position, was sympathetic to the appellant but nevertheless the dominant narrative in the judgement is one of a soldier who falls short of standards of bravery expected of him. Therefore, he deserves

127 *Id*., para 2.
128 *Id*., para 4.
129 *Id.*, para 7.
130 *Id*., para 7.
131 *Id*., para 4.
132 *Id*., para 8.
133 *Id.*, para 8.

no sympathy as being (and remaining) brave at all times is part of his job, an ontological demand. What is the psychological impact of such an imposition of the virtue of bravery and the shame of cowardice finds no place in the nationalist imagination of the state/ court. But how burdens of masculinity construct the ideologies of nationhood, national honour and patriotism is a pressing issue in need of deliberation in the contemporary hyper nationalist world where many forms of collective (and individual) violence in the name of love for one's country are not just legitimised but also eulogised.

VIII CONCLUSION

This year witnessed renewed judicial commitment to the cause of democratic participation of local women (*Vaishnorani Mahila Bachat Gat*), elimination of female foeticide (*Federation of Obstetrics and Gynecological Societies of India*) and punishing domestic cruelty (*Rupali Devi*). The court's decisions on the award of compensation for medical negligence (*Shoda Devi*) and custodial death (*JunuGayary*) were encouraging. The survey also documented cases where the court was called upon to adjudicate on emotions of remorse (*Manoharan*) and cowardice (*Dalbir Singh*) inviting legal scholarship to explore the entangled relationship of law and emotions. We also witnessed how law became a site of reinforcing misplaced notions of (familial/ female) honour (*Ude Singh, Nawaz*), privileging of male rage (*Rambir*) and buttressing conservative sexual morality (*Indian Hotel and Restaurant Association*), revealing the continuous need of interpretive labour of feminist lawyers and academics that would mark a conceptual leap in judicial imagination to inaugurate radical (re)thinking of sexuality, love, marriage, family and nation.