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WOMEN AND THE LAW

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I INTRODUCTION

THIS SURVEY focuses on the decisions of the Supreme Court of India in the year 2021 on issues relating to women, gender and sexuality. It does not offer an exhaustive account of all the Supreme Court decisions. Instead, the reporting is partialand selective, primarily drawn from Indian law reporter, SCALE. The survey is divided into seven parts. Part II contains cases on questions of equality and dignity. This year the court focused on equality rights of women as workers: as women officers and sex workers. Part III includes cases where the institutional violence of family and marriage gets surfaced: honour killing, harassment, dowry death, abetment of suicide, cruelty, sex-selective abortion. Part IV contains cases on sexual violence, from rape, kidnapping to sexual assault of children and men. Parts III and IV together occupy largest space in comparison to all the other parts. The overwhelming number of cases of violence against womenevery year explains why the question of violence continues to dominate the debates of Indian feminism even today. Part V is on matrimonial disputes and Part VI discusses cases pertaining to compassionate appointments and compensation. I conclude in Part VII.

II EQUALITY AND DIGNITY

Recognition of 'Indirect Discrimination'

Lt. Col. Nitisha v. *Union of India*[1] is a landmark decision of this year where the Supreme Court recognised the concept of 'indirect discrimination' under the Constitution of India.[2] This case emerges from the contentious implementation of *Babita Puniya*[3] where the apex court had declared the Indian army's policy of denying women officers a permanent commission (PC) discriminatory and hence unconstitutional. To implement this decision, the Union Government instituted a processthrough which eligible women officers would be granted PCs. The assessment

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1 2021 (4) SCALE 526.

2 For the analytical framework of indirect discrimination which the court evolved for India, see *id*., paras 66-70.

criteria in simplified terms entailed that (i) eligible women officers clear a certain percentage score, benchmarking with the lowest male officer who had received PC in their corresponding batches; (ii) Annual Confidential Reports (ACRs); (iii) fulfilment of certain medical requirements. The contention of the petitioners was that this criterion though seemingly gender neutral was in effect discriminatory for women.

Specifically, the petitioners argued that since women Short Service Commission officers (WSSCOs) were earlier not entitled to PC, 'their ACRs were written in a casual manner.'[4] Since for PC, ACRs only till the 5th/10th year of service were to be considered, 'in effect, the Army has obliviated the years of service, hard work and honours received by WSSCOs beyond their 5th/10th year of service and relegated them back to a position they held, in some cases, more than 10 years ago.'[5]Further, the women officers were 'subjected to a rigorous medical standard at an advanced stage of their careers, merely on account of the fact that the Army did not consider them for granting them PC, unlike their male counterparts.'[6]

The court approached the above issues bearing in mind the constitutional promise of substantive equality. It noted that substantive equality can only be achieved if 'patterns of discrimination and marginalization'[7] experienced by certain groups are recognised. Substantive equality, it declared, is closely tied to indirect discrimination.[8] Clarifying the distinction between direct and indirect discrimination, the court observed:[9]

> [A]s long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the *effects of the concerned action*, we enter the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is *the institutional or societal framework within which the impugned conduct occurs*. The doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible.

In other words, to discern discrimination, the focus should not just be onthe intention of the discriminator (direct discrimination) but it should also be on examining

3 *The Secretary, Ministry of Defence* v. *Babita Puniya*, 2020 (3) SCALE 712.

4 *Supra* note 1, para 90.

5 *Id*., para 97.

6 *Id*., para 106.

7 *Id*., para 44.

8 *Id*., para 45.

9 *Id*., para 53 (emphasis mine).

the underlying effect and consequence of a rule on the marginalised and disadvantaged groups.[10]Applying this conception of anti-discrimination to the facts of this case, the court held:[11]

> The fact that there was no pre-planning to exclude women from the grant of PC is irrelevant under an indirect discrimination analysis. As we have noted previously, under this analysis, the Court has to look at the effect of the concerned criteria, not at the intent underlying its adoption. In light of the fact that the pattern of evaluation will in effect lead to women being excluded from the grant of PC on grounds beyond their control, it is indirectly discriminatory against WSSCOs.

Sex Workers' Rights

In September, 2020, Durbar Mahila Samanwaya Committee, a sex-workers collective in West Bengal,filed an application seeking a direction for the concerned authorities to provide dry rations and cash transfers to sex workers.[12] They pleaded that sex workers were struggling tomake endsmeet during the pandemic. They were denied dry rations on the ground that they could not produce proof of identity.In response, the court directed the State Governments and Union Territories to provide dry rations to sex workers without insisting on proof of identity. The state authorities wereasked to identify sex workers as per the data gathered by National Aids Control Organisation (NACO).The court also instructed the state authorities not to involve police in this activity. However, it was found that the aforesaid directions were not complied with. It was thus submitted by the counsel of the applicants that the only solution would be to issue ration cards to all the sex workers on the basis of their identification by NACO and other community-based organizations.

The court noted that way back in 2011, it had instructed the State Governments and the Union Territories to issue ration cards and identity cards to sex workers, but unfortunately that direction wasnot implemented. Emphasising that 'right to dignity is a fundamental right that is guaranteed to every citizen of this country *irrespective of his/her vocation*',[13] the court affirmed that the state is required to provide basic amenities to all the citizens of the country. The State Governments and Union Territories were, once again, directed to commence the process of issuance of ration cards and voter identity card to the sex workers. A status report was called within a period of four weeks from the order.

III VIOLENCE OF FAMILY AND MARRIAGE

Sexual governance

The regimes of sexual governance are based on the nexus between the institution of family and state where law is mobilised to ensure conformity with the dominant

10 *Id*., para 46.

11 *Id*., para 99.

12 *Budhadev Karmaskar* v. *State of West Bengal*, Criminal Appeal No(s).135/2010 (Date: Dec. 14, 2021), *available at*: https://main.sci.gov.in/supremecourt/2007/37388/37388_2007_5_1_32160_Order_14-Dec-2021.pdf (last visited on Sep. 13, 2022).

13 *Ibid.*

sexual normative framework. How young people are prevented from exercising their right to choose sexual partners by the abuse of processes of law was well illustrated in *Laxmibai Chandaragi B.* v. *State of Karnataka*.[14]Laxmibai had married petitioner no. 2 without informing her parents. A missing complaint was filed by her family, investigating which the investigating officer (IO) reached the residence of petitioner no.2. She spoke to the IO herself and informed him that that she had already married petitioner no.2 and was living with him. However, the IO instead insisted that she should appear in the police station to record a statement. The IO did not close the case even after she had sent a letter to him stating that she was married and in fact was under threat from her own parents.

In her petition before the apex court, she enclosed the transcript of her conversation with the IO who was pestering her to return otherwise a case of kidnapping against would be registered against her husband at the behest of her family members. Commenting on this dismal state of affairs where this young couple was being subjected to harassment merely because they had exercised their right to freedom of choice, the court observed:[15]

> [T]he consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock and that their consent has to be piously given primacy […] Such a right or choice is not expected to succumb to the concept of "class honour" or "group thinking."

The court noted that both the petitioners were well qualified, adults and 'Hindu by religion'. While it is not clear why the court thought it necessary to indicate that both of them were Hindus, it noted that 'this is the way forward where caste and community tensions will reduce by such inter marriage.'[16] The court came down strongly on the IO and ordered that he 'must be sent for counseling as to how to manage such cases.' The police authorities were directed to lay down guidelines and conduct training programmes forsensitive handling of such cases. But the casteist and vindictive parents of the girl were let off with the hope that they will develop 'a better sense to accept the marriage and re-establish social interaction' with the petitioners.[17]

Honour Killing

Hari & Another v. *State of U.P.*[18] is an important precedent as it concerns the essence of vicarious liability in criminal law under section 149 of the IPC. It also enwraps the gendered subtext of annihilation of, not caste, but those who transgress the caste borders triggered by love. The facts of the case, which are hard to narrate without fear and trembling relate to an audacious act of inter-caste marriage which

14 2021 (2) SCALE 579.
15 *Id*., para 10.
16 *Id*., para 9.
17 *Id*., paras 13-14.
18 2021 (14) SCALE 270.

for B.R. Ambedkar, as the Supreme Court noted, 'is one remedy to get rid of casteism in order to achieve equality.'[19] The importance of this judgment cannot be overstated as it highlights the potential enwombed under section 149 of the IPC to convict those who do not actively participate but display their cruelty as onlookers, bystanders and members of violence against acts of love which threaten the hierarchical stratification of the caste system. Now the facts.

