

I. EQUAL JUSTICE TO WOMEN : ROLE OF COURTS AND JUDGES

*BEING A PROPOSAL FOR GENDER SENSITIZATION OF JUDICIAL OFFICERS
RECOMMENDED TO JUDICIAL ACADEMIES AND TRAINING INSTITUTIONS*-*

Structure and Objects

The course is designed to serve gender sensitization of judicial officers at all levels. The minimum duration is two and half days; it can however be stretched for one full week to get optimum results.

The syllabus is prepared on the assumption that women do not get equal protection of the laws and they are discriminated against both in substantive law and in procedure, a lot of which can be moderated in its impact if the presiding officers of courts are sensitive to the inequalities women suffer from in society.

The objects of the course specifically are :

- (a) to appreciate patent and latent discriminatory provisions against women in the laws of the country and the promise of equality made under the Constitution of India;
- (b) to understand women's rights as human rights to be able to interrogate unsustainable attitudes and practices inherited by the legal system;
- (c) To identify instances of gender bias in adjudication and the circumstances which lead to such results;
- (d) to be able to intervene effectively to prevent discrimination against women in court proceedings;
- (e) to develop gender-neutral attitudes and skills; and
- (f) to promote justice to women on the basis of equality guarantee of the Constitution of India.

PROGRAMME DESCRIPTION

Day One

2 PM-2.30 PM

Session I

- Introduction of faculty and participants.
- Discussion on objects and methodology-Roles and Responsibilities for the successful conduct of the workshop.

2.30 PM-3.30 PM

Session II

Lecture-Discussion on "Women, Equality and Law"

Faculty : A law professor familiar with issues of gender justice debate and an expert in laws relating to women.

* The proposal was originally prepared by Professor N. R. Madhava Menon while working as a Consultant to the First National Judicial Pay Commission, Government of India (1999).

Note : This session has four objectives-

- (1) for participants to reflect on perceived injustices in law and procedure relating to domestic violence;
- (2) provide perspectives on possible alternate courses of action open to the court which can be more equitable in domestic relations situations;
- (3) enable the participants to appreciate evidence with a gender perspective and
- (4) understand the importance of being sensitive in taking depositions, issuing interim orders, giving adjournments, writing judgments and invoking services of other professionals (social work, medicine, forensic experts) in domestic violence cases.

Participants will be encouraged to write down their impressions on the two sessions held in the afternoon and turn in their comments on the following day which will form part of the evaluation.

Day Two
Saturday

9.30 AM-12.30 PM

Session IV

Topic : **Rape Trials and Problems in Equal Justice**

Faculty : A Prosecutor with expertise in conducting rape trials and a Defence lawyer preferably a woman; a High Court Judge who has written opinions in rape appeals and a woman activist familiar with issues of gender justice in sexual violence cases.

Reading Materials

- (1) Edited case files of rape cases where injustice is perceived by women's groups.
- (2) Excerpts of Law Commission Reports and Parliamentary Debates on amendment of rape law.
- (3) Report of The National Commission for Women titled "Rape : A Legal Study".
- (4) Selected articles, research studies and media reports on health and psychological problems associated with rape.
- (5) Statistics on incidence of rape, conviction rates etc.

Teaching Methods

The session will begin with a short video-clipping on the trauma of rape victims and medical opinions on the problems arising therefrom.

It will then be followed by short presentations on the experience of prosecutors and defense lawyers in conducting rape trials.

The discussion will then be initiated by the social activist focussing on what women expect from the courts, prosecutors and defense attorneys. The trainer who moderates the discussion will seek division of the house on controversial issues with a view to involve the judges at an affective level. He would also provide comparative perspectives from other jurisdictions with the help of charts and transparencies.

The High Court judge will then reflect on why and where appellate courts intervene in trial court judgments and what High Court expects the trial Court to do in respect of gender equality in rape and

related sexual violence. The participants will be encouraged to question the interpretations taken by the appellate courts.

Expected outcomes of the Session

This session is bound to be lively involving almost every participant. At the end of the three hour-long session participants will get-

- (a) ability to appreciate the grievances often aired by women's groups in respect of rape trials;
- (b) perspectives on the need to have a wider knowledge base to be able to conduct rape trials fairly and equitably;
- (c) willingness to correct tendency to underestimate the injury to the victim and to bestow misplaced sympathy to offenders;
- (d) opportunity to sharpen skills for better appreciation and interpretation of evidence including expert testimony and
- (e) confidence to control court interactions which tend to prejudice the victim.

12.30 PM-2.00 PM

Lunch Break

2.00 PM-5.30 PM

Session V

Topic : **Marriage Disputes and the Matrimonial (Family) Court**

Faculty : A Senior Family Court Judge, a Family Counsellor (Conciliator) attached to the Family Court and two pre-selected participants with experience in matrimonial jurisdiction.

Reading Materials

- (1) Edited case file materials on divorce, maintenance and child custody cases.
- (2) Excerpts of Law Commission Reports, Research studies and socio-legal reports on matrimonial litigations highlighting gender justice issues.

Teaching Methods

Session to begin with a 30 minute Moot Court of arguments in a trial case-Trainer to present the facts in advance and introduce the two participants who will represent the parties. The Family Court Judge to preside-After judgment, participants to raise questions and offer comments for 30 minutes.

The Family Court Judge is then to give a presentation on how the Family Court is different from an ordinary civil court in the matter of gender justice. Participants to offer comments on how far conciliation/counselling can be a necessary part of all matrimonial cases and what are the skills and attitudes necessary therefor.

The last one hour of the session will be small group conciliation/counselling exercises on assigned matrimonial petitions in which the participants will play roles and record their experiences in the exercise.

Expected Outcomes

Besides acquainting the judges on the peculiar problems experienced by women in matrimonial proceedings, this session will (a) expose the participants to the skills necessary to deal sensitively with matrimonial disputes; (b) help identify usual prejudices associated with dealing with such litigation; (c) promote understanding of the dynamics of inter-personal relations in marriage which should help in negotiating mediated settlements; (d) provide ideas from behavioural sciences on how to deal with child custody matters while being fair and just to the woman involved.

As on the previous day, participants will be asked to write down their specific comments on a proforma circulated in respect of what they learnt or failed to learn in the two sessions. The proforma will be so prepared as to probe the extent of gender sensitization of the respondents in respect of a criminal proceeding as well as a civil proceeding (rape and divorce/custody).

Day Three

9.30 AM-12.30 PM

Session VI

Sunday

Topic : Discrimination and Harassment of Women at Work Place

Faculty : A Woman trade unionist, a member of the Women's Commission or a women activist, a High Court Judge experienced in labour disputes and a woman journalist reporting on women's issues.

Reading Materials

- (1) Selected judgments on sexual harassment at work place and on Equal Remuneration Act.
- (2) Reports on discrimination in employment.

Teaching Methods

The session will start with a little quiz on participants' perspectives and beliefs on discrimination and harassment of women at work place. Using the flip chart the trainer will consolidate the responses in the class in such a way as to project the range of gender-based prejudices and problems.

This will be followed by a panel discussion amongst the faculty, each highlighting one or other dimension of the problem. The moderator will focus attention of the group on major biases and injustices raised keeping in focus the role of the judge in moderating or aggravating the impact of such biases on women's right to equal treatment and dignity.

The final part of the session will be devoted to small group interactions on writing out a code of judicial conduct in reducing gender-based inequalities in dealing with employment-related disputes and in court administration.

Note : At the end of this session, participants will have (a) clearer understanding of how and where women experience discrimination in work places, (b) acquire minimum skills to be able to correct the imbalances when such disputes come before them and (c) help provide a more gender-friendly atmosphere in the courts.

12.30 PM - 2.00 PM Lunch Break

2.00 PM-3.30 PM Session VII

Topic : **Sex Equality at the Bar and in the Courts**

Faculty : Chairman of the Bar Council/Bar Association, representative of the Women's Bar, and two participants of whom one to be a woman.

Teaching Methods

The Session will largely be based on brief presentations by the Faculty. However, the initial few minutes will be devoted to ascertaining the perceptions of participants on what they consider to be the state of affairs at the bar and in court proceedings. The participants will be asked to write in a piece of paper three instances which in their belief can be discriminatory of women in the bar room, court offices and in court transactions including trial.

Expected outcomes

Besides sensitizing the judges on the problem in their own midst, the session will help in drawing up a judicial code of conduct to create a more genderneutral atmosphere not only to women lawyers and judges, but also women litigants, women witnesses and women employees of courts. Judges will begin to realize the need to adopt gender-neutral language, avoid sexist remarks, renounce double standards wherever they exist and to respect women's dignity particularly of those belonging to minority sections of the population.

3.30 PM-4.00 PM Break for Refreshments

4.00 PM-5.00 PM Session VIII

Evaluation and Valediction

Points to Consider

There can be many variations of the above design depending upon the specific needs of participants, time available for training and resources which the Academy commands. The point to be noted is that a well-thought-out training design is a pre-requisite for the success of in-service training. Such design should necessarily be based on a needs assessment on which specific objectives to be achieved by each session/module should be spelt out clearly. Participants should be involved as much as possible for which the training methods should be varied and interesting. Lectures ought to be kept to the minimum and each session should be co-taught by a balanced mix of experts carefully chosen and adequately briefed on the expected outcomes of their respective sessions.

Too much of reading materials even if distributed will not be read. As such, careful selection and proper editing should be done well in advance. For a course of 2½ days' duration, it is prudent to contain the reading materials to about 100 neatly typed A-4 size pages. The reading materials should be supplied in bold print with titles and sub-titles and, wherever possible, with short catch notes/summary of points. Additional reading materials may be listed after every module/topic and such materials may be kept in reserve in the library for participants to browse through. Some participants

are likely to take special interest in topics of their choice and would be wanting to learn more on their return to their respective stations. Certainly they would be wanting to consult as many materials as are available on a given proposition as and when the issues confront them in the course of their professional work. The reference list given in the reading materials will be the initial resource to fall back upon.

As far as possible at least a small number of participants must be invariably asked to read the materials in advance and to react in each session so that those who have not read the materials will also be benefitted. It is a good strategy to force participants to bring the materials in class and consult relevant pages occasionally during the session.

Evaluation in a prepared proforma at the end of each day will be more beneficial rather than be content with a general evaluation at the end of the course.

If the course were to be repeated, a few of those judges who were participants in the earlier course may be invited as faculty for the succeeding course.

There may be an opinion that what is presented here for a 2½ day course is rather too heavy and taxing to the ordinarily overworked judges who expect some relief and relaxation in a week-end retreat. It is important that continuing education to succeed must endeavour to remove such impressions which have been created all around from the way they are conducted at present. These are costly exercises and the benefits should outweigh the costs if they have to be sustained with public support. As such, it is desirable to make it tight involving the participants in some or other useful activity all the time available. By corresponding with participants well before their arrival at the academy, they should be prepared to put in their effort and time totally for their own benefit.

II. QUESTIONNAIRE TO ASSESS AWARENESS OF GENDER EQUALITY ISSUES ON THE PART OF JUDICIAL OFFICERS

Please tick (✓) against any one answer. You may add your comments, if any.

1. Gender is
 - (a) social construction of masculinity and femininity
 - (b) natural difference between male and female
2. A man's main role in the family is that of a
 - (a) breadwinner
 - (b) home maker
 - (c) giver of security and protection
 - (d) partner in all the above
3. A woman's main role in the family is that of a
 - (a) breadwinner
 - (b) home maker
 - (c) care giver
4. The family is the safest place for women
 - (a) Yes
 - (b) no
5. Preservation of marriage is absolutely essential
 - (a) Yes
 - (b) no
6. The primary responsibility to preserve a marriage is on the
 - (a) husband
 - (b) wife
 - (c) both
7. Women are themselves responsible for their problems in married life
 - (a) Yes
 - (b) no
8. Woman should bear a little violence in marriage for the sake of herself and the children
 - (a) Yes
 - (b) no
9. Women are adored in society and are generally respected
 - (a) Yes
 - (b) no
10. Provocative clothes can be an invitation to rape
 - (a) Yes
 - (b) no
11. Being raped is a state worse than death to the women
 - (a) Yes
 - (b) no
12. Child sexual abuse in the family is common in India
 - (a) Yes
 - (b) no
13. Woman should have equal access to assets acquired during marriage even if she herself had opted for divorce
 - (a) Yes
 - (b) no
14. The mother is an equal and natural guardian of children, male and female
 - (a) Yes
 - (b) no
15. The Constitution gives preferential rights to women
 - (a) Yes
 - (b) no

16. CEDAW is about - - (write two sentences)

17. Visakha case in the Supreme Court is about - - - (write two sentences)

18. Family Court is different from the regular civil court because - - - (write two sentences on the difference)

19. Women litigants face discrimination in court as it is managed mostly by men

(a) Yes (b) no

20. Judges are trained to dispense justice impartially and there is no reason for women to complain against judicial processes

(a) Yes (b) no

N.B.: This is a survey questionnaire which may help to make a preliminary assessment of the disposition of the judicial officers in a gender sensitisation course.

Credit : Ruchira Goswami and Krishna Roy, NWS (2001).

III. THE NATIONAL COMMISSION FOR WOMEN AND GENDER SENSITISATION

Dr. Poornima Advani*

After a long arduous struggle by dedicated women activists and lengthy deliberations by Government over a period of more than a decade and a half, under Act No 20 of 1990 passed by Parliament, the Government was empowered to constitute a National Commission for Women. It took the Government another two years to set up The National Commission for Women which finally came into being in 1992.

What was conceptualized by the activists and repeatedly stressed was a Commission at the Center and others at the States level, with an autonomous status and over-riding powers so as to enable them to act as watchdogs to monitor and ensure implementation of laws and of government pronouncements or manifestos.

The Commission as set up, although far from being an autonomous body, has wide ranging powers, embracing protective, promotional and advisory roles. In particular, the Commission has been empowered to investigate all matters relating to the safeguards provided by the Constitution and other laws, review the existing provisions of statutes, investigate cases of violation of existing provisions of the Constitution of India and other laws relating to women and look into complaints and also take *suo moto* cognizance of matters relating to deprivation of women's rights and non-implementation of laws meant for their protection and development, or non-compliance with decisions aimed at their welfare, etc. One of the important roles of the Commission is to make appropriate recommendations for effective implementation of existing safeguards and also to move amendments to existing laws to make them more gender stringent.

For enabling the Commission to reach out to all types of distressed women, the Commission is also authorized to inspect custodial and similar other institutions and to fund litigation involving issues affecting a large body of women. These functions have enabled the Commission to provide some respite to several suffering women by taking up procedural and legal issues with the law enforcement agencies.

The Act also enjoins the Commission to evaluate the progress of development schemes and empowers it to participate and advise on the planning process of socio-economic development of women. Responsibility is also cast on the Commission to make periodical reports to the Government on relevant matters and particularly on difficulties faced by women in various fields. The Act, in turn, enjoins upon the Government to table the reports of the Commission before both the House of Parliament along with an Action-Taken Report accompanied by reasons for non-acceptance of any of the recommendations. Similarly, when a report relates to a matter concerning any State Government, the same is required to be laid before the appropriate legislature.

To be able to provide succour and reach out to as many women as possible, the Commission has set up its own Complaints Cell, a Counseling Unit and a Legal Unit. The Complaints Cell,

* Member, National Commission for Women.

established within the Commission, lends a sympathetic ear and a helping hand to hapless women involved in domestic trials and tribulations and provides counseling services to them. Normally, the Commission aims at conciliation but in suitable cases, it assists the victims in lodging police complaints and in the follow-up of their cases with the law enforcement agencies. As a special gesture of concern for the women, Helpline Control-rooms are maintained outside office hours for providing emergency assistance to the suffering women.

As per statistics available, the Commission had received 9010 Complaints from 1992 to 1998. With growing awareness of the existence of the Commission and the cases it had been handling, the number has been steadily going up. It shot up to 2181 between July 1999 to December 1999 and to 2369 from January 2000 to June 2000.

The Commission has widened its area of functioning by arranging visits and programmes ranging from legal awareness camps to public hearings to Parivarik Mahila Lok Adalats (PMLA) in the farthest nooks and corners of the country.

The Commission's initiative in organizing PMLAs through local NGOs has helped in reducing the work load on the District Legal Aid and Advisory Boards (DLAAB) which are constituted to coordinate free legal services and local Adalats within their districts. The objective of introducing PMLAs, apart from reducing the work load on DLAABs, was to provide speedy justice to women, to generate awareness amongst the public regarding conciliatory modes of dispute settlement, to gear up the process of organizing Lok Adalats, to encourage the public to settle their disputes outside the formal set up of courts and to empower people, specially women, to participate in the justice delivery system.

So, much for the Commission's functions and organisation. Coming to the situational realities that it faces, we find that women continue to suffer from numerous disabilities and inequities. Despite the guarantees of the Constitution, protection of the laws and the support of various developmental schemes, women continue to be victims of domestic violence, sexual harassment at the workplace and atrocities in general. Illiteracy, ignorance, lack of awareness, poverty and above all, economic dependence coupled with oppression caused by customary practices have placed women in a situation where they have to face persecution, day-in and day-out.

One most telling statistical data which sums up the total scenario is contained in the continuously falling sex ratio of females. Whereas in most developed societies, women outnumber men because of well known biological forces, Indian society has always had a scarcity of women. Worse still, the ratio has been getting more and more skewed. The 2001 Census has indicated that there are 933 females for every 1000 males. At the beginning of the century there were 972 females for every 1000 males. These diminishing ratios and the missing women have naturally caused immense concern. Where have they gone? What has caused such drastic reduction in the number of females? Well, the missing numbers have been traced to the increasing cases of female foeticide and infanticide, at least in certain States. Alas, even those females who survive these early threats at birth or in infancy, continue to be neglected and abused, at home and outside, throughout their lives whether as daughters or as wives or as widows. Various statistics relating to education and health document the same story. Figures of crimes against women as revealed by the National Crimes Record Bureau bring out the grimness of the situation affecting the "better half" (which, alas, is less than half) of our population.

While various reasons such as provocation, alcoholism, drug abuse, dowry demand, etc, are being cited for the ever-increasing crimes, analysts opine that they do not sufficiently account for such a spate of crimes. Most activists feel it all boils down to the degraded condition of women caused by illiteracy, unjust gender division of labour, economic stress due to their total dependence on men folk and a lack of community support system.

A holistic picture concerning women must comprehend the totality of laws intended for their protection and the schemes intended for their development. It will have to look at both the design as well as the implementation of the laws and schemes. Obviously there are deficiencies of design which need looking into. Equally there has to be spread of awareness among women so that they know what they are entitled to. And above all, laws have to be enforced and the schemes have to be implemented with a sensitivity which will ensure the end purpose being achieved.

If the legal mechanism is at fault, even partially, then we need to look at improvement in the laws as well as the justice delivery system by means of which women can access their rights. No doubt, the formal justice delivery system is an important limb for achieving justice for all but the unruly delays and corruption at all levels have become even more serious hurdles in the pathways leading to justice.

So far as the laws themselves are concerned, their deficiencies have been the subject of considerable research and discussion. This is where the National Commission has made appreciable contribution. There have been continuous and systematic efforts on the part of the Commission to review laws relating to women and to suggest stringent additions / alterations to make them more gender effective. So far as the legal provisions containing safeguards for women are concerned, the Commission has undertaken an in-depth study and review of 39 Acts so far and forwarded appropriate recommendations to the Government from time to time. Some of these study-cum-review exercises were mooted by the Ministry, while others were initiated by the Commission *suo-moto*.

Some of the important statutes to which amendments have been suggested by the Commission are:- The Dowry Prohibition Act, 1961 (28 of 1961), the Medical Termination of Pregnancy Act, 1971 (34 of 1971), The Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994, The Child Marriage Restraint Act, 1929 (19 of 1929), The Family Courts Act, 1984, The Indian Divorce Act, 1869 (4 of 1869), The Christian Marriage Act, 1872 (15 of 1872), The Hindu Marriage Act, 1955 (25 of 1955), National Commission for Women Act (20 of 1990).

Beside, the Commission has also mooted fresh legislation in some areas, for example, legislation concerning domestic violence and sexual harassment of women at work place.

Equally important, is the factual aspect that the laws, even as they exist, are not implemented. The rigour and vigour which are required if age old problems afflicting Indian society are to be combated effectively are found miserably wanting. It is to fill in this emergent need that the NCW has stepped in and taken a lead in addressing the issue of law enforcement vis-à-vis gender in a holistic manner.

It is with this objective in view that it was decided to hold a national workshop on the subject at New Delhi on 1st and 2nd June 2001. As a prelude, four regional workshops (at Patna, Chandigarh, Bangalore and Bhopal) were designed to facilitate interactive participation of victims of crime and

officials concerned with law enforcement together with NGO's. It was felt that bringing all sectors of the justice delivery systems together for an interface with the victims would act as a conduit between the various agencies as they would get to understand each other's perspective and thereby be able to identify the real issues and factors responsible for the injustice suffered by women in our society.

All the four workshops witnessed a number of depositions on the theme of law enforcement by members of the police force and public prosecutors who participated therein, as well as victims and NGOs who placed their experiences before the participants at the workshops. The general discussion featured around the fact that women are discriminated against from womb to tomb. Women also live in constant fear of violence and abuse not only from strangers but also from their own relatives, be it their father, uncle, brother, cousin or husband.

Criminal Justice system has three wings- investigation, prosecution and judiciary. Some of the typical remarks about the prevailing situation and suggestions for improvement concerning these various wings of the law enforcement mechanism are summarised hereunder.

Concerning the Police

Factually speaking, the only institution that is perceived as the State by the masses in rural areas is the police station. But its functioning leaves a lot to be desired. In principle, priority is supposed to be given to crimes against women, which are to be supervised by senior officers. This norm, however, is not implemented in practice. There is an acute shortage of women in the police force. As the participants pointed out, there were only 745 women police officers in the whole of Punjab and they were not stationed at strategic points. There was need for more women in the police force because women victims feel more confident in interacting with women officials. In Madhya Pradesh also there were only two per cent female police officers. The police officers themselves felt the need to have at least 10 per cent women in the police force. Each police station could then have a cell with female staff to look after matters relating to crimes against women.

Another intrinsic problem within the police department, which is the main anchor for gender related issues, seems to be that women constables are not used for effective contribution and are considered more of a liability than a regular police resource. It was stated that as most of them had been recruited on compassionate grounds due to the death of their husbands while on duty, they do not come up to the mark and therefore even though the police department is at present over burdened, work distribution is uneven.

More than the issue of numbers and work distribution, it was brought out again and again that the police, like any other segment of society, had stereotyped, patriarchal values. Reportedly, when a woman victim enters a police station, the usual comments she has to hear from the police officials are: '*kitni bold mahila hai*', '*dekho thana me chali ayee hai*'. When the victim speaks about harassment by the husband which compelled her to approach law enforcement agencies, the insensitivity of the police officers leads to further lewd comments on her, blaming her for the evils. The police take no time in throwing her out of the police station.

Leaving aside, for the present, the women victims of atrocities and their reported illtreatment by the police, it was stated that even women in police services are looked down upon by the male colleagues and treated at best as individuals with secondary status. One lady police officer explained

this with an example: when there is an important event, women officers are allotted reception duties and not given important assignments. That being so, even the talented clever lady officer develops a feeling of inferiority as against job satisfaction for which she pines. Utter frustration makes her feel that it would have been better if she had been a receptionist instead of being a police officer. She would at least have had job satisfaction.

Talking of attitudes vis- a- vis the victims of gender crimes, some of the typical behavioral patterns of investigating officers as described were as follows:- Insensitivity to women complainants; reluctance to register cases of the nature of family quarrel; registration of cases under section of law inviting lesser punishment; viewing cases of premarital pregnancies as the sole responsibility of women; ignoring instances of eve teasing as due to the 'dressing style' of women; attitude of branding a rape victim as 'of loose moral character'; dismissing dowry-related torture cases as matters of 'quarrelsome women', blaming child sexual abuse cases as caused by failure of the mother in bringing up the child; very liberal attitude in dealing with bigamy cases; tendency to brand persistent women petitioners as 'insane'. Hence it was emphasised that the police personnel needed to be sensitised to women's issues.

Concerning the Public Prosecutors

The problems in law enforcement are a lack of co-ordination amongst investigating agencies, prosecuting agencies and judiciary, anomalies in the sentencing process and anomalies in the Indian penology systems; e.g. when an accused is sent for recording statement under section 164 of the Criminal Procedure Code, the accused is detained with other criminals and as a result, he returns properly tutored. When he is brought back, he declines to make a confessional statement, which grossly affects investigation.

If only the existing laws were properly implemented, crime against women could be controlled. Investigation and prosecution should be a joint venture as it was before. Their separation during the amendment of the Criminal Procedure Code during 1973 has created more dislocatory problems. Police should be given special training in handling sensitive cases. They must be made fully aware of the laws. They must respond to every complaint of domestic violence made even over telephone. They must react expeditiously.

It was also pointed out that appointment of public prosecutors was handled politically which affected accountability. Their role and function needed to be defined and their efficiency improved by providing more facilities. Here also the question of values and attitudes was seen to be important. It was suggested that women prosecutors are needed to deal with crimes against women and they need to be suitably sensitised.

Concerning the Judiciary

Our judiciary has an admirable record in protecting the rights of women and other disadvantaged sections of society and people could have an innate faith in the judicial system, but for the delays which have become part and parcel of the justice delivery system. The causes are not difficult to trace. An analysis has shown that the delays occur partly due to the inadequacy of benches and partly because of the frequent adjournments. Again and again demands have been voiced for increasing the number of judges, filling up the vacancies and to speed up the process of justice by cutting down adjournments ruthlessly and ensuring prosecution of cases of crimes against women on a day to day basis.

Though in a number of instances, certain judgements have come in for some criticism, it was pointed out that it was more of a reflection on the quality of investigation and prosecution about which judges themselves were most vocal. It is equally true however, that since judges also come from the same society, from which come the other members of the criminal justice system, they also cannot be entirely free from the value system, the prejudices, the biases and stereotypical views. These cannot but get reflected in the evaluation of evidence and formulation of judgements. It is therefore equally necessary that the judiciary is also exposed to gender training to enhance their sensitivity so that, while justice continues to be blind in the traditional sense, the judges also acquire a third eye to take in the special vulnerabilities and weaknesses of the women victims of various crimes.

Thus, the discussion in almost all the workshops focussed around institutional and attitudinal issues arising out of gender and law enforcement. The institutional issues involved analysis of the police, prosecution, judicial and administrative systems and their role in prevention, prosecution and protection. The themes covered included: priority given to Crimes Against Women (CAW) in the institutional set up; priority of property offences vs offences against body; the concept of private vs public i.e. the general feeling of CAW as being a domestic issue and not a public issue; priority in investigation; priority of laws (social legislation vs other legislation); priority in trial; priority in prosecution; priority in media; priority in public perception (as to whether priority is required only for serious offences, like rape, but not for other CAW); links of law enforcement agencies with the community in matters of non-institutional assistance, [for example, is there any institutional mechanism to involve NGOs during law enforcement, as envisaged in Prevention of Immoral Traffic Act (PITA)]; male domination as a social norm; institutional mechanisms of accountability of the law enforcement agencies; customs and norms standing in the way of law enforcement; "burn out" issues (i.e. the common explanation that the law enforcement officials are busy elsewhere all the time on other duties and have no time for CAW); the existing system of "complaint based action", with no *suo moto* cognizance, (for example no action is normally initiated on matters relating to CAW as against the case of murder where the SHO himself will *suo moto* take up the FIR); the gender sensitivity or gender bias within the existing laws and rules; legal awareness and legal literacy - how often updated; legal status of the CAW cell in the States - how legally and professionally equipped are they; and the role of training in inculcating "gender awareness" and "gender discipline".

The regional workshops were finally capped by a National Workshop organized in New Delhi in June 2001. The main recommendations emanating from this workshop also pertained to the working of the police stations, the role of NGOs and the methodology for assessment of police working in relation to gender issues.

It was emphasized that since female victims could confide better in female staff, it was necessary to ensure that such women were able to meet women police officials on their first visit. This necessitates the appointment of adequate number of police officials on the police force and their availability at all police stations. It follows *ipso facto* that the police stations would have to provide suitable facilities for female staff. Of course, police also need facilities like computers, copying machines, and, if possible, video cameras so that authentic record of proceedings becomes available and can be provided to the victims also.

The role of the NGOs cannot be over-emphasized in establishing proper police-public cooperation. It should be mandatory for the police to associate social workers with their investigation. It would help if monthly meetings are held with complainants/victims along with the NGOs wherein the victims are kept apprised of the progress of investigation and outcome of the case at regular intervals.

The entire functioning of the police needs to be subjected to a feminist audit and an annual report on the status of women should be brought out by the police specially with reference to the cases pending and crimes against women. Suggestion were also made for instituting annual Mahila Awards for police officers to reward those who have dealt effectively with crime against women in all aspects, namely, prevention, detection and sensitive handling etc. This is likely to promote gender sensitivity and motivate officers for prompt and effective response.

Similar recommendations emerged about other wings of the criminal justice systems like the prosecution and the judiciary. The main underlying theme in all these recommendations relates to changing the mindset of the people dealing with various aspects of the system. Laws may be perfect, institutions may be solid but if the value systems of the men and women who are entrusted with the implementation of the laws and the running of the institutions lack sensitivity, desired results can never be achieved. The same applies to the entire administrative set up which is concerned with the implementation of numerous development schemes which have been designed for the socio-economic upliftment of women. Women have to be made aware of the laws meant for their protection and their rights and privileges. They must have the self confidence to access the justice system and to fight for their due. This requires that the administrative system also must be sensitized at all levels so that their schemes are designed on a gender fair basis and they are implemented with a gender sensitive hand.

It was against this background that the NCW came to the conclusion that the basic requirement was the sensitization of the organizational heirarchies in all spheres, administrative, police, judicial, media, even the NGOs. This led to the subsequent enterprise of preparing training modules for gender sensitization across all segments of the development administration as well as the law enforcement machinery. To this end, a two day National W orkshop was held at Vigyan Bhavan and five course curricula were presented by the five premier institutions.

