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WOMEN AND THE LAW

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I INTRODUCTION

In 2020, the world stopped. A virus took over our lives so completely that many thought it was an announcement of the apocalypse. The cessation of all activity, all movement, all production, did feel like the end of the world. But the feeling of the end did not break the desire for 'normalcy' – that wretched state of being – which has produced this world of impoverishment, inequality, discrimination and violence. As the public sphere became contaminated, 'home' became the refuge – a sphere now for both production and reproduction. Home restored the semblance of normalcy. Nothing really changed within the home. As the work space became distant and virtual, home felt more intimate and real than ever: the ideal of 'domestic' was laid bare in all its horrors. Now there was no escape from domesticity, no other place to go to. Domestic violence *naturally* increased manifold. The paranoid state, paralysed by the fear of contagion, shut-down and shut-in all potential threats, barely noticing that home itself had turned into a prison. Women and children (no matter how much we detest this clubbing together) were its prisoners.

2020 changed the world; yet nothing changed. Nothing for women; nothing for children who will grow up and inherit this world of our making.

Even as the law collapsed (rights became more abstract than ever and welfare measures were locked down too), the administration of justice continued in the virtual mode. This year's survey only sketchily captures what really transpired in the world of women and the law in 2020. Except for a select few cases of the high courts, this *survey* primarily focuses on reported Supreme Court decisions.

II GENDER EQUALITY: REPRESENTATION, RESERVATION, IDENTITY

Representation in armed forces

As per section 12 of the Army Act, 1950, females were ineligible for employment in the regular army except in corps specified by the central government. From January 1992 onwards, the central government issued several notifications making women eligible for appointment as officers, through short service commissions (SSC) in

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specified non-combat branches (Combat Support Arms and Services) of the army. A PIL was filed for the grant of Permanent Commission (PC) to Short Service Commission women officers in the army. The Delhi High Court, where several of these petitions were originally filed, had held that in all streams, except combat operations, where the army provided for the option for SSC women officers, the option should equally be extended to the conferment of PC. Contempt proceedings were started against the government for non-compliance with the high court decision. The union government, on the other hand, challenged the high court judgment before the Supreme Court. During the pendency of the appeal, in 2019, the union government issued a policy circular (to be applied prospectively) granting women officers PC in eight arms/services in addition to the existing streams of Judge Advocate General (JAG) and Army Education Corps (AEC). Their appointment, however, was restricted to "staff appointments only" (*i.e*. not command appointments).

In *The Secretary, Ministry of Defence* v. *Babita Puniya*,[1] the Supreme Court inherited this history of almost two decade old litigation on the issue of PC for women in the army. The court declared that women officers who have (now) been granted PC have to be treated at par with male officers and thus none of the restrictions imposed on women officers is justified. Following the sameness approach of equality, the court noted that "[w]omen officers have brought laurels to the force"[2] and "[t]he time has come for a realisation that women officers in the Army are not just adjuncts to a male dominated establishment whose presence must be "tolerated" within narrow confines."[3] In this regard, the court sought to remove the disadvantages which could be experienced by women officers even after the grant of PC, *viz*., number of years of service, choice of specializations, consequential benefits including promotion, pension and financial benefits *etc*.[4]

Particularly, the restriction of women officers to "staff appointments only" was categorically removed by the court. It was observed that the submissions of the state:[5]

> [...] are based on sex stereotypes premised on assumptions about socially ascribed roles of gender which discriminate against women. Underlying the statement that it is a "greater challenge" for women officers to meet the hazards of service "owing to their prolonged absence during pregnancy, motherhood and domestic obligations towards their children and families" is a strong stereotype which assumes that domestic obligations rest solely on women. Reliance on the "inherent physiological differences between men and women" rests in a deeply entrenched stereotypical and constitutionally flawed notion that women are the "weaker" sex and may not undertake tasks that are "too arduous" for them. Arguments founded on the physical strengths and weaknesses

1 2020 (3) SCALE 712.
2 *Id.*, para 56.
3 *Id.*, para 57.
4 *Id*., para 69.
5 *Id.* para 54.

> of men and women and on assumptions about women in the social context of marriage and family do not constitute a constitutionally valid basis for denying equal opportunity to women officers. To deny the grant of PCs to women officers on the ground that this would upset the "peculiar dynamics" in a unit casts an undue burden on women officers which has been claimed as a ground for excluding women.

The court then "emphasise[d] the *need for change in mindsets* to bring about true equality in the Army." And, affirmed:[6]

> If society holds strong *beliefs about gender roles* – that men are socially dominant, physically powerful and the breadwinners of the family and that women are weak and physically submissive, and primarily caretakers confined to a domestic atmosphere – it is unlikely that there would be a change in mindsets.

Here, one needs to pause and pay attention to the court's reasoning where social "beliefs about gender roles" should be given up to achieve "a change in mindsets." What is a belief, one may ask? How do we come to believe (and live) the sexual stereotypes about who we are/ can be? Specifically, can the liberal fantasy of inclusiveness which is at work in this decision displace the material effects of nationalistic beliefs and gendered stereotypes that constitute and sustain the armed forces?

Responding to similar petitions by women officers in the Indian navy,[7] the court lifted the statutory bar on the engagement or enrolment of women in the navy, under section 9(2) of the Navy Act, 1957,[8] to the extent envisaged in the central government notifications. The court, *inter alias*, held:[9]

> (v) All SSC officers in the Education, Law and Logistics cadres who are presently in service shall be considered for the grant of PCs [...]
>
> (vi)The period of service after which women SSC officers shall be entitled to submit applications for the grant of PCs shall be the same as their male counterparts;
>
> (vii) The applications of the serving officers for the grant of PCs shall be considered on the basis of [...] (i) availability of vacancies in the stabilised cadre at the material time; (ii) determination of suitability; and (iii) recommendation of the Chief of the Naval Staff. Their empanelment shall be based on inter se merit evaluated on the ACRs of the officers under consideration, subject to the availability of vacancies;

6 *Id*., para 55.

7 *Union of India* v. *Ld. Cdr. Annie Nagaraja,* 2020 SCC Online SC 326.

8 The Navy Act, 1957, s. 9(2) reads: No woman shall be eligible for appointment or enrolment in the Indian Navy or the Indian Naval Reserve Forces except in such department, branch or other body forming part thereof or attached thereto and subject to such conditions as the Central Government may, by notification in the Official Gazette specify in this behalf.

9 *Supra* note 7, para 96.

> (viii) SSC officers who are found suitable for the grant of PC shall be entitled to all consequential benefits including arrears of pay, promotions and retiral benefits as and when due.

No doubt these decisions reveal how far Indian women are from the bare realization of formal equality in public and professional life; but can mere induction of women change the belief, remove the stereotype(s) and reform the army? Is the "female soldier" subversive of the male institution?[10] Here my argument is not that the promise of liberal feminism was betrayed before it was realised since the call for gender justice did not translate into the absorption of women in areas of operation which, it was stated, was "a policy decision".[11] Instead, I am suggesting, that the "feminist" pronouncement, even as it calls out the (negative) gender and sexual stereotypes, does not disrupt the gendered narratives of nation and nationalism(s),[12] the feminine imaginary of the national territory, the motherland, to be defended by the 'sons of the soil'. Surely, this disruption would not happen even by changing the "policy" and inducting women into combat roles. Only a complete overhaul and radical re-imagination of sociality and solidarity of the 'nation' would challenge the violent masculinity of the military.

Filling of seats through horizontal reservation

Sonam Tomar and Reeta Rani had applied for the posts of constables in the Uttar Pradesh Police in the reserved categories of OBC and SC respectively.[13] In the miscellaneous application filed by them, they claimed that ('general' category) candidates with lower marks had been selected in the 'general' female category. There were 188 'general' female category posts which were filled but none of the OBC

10 This question was asked by one of my students in the feminist jurisprudence class. The "feminist" discussion on the army never stops with the goal of inclusion of women, since gender, following Joan Scott, serves as the category of historical and political analysis. Joan Scott, "Gender: A Useful Category of Historical Analysis" 91(5) *Historical Review* 1053-1075 (Dec., 1986): "The subject of war, diplomacy, and high politics frequently comes up when traditional political historians question the utility of gender in their work. But here, too, we need to look beyond the actors and the literal import of their words. Power relations among nations and the status of colonial subjects have been made comprehensible (and thus legitimate) in terms of relations between male and female. The legitimizing of war - of expending young lives to protect the state - has variously taken the forms of explicit appeals to manhood (to the need to defend otherwise vulnerable women and children), of implicit reliance on belief in the duty of sons to serve their leaders or their (father the) king, and of associations between masculinity and national strength." *Id*. at 1073.

11 See Prerna Dhoop, "Remaking the Indian Military for Women: Beyond the Babita Puniya Judgment" 55(20) *Economic and Political Weekly* (May 16, 2020).

12 In January 2021, the Supreme Court admitted an application by the central government to reconsider the applicability of *Joseph Shine* v. *Union of India* (2019) 3 SCC 39 for armed forces, *available at*: https://www.livelaw.in/pdf_upload/joseph-shine-05-11-2020-387399.pdf (last visited on May 2, 2022). Also see Army Chief General Bipin Rawat's comment on homosexuality at the Annual Army press conference in 2019, *available at*: https://www.thehindu.com/news/national/adultery-homosexuality-not-acceptable-in-army/article25963443.ece (last visited on May 2, 2022).

13 *Saurav Yadav* v. *State of U.P.* (2021) 4 SCC 542. I particularly want to thank Isha Anupriya for sharing an excellent summary of this case with me.

female category candidates were considered. The last candidate selected in the 'general' female category obtained less marks than as many as 21 female OBC applicants. The issue before the apex court was about the fair and just method of filling the horizontal quota reserved for women candidates.