Roshni, a girl belonging to Jaat community eloped with Vijendra, a lower caste Jaatav boy. They were accompanied by Ram Kishan, another lower caste person who helped them. This act of affection triggered the hunt which ended up in the merciless hanging of the three youngsters on a banyan tree. 'Vijendra and Ram Kishan were hung upside down and their private parts were burnt.'[20] This decision of death came as a 'unanimous decision' of the local village panchayat in the State of Uttar Pradesh. As inhumanity of humans towards their own species can break all bounds, 'the parents of the three youngsters were compelled to tighten the noose around the neck of their children.'[21] After hanging them to death, the bodies were cremated to destroy evidence with a diktat that no one should leave the village. A few persons belonging to Jaat caste guarded the village boundaries. Nevertheless, Amichand, uncle of Ram Kishan'somehow escaped' from the village and informed the local police station about the macabre incident.

The lower court held a number of accused guilty under the IPC for murder, hurt, evidence tampering read with joint liability provisions (sections 147 and 149 of the IPC) and the SC/ST (Prevention of Atrocities Act), 1989. 35 convicts filed an appeal in the high court. In the high court, two of the appellants were acquitted, while the conviction of all other 33 was upheld. However, the death sentence awarded to eight accused was converted into life sentence. 27 of them were sentenced to life. 30 accused persons filed an appeal against the judgment of the high court. The state filed an appeal against commuting of death sentence into life for eight persons.

The Supreme Court upheld the decision of the high court for most of the accused persons. The Supreme Court underscored an important strand of section 149 in rejecting the argument of the defence that many accused were mere 'onlookers' or 'bystanders'. The apex court reiterated the cardinal principle underlying section 149 describing the provision as 'declaratory of the vicarious liability'.[22] The court clarified the settled position by endorsing an important precedent that 'overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149.'[23] It was made categorically explicit that the nature of guilt under section 149 is broader in scope. It requires mere 'knowledge' (as opposed to intent under section 34) and

19 *Id*., para 39.
20 *Id*., para 8.
21 *Ibid.*
22 *Id.*, para 35.
23 *Id.*, para 35.The court cited*Lalji* v. *State of U.P.* (1989) 1 SCC 437.
24 *Id.*, para 38.

does not desire any active participation of the members of the unlawful assembly. Consider the following important assertion of the court:[24]

> Even in respect of those who are not assigned any active role or overt act, there is no doubt that they shared the common object to punish the deceased and kill them. Their presence in the Panchayat continuously for nearly 12 hours without any protest or any attempt made by them to stop the violence would lend support to the prosecution version that all the appellants shared the common object of murdering the deceased.

The significance of this case in arresting gendered violence lies in the manner the court appreciatedthe evidence presented before it. It clarified that the testimony of a witness who had turned hostile was correctly relied on by the high court: 'Even if the witnesses have turned hostile, their evidence can be accepted, if they are natural and independent witnesses and have no reason to falsely implicate the accused.'[25] The court underlined the caste configurations and power dynamics of the social structure which play a part in turning of witnesses as hostile. And this should not be overlooked by the juridical lens. 'The reasons for PW-1 turning hostile are understandable as she comes from a lower-strata of the society, living in a village dominated by the caste to which the accused persons belong.'[26]

The Supreme Court also indicted the government of Uttar Pradesh in its inability and reluctance in implementing the Witness Protection Scheme proposed by the Central Government and endorsed by the Supreme Court in many previous cases:[27]

> Right to testify in Courts in a free and fair manner without any pressure and threat whatsoever is under serious attack today. If one is unable to testify in Courts due to threats or other pressures, then it is a clear violation of Article 19 (1) (a) and Article 21 of the Constitution. Right to life guaranteed to the people of this country also includes in its fold the right to live in a society which is free from crime and fear and the right of witnesses to testify in Courts without fear or pressure […] Implementation of the Witness Protection Scheme at the time when the witnesses were deposing in the present case, would have prevented the prosecution witnesses from turning hostile. If the material witnesses were relocated from the village and escorted to the courtroom, they would have deposed freely in court.

The failure of Amichand to accurately mention the names of all the accused in the FIR was not taken as weakening of the prosecution case against those whose names were added later. The Supreme Court approved the lower court's approach for accepting the explanation of Amichand who was under severe 'trauma of witnessing an egregious crime […] The ghastly crime was committed at four different places for

25 *Id.*, para 26.
26 *Id*., para 24.
27 *Id*., paras 28, 31.

a prolonged period of more than 12 hours. Inconsistencies in the version of the witnesses are natural, especially when a large number of persons are involved.'[28]

Unnatural death of married woman

This year, very much like previous years, many cases of natural death of married women came before the Supreme Court where husbands and in-laws were implicated. Most of these cases were dowry death and abetment of suicide. I have classified them according to the legal issues which emerged in these cases.

Circumstantial evidence and Reversal of Burden of Proof

In *R. Damodaran* v. *State*,[29] the appellant challenged his conviction under section 302 of the IPC for killing his wife – inflicting injuries on her that led to haemorrhage – who was in an advanced stage of pregnancy. The court rejected the appeal since the prosecution had established a clear chain of events which left no doubt about the guilt of the appellant.[30] All the circumstances clearly pointed to the fact that the appellant had murdered his wife who was at the advanced stage of pregnancy, had taken the dead body to the hospital and made a false statement that she had got a cardiac arrest.

In *Nagendra Sah* v. *State of Bihar*[31] the appellant's wife had died due to burn injuries and the cause of death was 'asphyxia due to pressure around neck by hand and blunt substance'. He was convicted under sections 302 (murder) and 201 (false evidence) of the IPC by the trial court, confirmed by the high court. The conviction was based on circumstantial evidence. In the appeal preferred before the apex court, the court noted that witnesses (including deceased's mother and brother) had deposed that the couple had no marital discord between them and the woman had caught fire when she was boiling milk for her child. Since the case of the prosecution was solely based on circumstantial evidence, the apex court reiterated the principles which govern such cases. Relying on *Sharad Birdhichand Sarda* v. *State of Maharashtra*,[32] the court noted:[33]

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established […] it is a primary principle that the accused *must be* and not merely *may be* guilty before a court […]
>
> (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,

28 *Id.*, paras 32, 33.

29 2021 (3) SCALE 69. Also see, *Parubai*v. *The State of Maharashtra*, 2021 (9) SCALE 320.

30 In another case, it was also stressed by the court that in the absence of a chain of events pointing to the guilt of accused, the 'last seen theory' cannot be applied to incriminate the accused. See, *Surendra Kumar* v. *State of U.P.,* 2021 (6) SCALE 114.

31 2021 (10) SCALE 674.

32 (1984) 4 SCC 116.

33 *Id.*, para 153 (emphasis mine).

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

On the applicability of section 106 of the Indian Evidence Act (IE Act), the court held that the section will only apply to those cases where the prosecution has been able to establish those facts 'from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused.'[34] Specifically, the court observed:[35]

> In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.

The court also stressed that 'only an opinion of the medical practitioner' who conducted the autopsy could not become the reason of convicting the appellant under sections 302 and 201 of the IPC, and thus acquitted the appellant.