- The National Police Academy, Hyderabad presented the curriculum for gender sensitization of the police;
- The Lal Bahadur Shastri National Academy of Administration presented the syllabus for administrative personnel;
- The Andhra Pradesh Judicial Academy did the same job for the judiciary;
- The Gender Training Institute, New Delhi prepared the curriculum for the NGOs; and
- The Indian Institute of Mass Communication, New Delhi finalized the same for the media.

After the initial brain storming at the National W orkshop, these draft curricula went back to the respective institutes for further elaboration and refinement. The present volume is the outcome of this exercise.

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IV. TOWARDS EQUALITY

SUMMARY OF RECOMMENDATIONS OF THE STATUS OF WOMEN COMMITTEE (1975)

CHAPTER III—THE SOCIO-CULTURAL SETTING OF WOMEN'S STATUS

The review of the disabilities and constraints on women, which stem from socio-cultural institutions, indicates that the majority of women are still very far from enjoying the rights and opportunities guaranteed to them by the Constitution. Society has not yet succeeded in framing the required norms or institutions to enable women to fulfil the multiple roles that they are expected to play in India today. On the other hand, the increasing incidence of practices like dowry indicate a further lowering of the status of women. They also indicate a process of regression from some of the norms developed during the Freedom Movement. We have been perturbed by the content analysis of periodicals in the regional languages, that concern for women and their problems, which received an impetus during the Freedom Movement, has suffered a decline in the last two decades. The social laws, that sought to mitigate the problems of women in their family life, have remained unknown to a large mass of women in this country, who are as ignorant of their legal rights today as they were before independence (3.362).

We realise that changes in social attitudes and institutions cannot be brought about very rapidly. It is, however, necessary to accelerate this process of change by deliberate and planned efforts. Responsibility for this acceleration has to be shared by the State and the community, particularly that section of the community which believes in the equality of women. We therefore, urge that community organisations, particularly women's organisations should mobilise public opinion and strengthen social efforts against oppressive institutions like polygamy, dowry, ostentatious expenditure on wedding and child marriage, and mount a campaign for the dissemination of information about the legal rights of women to increase their awareness. This is a joint responsibility which has to be shared by community organisations, legislators who have helped to frame these laws and the Government which is responsible for implementing them (3.36).

CHAPTER IV—WOMEN AND THE LAW

Eradication of Polygamy in Muslim Law

Full equality of sexes can hardly be possible in a legal system which permits polygamy and a social system which tolerates it (4.13). The only personal law, which has remained impervious to the changing trend from polygamy to monogamy is Muslim Law (4.14).

The solution of standard contracts fails to provide a substantive relief to the first wife with children. As the second marriage is not invalidated, the position of the husband is not prejudicially affected but for the financial implications arising out of the step. The deterrence of the criminal sanction when a person intends to contract a second marriage is absent. Further, it is ineffective in cases of fake conversions to Islam from other religions, to circumvent the prohibition against bigamy. The remedy is out of step with the position in the other personal laws in India and should be rejected (4.20).

While the desirability of reform in Muslim Law is generally acknowledged, the Government has taken no steps towards changing the law for over two decades on the view that public opinion in the

Muslim community did not favour a change. This view cannot be reconciled with the declaration of equality and social justice. We are of the opinion that ignoring the interest of Muslim women is a denial of social justice. The right of equality, like the right of free speech, is an individual right (4.26).

We are of the firm view that there can be no compromise on the basic policy of monogamy being the rule for all communities in India. Any compromise in this regard will only perpetuate the existing inequalities in the status of women (4.30).

Enforcement of Provision Against Bigamy under Hindu Marriage Act

- a) In our opinion the right to initiate prosecution for bigamy should be extended to persons other than the girl's family with prior permission of the Court to prevent the current wide-spread violation of a most salutary provision of the law which very clearly lays down the social policy of the country (4.33-34).
- b) We recommend that the words 'solemnized' should be replaced by the words "goes through a form of marriage". Further an explanation should be added to section 17 of the Hindu Marriage Act that an omission to perform some of the essential ceremonies by parties shall not be construed to mean that the offence of bigamy was not committed, if such a ceremony of marriage gives rise to a defacto relationship of husband and wife (4.39).
- c) We recommend that provision be introduced in Section 6 of the Hindu Marriage Act to the effect that nothing contained in the Hindu Marriage Act shall prevent a court from granting an injunction against a proposed bigamous marriage under the Act or under the provision of the Specific Relief Act, 1963.

Reform of Marriage Laws Prevalent in Former French and Portuguese Territories

In our opinion continuation of such diverse laws (permitting polygamy), contradictory to our social policy, in these territories is totally unjustified. We recommend the immediate replacement of these laws by the Hindu Marriage Act 1965 (4.51).

Restraint of Child Marriage

- a) When the legal age of marriage in case of a female is below the age of discretion she cannot be expected to form an intelligent opinion about her partner in life. The policy of law which permits the marriage of a girl before she is physically and mentally mature is open to serious question. Child marriage is one of the significant factors leading to the high incidence of suicide among young married women in India. Therefore, increasing the marriage age of girls to eighteen years is desirable (4.61).
- b) An anachronism in Muslim Law governs some sects. After puberty, a Muslim male in all sects and a Muslim female belonging to the Hanafi and Ithana Ashari sects can marry without a guardian. 'But a Malik, Shafii or Daudhi or Sulayamani Bohra virgin cannot marry without a guardian and her only remedy is to change over to the Hanafi school and marry according to its tenets (4.62).

In our opinion a change in the law to remove the existing disability in these sub-schools, to bring them in conformity with the Hanafi law is necessary (4.63).

c) There are large scale violations of the Child Marriage Restraint Act, particularly in the rural areas. The State of Gujarat has made it a cognizable offence with provision for appointment of a Child Marriage Prevention Officer.

We recommend that all offences under the Child Marriage Restraint Act should be made cognizable, and special officers appointed to enforce the law (4.65).

d) The right to repudiate a child marriage by a girl on attaining majority is provided under Muslim Law if the following facts are established :-

(i) that she was given in marriage by her father or other guardian before she attained the age of 15;

(ii) that she repudiated the marriage before she attained the age of 18;

(iii) that the marriage was not consummated (4.67).

In our view the right to repudiate the marriage on attaining majority should be made available to girls in all communities where the marriage was consummated or not (4.68).

e) The Parsee Marriage and Divorce Act provides that "no suit shall be brought in any court to enforce any marriage between Parsees or any contract connected with or arising out of any such marriage if, at the date of the institution of the suit, the husband shall not have completed the age of 16 years or the wife shall not have completed the age of 14 years"

We recommend legislation prohibiting courts from granting any relief in respect of marriage solemnized in violation of the age requirements prescribed by law, unless both the parties have completed the age of 18 years (4.69).

Registration of Marriage

Compulsory registration of marriages as recommended by the U.N. will be an effective check on child and bigamous marriages, offer reliable proof of marriages and ensure legitimacy and inheritance rights of children (4.70-4.72).

We recommend that registration should be made compulsory for all marriages (4.73).

Prevention of Dowry

The Dowry Prohibition Act 1961 has signally failed to achieve its purpose. In spite of the persistent growth of this practice there are practically no cases reported under the Act (4.75). There is hardly any evidence of social conscience in this regard in the country today (4.77). The educated youth is grossly indifferent to the evil and unashamedly contributed to its perpetuation. Stringent enforcement of the policy and purpose of the Act may serve to educate public opinion better.

a) A very small but significant step could be taken by the Government by declaring the taking and giving of dowry to be against the Government Servants' Conduct Rules. Such a lead was given earlier to prevent bigamous marriages and giving or taking of dowry should be similarly dealt with (4.78).

- b) The policy of making the offence non-cognizable nullifies the purpose of the Act. We recommend that the offences under the Dowry Act should be made cognizable (4.80).
- c) One of the major loop-holes in the existing legislation is that anything is allowed in the name of gifts and presents. Therefore, any gifts made to the bridegroom or his parents in excess of Rs. 500/- or which can be so used as to reduce his own financial liability should be made punishable (4.81).
- d) The practice of displaying the dowry tends to perpetuate the practice as others follow suit. To curb the evil of dowry we recommend legislation on the lines of the West Pakistan Dowry (Prohibition of Display) Act 1967 which penalised display of gifts made at the time, or immediately before or after marriage (4.82).
- e) An evaluation of the impact of the amended Dowry Prohibition Act should be made after 5 years. The next step should be to set a ceiling even on the gifts that may be made to the bride (4.83).

Improvement of Laws of Divorce

The concept of 'union for life' or the sacramental nature of marriage which renders the marriage indissoluble has been eroded and through legislation the right of divorce has been introduced in all legal systems in India, but the same variations and unequal treatment of sexes characterises this branch of law also (4.84).

We recommend the following changes

- Hindu Law :
- (a) Difference in the place of work should not be regarded as a ground for a case of desertion or restitution of conjugal rights (4.94).
 - (b) Cruelty and desertion should be added as grounds for divorce in the Hindu Marriage Act so that persons are not compelled to follow the present circuitous route and undergo the expense of going to court twice (4.95).
- Muslim Law :
- (c) We recommend that the right of the wife to divorce on the failure of the husband to maintain her, irrespective of her conduct which may be the main or contributory cause, should be clearly spelt out (4.100).
 - (d) We recommend immediate legislation to eliminate the unilateral right of divorce, and to parity of rights for both partners regarding grounds for seeking dissolution of marriage (4.103).
- Christian Law :
- (e) We regret that the reforms in Christian Marriage laws as recommended by the Law Commission and incorporated in the Christian Marriage Matrimonial Causes Bill 1960 have not yet been enacted and recommend that no further time be lost to reform and amend this law (4.104-4.106).
- Jewish Law :
- (f) We recommend that reform and codification on the Jewish law be undertaken and the principle of monogamy as well as the normal grounds for divorce as provided in the Special Marriage Act be adopted for this community also (4.108).

General

- (g) In our opinion conversion should not be a ground for divorce as it offers an easy way of avoiding matrimonial obligations (4.111).
- (h) We recommend that mutual consent as a ground for divorce should be recognised in all the personal laws so that two adults whose marriage has, in fact, broken down can get it dissolved honourably (4.112).
- (i) The provision in the Parsee Marriage and Divorce Act which enables the wife to obtain a divorce if her husband has compelled her to prostitution should be included in all other personal laws (4.113).
- (j) As a general principle, we recommend parity of rights regarding grounds for divorce for both husband and wife (4.114).

Adoption

- (a) We recommend that the right of adoption should be equal for husband and wife, with the consent of the other spouse (4.125).
- (b) We welcome the step taken by the Government in introducing a uniform and secular law of adoption – The Adoption of Children Bill 1972 – and recommend an early enactment of the Bill as it will extend the right of adoption equally to men and women of all communities, and will be a step towards a uniform secular law (4.129).

Guardianship

We recommend :-

- (a) that the control over the person and property of a minor cannot be separated and should vest in the same person;
- (b) that the question of guardianship should be determined entirely from the point of view of the child's interest and not the prior right of either parent;
- (c) that the parent who does not have guardianship should have access to the child;
- (d) that whatever the decision taken earlier, the child's choice of guardian should be obtained when the child reaches the age of 12 (4.143).
- (e) We support the recommendations of the U.N. Commission on the Status of Women as follows:-
 - (i) 'Women shall have equal rights and duties with men in respect to guardianship of their minor children and the exercise of parental authority over them, including care, custody, education and maintenance;
 - (ii) 'Both spouses shall have equal rights and duties with regard to the administration of the property of their minor children, with the legal limitations necessary to ensure as far as possible that it is administered in the interest of the children;

- (iii) The interest of the children shall be the paramount consideration in proceedings of custody of children in the event of divorce, annulment of marriage or judicial separation;
- (iv) No discrimination shall be made between men and women with regard to decisions regarding custody of children and guardianship or other parental rights in the event of divorce, annulment of marriage or judicial separation (4.144).

Maintenance

The provision for maintenance in the Criminal Procedure Code continue to reflect the old attitude to women. With some modifications like extending the rights to demand maintenance to indigent parents and to divorced wives, the obligation to maintain continues to be that of the man. There are today women economically independent who cannot only look after themselves but also their husbands and children (4.147).

- (a) As we believe in the equal status of husband and wife, and of son and daughter, we recommend amendment of the law of maintenance to provide for the obligation of the economically independent woman :-
 - (i) to maintain her dependent husband;
 - (ii) to share with him the duty to maintain their children;
 - (iii) to share with her brothers the duty to maintain their indigent parents (4.148).
- (b) The underlying principle for the inclusion of the right of maintenance in the Criminal Procedure Code is to prevent starvation and vagrancy. The ceiling of Rs. 500/- on the total amount of maintenance for all dependent persons seems unjustified (4.148).

In extending the right of maintenance to divorced wives, an exception has been introduced to deny maintenance to those divorced wives who have received 'a sum of money payable under customary or personal law'. This exclusion of all divorced Muslim women defeats the purpose of the section to provide a speedy remedy to indigent women (4.149).

We therefore recommend that the ceiling placed on the maximum amount payable as maintenance should be removed and the term wife to include divorced wife be made applicable to all women without any exception (4.150).

- (c) Under Muslim law the wife's right to maintenance lasts only as long as she remains a wife. If she is divorced, she loses her right and is only entitled to maintenance for 3 months. This has created a discrimination between the Muslim and other Indian women. We recommend the removal of this discrimination and extension of right of maintenance to divorced wives (4.155).
- (d) In order to minimise the hardship caused by non-payment of maintenance, and to ensure certainty of payment, we recommend that all maintenance orders should be deducted at the source by the employer as done in the case of income-tax. Where it is not possible to deduct at the source, as in the case of a business man or a self-employed person, the arrears of maintenance should be recovered as 'arrears of land revenue or by distress' (4.159).

- (e) An additional mode of execution of the maintenance decree may be to adopt the same procedure as is done in the case of fines under the Criminal Procedure Code (4.160).

Inheritance

- (a) The Indian Succession Act confers no restrictions on the power of a person to will away his property. Therefore, the protection enjoyed by a Muslim widow to a share of the estate and by a Hindu widow to be maintained is denied to other widows under this law. There is a need to incorporate some restriction on the right of testation, similar to that prevailing under Muslim law to prevent a widow from being left completely destitute (4.165).
- (b) A characteristic feature of the Travancore and Cochin Christian Succession Laws is the discrimination against women (4.167). We recommend that immediate legislative measures be taken to bring Christian women of Kerala under the Indian Succession Act as a first step to unify the law (4.173).
- (c) According to the law prevailing in Goa, the widow is relegated to the fourth position and is entitled to only the fruits and agricultural commodities. This needs to be remedied immediately (4.177). Similar anomalies prevail in the succession laws governing Christians of Pondicherry which relegate a woman to an inferior position and do not regard her as full owner even in the few cases where she can inherit property (4.178). We recommend the extension of the Indian Succession Act to Goa and Pondicherry (4.178).
- (d) The one major factor which helps to continue the inequality between sons and daughters under Hindu law is the retention of the Mitakshara co-parcenary, the membership of which is confined only to male members. A number of decisions and legislation in the 20th century have made inroads in the concept of the co-parcenary, but the suggestion regarding its abolition received opposition at the time of Hindu Law reform. The compromise arrived at provides limited inheritance rights to the nearest class I female heirs of a co-parcenary but perpetuates unequal treatment between brother and sister. The right of a co-parcener to renounce his share in the coparcenary deprives the female heirs of any share. Secondly, the right to transform self-acquired into joint family property is frequently used to reduce the share of a female heir (4.189-4.193). We recommend the abolition of the right by birth and the conversion of the Mitakshara co-parcenary into Dayabhaga (4.194).
- (e) Section 4 (2) of the Hindu Succession Act excludes the devolution of tenancy rights under State laws from the scope of the Act. This had led to the elimination of the beneficial effects of the Hindu Succession Act under the land legislation in many States (4.195-4.200). In order to achieve the social equality of women as also in the interests of uniformity, we recommend the abolition of the exception provided in section 4 (2) of the Hindu Succession Act, relating to devolution of tenancies (4.201).
- (f) Section 23 of the Hindu Succession Act relating to the right of inheritance to a dwelling house has also resulted in some discrimination between unmarried, widowed and married daughters. The main object of the section is unexceptionable as it asserts the primacy of the rights of the family as against the right of an individual and therefore the restriction against partition which

is against the family interest should be retained. But nothing justifies the invidious distinction between married and other daughters (4.204 and 4.205). We recommend the removal of the discrimination between married and unmarried daughters regarding the right over a dwelling house (Sec. 23 Hindu Succession Act).

- (g) The unrestricted right of testation often results in depriving female heirs of their rights of inheritance (4.206). We recommend that the right of testation should be limited under the Hindu Succession Act, so as not to deprive legal heirs completely (4.207).
- (h) We recommend legislation in Muslim Law to give an equal share to the widow and the daughter along with sons as has been done in Turkey (4.218).
- (i) The medley of laws which govern the right of inheritance, not only of female heirs of different communities, but even of female heirs of the same community require immediate measures. Broad principles like equal rights of son, daughters and widows, a restriction on the right testation, so that dependent members are not left completely desitute are needed immediately (4.219).

GENERAL RECOMMENDATIONS

Matrimonial Property

In the socio-economic situation prevailing in our country the contribution of the wife to the family's economy is not recognised. A large number of them participate in the family's effort to earn a livelihood as unpaid family workers. Even when they do not do so the economic value of their effort in running the house, assuming all domestic responsibilities, thus freeing the husband for his avocation is not accepted in law either directly or indirectly. Married women who do not have independent source of income or give up employment after marriage to devote their full time in family obligations are economically dependent on their husbands. In majority of cases, movable and immovable property acquired during marriage are legally owned by the husband, since they are paid for out of his earnings. The principle of determining ownership on the basis of financial contribution works inequitably against women. In case of divorce or separation, women without any earnings or savings of their own are deprived of all property which they acquire jointly. Even property received by them at the time of marriage from the husband or his family is denied to the woman in some communities. The fear of financial and social insecurity prevents them from resorting to separation or divorce even when the marriages are unhappy. It is necessary to give legal recognition to the economic value of the contribution made by the wife through house work for purposes of determining ownership of matrimonial property, instead of continuing the archaic test of actual financial contribution (4.222-4.225).

We, therefore, recommend that on divorce or separation the wife should be entitled to at least 1/3 of the assets acquired at the time of and during the marriage (4.226).

Family Courts

The statutory law in all matrimonial matters follows the adversary principle for giving relief i.e. the petitioner seeking relief alleges certain facts and the respondent refutes them. In addition, most of the grounds in these statutes are based on the 'fault principle' instead of the breakdown theory. As a result, strong advocacy rather than family welfare is often the determining factor in these cases. The

absence of distinction between matrimonial causes and other civil suits leads to unusual delay which stands in the way of conciliation and further embitters the relationship of the parties. Conciliation, which needs to be the main consideration in all family matters is not the guiding principle in the statutes dealing with them (4.227-4.228).

We strongly recommend the abandonment of the established adversary system for settlement of family problems, and establishment of Family Courts which will adopt conciliatory methods and informal procedure, aiming to achieve socially desirable results (4.233).

Uniform Civil Code

The absence of an uniform civil code 27 years after independence is an incongruity which cannot be justified with all the emphasis that is placed on secularism, science and modernisation. The continuance of various personal laws which discriminate between men and women violates the Fundamental Rights and the Preamble to the Constitution which promises equality of status to all citizens. It is also against the spirit of national integration and secularism (4.236).

Our recommendations regarding amendments of existing laws are only indicators of the direction in which uniformity has to be achieved. We recommend expeditious implementation of the constitutional directive of Article 44 by the adoption of a uniform Civil Code (4.237).

Needed Reforms in Criminal Law

a) *Consent to sexual intercourse* : While consent to sexual intercourse is strictly interpreted and excludes consent given by woman under duress or fraud, no provision is made for consent obtained by putting someone else in fear in the presence of the woman. We welcome the recommendation of the Law Commission in this regard (4.242).

In our view consent to have sexual intercourse requires more maturity than to have an abortion. The same age-limit should be applied in both cases. We recommend that the age consent below which a girl's consent to sexual intercourse is not legal should be 18, permitting some degree of flexibility to the court in border-line cases to decide whether the girl is mature enough (4.243).

b) *Bigamy* : The present law restricts jurisdiction of the court to the place where the bigamous marriage was performed or where the husband and wife last resided. This causes difficulties to the wife who may have to move on after being abandoned by her husband. We recommend that in addition to the two jurisdictions under the Criminal Procedure Code, provision be made for inquiry and trial for bigamy in a court within whose jurisdiction the wife is residing (4.246).

c) *Adultery* : Adultery in our opinion should be regarded only as a matrimonial offence, the remedy for which may be sought in divorce or separation. Retention of this as a criminal offence brings out clearly the values of the last century which regarded the wife as the husband's property. It also prevents lawyers and others from giving necessary help to an oppressed wife. We recommend that continuing to regard adultery as a criminal offence is against the dignity of an individual and should be removed from the Penal Code (4.248).

Nationality

- a) In the absence of any provision dealing with the case of Indian women marrying foreigners in the Citizenship Act many of them have become stateless. We recommend that the Citizenship Act be amended to provide a special rule for Indian women marrying aliens, stating that she will in no case lose her Indian nationality as a result of her marriage to a foreigner (4.256).
- b) The present rule prevents the children of such Indian women from being considered as Indian citizens. Where the father and mother are separated and the mother is the guardian, there is no justification for the rule that the child's nationality will be transmitted through the father. We, therefore, recommend the amendment of section 4 (1) of the Citizenship Act to read as follows:-

"A person born outside India on or after the 26th January, 1950, shall be a citizen of India by descent if his father or mother is a citizen of India at the time of his birth" (4.257).

CHAPTER V—ROLES, RIGHTS AND OPPORTUNITIES FOR ECONOMIC PARTICIPATION

The Indian Constitution guarantees equality of opportunity in matters relating to employment and directs the State to secure equal rights to an adequate means of livelihood, equal pay for equal work and just and humane conditions of work. The impact of transition to a modern economy has meant the exclusion of an increasing number and proportion of women from active participation in the productive process. A considerable number continue to participate for no return and no recognition. The majority of those who do participate fully or on sufferance, without equal treatment, security of employment or humane conditions of work. A very large number of them are subject to exploitation of various kinds with no protection from society or the State. Legislative and executive actions initiated in this direction have made some impact in the organised sector, where only 6% of working women are employed, but in the vast unorganised sector, which engages 94% of working women in this country, no impact of these measures have been felt on conditions of work, wages or opportunities.

Estimates of employment and under-employment clearly indicate that the position is worse for women. Measures to remove women's disability and handicaps in the field of economic participation have proved extremely inadequate. While several factors have handicapped and prevented women's integration into the process of development, the lack of a well defined policy, indicating areas where they require special assistance and protection, leaves them without access to knowledge, skills and employment.

Prejudices regarding women's efficiency, productivity, capacity for skills and suitability debar them from employment in many areas, and result in wage discrimination. The criteria for determining their unsuitability for particular types of jobs are not clear or uniform. Recasting the employment policy for women requires re-examination of existing theories regarding their suitability for different types of work on scientific lines, and deliberate efforts to promote equality of opportunity by special attention to women's disability and handicaps. Our recommendations aim to make the Constitutional guarantees meaningful and arrest the trend towards gradual exclusion of women from their rights to a fuller participation in the economic process.

We therefore recommend the adoption of a well defined policy to fulfil the Constitutional directives and Government's long term objective of total involvement of women in national development. Such a

policy should be framed by a Government Resolution. This policy will need to be implemented carefully to avoid evasion by direct or indirect methods. Apart from specific occupations from which women are debarred by law, employers should not be permitted to exclude them from any occupation unless the basis for unsuitability is clearly specified.

The creation of a cell within the Ministry of Labour and Employment at both Central and State levels under the direction of a Senior Officer to deal with problems of women (5.323).

We further recommend the following changes in the existing laws :

A. Maternity Benefits Act 1961

- (i) This Act should be extended to all industries not covered by the Act at present and the provision of maternity relief ensured by the creation of a Central Fund levying contributions from employers. The administration of the Fund should follow the pattern already established by the Employees State Insurance Corporation.
- (ii) The Act should also cover agricultural labourers in the same manner as suggested for other industries. To facilitate its implementation, the Central Fund should also include a levy on Agricultural Holdings Tax by the Committee on Taxation of Agricultural Wealth and Income.
- (iii) The anti-retrenchment clause already included in the Employees State Insurance Act 1948 should be incorporated in the Maternity Benefits Act.
- (iv) For women retrenched for short periods and reemployed on the same jobs, the period of unemployment should not be treated as discontinuation of service for their eligibility for this benefit. For casual labour, a minimum of 3 months of service should be considered as qualifying them for this benefit.
- (v) As decided by the Supreme Court in the case of bidi workers, the provision of maternity benefits should be extended to home workers in all other industries.
- (vi) In order to eliminate unjust denial of maternity benefits, scrutiny of applications should be done by a Committee of the management and trade union representatives. The latter should preferably include a woman. This will provide greater incentive to women workers to participate in trade union activities.
- (vii) The penalties for evasion of this law should be made more stringent.
- (viii) The system of paying cash benefits in a lump-sum sometimes gives rise to inadequate attention to the nutritional needs of the mother and the child. Payment of maternity benefits should be made periodically (5.324).

B. Provision of Creches

- (i) The present limit of 50 women workers for the application of this provision under the Factories be reduced to 20.
- (ii) Women employed as casual labour or as contract labour should be entitled to share this benefit.
- (iii) Wherever there is a demand, a room should be provided for keeping small children for other groups of women workers e.g. workers in offices, hospitals, shops and commercial establishments.

- (iv) As far as possible, creches should be established near the residence of women workers rather than the place of work. The ideal arrangements, in our view, would be neighbourhood creches (5.325).

C. Working Time

Permission to work up to 10.00 P.M. should be granted, provided arrangements for transport and security are made.

We further recommend effective implementation of the Maternity Benefits Act in all States, and the extension of the Employees State Insurance Scheme to those areas which are not covered by it at present (5.326).

Equalisation of Wages

We recommend legislative enactment of Article 39 (d) of the Constitution - equal pay for equal work - to add the weight of legal sanction to what is only a policy at present.

We further recommend incorporation of this principle in the Minimum Wages Act (5.327).

Integrated Development of Training and Employment

- (i) We recommend reservation of a definite quota for women for training within the industry in order to arrest their retrenchment as a consequence of modernisation.
- (ii) A similar quota should be reserved for women for training of apprentices under the National Apprentices Act.
- (iii) We further recommend developing programmes of vocational training in close relationship with industries located in the area. Links with possible employing agencies have to be developed from the beginning so that the training does not end in futility.
- (iv) As recommended by the Committee of the All India Council for Technical Education, Polytechnics for Women should include a production centre with assistance from the Small Scale Industries Departments of the State concerned.
- (v) Training programmes in production and market organisation to develop self-employment should be developed.
- (vi) Special efforts have to be made to develop vocational training for both illiterate and semi-literate women workers.
- (vii) We further recommend development of training-cum-production centres in small scale or cottage industries in both rural and urban areas to provide employment to women near their homes (5.328).

Part-time Employment

We recommend specific provisions for part-time employment of women by suitable revisions in recruitment rules and service conditions. We also recommend detailed investigation of areas where part time employment could be generated by agencies like the Directorate General of Employment and

Training, the Institute of Applied Manpower Research, the National Council of Applied Economic Research, etc. Such studies should include examination of existing avenues for part-time employment viz. in the unorganised industries and occupations (5.329).

Employment Information

We recommend expansion of the national employment service, particularly in rural areas, and the development of a women's cadre in the service to provide employment information and assistance to women (5.330).

Provision for Re-entry

We recommend that provision for special leave without pay, subject to a maximum of 5 years during service, should be made in all occupations, in order to enable women to devote full-time for the care of their family. Their lien should be protected (5.331).

Enforcement of Laws Protecting Women Workers

We recommend increase in the number of women on the inspectorate of different labour departments as well as provision for women welfare officers wherever women are employed (5.332).

We Further Recommend :

- (i) Steps to organise labour unions in the field of agriculture, and other industries where such organisations do not exist at present.
- (ii) Formation of Women's Wings in all trade unions, to look after the problems of women workers and to improve women's participation in trade union activities (5.333).

CHAPTER VI—EDUCATIONAL DEVELOPMENT

Our investigation of the progress of women's education in India reveals that while there has been a tremendous increase in the number of girls receiving formal education in the period after Independence, the gap between the enrolment of boys and girls has continued to increase at all levels and the proportion of girls in the relevant age groups covered by the school system still remains far below the constitutional target of universal education upto the age at 14. Social attitudes to the education of girls range from acceptance of the need to one of the absolute indifference. The reasons for the variation in social attitude and the consequent slow progress of women's education are both social and economic, which are intensified by inadequate facilities and the ambivalent attitude regarding the purpose of educating girls.

In spite of the expansion, the formal system of education now covers only 10% of the total female population. Less than 7% of the 15 to 25 age group and less than 2% of the 25 and above age group have received any formal education. The number of illiterate women has increased from 61 million in 1950-51 to 215 million in 1970-71.

The challenge of the widening illiteracy gap will have to be borne in mind in determining priorities in educational development in the years to come. The claims of the formal educational system which can cater to the need of only a minority for a long time will have to be balanced against the claims

of eradication of illiteracy. This stands out as the most important and imperative need to raise the status of women who are already adults and constitute the largest group (6.53). While the constitutional directive of universal education upto the age of 14 must receive the highest priority in the formal system an alternative system has to be designed to provide basic education to adult women, particularly in the 15-25 age group (6.55).

Imbalances in women's education and literacy are the consequences of great disparity of educational progress between rural and urban areas, to a great extent, variations in regional attitudes to women (6.57). The influence of these and other sociological factors, which, for instance, influence the educational development among Muslim women or women of Scheduled Castes and Tribes make the use of national or state averages in assessing progress of education or literacy rather meaningless (6.61-63).

In our opinion, any plan for educational development of women which does not take these imbalances into account will contribute to the increase of inequalities between different sections of the population. Removal of these imbalances will require special attention from public authorities based on careful identification of factors responsible for them. Special programmes will need to be designed for their removal if equality of educational opportunities is to be brought within the access of the majority of women in this country (6.64).