There existed diverging views of high courts on this issue. In the first view, if candidates belonging to reserved categories were selected on the basis of their own 'merit', their selection could not be counted against the quota reserved for the categories for vertical reservation. Thus, the candidates belonging to any of the vertical reservation categories are entitled to be selected in "open or general category." The second contrasting view in relation to horizontal reservation is that once the vertical reservation is provided for, then while accounting for horizontal reservation, the candidates from reserved categories can be adjusted only against their respective categories and not against the "open or general category".

The Supreme Court rejected the second view and held that "any selection which results in candidates getting selected against Open/General category with less merit than the other available candidates will certainly be opposed to principles of equality."[14] Adhering to the second view would mean endorsing a selection criterion where the last female candidate selected in the open/general category would have secured less marks than the female candidate belonging to the reserved category because the latter, despite securing higher marks than 'general' counterparts, could only be accommodated in the vertical reservation category, and not the open category. This would also lead to the wrong idea that open/general seats are reserved for the candidates other than those coming from the category of vertical reservations.

Recognition of gender identity

In *Christina Lobo* v. *State of Karnataka*,[15] the petitioner filed a writ in the nature of mandamus seeking a change in her name and gender in her mark-sheets and educational records. She was born as biological male and in the birth certificate, her gender was shown as male and her name as 'Clafid Claudy Lobo'. But she identified herself as a female from a very young age and underwent gender reassignment surgery. The Karnataka Secondary Education Examination Board, one of the respondents, pleaded that under the Transgender Persons (Protection of Rights) Act, 2019 ('the Act'), a transgender is required to make an application to the district magistrate for issuance of a certificate of identity as a transgender person. This was not done by the petitioner. The petitioner, on the other hand, relied on *National Legal Services Authority* v. *Union of India*[16] *(NALSA)* and emphasized that the transgender persons have the right to decide their self-identified gender. Reliance was also placed on *Jeeva M.* v. *State of Karnataka*[17] wherein directions were issued to the Principal Secretary, Education Department, State of Karnataka to implement the directions of the apex court in *NALSA'*s case.

14 *Id.*, para 31.

15 2020 SCC OnLine Kar 1634.

16 (2014) 5 SCC 438.

17 W.P.No.12113/2019(Edn-Res) (Karnataka High Court).

The Karnataka High Court, relying on *NALSA*, reiterated that "the recognition of one's gender identity lies at the heart of the fundamental right to dignity" and "[s]elf- determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India."[18] The court took note of rule 3(3) of the Transgender Persons (Protection of Rights) Rules, 2020 issued by the central government in exercise of the powers conferred by section 22 of the Transgender Persons (Protection of Rights) Act, 2019. Rule 3(3) provides that transgender persons who have officially recorded their change in gender, whether as male, female or transgender, prior to the coming into force of the Act are not required to submit an application for certificate of identity under these rules. In this case, since the identity of the petitioner was officially recorded in the 'Aadhaar' card issued by Unique Identification Authority of India (UIDAI) and the passport was issued by the central government, the court ruled, she was not required to make an application for certificate of her identity.

III VIOLENCE OF MARRIAGE AND FAMILY

Murder of wife

In *Paul* v. *State of Kerala,*[19] the deceased victim was the wife of the appellant. Ever since her marriage she was subjected to physical and mental cruelty. She died by strangulation at the hands of her intoxicated husband. The appellant was convicted for murder under section 302 of the Indian Penal Code (IPC). He appealed and prayed for the applicability of section 304 Part I or Part II as he had acted in a state of intoxication. The court sustained conviction under section 302 since a voluntarily induced state of intoxication does not affect culpability.

In *Jayantilal* v. *State of M.P.*[20] the appellant, convicted for the murder of his wife, appealed against his conviction. The Supreme Court observed that the appellant "was under an obligation to give a plausible explanation" regarding the death of his wife. Since family members were present in the home some time before the occurrence, no explanation was accorded for the multiple injuries on the deceased's body, and there was "a strong circumstance indicating that he is responsible for commission of the crime",[21] the court dismissed the appeal.

Dowry death

Dying declarations

Contradictions in dying declarations do not necessarily result in acquittal. The court must appreciate the context and circumstances of each dying declaration. In *Kashmira Devi* v. *State of Uttarakhand*,[22] there were three dying declarations. In the

18 *NALSA, supra* note 16, paras 74 and 75.

19 2020 (2) SCALE 273.

20 2020 (13) SCALE 143.

21 *Id.*, para 25. Also see, *Nawab* v. *State of Uttarakhand,* 2020 (2) SCALE 299, the appellant was convicted for murdering his wife based on circumstantial evidence. His plea that there was an intrusion by unknown men who had attacked his wife was rejected by the court. He was alone with her when the occurrence took place and had even taken a LIC policy in her name a few days before the death.

22 2020 (2) SCALE 534.

first two, the victim deposed that the stove burst and she had caught fire but in the third dying declaration, she told the additional tehsildar that her mother-in-law had set her on fire and no one else was involved. The court relied on the third dying declaration (in the first two, the victim was surrounded by her in-laws) and upheld the conviction of the mother-in-law under section 304B of the IPC but reduced the sentence to seven years.

Anticipatory bail

In *Naresh Kumar Mangla* v. *Smt. Anita Agarwal*,[23] the respondents (parents-in-law, brother-in-law, sister-in-law of the deceased – a wealthy and influential family of Agra) were granted anticipatory bail by the high court. They were charged under sections 498A, 304B, 323, 506 and 313 of the IPC and sections 3 and 4 of the Dowry Prohibition Act, 1961. Reiterating the established law of anticipatory bail,[24] the court stated the considerations that ought to be kept in mind while deciding upon the application:[25]

> [T]he nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and the larger interests of the public or the State.

Further, the court ruled:[26]

> [T]here can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it.

In the light of the above principles and the serious nature of the allegations in the FIR, the court allowed the appeal of the deceased's father and reversed the order of anticipatory bail.

Suspension of presumption of innocence

In *Preet Pal Singh* v. *State of Uttar Pradesh*,[27] the appellant (the father of the victim) challenged the suspension of sentence and grant of bail under section 389 of the CrPC. The trial court had upheld the conviction of the accused under sections 304B, 498A and 406 of the IPC and sections 3 and 4 of the Dowry Prohibition Act, 1961. The accused had appealed before the high court which was admitted, the execution of the sentence was suspended and he was released on bail (without recording any reasons). The apex court setting aside the order of the high court noted that "[t]he

23 2020 (14) SCALE 319.

24 *Gurbaksh Singh Sibbia* v. *State of Punjab* (1980) 2 SCC 565.

25 *Id*. at 28.

26 *Ibid.*

27 2020 (9) SCALE 584.

28 *Id*., para 38.

Respondent No. 2 has not been able to demonstrate any apparent and/or obvious illegality or error in the judgment of the Sessions Court, to call for suspension of execution of the sentence."[28] The court also observed that, as far as the presumption of innocence is concerned, there is a difference between sections 439 and 389 of the Cr PC:[29]

> [I]n case of post conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors.

The idea that presumption of innocence stands suspended post-conviction deserves to be interrogated. How do we conceive of fair trial and due process *at all appellate stages*, if the cardinal principle of presumption of innocence is diluted after conviction at the trial level? Is this position in line with the jurisprudence of bail in a liberal criminal justice system?

Abetment of suicide

In *Gurcharan Singh* v. *State of Punjab*,[30] the appellant along with his parents was charged under sections 304B and 498A read with section 34 of the IPC. The trial court acquitted them under sections 304B and 498A of the IPC, but convicted the appellant for abetting suicide of his wife under section 306 (even though no charge of abetment was framed against him). Though there was no direct evidence of cruelty against the appellant, the trial court observed that "the expectation of a married woman will be love and affection and financial security at the hands of her husband and if her hopes are frustrated by the act or by wilful negligence of the husband, it would constitute abetment."[31] The high court endorsed the trial court's decision. The apex court, however, reversed the decision of the lower courts and gave the following reasons:[32]

> Insofar as the possible reason for a young married lady with two minor children committing suicide, in the absence of evidence, conjectures cannot be drawn that she was pushed to take her life, by the circumstances and atmosphere in the matrimonial home. What might

29 *Id*., para 36.

30 2020 (11) SCALE 508.

31 *Id*., para 6.

32 *Id*., para 11. Also see, *Sandeep Kumar* v. *State of Uttarakhand*, 2020 (13) SCALE 553 (the appellants were charged under section 304A of the IPC - acquitted by the trial court, order reversed by high court. In appeal, the apex court restored the decision of the trial court since the prosecution could not establish that the cause of death was unnatural, forensic lab report did not show any sign of poisoning, no poison was recovered from the appellants' house, the deceased had a prior history of illness, there were no marks of injury on her body.)

33 2020 (13) SCALE 531.

> have been the level of expectation of the deceased from her husband and in-laws and the degree of her frustration, if any, is not found through any evidence on record. More significantly, wilful negligence by the husband could not be shown by the prosecution.

Domestic violence

Vague allegations are not sufficient to establish cruelty or domestic violence

In *Nimay Sah* v. *State of Jharkhand,*[33] the appellant was the brother-in-law of the deceased. He was convicted under section 498A of the IPC along with the husband (convicted under section 304B) and the father-in-law. The prosecution contended that the role of the appellant was limited to the demand of dowry at the time of *vidai* ceremony, and harassment of the deceased on non-payment of the same. The apex court acquitted the appellant since "apart from these vague allegations, no specific instance of hostile attitude or persistent demands of dowry have been pointed out by any of these witnesses."[34] There was no direct evidence against him, rather he was "named in the same breath along with other accused persons and their family members" which was not sufficient to hold him culpable with the other accused.