Dying declarations

In *Nagabhushan*v. *State*,[36] where there were two dying declarations of the deceased wife, the court held that 'each dying declaration has to be separately assessed and evaluated on its own merits.' To arrive at 'the true state of affairs', the contents of the dying declaration ought to be supported by the medical evidence and the injuries sustained by the deceased.The court also noted that just because the accused might have tried to extinguish the fire or save/help the victim later would not take the case out of the ambit of clause fourthly of section 300 of the IPC.

One Satpal was convicted for murdering her wife by pouring kerosene on her and setting her ablaze.[37] The victim had suffered 90% injuries but could give a statement against her husband before she passed away. Before the Supreme Court, he argued that the dying declaration was tutored and could not be relied. The court however rejected this argument and affirmed that 'merely because the parents and other relatives

34 *Supra* note 31, para 20. Also see, *Shivaji Chintappa Patil* v. *State of Maharashtra*, 2021 (3) SCALE 384, where the court held that '[s]ection 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt.'

35 *Id*., para 21.

36 2021 (3) SCALE 692.

37 *Satpal*v. *Haryana*, 2021 (3) SCALE 504. Also see, *Naresh Kumar* v. *Kalawati*, 2021 (4) SCALE 774.

of the deceased were present in the Hospital, when the statement of the deceased was recorded, it cannot be said that the said statement was a tutored one.'[38]

Evidence of 'Interested witness' in domestic cruelty cases

GumansinhBhikhabhai Chauhan v. *State of Gujarat*[39]arises from a matrimonial dispute where the woman was driven to commit suicide within eight months of her marriage. The reason for termination of her life was cruelty at the hands of her husband and mother-in-law. The factual narrative which triggered Tahera to eventually end her life was demand for money and harassment by the mother-in-law. The husband had demanded Rs. 25,000 for a start-up of milk business. The economically weak family of Tahera failed to conform to this demand. The mother-in-law was wholly dissatisfied with Tahera for her inability to prepare chapatis causing exasperation and resultant cruelty on Tahera. The Gujarat High Court found the evidence sufficient to establish the case of cruelty (both physical and mental) symptomatic in the demand of Rs. 25,000 and confirmed the decision of guilt arrived at by the sessions court. The husband appealed against the decision of the high court and contested his conviction under sections 498A (cruelty) and 306 (abetment for suicide). These sections of the IPC were read with section 113A of the IE Act which raises a presumption in case of abetment of suicide of a women due to marital discord and cruelty.

The Supreme Court upheld the conviction of the accused on both counts. It observed that the arguments tendered by the defence are baseless and unconvincing. The case gives a peek into the stratagems of the legal process if we note the arguments of the defence. One, that the monetary demand was not in the nature of 'money' but 'loan'. Two, that the woman was mentally instable as she was 'undergoing treatment and medication […] even before marriage.'[40] The court found no difficulty in rejecting these spurious claims as 'neither any evidence was produced by the defence in this regard nor anything about the illness or medication was stated by them in their statement under Section 313.'[41] The subtlety of loan as opposed to money failed to impress the court either. Finally, and most importantly, the Supreme Court clarified that having 'interested witnesses' providing evidence does not go against the victim or the case of the prosecution. This is due to the domestic nature of the crime in question. The elucidation on this point is worth a full citation for its precedential value:[42]

> Most often the offence of subjecting the married woman to cruelty is committed within the boundaries of the house which in itself diminishes the chances of availability of any independent witness and even if an independent witness is available whether he or she would be willing to be a witness in the case is also a big question because normally no independent or unconnected person would prefer to become a witness for a number of reasons. There is nothing unnatural for a victim of

38 *Id.*, para 16.
39 2021 (10) SCALE 198.
40 *Id.*, para 19.
41 *Ibid.*
42 *Id.*, para 21.

> domestic cruelty to share her trauma with her parents, brothers and sisters and other such close relatives. The evidentiary value of the close relatives/interested witness is not liable to be rejected on the ground of being a relative of the deceased.

The apex court then explained the nature of presumption under section 113A of IE Act and held that itwas rightly invoked in the present case. The case is important not only for clear iteration of law by the Supreme Court but also because it exposes the emptiness of the increasing discourse that section 498A and evidentiary presumptions arelegal toolsused by women against men. Significantly, this case illustrates that the legal provisions are necessary for addressing and arresting the all-too-usual cruelty that accompanies the marital cord to an extent that discord and death emerge as ghastly outcomes of the sacred union.

Proving 'Dowry death'

In *Satbir Singh* v. *State of Haryana,*[43]the Supreme Court clarified interpretive principles with regard to section 304B of the IPC(dowry death) read with section 113B of the IE Act (presumption as to dowry death):[44]

> i. Section 304-B, IPC must be interpreted keeping in mind the legislative intent to curb the social evil of bride burning and dowry demand.
>
> ii. The prosecution must at first establish the existence of the necessary ingredients for constituting an offence under Section 304-B, IPC. Once these ingredients are satisfied, the rebuttable presumption of causality, provided under Section 113-B, Evidence Act operates against the accused.
>
> iii. The phrase "soon before" as appearing in Section 304-B, IPC cannot be construed to mean 'immediately before'. The prosecution must establish existence of "proximate and live link" between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives.
>
> iv. Section 304-B, IPC does not take a pigeonhole approach in categorizing death as homicidal or suicidal or accidental. The reason for such non categorization is due to the fact that death occurring "otherwise than under normal circumstances" can, in cases, be homicidal or suicidal or accidental.
>
> v. Due to the precarious nature of Section 304-B, IPC read with 113-B, Evidence Act, Judges, prosecution and defence should be careful during conduction of trial.
>
> vi. […] the examination of an accused under Section 313, CrPC cannot be treated as a mere procedural formality, as it based on the fundamental principle of fairness […]

43 2021 (7) SCALE 84.

44 *Id*., para 36.

> vii. The Court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the accused to prepare his defense since the inception of the Trial with due caution, keeping in consideration the peculiarities of Section 304-B, IPC read with Section 113-B, Evidence Act.
>
> viii. Section 232, CrPC provides that, "If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal". Such discretion must be utilized by the Trial Courts as an obligation of best efforts.
>
> ix. Once the Trial Court decides that the accused is not eligible to be acquitted as per the provisions of Section 232, CrPC, it must move on and fix hearings specifically for 'defence evidence', calling upon the accused to present his defense as per the procedure provided under Section 233, CrPC, which is also an invaluable right provided to the accused.
>
> x. In the same breath, Trial Courts need to balance other important considerations such as the right to a speedy trial. In this regard, we may caution that the above provisions should not be allowed to be misused as delay tactics.
>
> xi. Apart from the above, the presiding Judge should follow the guidelines laid down by this Court while sentencing and imposing appropriate punishment.
>
> xii. Undoubtedly, as discussed above, the menace of dowry death is increasing day by day. However, it is also observed that sometimes family members of the husband are roped in, even though they have no active role in commission of the offence and are residing at distant places. In these cases, the Court need to be cautious in its approach.

In *Gurmeet Singh* v. *State of Punjab*[45] the appellant was convicted under section 304-B of the IPC. He preferred this appeal arguing that the courts below applied the presumption under section 113B of the IE Act 'as a matter of routine' since the death of his wife occurred within seven years of marriage. In this case, he argued, the other essential ingredients of section 304B of the IPC were not met.It was not established that 'soon before her death' she was subjected to cruelty for dowry. The apex court dismissed this argument and relying on the principles reiterated in *Satbir Singh*,[46] held that the courts below had rightly invoked the presumption against the appellant which he had failed to disprove. Amongst other arguments it was contended that since there was no charge under section 498A of the IPC, conviction under section 304B could not be upheld.The court rejected even this argument since the two

45 2021 (7) SCALE 97.

46 *Supra*note 43.

provisions are distinct in nature: 'Although cruelty is a common thread existing in both the offences, however the ingredients of each offence are distinct and must be proved separately by the prosecution.' If a case is made out, there can be a conviction under both the sections.[47]

Abetment of suicide

In *Velladurai*v. *State Rep. By The Inspector of Police*[48] the appellant was convicted for abetting his wife's suicide under section 306 of the IPC read with section 4(b) of Tamil Nadu Prohibition of Harassment of Women Act. Responding to his appeal, the Supreme Court held that there was no material based on which it could be said that the appellant played 'an active role by an act of instigating the deceased' and hence section 306 was not applicable.