Recommendations Regarding the Formal System

Co-education

In our opinion, the considerations of efficiency, economy as well as equal opportunity require the acceptance of co-education as a long term policy. In view of the divergent social attitudes, however, we recommend :

- (i) co-education should be adopted as the general policy at the primary level;
- (ii) at the middle and secondary stages separate schools may be provided in areas where there is a great demand for them. But the effort to pursue co-education as a general policy at these stages should continue side-by-side;
- (iii) at the university level co-education should be the general policy and opening of new colleges exclusively for girls should be discouraged;
- (iv) there should be no ban on admission of girls to boys' institutions;
- (v) wherever separate schools/colleges for girls are provided, it has to be ensured that they maintain required standards in regard to the quality of staff, provision of facilities, relevant courses and co-curricular activities;
- (vi) acceptance of the principle of mixed schools. There is a misgiving, however, that this provision may lead to exclusion of girls from some schools. Therefore, it is suggested that this measure may be reviewed a few years after it is implemented;
- (vii) wherever there are mixed schools, separate toilet facilities and retiring rooms for girls should be provided (6.72).

Curricula

We recommend :

- (i) There should be a common course of general education for both sexes till the end of class X, all courses being open to boys and girls.
- (ii) At the primary stage, simple needle craft, music and dancing should be taught to both sexes.
- (iii) From the middle stage, difference may be permitted under work experience.
- (iv) In class XI-XII girls should have full opportunity to choose vocational and technical courses according to local condition, needs and aptitudes.
- (v) At the university stage there is a need to introduce more relevant and useful courses for all students (6.81).

Pre-School Education

We recommend :

- (i) The provision of three years pre-school education for all children by making a special effort to increase the number of 'balwadis' in the rural areas and in urban slums.
- (ii) In order to enable them to fulfil the social functions discussed above, an effort should be made to locate them as near as possible to the primary and middle schools of the locality (6.85).

Universalisation of Education for the Age-Group 6-14

We recommend :

- (i) Provision of primary schools within walking distance from the home of every child within the next 5 years.
- (ii) Establishment of ashram or residential schools to serve clusters of villages scattered in difficult terrains. Where this is not immediately possible, preparatory schools may be provided for the time being.

General Recommendations

- (i) Provision of mixed staff in all mixed schools. This should be made a condition of recognition.
- (ii) Adequate provision of common-rooms and separate toilet facilities for girls in all schools.
- (iii) Adequate arrangements for co-curricular activities for girls in all schools.
- (iv) Provision of more need-cum-merit scholarships and hostel facilities for girls (6.93).

Higher Education

We recommend :

- (i) Development of more employment opportunities, particularly of a part-time nature, to enable women to participate more in productive activities.

Development of employment information and guidance services for women entering higher education. Many of them suffer from lack of information regarding job opportunities and regret their choice of subjects when faced by difficulties in obtaining employment (6.96).

Non-Formal Education

As stated earlier, the greatest problem in women's education today is to provide some basic education to the overwhelming majority who have remained outside the reach of the formal system because of their age and social responsibilities as well as the literacy gap. For the sake of national plans for development, it is imperative to increase the social effectiveness of women in the 15-25 age-group even if we cannot do so for the still older groups. Ad hoc approaches through the adult literacy, functional literacy and other programmes of the Government have proved inadequate. They also draw a sharp distinction between men and women in the content of the training. These distinctions, in our view, are out of date. Changes in family life, food habits, family planning all require joint efforts of men and women and continuing this kind of artificial division between the sexes may defeat the purpose of these programmes. As for vocational and occupational skills, the needs of women are greater than those of men. While we do not deny the value of crafts, women's need for vocational training cannot be limited to them. The skills differ according to the industrial and market potentials of regions and it is imperative to relate the training to local needs, resources and employment possibilities instead of adopting an artificial sex-selective approach. Ad hoc approaches through a multiplicity of programmes by various governmental agencies will lead to overlapping, lack of coordination and wastage of resources. The problem is an integrated one and cannot be solved by short term programmes. What is needed is a continuous process (6.97-6.101).

No attempt to professionalise this system will lead to development of the limiting, selective and a rigid approach with fixed curricula and classroom procedures. The prohibitive cost of such professionalisation would inevitably limit its operation to a few selected centres. The teachers in a non-formal system must have other skills of direct relevance to the problems of the community. Without this kind of community involvement, such programmes will lack stability and continuity (6.104).

The object of the system should be to provide access to information and use of information for better participation in social life with literacy as the core of the package. Though primarily meant for adolescents, the system should not exclude the young, particularly those who have been denied any formal education. Some of the latter may use it as a stepping stone to enter the formal system if our recommendation regarding multiple entry is accepted (6.105-6.106).

The system will have to be organised through community groups. The Panchayats and the Women's Panchayats recommended in Chapter VII would appear to be the ideal bodies for this purpose. Government's role should be limited to providing technical guidance and advice and enabling Government functionaries at the local level to participate in the programme apart from supportive assistance in the form of literature and reading material. Development of basic libraries in Villages and the slum areas of towns is an imperative necessity for this purpose. We therefore recommend concentration of governmental effort on providing this infrastructure (6.107).

Equality of Sexes as a Major Value to be Inculcated Through the Educational Process

The educational system is the only institution which can counteract traditional belief in inequality of sexes. The educational system today has not even attempted to undertake this responsibility. The schools reflect and strengthen the traditional prejudices through their curricula, classification of subjects

on the basis of sex and the unwritten code of conduct enforced on their pupils. This is one area where a major change is needed in the content and organisation of education. Educators must admit their responsibility and bring about this much needed change in the values of the younger generation (6.108-111).

CHAPTER VII—POLITICAL STATUS

Though women's participation in the political process has increased, both in elections and in their readiness to express their views on issues directly concerning their day-to-day life, their ability to produce an impact on the political process has been negligible because of the inadequate attention paid to their political education and mobilisation by both political parties and women's organisations. Parties have tended to see women voters as appendages of the males. Among women, the leadership has become diffused and diverse—with sharp contradictions in their regard and concern for the inequalities that affect the status of women in every sphere — social, economic and political. The revolution in status of women for which constitutional equality was to be only the instrument, still remains a very distant objective, while the position of some groups have changed for the better, the large masses of women continue to lack spokesmen in the representative bodies of the State. Though women do not constitute a minority numerically, they are acquiring the features of one by the inequality of class, status and political power. In this sense, the new rights have proved to be only concessional. Our recommendations aim to make women's political rights more functional as required by the needs of a democratic system (7.95-101)

In order to provide greater opportunities to women to actively participate in the decision-making process, it is imperative to recognise the true nature of the social inequalities and disabilities that hamper them. This can best be achieved by providing them with special opportunities for participation in the representative structure of local government*. The present form of associating women in these bodies, through cooption or nomination has become a kind of tokenism. The time has come to move out of this token provision to a more meaningful association of women in local administration, and to counteract the general apathy and indifference of the local bodies to women's development and change of status (7.115-6).

Women's Panchayats

We therefore recommend the establishment of Statutory Women's Panchayats at the village level with autonomy and resources of their own for the management and administration of welfare and development programmes for women and children, as a transitional measure, to break through the traditional attitudes that inhibit most women from articulating their problems and participating actively in the existing local bodies. They should be directly elected by the women of the village and have the right to send representatives to the Panchayat Samities and/or Zilla Parishads. A viable relationship with the Gram Panchayats should be maintained by making the Chairman and Secretary of both bodies ex-officio members of the other.

Reservation on Municipalities**

At the level of municipalities the principle of reservation of seats for women is already prevalent in certain States. We, therefore, recommend that this should be adopted by all States as a transitional

* The committee did not recommend special representation for women in legislative bodies. See Note of Dissent by Smt. Lotika Sarkar and Smt. Vina Mazumdar.

** See Notes of Dissent by Smt. Phulrenu Guha and Smt. Maniben Kare.

measure. We also recommend the constitution of permanent committees in municipalities, to initiate and supervise programmes for women's welfare and development.

Policy for Political Parties

We recommend that political parties should adopt a definite policy regarding the percentage of women candidates to be sponsored by them for elections to Parliament and State Assemblies. While they may initially start with 15% this should be gradually increased so that in time to come the representation of women in the legislative bodies has some relationship to their position in the total population of the country or the State.

Association in Important Bodies

We further recommend the inclusion of women in all important committees, commissions or delegations that are appointed to examine socio-economic problems.

CHAPTER VIII—POLICIES AND PROGRAMMES FOR WOMEN'S WELFARE AND DEVELOPMENT

A. Health and Family Planning

Demographic indicators, viz, female, maternal and infant mortality rates, and indicators of access to medical care, both reveal an increase in the neglect of female lives as an expendable asset. This is the only reasonable explanation for the declining sex ratio observed to persist over several decades. In our opinion, the neglect of maternity and child health services and general public health services through over-concentration on efforts for family planning have contributed to this trend as well as defeated the ultimate objective of the family planning programme. We are entirely in agreement with the draft Fifth Five Year Plan that integration of family planning with more positive health services like maternal and child health, and nutrition and improvement in the life expectancy of children and mothers will provide a far greater incentive to the adoption of family planning measures than the hitherto adopted negative approach. While welcoming this proposed integration, we wish to offer certain suggestion with regard to its organization at different levels so that the objective of integration is not defeated by organizational separatism (8.117).

We recommend that :-

- a) The rank of the Chief Executive for the integrated maternity and child health services, including family planning, should be upgraded to at least Additional Commissioner, so that this service does not again become subordinate to family planning. This procedure should be adopted at all levels of the administration at the Centre and the States.
- c) A separate budget head for maternity and child health services should be created, drawing on the provision now made for family planning and the general health services. It is important to increase the provision for these services to avoid their being neglected as has been the trend so far. Since programmes for immunisation and nutrition of infants yield better results when they form a part of general maternity and child health services, we see no difficulty in increasing the allocation for these services.
- c) At the level of the primary health centres, the maternity and child health services should be separated for purposes of administrative provision, medical personnel and budget. While they may share the same buildings and equipment, a separation of the administrative structure required for maternity and child health services will ensure greater priority of treatment. Facilities in the

way of maternity beds, equipment for immunisation of children and family planning for women could be allocated to the MCH Unit. The P.H.C. could be made responsible for sterilisation operations for men alongwith other general health services. The MCH Unit could coordinate the nutrition and immunisation measures which form a basic component of the intergrated child development programme. It could also collect and maintain fertility and morbidity statistics for women and children for better research and evaluation in these fields.

We recommend that each M.C.H. Centre should collect this data which should be studied and evaluated at the district level by persons of required competence. This will call for a health statistics Section at the district level.

- d) We recommend the abolition of the present practice of providing financial incentives to promoters of family planning. Incentives to women who accept family planning should be in the shape of a token or certificate to ensure them greater priority in health care facilities for both the mothers and their children. Such a step will promote greater acceptance of family planning and correct social attitudes towards these practices. Compensation for loss of wages during sterilisation operations should however be paid to daily wage labourers. Others should be given paid leave for this purpose.
- e) The qualifications prescribed for recruitment of personnel for these services in rural areas need to be gradually raised. Until women of requisite higher qualifications are available, the present requirements may continue, but they should be reviewed and progressively increased after every 3 years. Attempts should also be made to obtain the services of older and mature women for these services in the rural areas.
- f) We further recommend the promotion of research in the field of female disorders e.g. puerperal psychosis and effects of family planning methods.
- g) We disapprove the denial of maternity benefits to women in Government service after three children as adopted by some State Governments and recommend rescinding of such orders.
- h) We also recommend that mass campaigns for family planning should also aim to correct prevailing social attitudes regarding fertility and metabolic hereditary disorders and the sex of the child for which the woman is generally blamed. Correct information in these matters would go a long way to improve the status of women (8.177).

Changes Needed in the Medical Termination of Pregnancy Act

- (a) According to Section 4 (a) of the Act, consent of a minor girl is not required for this operation while in other surgical operations of children above 12 such consent is necessary. In our view this distinction is uncalled for and may lead to guardians compelling young girls to undergo this operation even when they do not want it. The consent of the patient should be essential. In the case of a minor girl nearing majority, if the doctor and the patient are in agreement, the consent of the guardian may be dispensed with. In all such cases, greater discretion should be permitted to the doctor (8.85).
- (b) Section 8 of the Act provides an overriding precaution to the doctor for any damage caused by the operation. Since no such protection is given for other operations, this seems an unnecessary clause and may lead to negligence. It may, therefore, be dropped (8.85).

- (c) While we appreciate the ethical considerations which make many doctors reluctant to perform this operation, we feel that it is a woman's right to have control over the size of her family. At the same time it is important that doctors should have the authority to discourage such operations when they pose definite risk to the health of a patient. The condition being imposed in many hospitals that abortion will only be performed if the patient agrees to sterilisation, should not be compulsive. It would be far better to adopt methods of persuasion through expert counselling (8.80.81).
- (d) The procedure and paper work involved in these operations need to be simplified. It is also necessary to extend facilities for authorized termination of pregnancies, particularly in the rural areas (8.83).
- (e) Many hospitals continue to insist on the husband's consent before performing these operations though this is not required by the law. A special effort needs to be made to convince the medical profession of the social value of this law from the point of view both individuals and society (8.83).
- (f) Most doctors are reluctant to perform these operations in the case of unmarried girls. It is necessary to clarify the point that rape is not the only ground to justify termination in cases of unmarried girls, nor is there any legal obligation on the doctor to inform the Police of an operation done in a rape case (8.84).

B. Welfare and Development

In order to prevent any ambiguity in the understanding of what constitutes women's welfare and to prevent the development of policies that sometimes go against the basic objectives, we recommend that the Government of India should evolve a national policy on women's development in the light of the constitutional directives and pledges made to the women of this country and to the international community from time to time (8.178).

In view of the need to maintain links between governmental, voluntary and community effort for promotion of women's welfare and to assist the process of Government planning with actual knowledge and experience of the problems and needs of women at different levels.

We recommend :

- (a) Reorganisation of the Central Social Welfare Board as a statutory and autonomous specialized agency for planning, coordination and management of welfare and development programmes for women and children.
- (b) Reorganisation of the State Social Welfare Advisory Boards as statutory autonomous agencies at the State level with similar functions. In addition, the State Boards may also serve as links between the Central agency, the State Government and the local bodies.

NEED FOR AGENCIES FOR COORDINATION, COMMUNICATION AND IMPLEMENTATION OF MEASURES TO IMPROVE THE STATUS OF WOMEN (NOTE AFTER CHAPTER IX) :

The U.N. Commission on the Status of Women in its 25th Report has recommended establishment of a National Commission or similar bodies "with a mandate to review, evaluate and recommend measures and priorities to ensure equality between men and women and the full integration

of women in all sectors of national life'. We accordingly recommend the constitution of statutory autonomous Commissions at the Centre and the State with the following functions :

- a) Collection of information on different matters, e.g., education, employment, health, welfare, political participation, impact of social legislation, etc., with the right to call for information on different matters from the concerned agencies of the Government and to suggest improved methods for collection of data in different fields.
- b) Evaluation of existing policies, programmes and laws that have a bearing on the status of women with the following powers :
 - (i) to censure non-implementation of these measures;
 - (ii) to point out lacunae or deficiencies in such measures and suggest amendments.

The Commission's criticisms and suggestions made after due consultation with relevant Ministries or Departments of Government should be placed before Parliament or the State Legislatures. They would be answered by the Government within a stated period with explanations or assurances.

- c) Recommendation of new laws, policies or programmes aiming to implement the Directive Principles of State Policy and the objectives of the U.N. Resolutions and Conventions regarding the status of women. These should be made to Parliament or the State Legislatures and Government will be statutorily responsible to consider such recommendation for action or to explain why they cannot be accepted.
- d) Redressal of grievances in cases of actual violation of existing laws.

The Commissions may be empowered to take effective steps to redress the grievances of affected parties.

Composition of the Commission

The composition of these Commissions should be broadbased, one category being selected for their representative status from different bodies like leading women's organisations, trade unions, legislatures, employers, etc., and the other group consisting of experts from the fields of law, health, education, social research, planning and administration. The Chairmen and the majority of the members of all the Commissions should be women. The Chairmen should be non-officials, but on a full time basis.

We further recommend the establishment of special Tribunals** for all violations of human rights, discrimination against women, violation or evasion of existing laws and policies for the protection of women and their rights in society.

* Shrinati Urmila Haksar and Shrinati Sakina A. Hasan were not in favour of this decision.

V. ON WOMEN, EQUALITY AND THE CONSTITUTION : THROUGH THE LOOKING GLASS OF FEMINISM[#]

Ratna Kapur and Brenda Cossman***

I Introduction

Formal equality for women is explicitly enshrined within Indian law. Notwithstanding formal guarantees of equality, Indian women's lives continue to be characterised by pervasive discrimination and substantive inequality. By examining the judicial interpretations of Indian constitutional law, this paper will illustrate how the legal system itself contributes to the gap between the formal guarantees of gender equality and the substantive inequality that plagues women's lives. We will argue that with some notable exceptions, the judicial approach to the equality guarantees of the Constitution is informed by a problematic approach to both equality, and gender difference.

The article begins by reviewing and evaluating two competing models of equality - formal versus substantive equality. We will attempt to briefly illustrate the extent to which Indian constitutional law is informed by a formal model of equality, and how attempts at moving towards a more substantive understanding have been thwarted by the deeply embedded assumptions regarding equality as formal equality. The paper will subsequently examine three competing approaches to the question of the relevance of gender difference: protectionist, sameness, and corrective. We then attempt to contextualise the Supreme Court and High Court case law on gender discrimination within these debates.

II Formal Versus Substantive Equality

The understanding of equality that has dominated Western thought since the time of Aristotle has been one of formal equality. Equality has been interpreted as "treating likes alike", its constitutional expression in American and subsequently Indian equal protection doctrine, as the requirement that "those (who are) similarly situated be treated similarly".¹ With this prevailing conception, equality is equated with sameness. Indeed, sameness is the entitling criteria for equality. Only if you are the same are you entitled to be treated equally. Further, within this equal treatment approach any difference in treatment as between similarly situated individuals, constitutes discrimination.² In other words, if you are the same, then you should not be treated differently.

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1. Tussman, Joseph and Tenbrock, Jacobus "The Equal Protection of the Law" 37 CALIF. L. REV. 341 (1949); see also Haragopal Reddy, "Equality Doctrine and the Indian Constitution" 45 ANDHRA LAW TIMES 57, 58 (1982) ["All persons are to be treated alike, except where circumstances require different treatment"].

2. As Parmanand Singh notes in Singh, "Equal Opportunity and Compensatory Discrimination: Constitutional Policy and Judicial Control" 18:2 JOURNAL OF THE INDIAN LAW INSTITUTE 300, 301 (1976) "...legal equality requires the absence of any discrimination in the words of the law"; see also, K.C. DWIREDI RIGHT TO EQUALITY AND THE SUPREME COURT 11 (1990), who define equality as signifying "that among equals law should be equal and equally administered".

The similarly situated test requires that the Court begin by defining the relevant groups or classes for comparison. In contrast a substantive model of equality begins with the recognition that equality sometimes requires that individuals be treated differently. This approach is extremely critical of the formal model of equality, and its emphasis is on sameness. Martha Minow, in exploring the problematic connection between equality and sameness has observed :

The problem with this concept of equality is that it makes the recognition of difference a threat to the premise behind equality. If to be equal you must be the same, then to be different is to be unequal.³

This initial definitional step can effectively preclude any further equality analysis. If the Court defines the classes as different, then no further analysis is required; difference justifies the differential treatment.⁴ Accordingly, when groups are not similarly situated, then they do not qualify for equality, even if the differences among them are the product of historic or systemic discrimination.⁵

The focus of a substantive equality approach is not simply on equal treatment under the law, but rather on the actual impact of the law.⁶ The explicit objective of a model of substantive equality is the elimination of the substantive inequality of disadvantaged groups in society. As Parmanand Singh notes, it "takes into account inequalities of social, economic and educational background and seeks the elimination of existing inequalities by positive measures".⁷ The focus of the analysis is not with sameness or difference, but rather with disadvantage. Substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society.⁸ The central inquiry of this approach is whether the rule or practice in question contributes to the subordination of the disadvantaged group. Accordingly, discrimination consists of treatment that disadvantages or further oppresses a group that has historically experienced institutional and systemic oppression.

3 Martha Minow, "Learning to Live with the Dilemma of Difference : Bilingual and Special Education" 48 LAW AND CONTEMPORARY PROBLEMS 157, 20 (1985).

4 BRODSKY AND DAY, CANADIAN CHARTER OF EQUALITY RIGHTS FOR WOMEN : ONE STEP FORWARD, TWO STEPS BACK, 153 (1989) ["The way they make the difference between winning and losing. The Court can justify making a comparison between classes or refusing to make a comparison by the way they define the class, or whether they recognize it at all."] See also at 155, ["Just as the way the Court defines a class can determine the outcome, so can the way the Court compares or fails to compare the classes it has identified. Sometimes the courts simply fail to make a comparison; and sometimes comparisons are tautological because the courts compare classes only within the terms already set out in the law."]

5 The problems with the formal approach to equality, and with the similarly situated test have been widely recognised and criticised. For example, the Supreme Court of Canada in *Andrews v. the Law Society of Upper Canada* (1989) 1 S.C.R. 43, held : ["The test as stated is seriously deficient in that it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews."] In *a. Laxamana Murthy v. State of A.P.*, A 1980 A.P. 293, 298 the High Court similarly observed : ["Hitler's classification of all Jews into a separate category for the purposes of butchering them and Naxalites classification of all landlords into a separate category for purpose of exterminating them cannot therefore be faulted on this theory of equal protection clause"].

6 As Maureen Maloney has written in Maloney, "An Analysis of Direct Taxes in India : A Feminist Perspective" 30:4 JOURNAL OF THE INDIAN LAW INSTITUTE 397 (1998) ["Such inequality results from provisions which though seemingly neutral in their application (and therefore conforming to notions of formal equality) in reality result in discrimination. Certain provisions have the effect of discriminating between men and women because in practice they only affect women].

7 Singh, supra note 2, at 301. He describes this approach as one of equality in fact, or compensatory discrimination.

8 Kathy Lahay, "Feminist Theories of (In) Equality", in EQUALITY AND JUDICIAL NEUTRALITY 71 (S. Martin and K. Mahoney eds. 1987) argues that courts must adopt an approach which considers the effect of the rule or practice being challenged, to determine whether it contributes to the actual inequality of women, and whether changing the rule will actually produce an improvement in the specific material conditions of the women affected. See also Colleen Sheppard, "Equality, Ideology and Oppression : Women and the Canadian Charter" in CHARTER WATCH : REFLECTION ON EQUALITY (1986) who argues that the central question to be asked is whether the rule or practice in question contributes to the social inequality of women.

The shift in focus from sameness and difference to disadvantage significantly broadens the equality analysis. Within a formal equality model, the difference between, for example, able bodied and less able bodied persons could preclude an equality challenge. According to this model, because disabled persons are different, they do not have to be treated equally. Within a substantive equality model, however, the focus is not on whether disabled persons are different, but rather, on whether their treatment in law contributes to their historic disadvantage. Indeed, differences are not seen to preclude an entitlement to equality, but rather, are embraced within the concept of equality. Within this model of equality, differential treatment may be required "not to perpetuate the existing inequalities but to achieve and maintain a real state of effective equality."⁹ As such, the failure of a rule or practice to take into account the particular needs of disabled persons, and thus perpetuate the historic disadvantage of this group, would constitute discrimination, and violate their equality rights.

III Judicial Approaches to Equality Rights in India

The following section will briefly review the judicial approaches to the equality rights guaranteed by Articles 14, 15 and 16 of the Indian Constitution. It will attempt to illustrate the extent to which, the constitutional doctrine is informed by a formal model of equality, in which equality is equated with sameness. While some inroads have been made towards a substantive model of equality in recent case law, the continuing hold of the formal model of equality over the judiciary's approach has operated to profoundly limit even these more progressive approaches to the equality guarantees.

A. Article 14

Article 14 of the Constitution guarantees equality before the law and equal protection under the law. It has been interpreted as a prohibition against unreasonable classification. The equality guarantee does not require that the law treat all individuals exactly the same. Rather, it allows the State to make classifications. However, this power of classification must be exercised on reasonable grounds.¹⁰ The Supreme Court has expressly adopted a similarly situated approach to equality rights under Article 14.¹¹ Accordingly, the first step in determining whether Article 14 has been violated is a consideration of whether the persons between whom discrimination is alleged fall within the same class. If the persons are not deemed to be similarly circumstanced, then no further consideration is required.

The principles adopted by the court are premised on a formal model of equality. The focus of the analysis is on the question of sameness - on determining whether the persons among whom the denial of equality is alleged are the same, or whether the classification is based on reasonable differences.

9. Raj Kumar Gupta, "Justice : Unequal but Inseparable" 11 JOURNAL OF THE INDIAN LAW INSTITUTE 57, 76 (1969).

10. Article 14 provides : "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The Supreme Court has held that two conditions must be met to pass this text of reasonable classification : ["(i) ... the classification must be founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group (ii) ... that differentia must have a rational relation to the object sought to be achieved by the statute in question"] : Budhan Choudhry v. State of Bihar, A 1955 S.C. 191; State of W.B.v. Anwar Ali, (1952) S.C.R 340; R.K. Dalmia v Justice S.R. Tendolkar, A 1958 S.C. 538. See also H.M. SEERVAL, CONSTITUTIONAL LAW OF INDIA 292-293 (3rd ed. 1988); D.D. BASU, CONSTITUTIONAL LAW OF INDIA 32 (10th ed. 1988).

11. ["The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike, both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another, if as regards the subject matter of the legislation, their position is substantially the same"] in Dalmia, id. at 539. See also U.P. Electric Co. v. State of U.P., A 1970 S.C. 21.

In this approach, there is no interrogation of substantive inequalities - of such social and economic disadvantages that may have produced differences between persons.¹²

More recently, the Supreme Court has emphasised a "new dimension" of Article 14, namely "that it embodies a guarantee against arbitrariness".¹³ While the new doctrine has been harshly criticised as a significant shift away from the reasonable classification approach by some commentators,¹⁴ there has been little if any significant change in the underlying understanding of equality. The new judicial reasoning has incorporated the doctrine of classification into its folds and thus continues to be premised on a formal model of equality.¹⁵

B. Article 15

Article 15 prohibits discrimination on the ground of religion, race, caste, sex, and place of birth. In reviewing the judicial interpretation of Article 15, we will attempt to identify some of the doctrinal techniques used by the Courts and locate these techniques within the broader context of the competing models of equality.

(i) Discrimination

A number of debates have arisen in the case law regarding the meaning of discrimination within Article 15.¹⁶ At a general level, this concerns the context of the judicial interpretations of the treatment authorised by Article 15 (3). This article, which allows the State to make special provisions for women, has been interpreted as authorising the State to discriminate in favour of women. However, a further question is whether article 15 (3) authorises discrimination against women. In *Mahadeb Jiew v. B.B. Sen*,¹⁷ the Calcutta High Court held that Article 15 (3) could not be used to authorise discrimination against women but rather, from the language used in the Article, it was clear that intention of the

12. See, for example *BASU*, supra note 10, at 32 who writes ["When a law is challenged as denying equal protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of the legislation"]. Basu's description of reasonable classification under Article 14 is explicitly based on the equation of equality and sameness.

13. *Ajay Hasia v. Khalid Mujib*, A 1981 S.C. 487, 499; *E.P. Royapappa v. State of Tamil Nadu*, A 1974 S.C. 555, 583; *Ramana Dayaram Shetty v. I.A.A.I.*, A 1979 S.C. 1628, 1643. See also *Maneka Gandhi v. Union of India*, A 1978 S.C. 597, 624 where the Court held: ["Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits ... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment"].

14. *SEERVAI*, supra note 10, at 272-279, para 16.

15. ["The Doctrine of classification ... is ... a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting a denial of equality. If the classification is not reasonable ... the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached."]: *Seervai*, supra note 10 at 408.

16. Article 15 provides :-

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, place of birth or any of them.
- (2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
 - (a) access to shops, public restaurants, hotels and places of public entertainment; or
 - (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public
- (3) Nothing in this article shall prevent the State from making any special provision for women and children.
- (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the Scheduled Castes and the Scheduled Tribes.

17. A 1951 Cal. 563.

framers of the Constitution was to protect the interests of women and children.¹⁸ Article 15 (3) has thus been limited to upholding legislation that benefits women; not extended to authorising discrimination against women. This interpretation is useful, as far as it goes. At the level of application, when the Courts must interpret whether legislation benefits or discriminates against women, the doctrine provides little guidance. The absence of a substantive approach to equality that attempts to contextualise the legal regulation of women within gender oppression allows the courts to classify laws as "protection". There is little consideration of whether the laws actually benefit women or of the appropriateness of the underlying rationale for the ostensibly protectionist legislation.¹⁹

This question of the treatment authorised by Article 15 (3) is related to a deeper question of the meaning of discrimination within Article 15 more generally. Two approaches to the meaning of discrimination can be identified in the case law. In the first approach, discrimination means any classification or distinction on the prohibited grounds. It is based on a formal understanding of equality as sameness, and thus, of discrimination as any distinction as between similar individuals on the prohibited grounds. This formal approach to discrimination is evident in the court's use of the terms "preferential" or "compensatory" discrimination. The courts speak of discrimination in favour of women - a term that only makes sense if discrimination is taken to mean any classification or distinction.²⁰

In the second approach, discrimination means an adverse distinction on the prohibited grounds, that is, distinctions that disadvantage. It is based on a more substantive understanding of equality, concerned not simply with treatment that differentiates, but rather, with treatment that disadvantages. This approach to discrimination was suggested in *Anjali Roy*, wherein the Court held :

All differentiation is not discrimination but only such differentiation as is invidious and as is made, not because of any real difference in the condition or natural differences between the persons dealt with which makes different treatment necessary, but because of the presence of some characteristics or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiations made as a justifying reason.²¹

The Court's approach goes some way toward substantive equality, in so far as it directs attention to whether the distinctions drawn by the legislation are invidious. However, this shift is limited by the Court's understanding of difference as effectively precluding equality. Within this framework of formal equality, invidious distinction would only be those distinctions not based on real differences. The Courts approach thereby remains overly influenced by a formal model of equality.²²

18. According to the Court, Article 15 (3) did not use the language "discriminate against" but rather use "special provisions for". In *Dattatraya Motiram More v. State of Bombay*, A 1953 Bom. 311, at para 7, the Court held that the effort of the joint operation of Article 15 (1) and 15 (3) was that the State could discriminate in favour of women against men, but could not discriminate in favour of men against women. See also *Shahdad v. Mohd Abdullah*, A 1967 J. & K. 120, *Mt. Choki v. State*, A nothing at 410 that ["...it effectuates both the general policy underlying Art 15 (1) and the necessity of making an exception in favour of women and children, whose position requires special protection"].