In *Shyamlal Devda* v. *Parimala*[35] the respondent had filed the domestic violence complaint against the husband, parents-in-law and several other relatives. The matrimonial home of the respondent was in Chennai but she had filed the complaint in Bangalore, where she was residing with her parents. The appellants contested the jurisdiction as well as sought for quashing the proceedings. The court while rejecting the objection as to jurisdiction held that as per section 27 of the Domestic Violence Act (DV Act), the petition can be filed where the 'person aggrieved' permanently or temporarily resides or carries on business or is employed. However, besides the husband and parents-in-law, the proceedings against the other relatives were quashed as there were "no specific allegations" as to how the other relatives who resided in different cities had caused the acts of domestic violence.

Claims of conflicting rights

In *Satish Chander Ahuja* v. *Sneha Ahuja*,[36] the appellant was the respondent's father-in-law. He had filed a suit praying for a mandatory injunction against the respondent to remove herself from his property. He contended that the respondent had filed frivolous cases of domestic violence against him alongside the ongoing divorce proceedings between her and his son. In particular, he asserted that she had no right of residence against him. Hearing these arguments, the Supreme Court marked a significant turn in the jurisprudence of domestic violence, specifically the meaning

34 *Id*., para 14.
35 2020 (2) SCALE 313.
36 2020 (11) SCALE 576.

of "shared household" under section 2(s) of the DV Act, and overruled *Batra* v. *Batra*.[37] Correcting the interpretive wrong of *Batra*, the court noted:[38]

> The expression "at any stage has lived" occurs in Section 2(s) after the words "where the person aggrieved lives". The use of the expression "at any stage has lived" immediately after words "person aggrieved lives" [...] has been used to protect the women from denying the benefit of right to live in a shared household on the ground that on the date when application is filed, she was excluded from possession of the house or temporarily absent. The use of the expression "at any stage has lived" is for the above purpose and not with the object that wherever the aggrieved person has lived with the relatives of husband, all such houses shall become shared household, which is not the legislative intent.

The court clarified, contrary to the presumptions made in *Batra*, that "living" under section 2(s) refers to a living which has "some permanency"; "[m]ere fleeting or casual living at different places shall not make a shared household."[39] However, "the right to residence under Section 19 is not an indefeasible right [...] especially when the daughter-in-law is pitted against aged father-in-law and mother-in-law."[40]

The next question considered by the court was on the legality of the trial court decree passed in favour of the father-in-law on the alleged admission by the daughter-in-law that the suit property was solely owned by the father-in-law (under Order XII Rule 6 of the Civil Procedure Code). Here, taking note of section 26 of the DV Act, the court clarified that the relief under DV Act may be sought in any legal proceeding. Thus, "the claim of the defendant that suit property is shared household and she has right to reside in the house ought to have been considered by the Trial Court and non-consideration of the claim/defence is nothing but defeating the right, which is protected by Act, 2005."[41] The court also clarified that the pendency of proceedings under DV Act or any order interim or final passed under DV Act does not bar initiation or continuation of any civil proceedings, which relate to the subject matter of the concerned order. In fact, the judgment or order granting relief under section 19 is "relevant"[42] and may be taken into account by the civil court.

In *S. Vanitha* v. *The Deputy Commissioner, Bengaluru District,*[43] the appellant's parents-in-law filed an eviction suit against the daughter-in-law under sections 3 and 4 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (2007

37 (2007) 3 SCC 169.

38 The court held that *Batra,* in restricting the right to residence only to premises which were owned or taken on rent by the husband or which belonged to the joint family of which the husband was a member, failed to appreciate the scheme of the Act *Batra's* conclusion was based on the erroneous view that an alternative interpretation would lead to "chaos". *Supra* note 36, para 62.

39 *Id*., para 63.

40 *Id*., para 83.

41 *Id*., para 96.

42 As per s. 43 of the Indian Evidence Act.

43 2020 (14) SCALE 210.

Act). They alleged that after a dispute, their son had left the house in which the appellant was staying. She continued to live in that house and in fact ousted them which compelled them to go and live in their native place. Their argument was that since the marriage between the appellant and their son had dissolved, she had no right over the suit premises, and her claim for maintenance could only be made against her former husband. The appellant argued that this was a collusive suit (with her estranged husband) and there was no provision in the 2007 Act to order such an eviction. She asserted her right to reside in a shared household under section 17 of the Domestic Violence Act. On the other hand, the parents-in-law argued that though the 2007 Act has no express provision to pass eviction orders, by necessary implication, that power has to be read within the jurisdiction of the tribunal constituted under the 2007 Act.

The court thus was called upon to decide on the apparent conflict between the two legislations directed to protect the interests of two different vulnerable groups. The court was categorical:[44]

> [T]he right of a woman to secure a residence order in respect of a shared household cannot be defeated by the simple expedient of securing an order of eviction by adopting the summary procedure under the Senior Citizens Act 2007 [...] the over-riding effect for remedies sought by the applicants under the Senior Citizens Act 2007 under Section 3, cannot be interpreted to preclude all other competing remedies and protections that are sought to be conferred by the PWDV Act 2005.

It was further observed that in a case where the suit premises are a site of contestation between two protected groups, "it would be appropriate for the Tribunal constituted under the Senior Citizens Act 2007 to appropriately mould reliefs, after noticing the competing claims of the parties claiming under the PWDV Act 2005 and Senior Citizens Act 2007."[45] Clearly, section 3 of the 2007 Act cannot be deployed to nullify a woman's right to a shared household. Specifically, with regard to this case, the court held that "[m]erely because the ownership of the property has been subsequently transferred to her in-laws [...] or that her estranged spouse [...] is now residing separately, is no ground to deprive the appellant of the protection that was envisaged under the PWDV Act."[46] And thus, the claim of "shared household" cannot be annulled by a summary procedure under the 2007 Act; it has to be determined independently by the appropriate forum.

Anticipatory bail in the Muslim Women (Protection of Rights on Marriage) Act, 2019

In *Rahna Jalal* v. *State of Kerala*,[47] the complainant filed a FIR under section 498A read with section 34 of the IPC and the Muslim Women (Protection of Rights

44 *Id*., paras 21-22.

45 *Id*., para 22.

46 *Id*., para 23.

47 2020 (14) SCALE 472.

on Marriage) Act, 2019 (2019 Act) against her husband and mother-in-law (the appellant). The complaint was that the husband pronounced talaq three times and entered into a second marriage.[48] Even though the 2019 Act was not applicable to the appellant (since the offence of pronouncement of triple talaq under the 2019 Act can only be committed by a Muslim man),[49] the court used the opportunity to clarify the confusion around the non-obstante clause in section 7 of the 2019 Act.[50] It was affirmed that the 2019 Act, specifically section 7(c), does not override the provisions of section 438 of the CrPC since "[t]he power of the court to grant bail is a recognition of the presumption of innocence (where a trial and conviction is yet to take place) and of the value of personal liberty in all cases."[51]

In the 2019 Act, there is no restriction on the power of the Magistrate to grant bail, "save and except, for the stipulation that before doing so, the married Muslim woman, upon whom talaq is pronounced, must be heard and there should be a satisfaction of the Magistrate of the existence of reasonable grounds for granting bail to the person."[52] This requirement, it was observed, extends to the application for grant of anticipatory bail as well. Only after hearing the married Muslim woman, the competent court can grant bail to the accused. However, the court will have the discretion to "grant ad-interim relief to the accused during the pendency of the anticipatory bail application, having issued notice to the married Muslim woman."[53]

IV SEXUAL VIOLENCE

In *suo motu* proceedings initiated by the Supreme Court to assess the responsiveness of the criminal justice system in matters of sexual offences,[54] the court called for a status report with regard to the implementation of amendments undertaken

48 *Id.*, para 3.

49 As against the charge of cruelty, the court found the allegations "vague" and "bereft of details" and thus allowed the bail application.

50 S. 7 reads thus:

Offences to be cognizable, compoundable, etc: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, -

(a) an offence punishable under this Act shall be cognizable, if Crl.A./2020 information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage;

(b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

51 *Supra* note 47, para 10.

52 *Id.*, para 11.

53 *Id.*, para 18.

54 *In Re: Assessment of the Criminal Justice System in Response to Sexual Offences,* 2020 (2) SCALE 317.

in both procedural and substantive criminal law on sexual violence. Specifically, the court sought a report about the following:

> (1) Whether all the police stations have a woman police officer or woman officer to record the information of the victim,
>
> (2) In case, an information relating to offence of rape received at a police station, reveals that the place of commission of the offence is beyond its territorial jurisdiction, whether in such cases FIR without crime number are being recorded.
>
> (3) Whether provisions are available for recording of first information by a woman police officer or a woman officer at the residence of the victim or any other place of choice of such person in case the victim is temporarily or permanently mentally or physically disabled.
>
> (4) Whether all the district police units have the details of a special educator or an interpreter in case of a mentally or physically disabled victim.
>
> (5) Whether the police department of states or union territories have issued any circulars to make provision of videography of the recording of statements and depository of the same.
>
> (6) Whether any state has published guidelines in the shape of standard operating procedure (SOP) to be followed for responding after receipt of the information relating to case of rape and similar offences.
>
> (7) Whether any case has been registered under the section 166A of the IPC against any public servant.
>
> (8) Whether there is any mechanism in place to complain about the non-recording of information by the officer giving cause to offence under section 166A with any other institution/office, other than the concerned police station.
>
> (9) Whether any advisory or guidelines have been issued by the authorities to all the hospitals and medical centres in this regard.
>
> (10) Whether any case has been registered against any person under section 166B of the IPC.
>
> (11) Whether the medical opinion in the cases relating to rape and similar offences is being given in compliance with the mandate of section 164A of Cr PC.
>
> (12) Whether the medical opinion in the cases relating to rape and similar offences is being given in tune with definition of rape under section 375 of the IPC as it stands today.
>
> (13) Whether the states have adopted the guidelines and protocols of the Ministry of Health and Family Welfare, Government of India or have they prepared their own guidelines and protocols.