Vague and bald allegations

In *Mirza Iqbal @ Golu* v. *State of Uttar Pradesh*,[49] the court quashed the proceedings initiated under sections 498A, 323, 504, 506, 304B of the IPC and sections 3 and 4 of the Dowry Prohibition Act. Reiterating the observations made in *Geeta Mehrotra* v. *State of Uttar Pradesh,*[50]the court held that prosecution cannot be initiated on 'vague and bald allegations' without any specific allegations either in complaint or in the chargesheet.Similarly, in *Kuljit Singh* v. *State of Punjab*,[51] the court acquitted the mother-in-law of the deceased woman from the charges under section 304B of the IPC. It was noted that her conviction was based on 'a sweeping statement' that 'the husband and in-laws of the deceased had inflicted cruelty' without specifying their respective roles.[52]

Bail

In a case where bail was granted in a case of dowry death,[53] the Supreme Court recorded the importance of providing reasons in bail orders:[54]

> An order without reasons is fundamentally contrary to the norms which guide the judicial process. The administration of criminal justice by the High Court cannot be reduced to a mantra containing a recitation of general observations. That there has been a judicious application of mind by the judge who is deciding an application under Section 439 of the CrPC must emerge from the quality of the reasoning which is embodied in the order granting bail. While the reasons may be brief, it is the quality of the reasons which matters the most. That is because the reasons in a judicial order unravel the thought process of a trained judicial mind.

47 *Supra* note 45, para 20.
48 2021 (10) SCALE 694.
49 2021 (15) SCALE 341.
50 (2012) 10 SCC 741.
51 2021 (14) SCALE 681.
52 Also see, *Parvati Dev* v. *State of Bihar*, 2021 (15) SCALE 493.
53 *Sonu* v. *Sonu Yadav*, 2021 (5) SCALE 450.
54 *Id*., para 11.

The court observed that especially in cases of serious nature, like the present case where a woman had died in unnatural circumstances within a year of marriage, '[t]he seriousness of the alleged offence has to be evaluated in the backdrop of the allegation[s]'[55] made in complaint.

Anticipatory Bail

In *Vipan Kumar Dhir* v. *State of Uttar Pradesh*,[56] the appellant-complainanthad filed a FIR against the mother-in-law (respondent-accused) and other members of the matrimonial family of his deceased daughter. The accused's first application for bail was rejected by the sessions court, after which she 'had been on the run'. She had continued to evade arrest tillheryounger son (co-accusedand brother--in--law of the deceased) was granted anticipatorybail. Only after this, she filed a petition for her anticipatory bail before the high court seeking parity with the co-accused and assuring the court that she would join the investigation andremain present at each date of trial proceedings. The high court granted her relief which was challenged by the appellant-complainant. Allowing the appeal, the court noted that the high court erred in its rationale while granting bail. There was no question of parity between the two accused since the charges against them were materially different. Moreover, her conduct of absconding for more than two years was unwarranted and should have been taken note of by the high court.

498A: Compensation in lieu of reduction of sentence

In *Samaul Sk.* v. *State of Jharkhand*[57] the appellant was sentenced to three years imprisonment under section 498A of the IPC. The case was filed by his second wife (respondent) who alleged that on the instigation of the first wife he had started physically and mentally torturing her. The appellant filed a SLP and sought the benefit of Probation of Offenders Act, 1958 which was rejected. The court however noted that the sentence could be reduced subject to the condition that he gave adequate compensation to his second wife and her children besides the amount paid under section 125 of the CrPC. The respondent-wife also agreed to the applicability of Probation of Offenders Act or reduction of sentence if she was provided with due compensation. Even though the court had rejected the appellant's plea earlier, it changed its position eventually and observed:[58]

> If the petitioner/appellant is showing remorse and is willing to make arrangements for respondent No.2 and his two children born out of the wedlock, we would not like to come in the way of such an arrangement, which should be beneficial to respondent No.2 and her children.

Considering '[t]he object of any criminal jurisprudence is reformative in character and to take care of the victim',[59] the court relied on section 357 of the CrPC and ordered the appellant to pay the compensation in lieu of reduction of the sentence.

55 *Ibid.*
56 2021 (11) SCALE 687.
57 2021 (10) SCALE 31.
58 *Id.*, para 8.
59 *Id.*, para 9.

False case

In *Kalpana Sharma* v. *State of Uttar Pradesh*,[60] the argument of the prosecution was that the appellant was in a relationship with the deceased. When she refused to marry him, he committed suicide by consuming poison. Thus, '[i]n view of the relation maintained by her', according to the prosecution, it amounted to abetment for committing the suicidewithin the meaning of section 306 of the IPC.[61]It was further alleged that the appellant and other members of the family had abused the deceased by uttering casteist words.When appellant's application for quashing the charges under section 482 of the CrPC was rejected by the high court, she approached the apex court. She argued that no offence was made out against her under section 306 of the IPC or section 3(2)(v) of the SC/ST Act. The court accepted the appeal: 'Merely because he consumed poison in front of the house of the appellant, that itselfwill not indicate any relation of the appellant with the deceased.'[62]Abetment required 'a positive act' of instigation or aiding on the part of the accused' in the absence of which the section is not applicable.

Sex-selective abortion

In *Smt. Rekha Sengar*v. *State of M.P*.[63] the petitioner was charged with the offences of pre-natal sex determination and abortion of female foetuses under the provisions of IPC, Medical Termination of Pregnancy Act, 1971 and under the provisions of the Pre- Conception and Pre-Natal Diagnostics Techniques (Regulation and Prevention of Misuse) Act, 1994 ('PC&PNDT Act'). She approached the apex court on being denied bail by lower courts. The noted that section 27 of PC&PNDT Act stipulates that all offences under the Act are non-bailable, non-compoundable and cognizable. In the words of the court:[64]

> [N]o leniency should be granted at this stage as the same may reinforce the notion that the PC&PNDT Act is only a paper tiger and that clinics and laboratories can carry out sex -determination and feticide with impunity. A strict approach has to be adopted if we are to eliminate the scourge of female feticide and iniquity towards girl children from our society.

IV SEXUAL VIOLENCE

Gender-sanitising of judicial language

A public interest litigation was filed before the Supreme Court seeking directions that all courts should be refrained from making observations that trivialize the trauma undergone by survivors of sexual violence.[65] It was also prayed that directions should be issued to all courts that the discretion provided under sections 437(3)(c) and

60 2021 (11) SCALE 1.

61 *Id*., para 8.

62 *Id*., para 9.

63 2021 (3) SCALE 305.

64 *Id*., para 5.

65 *Aparna Bhat* v. *State of M.P*., 2021 (4) SCALE 312.

438(2)(iv) of the CrPC, to impose bail conditions, is not exercised based on irrelevant or illegal considerations (like marriage proposal by the accused, tying *rakhi*to the accused, rendering community service *etc.*).

Explaining why stereotyping is harmful, the court stated that 'stereotyping excludes anyindividualized consideration of, or investigation into, a person's actual circumstances and their needs or abilities.'[66] With respect to bail conditions, the court,*inter alia,* directed that bail orders should not be based on stereotypical notions about women and their position. Also, in cases involving gender-based crimes, the court should not encourage compromises between the parties or make suggestions to get married. The court further directed that the courts should 'desist from expressing any stereotype opinion' such that:[67]

> (i) women are physically weak and need protection; (ii) women are incapable of or cannot take decisions on their own; (iii) men are the "head" of the household and should take all the decisions relating to family; (iv) women should be submissive and obedient according to our culture; (v) "good" women are sexually chaste; (vi) motherhood is the duty and role of every woman, and assumptions to the effect that she wants to be a mother; (vii) women should be the ones in charge of their children, their upbringing and care; (viii) being alone at night or wearing certain clothes make women responsible for being attacked; (ix) a woman consuming alcohol, smoking, etc. may justify unwelcome advances by men or "has asked for it"; (x) women are emotional and often overreact or dramatize events, hence it is necessary to corroborate their testimony; (xi) testimonial evidence provided by women who are sexually active may be suspected when assessing "consent" in sexual offence cases; and (xii) lack of evidence of physical harm in sexual offence case leads to an inference of consent by the woman.