19. This approach was also followed in *Anjali Roy v. State*, A 1952 Cal. 825.

20. In *Dattatraya*, supra note 18 at 314 para 7, for example, the Court states : ["The proper way to construe Article 15 (3) - is that ... discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15 (1)"].

21. Supra note 19, at para 16. This substantive approach to discrimination was also hinted at in *Kathi Running Rawal v. Saurashtra*, A 1952 S.C. 123, 125 wherein Sastri, CJ stated : ["Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context."]

22. There is no symmetry between the formal approaches to discrimination and to the relationship between the articles discussed in the following section; nor between the more substantive approaches to discrimination and to the relationship between the articles. The difference between these understandings of discrimination and of the relationship between the

(ii) Relationship between Articles 15(1) and 15(3)

A major issue that has arisen with regard to Article 15 is the relationship of clauses (1) and (2) with clauses (3) and (4). Two approaches to this relationship have emerged in judicial decision-making. We will refer to them as the "exception approach" and the "holistic approach". In the first approach, Articles 15(3) and 15(4) are interpreted as exceptions to the general equality guarantees. A classic statement of this "exception approach" is found in *Anjali Roy v. State of W.B.*, in which the Calcutta High Court held that Article 15(3):

... is obviously an exception to clause (1) and (2) and since its effect is to authorise what the Article otherwise forbids, its meaning seems to be that notwithstanding that clause (1) and (2) forbid discrimination against any citizen on the grounds of sex, the State may discriminate against males by making a special provision in favour of females.²³

The "exception approach" has been overwhelmingly supported by commentators.²⁴ In the second approach, Article 15 is seen as a whole, and therefore Article 15(3) and 15(4) are used to interpret the equality provisions more generally. This "holistic approach" was endorsed in *Dattatraya*, wherein the Bombay High Court held:

... Article 15(3) is obviously a proviso to Article 15(1) and proper effect must be given to that proviso... The proper way to construe Article 15(3) in our opinion is that whereas under Article 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Article 15(3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1).²⁵

The "holistic approach" appears to have been given more general expression by several High Courts, and the Supreme Court.²⁶

These two competing approaches to the relationship between the clause of Article 15 roughly correspond to the two competing models of equality. In the first, "exception approach" equality is

articles remain unarticulated, and the relationship to the broader models of equality is obscured in both the case law and the commentaries. For example, in *Dattatraya* supra note 18, the Court adopted the formal approach to discrimination, yet was also shown to have adopted the more substantive approach to the relationship between the Articles. Conversely, in *Anjali Roy*, supra note 19 the Court adopted a more substantive approach to discrimination, but the formal approach to the relationship between the Articles. This apparent inconsistency is also evident in the commentaries.

23. Supra note 19 at 830-831.

24. SEERVAI, supra note 10, at 396 for example, argues that Articles 15(3) and 15(4) must be seen as exceptions to the general guarantees of equality. ["Article 15(1) prohibits discrimination only on the ground of sex; therefore a discrimination in favour of women would necessarily discriminate against men only on the ground of sex and would be void. The discretionary power in Art. 15(3) relaxes this prohibition in favour of women by expressly authorising such discrimination by way of an exception"]. See also SEERVAI, SUPPLEMENT TO THE THIRD EDITION, (1988) 241. JAIN and BASU both argue that Articles 15(3) and 15(4) are exceptions to Articles 15(1) and (2). BASU, supra note 10, at 67, who argues for example : ["Being an exception, clause (4) cannot be so extended as in effect to destroy the guarantee in cl(1)..."]. See also JAIN, M.P. INDIAN CONSTITUTIONAL LAW 430 (3rd ed. 1978).

25. *Dattatraya*, supra note 18, at 314. See also *Ram Chandra Mahton v. State of Bihar*, A 1966 Pat. 214, BASU, supra note 10 at 68 is extremely critical of this approach. With regard to the decision in *Dattatraya* he writes : ["...such discrimination in favour of women would be justifiable only if clause (3) could be regarded as a complete exception to clause (1) of Article 15. The use of the word "women" in juxtaposition to children in (3)(d) suggests that the special provision referred to in it must be related to such disabilities which are peculiar to women and children"].

26. An early indication of the Supreme Court's preference for it is evident in *Abdul Aziz v. Bombay*, A 1954 S.C. 321. In rejecting the argument that Article 15(3) should be restricted to provisions that benefit women, the Court stated that "Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights." More recently, the Supreme Court has held that Articles 14, 15 and 16 constitute a single code. See *Kerala v. N.M. Thomas*, (1976) 1 S.C.R. 906; *Shamsher Singh v. State*, A 1970 P. & H. 372.

equated with sameness. Any deviation from identical treatment as contemplated by Article 15(3) and 15(4) must then be considered an exception to equality. In the second, "holistic approach", equality is understood as sometimes requiring that individuals be treated differently. Therefore, the special treatment contemplated by Article 15(3) and 15(4) need not be seen as an exception, but as a fundamental part of equality.²⁷ This approach, however, stops considerably short of recognizing equality as essentially a question of disadvantage. The shift toward substantive equality is further limited by the extent to which the Court remains overly influenced by a formal model of equality. For example, while the Court in *Dattatraya* adopted this more substantive understanding of the relationship between the articles, it also adopted an approach to discrimination based on a formal model of equality.²⁸

(iii) On the Grounds Only of Sex

Article 15(1) prohibits discrimination "...on the grounds only of religion, race, caste, sex, place of birth or any of them." It has been interpreted as requiring discrimination "only" on the prohibited grounds. As the Court noted in *Anjali Roy v. State of W.B.*:

[T]he discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article.²⁹

According to this interpretation, if discrimination is found to exist on grounds other than those enumerated, then there is no violation of Article 15(1). Even discrimination on the basis of sex, coupled with discrimination on other non-enumerated grounds, would not constitute a violation.³⁰

The focus on "the grounds only of sex" has been used primarily to uphold legislation that provides preferential treatment for women. In attempting to uphold this legislation the courts have searched for some other grounds on which the legislative distinction is based. In their search, the Courts have cast their net widely. They have found, for example, that distinctions based also on the "backward" social position of women, on the financial need of wives for support, and on public morality constitute grounds other than those stated in Article 15(1).³¹ This process by which the courts are attempting to uphold

27. Such an approach has been advocated by Marc Galanter, in relation to the provisions of both Article 15 & 16 : ["Article 15(4) and 16(4) are undoubtedly exceptions to the constitutional prohibition of State employment of the otherwise forbidden criteria of caste, religion and so forth. But it does not follow that they are exceptions to the policy of equal treatment mandated by Articles 14, 15 and 16. In respect to the general policy of equality they represent an empowerment of the State to pursue substantive equality in respect to the disparities between the backward classes and others"]. Marc Galanter, "Symbolic Activism : A Judicial Encounter with the Contours of India's Compensatory Discrimination Policy", *LAW AND SOCIETY IN MODERN INDIA*, 112 (1989).

28. For example, *SEERVAI*, supra note 10, at 404, an advocate of the formal equality approach to the relationship between the Articles, adopts a more substantive definition of discrimination. He notes that the definition of discrimination in the Oxford dictionary is "to make an adverse distinction with regard to; to distinguish unfavorably from others". This apparent inconsistency, however, in Seervai's analysis is remedied, in so far as, in his view any preferential treatment of one group can be seen as adverse treatment of another group. Thus, virtually any distinction can be understood as adverse distinction. His concept of discrimination can thereby be seen as premised on a formal model of equality in which equality is equated with sameness, and discrimination with any difference in treatment as between those who are the same.

29. Supra note 19, at 829 para 16. See also *Purnananda Banerjee v. Swapna Banerjee*, A 1981 Cal. 123; *Shahdad v. Mohd. Abdullah*, supra note 18.

30. The Court in *Dattatraya*, supra note 18, at 313 para 7, similarly held : ["It must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is only on one of the grounds mentioned in Article 15(1). If there is a discrimination in favour of a particular sex, or in other words, the classification on the ground of sex is permissible provided that classification is the result of other considerations besides the fact that the persons belonging to that class are of a particular sex"].

legislation that gives preferential treatment to women is somewhat misdirected. Both the backward social position of women, and the financial need of wives for support are products of the social, economic and political inequality of women. Legislation designed to promote women's position and/or provide for the financial needs of economically dependent women should not be seen as discrimination against women. But the reason is not because these distinctions are broader than the ground of sex. Rather, it is precisely because these provisions are based on ameliorating the conditions that women have suffered on the ground of sex. Sex is a category which has traditionally denoted disadvantage - it has been used as a ground for discrimination and has resulted in women being "more backward" than men. Yet, the Court attempts to distinguish the ground of sex from other factors, rather than seeing the fundamental relationship between them.

The intention of the Courts in their inquiry into "on the ground only of sex" is laudable. They can in some respects be seen to be pursuing a more substantive vision of equality - that is - one which is concerned with promoting the social, economic and political equality of women. As such, the courts do not strike down legislation designed to benefit women by calling it discrimination on the basis of sex. However, their focus on the technical meaning of "only on the ground of sex" obscures this normative vision of equality. Indeed, the construction of this issue as a narrow and mechanical question of interpretation is motivated by the prevailing understanding of equality as formal equality. The deeply rooted belief that any special treatment constitutes an exception to equality leads the Court to attempt to avoid the issue (Article 15(3) notwithstanding) by constructing the discrimination as not only on the basis of sex. Moreover, this narrow focus on "the grounds only" of sex is potentially dangerous. Without an inquiry into disadvantage and substantive inequalities, a search for other grounds could even be used to uphold legislation that disadvantages women. For example, legislation prohibiting women from voting could be found to be based not only on sex, but also on the "backward social position" of women.

The Delhi High Court, in *Walter Alfred Baid v. Union of India*,³² although dealing primarily with a challenge under Article 16(2), recognised some of the problems implicit in this approach to "only on the grounds of sex". The Court observed:

... it is difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex "alone" because it is based on "other considerations" even though these other considerations have their genesis in the sex itself. It virtually amounts to saying that woman was being discriminated against...not because she belonged to a particular sex but because of what the sex implied...³³

The Court concluded:

Sex and what it implies can not be severed. Considerations which have their genesis in sex and arise out of it would not save such a discrimination. What could save such a discrimination is any

31. In *Girdhar Gopal v. State of M.B.*, A 1953 M.M. 147, the Court adopted this approach to uphold the constitutionality of section 354 of the Indian Penal Code - the offence of outraging the modesty of women. The Court held at para 5 ["If the discrimination is based not merely on any of the grounds stated in Art. 15(1) but also on considerations of property, public morals, decency, decorum and rectitude, the legislation containing such discrimination would not be hit by the provisions of Art. 15(1). It cannot be denied that an assault or criminal force to a woman with intent to outrage her modesty is made punishable under s. 354 not merely because women are women, but because of the factors enumerated..."].

32. A 1976 Del. 302.

33. Id. at 306 para 10.

ground or reason independently of sex such as socio-economic conditions, marital status, and other disqualifying conditions such as age, background, health, academic accomplishments, etc.³⁴

The approach in *W.A. Baid* recognised the connection between sex and the social implications of sex, and thus criticised the narrow doctrinal approach to "only on the ground of sex". However, the approach is not unproblematic. The decision is rooted firmly within a formal model of equality, and the result of the case was to strike down a recruitment rule that had been advantageous for women.

While the debates within the Article 15 case law reveal a tension between a formal and substantive vision of equality, these underlying normative differences remain unarticulated, and the case law remains overly determined by a formal model of equality. Rather than weaving the various substantive equality threads together, the threads are left to unravel.

C. Article 16

A similar tension between formal and substantive equality is apparent in Article 16, which guarantees equality of opportunity and prohibits discrimination in matters of employment.³⁵ A formal interpretation of equality of opportunity pervaded the early case law. For example, in *All India S.M. and A.S.M.'s Assn. v. Gen. Manager Central Railway*, the Supreme Court held that equality of opportunity in matters of promotion guaranteed by Article 16(1) must be interpreted to mean equality among members of the same class of employees, and not equality among members of different classes.³⁶ The similarly situated test, with its emphasis on sameness as the basic entitlement to equality, thus infused the court's understanding of equality of opportunity and reinforced the formal model of equality.³⁷

Notwithstanding this formal equality approach, a tension has emerged within the court's approach to equality of opportunity. For example, a similar controversy has arisen over the appropriate relationship between the clauses of article 16. Within the formal approach to equality of opportunity, the special provisions authorised by 16(4) for "backward classes" are seen as exceptions to the general equality of opportunity guarantees under Articles 16(1) and 16(2). The commentators again advocate the formal

34. *Id.* at 308 para 10.

35. Article 16 provides :-

- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.
- (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
- (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
- (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

36. A 1960 S.C. 384, followed in *Govind Dattatray v. Controller of Imports and Exports*, A 1967 S.C. 839.

37. It should be emphasised that the critique is directed at the judicial approach to equality, and not necessarily at the particular outcome of the cases. The *All India SM and ASM's Assn* case could have been decided by reference to a more substantive understanding of equality, and equality of opportunity. The differential treatment in the case, namely that between road-side station masters and guards, was not discrimination, that is, it was not treatment based on personal or group characteristics and/or historical disadvantage. The ruling of the Supreme Court can be supported, without endorsing the particular model of equality that informed the Court's reasoning.

approach.³⁸ Within the second, more substantive approach to equality of opportunity, the special provisions are seen to be used in interpreting the general guarantees.³⁹ This approach has been adopted in the case law. Some High Courts have gone so far as to say that Articles 14, 15 and 16 constitute a single code.⁴⁰

The Supreme Court has addressed this debate. In *Kerala v. N.M. Thomas*,⁴¹ the Supreme Court held that Article 16(4) was not an exception to Article 16(1), and further held that Articles 15 and 16 are facets of Article 14. Indeed, in *Thomas*, the Supreme Court began to articulate a substantive model of equality.⁴² The clearest statement of this doctrinal shift is found in the judgment of Mathew, J. which explicitly rejects the formal model of equality,⁴³ and argues that equality of opportunity will require more than equality in law or formal equality.⁴⁴

Though complete identity [sic] of opportunity is impossible in this world, measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1).⁴⁵

In *Thomas*, the Supreme Court began to articulate a substantive model of equality. While some Courts have recognised the doctrinal shift in *Thomas*,⁴⁵ other courts and commentators have argued strenuously against it.⁴⁷ Not surprisingly, the *Thomas* case has been most severely criticised by those commentators who remain firmly committed to equality as formal equality. Their criticisms, however, are rarely articulated in such terms, but rather, remain focussed on the narrow, doctrinal aspects of

38. BASU, *supra* note 10, at 71 argues for example ["Clause (1) and (2) of this Article guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment, under the State. Clauses (3) - (5), however, lay down several exceptions to the above rule of equal opportunity"].

39. Marc Galanter has described the formal approach to equality of opportunity as one in which : ["Equality is visualised as identical opportunities to compete for existing values among those differently endowed, regardless of structural determinants of the chances of success or of the consequences for the distribution of values"]. Galanter, *supra* note 27 at 262. Within this view, preferential treatment, or "compensatory discrimination" is seen as an exception to equality; it "is accepted as a marginal adjustment to be made where the results of complete equality are unacceptable". He contrasts this approach with a second, more substantive approach to equality, in which ["...the present is seen as a 'transition' from past inequality to a desired future of substantive equality; the purposes of compensatory discrimination is to promote equalization by offsetting historically accumulated inequalities. Thus compensatory discrimination does not detract from fulfilment of the nation's long run goal of substantive redistribution and equalization"] *Id.* at 263.

40. See *Shamsher Singh Hukam Singh v. Punjab*, A 1970 P. & H. 372. For example, in *Shamsher Singh*, the Court held : "Article 14, 15 and 16, being the constituents of a single code of constitutional guarantees, supplementing each other, clause (3) of Article 15 can be invoked for construing and determining the scope of Article 16(2)".

41. A 1976 S.C. 490.

42. For a detailed discussion of the doctrinal shift in *Thomas*, see Galanter, *supra* note 27, at 265-278.

43. Justice Mathews argues that formal equality is achieved by treating all persons equally : ["Each man to count for one and no one to count for more than one. But men are not equal in all respects. ...We, therefore have to resort to some sort of proportionate equality in many spheres to achieve justice"] *Thomas*, *supra* note 41, at 513 para 78. He continues : ["The principle of proportional equality is attained only when equals are treated equally and unequals unequally. This would raise the baffling question : Equals and unequals in what?"] Mathew, J. notes the formal approach to equality requires criteria by which differences, and thus differential treatment can be justified, and observes that "(t) he real difficulty arises in finding out what constitutes a relevant difference." *Id.* at 513 para 789.

44. ["Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities, but on the existence of abilities."] *Id.* at 515 para 90. A similar shift is evident in Krishna Iyer J.'s decision, who refers, for example, to the need to bring the weaker sections of society ["to a real, not formal equality"]. *Id.* at 529 para 142 He concludes : ["...that the genius of Articles 14 to 16 consist not in literal equality but in progressive elimination of pronounced inequality."] *Id.* at 537 para 167.

45. *Id.* at 514 para 82. At 515 para 89, he writes "...if we want to give equality of opportunity for employment to the members of the Scheduled Castes and Scheduled Tribes, we will have to take note of their social educational and economic environment."

46. See *Jagdish Rai v. State of Haryana*, A 1977 P. & H. 56, 61, in which the *Thomas* case is interpreted as having "introduced a new dynamic and a new dimension into the concept of ... equality of opportunity"; See Singh, *supra* note 2, at 304-319; and see generally Galanter, *supra* note 27.

47. SEERVAI, *supra* note 10, at 428-441.

the case. Indeed, the failure of the Court to go far enough in articulating its substantive model of equality can be seen to have contributed to this critical reaction.⁴⁸

The Supreme Court has continued to approach Article 16 in a manner that is critical of formal equality, and appears to be more informed by a substantive approach. In *Roop Chand Adlakha and others v. Delhi Development Authority*,⁴⁹ the Court was critical of the doctrine of classification within formal equality, observing that the process of classification could obscure the question of inequality.⁵⁰ More recently, in *Marri Chandra Skekhar Rao v. Dean, Seth G.S.M.*,⁵¹ the Supreme Court recognized that disadvantaged persons may have to be treated differently in order to be treated equally:

Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality... The State must, therefore, resort to compensatory State action for the purpose of making people who are formally unequal in their wealth, education or social environment, equal in specified areas.⁵²

Notwithstanding the critics of this substantive approach, it is important to recognize that the choice between formal and substantive equality is not simply a choice of the correct interpretative techniques. It is a normative choice of the appropriate model of equality informing the constitutional guarantees. Any attempt at framing the issue as exclusively one of mechanical techniques simply masks these difficult normative choices facing the judiciary.

It is, moreover, a normative choice between questions of sameness and difference, or questions of disadvantage. Instead of comparing the relative sameness and/or difference, a shift to a substantive model of equality would require the Court's commitment to explore the question of disadvantage in equality challenges, that is, to interrogate whether the differential treatment reinforces the inequality of historically and systemically disadvantaged groups.

V. Judicial Approaches to Sex Discrimination

A. Introduction: The Relevance of Gender

The case law dealing with sex discrimination reflects the more general judicial approaches to the interpretation of equality rights. The same tension between formal and substantive equality is apparent,

48. Both the doctrinal techniques and the discourses used by the Supreme Court have restricted the transformative potential of the case. For example, the Court adopted "the theory of legislative device". The Court cites with approval the passage from *Devadasan's* case. ["The expression "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article"]. While this theory of legislative device can be seen to support the view that Article 15 and 16 must be broadly construed, the reasoning of the Supreme Court has remained predominantly at the level of technical doctrine. The court has not gone far enough in articulating its substantive theory of equality that ought to inform this doctrine. Opponents of this approach remain free to engage exclusively at the level of technical interpretation from the unstated vantage point of formal equality. *Seervai* and *Basu* continue to chip away at the reasoning without having to confront the fundamental differences in their normative vision of equality informing the Constitution. Similarly, the Court continues to invoke the term "compensatory discrimination". Discrimination thus continues to mean any distinction, rather than distinctions that disadvantage within the broader understanding of substantive equality.

49. A 1989 S.C. 307

50. *Id.* at 312 ["The over emphasis on the doctrine of classification or any anxious and sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the article of its previous content and end in replacing the doctrine of equality by the doctrine of classification...The idea of similarity or dissimilarity of situations of persons, to justify classification cannot rest on merely differentia which may, be themselves be rational or logical, but depends on whether the differences are relevant to the goals to be reached by the law which seeks to classify"].

51. 1990 3 S.C.C. 130.

52. *Id.* at 138.

a tension which remains largely unarticulated in the case law. The sex discrimination case law remains overly determined by a formal model of equality. While some inroads to a substantive model of equality are evident, the judicial approaches remain limited by their formal equality discourse. But the case law dealing with sex discrimination raises some issues of its own. The prevailing conception of equality as sameness has led to a focus on the relevance of gender difference. Three approaches are apparent: protectionist, sameness and corrective. The following discussion will first briefly review and evaluate these approaches to gender difference. It will attempt to reveal the extent to which these judicial approaches are overwhelmingly informed not only by a formal approach to equality, but moreover, by a deeply problematic approach to gender difference.

The first, and most common approach is a protectionist approach in which women are constructed as weak and subordinate, and are thus in need of protection. In this approach, the Court's understanding of women's differences is asserted as justification for differential treatment. While in some circumstances this differential treatment is preferential treatment, more often than not the differences are seen as sufficient justification in and of themselves for differential treatment. This approach tends to essentialise difference - that is to say - to take the existence of difference as the natural and inevitable point of departure. There is virtually no interrogation of the basis of the difference, nor any substantive consideration of the impact of the differential treatment on women. Rather, women's differences are seen to justify differential treatment, and any differential treatment is virtually deemed to be preferential treatment. In the name of protecting women, this approach often serves to reinforce their subordinate status.

The second approach is an equal treatment or sameness approach, in which women are constructed as the same as men, and thus, ought to be treated exactly the same as men in law.⁵³ This sameness approach is invoked in a number of different contexts. It has been used to strike down provisions that treat women and men differently. It has, however, also been used to preclude any analysis of the potentially disparate impact of gender neutral legislation. According to the sameness approach, it is sufficient that women and men be treated formally equally.

Some feminist approaches endorse this conception of equality according to which gender difference ought to be irrelevant, and women ought to be treated exactly the same as men.⁵⁴ In this approach, any recognition of gender difference in the past has simply been a justification for discriminating against women. Advocates of this approach for example, argue that special treatment has historically been a double-edged sword for women, that is, under the guise of protection, it has been used to discriminate against women. Any admission of differences between women and men, and any attempt to accommodate those differences is seen to provide a justification for continued unequal and discriminatory treatment.⁵⁵ For example, the use of gender difference in the past in prohibiting women to vote, to be elected to government, to be admitted to the legal profession, and other such participation in the economic, political and cultural dimensions of society.⁵⁶

53. This approach is exemplified by S. Jahwari, "Women and Constitutional Safeguards in India", 40 ANDHRA LAW TIMES JOURNAL, 11 (1979) who writes : ["The true meaning of the principle of equality between men and women is that certain natural differences between men and women is to be treated as normally irrelevant in law, and that consequently is not to be treated as constituting in itself a sufficient justification for unequal treatment"].

54. This approach is associated with the work of Wendy Williams "The Crisis in Equality Theory and Maternity, Sexuality and Women" 7 WOMEN'S RIGHTS LAW REPORTER 179 (1982), and Williams "Equality's Riddle and Pregnancy and the Special Treatment/Equal Treatment Debate", 13 NYU REV. L. & SOC. CHANGE 325.

55. See generally Williams, "The Crisis in Equality". Id.

56. For example, in *Bradwell v. Illinois*, 16 Wall. 130 (1872) 490, the refusal to admit a woman to the legal profession was upheld by the United States Supreme Court, on the basis of women's differences.

The third, and most promising approach is a corrective approach, in which women are seen to require special treatment as a result of past discrimination. Within this approach, gender difference is often seen as relevant, and as requiring recognition in law.⁵⁷ Under this approach, it is argued that a failure to take difference into account will only serve to reinforce and perpetuate the difference and the underlying inequalities. Proponents of this approach attempt to illustrate how the ostensibly gender neutral rules of formal equality are not gender neutral at all - but rather, based on male standards and values. As Naudine Taub has argued "rules formulated in a male-oriented society reflect male needs, male concerns and male experience."⁵⁸ In such a model, women will only qualify for equality to the extent that they can conform to these male values and standards. Thus, the corrective approach argues that gender differences must be taken into account in order to produce substantive equality for women.

There are some important similarities between the protectionist approach and the corrective approach. Most significantly, both of these approaches conclude that gender difference can be relevant and therefore must be recognised in law. However, there are important distinctions between these approaches. Most notably, the protectionist approach is more likely to accept both gender differences and special protection as natural or essential. The corrective approach, on the other hand is more likely to consider the basis of the difference, and the impact of recognition versus non-recognition of the difference, on the lives of women. Gender difference is not essentialised, but rather, its relevance is seen in the context of past disadvantage. In other words, gender difference needs to be recognized because of the extent to which it has historically been the basis of disadvantage and discrimination.

These approaches to gender difference are often seen to roughly correspond to the formal and substantive approaches to equality. Both the protectionist and the sameness approach to gender can be seen to be based on a formal model of equality, whereas the corrective approach to gender is based on a substantive model of equality. It is important, however, that these debates not be collapsed. The adoption of a substantive approach to equality does not automatically resolve the question of the relevance of gender difference. That is, a substantive approach does not necessarily correspond to a corrective approach to gender. Rather, it might in a particular context determine that treating women differently would further contribute to their disadvantage, and thus conclude that women ought to be treated the same. A substantive approach to equality, while opening the space for gender difference to be recognised, does not eradicate the need to make choices regarding when and how difference ought to be recognised.

The basic inquiry of the substantive approach is whether the impugned provision contributes to or reinforces the subordination of women. In some contexts, this substantive approach will require a sameness approach, whereas in other contexts it will require a corrective approach. For example, in relation to basic civil and political rights such as the right to vote and the right to own land, gender would be considered irrelevant in the pursuit of equality, and any recognition of gender would likely

57. See Note, "Towards a Redefinition of Sexual Equality", 95 HARV. L. REV. 487 (1981); Krieger and Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality", 13 GOLDEN GATE U.L. REV. 513 (1983).

58 N. Taub, Book Review, 80 COLUMBIA LAW REVIEWS 1686, 1694 (1980). As Brodsky and Day, *supra* note 4, at 149 further note: ["The extreme and persistent economic and social inequality of women, which is the result of society's bias and oppression, is obscured by a definition of equality that focuses only on differences in the form of law. Women are poorer than men, they work in ill-paid female ghettos, they are the primary care givers for their children and parents, and they are overwhelmingly, the victims of rape and battery. Simple gender neutrality in law based on male standards does not address those major inequalities"].

only contribute to, or reinforce, the subordination of women. In relation to employment rights, however, a substantive approach may require a recognition of women's reproductive differences in so far as the pursuit of equality will require that women are provided with maternity leave and benefits.

B. Employment

Sex discrimination challenges in the employment law context can be divided into two sets of cases. In the first set, women have challenged rules, regulations and practices that restrict or prohibit women's employment. In a second, and smaller set of cases, rules, regulations and practices that treat women preferentially have been challenged on the basis that they restrict or prohibit men's employment.

(i) Restrictions of Women's Employment

Many of the rules, regulations and practices that impose restrictions on women's employment have been found to violate the equality guarantees. However, the decisions in this area are not entirely unproblematic. Firstly, some of the rules and practices which restrict women's employment have been upheld. Secondly, the approach to equality and gender difference informing these decisions are often problematic. The courts have overwhelmingly adopted a formal approach to equality. The approach to gender difference, however, is divided. Many judges have adopted a protectionist approach, while others have adopted a samenssss approach.

In *Raghuban Saudagar Singh v. State of Punjab*,⁵⁹ a government order directing that women were ineligible for appointments to all positions in men's jails with the exception of the positions of clerks and matrons, was challenged as discrimination on the basis of sex.⁶⁰ The Court held that the order did not constitute discrimination only on the ground of sex.

It needs no great imagination to visualise the awkward and even the hazardous position of a woman acting as a warder or other jail official who has to personally ensure and maintain discipline over habitual male criminals.⁶¹

The Court concluded:

...where disparities of either-sex patently add to or detract from, the capacity and suitability to hold a particular post or posts, then the State would be entitled to take this factor into consideration in conjuncture with others.⁶²

The Court upheld the restriction on women's employment.

In the *Raghuban* case the Court adopts a formal approach to equality, within which the perceived differences between women and men justify the differential treatment, and in effect, preclude women's entitlement to equality. Moreover, the Court adopts a protectionist approach to gender difference. The

59. A 1972 P. & H. 117.

60. The petitioner was a Deputy Superintendent of a women's jail. As a result of the government order, she was denied promotion.

61. *Raghuban*, supra note 59, at 121 para 17.

62. In further support of this assertion of the fundamental physical differences between the sexes, the Court quoted from a 1907 United States Supreme Court decision, *Curt Muller v. State of Oregon* (1907) 208 U.S. 412 "The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength... This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her".

Court emphasised the differences in physical strength between women and men. While a certain level of physical strength may indeed be a necessary occupational qualification, the Court did not interrogate whether the gender-based classification was the most reasonable means of meeting this qualification. Instead of banning an entire class of candidates, a more reasonable classification might have been based on ensuring that individual candidates meet the required level of physical strength. The Court, however, did not consider the reasonableness of the classification. Rather, physical difference in strength was put forward as natural gender difference and as applying to all women and all men. Indeed, the Court seemed to be concerned with differences beyond mere physical strength. Without exploring the nature of these differences, the Court concludes that these "patent disparities" would make it awkward, unsuitable and indeed, immoral for women to be employed as jail officials. Underlying the decision appears to be a concern with protecting women, as the weaker sex, from male prisoners.