(14) Whether requisite medico-forensic kits are available with all the hospitals/health centres run by the government or by local authorities.

(15) Whether the medical experts have done away with the per-vaginum examination commonly referred to as 'two-finger test' and whether any directions have been issued by the states in this regard.

(16) Whether medical experts have done away with the practice of giving opinion on the previous sexual experience of the victim or any directions have been issued by the states in this regard.

(17) Whether lady medical practitioners, if mandated, are available at all district and sub-divisional headquarters to draw up the medical examination report of the victim.

(18) Whether there is any standard operating procedure (SOP) or protocol for taking samples for forensic DNA, forensic odontology and other forensics for medical practitioners.

(19) Whether there are adequate number of equipped forensic laboratories at least one at every division level to conduct forensic DNA and forensic odontology analysis regionally.

(20) Subject to availability, whether central government has notified sufficient number of government scientific expert other than already specified under section 293 of CrPC.

(21) Whether police are completing the investigation and submitting the final report within a period of two months from the date of recording of information of the offence and if not, reasons for delay.

(22) Whether sufficient number of women police officers are available to conduct investigation into the offences relating to rape and other sexual offences.

(23) Whether the police are taking the victim for recording of the statements as soon as the commission of the offence is brought to the notice of police.

(24) Whether the magistrate courts or the trial courts have the availability of the interpreter or special educator in each district.

(25) Whether the magistrate courts or the trial courts have the facility of videography of the statements and depository of the same in the courts.

(26) Whether trial of cases relating to rape are being conducted by courts presided over by a woman.

(27) Whether sufficient number of lady judges are available to preside over the Courts dealing with sexual offences and rape.

(28) Whether all courts holding trial of cases relating to offence of rape have requisite infrastructure and are conducting in camera trial.

(29) Whether the trial relating to cases of rape is being completed within a period of two months from the date of filing of charge-sheet, if not, the reasons for the delay.

(30) Whether sufficient number of special courts have been established to deal exclusively with the cases of rape and other sexual offences.

(31) Whether case-calendar as envisaged in the *Rasheed* case[55] is being prepared by the trial courts keeping in mind the timeline of two months mandated by section 309 of Cr PC.

(32) Whether the attendance of the witnesses is being ensured by the prosecution to ensure the examination of witnesses on the fixed dates.

(33) Whether any guidelines have been issued by bar councils or associations urging the advocates to assist the court in completion of trial within the stipulated period.

(34) Whether special exclusive permanent trial courts have been created in the state to deal with cases relating to rape and sexual assaults

(35) Whether any high court has constituted a special bench for expeditious hearing of appeal in these cases.

(36) Whether any policy of victim/witness protection in the cases relating to rape is framed and implemented

(37) Whether police protection is being provided to the victim during investigation and trial of the offence.

(38) Whether there are special waiting room in the court premises for victim/witnesses of cases relating to offence rape.

(39) Whether the trial courts have taken appropriate measures to ensure that victim woman is not confronted by the accused during the trial as mandated by section 273 Cr PC.

(40) Whether courts are recommending the district legal service authority (DLSA) or the state legal service authority (SLSA) for compensation in appropriate cases.

(41) Whether the amount of interim or final compensation is being provided to the victims in a time bound manner.

(42) Whether the above-mentioned scheme of 2018 or suitably amended scheme, has been implemented by the states for rehabilitation of victims of rape.

(43) Whether the SLSA or NLSA has formulated any scheme for social, medical and economic rehabilitation of the victim.

(44) Whether any state has prepared a policy with regard to the counselling of the victim and medical, social and in some cases, economic rehabilitation of the victim.

(45) Whether there are any counselling/rehabilitation centres in existence for the victims of rape.

55 *State of Kerala* v. *Rasheed*, AIR 2019 SC 721.

(46) Whether the Nirbhaya Fund by central or state government(s) has been utilized for the purposes envisioned.

To gather the above information and prepare the status report, a senior advocate was appointed as the amicus curiae in the matter. One does not gather from the judgment how this research is to be undertaken, what methodology will be adopted for collection of data, which agencies will be involved. However, the above forty-six questions raised by the apex court are important research questions for socio-legal researchers and may open up possibilities of diversifying empirical research on impact assessment of (both legislative and judicial) rape law reforms.

Rape

On March 20, 2020, at 5:30 a.m., the Delhi Gang Rape convicts - Mukesh Singh, Vinay Sharma, Akshay Thakur and Pawan Gupta - were executed at Tihar Jail, New Delhi. After the confirmation of death sentence by the Supreme Court in 2017 and dismissal of review in 2018, an execution warrant was issued on January 7, 2020, pursuant to which the death row convicts filed a spate of (review/curative) petitions. Termed as "delay tactics" in the mainstream media and by the victim's family, these petitions were anguished attempts by these condemned men to remain alive.

Vinay Sharma had filed a curative petition on January 8 which was rejected on January 14.[56] On January 29, he preferred the mercy petition to the President which was rejected and communicated to him within three days. He then filed a writ petition challenging the rejection of the mercy petition. It was contended that he was not a habitual offender and belonged to the lower class of society. These aspects could only be considered through a social investigation report which was not placed before the President. It was also argued that he was illegally placed in solitary confinement, subjected to physical and mental torture and was on psychological medication. The court did not find favour with any of these averments and did not find any ground for the exercise of judicial review of the order of the President.

Akshay Thakur's[57] petition was also rejected as he could not make out any ground indicating an error apparent on the face of the record.[58] Mukesh Kumar[59] challenged the rejection of his mercy petition that sought commutation of the death sentence. He had filed the mercy petition on January 14, 2020 to the Governor and the President. The Governor rejected the mercy petition on January 15, the president on January 17. On January 17, the sessions judge issued a fresh warrant directing the death sentence to be executed on February 1, 2020. The present petition was filed on the ground that mercy petition was rejected without application of mind and that relevant material was not placed before the President, for instance, about the petitioner's suffering in

56 *Vinay Sharma* v. *Union of India*, 2020 (3) SCALE 572.

57 *Akshay Kumar Singh* v. *State (NCT of Delhi)*, 2020 (1) SCALE 65.

58 He filed another writ, seeking review of the rejection of the mercy petition, on Mar. 19, a day before the execution, which was also dismissed by the apex court. *Available at*: https://indiankanoon.org/doc/9585655/ (last visited on Apr. 17, 2021).

59 *Mukesh Kumar* v. *Union of India,* 2020 (2) SCALE 596.

the prison. The counsel for the petitioner presented a morbid account of the prisoner's ordeal:[60]

> [H]e was beaten up in the prison and sexually harassed and was suffering everyday in the prison [...] his brother Ram Singh was actually murdered though his death was projected as "suicide" and that due to death of his brother, the petitioner was living in "perpetual fear".

Passing over the aforementioned submissions in silence, the court held that "alleged sufferings in the prison" cannot be a ground for judicial review of the executive order passed under Article 72. And, that quick consideration of the mercy petition and swift rejection of the same also cannot be a ground for judicial review.

Pawan Gupta[61] had filed a SLP raising the plea of juvenility. No doubt the claim of juvenility can be raised at any stage, even after the final disposal of the case,[62] but if the accused had already taken the plea of juvenility before the trial court, then the high court and the Supreme Court, which was rejected at all levels, then "it is not open to the accused to reagitate the plea of juvenility by filing the fresh application under Section 7A of the JJ Act."[63]

On the day of their hanging, there was a collective celebration, a festivity. Some believe justice, at last, was done. The anxious attempts of the culprits – begging for mercy over and over again – were seen as manipulative tactics abusing the judicial process. But, what if one were to read in the repeated filing of petitions a desperate plea for mercy, a hope for forgiveness? Were these appeals made to an-*other* law where anger and grief do not necessarily turn retributive, where justice does not kill, but heals?[64]

Hathras rape case

On September 14, 2020, a 19 year old Dalit woman was gang-raped by upper caste men in the Hathras district of Uttar Pradesh. She died two weeks later in a Delhi hospital and was allegedly forcibly cremated by the police without the consent of her family. Multiple writ petitions and intervention applications were filed in this matter. The apex court[65] directed that the victim's family and the witnesses should be provided security. Since the CBI was carrying out the investigation, the court did not feel the need to transfer the trial of the case at this stage. The court also directed the high court

60 *Id.*, para 30.

61 *Pawan Kumar Gupta* v. *State of NCT of Delhi,* 2020 (5) SCALE 822.

62 *Ram Narain* v. *State of Uttar Pradesh* (2015) 17 SCC 699.

63 *Supra* note 61, para 7. He again filed a curative petition on Mar. 19 which was dismissed, *available at*: https://indiankanoon.org/doc/40219377/ (last visited on Apr. 17, 2021). On the date of the execution, he filed an "application for stay of execution of death warrant and application for urgent hearing" which was also rejected, *available at*: https://indiankanoon.org/doc/9199702/ (last visited on Apr. 17, 2021).

64 I attempted to articulate this hope from law in "Thinking Forgiveness: Mother to Mother" *Deccan Chronicle* (Jan. 22, 2020), *available at*: https://www.deccanchronicle.com/opinion/columnists/220120/thinking-forgiveness-mother-to-mother.html (last visited on Apr. 7, 2021).

65 *Satyama Dubey* v. *Union of India*, 2020 (12) SCALE 216.

to delete the name and relationship of the family members with the victim which was illegally mentioned in the order passed by the high court.