The court also mandated gender sensitivity training for all judges, along with incorporation of gender in the curriculum of legal education. While the court, in absolutely right spirit, stated that '[t]he court's the use of language and appropriate words and phrases should be emphasized as part of [judicial] training',[68] this surveyor's fear is that this should not be reduced to incorporating a politically correct judicial culture where everyone speaks feminist language without the struggle and destabilisation that feminism ought to bring to legal concepts and categories. Here, it is also important to note and add that gender stereotypes are not only about women. Besides masculine stereotypes, entrenched myths about institutions of marriage and family, about kinship and community, about regions and nations, about romance and lust, as also love and hate, are entrenched in judicial vocabulary as well as interpretive practices. It is important for future of judicial feminism to unpack and unveil these dimensions of our life-world marked and marred by gender-based stereotypes.

66 *Id.*, para 35.
67 *Id.*, para 45.
68 *Id.*, para 46.

Rape

The question of consent

Tarun Tejpal, ex editor-in-chief of the Tehelka magazine who was accused by a junior colleague of rape and sexual harassment was given a benefit of doubt and acquitted of all charges under sections 376 (2) (f), 376(2)(k), 354, 354A, 354B, 341 and 342 of the IPC by the sessions court in Goa.[69]On reading the judgment, one suspects that the finding of not guilty is supplemented with, what Pratiksha Baxi has called, 'an excess'.[70] The sessions court of Goa in its 527 pages long judgment put the complainant herself on trial. The court found that she failed to be the 'sterling witness' which a rape survivor, if she chooses to seek legal justice, ought to be. However, her credibility in this case was determined by her beliefs, journalistic writings friendships, the causes she supported, the people she sought assistance from, her intimate relationships, her sexuality. While paying lip-service to the legal dictum in rape cases that sexual history of the complainant is not relevant in rape cases, the court turned the trial into a voyeuristic spectacle where the complainant was asked to defend herself from the charge of relying on a feminist community for navigating the legal process. In allowing a humiliating cross-examination, the judge allowed irrelevant and sexist questions and considerations to ascertain whether she was speaking the truth.

In a shocking judgment which painted the complainant as manipulative and deceitful, the judge ended up exposing the limits of the project of expunging stereotypes from judicial decisions. This judgement is a good case study to understand how stereotypes organically evolve, change and stick with some ideas, people, places. We see how this judgment marvels in another stereotype, in the afterlife of the #metoo movement: feminists are manipulative, they distort facts to misuse laws against men.

Attempt to rape

In *State of Madhya Pradesh* v. *Mahendra alias Golu*,[71] the trial court had convicted the respondent for attempting to rape two minor girls under section 376(2)(f) read with section 511 of the IPC while acquitting him under sections 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The high court set aside the conviction and convicted him under section 354 of the IPC and sentenced him to undergo two years of rigorous imprisonment and fine. The reasoning of the court was that 'he had not gone beyond the stage of preparation and he did not intend to do so at all events.'[72]

Drawing upon the jurisprudence of law of attempt in India and interpreting the rape provision as it stood before 2013, the court held that the accused had crossed the stage of preparation and was liable for attempt. For the court, the accused had reached the end of the preparation stage when he lured the minor girls, took them inside a

69 *State* v. *Tarunjit Tejpal*, In the Court of District and Panaji (Date: May, 21, 2021).

70 Pratiksha Baxi, "For the Judge, It Was a Feminist Who Was on Trial, Not Tarun Tejpal" *available at*: https://thewire.in/women/for-the-judge-it-was-a-feminist-who-was-on-trial-not-tarun-tejpal(last visited on Sep. 22, 2022).

71 2021 (12) SCALE 576.

72 *Id*., para 5.

room and closed the doors having sexual intention. His later actions of stripping and rubbing his genitals against those of the victims fell under the realm of attempt to commit sexual intercourse. As the court remarked: 'These acts of the respondent were *deliberately done with manifest intention* to commit the offence aimed and were *reasonably proximate* to the consummation of the offence.'[73] In court's understanding, the line between preparation and attempt is thus both in terms of determination to execute intention as well as (temporal/ spatial) proximity with consummation of the act.[74] The court thus set aside the decision of the high court and held him guilty of attempting to commit rape.

Quashing of FIR: breach of promise to marry is not rape

The court quashed a chargesheet arising from a complaint filed under section 376 of the IPC.[75] The facts revealed that far from being a rape case, it was a case of unfulfilled desire to get married where the girl sought intervention of the law. The court found that the complainant's statement under 164 of the CrPC, in all earnestness, revealed that her 'sole grievance is that Sonu is refusing to marry [her]'.[76]

Rehabilitation of rape victim

In *Ms. X* v. *State of Jharkhand*,[77] the petitioner approached the Supreme Court under Article 32 of the Constitution. She averred that she is rape victim, whose identity was disclosed by the media. She invoked the jurisdiction of the court to secure rehabilitation and protection for herself and her children. The state contested the petition on the ground that 'she is in a habit of making false allegations against several persons and officers' and she already has been granted police protection. Having heard both the sides, the court held that '[t] he petitioner being a rape victim deserves treatment as rape victim by all the authorities.'[78] Specifically, the court instructed the relevant departments to: (i) ensure that her minor children are provided free education till they attain the age of 14 years, (ii) consider provision for housing under Prime Minister AwasYojna or any other Central or State Scheme,(iii) review the police security provided to her, and (iv) render legal services to her as may be deemed fit.[79]

Lazy defense strategies

In *Phool Singh* v. *State of Madhya Pradesh,*[80] the appellant challenged his conviction for rape resorting to grounds which have no standing in the contemporary jurisprudence of rape law in India. He argued thatthere were no external or internal injuries found on the complainant; the prosecution case rested solely on the deposition of the complainant only; there was delay in registering the FIR. There are well established precedents which held that absence of injuries does not mean presence of

73 *Id*., para 24 (emphasis mine).
74 *Cf*: B.B. Pande, "An Attempt on Attempt" (1984) 2 SCC 42 (*J*).
75 *Sonu @ Subhash Kumar* v. *State of U.P*., 2021 (3) SCALE 635.
76 *Id*., para 3.
77 2021 (2) SCALE 107.
78 *Id.*, para 16.
79 *Id.*, para 27.
80 2021 (14) SCALE 444.

consent; that the testimony of the complainant is not tainted in rape cases and it is not necessary to look for corroboration; that sole testimony of the victim of sexual assault, once found reliable, is sufficient to convict an accused; that delay in FIR does not automatically taint the proceedings. The court reiterated all these principles and rightly rejected the appeal.

Intersectionality

In *Patan Jamal Vali* v. *State of Andhra Pradesh,*[81] the appellant challenged his conviction under section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and section 376(1) of the IPC. The victim was blind by birth and belonged to Madigacommunity which is a scheduled caste. It was argued by the accused-appellant during the trial that guilt under section 3 (2) (v) of SC/ST Act could not be established because victim's mother had not mentioned in the report or in the statement to the police that the accused had committed the offence since they belonged to a scheduled caste. The sessions court rejected this contention and recognised the power dynamics at play since the victim belonged to a lower caste: 'he did commit the act on the ground that she belongs to scheduled caste and on the impression that she cannot do anything against him.' The high court also upheld the conviction under both laws.