In the recent case of *Omana Oomen v. FACT Ltd.*,⁶³ female apprentice trainees were denied the opportunity to write an internal examination on the basis of restrictions imposed on the working hours of women by S. 66 of the Factories Act. The petitioners contended that they could have been accommodated in the day shift in which there were several male technicians and that women technicians had been absorbed in other divisions of the company. The Court held that the restriction was based entirely on the basis of sex, and thus violated Articles 14 and 15.

Many constitutional challenges have been directed to employment rules that specifically restrict the employment of married women. In *Bombay Labour Union v. International Franchise*⁶⁴ a rule requiring an unmarried woman to give up her position when she married was challenged. The rule only applied to a particular department of the company. The justification put forward by the company for this rule was the need to work in teams, that attendance must be regular and that there is greater absenteeism among married women. The Supreme Court held that there was no evidence that married women were more likely to be absent than unmarried women.

If it is the presence of children which may be said to account for greater absenteeism among married women, that would be so more or less in the case of widows with children also... The only difference in the matter of absenteeism that we can see between married women...and unmarried women...is in the matter of maternity leave which is an extra facility available to married women. To this extent only, married women are more likely to be absent than unmarried women and widows. But such absence can in our opinion be easily provided for by having a few extra women as leave reserve and can thus hardly be a ground for such a drastic rule...⁶⁵

The Court struck down the restriction on women's employment

In *C.B. Muthamma v. Union of India and Others*,⁶⁶ the petitioner, a successful candidate in the Indian Foreign Service, was refused appointment because she was married. The rules of the Indian Foreign Service, prohibiting the appointment of married women, and requiring that unmarried women in the employment of the Foreign Service obtain permission before marrying, were challenged. The Supreme Court held:

63. A 1991 Ker. 129.

64. A 1966 S.C. 942.

65. Id. at 944 para 3.

66. A 979 S.C. 1868.

If a woman member shall obtain permission of government before she marries, the same risk is run by government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service is unlikely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, intercontinental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species.⁶⁷ The Court held that although the rule is discriminatory, the application should be dismissed in light of the subsequent promotion of the petitioner. However, the Court concluded by strongly urging the Government to "overhaul all Service Rules to remove the stain of sex discrimination."⁶⁸

The Court adopted a formal approach to equality, and a sameness approach to gender. For the purposes of employment in the Foreign Service, women and men are to be considered the same. According to the Court, women and men must both balance the demands of work and family. Women and men must therefore be treated the same in law. However, the Court is cautious in its adoption of this sameness approach, and in fact, goes on to limit its applicability:

We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarity of societal sectors or the handicaps of either sex may compel selectivity.⁶⁹

The sameness approach is thus expressly limited to the particular circumstances of the particular case. The Court leaves open the possibility of adopting an approach which recognises differences. Indeed, the discourse of the decision suggests an underlying protectionism. The references to women as "the gentler of the species", suggests that the Court does see women as different, as weaker, and as in need of protection. Indeed, the recurring references to women as "the weaker" and "the gentler" sex reinforces images of women as weak, and in need of protection.⁷⁰

In *Air India v. Nergesh Meerza*⁷¹ air hostesses challenged the discriminatory employment conditions for air hostesses and stewards. The Supreme Court upheld a contractual condition permitting the termination of an air hostess's services on her marriage within the first four years, but invalidated a condition that terminated her services on her first pregnancy. The Supreme Court began with a review of the basic principles of reasonable classification under Article 14,⁷² and set out the criteria for determining the distinct classes.⁷³ Based on this test, the Court concluded that Air Hostesses constituted

67. Id. at 1870 para 5.

68. Id. at 1870 para 9.

69. Id. at 1870 para 7.

70. While the Court's references to misogynous and masculinist culture suggest that women's difference are the product of these oppressive relations, (the Court writes, for example, "This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against men's thralldom". Id. at para 3.) these references are at least in part undermined by references which suggest that women are naturally and essentially weak.

71. A 1981 S.C. 1829.

72. In reviewing the doctrine of reasonable classification, the Court adopts the standard formulation of equality as sameness, according to which likes must be treated alike. The Court writes, for example ["(3) Article 14 certainly applies where equals are treated differently without any reasonable bias. (4) Where equals and unequals are treated differently, Article 14 would have no application"]. Id. at 1842 para 37.

73. These criteria include, "(a) the nature, the mode and the manner of recruitment of a particular category (b) the classifications of the particular category (c) the terms and conditions of service of the members of the category (d) the nature and character of the posts and promotional avenues (e) the special attributes that the particular category possess which are not to be found in other classes and the like". Id.

a separate class of Air India employees. The Court considered the list of circumstances, noting the differences in recruitment, terms and conditions of service, the promotional avenues, and other "special attributes" between Air Hostess (AHs) and Assistant Flight Purser (AFPs), and concluded that AHs were distinct from the class of AFPs.

The Court then considered the challenge to the restriction on marriage. The restriction was upheld on the grounds that it fostered the State family planning programme, that women would be more mature to handle and make a marriage work successfully if forced to wait four years, as well as on the grounds of the financial hardship the corporation would incur should the bar to marriage be removed.⁷⁴ The Court concluded that the treatment of the "fair sex" in this regulation is neither arbitrary nor unreasonable, and thus does not violate Article 14.

The Court subsequently examined the regulation requiring AHs to retire upon their first pregnancy. According to the Court, the dismissal of a pregnant AH "[a]mounts to compelling the poor AH not to have any children and thus interfere with and divert the ordinary course of human nature."

It seems to us that the termination of the services of an AH under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood - the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilized society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values.⁷⁵

The Court concluded that the pregnancy restriction was unreasonable and arbitrary, and thus in violation of Article 14.⁷⁶

The Air India case illustrates the problems with a formal approach to equality, as well as with an approach to gender equality informed by the narrow sameness/difference debate. Firstly, the formal approach to equality, and its similarly situated test is used to preclude any analysis of substantive inequality between male and female employees. The Court uses the very discrimination between these two groups of employees to distinguish between them - that is, the practice of institutional discrimination against AHs is used in the very definition of classes. As a result of the history of discriminatory treatment between a group of female and male employees, the Court was able to conclude that the classes are distinct, and that no comparison needs to be made between them for the purposes of Article 14. For example, rather than considering the problematic nature of the distinctions between the recruitment requirements for the AHs and AFPs, the Court uses the difference requirements regarding

74. The Court held ["Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan"]. I. at 1850 para 78.

75. Id. at 1850 para 80.

76. In a more recent case against Air India, *Lena Khan v. Union of India*, A 1987 S.C. 1515, the regulations which required air hostesses employed in India to retire at age 35, with extension to age 45, but which allowed air hostesses employed outside India to continue employment beyond age 45, was challenged as violative of Articles 14 and 15. The Supreme Court held that such discrimination should not be allowed merely because it complies with local law abroad. However, in light of Air India's submissions that it would phase out air hostesses recruited outside of India at age 45, the Court concluded that no intervention was required at this time.

marital status as between AHs and AFPs as a factor in concluding that these employees are different. The circularity of the approach is evident - past institutional discrimination (AHs/women must be unmarried; AFPs/men need not be) is thereby used to preclude any analysis of institutional discrimination (AHs/women and AFPs/men are distinct classes).

Secondly, while some have looked favourably on the decision,⁷⁷ the Court's approach to gender difference is quite problematic. In recognising differences in the context of marriage, the approach adopted by the Court was protectionist - women need to be treated differently to protect them. In recognising difference in the context of pregnancy and maternity, the approach adopted by the Court was also protectionist and essentialist. Pregnancy and maternity were not simply seen as a biological difference which, in the interest of treating women equally, must be recognised. Rather, in the Court's view, it was also a difference in the roles of women and men, according to which women are not only responsible for child bearing, but also for child rearing. In this view, women's role as mothers is seen as natural and a product of biology, rather than product of the sexual division of labour. The approach adopted by the Court was based upon, and served to reinforce, the ideology of motherhood that has been constructed around these physical differences.⁷⁸ Notwithstanding the fact that the Court struck down the pregnancy restriction on women's employment, its understanding of women as different precluded an analysis of the sexist ideologies that continue to inform systemic gender discrimination.

In *Maya Devi v. State of Maharashtra*,⁷⁹ a requirement that married women obtain their husbands' consent before applying for public employment was challenged as violating Articles 14, 15 and 16. The Supreme Court held:

This is a matter purely personal between husband and wife. It is unthinkable that in social conditions presently prevalent a husband can prevent a wife from being independent economically just for his whim or caprice.⁸⁰

The Court emphasised the importance of economic independence for women, and the importance of not creating conditions that discourage such independence. The consent requirement was held to be unconstitutional. In this case, the Court was of the view that consent requirements were an anachronistic obstacle to women's equality. In order to achieve economic independence women must not, at least in this regard, be treated differently than men. The decision might be seen to reflect a formal model of equality, and a sameness approach to gender difference which requires that women and men be treated the same. However, the decision also supports a more substantive approach to equality - that is - a recognition that the consent requirement contributed to the subordination of women. The case exemplifies how a substantive approach to equality may still require a choice to be made about the relevance of gender. In this case, an inquiry into whether the rule contributed to or reinforced women's subordination revealed that in this particular context, gender ought to be irrelevant, and thus, a sameness approach was appropriate.

77. See Rani Jethmalani, "India: Law and Women" in *EMPOWERMENT AND THE LAW: STRATEGIES FOR THIRD WORLD WOMEN* 61 (M. Schuler ed. 1986).

78. Indeed, even the physical difference that is being recognised is one loaded with social meaning - pregnancy is simply a biological difference, but it is seen as "a natural consequence of married life". For example in reviewing the American case law on sex discrimination and pregnancy, the court made the following observation: "...pregnancy...is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Any distinction, therefore, made on the ground of pregnancy cannot but be held to be extremely arbitrary". *Supra* note 71, 1852 para 88.

79. 1986 1 S.C.R. 743.

80. *Id.* at 745.

(ii) Preferential Treatment

Several cases have involved challenges to employment rules, regulations and practices that treat women preferentially, on the basis that such preferential treatment discriminates against men. The results of these cases have been mixed. In those cases where the employment rules have been upheld, the Court has adopted a more substantive approach which recognizes that equality may require differential treatment. For example, in *Shamsher Singh v. State*⁸¹ the employment practices of the State educational system were challenged as violating Article 16(2). The educational system had two branches, one run exclusively by women, the other, exclusively by men. In the women's branch, Assistant District Inspectors were granted a special pay increase. The educational department was subsequently reorganised, and as a result both male and female Assistant District Inspectors were designated as Block Education Officers. Both the women and men were performing identical duties. The male petitioner challenged the pay increase as sex discrimination, and as violative of Article 16(2). The question referred to the Full Bench of the High Court was whether Article 15(3) could be invoked to interpret Article 16(2). In response, the Court held that Articles 14, 15 and 16 constitute a single code, and that Article 15(3) could thereby be invoked to determine the scope of Article 16(2).⁸² The petition was dismissed and the pay increase upheld.

In those cases where employment rules have been struck down, the Court has adopted a formal approach to equality, and a sameness approach to gender difference. For example, in *Walter Alfred Baid v. Union of India*,⁸³ a recruitment rule in a school of nursing, a predominantly female institution, which made male candidates ineligible for the position of senior nurse tutor, was struck down as violating Article 16(2). The Court held that Article 16(2) did not permit a classification on the basis of sex.

Article 16(2) incorporates a concept of absolute equality between the sexes in matters of employment which is underscored by the absence of any saving in the other clauses in relation to sex.⁸⁴

The Court thereby adopted a formal approach to equality, according to which women and men are to be treated the same for purposes of employment. This sameness approach does not allow for any difference in treatment on the basis of sex - including a difference in treatment which may advantage women.

With regard to the relevance of gender difference, the Court further stated that although "it is true that there are patent physical disparities between the two sexes", such differences could not justify differential treatment without violating Article 16(2):

It is too late, therefore, for anyone to suggest that there is an area of human activity for which women as a class are ineligible or any work for which all women are unfit.⁸⁵

While recognising certain physical differences as natural, the Court adopted a sameness approach to gender difference, that is, for the purpose of the law, any such gender difference should be irrelevant.

81. *Supra* note 26.

82. *Id.* at 376 para 19.

83. *Supra* note 32.

84. *Id.* at 306 para 10.

85. *Id.* at 307 para 10.

In concluding that the classification in question was one based on sex, the Court rejected the distinction "between sex and what it implied".⁸⁶ This rejection of the narrow interpretation of "only on the ground of sex" opened the possibility of recognising the extent to which gender differences are socially constructed and bringing these social dimensions of difference within the folds of the equality guarantees of the Constitution. In the context of a substantive model of equality, this approach would allow the Courts to address the broad range of socially constructed inequalities that women suffer - from economic dependency to educational disadvantage. However, in the W.A. Baid case, this understanding of gender difference was coupled with a sameness approach, whereby any difference, whether natural or otherwise, ought to be irrelevant for the purposes of the law. As a result of the formal approach to equality, and sameness approach to gender difference, the Court found that the gender specific recruitment rule violated Article 16(2). The effect of this approach was to preclude any analysis of the purpose of the differential in treatment, and thus, any consideration of whether the differential in treatment was intended to advantage or disadvantage women. Further, the particular examples used by the Court to distinguish between those factors implied by sex, and those factors which are not, were also problematic.⁸⁷ Socio-economic conditions, marital status, health and education are all factors that may be relevant to sex, if measured in terms of the substantive inequality of women, and in respect of which a corrective approach to gender difference may thus be required.

C. Civil and Political Rights

The constitutional challenges to legislation dealing with civil and political rights can be divided into three sets of cases. In the first set, women have challenged legislation that restricts their rights to own land. In the second set of cases, legislation that provides reservations for women have been challenged as discriminatory. These reservations have been upheld. A third set of cases raises some of the problems in the classification of legislation as preferential.

(i) Restrictions on Land Ownership

In *Pritam Kaur v. State of Pepsu*,⁸⁸ Section 5(2)(a) of the Pepsu Court of Wards Act was challenged as in violation of Article 15(1). Section 5(2) authorised the government to make an order directing that property of a landholder be placed under the supervision of the Court of Wards, if the landholder was incapable of managing his affairs. Section 5(2)(a) authorised such an order if a landholder "by reason of being a female" was incapable of managing the property. The Court noted:

To be a woman is an additional reason on the basis of which the Government can deprive her of the management of her estate. In other words, if a man mismanages his estate, that mismanagement will not render his estate liable to be taken over by the Court of Wards unless his case falls under any one of clauses (b), (c) and (d) of section 5(2) of the Act. Whereas in the case of a woman it can be so taken merely for the reason that she is a woman.⁸⁹

86. "Considerations which have their genesis in sex and arise out of it would not be saved by such a discrimination. What could save such a discrimination is any ground or reason independently of sex such as socio-economic conditions, marital status, and other disqualifying conditions such as age, background, health, academic accomplishments, etc." *Id.* at 308 para 10.

87. *Id.*

88. A 1963 P. & H. 9.

89. *Id.* at 16 para 17.

The Court concluded that section 5(2) of the Act discriminated on the basis of sex, and thus violated Article 15.

However, two subsequent cases dealing with restrictions on women's land ownership have been upheld. In *Sucha Singh Bajwa & Sadhu Singh Bajwa v. The State of Punjab*,⁹⁰ section 5 of the Punjab Land Reforms Act was challenged as violating Article 15 on the grounds that it allowed the holder or owner of the land to select the separate permissible area in respect of adult sons, but not adult daughters. The High Court held:

The subject of the legislation is the person owning or holding land, and not his or her children...[Since] every person described in section 5 whether male or female is allowed the same permissible areas and there is no discrimination qua one land owner and the other on the ground of sex...⁹¹

The Court further held that the distinction was not made on the ground of sex alone, but rather "also for reason that a daughter has to go to another family after her marriage in due course."⁹² The Court upheld the restriction.

The decision highlights the ways in which classification and comparison can be manipulated within a formal equality approach. The Court defines the relevant comparison as one between the landlords. Accordingly, since there is no discrimination between male and female *landholders*, the provision is not seen to discriminate on the basis of sex. While the discrimination as between sons and daughters on the face of the legislation might be seen to offend even a formal approach to equality, the Court evades this question by simply defining this comparison between potential recipients as irrelevant.

Further, the Court's approach to gender is also problematic. In support of its decision, the Court resorts to the doctrine of "only on the grounds of sex" and argues that there are other factors not based on sex that justify the differential treatment of a daughter, such as the fact that daughters go to another family after marriage. The reasoning exemplifies the problematic distinction between sex and what it implies, that is, the failure to explore the connections between such customary practices and the social construction of gender. The practice of daughters leaving their natural families on marriage is a product of the social organization of gender, and the roles that women are expected to assume. The practice is, in other words, one that is implied by sex. By focussing narrowly on sex, the Court fails to see the necessary connection between sex and what sex implies. Stereotypes of women are used as justification for differential treatment, without any real analysis of disadvantage, nor any attempt to explore the extent to which these stereotypical roles of women have served to reinforce women's inequality.

In *Nalini Ranjan Singh and others v. The State*,⁹³ Section 2(ee) of the Bihar Land Reforms Act was challenged as violating Article 15. The definition of family in the section did not include an adult daughter, for the purposes of claiming a separate unit of land, and was thus alleged to discriminate as between adult daughters and adult sons. On the basis of principles of Hindu personal law, the Court held that daughters are not members of the coparcenary.

90. A 1974 P. & H. 162.

91. Id. at 171 para 13.

92. Id.

93. A 1977 Pat. 171.

Although a daughter can be a member of a joint Hindu Undivided Family, she cannot be given a status as a coparcener in a coparcenary, even after the commencement of the Constitution... There are various factors which sanction that while a son may be a member of a coparcenary, a daughter may not. As a necessary corollary it follows that the very same reasons which justify the discrimination between a son and a daughter in a coparcenary apply with force to any attack on the validity of the impugned legislation as being violative of Article 15(1).⁹⁴

The Court thus upheld the restriction.

(ii) Reservations

The cases dealing the constitutional challenges to reservations for women in political institutions have been upheld. In *Dattatraya Motiram More v. Bombay*,⁹⁵ s. 10(1)(c) of the Bombay Municipal Boroughs 1925 Act for the reservation of seats for women was challenged as violating Articles 14, 15 and 16. With regard to Article 15, the Court adopted the approach that Article 15(3) must be interpreted as a proviso to Article 15(1), and that Article 15(1) prohibited discrimination "only on the ground of sex", and that Articles 15(1) and 15(3) together allowed the State to discriminate in favour of women against men, but not to discriminate in favour of men against women. The Court held that the reservations did not constitute a classification only on the ground of sex, but rather, was the result of "other considerations besides the fact that the persons belonging to that class are of a particular sex".⁹⁶

There is force in the Advocate General's argument that if Government have discrimination in favour of women in reserving seats for them, it is not only on the ground that they are women, but there are various other factors that come into play. It is said that even today women are more backward than men. It is the duty of the State to raise the position of women to that of men.⁹⁷

The decision can be seen to be informed by a substantive model of equality and a corrective approach to gender, in so far as the Court recognizes that the social and historic inequality of women must be recognised in order to overcome this inequality. However, some aspects of the decision limit this progressive approach. For example, the substantive understanding of equality remains limited by the discourse of formal equality apparent in the narrow technical reading of Article 15(1), and of "only", as well as the use of the term discrimination to imply any difference in treatment. Similarly, the understanding of difference is problematic in so far as the Court separates sex from what sex implies—the recognition of the social inequality of women is not seen as based on sex. This distinction reinforces an understanding of sex difference as natural and biological.

In *K.R. Gopinath Nair v. The Senior Inspector cum Special Sale Officer of Cooperative Societies and Others*,⁹⁸ the Kerala High Court held that section 28A of the Kerala Cooperative Societies Act which provided for the reservation of a seat in the committee of every cooperative society did not violate Articles 14 and 15. The Court held that the provision of special measures for women and children has been recognised in Article 15, as well as being one of the proclaimed directive principles of State policy in Article 38. The Court stated:

94. Id. at 179 para 8-A.

95. Supra note 17.

96. Id. at 313 para 7.

97. Id.

98. A 1987 Ker. 167.

Even on a global view, women still suffer the pangs of inequality, though women constitute about 50% of the population, effective participation in the political administration is, to them, still a teasing illusion.⁹⁹

The Court then concludes that

...s 28A is a small step in the correct and progressive direction in offsetting the ill effects of age old handicaps of women.¹⁰⁰

The decision can be seen to be based on a substantive approach to equality, in which the Court examines whether the provision in question contributes to women's subordination. The Court's inquiry reveals that the provision, which treats women differently, is specifically intended to eradicate historic discrimination against women, and thus, that a substantive approach to equality in this context requires a corrective approach to gender difference.

(iii) Civil Procedure

In *Mahadeb Jiew v. Dr. B.B. Sen*,¹⁰¹ a provision of the Civil Procedure Code, which gave the courts discretion to order security for costs where the plaintiff is a woman, and does not possess sufficient immoveable property in India, was challenged as discrimination was not on the basis of sex alone, but rather, also involved property considerations.

Possession of sufficient immoveable property in India is not a consideration bearing on sex at all... The basic criterion is...that the person who is ordered to secure for costs is one who has not sufficient property out of which to pay the successful litigant's costs.¹⁰²

The Court thus upheld the provision. The Court was unmoved by the fact that men without sufficient immovable property in India were not required to provide security for costs. It simply insisted that the discrimination could not be said to be on the basis of sex alone, but on the combined grounds of sex and property.

The case exemplifies the problematic and indeed dangerous potential of the 'only on the ground of sex' approach, whereby virtually any factor or characteristic can be added to the sex discrimination and thereby make the discrimination not only on the ground of sex. Moreover, the failure to inquire into the question of the social and economic disadvantage of women precludes any consideration of assumptions informing this rule. The distinction between women and men without sufficient immoveable property can be seen to be based on the underlying assumption that women do not have any source of income—they do not work outside of the home and therefore, will not be able to pay for costs. Men, on the other hand, are assumed to work outside the home, and thus, presumed to be able to pay for costs. The sexual division of labour has operated to make many women economically dependent. However, the classification is too broad. Some women may well work outside the home; men may be unemployed. The 'only on the grounds of sex' test, fails to reveal and interrogate the validity of these underlying assumptions. While the objective of the provision is legitimate - that is, ensuring that plaintiffs have sufficient means to pay costs - this objective is not well served by criteria on the basis of sex.

99. Id. at 168 para 8.

100. Id. at 169 para 13.

101. Supra note 17.

102. Supra note 17 at 568 para 29.

In *Shahdad v. Mobd Abdullah*¹⁰³ the provisions of the Civil Procedure Code, which state that service of a summons must be made on a male member of the family, were challenged as violating Article 15. In rejecting the challenge, the Court held:

...we have to analyse the background in which this rule was enacted. The functions of females in Indian society is that of housewives. Until very recently it was in exceptional cases that ladies took part in any other activity than those of housewives. Females were mostly illiterate and some of them Parda Nashin. Therefore in enacting this rule, the legislature had in view the special conditions of the Indian society and therefore enjoined service only upon male members and did not regard service on females as sufficient.¹⁰⁴

The Court noted that Article 15(3) is intended "to cover any provision specially made for women" and that the provision:

...does not give them any disadvantageous position but rather exonerates them from the responsibility of fastening notice of service as service of the other members of the family.¹⁰⁵

After noting other provisions which "confer special privileges upon a protection to women" which have been upheld by the courts, the Court concluded that the service provisions of the Civil Procedure Code did not constitute discrimination on the basis of sex.¹⁰⁶

The decision is based on a formal approach to equality, in which any difference can be used to justify differential treatment, and a protectionist approach to gender, in which women are seen as different and as in need of protection. The Court seized upon women as housewives as a difference which justified the differential treatment of women and men in law. The approach did not challenge the stereotype of women as housewives; it did not examine the extent to which these stereotypes of women have served to reinforce women's inequality - nor the extent to which the underlying sexual division of labour has produced such inequality. Rather, the difference is taken as natural. The decision exemplifies the way in which the recognition of gender difference under the guise of protection can perpetuate women's subordination. The recognition of the difference in the sexual division of labour serves only to reinforce the negative stereotypes of women as housewives.

Moreover, in the Court's protectionist view, the fact that women are not subject to service is seen as preferential rather than restrictive treatment for women. The protectionist approach blinds the Court to the fact that such a differential in treatment accords women less than equal rights and responsibilities, and thus renders them less than equal members of the family. From the perspective of substantive equality, the legislation could be seen to disadvantage women. However, even within a substantive approach to equality and a corrective approach to gender, it might be necessary to recognize gender difference in this case. It could be argued that the continuing sexual division of labour and the resulting inequalities of women within the family are such that women ought not be burdened

103.Supra note 18.

104.Id. at 127 para 32.

105.Id. at 127 para 33.

106.The Court referred to the decisions regarding the provisions adultery under section 497 of the Indian Penal Code, A 1953 M.B. 147 and the maintenance provisions under Section 488 of the Civil Procedure Code, A 1952 Mad 529. ["These authorities therefore lend support to the view that in enacting O.S. r. 15 there is no discrimination between a woman and a man simply on the ground of his or her sex on receiving a notice on behalf of some other member of the family"].

with equal rights. This was not, however, the approach in *Shahdad*, where the Court merely seized upon a perceived difference, and justified differentiation of treatment.¹⁰⁷

D. Criminal Law

Constitutional challenges have been brought to the adultery, maintenance, prostitution and bail provisions of the criminal law. Unlike the employment cases, these sex discrimination cases have been largely unsuccessful. The Courts have primarily adopted a formal approach to equality and a protectionist approach to gender difference.

(i) Adultery

The Supreme Court has considered several challenges to section 497 of the Indian Penal Code, which makes only adultery committed by a man an offence, and section 198 of the Code of Criminal Procedure, which allows only the husband of the "adulteress" to prosecute the men with whom she committed adultery, but does not allow the wife of that man to prosecute him. In *Abdul Aziz v. Bombay*,¹⁰⁸ the accused, charged with committing adultery under s. 497, challenged the section as discriminating on the basis of sex, and in violation of Articles 14 and 15. The High Court concluded that the difference of treatment was not based on sex but rather, on the social position of women in India. On appeal, the Supreme Court held that any challenge under 15(1) was met by 15(3). The Court rejected the argument that 15(3) "should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes".¹⁰⁹ The Court held:

Article 14 is general and must be read with the other provision which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children.¹¹⁰

The Court thus upheld the adultery provisions as beneficial to women.

The Court adopted the "holistic approach" to Article 15, and thereby seemed to endorse the view that equality may require that disadvantaged groups be treated differently, and in fact, preferentially. However, the Court's understanding of discrimination - that is - of any distinction on the prohibited grounds - is suggestive of a more formal approach to equality. Notwithstanding the Court's statement that the Articles should be read together, it seems to understand the preferential treatment allowed by Article 15(3) as an exception to equality. Moreover, it is not clear whether the adultery laws do in fact treat women preferentially. On one level, there is an obvious benefit to not being subject to criminal prosecution. Yet, at another level, the adultery laws are based on problematic assumptions about women, about women's sexuality and about the relationships between women and men. Women are seen as the passive victims of aggressive male sexuality, incapable of agency in sexual relations, and

107. In *Smt. Savitri Aggarwal v. K.K. Bose*, A 1972 All. 305 an order granting a hotel bar licence for the sale of foreign liquor was challenged as violating Article 15. The District Excise Officer had granted the license on the basis of sex, observing that certain applications "deserve sympathetic consideration as they are ladies". The Allahabad High Court held that such a preference in the granting of licenses did not constitute a special provision for women pursuant to Article 15(3). "What Article 15(3) contemplates is the making of special provision for women as a class and not the making of provisions for an individual women". The Court allowed the petition, and quashed the order granting the licence.

108. *Supra* note 26.

109. *Id.* at 322 para 5.

110. *Id.* at 322 para 6.

needy of protection. Within this understanding, the adultery is seen as the fault of the man; a woman is simply his hapless victim; and not to be blamed. The failure to interrogate the adultery provisions at a deeper level leaves these assumptions in place, and the adultery provisions continue to reinforce underlying social inequalities. The Court's approach, wherein any differential in treatment can be seen to be beneficial, and any benefit can be seen to fall within Article 15(3), thus fails to adequately consider the questions of inequality and subordination.

In *Sowmithri Vishnu v. Union of India*,¹¹¹ Section 497 of the Indian Penal Code was challenged as unconstitutional by a woman whose husband had prosecuted her lover for adultery. She argued that the section was discriminatory because the husband had a right to prosecute the adulterer. The wife, on the other hand, had no right to prosecute either her adulterous husband or the woman with whom the husband had committed adultery. In addition, she argued that the section did not take into account situations where the husband had sexual relations with an unmarried woman. In dismissing the petition, the Court held that confining the definition of adultery to men was not discriminatory as "[I]t is commonly accepted that it is the man who is the seducer and not the woman."¹¹²

Again, in the Court's view, a wife who is involved in an adulterous relationship is the victim rather than the author of the crime. The offence is committed against the sanctity of the matrimonial home and it is the man who defiles that sanctity.¹¹³

The Court's decision was firmly located within a formal equality approach. The challenge was not allowed on the grounds that in the context of adultery, women and men are different. Further, the Court clearly articulated its protectionist approach to gender difference. The man was regarded as the seducer and the author of the crime. The approach essentialises women as passive, as incapable of agency in sexual relations, and as victims. Moreover, in the Court's view, these differences were seen as natural.¹¹⁴

Yet, even within this view, it is not clear why the wife of the adulterer cannot prosecute him. This question is more directly addressed by the Court in, *Revathi v. Union of India*,¹¹⁵ section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure were again upheld. According to the Court, these provisions:

...go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit and the community punishes the "outsider" who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses...¹¹⁶

111.A 1985 S.C. 1618.

112.Id. at 1620 para 6.

113.Id. at 1620 para 7.

114.In upholding the adultery provisions, the Court further held that the underinclusive definition was not discriminatory. This holding reinforces the courts position on relations between married men and unmarried women, who are often prostitute women. Prostitute women are different from all other women and thus entitled to less legal rights or protection than all other women. Such women belie the patriarchal construction of female sexuality as passive. Their agency is considered a threat to the family and the matrimonial relationship and therefore, the law operates primarily against them.