Appointment of amicus curiae

In *Anokhilal* v. *State of M.P.,*[66] a matter of rape and murder of a minor girl, appellant-accused was convicted and sentenced under sections 302, 376(2)(f), 377 of the IPC and sections 4, 5, 6 of the POCSO. His counsel contended that the trial was not conducted in a fair manner. Even though an *amicus curie* was appointed at the time of framing of charges, he neither studied the case nor interacted with the accused. The court laid down the following norms to be followed in future cases:[67]

> [W]here there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum 10 years of practice at the Bar alone be considered to be appointed as *Amicus Curie* or through legal services to represent the accused.
>
> In all matters dealt with by the High Court cases concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as *Amicus Curiae* [...] *Amicus Curiae* [must be given] some reasonable time [...] to prepare the matter [...] *Amicus Curiae* on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as noticed in *Imtiyaz Ramzan Khan*.[68]

In the light of the above, and since the accused's right to legal aid and fair representation was denied, the court ordered *de novo* consideration of the case by setting aside the conviction and death sentence.

Sexual assault leading to death: culpability and sentence

In *Shatrughna Baban Meshram* v. *The State of Maharashtra,*[69] the appellant was tried under sections 376(1)(2)(f)(m), 376A, 302 of the IPC and under section 6 of the POCSO Act. The victim was a girl of two and half years. The trial court, by its order passed on the same day, awarded death sentence to the appellant under section 302 of the IPC and 376A of the IPC; the high court upheld the same. The offence was committed on February 11, 2013 when the provisions of the Criminal Law Ordinance were in force (section 376(2) mandatory minimum of ten years, extending to life; 376A mandatory minimum of 20 years extending to life for the remainder of natural life or death). However, the Amendment Act having been given retrospective effect from February 3, 2013 (section 376(2) mandatory minimum of ten years, extending to life for the remainder of natural life; 376A mandatory minimum of 20 years extending to life for the remainder of natural life or death), the first question before the court

66 2020 (1) SCALE 75.
67 *Id*., para 22.
68 (2018) 9 SCC 160.
69 2020 (12) SCALE 287.

was whether the imposition of life sentence for the offence under section 376(2) could mean imprisonment for the remainder of that person's natural life.[70]

The court rightly stated that "a statutory prescription that it "shall mean the remainder of that person's life" will certainly restrain the executive from exercising any such statutory power and to that extent the concerned provision definitely prescribes a higher punishment ex-post facto."[71] This would negate Article 20(1) of the Constitution. The court thus "declare[d] that the punishment under section 376(2) of the IPC in the present case cannot come with stipulation that the life imprisonment "shall mean the remainder of that person's life"."[72] Since section 376A of the Ordinance was identical with that of the Amendment Act, retrospective effect to the Act as far as this is concerned would stand the test of Article 20(1).[73]

The court then examined the evidence on record to arrive at the following conclusion:[74]

> The circumstances proved on record are not only conclusive in nature but completely support the case of the prosecution and are consistent with only one hypothesis and that is the guilt of the Appellant. They form a chain, so complete, consistent and clear, *that no room for doubt or ground arises pointing towards innocence of the Appellant*. It is, therefore, established beyond any shadow of doubt that the Appellant committed the acts of rape and sexual assault upon the victim and that *injury no.17 was the cause of death of the victim*.

Thus, the appellant was found guilty of having committed offences punishable under clauses (f), (i) and (m) of section 376(2) of the IPC, and section 5 (j) and (m) read with section 6 of the POCSO Act (as it stood then). Injury no. 17, which was the cause of death according to medical opinion, was caused by forceful sexual assault[75] and thus the appellant was also held guilty under section 376A of the IPC.

The next question for the court was whether the act of the appellant falls within section 299/300 of the IPC. The court reviewed previous cases[76] on culpable homicide and murder and concluded that the present case falls within *fourthly* of section 300

70 Criminal law Amendments, 2018 are not applicable to this case as they cannot be given retrospective effect.

71 *Supra* note 69, para 15.

72 *Ibid*.

73 Here, it would be worthwhile to revisit the contentious decisions of the Supreme Court wherein the court upheld sentences where the convict is debarred from earning remission for either the rest of the life, or for a specified period of 20, 30 or more years. See, *Swamy Shraddhananda* v. *State of Karnataka* (2008) 13 SCC 767, and *Union of India* v. *V. Sriharan* (2016) 7 SCC 1 (with a dissenting opinion of Lalit and Sapre, JJ). For a wider critique of 'life imprisonment', see Nishant Gokhale , "Life Imprisonment In India: A Short History of a Long Sentence" 11 *NUJS L.Rev.* 395 (2018).

74 *Supra* note 69, para 21.

75 *Id.*, para 6.

76 A critical reading of the court's review of cases, though important, is beyond the scope of this survey.

("imminently dangerous act that it must in all probability cause death"). Was this a case of 'intentional bodily injury' or 'imminently dangerous act'? In my humble submission, invocation of *fourthly* was inappropriate according to the present scheme of the IPC.[77] In many previous decisions, favourably cited by the court,[78] the same error has been committed. This error of reading has grave consequences since it is fundamentally a question of how the court understands sexual assault. What is the underlying implication of classifying the sexual assault as "imminently dangerous act" as opposed to "intended bodily injury"? Is rape/sexual assault dangerous sex or is it a serious bodily injury, an assault both on person and dignity? In the present case, bodily injury no. 17 was an intentional bodily injury caused to a baby. For a reasonable person, on a "broad-based appraisal"[79] (amount of force used, the age of the victim), wouldn't this injury be "sufficient in the ordinary course of nature" to cause (unintended) death, making it the case of *thirdly*?

Thus, even as one (myself included) may lean in favour of the abolitionist fervour of the court[80] - the court granted life imprisonment under section 302 and rigorous imprisonment for 25 years under 376A[81] – the manner in which the court arrived at this sentence falls short of the required rigorous reading and application of the substantive provisions of the penal code.

Sole testimony of the child victim

In *Ganesan* v. *State*[82] the accused was punished under sections 7 and 8 of the POCSO Act. The victim was a 13 year old girl who was studying in class five at the time of the incident. In the present appeal, *inter alias*, the appellant argued that the mother of the victim had turned hostile that therefore the lower court committed an error in convicting him solely based on the testimony of the victim. The court held that the solitary evidence of the child victim is sufficient, if it is trustworthy, unblemished and is of 'sterling quality'.

Promise to marry

The question whether rape law can be the instrument of reparation for broken hearts is at the centre of promise to marry cases. In *Maheshwar Tigga* v. *The State of Jharkhand*[83] the allegation of rape arose from a love relationship which could not

77 No doubt the present scheme of homicide provisions in the IPC requires urgent reforms to make the homicide law clear, but till we are working within the present structure of s. 299/ 300, we ought to read the law carefully for *what it is*. For a critique of homicide provisions, see Stanley Yeo, Neil Morgan Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2012).

78 *State of Orissa* v. *Dibakar Naik* (2002) 5 SCC 323; *State* v. *Sunil* (2001) 1 SCC 652, amongst others.

79 B.B. Pande, "Limits of Objective Liability" 16(3) *Journal of the Indian Law Institute* 469-82 (1974).

80 For the comment on politics of death penalty sentencing, see this year's *survey* on "Criminal Law".

81 This punishment is in consonance with U. U. Lalit's J. dissent in *Sriharan's case.*

82 2020 (12) SCALE 130.

83 2020 (11) SCALE 176.

lead to marriage (one of the reasons was that the parties belonged to different religions). The court examined the evidence on record and acquitted the appellant. In arriving at this decision, the court did not just reproduce the precedents on this matter but presented a careful and nuanced reading of the law.

In the instant case, the consent of the complainant was:[84]

> [A] conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her [sic], because of her deep"seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love.

Leaving aside normative notions of "normal" sexual behaviour (where carnal intimacy is contingent on the supreme emotion of love), the court was careful in not painting the complainant's experience with the stroke of victimhood. While it can be argued that "a conscious and deliberated [sexual] choice" is *always* mediated by unconscious desire (desire not just for sex but some other super-ordinate goal like marriage), since the concept of 'consent' legally distinguishes rape from sex, courts are bound to closely scrutinise the context as well as terms of consent.

Force, fear or misrepresentation take away the essence of consent. Commenting on section 90 of the IPC (consent given under a misconception of fact is no consent), the court remarked "the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years."[85] Here, it is important to note that the court is specifically talking about misconception around the promise to marry (and not other kinds of misconception of facts, say about use of contraceptives or STD). The complainant, the court observed, "was herself aware of the obstacles in their relationship because of different religious beliefs [...] unfortunately differences also arose whether the marriage was to solemnise in the Church or in a Temple and ultimately failed."[86] In the absence of any evidence that the appellant *right from the inception* did not intend to marry her and had misrepresented *only* in order to establish physical relation with her, the court acquitted the appellant.

Reversal of sessions court decision by high court

In *Chaman Lal* v. *The State of Himachal Pradesh*,[87] the appellant was charged under sections 376 and 506 of the IPC. The 19 year old victim, who was diagnosed with "mild retardation" (IQ of 62) had given birth to a female child. The DNA test revealed that the accused was the biological father of the baby. The trial court had acquitted the appellant since there was delay in the lodging of FIR and "also on the ground that the prosecutrix was not mentally unsound to understand the consequences

84 *Id*., para 20.
85 *Id*., para 14.
86 *Id*., para 11.
87 (2020) 17 SCC 69.

and what was happening."[88] The high court reversed the order of acquittal since the victim "was not in a position to understand the good and bad aspect of the sexual assault."[89] The appellant challenged his conviction by the high court. Dismissing the appeal of the appellant, the apex court held that sessions court had failed to appreciate the evidence on record which established that the appellant has taken "undue advantage of her mental sickness/illness."