This appeal centred on the interpretation of section 3(2)(v) of SC/ST Act (as it stood before 2016). The section provided enhanced punishment to the accused who did not belong to SC/ST community for commission of any offence under the IPC punishable with ten years or more 'against a person or property *on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe*'. The Supreme Court charted the precedents on SC/ST Act where this provision was not invoked since 'the prosecution could not prove that the rape was committed *only* on the ground that the woman belonged to the SC & ST community.'[82] Disagreeing with such a reading of the law, the court rightly remarked that reading 'only' into the provision would amount to adding a restriction which is not present in the statute.

However, the apex court also disagreed with the interpretation of the sessions judge since the prosecution had not furnished evidence to show that the accused had committed the offence *on the basis of the caste identity* of the victim. The court disputed the sessions judge's presumption that the accused 'knew' her caste and emphasised that under (the then) section 3(2)(v), 'knowledge by itself cannot be said to be the basis of the commission of offence.' This is what the court meant when it asserted that this statute (prior to 2016) recognized only 'a single axis model of oppression' where the victim was required to prove 'a discrete experience of oppression suffered on account of a given social characteristic.'[83] Thus, the court set aside conviction under the then SC/ST Act but sentenced the accused to life imprisonment under section 376(a) relying on the framework of intersectional identities of the victim.

81 2021 (6) SCALE 495.

82 *Ashrafi* v. *State of Uttar Pradesh* (2018) 1 SCC 742.

83 *Supra* note 81, para 50.

The court used the opportunity opened by this case to stress the significance of Kimberle Crenshaw's framework of 'intersectionality'[84] in order to address the question of victimisation in cases of multiple, intersecting marginal identities. In the court's words:[85]

> When the identity of a woman intersects with, inter alia, her caste, class, religion, disability and sexual orientation, she may face violence and discrimination due to two or more grounds […] In such a situation, it becomes imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman.

According to the court, the 2016 amendment of SC/ST Act by replacing "on the ground of" and substituting it with "knowing that such person is a member of a Scheduled Caste or Scheduled Tribe" has adopted an intersectional framework. Under the new law, if the accused was acquainted with the victim or his/her family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise (section 8©).

Alongside caste, the court also reflected on the urgency to appreciate gender-disability intersectional frame. The court recognised the increased vulnerability (not victimhood) of women with disabilities owing to which they may face a higher risk of sexual violence. With the objective of making the criminal justice system more disabled-friendly, the court issued directions for sensitization of trial, appellate judges, public prosecutors to deal with cases involving survivors of sexual abuse. It emphasised that complete legal weight should be given to the testimony of the disabled. It also suggested the Bar Council to introduce topics like intersectional nature of violence more generally in the legal curriculum, and the National Crimes Record Bureau to consider maintenance of disaggregated data on gender-based violence with disability as one of the variables.

Kidnapping

Aversinh @ Kiransinh Fatehsinh Zala v. *State of Gujarat*[86] is a strange decision where the court convicted the appellant for kidnapping a minor girl (aged 16 years and three months old), while simultaneously stating that 'if not for the age of the prosecutrix, the two could have been happily married and cohabiting today.' While the court distinguished the case with its earlier decision in *S. Varadarajan*v. *State of*

84 The court's citation of Kimberle Crenshaw's article was incorrect. The correct name and citation is: Kimberle Crenshaw, "Demarginalizing The Intersection Of Race And Sex: A Black Feminist Critique of Anti Discrimination Doctrine Feminist Theory, and AntiRacist Politics", *University of Chicago Legal Forum* 139 (1989).

85 *Supra* note 81, para 12.

86 2021 (1) SCALE 572. *Cf*: *Mohammad Yousuf @ Moula*v. *State of Karnataka*, 2021 (2) SCALE 1, where the appellants were convicted under ss. 366, 343, 323 and 506 read with ss. 114 and 34 of the IPC. The court rejected the appeal since the victim girl was less than 18 years of age and he herself had deposed that the appellants has forcibly taken and wrongfully confined her.

Madras,[87] it bypassed the questions raised by the immanent contradictions in the testimony of the minor girl. On the one hand, she had claimed that she was 'caught' and 'forcibly taken' by the accused and 'repeatedly' raped and 'pressurised into performing marriage', on the other hand, she admitted to 'being in love' with him and 'having had consensual sexual intercourse with him'.

These contradictions which pointed to a consensual affair between the two were set aside by what the court on account of the 'unambiguous language' of the section 361 of the IPC. In the court's view, while many legal provisions deem a minor as incapable of giving lawful consent, section 361 'goes beyond this simple presumption' as the section 'bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians.'[88] The court reiterated its highly conservative and irrational decision in *Satish Kumar Jayanti Lal Dabgar*v. *State of Gujarat*[89] to uphold the 'protective essence of the offence of kidnapping.' One may ask, at what cost is thisprovision protecting guardianship rights of parents of the minor girl? In this case, the boy who is convicted of kidnapping was 'no older than about eighteen or nineteen years at the time of the occurrence'. To what extent is this law which labels young people for non-violent and consensual, though rebellious, acts of love as criminal, a just law?

Minor's rape and murder

Yogesh v. *State of Haryana*[90] is a case of rape of a minor schoolgirl of seven years. The girl was abducted and allegedly raped by the appellants. The investigation shows that the accused killed her and disposed of the body in village fields. The trial court and the High Court of Punjab and Haryana confirmed the guilt of the appellants. The Supreme Court in considering the case doubted the appreciation of evidence by the high court. The Supreme Court noted that the father of the victim cannot be considered as an eye-witness due to inconsistencies in his testimony. Further, the accused cannot be directly linked with the crime due to the ambiguity of the record and the way 'disclosure statements [of the appellants] led to the recovery of the dead body.'[91] On the basis of this reasoning the Supreme Court allowed the appeals and set asidethe conviction and punishment given by the lower courts.

The judgment delivered by U.U. Lalit J. shows a contrast with the previous decision of *Hari*[92] where the court, speaking through Nageshwar Rao J., had stated that the Supreme Court should not interfere in the evaluation of evidence by the lower courts. It may be the case that in this decision the Supreme Court found the inconsistencies of testimony and investigative flaws as severe enough to set aside the conviction of the accused. Nevertheless, one is left wondering why there is no

87 1965 SCR (1) 243.

88 *Supra* note 86, para 15.

89 (2015) 7 SCC 359. For a critique of this case, see Latika Vashist, "Women and the Law" LI *ASIL* 1057, 1078 (2015).

90 2021 (5) SCALE 455.

91 *Id.*, para 24.

92 *Supra*note 18.

exasperation at the unclear recording of evidence; 'the record is not clear as to when the present appellants were arrested and how and in what manner their disclosure statements led to the recovery of the dead body.'[93] The Supreme Court noted that one of the accused (Sumit), out of the four who were convicted by the high court, never preferred an appeal against his conviction.[94] This paragraph from the judgment casually ends with the following sentence: 'It is reported that Sumit was on bail during the pendency of the appeal and after dismissal of his appeal, has gone absconding.'[95]Was the appeal not preferred, then, because he could never be arrested? And how doesone link, if one should, this absconding with the unclear recording of the evidence? The court passes all this in silence. This is not to cast any doubt on the final decision of the court, but these questions certainly haunt the final verdict.

Commutation of Death Sentence

In *Irappa Siddappa Murgannavar*v. *State of Karnataka*,[96] the appellant was convicted and sentenced for rape and murder of a five-year old girl. Before the apex court, he prayed for commutation of death sentence on the ground of violation of section 235(2) of the CrPC (which mandates that the accused must be heard on sentence) and high court's oversight in noting mitigating circumstances in the case. The court observed that 'merely on account of infraction of Section 235(2) of the Code of Criminal Procedure, the death sentence ought not to be commuted to life imprisonment.' But at the same time noted that the accused must be given the opportunity to place all relevant material before the court for hearing on sentence.