115.A 1988 S.C. 835.

116.Id. at 838 para 5.

The fact that the wife of the adulterer is expressly prohibited from prosecuting her husband is the only exception to the general rule that anyone can set the criminal law in motion. This exception is based on a particular understanding of the nature of the harm caused by adultery. Adultery is seen as a violation of a husband's property rights over his wife; more specifically, of his wife's sexuality. It is not a violation of a wife's rights since she is not seen as having the same claim to her husband. Thus, it is only the husband who can prosecute an adulterer since he is the only one who is seen to have suffered a harm. This basic difference in the understanding of adultery, a difference that is seen as natural, is used to justify the differential treatment, and thereby uphold the law. The underlying sexist assumptions, again, remain uninterrogated.

(ii) Maintenance

Several challenges have been made to S. 488 of the Code of Criminal Procedure which requires men to pay maintenance in favour of their wives, but imposes no corresponding duty on women to maintain their husbands. In *Thamsi Goundan v. Kanni Ammal*,¹¹⁷ this provision was challenged as violating Article 14. The Court, in adopting the reasonable classification approach, held that the classification was based on the difference between men and women.

Women as a whole suffer from several disabilities from which men do not suffer. They have no right at least under Hindu law to participate along with their brothers in the inheritance to the property of their parents...Instances can be multiplied without number to show how women have not equal rights with men. That as a class they are weaker than men cannot also be disputed. In fact they are even called by the appellation "Weaker Sex". The very provision in clause 3 of Article 15, that special provision may be made for women, suggests the existence of disparity.¹¹⁸

The Court held that section 488 "applies to all women in similar circumstances", that is, to all women deserted by their husbands, and that "(l)egislation in favour of this class of people" is not arbitrary.¹¹⁹

The Court adopted a formal approach to equality regarding Article 14, according to which only those who are similarly situated are to be treated the same. Women, and more specifically, wives deserted by their husbands, are not the same as men, and therefore need not be treated the same. Moreover, Article 15(3) allows for special treatment of this class of women. The Court's approach to gender is thus one of emphasizing the difference. The Court recognised that there has been historical discrimination against women insofar as they have been denied property rights. Yet it proceeded to treat the difference between men and women as natural, and in so doing, adopted a protectionist approach. The Court explicitly stated women are weaker than men and thus, in need of protection. There is no further interrogation of the deeper relationships of oppression that create these inequalities, such as the sexual division of labour which renders women economically dependent on men.¹²⁰

117.A 1952 Mad. 529.

118.Id. at 530 para 3.

119.Id.

120.In *Gupteshwar Pandey vs. Smt. Ram Peari Devi*, A 1971 Pat. 181 the Court again held that S. 488 was a special provision designed for the benefit or protection of women or children whose husbands or fathers failed to maintain them in spite of sufficient means, and thus within the scope of Article 15(3). The Court again adopts a formal approach to equality, within which Article 15(3) is understood as an exception to equality, and a protectionist approach to gender difference, according to which s. 488 is justified on the basis that women are the weaker sex, and in need of special protection.

In *K. Shanmukhan v. G. Sarojini*¹²¹ section 124(1)(b) of the Criminal Procedure Code was challenged as being in violation of Article 14 by discriminating between divorcees and wives whose marriages were subsisting. The provision entitles a divorced woman to maintenance, while a married woman is not entitled to maintenance if she refuses to live with her husband without sufficient reason, lives in adultery or lives separately by mutual consent. The Court adopted the reasonable classification test, and held that the classification was based on intelligible differentia.

In the Court's view divorced women and married women were differently situated. The conditions stipulated in the impugned legislation could only apply to married women; they were, by their very nature, inapplicable to divorced women. Similarly, the Court observed that divorced women were disentitled to maintenance in situations which do not apply to married women, such as, when divorced women remarry. The Court adopted a formal approach to equality, according to which the differences between married and divorced women were deemed to be sufficient to defeat the challenge. There is no interrogation of whether the legal treatment disadvantages wives.

Further, the approach to difference is essentialist - that is - in the Court's view, the differences between married women and divorced women were seen as natural, as part of the nature of the institution of marriage. There was no consideration of the extent to which these differences are in fact a product of the legal regulation of marriage - that is - married women and divorced women are different because the law treats them differently. Rather than considering the question of economic dependence and economic need, a criteria according to which married and divorced women may be similarly situated, the Court justified the differential entitlement of maintenance on the basis of the accepted differences. The case illustrates how virtually any difference, including those differences created solely through law, can be found to be intelligible criteria, and thereby satisfy the reasonable classification test of the formal equality approach.

The constitutionality of section 125 of the Criminal Procedure Code has been considered in a number of cases. These cases have involved applications for maintenance under section 125, and although the Courts have referred to the equality provisions, the cases are not strictly speaking, constitutional challenges. In *Mustt. Sahida Begum v. Md. Mofizull Haque*,¹²² the Court held that if the personal law was held to be final, with the conclusion that a divorced woman cannot claim any further maintenance beyond the period of iddat, a discrimination would occur between the divorced muslim woman and divorced women belonging to other religions or castes. The court rejected the challenge.

The court can be seen to have based its decision on a substantive approach to equality in so far as it considered how the difference in this instance disadvantages. Religion cannot be a basis for reasonable classification. The court upheld the premise on which maintenance was granted, which is economic necessity. It clearly states that the relevant criteria must be economic necessity, and that the section is meant to protect the distresses of all wives, including divorced women, irrespective of religion or castes, for their future life until remarriage. At the same time the Court does not outline the reasons for women's economic dependence. It is stated as a fact, and the implicit assumption is that it is a natural and unalterable condition of women.¹²³

121.1981 Cr. L.J. 830 (Ker.).

122.1986 Cr. L.J. 102 (Ori.).

123. In *Balan Nair v. Bhavani Amma Valsamma*, A 1987 Ker. 110, the Kerala High Court commented, in obiter, on section 125 of the Criminal Procedure Code:

Though s. 125 benefits a distressed father also, main thrust of the provision is to assist women and children in distress. That is fully consistent with Article 15(3) of the Constitution which states that the prohibition contained in the Article shall not prevent the State from making any special provision for women and children... The provision is a measure of social justice and specially enacted to protect women and children.

(iii) Prostitution

Several challenges have been made to the provisions of the Suppression of Immoral Traffic (Prevention) in Women and Children Act (PITA). Two early cases involved challenges to section 20 of PITA. Section 20 permits the removal of prostitutes from any area in the interests of the general public. The magistrate is further empowered to prohibit the prostitute woman from re-entering the place from which she has been removed. In *Smt. Shama Bai v State of Uttar Pradesh*,¹²⁴ section 20 was challenged by a prostitute woman. She argued that prostitution was her hereditary trade, that it was the only means of her livelihood and that members of her family were economically dependent on her. The writ was filed primarily to prevent her landlord from using the provisions of PITA for evicting her from the premises. The Court held that the unfettered discretion conferred on the magistrate to remove any woman believed to be a prostitute from his jurisdiction by section 20 violated Article 14. The Court held that prostitute women were subject to a punitive form of surveillance to which other women were not, and that this differential treatment constituted discrimination between persons who were similarly situated.¹²⁵

In *The State of Uttar Pradesh v. Kaushaliya*,¹²⁶ section 20 was again challenged as violating Article 14. The Supreme Court, in adopting the reasonable classification approach, held that the difference between prostitute women and non-prostitute women was a reasonable classification. Further, the Court ruled that there were real differences between a prostitute woman who does not demand in the public's interest any restrictions on her movements, and a prostitute, whose actions in public places call for the imposition of restrictions on her movements and even deportation. The object of PITA was not only to suppress immoral traffic in women and girls, but also to improve public morals by removing prostitutes from busy public places in the vicinity of religious and educational institutions.¹²⁷

The decision in *Kaushaliya* is based on a formal model of equality. The differences between prostitute and non-prostitute women, and the differences between prostitutes in busy localities and prostitutes working discretely, were seen to justify the differential treatment. The effect was to preclude an entitlement to equality for those women who fell into the "problematic" classification: prostitute women working in busy area. There was no interrogation of the basis for the ostensible differences. Rather, prostitute women were simply deemed different from other women because of their inherent immorality. The approach not only stigmatises prostitute women by justifying the criminalisation of their work, but also uses moral considerations to distinguish them from all other women. Prostitute women thus become inherently bad and immoral, and need to be controlled by harsh penal provisions.

The Court held that the provision was consistent with Article 15(3) and could benefit a distressed father although the main thrust was to assist women and children in distress. The court cited a Supreme Court decision, *Ramesh Chander v. Veena Kaushal*, where it stated that "the brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance." The Court relied on social justice as an interpretive tool for constitutional provisions. The case does not elaborate beyond stating that "men and women equally, have the right to an adequate means to livelihood" and that Article 15 (3) enables the State to make special provisions for women and children.

124. A 1959 All. 57.

125. The decision was progressive in many important respects. Most significantly, the Court was prepared to consider the work of prostitute women as a trade rather than a crime. It recognized that women entered the profession because of social and economic hardship, rather than immorality.

126. A 1964 S.C. 416; The High Court had held that the delegation of power was unguided and unfettered; and that women who were similarly situated that is prostitute women, were being treated differently. It thus struck down the provision.

127. *Begum v. State*, A 1963 Bom. 17 (relied on).

Several constitutional challenges to PITA have been made by brothel owners. The Courts have rejected these challenges, holding that brothel owners should not be allowed to take advantage of the Act.¹²⁸ These cases also adopted a formal approach to equality, and a difference approach to prostitute women. In *Sayed Abdul Khair*¹²⁹, the Court held that the provisions of PITA were a reasonable classification since young women all over the world were special victims of the vice market. In *Moainuddin*¹³⁰, the Court held that women and girls who solicit for prostitution were different from other women. While *Sayed Abdul Khair* was based on the need to protect women, in *Moainuddin*, the Court seemed more concerned with issues of morality. The differentiation is based on assumptions that these women are essentially bad. This differentiation disqualifies them from equality and perpetuates their situation and status as 'bad women'.

(iv) Bail

Several challenges have been directed to section 497(1) of the Criminal Procedure Code which allows the Court to grant bail in non-bailable cases when: the accused is under 16 years of age; a woman; sick or infirm. In *Nirmal Kumar Banerjee v. The State*¹³¹ the Calcutta High Court held that the constitutional validity of the provision had to be determined against Article 14, a general provision, read together with Article 15(3), a provision where the State was empowered to allow special treatment for women and children. The provision was held to constitute a reasonable classification, as a female, or a person below 16 years of age, or an infirm person, were not likely to interfere with the investigation or to delay the trial by abscondence or interference.

While the Court adopts a "holistic approach" to the equality provisions, it continues to interpret discrimination in a way that means any distinction, rather distinctions that disadvantage within the broader meaning of equality. In so doing, the Court's understanding can be seen to be firmly located within a formal model of equality. It upholds the provision by adopting a protectionist position where by women are to be treated in the same way as a person under 16 or someone with an infirmity. Women are seen as weak, as incapable of exercising basic rights in the same way as children and the infirm, and thereby in need of protection.

Similarly, in *Mt. Choki v. State of Rajasthan*¹³², the Court held that section 497(1) of the Criminal Procedure Code, in providing for special provisions in favour of women and children, was within the scope of Article 15(3). The decision was based on the reasoning that, for the purposes of bail, women and children are different from men. The assumption informing the decision is that women are caretakers of the home and thus need to be accommodated so that the home does not suffer. The reasoning is thus based on a protectionist understanding of gender and of women's roles in the home. There is no inquiry into the institutional and structural discriminations that are responsible for keeping women in the home and in the role of primary care givers.

128. In *Sayed Abdul Khair v. Babubhai, Jamalkhai and Another* 1974 Cr.L.J. 1337 (Bom). The accused, a brothel keeper, challenged section 15 (4) and 16 (1) of the Act as violating Article 14, on the basis that the sections discriminated between girls and women. The provisions empower a special police officer to enter any premises to remove any girl under the age of 21 years if she is carrying on or being made to make her carry on any prostitution. In *Moainuddin v. State of* 1986 Cr.L.J. 1397 (A.P) Section 8 of the Immoral Traffic (Prevention) Act, that punishes women or girls soliciting for the purposes of prostitution, was challenged by a brothel keeper as violating Article 14.

129. *Id.* *Sayed Abdul Khair* at 1349 para 14.

130. *Id.* at 1398 para 4.

131. 1972 Cr. L.J. 1582 (Cal).

132. A 1975 Raj. 10.

E. Education

The case law in this area has involved challenges to the admission practices of educational institutions. In one set of cases, female students have been denied or restricted access to particular schools and colleges. This restricted access has been challenged as discrimination on the basis of sex, and thus, in violation of Article 15. The Courts have generally upheld the restrictions. The grounds have been varied, but the approaches have predominantly been narrow and technical, focusing for example on the meaning of discrimination and/or the significance of "only on the basis of sex". The Courts have generally been unwilling to find such admission practices to be discrimination on the basis of sex. In considering these restrictions under Article 15(3), the courts have emphasized the objective of the practices, namely, the attempt to promote schools and colleges specifically for women. The admission practices are thereby seen as preferential treatment as authorized by Article 15(3). While the result could be supported by a substantive model of equality, the discourse of the decisions remain informed by a model of formal equality.

In *Anjali Roy v. State of W.B.*¹³³ an order of the Director of Public Institution directing that no more women students be admitted to College A, but only to College B was challenged as violating Article 15. The High Court held that there was no discrimination within the meaning of Article 15(1) and upheld the restricted access. The Court adopted the technical approach of "only on the ground of sex", and concluded that no "discrimination was made against the appellant only on the ground that she was a woman".¹³⁴ The refusal to admit the appellant was, according to the Court, not only on the ground of sex but "due to the introduction of a comprehensive scheme for the provision of education facilities to both male and female students".¹³⁵

The cardinal fact is that she was not refused admission merely because she was a woman, but because under a scheme of better organization of both male and female students at Hooghly, which covered development of the Women's College as a step towards the advancement of female education...¹³⁶

The holding is consistent with a corrective approach to gender difference and a substantive model of equality—that is—women's difference must be recognized to overcome historic disadvantage. Yet the decision of the Court was firmly located within a formal model of equality. While recognising that discrimination involves invidious distinctions, the Court adopted the formal equality approach to the relationship between Articles 15(1) and 15(3), and as such, could hold that special provisions for women were legitimate, although they allowed invidious discrimination against men.¹³⁷ The Court did not consider invidious discrimination within the broader context of substantive inequalities, but only within a formal equality context, such that invidious discrimination can be directed equally at men as at women. The only difference is that Article 15(3) permits the former, and not the latter.

The Court subsequently noted the exclusion of sex from Article 29(2) which deals specifically with admission to educational institutions:¹³⁸

133. *Supra* note 19.

134. *Id.* at 830 para 17.

136. *Id.*

137. *Id.* at 831 para 20.

138. Article 29 of the Constitution provides:-

- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
- (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste language or any of them.

The framers of the constitution may have thought that because of the physical and mental differences between men and women and considerations incidental thereto, exclusion of men from certain institutions serving women only, and vice versa would not be hostile or unreasonable discrimination.¹³⁹

This passing reference to "physical and mental differences between men and women" is significant. While the Court does not specifically endorse this explicit statement of natural and essential gender differences, the failure to interrogate the assumptions suggests that it is not seen as controversial and in fact, reinforces this view of essential differences.¹⁴⁰

In *University of Madras v. Shanta Bai*,¹⁴¹ an order directing that women students not be admitted to affiliated colleges without receiving special permission was challenged as violating Article 15. The Court held that the university was not part of the State within the meaning of Article 12, and is therefore not subject to the prohibitions of Article 15.¹⁴² However, the Court then considered the relationship between Article 15 and Article 29(2) of the Constitution,¹⁴³ and held:

...The true scope of Article 15(3) is that notwithstanding Article 15(1), it will be lawful for the State to establish educational institutions solely for women and that the exclusion of men students from such institutions would not contravene Article 15(1). The combined effect of both Articles 15(3) and 29(2) is that while men students have no right of admission to women's colleges, the right of women to admission in other colleges is a matter within the regulation of the authorities of these colleges.¹⁴⁴

The Court further discussed the reasons underlying these admission policies, namely, the insufficient number of women's colleges to accommodate the demand.

In a later set of cases, the allotment of seats for female students within educational institutions has been the subject of constitutional challenges. In *Balaji v. State of Mysore*,¹⁴⁵ for example, the Supreme Court held that Article 15(4) could not be interpreted so as to render 15(1) nugatory, and therefore, that reservations could not exceed 50%. An issue that has subsequently arisen is whether the allotment of seats for women constitutes a reservation within the meaning of 15(4), and thus, whether the allotment of these seats to be considered in calculating the permissible 50%. The judicial approach to the issue has been divided. Sometimes this allotment of seats for women has been held to be a reservation¹⁴⁶ Other times that allotment has been designated as an "indication of source". and not a reservation.¹⁴⁷

139. Supra note 19 at 831 para 22.

140. *Id.* But the Court declined to rule on the relationship between Articles 29(2) and 15.

141. A 1954 Mad. 67.

142. Educational institutions will fall within the scope of Article 15 only if they are state maintained; the University of Madras is State-aided, but not state maintained.

143. Supra note 141 at 70 para 9 ["...the omission of "sex" in Article 29(2) would appear to be a deliberate departure from the language of Article 15(1) and its object must have been to leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an obligation to admit women"].

144. *Id.*

145. A 1963 S.C. 649.

146. In *Subhash Chandra v. State*, A 1973 All. 295 the Court held that the allotment of seats for women in medical school was a reservation, and thus, to be taken into account in calculating the total reservation of seats. The Court held: ["Sub-articles (3) and (4) of Article 15 classify women and children. Socially...as distinct groups. If the State Government makes reservations for these groups it cannot be said that classification is not based on rational differentia. The objective of these reservations in favour of various categories of candidates is obviously to make special provision for their advancement."] The Court thus concluded that such reservations were within the scope of Article 15(3), and did not offend Article 15(1).

147. In *Sukhvinder Kaur v. State*, A 1974 H.P. 35 the High Court refused to treat the allotment of seats for women, as well as those allotted for other diverse categories which did not come within the definition of backward classes as "reservation". In *Padmaraj Samarendra v. State of Bihar and another*, A 1979 Pat. 266, the Court held that the allotment of seats for female

F. Family Law

Constitutional challenges to family laws on the ground of sex discrimination have met with very mixed results.¹⁴⁸ In some cases, the Courts have held that laws which treat women differently than men are discriminatory and thus, in violation of the equality guarantees. Indeed, some cases recognise that the discriminatory treatment is based on sexist attitudes and practices which reinforce women's subordination. The approach adopted by those courts is one of formal equality and sameness—women and men are the same, and thus ought to be treated the same in law. However, other cases have rejected the challenges to family laws. These cases, though also adopting a formal model of equality, emphasise the differences between women and men, and thus, preclude interrogation of substantive inequalities.

(i) Divorce

Section 10 of the Divorce Act (1869) which provides that a husband may petition for divorce on the basis of her husband's adultery coupled with desertion, cruelty, rape, incest or bigamy, has been challenged as violating Articles 14 and 15. In an early case, *Dwaraka Bai v. Professor N. Mathews*,¹⁴⁹ the Court held that section 10 was based on differences in adultery committed by women and men, and thus constituted a sensible classification.

A husband commits an adultery somewhere but he does not bear a child as a result of such adultery, and make it the legitimate child of his wife's to be maintained by the wife. He cannot bear a child nor is wife bound to maintain the child. But if the wife commits adultery, she may bear a child as result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child under s. 488...¹⁵⁰

According to the Court, these differences justified the different grounds for divorce, and Section 10 was upheld.

More recently, in *Swapna Ghosh v. Sadananda Ghosh*,¹⁵¹ section 10 was again challenged. After reviewing the justification for this provision—namely—that a husband would not bear a child to be maintained by his wife, but a wife might bear a child to be maintained by her husband,¹⁵² the Court held:

students was not a reservation in the strict sense. Reservations involve the allotment of seats "for the reason that the persons for whom the seats are earmarked should be educationally, socially or culturally backward and require protection". In this case, according to the Court, the allotment of seats for women was not for this reason, but rather, based on the state's need for more female doctors in government hospitals. Thus, The Court held that the allotment was not a reservation, but an allotment of source. The Court further held that since the reason for the allotment was the state need for female doctors, the allotment was not "only on the grounds of sex". and thus, did not violate Article 15 (1).

148. Challenges to social reform in personal law, on the basis of violating equality rights under Art 14 and 15 have generally been dismissed by the Courts. See, for example, *Gogireddy Sambireddy v. Gogireddy Jayamma* and another A 1972 A.P. 156. As Seervai notes, it has generally been held that ["...the State is entitled to proceed by stages and to consider whether any particular community governed by the personal law is ripe enough for reform to proceed"] SEERVAI, *supra* note 10, at 403. The focus of the subsequent discussion is thus on constitutional challenges specifically dealing with allegations of sex discrimination within particular personal laws, not as between different personal laws.

149. A 1953 Mad. 792.

150. *Id.* at 800 para 30.

151. A 1989 Cal. 1.

152. The Court noted that the only defense for this provision was that stated in *Dwaraka Bai v. Mathews*, *supra* note 149, at para 3, namely, where the Court held that since the husband even by committing adultery "does not bear a child as a result and make it a child of his wife to be maintained by the wife", the wife by committing adultery "may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child under Section 488, Criminal Procedure Code.

I would like to think that even assuming that the liability to conceive as a result of adulterous intercourse may otherwise be a reasonable ground for classification between a husband and a wife permissible under Article 14, since a wife conceives and the husband does not only because of the peculiarities of their respective sex, any discrimination on such ground would be a discrimination on the ground of sex alone against the mandatory prohibition of Article 15.¹⁵³

The Court, however, concluded that the case could be decided without a determination of these issues : My only endeavour is to draw the attention of our concerned legislature to these anachronistic incongruities and the provisions of Article 15 of the Constitution forbidding all discrimination on the ground of Religion or Sex and also to Article 44 staring at our face for four decades with its solemn directive to frame a UCC.¹⁵⁴

On the facts, the Court confirmed the divorce decree in favour of the wife on the grounds of the husband's adultery, cruelty and desertion.¹⁵⁵

While the decisions reached in these two challenges to s. 10 of the Divorce Act were different, the reasoning informing the decisions is similar in many important respects. Firstly, both decisions are located within a formal model of equality. In *Dwaraka Bai*, women and men were seen as different, and therefore as not qualifying for equal treatment. In *Ghosh*, the Court similarly accepted that the differences between women and men might be the basis for a reasonable classification for the purposes of Article 14. However, the decision in *Ghosh* turned on the Court's approach to Article 15. The Court adopted the 'only on the ground of sex' approach to Article 15(1), and that any differential treatment on the basis of the reproductive differences between women and men would constitute discrimination 'only on the ground of sex' In the Court's view, sex was an absolutely prohibited ground for classification, and thus, section 10 of the Divorce Act which did not treat women and men the same, was in violation of Article 15(1). Further, the two decisions adopt very similar approaches to gender difference. In *Dwaraka Bai*, the differences between women and men justified the different grounds for divorce. In *Ghosh*, the differences between women and men did not justify the different grounds for divorce. Notwithstanding these differences, women and men had to be treated the same. Yet, both decisions focus on the same biological differences of reproduction. Both decisions view these differences as natural and as the only possible justification for the differential treatment. Both decisions collapse the biological differences of reproduction with the gender differences that have been socially constructed-differences that have also come to be viewed as natural and inevitable. The decisions are informed by the same understanding of difference-the only distinction between them being the legal significance of this difference. The two decisions, although different in their result, can be seen as located within the same discourse of formal equality and a very similar discourse of gender difference.

(ii) Restitution of Conjugal Rights

Section 9 of the Hindu Marriage Act, which provides for the remedy of restitution of conjugal rights, has repeatedly been challenged as violating Article 14.¹⁵⁶ In *Sareetha v. Venkata Subbaiah*¹⁵⁷, the Court

153. *Supra* note 151, at 3 para 3.

154. *Id.* at 3 para 4.

155. *Id.* at 5 para 9. More specifically, the divorce decree was confirmed "on the ground that the husband-respondent is guilty of adultery coupled with such cruelty as without adultery would have justified a decree of judicial separation and also of adultery coupled with desertion without reasonable excuse for two years and more".

156. See also *Swaraj Garg v. K.M. Garg*, a 1978 Del. 296, in considering the interpretation of s. 9, wherein the Court held that any law that gave husbands the exclusive right to decide the place of the matrimonial home without considering the merits of the wife's claim would violate Article 14.

157. A 1983 A.P. 356.

held that section 9 did not meet the traditional classification test, and was thus unconstitutional. The Court noted that Section 9 did not discriminate between husband and wife on its face, in so far as "the remedy of restitution of conjugal rights" is "equally available to both wife and husband", and it thus "apparently satisfies the equality test".¹⁵⁸ Notwithstanding this formal equality, the Court then turned its attention to the operation of the remedy.

In our social reality, this matrimonial remedy is found used almost exclusively by the husband and is rarely resorted to by the wife. The reason for this mainly lies in the fact of the differences between the men and the women. By enforcing a decree for restitution of conjugal rights the life pattern of the wife is likely to be altered irretrievably whereas the husband's can remain almost as it was before. This is so because it is the wife who has to beget and bear a child. This is practical, but the inevitable consequence of the enforcement of this remedy cripples the wife's future plans of life and prevents her from using this self destructive remedy. Thus the use of the remedy of restitution of conjugal rights in reality becomes partial and one-sided and available only to the husband...¹⁵⁹

The Court thus held:

As a result, this remedy works in practice only as an engine of oppression to be operated by the husband for the benefit of the husband against the wife. By treating the wife and husband who are inherently unequal as equals, section 9 of the Act offends the rule of equal protection of the law. For that reason the formal equality that Section 9 of the Act ensures cannot be accepted as constitutional.¹⁶⁰

The Court in *Sareetha* concluded that notwithstanding the gender neutrality of the provisions regarding the restitution of conjugal rights, the law had a disparate impact on women. The law is used primarily by husbands against their wives; not by wives against their husbands. Accordingly, the Court concluded that the law operated "as an engine of oppression" against women. The Court thus moved beyond a formal equality approach to consider the substantive inequalities which are produced by the operation of the law.

The approach in *Sareetha*, however, is not entirely unproblematic. Firstly, while the Court seems on the one hand to expressly reject formal equality as inadequate, the language of the decision on the other hand retains this understanding of equality. For example, the Court specifically concludes that women and men are unequals, and therefore ought not be treated the same. The conclusion is cast in the language of formal equality rather than moving beyond it. Moreover, the decision is problematic in its approach to difference. In the Court's view, the inequalities produced by the law are a result of the differences between women and men. The Court focuses on the biological differences of reproduction, and, presents the differences between women and men as natural and inevitable. Yet, there is much more at stake than biological differences. The oppression to which the Court refers is not merely the product of biological difference. It is product of the sexual division of labour in general, and the social relations of child rearing in particular, which have been constructed around these biological differences, whereby women have been allocated the responsibility for child care.

While women's role in child rearing is often seen as a natural consequence of women's role in child bearing and thus, as biologically determined biological differences are relevant only in terms of

158. *id.* at 373 para 38.

159. *id.*

160. *id.*

pregnancy and breast feeding. Beyond these early periods of infancy, women's responsibility for child care is a social, not a natural phenomenon. However, in Sareetha, these differences are collapsed, and women's role in child care is seen as a natural product of biological difference.

The approach of the Court to equality is commendable, in so far as it recognises the impact of child rearing on women. However, the approach to difference is somewhat problematic in so far as it reduces this difference to a natural one. The decision exemplifies some of the dilemmas presented by difference. If difference exists, and matters in the lives of individuals, then it must be recognised. Yet, in recognising difference, we risk reinforcing the underlying social inequalities that produce these differences. In the context of Sareetha, the dilemma is how to recognise the impact of child rearing on women, without reinforcing the social inequalities that have produced this sexual division of labour.

In *Harvinder Kaur v. Harmander Singh Choudhry*,¹⁶¹ section 9 of the Hindu Marriage Act was again challenged. However, in this case, the Delhi High Court rejected the challenge and declined to follow the case of Sareetha. The Court noted that while Sareetha was based on the assertion that "a suit for restitution by the wife is rare", this was only true prior to the enactment of the Hindu Marriage Act. Since the Hindu Marriage Act was amended in 1964 allowing either party of the marriage to petition under section 13,

There is complete equality of the sexes here and equal protection of the laws.¹⁶²

The Court was only concerned with formal equality—that is, with whether women and men were treated as formal equals under the law. There is no consideration of the impact of the law, nor in turn, whether there is a disparate impact of the law on women.

In rejecting the challenge, the Court further held that the Constitution ought not to be applied to the family.

Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate and delicate, the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond.¹⁶³

In the Court's view, the application of constitutional law would encourage litigation within the marital relationship—litigation which should be discouraged as far as possible.

The reasoning in *Harvinder Kaur* is a classic statement of the understanding of the family as private and of the public/private distinction. The family is understood as private, and thus beyond the appropriate intervention of the law. This public/private distinction has been an important dimension of

161. A 1984 Del. 66.

162. *Id.* at 75 para 44.

163. The Court further articulated its understanding of the family as private, and thus beyond the scope of the Constitution: ["In the home the consideration that really obtains is the natural love and affect which counts for so little in these cold Courts"]. *Id.* at para 45. In support of its view, the Court cited the 1919 English case of *Balfour v. Balfour* 2 KB 571 which in its view: ["...illustrates that the house of everyone is to him his castle and fortress. The spouses can claim a kind of sacred protection behind the door of the family home which, generally speaking, the civil authority may not penetrate. The introduction of Constitutional Law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling"].

the legal reinforcement of women's subordination.¹⁶⁴ Women have traditionally been confined to the private sphere of the family, as wives and mothers, sisters and daughters; and their access to the public sphere has been denied. The public/private distinction has been used to insulate from legal review the discrimination that women face within the private sphere of the family. Discriminatory practices, ranging from unequal inheritance rights, to sexual assault, to dowry death have been, and continue to be justified on the ground that they occur within the private sanctuary of the family, and thus beyond the scope of the law.