Vengeance for filing rape complaint

In *Parminder Kaur @ P.P. Kaur @ Soni* v. *State of Punjab*,[90] the appellant was charged under sections 366A and 506 of the IPC. The complaint against her was that she had first tried to entice a minor girl for having sexual intercourse with her rich tenant in return for clothes and trips from him, and then criminally intimidated her. She was found guilty by the trial court, which was upheld by the high court. The Supreme Court noted how this case was an instance of shoddy investigation and "gross misappreciation of conflicting testimonies". It was revealed that the appellant lived with her mother and child and had no tenant in her premises. The complaint was motivated by a desire for vengeance against her as she had previously filed a rape complaint against the complainant's close acquaintance. The appellant had faced many difficulties in filing the rape FIR and in fact, "in that rape trial, the trial court drew a damning observation against her character (calling her a child trafficker) owing to these proceedings."[91] The appellant was thus acquitted.

Sexual harassment

In *Mr. Kedarnath Mahapatra* v. *Union of India*[92] the petitioner, a school principal, was accused of sexually harassing a 14 year old girl studying in his school. The mother of the girl had filed a complaint with the police which was registered under section 354A of the IPC and section 12 of POCSO Act. The petitioner was arrested and sent to judicial custody and was later released on bail. The father of the girl informed the school management that his daughter was subjected to sexual harassment. The petitioner was then suspended and disciplinary proceedings were initiated against him.

The petitioner filed a writ challenging the initiation and continuation of disciplinary proceedings since the criminal case was also going on simultaneously. His argument was that since the charges framed in the disciplinary proceedings directly arose from the FIR, if disciplinary proceedings were conducted before the conclusion of the criminal trial, grave prejudice would be caused to the criminal case as "he will be forced to disclose his defence in the disciplinary proceedings."[93] The court rejecting

88 *Id.*, para 2.1.
89 *Id.,* para 3.
90 2020 (9) SCALE 121.
91 *Id*., para 23.
92 W.P. no. 3680 of 2018, order on 4 May, 2020 (Telangana High Court).
93 *Id*., para 5.

this argument held that disciplinary proceedings should not be kept in abeyance. In the court's words:[94]

> Differing [sic] disciplinary proceedings on the ground that criminal case is pending is an exception to normal rule and to be exercised in a case where the criminal proceedings involve complicated questions of facts and law and no greater harm would be caused to employer by differing [sic] the disciplinary proceedings; that there is no possibility of delay in conclusion of criminal trial. Each case has to be considered in the facts of the case [sic]. Where allegation of sexual harassment is made, more so, against a girl student in an educational institution, it is not a case of merely committing a misconduct but by such conduct, if established, as held by the Hon'ble Supreme Court in the Apparel Export Promotion Council, it would be a case of offending the fundamental right to equality and right to life and liberty of the girl student. Writ Court also should keep in mind that in a case of sexual harassment issue is no more confined to the employer and employee, but it also concerns the girl student, her parents and other students in the school.

In *Institute of Hotel Management, Catering Technology and Applied Nutrition* v. *Suddhasil Dey*,[95] an internal complaints committee (ICC) was constituted by the appellant institute to investigate the complaint made against the respondent. The committee had recorded the depositions of the complainants in the absence of the respondent because "the ICC felt that divulging the names of the complainants would compromise their safety and security and that it was necessary to maintain confidentiality."[96] The ICC submitted its findings in an inquiry report which was placed before the Board of Governors (BoG) of the institute, which was the disciplinary authority, and comments of the respondent were sought. He submitted his comments

94 *Id*., para 16 . Also see, *Union of India* v. *Lt. Col. S.S. Bedi*, 2020 (8) SCALE 796. In this case, the charge was not of sexual harassment but criminal force and "outraging of modesty". The appellant was commissioned in the Indian Army Medical Corps and was posted at Base Hospital, Lucknow as a medical specialist. A complaint was filed by two women who alleged that he had misbehaved with them during check-up by inappropriately touching their private parts. He was charged for using criminal force with the intent to outrage their modesty and was sentenced to be cashiered from service by the general court martial. The conviction by the court martial was challenged by the petitioner before the Delhi High Court. The writ petition filed by him was transferred by the Delhi High Court to the principal bench of the Armed Forces Tribunal, New Delhi. The tribunal upheld the conviction but converted the punishment of cashiering to a fine of Rs.50,000 since the appellant had "a blemishless record of service". According to the tribunal, the punishment of cashiering from service was "shockingly disproportionate". Both parties appealed. The court, on appreciation of evidence, upheld the conviction. On the question of sentence, the court restored the punishment of penalty of cashiering "by taking into account the reprehensible conduct of the Appellant abusing a position of trust being a Doctor which is not condonable." However, in the light of his record of service and advanced age, and in case the respondents decided not to initiate proceedings under army pension regulations, the appellant was extended all pensionary benefits.

95 2020 (4) SLR 437.

96 *Id*., para 5.

on the inquiry report. The BoG did not concur with the inquiry report on the ground that the findings are "not supported by evidence on the basis of which any conclusion can be drawn" and had resolved to remand the matter to the ICC "for further enquiry for the purpose of recording evidence of complainant and other witnesses" and to submit a report within 21 days. The ICC resubmitted an inquiry report based on which the BoG dismissed the respondent. An appeal filed by him was dismissed. He then challenged the order before the tribunal. The tribunal quashed the order of dismissal, remanded the matter back to the BoG with the direction to act strictly in terms of provisions of the Act and pass a speaking order. Until then, the applicant was suspended. Hence, this appeal by the institute.

The High Court of Calcutta started with a note of caution:[97]

> It is [...] imperative to tread with caution and circumspection so that while justice is rendered to a victim of sexual harassment, justice is also rendered to the man accused of the same. It is the due process that undoubtedly needs to be adhered to, so that a party to the proceedings has little reason to believe that he or she did not receive just justice [sic].

Upholding the order of the tribunal, the court closely read the provisions of The Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 (SH Act) and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (SH Rules). Taking note of section 28 of the SH Act (the provisions of the Act would be in addition to and not in derogation of the provisions of any other law for the time being in force), the court held that the safeguards provided by the Central Civil Services (Classification, Control and Appeal) Rules, 1971 (CCS Rules) cannot be denied while proceedings under the SH 2013 Act are in progress. The ICC (as per the provisions contained in section 11 of the 2013 Act and rule 9 of the 2013 Rules) must hold the inquiry as far as practicable in accordance with the procedure laid down in the CCS Rules. Further, the court observed that the SH Act/ SH Rules do not bar cross-examination of the complainant or witnesses before the ICC by the respondent.[98] In this regard, "it is always open to the ICC to modulate the mode and manner of cross-examination so that the right of a party to the proceedings under the 2013 Act, - be it the complainant or the respondent - to be treated fairly is not abrogated."[99]

According to the court, section 13(4) of the SH Act "does not make it imperative for the disciplinary authority to act on the recommendations of the ICC by accepting it [...] If the recommendations were binding, it would cease to be a recommendation."[100]

97 *Id.*, para 3
98 *Id.*, para 40
99 *Id.*, para 38.
100 *Id.*, para 50.

The court was also of the view that the respondent should be given a copy of the inquiry report prior to disciplinary action being taken.[101] This will give the respondent a fair chance to present his defence.

In another case of sexual harassment at workplace,[102] the complainant challenged the order of the single judge who had dismissed her writ petition challenging the recommendations of the ICC to the effect that it granted benefit of doubt to the respondent due to lack of 'substantive evidence' and 'direct witnesses' and recommended transfer of both the parties 'to protect and maintain the healthy and congenial working environment' and imposed costs on her for filing 'false complaint' of sexual harassment. The Delhi High Court set aside the decision of the single judge to the extent that it labelled the complaint 'false'. The court also made some important observations with respect to the SH Act and its implementation which are summed up as follows.

> [W]hen a woman complains against her male colleague for sexual harassment, her own efficiency or inefficiency or temperament or the fact that disciplinary proceedings were initiated or are pending against her, are completely irrelevant and extraneous to the inquiry. Her credibility is not diminished because of such pending disciplinary proceedings against her.[103]
>
> It is incumbent under the Act for an organization to set out these details and information at prominent places so that any woman who requires help can easily approach the concerned person to submit her complaint and/or appeal.[104]
>
> [T]he Internal Complaints Committee [...] is not to doubt the veracity of the complaint or view the complainant with suspicion. It is to believe her and not compel her to name witnesses to seek corroboration.[105]
>
> [T]he high standard of proof required in criminal trials is not called for during an inquiry by the Internal Complaints Committee [...] a woman who is perturbed by an action of a male colleague, either through words, gestures or action, cannot be expected to have such clarity of thought, to know who all were present at the time of the incident, and who all may have witnessed the incident and remember their names and faces. The mere inability of a woman to name such witnesses cannot suffice to falsify her complaint [...] there can be no insistence on production of witnesses by the complainant to corroborate her statement.[106]

101 *Id*., para 48.
102 *Ms. X* v. *Union of India*, 2020 SCC OnLine Del 1618.
103 *Id*., para 12.
104 *Id*., para 17.
105 *Id*., para 17.
106 *Id*., para 21.

> The transfer of the complainant should be only if she seeks it or when she has been found to have filed a false complaint. It would be adding insult to injury, if a woman who has been wronged, is sought to be transferred for making a genuine complaint and that too, to ensure a congenial and harmonious environment.[107]

In *Vijayakumaran C.P.V.* v. *Central University of Kerala*,[108] the appellant was appointed as Associate Professor and had to be on probation for 12 months from the date of joining as per the rules of the university. After assuming office, a sexual harassment complaint was filed against him. Based on the report of the inquiry committee, he was terminated from service. He challenged the termination order being *ex facie stigmatic*. The trial court and the high court construed the order as *termination simpliciter*.