In the present case, the court observed that the high court had erred in declaring that there were no mitigating circumstances to reduce the sentence:'young age of the appellant at the time of commission of the offence (23 / 25 years), his weak socioeconomic background, absence of any criminal antecedents, non pre-meditated nature of the crime, and the fact that he has spent nearly 10 years 10 months in prison' were significant extenuating factors, along with his conduct in prison which the court saw as 'expiation for his past deeds, also reflecting his desire to reform and take a humane turn'.[97]The court strongly believed 'that there is hope for reformation, rehabilitation' but belied that hope as it directed that this reformable appellant 'shall not be entitled to premature release/remission' until he has undergone actual imprisonment for at least 30 years.[98]

93 *Supra* note 90, para24.

94 *Id*., para 18.

95 *Ibid.*

96 2021 (13) SCALE 344.

97 *Id*., para 28.

98 *Id*., para 29.*Cf*: *Lochan Shrivas*v. *State of Chhattisgarh*, 2021 (15) SCALE 357, wherein the appellant was punished under ss. 363, 366, 376(2)(i), 377, 201, 302 read with s. 376A of the IPC and s. 6 of the POCSO Act. The sentence of death was awarded and confirmed by trial and high court. It was commuted to life imprisonment on the ground that the state had not placed any evidence toshow that there was no possibility of reformation of the accused.

Interpreting POCSO

In *Attorney General for India* v. *Satish*[99] the legal issue before the Supreme Court was the interpretation of section 7 of the POCSO Act. This came up from two decisions of the Bombay High Court where a restrictive meaning was given to the expression 'sexual assault' under section 7.

In the first case,[100]the accused had called the victim, a girl of around 12 years, to his house, pressed her breast and attempted to remove her salwar.The high court drew upon the principle of proportionality of punishment with the crime and made a distinction between sexual assault as defined in section 7 of the POCSO and section 354 of the IPC. The offense under POCSO, an act committed with 'sexual intent which involves physical contact without penetration' is punishable with minimum seven years as opposed to outraging modesty of woman which is punishable with minimum sentence of one year. According to the Bombay High Court, 'pressing of breasts'did not fall under section 7 because there was'no direct physical contact i.e. skin to skin with sexual intent without penetration.'The court was also of the view that the words 'any other act' refers to acts 'which are similar to the acts which have been specifically mentioned in the definition on the premise of the principle of 'ejusdem generis.''

In the second case,[101] the same judge held that the 'acts of holding the hands of the prosecutrix or opened zip of the pant' do not fit in the definition of sexual assault under section 7. In both these cases Bombay High Court was suggesting that POCSO with its mandatory minimum sentence is a stringent penal law and requires stricter proof and serious allegations, and thereforephysical contact must mean 'skin to skin contact'.

The Attorney General for India, the National Commission for Women and the State of Maharashtra appealed against these decisions before the Supreme Court. The Supreme Court held that 'touch' and 'physical contact' in section 7 mean the same and thus set aside the interpretation that physical contact requires skin to skin contact while touch may not. The court held that a narrow interpretation of physical contact would frustrate the very object of the Act'inasmuch as in that case touching the sexual or nonsexual parts of the body of a child with gloves, condoms, sheets or with cloth, though done with sexual intent would not amount to an offence of sexual assault under Section 7 of the POCSO Act.'[102]

The court further stressed that the significant ingredient in section 7 is 'sexual intent' and not 'physical contact'.The court also ruled out the application of rule of lenity (strict construction of criminal statutes in case of ambiguity), holding that section 7 is unambiguous and clear. On the assertion that POCSO should be strictly interpreted on account of sections 29 and 30 (which make a presumption of guilt for the offences

99 2021 (13) SCALE 632.

100 *Satish s/o Bandu Ragde*v. *State of Maharashtra*,Criminal Appeal No. 161 Of 2020(Date: Jan. 19, 2021).

101 *Libnus*v. *State of Maharashtra*, 2021 SCC OnLine Bom 66.

102 *Supra* note 99, para 33.

alleged under this Act along with the presumption as to the presence of *mens rea* which can be rebutted only by furnishing evidence to the contrary beyond reasonable doubt), the court remarked:[103]

> The Court can not be oblivious to the fact that the impact of traumatic sexual assault committed on children of tender age could endure during their whole life, and may also have an adverse effect on their mental state. The suffering of the victims in certain cases may be immeasurable. Therefore, considering the objects of the POCSO Act, its provisions, more particularly pertaining to the sexual assault, sexual harassment etc. have to be construed vis-a-vis the other provisions, so as to make the objects of the Act more meaningful and effective.

The court also ruled that the principle of ejusdem generis will not apply in interpreting the Act:[104]

So far as Section 7 of the POCSO Act is concerned, the first part thereof exhausts a class of act of sexual assault using specific words, and the other part uses the general act beyond the class denoted by the specific words.

So construed under section 7, sexual intent coupled with touching/ physical contact becomes sexual assault. Holding hands with sexual intent is criminal assault. When it comes to children, the horror associated with child sexuality is so pronounced that the legislature/ judiciary/ society would even go to the extent of criminalising intention itself. Having sexual intent with respect to children itself is so dangerous that coupled with any form of physical contact, it has to be criminalised with minimum three/ five years depending on the age of the child.

Male Sexual Assault in Military

In *Union of India* v. *Mudrika Singh*,[105] the complainant, a constable in the BSF had filed a complaint that the respondent committed an act of sexual assault on him while he was on *naka* duty. The Deputy Commandant prepared the Record of Evidence (RoE) and submitted the same to the Commandant. The Commandant noted an inconsistency in the statements of the witnesses regarding the date of occurrence and called for the preparation of an additional RoE.The Summary Security Force Court (SSFC) found the respondent guilty under section 24(a) of the BSF Act, 1968. The appellate authority – the DirectorGeneral of BSF - upheld the charge against the respondent but commuted the punishment. To challenge the punishment, the respondent moved the high court under Article 226 of the Constitution. The high court set aside the punishment on the grounds that the original RoE was insufficient to prove the charges and it was outside the jurisdiction of the Commandant to order for an additional RoE.

The state challenged the high court verdict. The apex court, in detail, analysed the relevant provisions of the BSF Act 1968 and BSF Rules 1969 and held that the

103 *Id.*, para 37.
104 *Id.*, para 41.
105 2021 (14) SCALE 509.

high court 'demonstrated a callous attitude' since the discrepancy regarding the date of occurrence was too 'trivial' to invalidate the entire disciplinary proceedings. Significantly, the apex court implored all courts 'to interpret service rules and statutory regulations governing the prevention of sexual harassment at the workplace in a manner that metes out procedural and substantive justice to all the parties.'[106]

The court strongly remarked on the disturbing 'trend of invalidation of proceedings inquiring into sexual misconduct, on hyper-technical interpretations of the applicable service rules.'[107] The court emphasised that in 'transformative legislation' (*eg.*, Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013), the appellate mechanisms must ensure that the process is not turned into a punishment for the aggrieved. In a significant move, the court held that it is incumbent on judiciary to 'uphold the spirit of the right against sexual harassment, which is vested in *all persons* as a part of their right to life and right to dignity under Article 21 of the Constitution.' Making the linguistic shift from man-woman to 'superior-subordinate', the court highlighted 'the power dynamics that are mired in sexual harassment at the workplace.'

V MATRIMONIAL DISPUTES

Irretrievable Breakdown of marriage

The fundamental premise of dominance feminism – that all sexual power is located in males and females are agencyless victims – has long been exposed as a lie not just empirically but even conceptually. *Sivasankaran*v. *Santhimeenal*[108] is one case that demonstrates the same: women are not just victims; in fact, when women embrace victimhood as their identity, they turn into oppressors themselves. The parties in this case were entangled in matrimonial litigation for almost twenty years. Their marriage was never consummated, the appellant remarried after six years of marriage (after decree of divorce was granted by the trial court), and all efforts of mediation had failed.Their respective versions of initial discord were very different: the appellant alleged that the respondent never wanted to get married in the first place and had left him immediately after the marriage took place; the respondent on the other hand alleged he had made demands of dowry due to which she had returned to her parents and consummation of marriage could not take place.