The constitutionality of section 9 of the Hindu Marriage Act was considered by the Supreme Court in *Saroj Rani v Sudarshan Kumar*.¹⁶⁵

The Court held that restitution of conjugal rights did not violate Article 14, thus affirming the decision in *Harvinder Kaur* and overruling the decision in *Sareetha*. According to the Court

In India it must be borne in mind that conjugal rights ie the right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself.¹⁶⁶

In the Court's view, there were sufficient procedural safeguards to prevent section 9 "from being a tyranny", and that the decree was only intended where the disobedience was willful. The Court further held that the decree for the restitution of conjugal rights "serves a social purpose as an aid to the prevention of the break-up of marriage", and thus concluded without any further equality analysis that it did not violate Article 14. While the Court implicitly adopts the approach of equality and gender of the Delhi High Court in *Harvinder Kaur*, it does not expressly state or develop its own views in this regard.¹⁶⁷

(iii) Succession Laws

Several challenges have been made to the laws of succession, These challenges have overwhelmingly unsuccessful. In *Mukta Bai v. Kamalaksha*¹⁶⁸ hindu personal law which excluded

164. Madhu Kishwar, "Some Aspects of Bondage: The Denial of Fundamental Rights to Women", *MANUSHI* 31 (Jan-Feb.1983), arguing that the family structure in India reinforces the subordination of women in a way that precludes women's access to fundamental rights. At 31-32, she writes: ["The feature which most distinguishes women's oppression is that the denial of their most basic rights takes place first and foremost within the family. This is done so effectively that the hand of the government or of any similar repressive agency is seldom visible in keeping women oppressed. That is why it is easy to dismiss such violations as private family affairs rather than as social and political issues. But if we examine closely how the family functions in keeping women subjected we can begin to see how an exploitative family structure receives crucial support from the government and the state through various laws and rules of behaviour which legitimate the authority of the male members over the lives of women members of the family"]; See also NANDITA HAKSAR, *DEMYSTIFICATION OF LAW FOR WOMEN* 58 (1986); Nadine Taub and Elizabeth Schneider, "Perspectives on Women's Subordination and the Role of Law" in *THE POLITICS OF LAW* (D. Kairys ed. 1982); Frances Olsen, "The Myth of State Intervention" 18 *MICH. L. REV.* 835 (1985); Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to Further Feminist Struggles" 25 *OSGOODE HALL L.J.* 485 (1987).

165. A 1984 S.C. 1562.

166. *Id.* at 1562 para 15.

167. It should be noted that the Supreme Court did not comment on the holding in *Harvinder Kaur* regarding the non-applicability of the Constitution to the legal regulation of the family. Further, more recent cases involving challenges to personal laws have not strictly followed *Harvinder Kaur* in so far as the non-applicability of the Constitution to the legal regulation of the family is concerned. For example, in *Krishna Murthy v. P.S. Uma*. A 1987 A.P.237. *Swapna Gosh v. Sadanada Gosh* supra note 151; and *Lalitha Ubhayankar and another v. Union of India and another*, A 1991 Kar. 186; the courts were willing to consider constitutional challenges to the Hindu Marriage Act, The Divorce Act (1869). and the Hindu Adoptions and Maintenance Act, respectively. The ideology of privacy was not invoked, as in *Harvinder Kaur*, to preclude an analysis of the operation of the provisions of relating to the legal regulation of the family.

168. A 1960 Mys. 182.

illegitimate daughters from maintenance from the estate of their putative fathers was challenged as violating Article 14. In rejecting the challenge, the Court held:

The fact that the law makes no provision for the maintenance of an illegitimate daughter cannot be said to amount to discrimination against illegitimate daughters, such as would amount to violation of Article 14 of the Constitution.¹⁶⁹

The reasoning in the decision is entirely conclusory. There is no consideration of Article 14 case law, nor any analysis of why the distinction did not amount to discrimination.

Challenges to the Hindu Succession Act, 1956, on the ground that it discriminated on the basis of sex, brought overwhelmingly by men have been rejected by the courts. For example, in *Kaur Singh v. Jaggar Singh*¹⁷⁰ Section 14, which provides a female Hindu with the right of absolute ownership over her property was challenged as discriminatory.¹⁷¹

While the Court acknowledged that the Hindu Succession Act did create an apparent anomaly in the powers of alienation of property, it held that the removal of such remained the prerogative of the legislature, not the courts. The Court held that "it may well be that in view of the inferior status enjoyed by the females, the Legislature thought fit to put the females on a higher pedestal", which was within the purview of Article 15(3).¹⁷² It further held that women as a class were different from men as a class and the legislature had merely removed the disability attaching to women.

In *Partap Singh v. Union of India*¹⁷³, Section 14(1) was again challenged as violating Articles 14 and 15(1). The Court found that section 14(1) was enacted to address the problem faced by Hindu women who were unable to claim absolute interest in properties inherited from their husbands, but rather, who could enjoy these properties with the restrictions attached to widow's estates under Hindu law. As a special provision intended to benefit and protect women who have traditionally been discriminated against in terms of access to property, it was not open to Hindu males to challenge the provision as hostile discrimination. Rather, the Court concluded that the provision was protected by Article 15(3), which in its view, "overrides clause 15(1)".¹⁷⁴

While the Court thus upheld the provision, the approach to equality and to gender on which it did so remains unclear. The decision could be informed by either a protective approach (women need special provisions to protect them) or a corrective approach (women have historically been discriminated against and require special provisions to correct). The Court's reference to the traditional problems that women faced in property ownership is suggestive of the latter.

In *Sonubhai Yeshwant Jabhar V. Bala Govinda Yadav and Others*¹⁷⁵ section 15(2) of the Hindu Succession Act was challenged as discriminating on the basis of sex, and thus being in violation of Articles 14 and 15. Section 15(2) (b) provides that the property inherited from a husband of a female

169. *Id.* at 183 para 5.

170. A 1961 Punj. 489.

171. The plaintiffs argued that the effect of section 14 was discrimination in the powers of alienation of property between women and men. While women had by virtue of section 14 absolute ownership and thus absolute rights of alienation, men who were still governed by the Punjab Customary Law were not free to dispose of ancestral immoveable property by will.

172. *Id.* at 493 para 13.

173. A 1985 S.C. 1695.

174. *Id.* at 1697 para 6.

175. A 1983 Bom. 156.

Hindu dying intestate will devolve upon the heirs of the husband, whereas s. 8, dealing with the property of a male Hindu dying intestate does not make any such provision regarding property inherited from his wife. In rejecting the challenge, the Court held that the rules were enacted with the clear intention of ensuring the continuity of the property within the husband's line. The assumption that property should be passed down through the male line is so deeply held that the Court does not question the gender bias of the assumption. The historic discrimination against women in inheritance has created a norm—that property passed through the male line—and it is against this norm which any challenges to the practice are measured, and ultimately rejected.

(iv) Maintenance

Constitutional challenges have been directed to the maintenance provisions of several family law statutes. In *Puranananda Banerjee v. Sn. Swapan Banerjee and Another*¹⁷⁶, section 36 of the Special Marriage Act, which provides for a grant of alimony pendente lite to a wife was challenged as violating Article 15. In upholding the section, the Court held that it did not discriminate only on the basis of sex, but rather provided maintenance where the wife had no independent income sufficient for her support. The Court further held that even if section 36 did discriminate on the basis of sex alone, it would be protected by Article 15(3).

The Court has approached the question of the constitutionality of section 36 from the perspective of formal equality. In its effort to uphold the provision, the Court first adopted the technical approach of "only on the ground of sex". Rather than viewing women's economic dependency as a socially constructed gender difference, the Court severed sex from what sex socially implies. The formal model of equality is echoed in the Court's understanding of discrimination—that is - as any distinction on the prohibited grounds—which is justified under Article 15(3).

The objective of the Court in this case is laudable—that is—it sought to uphold legislation specifically designed to address women's economic dependency in the family. However, this objective could be better served by a substantive approach to equality, which directs attention to whether the rule in question contributes to the disadvantage of women and a corrective approach to gender, which acknowledges that women may need to be treated differently to make up for past disadvantage. Within such an approach, the provision could be upheld on the ground that it takes gender difference into account to compensate for past disadvantage. The reality of women's economic dependence, resulting from the sexual division of labour within the family, requires that provisions exist to recognize and compensate women for this dependence.¹⁷⁷

VI. Conclusion

In this paper, we have attempted to provide a comprehensive review of the High Court and Supreme Court Constitutional cases on sex discrimination. We have argued that this case law is primarily informed by a formal model of equality—that is—an understanding of equality as sameness, and a disqualification of those who are different from an entitlement to equality. We have tried to reveal the ways in which this understanding of equality has led to a focus on the relevance of gender difference.

176. A 1981 Cal. 123.

177. In *Krishna Murthy v. P.S. Umadevi*, A 1987 A.P.237, Section 24 of the Hindu Marriage Act was challenged as violating Article 14, on the basis that a spouse's liability for alimony was vague, particularly as compared to the Divorce Act, where a husband's liability for alimony was expressly limited to a maximum of 1/5 of his income. In a brief decision, the High Court rejected the challenge, and held that there was no invidious discrimination or undue disability to the wife or the husband.

In one set of cases, the courts have held that women are different than men; that women are weaker and in need of protection. This difference is used to virtually disentitle women to any claim to equality. In upholding legislation, this approach cannot distinguish between differential treatment that disadvantages and differential treatment that advantages. It cannot, in other words, distinguish between legislation that further contributes to women's subordination, and legislation that attempts to correct or compensate for that subordination. Rather, any and all differential treatment can be justified on the basis that women are essentially and biologically different.

In the second set of cases, the courts have held that for the purposes of legislation, women and men are the same, and therefore must be treated the same in law. The sameness approach has been used to uphold legislation that treats women and men the same, and to strike down legislation that treats women differently. However, in striking down the legislation, this approach cannot distinguish as between differential treatment that disadvantages and differential treatment that advantages. Like the protectionist approach, there is no distinction between protectionist legislation that discriminates against women, and corrective legislation that attempts to compensate for past discrimination. In comparison to the protectionist approach, the sameness approach would strike down both protectionist and corrective legislation.

In contrast to formal equality, we have described a second substantive model of equality, and have attempted to reveal the limited extent to which this alternative vision of equality has informed judicial interpretations. In this model, equality is not a question of sameness and difference, but rather a question of disadvantage. Within a substantive model of equality the central question is whether the impugned legislation contributes to the subordination of the disadvantaged group, or to overcoming that subordination. This model of equality creates space for a third approach to gender difference, that is a corrective approach. This third, though very small, set of cases recognises that to correct or compensate for past discrimination, women may have to be treated differently.

By asking different questions, then, the substantive approach to equality can direct attention to and distinguish between protective and corrective legislation, that is, rules that contribute to women's subordination, and rules that contribute to overcoming that subordination. This model can be used to strike down protective legislation, and to uphold corrective legislation. Moreover, this model of equality still leaves room for a sameness approach—that is by focusing on the relative advantage and disadvantages of women—the inquiry can lead to the conclusion that in a particular context, gender difference ought to be irrelevant, and women and men ought to be treated the same.

VI. GENDER EQUITY : MAKING IT HAPPEN[#] (STRATEGIES AND SCHEMES OF GOVERNMENT OF INDIA)

Poornima Advani*

Prologue

On the midnight hour of August 14-15, 1947, when India awoke to "life and freedom", most of its 170 million women scarcely knew what the "Tryst with Destiny" was all about. Victims of poverty, ignorance and oppressive social institutions, they hardly knew their destiny and who controlled it. True, the same could be said of the majority of Indians – men and women. There were the backward classes and the tribal communities who, too, were steeped in the same quagmire of want, illiteracy, ill-health and superstition. Women were the most backward and most oppressed sub-section of every section of society. It is also true that, in India's long history, individual women had risen to levels of eminence – literary, religious, social or even political – which would have been the envy of their sex anywhere in the world. Gandhiji's mass-mobilization for India's freedom had also involved women in large numbers from all strata of society. The leaders of women's movement, as it then existed, also had international linkages with the suffragist and the anti-imperialist lobbies of the West. But this touched only a very small minority of women and the mass involvement of women in the freedom struggle was an isolated, albeit a very significant and powerful, expression of women's power. So far as the overwhelming majority of women were concerned, however, they represented the most backward face of Indian citizenry. Hardly 7 per cent of them were literate; life expectancy was a bare 37 years and they were subject to debilitating diseases and suffered maternal mortality of a rate as high as 1000 per hundred thousand live births.

The stalwarts who led India to its Independence were aware that if the new India of their dreams was to become a reality, it would need social engineering on a massive scale, in respect of the backward and oppressed sections of the country's population and above all, its women. In 1931, when Gandhiji was standing on the deck of a ship taking him to London, as the spokesman and representative of nationalist India to the second Round Table Conference, he was asked by a newspaper correspondent as to what constitution he would bring back if he could help it. Gandhiji's reply was: "I shall strive for a Constitution which will release India from all thralldom and patronage – I shall work for an India in which there shall be no high class and low class of people. – Women shall enjoy the same rights as men ..." (emphasis added)

Constitution

It is not surprising, therefore, that when India's Republican Constitution was written, it vibrated with the same lofty sentiments and gave a clarion call for a liberal and egalitarian order.

The Preamble to the Constitution of India began with the ringing words:

"WE, THE PEOPLE OF INDIA,
having solemnly resolved to constitute India into a Sovereign Democratic Republic,
and to Secure to ALL ITS CITIZENS;
Justice – social, economic and political;

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Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity;
and to promote among them all
Fraternity, assuring the DIGNITY OF THE INDIVIDUAL and the unity of the Nation,
In our Constituent Assembly this 26th day of November 1949
Do hereby Adopt, Enact and Give to ourselves this Constitution."

The Constitution was given unto themselves by the People of India - all its People, men and women alike. And it aimed at securing such enduring values as justice, equality, fraternity and dignity. And these precious gifts were to be made available to all its citizens, all men and all women.

To attain these national objectives the Constitution enacted a framework of Fundamental Rights and Directive Principles, almost unique in the Constitutions of the world

Part-III of the Constitution enumerated several Fundamental Rights and Freedoms such as freedom of speech, protection of life and personal liberty.

Article 14 declares, "The State shall not deny to any person equality before the law—" This is the bedrock of equality of status as an individual guaranteed to every citizen, man or woman.

Not content with a general declaration of the right to equality and fully conscious of the types of discrimination prevalent in the country, the framers of the Constitution went a step further in Article 15 and laid down that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

The Constitution makers were also aware of the fact that equality would have no meaning between people, and sections of people, placed in highly unequal situations through accidents of history and social evolution. Therefore, they made a specific provision under Article 15(3) for what is called positive discrimination. This enables the State to make any special provision for the benefit of women and children even in violation of the fundamental obligation of non-discrimination among citizens. Thus, special laws and rules were made for women, particularly, in the field of labour legislations, like the Factories Act, the Mines Act, etc. This was done in the larger and long-range interest of the community itself.

It is important to note that these provisions bestowing absolute equality on women in the matter of their civil or political rights were far ahead of the position prevailing in many of the western countries, where bitter battles had to be fought to extend suffrage to women.

Article 16(1) guarantees "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State". As in the case of equality of status, here too Article 16(2) forbids discrimination in respect of any employment or office under the State on the grounds only of "religion, race, caste, sex, descent, place of birth, residence or any one of them".

The obligation not to discriminate on grounds of sex in matters relating to employment or appointment to any office under the State has thus, at least, theoretically ensured a significant position and status to Indian women.

A declaration of Fundamental Rights is meaningless unless there is an effective machinery for the enforcement of the rights. Hence, Article 32 provides a guaranteed remedy for the enforcement of the rights conferred by Part III and this remedial right is itself made a fundamental right by being included in Part III.

The Directive Principles of State Policy are enunciated in Part-IV of the Constitution. These embody major policy goals of the Indian State.

There are sixteen Articles of the Constitution that deal with the Directive Principles. They cover a wide range of State activity embracing economic, social, legal, educational and international problems. Some of them concern women indirectly or by necessary implication. A few are, as it were, "women-specific".

In the first category fall -

- i) the omnibus provision of Article 38 which, in brief, directs the State to secure a just social, political and economic order, geared to promote the welfare of the people;
- ii) Art.39(b), (c) and (f) which concern distribution of ownership and control of material resources of the community for the common good, prevention of concentration of wealth and means of production to the common detriment, and protection of childhood and youth against exploitation and moral and material abandonment;
- iii) Art.40 (organization of village panchayats to promote self-government);
- iv) Art.41 (right to work, education and public assistance in cases of unemployment, old age, sickness, disablement and other types of underserved wants);
- v) Art 43 (provision of work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure, of social and cultural opportunities, and the promotion of cottage industries);
- vi) Art.44 (Uniform Civil Code);
- vii) Art.45 (free and compulsory education for all children up to the age of 14); and
- viii) Art.47 (raising the level of nutrition and the standard of living of the people and improvement of public health).

Directive Principles which concern women directly and have a special bearing on their status include:

- i) Art 39 (a) (right to an adequate means of livelihood for men and women equally);
- ii) Art 39 (d) (equal pay for equal work for both men and women);
- iii) Art 39(e) (protection of the health and strength of workers – men, women and children from abuse and entry into avocations unsuited to their age and strength); and
- iv) Art 42 (just and humane conditions of work and maternity relief).

Juridicially, these Directive Principles are a vital part of the Indian Constitutional law. But while the Fundamental Rights are made expressly justiciable under Article 32, these Principles are made expressly non justiciable under Article 37. They are, nevertheless, fundamental in the governance of the country. They may confer no power or legislative competence; nor may they give rise to a cause of action for which remedy is available in a court of law. But the State is charged with a duty to apply these principles in making laws. They lay down a code of conduct for the administrators of India while they discharge their responsibility as agents of the sovereign power of the nation. In short, the Directive Principles enshrine the fundamentals for the realization of which the State in India stands. If the Fundamental Rights guarantee a political democracy in India, the Directive Principles promise the eventual emergence of a social and economic democracy to sustain the former. Thus, while Fundamental Rights needed immediate implementation, the Directive Principles depended on the ability of the State. They are "like a cheque on a bank payable when able - only when the resources of the bank permit".

Fundamental duties are also included in the Constitution by an amendment. Article 51(A)(e) imposes a Fundamental Duty on every citizen to renounce practices derogatory to the dignity of women.

The Constitution was also amended by the 73rd and 74th Amendments to provide for reservation of 1/3rd seats for women in all institutions of local government and posts of chairpersons in such bodies.

The Constitution, with its Preamble, the Fundamental Rights and Duties and the Directive Principles, lays down a vision which the different organs of the Government, the legislature, the judiciary and the executive, were supposed to take forward.

Laws

Following the clear enunciation of the State's approach to women's issues, the Indian legislatures have passed various laws from time to time to protect and promote the cause of women and to remove their disabilities. Of course, many such laws were enacted in the earlier decades as part of the Government's efforts at social reform or labour welfare. But the post Independence era saw several of these laws being amended in response to the egalitarian urges of the new Constitution.

Important laws passed by the Indian legislatures which have a bearing on women's lives and status have been listed at Annexure A (Part I). Some of these laws have been dealt with hereinunder to give a concise idea of the subject matter contained therein.

The Child Marriage Restraint Act, 1929

The Act, duly amended in 1938, 1951, 1968 and 1978, applies to all persons in India irrespective of their caste, community and religion. The marriageable age for the groom is 21 years and for the bride is 18 years. The Act prescribes punishments for an adult male contracting a child marriage, any one who performs, conducts or directs the child marriage and a male parent/guardian who promotes, permits or solemnizes a child marriage. The Act also creates a presumption that where a minor contracts a child marriage, the parent/guardian/person having charge of such minor has negligently failed to prevent the marriage from being solemnized. Offences under the Act are cognizable for certain purposes. Although the Act prohibits and prescribes punishment for child marriage, it does not in any way affect the validity of such a marriage.

The Factories Act, 1948

The Factories Act was enacted to regulate conditions of labour with regard to health, safety and welfare facilities. Inter alia, it also specifies the nature of work that must not be given to a female worker/employee. For example, the law says that a female is not to work on or near a machinery in motion. Further, she must not be employed during the night shift, nor can she be compelled by the employer to lift excessive weight. The Act also mandates separate latrines, urinals and washing facilities exclusively for the use of female employees. It further ordains that in any factory where more than 30 female employees are working, the employer must maintain adequate number of suitable creches for taking care of children under the age of six years of such female employees.

The Special Marriage Act, 1954

The Act which replaced the Special Marriage Act, 1872 provides a special civil forum of marriage which can be availed of by any citizen of India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The parties can observe any ceremony for the solemnization of their marriage but certain formalities are prescribed under this Act before the marriage can be registered by the Marriage Officer. The Act further permits persons who are already married under others forms of marriage to register their marriage under this Act and thereby avail themselves of its provisions.

The Hindu Succession Act, 1956

The Act seeks to amend and codify the law relating to intestate succession for Hindus. It simplifies the law by abolishing the different systems prevailing under the *Mitakshara* and *Dayabhaga* schools. It also extends to persons in South India who were governed by the *Marumakkattyan* law. The Act introduces some radical and fundamental changes, the most significant being that it grants equal rights of succession to male and female heirs in the same category, e.g. brother and sister, son and daughter. It recognises the right of a woman to inherit equally with men. It also abolishes the right to fee or limited estate of female heirs with the result that the Class I heirs of a man succeed to the estate of the deceased "simultaneously", taking the property in equal shares and as 'absolute' owners.

The Immoral Traffic (Prevention) Act, 1956

The Act prescribes punishments for keeping a brothel, for living on the earnings of a prostitute, for trafficking in women for prostitution, etc. It also aims at prohibiting prostitution in public places with a view to safeguarding public morals and society. It prescribes stringent action against commission of offences against a child or a minor. Every offence punishable under the Act is cognizable and the Special Police Officer is empowered to arrest the offender without warrant. The Special Police Officer has the power to enter premises and, if directed by the court, even to search the premises and to rescue persons from such premises. Such rescued persons are to be taken in custody and medically examined.

The Hindu Adoption and Maintenance Act, 1956

The Act lays down the requisite conditions of valid adoption and eligibility conditions for persons desirous of adopting and giving into adoption and persons who may be adopted. The law clarifies the

effects of adoption on the status of the persons involved and the right of the adoptive parents to dispose of their properties. It also spells out the right of maintenance of a Hindu wife. The Act specifies the special circumstances under which a Hindu wife can claim maintenance. All these factors are essentially measures of social justice designed to prevent destitution in society. Similarly, the Act also deals with the circumstances under which a widowed daughter-in-law, children, aged parents and dependants are entitled to maintenance.

The Maternity Benefit Act, 1961

The object of the Act is to impart social justice to women workers. It protects the dignity of motherhood by providing for full and healthy maintenance of the woman worker and her child during the period of her confinement. The Act provides for payment of maternity benefits in cash for a certain period before and after confinement. It further provides for grant of leave and other medical facilities. The Act entitles the woman worker to nursing breaks until her child attains the age of 15 months. It prescribes the period during which the employer is prohibited from giving to a pregnant woman employee any arduous work, or work which involves long hours of standing, or work which in any way is likely to interfere with her pregnancy or the normal development of the foetus, or is likely to cause miscarriage, or otherwise adversely affect her health.

The Medical Termination of Pregnancy Act, 1971

The Act aims at protecting the physical and mental health of a pregnant woman. Consisting of just eight sections, it deals with various aspects like the time, place and circumstances under which a pregnancy may be terminated by a registered medical practitioner. It legalises abortion in cases where there is failure of contraceptives or where the pregnancy will adversely affect the physical or mental well-being of the prospective mother. The Act mandates that in every case of medical termination of pregnancy, consent of the pregnant woman must be taken unless she is a minor or a lunatic, when her guardian's consent would suffice.

The Indecent Representation of Women (Prohibition) Act, 1986

The Act prohibits indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner. It further prohibits sale, distribution and circulation of material containing indecent representation of women. To enforce implementation, a Gazetted Officer is empowered to enter and search any place if he has reason to believe that an offence under the Act has been or is being committed. He can also seize the material which contravenes any of the provisions of the Act. Any person/company contravening the provisions of the Act is punishable with imprisonment and fine. Offences under the Act are cognizable and bailable.

The Commission of Sati (Prevention) Act, 1986

The Act purports to effectively prevent commission of *sati* and its glorification. It prescribes punishment for whoever may attempt to commit *sati* or abet the commission of *sati*, directly or indirectly. The abettor is disqualified from inheriting the property of the person in respect of whom such *sati* is committed. Glorification of *sati* (defined exhaustively in the Act) is also made punishable. The Collector/District Magistrate has the powers to seize properties and funds collected for the purpose of glorification of *sati*. The Act ordains removal of temples/structures where worship or ceremonies are performed with

a view to perpetuating the honour of or to preserving the memory of any person in respect of whom *sat*' has been committed. The Act also mandates establishment of special courts to take cognizance of offences committed under the Act.

The National Commission for Women Act, 1990

The Act empowers the Central Government to constitute the National Commission for Women, consisting of a Chairperson, committed to the cause of women, five able, knowledgeable and experienced members dedicated to the cause of development of women, and a Member-Secretary. All the Members, including the Chairperson, are to be nominated by the Central Government. The Act provides for Expert Committees to be appointed by the Commission, procedures to be regulated by the Commission and most important, various functions to be discharged by the Commission (section 10). The Commission enjoys powers of a civil court in trying a suit.

The Pre-Natal Diagnostic Techniques (Regulations and Prevention of Misuse) Act, 1994

The Act restricts the use of Pre-Natal Diagnostic Techniques for the purpose of detecting genetic or metabolic disorders, chromosomal abnormalities, congenital malformations or sex linked disorders. It prohibits the use of these techniques for determining the sex of the foetus leading to female foeticide. The techniques are to be used only under certain conditions and only by registered institutions. The Act also regulates genetic counselling centres, genetic laboratories and genetic clinics by making registration of such centres/laboratories/clinics compulsory. Such centres are prohibited from issuing advertisements relating to PDI's for detection or determination of sex of the foetus. Further, there is an absolute prohibition on communicating the sex of the foetus to the woman or her relatives. Any contravention of these provisions can result in conviction and punishment. Every offence under the Act is cognizable, non-bailable and non-compoundable.

Judgements

The judiciary has also contributed its share to the promotion of women's cause through some creative interpretive judgements and historic rulings which have either themselves become law or have led to suitable legislation being enacted. Even if at times the rulings of lower courts in individual cases have disappointed those working in the women's movement, the general tenor of response of the higher judiciary to women's issues has been quite progressive. Some of the important landmark judgements are cited below:

1. Government of Andhra Pradesh v. P B Vijay Kumar and another, AIR 1995 SC 1648.

It was held that making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3) is not whittled down in any manner by Article 16. The "Special Provision" which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation.

Both reservation and affirmative action are permissible under Article 15(3) in connection with employment or posts under the State. Both Articles 15 and 16 are designed for the same purpose of creating an egalitarian society – "equality is one of the magnificent corner stones of Indian democracy." We have, however, yet to turn that corner. For that purpose, it is necessary that Article 15(3) be read in harmony with Article 16 to achieve the purpose for which these Articles have been framed.

2 Karnel Singh v. State of MP, AIR 1995 SC 2472

"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars – the nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence."

3 Vishaka and Others v. State of Rajasthan and Others, AIR 1997 SC 3011

Sexual harassment of a working woman amounts to violation of rights of gender equality and right to life and liberty (Articles 14, 19 & 21) and as a logical consequence, it also amounts to violation of right to practice any profession, occupation or trade.

It was also laid down that in the absence of a domestic law to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution. Any International Convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof – "

The judgement went on to lay down the definition of the offence of sexual harassment, the preventative steps, the complaint mechanism and the need for creating awareness of the rights of female employees.

4 Ms. Gita Hariharan and Another v. Reserve Bank Of India and another, AIR 1999 SC 1149

The Court ruled that the mother can act as the natural guardian even when the father is alive. Normally when the father is alive, he is the natural guardian and it is only after him that the mother becomes the natural guardian. But, the word, 'after' shall have to be given a meaning which would subserve the need of the situation viz., welfare of the minor and having due regard to the factum that law Courts endeavour to retain the legislation rather than declaring it to be void, "we do feel it expedient to record that the word 'after' does not necessarily mean after the death of the father." On the contrary, it depicts an intent so as to ascribe the meaning thereto as 'in the absence of' – be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word 'after' as used in section 6 then and in that event the same would be in accordance with the intent of the legislation, viz. welfare of the child.

5 Delhi Domestic Working Women Forum v. Union of India and others, Jt 1994(7) SC 183

In this case relating to rape and violence to working women, the Court called for protection to the victims and provision of appropriate legal representation and assistance to the complainants of

sexual assault cases at the police station and in courts. It also laid down that advocates be appointed by the court upon application by the police in order to ensure questioning of victims without undue delay. It sought to ensure the anonymity of the rape victims, as far as necessary, in rape trials and compensation to rape victims. The Court went as far as to recommend the desirability of setting up a Criminal Justice Compensation Board. It directed the National Commission for Women to perform the functions of safeguarding of women and calling for special studies of discrimination and atrocities against women. It wanted a scheme to be prepared within 3 months for wiping out the tears of such unfortunate victims.

6 Gaurav Jain v. Union of India, AIR 1997 SC 3021

The Court urged the State, all voluntary organisations and public spirited persons to come to the aid of the prostitutes, to retrieve them from prostitution and to socially reintegrate them.

The Supreme Court also gave comprehensive instructions to the Government for the rescue and rehabilitation of the children of the prostitutes so as to prevent second generation prostitution. The court explained that it was in the interest of such children and of society at large that the children of prostitutes be segregated from their mothers and be allowed to mingle with others and become part of the society. Also see *Vishal Jeet v. UOI* (1990) 3 SCC 318.

7 Sarla Mudgal v. Union of India, (1995) 3 SCC 635

Motivated conversions in order to enter into polygamous relationships are well-known in India. The husband conveniently converts to a religion permitting polygamy and contracts a second marriage without legally dissolving the first marriage. In such a case the wife is left with no effective legal remedy except for obtaining divorce or judicial separation. Even the judiciary has come down heavily on such motivated conversions which enable the husband married under a monogamous law to convert to a religion permitting polygamy. The Court clarified: "A marriage solemnised under a particular statute and according to personal law cannot be dissolved according to another personal law just because one of the party changes his/her religion. Nor conversion of the spouse dissolves the marriage automatically. Hence a spouse embracing a different religion than that at the time of the first marriage and solemnising a second marriage would be liable for punishment... and such second marriage would be void."