The court held that the order was *ex facie stigmatic* as "it has made the report of the inquiry conducted by the Internal Complaints Committee and the decision of the Executive Council [...] as the foundation, in addition to the ground of academic performance."[109] An order of termination is *ex facie stigmatic* and punitive if "there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt."[110] The court clarified that "[s]uch an order could be issued only after subjecting the incumbent to a regular inquiry as per the service rules."[111]

In the instant case, the allegations of sexual harassment against the employee were of a serious nature and thus a simple order of termination could not be passed. "Such complaints" the court stated "ought to be taken to its logical end by not only initiating departmental or regular inquiry as per the service rules, but also followed by other actions as per law."[112] Further, "a regular inquiry or departmental action as per service rules is also indispensable so as to enable the employee concerned to vindicate his position and establish his innocence."[113] The court thus held that the order was illegal being *ex-facie stigmatic* as it was issued without subjecting the appellant to a regular inquiry as per the service rules. The university was directed to

107 *Id*., para 22.
108 2020 (2) SCALE 661.
109 *Id.*, para 7.
110 *Id.*, para 9.
111 *Ibid*.
112 *Id.* at 10.
113 *Ibid*.

reinstate him, and pending suspension, initiate departmental or regular inquiry against him as per the service rules.[114]

V CIVIL MATTERS

Daughters as coparceners

The division bench decisions of the Supreme Court in *Prakash* v. *Phulavati*[115] and *Danamma @ Suman Surpur* v. *Amar*[116] had led to confusing and conflicting interpretations of section 6 of the Hindu Succession Act, 1956. *Phulavati* had held that section 6 was not retrospective in operation and was applicable to a living daughter of a living coparcener. In *Danamma* (which had approvingly cited *Phulavati*), the provision was given retrospective effect to the extent that the 2006 amendment was applied even though partition suit was filed in 2002 and a preliminary decree in the case had also been passed. A larger bench in *Vineeta Sharma* v. *Rakesh Sharma*[117] was constituted to settle the position of law.

The apex court overruled *Phulavati* (and *Danamma* to the extent it endorsed *Phulavati)* and settled the position of law, as follows:[118]

(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv) [...] The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the

114 The difference between the "fact-finding inquiry" under the Sexual Harassment Act, 2013 and "departmental inquiry" under the Central Civil Services (Classification, Control and Appeal) Rules, 1965 is discussed in *Nisha Priya Bhatia* v. *Union of India*, 2020 (6) SCALE 682. In this case, the appellant, former Director, Research and Analysis Wing, was declared "exposed" and released, compulsorily retired, from service under rule 135 of the Research and Analysis Wing (Recruitment, Cadre and Services) Rules, 1975. She had filed a sexual harassment complaint against the officers working in the organisation, following which a complaints committee was constituted which in its *ex parte* report concluded that the allegations could not be proved. Following this, the appellant attempted suicide outside the PMO, an incident which was widely reported in the media. While another committee was constituted after this incident, the appellant was declared "exposed" and unemployable. She challenged the constitutional validity of rule 135, sought modification in CCS Rules in line with guidelines on sexual harassment and also sought compensation for violation of her right to life and dignity (on account of improper constitution of departmental committee and callous disregard towards her complaint). Though she was granted the compensation, the other two pleas were rejected.

115 (2016) 2 SCC 36.

116 (2018) 3 SCC 343.

117 2020 (9) SCALE 514.

118 *Id*., para 129.

> daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal [...]

Jurisdiction of family courts

In *Rana Nahid @ Reshma @ Sana* v. *Sahidul Haq Chisti*[119] the issue was one of the jurisdiction of Family Courts to try maintenance application of a Muslim divorced woman filed under sections 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 ('1986 Act'). The appellant had filed an application for maintenance under section 125 of the CrPC against the husband-respondent. The Family Court held that since the appellant is a Muslim divorced woman, her petition for maintenance under section 125 CrPC is not maintainable. The Family Court, following *Iqbal Bano* v. *State of U.P.*,[120] treated the application under section 125 CrPC as an application under section 3 of the 1986 Act. The high court however held that the order of the Family Court converting the application under section 125 Cr.P.C. into an application under section 3 of the Act was without jurisdiction. It was of the view that the appellant could file an application under section 3 before the court of competent magistrate.

When the matter came before the Supreme Court, Banumathi, J. was of the opinion that the Family Court cannot convert the petition for maintenance under section 125 Cr PC to section 3 or 4 of the 1986 Act. Upholding the full bench decision of Bombay High Court in *Karim Abdul Rehman Shaikh* v. *Shehnaz Karim Shaikh,*[121] the court held that a Muslim woman can apply under sections 3 and 4 of the 1986 Act only to the first class magistrate having jurisdiction under CrPC. The Family Court cannot deal with such applications. Quoting from *Karim Abdul,* the judge affirmed:[122]

> [T]he fact that the Muslim Women Act does not refer to a Family Court or does not say that application under sections 3 and 4 can be filed before the Family Court is very material. If the jurisdiction of the Family Court was sought to be protected, there would have been an express provision making it clear that the Family Court has jurisdiction to entertain applications of divorced Muslim women under sections 3 and 4 of the Muslim Women Act.

Disagreeing, Indira Banerjee, J. rightly saw the issue in the light of constitutional mandate of equality and stressed that "Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."[123] According to her:[124]

> If there is any ambiguity, with regard to the jurisdiction of the Family Court, by reason of use of the expression subordinate Civil Court in Section 7(1)(a) and (b) of the Family Courts Act and the specification of Magistrate of the First Class exercising jurisdiction under Chapter

119 2020 (8) SCALE 1.
120 (2007) 6 SCC 785.
121 2000 (3) Mh.L.J. 555
122 *Id.*, para 22.
123 *Supra* note 119, para 80(54).
124 *Id.,* para 88(62).

> IX of the Cr.P.C. in Section 7(2)(a) thereof, this Court is duty bound to clear the ambiguity by interpreting the law in consonance with the fundamental rights conferred under Articles 14 and 15 of the Constitution, and the country's commitments under International Instruments and Covenants such as the CEDAW, keeping in mind the fact that the Family Courts Act was enacted two years before the 1986 Act for Muslim Women.

Further, she stated that a purposive interpretation should be given to the expression "Subordinate Civil Court" in section 7 since "[a] literal and rigid interpretation of the expression "Subordinate Civil Court" to single out divorced Muslim Women seeking maintenance from their husbands, access to Family Courts when all other women whether divorced or not and even Muslim Women not divorced can approach Family Courts would be violative of Article 14 of the Constitution."[125] Thus, on a "harmonious conjoint reading" of sections 7 and 8 of the Family Courts Act with sections 3(2), 3(3), 4(1), 4(2), 5 and 7 of the 1986 Act, she concluded that a Family Court should be "deemed to be the Court of a Magistrate" for deciding claims of maintenance of a divorced Muslim women.

In view of the differing views, the matter was referred to a larger bench.

Directions in the matter of interim maintenance

In *Rajnesh* v. *Neha*[126] where proceedings for payment of maintenance under section 125 of the CrPC were pending for seven years, the Supreme Court, exercising power under Article 142, laid down detailed guidelines on the matter of maintenance/ interim maintenance on the following issues, and stated thus:[127]

> (a) Issue of overlapping jurisdiction: To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings [...] so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. We direct that:
>
> (i) where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or set-off, of the amount awarded in the previous proceeding/s, while determining whether any further amount is to be awarded in the subsequent proceeding;
>
> (ii) it is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding;
>
> (iii) if the order passed in the previous proceeding/s requires any modification or variation, it would be required to be done in the same proceeding.

125 *Id*., para 97(71).

126 2020 (13) SCALE 29.

127 *Id*. at 70.

> (b) Payment of Interim Maintenance: The Affidavit[s] of Disclosure of Assets and Liabilities [...] shall be filed by both parties in all maintenance proceedings, including pending proceedings before the concerned Family Court / District Court / Magistrates Court, as the case may be, throughout the country.
>
> (c) Criteria for determining the quantum of maintenance: [..."status of the parties; reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife"][128]
>
> [...Additional factors for determining maintenance are age and employment of the parties, aggrieved woman's right to residence, not restricting the wife's right to maintenance if she is earning, maintenance of minor children, serious disability or ill health...][129]
>
> The aforesaid factors are however not exhaustive, and the concerned Court may exercise its discretion to consider any other factor/s which may be necessary or of relevance in the facts and circumstances of a case.
>
> (d) Date from which maintenance is to be awarded: We make it clear that maintenance in all cases will be awarded from the date of filing the application for maintenance [...]
>
> (e) Enforcement / Execution of orders of maintenance: For enforcement / execution of orders of maintenance, it is directed that an order or decree of maintenance may be enforced under Section 28A of the Hindu Marriage Act, 1956; Section 20(6) of the D.V. Act; and Section 128 of Cr.P.C., as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly Sections 51, 55, 58, 60 r.w. Order XXI.

Divorce

In *Munish Kakkar* v. *Nidhi Kakkar*[130] appellant-husband had filed for divorce on the ground of cruelty which was granted in the trial court but was set aside by the high court. There were multiple efforts to mediate the dispute but it was found that the parties had no affection whatsoever for each other. However, all through the wife

128 *Id.* at 61.
129 *Id.* at 62-63.
130 2020 (1) SCALE 10.

insisted that she wanted to stay with him. The apex court invoked its powers under Article 142 of the Constitution to grant the decree of divorce and dissolve the marriage on the ground of irretrievable breakdown of marriage. The opposition by the wife was not on account of any desire to get back together but to only prevent the court from granting the decree of divorce. In "real terms", there was no willingness to stay together.