Over the years the respondent had instituted multiple cases against the appellant and still averred that she was/is willing to live with him. Her lawyer even opposed the jurisdiction of the apex court in relying on Article 142 of the Constitution to grant

106 *Id.*, para 32.
107 *Ibid.*
108 2021 (10) SCALE 477.

divorce in the absence of consent of both the parties.[109] Taking note of these facts and strong arguments by the respondent against the reliance on Article 142, the court traced the precedents where the court had used its power to do complete justice to granted divorce on the ground that the marriage had irretrievably broken down:[110]

> Living together is not a compulsory exercise. But marriage is a tie between two parties. If this tie is not working under any circumstances, we see no purpose in postponing the inevitability of the situation merely because of the pendency of the reference.

However, in the present case, besides invocation of Article 142, the court took note of the respondent's conduct towards the appellantduring pendency of the proceedings and granted divorce on account of mental cruelty under section 13(1)(i-a) of the Hindu Marriage Act.[111]

Transfer application

In *Amruta Ben Himanshu Kumar Shah* v. *Himanshu Kumar Pravinchandra,*[112] the petitioner filed a transfer application in the family court seeking transfer of the suit from the court in Gujarat to Bombay. Since an earlier petition seeking transfer was rejected, the petitioner was required to show fresh grounds. The court noted that there was indeed a change in circumstances –her mother had passed away, economic hardships had increased and on account of her absence in the court, her evidence was rejected – but since the case (for restitution of conjugal rights filed by the respondent-husband) was at its final stage, the court was reluctant to allow the transfer. However, the court ensured that petitioner's grievances were addressed. She was permitted to apply for reopening her evidence before the family court, her physical presence was dispensed with (except when she was to be cross-examined)andthe respondent was directed to pay for her travel and stay when her physical presence was required in the court.

VI MISCELLANEOUS

Compassionate Appointments

In *The Director of Treasuries in Karnataka* v.*Somyashree*,[113] the respondent (a divorced daughter) had applied for appointment on compassionate grounds under Rule 3(2)(ii) of Karnataka CivilServices(Appointment on Compassionate

109 Also see, *Subhransu Sarkar* v. *Indrani Sarkar*, 2021 (10) SCALE 672, where the respondent-wife was 'not convinced that an unworkable marriage should be put to an end.' The respondent expressed the wish that she wanted to live with her husband and also that she has to look after her son who was suffering from many ailments. The court noted that the parties were living separately for 16 years, there were no efforts made for reconciliation and their marriage was 'emotionally dead'.And thus invoked its Art. 142 jurisdiction to grant divorce. The appellant-husband was directed to grant of 25 lakhs as a full and final payment to the respondent.

110 *Supra* note 108, para 14.

111 In *Joydeep Majumdar* v. *Bharti Jaiswal Majumdar*, 2021 (3) SCALE 380, where the appellant-husband suffered adverse consequences in his life and career on account of the allegations made by the respondent-wife, the court read the same as mental cruelty inflicted by the wife.

112 2021 (2) SCALE 241.

113 2021 (10) SCALE 471.

Grounds)Rules 1996. Even though 'divorced daughter' was not explicitly included withing the meaning of 'dependent' under the aforesaid Rule, the high court held that a divorced daughter would fallin the same class as an unmarriedor widowed daughter. The appellant challenged the decision of the high court. The definition of 'dependent' as provided in Rule 2 of the Rules, 1996 was also reliedon: 'in case of deceased female Governmentservanther widower, son, (unmarried daughterorwidowed daughter)whowere dependent upon her and were living with her can be said to be'dependent'.'This definition also did not include a divorced daughter. Further, the appellant arguedthat the respondent was neither 'dependent' upon the deceased employee nor was she living with her at the time of her death.

The apex court noted that the expression 'divorced daughter' has indeed been added in the Rules in 2021. But in the present case,at the time of the death of her mother, respondent's marriage was subsisting. She had filed for divorce only after her death and immediately after obtaining the decree of divorce had applied for the compassionate appointment. The court emphasised the following considerations that should be borne in mind by courts in deciding upon applications of compassionate appointment:[114]

> (i) the compassionate appointment is an exception to the general rule;
>
> (ii) no aspirant has a right to compassionate appointment;
>
> (iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;
>
> (iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;
>
> (v) the norms prevailing on the date of the consideration of the application should be the basis or consideration of claim for compassionate appointment.

In another case,[115] the question was whether an unmarried brother can be included within the definition of dependent in a retrospective reading of the rule of compassionate appointment. In this case, the Rules as they stood on the date of the death of respondent's sister, did not include an unmarried brother within the definition of a dependent of a deceased female unmarried government servant. But they were amended to bring an unmarried brother of a deceased femaleunmarried Government servant within the definition.The Supreme Court held that unmarried brother's appointment was not permitted by the then Rules and hence he could not be appointed.The court reviewed the cases on compassionate appointments and gave the following rationale for its decision:[116]

114 *Id.*, para 7.

115 *The Secretary to Govt. Department of Education (Primary) &Ors*v. *Bheemesh alias Bheemappa*, 2021 (15) SCALE 456.

116 *Id.*, para 17 (emphasis mine).

In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. *But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee*. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.

Notional income of a housewife

N.V. Ramana's concurring opinion in *Kirti v. Oriental Insurance Company*[117] is noteworthy onthe question ofnotional income of a housewife and whether future prospects should apply to the same or not. He emphasised that 'the conception that housemakers do not "work" or that they do not add economic value to the household is a problematic idea that has persistedformany years and must be overcome.'[118]The issue of fixing notional income for a homemaker, he noted, serves important functions:[119]

It is a recognition of the multitude of women who are engaged in this activity, whether by choice or as a result of social/cultural norms. It signals to society at large that the law and the Courts of the land believe in the value of the labour, services and sacrifices of homemakers. It is an acceptance of the idea that these activities contribute in a very real way to the economic condition of the family, and the economy of the nation, regardless of the fact that it may have been traditionally excluded from economic analyses. It is a reflection of changing attitudes and mindsets and of our international law obligations. And, most importantly, it is a step towards the constitutional vision of social equality and ensuring dignity of life to all individuals.

While any methods can be employed to fix the notional income of a homemaker depending on facts of a particular case, the court should try to determine 'the truest approximation of the value added by a homemaker for the purpose of granting monetary compensation.' The judge also observed that granting of future prospects (*viz*. taking into account inflation *etc*.) on the notional income calculated such in cases, is equally significant:[120]

Once notional income is determined, the effects of inflation would equally apply. Further, no one would ever say that the improvements in skills that come with experience do not take place in the domain of work within the household.

VII CONCLUSION

This year's survey of cases on 'women and the law'shows that the Supreme Court of India charted new conceptual territories and introduced novel concepts to the legal landscape in India.The court fortified the notion of substantive equality with

117 2021 (1) SCALE 290.

118 *Id*., para 10.

119 *Id*., para 15.

120 *Id*., para 25.

the concept of 'indirect discrimination', introduced multiple-axis intersectionality framework to understand oppression,outlawed damaging gender-based and sexual stereotypes from judicial vocabulary andemphasisedhousework as work for the calculation of notional income and future prospects. The court also strengthened its stand against sexual violence as it emphasised, in a case of sexual assault of a man, that right against sexual harassment is vested in *all persons*, and pushed against regimes of sexual governance by emphasising the right to sexual choice.

These developments were witnessed alongside a few foistedlegal resolutions where the court's desire for solution elided the complexity of the questions posed by the cases. For instance, in its overwhelming focus on removing stereotypes from judicial language,it remains to be answered if we are merelysupressing a symptom of the larger malaise of resentment, envy and fear of the (sexual) Other. Or, for that matter, in the name of protecting children are we too easily giving up the foundations of liberal individualism on which modern criminal law rests?In expanding the judicial vocabulary of rights, are we adopting an easy rhetorical feminism in place of performing the feminist labour in pushing back the institutions and ideologies that continue to wield phallic power in our psychic lives.