The argument of irretrievable breakdown of marriage was also made, but rejected, in *Mangayakarasi* v. *M. Yuvaraj*.[131] They had been living separately and litigating since 2007. The appellant wife had filed a restitution of conjugal rights petition, while the husband sought divorce under section 13(1)(ia) stating that the wife was "rude", "quarrelsome" and her behaviour "intemperate". The lower courts rejected the divorce plea but the high court had granted divorce which led to this appeal. Before the apex court, the husband's counsel pleaded for the court's invocation of power to do complete justice under Article 142 of the Constitution and grant divorce as the marriage had irretrievably broken down. However, for the court:[132]

> [T]he differences between the parties are not of such magnitude and [are] in the nature of the usual wear and tear of marital life [...] merely because they have been litigating and they have been residing separately for quite some time would not be justified in the present facts, more particularly when the restitution of conjugal rights was also considered simultaneously.

Since the parties belonged to "a conservative background where divorce is considered a taboo" and concerned about "the future of the child [daughter who was 13 years old] and her marital prospects",[133] the court deemed fit that the marriage stayed in-tact.

Custody of child

Women do not *naturally* possess the capacity to care and thus it cannot be assumed that mothers have an inherent ability to raise children. In custody cases, this idea has been fairly accepted. It is the child's 'best interest' that determines custody claims. In *DSG* v. *AKG*,[134] custody of the minor daughter (13 years old) was given to the father. The mother showed symptoms of paranoid schizophrenia and required treatment. She had contested her husband's application, alleging he was guilty of sexual abuse. But the court found the child happy with her father. Based on the girl's desire to stay with her father, her custody was granted to him.

Compensation in accident cases

Kajal was 12 when she was hit by a truck due to which she suffered serious head injuries leading to brain damage.[135] Her disability was assessed as 100%: IQ less

131 2020 (5) SCALE 17.

132 *Id*., para 16.

133 *Ibid.*

134 2020 (1) SCALE 98.

135 *Kajal* v. *Jagdish Chand*, 2020 (3) SCALE 154.

than 20% of a child of her age, severe "hysteria", urinary continence and weakness. The apex court recounted the principles of compensation under Motor Vehicles Act and enhanced the amount awarded for compensation taking into account actual medical expenses (not limiting the amount to bills on which the name of the claimant is mentioned), loss of earnings (based on her notional income and also the loss of income of her attendants), attendant charges for her entire life based on the multiplier system (which factors in inflation rate, longevity of the claimant, uncertainties of life *etc.*) and the severity of the disability which requires constant care, pain, suffering, loss of amenities and future medical expenses.

Savitha met with an accident in which she suffered 32 % total body disability (which was medically assessed).[136] She underwent two surgeries which severely affected her ability of doing household work. Both trial court and high court gave a reduced assessment of her disability and awarded her much lower compensation than she was entitled to. The Supreme Court did not find favour with either the trial court's assessment (arrived at "by hair splitting the expert evidence") or the high court's determination (which was based on "inexplicable reasons") and enhanced the compensation amount taking into account loss of future earnings on the basis of whole body disability.

In *Rajendra Singh* v. *National Insurance Co*.,[137] the appellant's 30 year old wife was hit by a bus and died. The court relied on *Lata Wadhwa* v. *State of Bihar*,[138] and *Arun Kumar Agrawal* v. *National Insurance Co. Ltd.*,[139] and enhanced the compensation:[140]

> [H]er skills as a matured and skilled housewife in contributing to the welfare and care of the family and in the upbringing of the children would have only been enhanced by time and for which reason we hold that the appellants shall be entitled to future prospects at the rate of

136 *Savitha* v. *M/s Chodamandalam M.S. General Insurance Co. Ltd*., 2020 (8) SCALE 161.

137 2020 (7) SCALE 770.

138 (2001) 8 SCC 197, where "considering the multifarious services rendered by housewives, even on a modest estimation, the income of a housewife between the age group of 34 to 59 years who were active in life" was assessed at Rs 36,000 per annum. The court made a distinction with "elderly ladies in the age group of 62 to 72 who would be more adept in discharge of housewife duties by age and experience, and the value of services rendered by them has been taken at Rs 20,000 per annum."

139 (2010) 9 SCC 218 ("In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maid servant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.")

140 *Supra* note 137, para 11.

> 40% in addition to the loss of consortium and future expenses already granted.

Maintenance

In *Krishnaveni Rai* v. *Pankaj Rai*,[141] the High Court of Telangana had rejected the application of maintenance under section 125 of the CrPC on the ground that the marriage between the parties was a nullity. The appellant married the respondent nine years after the dissolution of her first marriage and eight years after her ex-husband had remarried. However, at the time of the remarriage, an appeal filed by her against the dissolution of the marriage with first husband was still pending (this appeal was filed after the expiry of the limitation period). The court held that maintenance cannot be denied unless the marriage was declared a nullity by a declaration of the court under section 11 of the Hindu Marriage Act:[142]

> It could never have been the legislative intent that a marriage validly contracted after the divorce and after expiry of the period of limitation to file an appeal from the decree of divorce should [be] rendered void on the filing of a belated appeal.

In *Abhilasha* v. *Prakash*,[143] the appellant (minor daughter of the respondent), along with her two brothers, through their mother filed for maintenance under section 125 of Cr PC. The application was rejected with respect to the brothers and the mother but the trial court allowed the same for the appellant till she attained majority. The argument of appellant's counsel was that even though she had attained majority but since she was unmarried and unemployed, she was entitled to maintenance. She relied on section 20 of Hindu Adoptions and Maintenance Act, 1956 (HAMA).

The court noted that an unmarried daughter who has attained majority is entitled to compensation if by reason of any physical or mental abnormality or injury, she is unable to maintain herself (section 125(1) (c) of the CrPC). However, under section 20(3) of HAMA, an unmarried daughter is entitled to maintenance if she cannot maintain herself. Taking into account the facts of this case, the apex court did not interfere with the orders of the lower court or the high court. However, it observed that maintenance under HAMA is a larger concept as compared to maintenance under section 125 and hence, recognised the right of the appellant under HAMA which she could claim afresh.

Adoption

Daughters' claim of inheritance rights has been a contested site that exposes - over and over again - the romantic view of familial love. *M. Vanaja* v. *M. Sarla*[144] is one such case that brings out the fault-lines of kinship and family and their fraught relationship with property. M. Vanaja lost her parents at a very young age. She was raised by M. Sarla (the respondent who was her biological mother's sister) and her

141 2020 (4) SCALE 289.

142 *Id*., para 37.

143 2020 (11) SCALE 85.

144 (2020) 5 SCC 307.

husband, Narasimhulu Naidu. After Narasimhulu Naidu's death (who died intestate), M. Vanaja claimed partition of the suit property in which M. Sarla was residing. The trial court relied upon sections 7 and 11 of HAMA to hold that the appellant could not prove the ceremony of adoption. This judgment was upheld by the high court, aggrieved by which the appellant filed an appeal before the Supreme Court.

The issues before the Supreme Court were: whether the appellant has proved that she was adopted by the respondent and her husband and if yes, whether she was entitled to a declaration that she is their daughter and entitled to partition of properties belonging to Narsimhulu Naidu. The court stressed on two important requirements of a valid adoption: consent of the wife before a male Hindu adopts a child and proof of the ceremony of actual giving and taking in adoption.

The school and college records of M. Vanaja as well as other documents (ration card, service record and pension application of Narsimhulu Naidu) produced in court, revealed that the respondent and her husband were shown as her parents. Relying on *L. Debi Prasad* v. *Tribeni Devi,*[145] she argued that these facts should be relied upon to draw an inference that she was their adopted daughter. The court distinguished the precedent[146] and held:[147]

> Though the Appellant has produced evidence to show that she was *treated as a daughter* by (Late) Narasimhulu Naidu and the Defendant, she has not been able to establish her adoption.

Mere treatment as a daughter did not mean she was the daughter who could inherit from them. The court relied on the testimony of the respondent who (supported by the grandmother) "categorically stated in her evidence that the Appellant was never adopted though she was *merely brought up* by her and her husband." Thus, the appeal was dismissed since the appellant failed to establish the fact of adoption according to the mandate of HAMA.

She was not a daughter, thus could not inherit. She could not inherit and thus was never a daughter.

VI CONCLUSION

The *survey* of cases of 2020 reveals it was also a year of possibilities, not just of despair. *Finally*, *Batra* v. *Batra* and *Prakash* v. *Phulavati* were overruled; *finally* women were granted permanent commission in the armed forces, *finally* the right to gender identity was enforced. Importantly, in sexual harassment cases, the courts emphasised that internal complaints committees must follow "due process" which entails that neither the rights of the accused get diluted nor is the complainant viewed with suspicion. Detailed guidelines were issued on the matter of maintenance, norms

145 (1970) 1 SCC 677.

146 With the reasoning that in that case the adoption took place in the year 1892 and "we are concerned with an adoption that has taken place after the Act of 1956 has come into force." *Supra* note 144, para 13.

147 *Ibid*.

laid down for the appointment of amicus curiae and conflicting rights of vulnerable groups were carefully determined.

But we could not really move beyond "sameness" or the "male point of view", could we?

Daughters have equal rights, by birth, as coparceners. Yet their claims are still seen as deviant claims of 'outsiders' who are not integral to the family of male coparceners.

Rapist were hanged. Carceral law did its justice. Yet some bodies, especially women's bodies, remain marred by rapeability.

Women have secured permanent commission in the armed forces. Yet armies remain.

Our world changed in 2020. Then why does it look the same?