8 Rohtash Singh v. Smt. Ramendri and others, (2000) 1 Femi-Juris C.C. 132 (SC)

The Court clarified that the claim for maintenance under the first part of section 125 Cr.P.C. is based on the subsistence of marriage while the claim for maintenance of a divorced wife is based on the foundation provided by explanation (b) to sub-section (1) of section 125 Cr.P.C. Therefore, even if a woman has been granted divorce on the ground of her deserting the husband, she continues to enjoy the status of a wife for the limited purpose of claiming maintenance of allowance from her ex-husband who continues to be under a statutory duty and obligation to provide maintenance to her so long as she has not re-married.

9 Balwant Kaur and others v. Chanan Singh and others, (2000) 2 Femi-Juris C.C. 6 (SC)

The case pertains to a widowed daughter's right to get maintenance from her father. It was laid down that once a person is found to be "dependent" of the deceased then such a "dependent" has a

pre-existing right *qua* the estate of the deceased to get maintenance and that right, if not crystallised by way of grant of a definite share in the estate of the deceased either on his intestacy or on the coming into operation of his testament in favour of the dependent, would remain operative even after the death of the Hindu and would get attached to the estate which may get transmitted to his heirs.

10. Raghubar Singh and others v. Gulab Singh and others, AIR 1996 SC 2401

It was laid down that the right to maintenance of a Hindu female flows from a social and temporal relationship between the husband and the wife and that right in the case of a widow is "a pre-existing right". Further, the widow's limited interest gets automatically enlarged into an absolute right notwithstanding any restriction placed under the document or the instrument of will. Specifically where the will made by the husband of a widow bequeathed property to a grandchild stipulating that till testator or his wife (widow) is alive, both should have a full control over the property, the widow would be full owner of the property.

Government Departments

The Constitutional provisions, laws and the rulings confer *de jure* rights on women but to become *de facto* entitlements, they have to be given the support of certain schemes or programmes. For example, the equal right to work or to be appointed to any office has meaning only if the concerned woman is able to have the necessary qualifications, educational or experience wise. Similarly, equal pay for equal work also vests rights in a woman worker but they can be realized if she is capable of equal performance or productivity, which may again depend on the status of her health. It is necessary, therefore, that this super structure of rights is supported by the infrastructure of opportunities, schemes and programmes which enable women to realize their potential. Hence, Sati may be forbidden by law but if social customs or attitudes continue to glorify it, widows will continue to march into funeral pyres or be pushed into them. Similarly, dowry will continue to flourish, despite the legal bar, until the government and civil society are able to bring about the desired attitudinal changes. Therefore, the entire gamut of schemes of various departments and agencies of the Government comes into the picture. An enabling environment has also to be created for the realization of these opportunities. This again depends on the policies of the Government as well as the activities of civil society through various voluntary and non-governmental organisations. Therefore, much of the responsibility for translating constitutional promises of gender equity into everyday reality devolves on the executive.

Part II of the document contains a detailed exposition of the response of the executive wing of the government to the women's problems. Various departments of the government formulate and implement different schemes or issue executive orders/instructions or guidelines that have a bearing on the lives, opportunities and aspirations of women. To bring it all together in one place, the Departments were asked to enumerate and describe the various gender related programmes and executive initiatives pertaining to their respective areas. A copy of the communication seeking information in this regard is at Annexure-B (Part I). All the Ministries and Departments addressed in this regard are listed at Annexure-C (Part I). The responses received in this regard form the subject matter of the said Part II. It may be pointed out that each and every Department responded to this communication. However, the material contained in this Part is, by its very nature, diverse and non-uniform. Since it has come from different departments whose functions, responsibilities and orientations are different,

there is no common format for the information presented therein. It needs to be emphasized that this is not a mere compendium of beneficiary oriented programmes pertaining to women nor a manual or handbook to be used for accessing the benefits under these schemes. It contains a compilation of schemes, orders and instructions. But more than that, it is, so to say, a mirror reflecting the approach of various arms of the Union executive to the concerns, problems and interests of women.

Broadly, the government departments may be divided into three categories. Firstly, there are women specific departments, principally, the Department of Women and Child Development, whose responsibilities are concerned almost solely with providing services and benefits to women (and /or children). Here the very raison d'être of the agency or the Department is amelioration of the conditions of women. It partly attempts to tackle their problems by implementing schemes and programmes formulated exclusively for their benefit. And partly it coordinates, oversees and monitors the activities in other sectors which directly or indirectly impact on the position of women. Naturally, here we expect, and indeed find, an elaborate discussion of the rationale, structure and functioning of various development programmes, administered by the Department.

In the second category are Departments whose activities are, as they are called, "women related". This embraces a large part of governmental activity in the social and economic spheres which significantly affects the lives of all citizens, though it may impact men and women differentially.

Education and health are two prime examples, as the services, in these two sectors are intended for all. But as far as education is concerned, the existing socio-economic context as well as cultural norms and traditions may affect the degree to which girls / women can access the services. Hence, different strategies may be needed to bridge the gender gap in educational attainments (enrolment, retention and proficiency). As regards health, needs of men and women are different throughout their life cycles. A national programme like population stabilisation may affect men and women quite dissimilarly and call for a properly differentiated approach in terms of information, education and communication as well as services. That is why MCH (Maternal and Child Health) and in recent years RCH (Reproductive and Child Health) programmes have occupied such pride of place in the strategy of health planners.

On the economic front again, agriculture and industrial sectors may appear quite gender-neutral. But, early, in our planned development history, it was observed that women's needs and problems were qualitatively different. Since large numbers of our rural women were engaged in agriculture and allied activities, there was need to focus our extension and training efforts on women, preferably through women extension workers. The kinds of industries, particularly in the small, cottage or village sectors, in which women preponderate, call for a different package of credit and market assistance.

Hence, the Departments dealing with these activities have detailed their gender differentiated approach to women's development in these areas.

In areas, like rural development and poverty alleviation, the gender consideration has come from the realization that poverty is concentrated in the feminine half of the population and the key to women's development and empowerment lies in upgrading their economic status. Hence, many schemes of these sectors, now, earmark a portion of the funds or benefits for women beneficiaries.

Interestingly, Department of Defence figures in this list of women related departments since significant new initiatives have been taken in the recent years in the three Services, which have breached the last male bastion, and provided for entry of women in the officers ranks or in technical categories. Another landmark achievement was the entry of women in civil aviation, where several women have shot into public prominence by taking command of modern jets and other advanced flying machines. However, these do not figure in the material in Part II because these developments pertain to the public sector, which is not the subject of this monograph. Of this, more later.

Then there are governmental activities outside the arena of development. There are the housekeeping departments dealing with functions like law and order, legal affairs and the like. Law enforcement agencies are concerned with the state of crime against women. But this vital subject is the responsibility of the State Governments. Hence, we have a host of communications from the Home Ministry, at the highest administrative and political levels, to the State administrations communicating the grave concern of the Parliament and urging effective action to control vice and violence affecting women.

So far as the framing of laws is concerned, the concerned Ministry has given us a picture of the new laws concerning women that have been passed and those which are being processed in the Department in response to the emerging needs and rising expectations of society.

The application of science and technology to ameliorate the condition of women through reducing drudgery and developing suitable women friendly technologies are described in some detail by the science related departments of the Government which are taking significant initiatives involving national and international organisations for empowering women.

Even the Department of Statistics does its bit by disaggregating data on gender basis setting the stage for quantifying women's contribution to GNP at some future date.

To return to the taxonomy of Government organizations, the third category is of departments which perform very important functions relating to certain sectors of the economy but which have apparently no gender orientation in their activities. Foreign affairs (Ministry of External Affairs), foreign trade (Ministry of Commerce) etc are some examples of State activities in the non-gender category. Similarly, there are economic sectors like Steel, Coal, Petroleum, Power etc. where again the departments deal, as a subject, not with people, but with commodities or resources, though their operations ultimately may affect the lives of citizens in a very profound way. Therefore, these departments do not feature in the picture in Part II. Of course, all Departments employ human beings and, therefore, in their recruitment, staffing and other personnel policies, they have to follow the guidelines of the Department of Personnel, which has issued fairly detailed instructions for a gender-fair personnel management. Similarly, the housing needs of women employees are governed by the Department of Urban Development rules on pool accommodation. And above all, the Supreme Court judgement in the celebrated Vishaka case on sexual harassment at the workplace has led to a flurry of activities in all Government departments and agencies to comply with all the do's and don'ts concerning the complaint mechanism and disciplinary action against erring staff.

Another large area of State activity relates to the public sector, comprising State undertakings, authorities, boards, commissions, etc. Together, they employ hundreds of thousands of employees, many

of them women, and their activities span the entire spectrum of national life. From banking to aviation, power to sports, culture to welfare, these semi-autonomous organizations represent an extension of the State and many of the Government departments have given detailed accounts of the working of these public bodies operating under their respective umbrellas. However, these accounts are not included in Part II which has been limited, by design, to departments themselves. It may suffice, however, to say that these public organizations all follow general guidelines issued by the concerned Departments of the Government. For example, the Bureau of Public Enterprises under the Department of Public Enterprises in the Ministry of Industry issues guidelines on recruitment and personnel policies for the public sector and the Standing Committee on Public Enterprises (SCOPE) coordinates the implementation of such guidelines. In the wake of the Supreme Court judgement referred to earlier, detailed instructions were issued by the Department of Personnel as also the Bureau of Public Enterprises for strict implementation of the guidelines. SCOPE set up its own women's wing. Many of the Departments did report in detail on how the various public corporations under their control were implementing these instructions of the Government. Some of the undertakings, indeed, go beyond Government directives in the matter of welfare provisions for women etc as a result of their negotiations with the staff or unions. For example, the Indian Bank Association, a trade association of all banks, including public sector banks, has in its bipartite settlement provided for maternity leave provisions of a very liberal order. But these details are not mentioned in Part II.

Another significant exclusion is the programmes of the state and local level governments. This is not to minimize the role of these governments; indeed women's development is largely in the domain of state governments, and local bodies - urban and rural - have often taken admirable initiatives. But all that falls outside the scope of this present document.

In this manner, the material contained in Part II constitutes the sum total of response of all Central Government Departments to the questions of gender equity and equality as they have evolved over the decades.

Here it is useful to point out that these various programmes do not exist in a vacuum. They all form part of the strategy of development which the Government has adopted since Independence. The process of planned development inaugurated in 1951, launched a series of Five Years Plans. These Plans themselves were a response to the prevailing and evolving ideology of development which was also influenced by the findings of various review committees and commissions as also by the pronouncements and declarations of various international forums and conferences, where the country was an active participant. This evolution of various schemes and programmes was designed from time to time to provide content to the various provisions contained in the constitution and the laws. It will be useful, therefore, to take a journey through these Plans to get an idea of the way in which schemes, plans and thinking have evolved over the decades.

Though the concern for women's issues had been part of the ideology underpinning the freedom movement and a sub-committee on women set up under the National Planning Committee had submitted several recommendations as early as in 1941, yet not much of this was reflected in the early plan documents of Independent India. Actually, a journey through India's plan documents is like an uphill climb with each successive plateau affording a wider horizon so far as the women's issues are concerned.

Five Year Plans

It has become convenient to divide this journey into three phases i.e 1950s and 1960s – when the approach was welfare centred; 1970s and 1980s – when developmental issues came to the fore, and the 1990s – when the goal became women's empowerment.

In the beginning, the whole approach was on a low profile and was conceived in a narrow, welfare oriented context where the State's role was minimal. The needs of women were clubbed with those of all other disadvantaged, handicapped or weaker sections, who needed community aid. The First Five Year Plan (1951-56) document, for example, dealt with the subject of women's development under the chapter on Social Welfare. It said "the principal social welfare problems relate to women, children, youth, family, under-privileged groups and social vice. Problems relating to health, maternity and child welfare, education, employment and condition of work are dealt with elsewhere in this report. Some problems of women have to be dealt through social legislation but other problems pertaining to health, social education, vocational training, increased participation in social and cultural life, provision of shelter and assistance to the handicapped and maladjusted, call for programmes at the community level".

Taking what looks like a hands-off approach, the document says that "a major responsibility for organizing activities in different fields of social welfare, like the welfare of women and children, social education, community organization, etc, falls naturally on private voluntary agencies. These private agencies have for long been working in their own humble way and without any adequate State aid for the achievement of the objectives with their own leadership, organization and resources. Any plan for the social and economic re-generation of the country should take into account the services rendered by these private agencies and the State should give them the maximum co-operation in strengthening their efforts".

A sum of Rs. 4 crore was provided as grants-in-aid to voluntary social service organizations for strengthening, improving and extending the existing activities in the field of social welfare and for developing new programmes and carrying out pilot projects. It was envisaged that this fund of Rs.4 crore should be administered by a Board to be set up by the Central Government to which a great deal of administrative authority would be devolved. The Board would be predominantly composed of non-officials, who had actual experience of field work in promoting voluntary welfare activities.

Thus, it would be seen that while the problems of women in difficult circumstances i.e. destitutes or widows etc. were assigned to the care of voluntary agencies, the issues relating to ordinary women in the matter of education, health or employment were submerged in the respective sectoral discussions. Though it may be argued that all problems of women were being addressed in different sections of the plan, not only was the approach diffused but also the focus on women in these sectoral discussions was also welfareist and based on a uni-dimensional perception of women's role as mothers or wives rather than as individuals entitled to "self-development and self-expression".

The Second Plan (1956-61) continued the same hold-all approach to welfare and a largely hands-off approach to the State's involvement. It reiterated that a comprehensive social welfare programme would include social legislation, welfare of women and children, family welfare, youth welfare, physical and mental fitness, crimes and correctional administration and welfare of the physically and mentally handicapped.

The Central Social Welfare Board had already been set up for assisting voluntary agencies in organizing welfare programmes for women and children and handicapped groups. The Board, in collaboration with State Governments, organized State Social Welfare Boards throughout the country. This network of Boards assisted voluntary institutions including women's welfare institutions.

The Social Welfare Board had also taken up welfare extension projects, each serving some 25 villages and providing maternal and child health services, craft classes, social education for women and care of children through *balwadis*. The Board also organized extensive training programmes for women, village-level workers and for mid-wives. It also made a beginning in tackling the difficult task of providing work for women in their homes. For this purpose, some match factories were established.

Later, these welfare extension projects were made over to *mahila mandals*, which had been set up under the Community Development Programme and they received financial assistance from the Social Welfare Board and the CDP budgets of the State Governments.

The Third Five Year Plan (1961-66) continued the same approach to women's welfare, with assistance being provided for expanding the existing welfare services and for assisting the voluntary organizations to continue services already established. The Plan pinpointed women's education and training as a major welfare strategy. The largest share was provided for expanding rural welfare services and starting of condensed courses for education of out-of-school women and girls. Stress was also laid on better coordination between various agencies at the Centre and the State levels for better utilization of available resources and improvement in the quality of services. This would avoid duplication and overlapping. It was also suggested that the voluntary agencies should themselves develop along specialized lines, each selecting a limited area of activity in which the workers gain experience and intimate knowledge of problems.

No significant initiatives were taken in the years immediately following the Third Plan or in the Fourth Five Year Plan (1969-74). It is also worth noting that the scale of assistance to welfare sector, as a whole, was quite limited and expenditure usually fell far short of the provisions, limited as they were. To illustrate, the expenditure on these programmes in first three Plan periods was only Rs.1.6 crores, Rs.13.4 crores and Rs.19.4 crores respectively and the Fourth Plan had made a provision of Rs.41.38 crores. Of course, in the area outside social welfare, attention was being given to women's education and health. Following the report of the National Committee on Education in 1958, which had urged prioritization of women's education, greater resources were allocated for the same. In the area of health, supplementary nutrition of children and nursing mothers had been introduced by the welfare department. The major programme was that of Family and Child Welfare Projects, each project having one main centre and five sub-centres. Their main activities were provision of integrated services to children in the villages, specially to pre-school children, and provision of training to women in home craft, health education, nutrition and child care. To begin with, welfare extension projects, begun in coordination with the Community Development Blocks, were converted into family and child welfare projects. The Central Social Welfare Board had also assisted voluntary organizations which implemented programmes for women and child welfare such as condensed courses of education for adult women or urban welfare extension projects etc. Attempts were also made for integration of family welfare and general health care through the maternal and child health care programme which focused on prophylaxis against nutritional anaemia, immunization of pregnant mothers and nutrition to vulnerable groups, and nutrition education, etc.

Besides, from the Third Plan onward more and more resources and attention were being focused on population control and women's role in reproduction was being addressed more vigorously than their productive role in the society and economy. Thus, though the focus started shifting from welfare to social sectors i.e. education and health and human resource development, there was still no focus on women's economic situation or their role in productive sectors, like agriculture, animal husbandry, etc. where most of them worked.

From the Fifth Plan (1974-79) the emphasis definitely moved to development because it was felt that India could not develop if 50% of its population i.e. women, were unable to develop to their full potential. Therefore, the new approach aimed at integration of welfare schemes with development services and stress was laid, alongside education and health, on beneficiary oriented schemes of economic benefit and employment for women. However, in all this, the perception of the role of a woman still remained one of a homebound individual devoted to the care of the family and she was seen as a client of development i.e. as the beneficiary of various services.

The Sixth Plan (1980-85) represents a major watershed in development planning so far as women are concerned. There was a new ferment in the women's movement in the country. Review Committees had critiqued the development strategy hitherto followed and its impact on the status of women. There was greater interaction between the women's organizations, academics, scholars and the planners. This led to a new recognition of the inadequacies of the approach so far followed and the finalization of a new strategy and the forging of new instruments. For the first time in the history of development planning, women's development was recognized as one of the development sectors and included in the Sixth Plan as a separate chapter entitled "Women and Development" and social welfare pertaining to women's welfare became one of its sub-sectors. The Plan recalled the Constitutional mandates for equal rights and privileges for women but acknowledged the gap between the promise and the reality. It diagnosed the problem principally as an economic one - "the low status of women in large segments of Indian society cannot be raised without opening up of opportunities of independent employment and income for them." This was a significant departure from the approach followed so far, which had focused principally on welfare and social services for women. The Plan emphasized a multi-pronged strategy of education, employment and health, which were seen to be inter-dependent, but ultimately dependent on the total developmental process.

The major thrust of the Sixth Plan in the field of welfare of women was their economic upliftment through greater opportunities for salaried, self and wage employment. For this purpose, appropriate technologies, services and public policies were called for. The technological package would include imparting new skills and upgrading existing skills. The service package would pay attention to training and credit needs and to marketing. The public policy package would include measures in the areas of ownership rights, enforcement of wage laws and employment impact assessment.

Since the key to achievement of improvement in the status of women was seen to lie in a fair share of employment opportunities, areas and sectors where women's employment was low or declining would be identified for priority treatment. Support services like creches would be established by employers, public and private, and Equal Remuneration Act would be made more effective. The needs and problems of self-employed women were also recognized and training programmes under the

Apprenticeship Act, Vocational Training Programme and the national scheme of Training of Rural Youth for Self Employment (TRYSEM) would cover larger number of rural women.

Social Welfare programmes were given an economic orientation with the focus on hostels for working women etc.

Making a departure from the family based approach of development, the Plan identified women as the most vulnerable members of the family and hence economic emancipation of family with specific attention to women, education of children and family planning would constitute the major operational aspects of a family centred poverty alleviation strategy.

To take corrective measures for gender equity, statistical data of physical achievement in beneficiary oriented programmes would be collected by sex and to ensure women's economic independence, government would endeavour to give joint titles to husband and wife in all developmental activities involving transfer of assets, mainly distribution of land and house sites and beneficiary oriented economic units.

The education and health programmes were also reviewed to give them an economic orientation with a focus on training and nutrition.

In the Seventh Five Year Plan (1985-1990), the multi-pronged approach of the previous plan was carried over. The long-term objectives of the development programmes for women were focused directly on economic and social status in order to bring them in the mainstream of national development. The basic approach centered on inculcating confidence among women and bringing about an awareness of their own potential for development as also their rights and privileges. An integrated multi-disciplinary approach was adopted for covering employment, education, health, nutrition and application of science and technology and other related aspects in areas of interest to women. It emphasized efforts to extend facilities for income generating activities and to enable women to participate actively in socio-economic development.

A number of beneficiary oriented programmes under various schemes were identified for monitoring by the newly set up Department of Women and Child Development under the Ministry of Human Resource Development. Individual sectors were scrutinized for identifying opportunities for women. In the agriculture and allied sectors, special attention was to be given for improvement of existing skills of women and imparting new skills under the programme of farmers' training. In the Integrated Rural Development Programme (IRDP) efforts would be made to select households headed by women beneficiaries for which a quota of 20% was mentioned. These were the beginnings of reservation or earmarking of funds or benefits of schemes for women which would later form the basis of 'component planning'. The same approach was also extended to other schemes of rural development and poverty alleviation, for example National Rural Employment Programme (NREP) and Rural Landless Employment Guarantee Scheme (RLEGP) as well as TRYSEM, where a third of the beneficiaries were expected to be women.

Thus, there was an attempt to ensure that women get a fair share of benefits under all development programmes. The Central Social Welfare Board also extended grant-in-aid to voluntary organizations to set up income generating units.

Also in the village and Small Scale Industries (SSI) and Khadi Industries, greater share of employment coverage was envisaged for women. Alongside, a proper monitoring mechanism was planned to ensure optimal utilization of facilities meant for women under different sectors and to minimize leakages. This would be achieved through specialist cells in ministries as well as at the State and District levels.

On the institutional side, a separate department of women's welfare was carved out from the then existing Ministry of Social and Women's Welfare to give a separate identity and to provide a nodal point on matters relating to women's development. Women's development corporations were planned for promoting employment generating activities by supporting schemes for women's groups and women from poorer sections of society.

The nineties ushered in the era of empowerment of women. The Eighth Plan (1992-97) envisaged a more comprehensive approach to women's development. In the re-packaging of the Plan, in the wake of the New Economic Policy adopted in 1991, the subject of women's development got clubbed again under the chapter on social welfare. But pride of place was given to Development of Women, with the focus clearly on employment, education and nutrition etc. with welfare being just a part of the larger picture.

The strategy in the Eighth Plan was to ensure that the benefits of development from different sectors did not bypass women and special programmes were implemented to complement and supplement the general development programmes and these latter would reflect greater gender sensitivity.

Thus, the emphasis was on mainstreaming of the gender perspective in development, so that women get a fair share of the benefits of development in all socio-economic sectors.

An equally important change was to view women as equal partners in development and not merely as beneficiaries of various schemes. Support was also extended to voluntary agencies for their advocacy and social activism programmes and the newly established Panchyati Raj Institutions (PRIs) were to be involved in designing and implementation of women's programmes.

Importantly, women's role was seen in more holistic terms and not restricted to that of motherhood and home-making. Women's issues were to be integrated in the total development endeavours. Stress was also laid on the formation and strengthening of grass-root level women's groups, which would articulate local women's needs and play an important role in decentralized planning and implementation of programmes. Services for women under various programmes of employment, education, health-care, family welfare, drinking water and nutrition would be made available at the grass-root level in the form of a package through convergence and integration.

To usher in changes in societal attitudes and perceptions in regard to the role of women in different spheres of life, mass-media and inter-personal communication techniques would be used. Above all, there would be empowerment of women, implying adjustment in traditional gender specific performance of tasks.

Since the stress was on economic emancipation of women, a lot of attention was given to the employment strategy for women which was to be integrated with all sectoral planning. It would be based

on promotion of opportunity of self-employment and creation of wage employment. A better deal for women working in the unorganized sector was also contemplated through training, technical support, credit and marketing for producers groups and cooperatives.

In the poverty alleviation programme like IRDP, TRYSEM, Jawahar Rozgar Yojana (JRY), targets were set for women beneficiaries, an open acknowledgement of the policy of earmarking resources and funds on a fair proportionate basis.

In view of the large number of women employed in agriculture and allied fields the Plan laid stress on training of women in these occupations and their larger coverage under the extension services. To improve their access to economic resources, surplus lands would be distributed to women headed households, and for married women, joint titles would be given for productive assets, houses and housesites. Similarly, for vocational training women would be encouraged in new expanding areas of technical education like electronics, computer systems, bio-engineering, communications and media.

Even in other areas, like health and education, emphasis was on enhancing women's income to facilitate access to nutrition, etc. Education was perceived as a key to empowerment and emphasis was laid on creating conditions to enable women to participate in the educational process in a more meaningful way.

On the welfare front, self-employment programmes were to be supported and improvement of income of women and skill formation were given priority. The activities of women development corporations as guarantors and promoters of credit to poor women or groups of women were to be expanded.

The Ninth Plan (1997-2002) is another major milestone in the story of women's development. For the first time, Empowerment of Women has been mentioned as one of the nine objectives of the national Plan. So, from a mere sectoral heading, women's development has been elevated to the level of a macro objective. Empowerment is seen as a mode of making women agents of social change and development. Therefore, women cease to be instruments of development and they become its principal actors. The plan focuses on both women-specific and women-related sectors. The principal strategies to achieve the objective of empowerment are :

- (i) To create an enabling environment for women to exercise their rights, both within and outside home, as equal partners along with men.
- (ii) To expedite action to legislate reservation of not less than 1/3rd seats for women in the Parliament and in the State Legislative Assemblies and thus ensure adequate representation of women in decision making.
- (iii) To adopt an integrated approach towards empowering women through effective convergence of existing services, resources, infrastructure and manpower in both women-specific and women-related sectors.
- (iv) To adopt a special strategy of "Women's Component Plan" to ensure that not less than 30 per cent of funds/benefits flow to women from other developmental sectors.
- (v) To organize women into Self Help groups and thus mark the beginning of a major process of empowering women.

In operational term, the Plan elucidates that an integrated approach will be adopted towards empowering women through convergence of existing programmes, with the ultimate objective of achieving the set goals. To this effect, the Ninth Plan directs both the Centre and the States to adopt a special strategy of "Women's Component Plan" in which not less than 30% of the funds / benefits are to be earmarked for women related sectors. It also suggested a special vigil on the flow of earmarked funds through an effective mechanism to ensure that the proposed strategy brings forth a holistic approach towards empowering women.

While organizing women into Self-Help Groups marks the beginning of a major process of empowering women, the institutions thus developed would provide a permanent forum for articulating their needs and contributing their perspectives to development. Recognizing the fact that woman has been socialized only to take a back seat in public life, affirmative action through a deliberate strategy will be initiated to provide equal access to and control over factors contributing to such empowerment, particularly in the areas of health, education, information, life-long learning for self development, vocational skills, employment and income generating opportunities, land and other forms of property, resources, credit, technology and market etc. The Plan notes that there is an urgent need to gender sensitize the census to capture women's work in the informal sector. It also envisages the preparation of satellite accounts to highlight women's work through an appropriate methodology consistent with national accounts. This is to set right the paradox that while women constitute nearly 50% of India's population, their contribution to her GDP amounts to only 1/5th, because most of the work they do at home or outside gets excluded from computation because of definitional and methodological deficiencies.

Keeping in view, the 'right to work' for every citizen, the Plan retains a special focus on women in agriculture and allied sectors. Attention is also given to identifying traditional sectors that are shrinking due to advancement of technology, market shift and changes in economic policies and introducing programmes to retain/upgrade the skills of displaced women to take up jobs in new and expanding areas of employment. Women in the informal sector, who account for more than 90 per cent of working women, receive special attention with regard to their working conditions because of the absence of legislative safeguards.

The need for a conducive credit policy to increase the access for women to credit through an appropriate institutional mechanism is recognized and women development corporations are expected to provide backward and forward linkages of credit and marketing facilities to women entrepreneurs.

The Plan recognizes the need to initiate affirmative action to ensure at least a minimum of 30 per cent reservation for women in services in the public sector and to ensure upward mobility for women in services. Support services like child-care facilities/day care centers and the homes for aged are also envisaged. To secure women's representation at decision making levels, the Plan seeks to encourage coaching facilities to compete in competitive examinations and it lends full support to legislation for reservation of not less than 1/3rd of total seats for women both in Parliament and State Legislative Assemblies.

As economic empowerment of women is mainly related to their participation in decision making with regard to raising and distribution of resources i.e. income, investment and expenditure at all levels, special efforts are contemplated to enhance their capacity to earn, besides enlarging their access to and control/ownership of family/community assets.

Responding to the increasing evidence of feminization of poverty in the wake of new economic policies centred on liberalization, privatization and globalization, the Plan promises that the present policies and programmes will be re-designed to make them more responsive to the special needs of women in abject/extreme poverty. Firstly, the Plan proposes to revamp TRYSEM in its design, curriculum and method of training to improve the employment opportunities for women in poverty. Secondly, poverty alleviation programmes like Development of Women or Children in Rural Areas (DWCRA), IRDP and TRYSEM are to be integrated to extend greater access to financial assistance and training to women's groups. Most importantly, efforts are to be made to ensure that a minimum of 30-40% of the benefits flow to women from all existing poverty alleviation programmes, both rural and urban.

For women in need of special care or protection, usual welfare and rehabilitation services are to be extended.

Since social attitudes and a traditional mindset have a crucial role in determining the status of women, efforts are to be made to put an end to negative and stereotyped portrayal of women and all types of mass-media and communication resources are to be used to change people's modes of thinking and behavioural patterns.

Institutional Set Up

That was the women's journey through the Five Year plans over half a century. The changes in approach to women issues also had to bring about changes in the institutional set up. During the Fifth Plan, a Bureau of Women's Development was created inside the Ministry of Social Welfare and in 1985, this Bureau instead of just being a section in the Social Welfare Ministry moved to be a separate Department of Women & Child Development (WCD). Its function was enlarged because it was felt that women's development could not be confined to only a few schemes of the Department of WCD. Women had to get a fair share in various other sectoral programmes. Gradually this was developed into the idea of a component plan which envisages each and every Ministry auditing its total plan and quantifying what it was going to spend on women either on schemes exclusively meant for them or on schemes relating to them. Beneficiary targets were also fixed and WCD was given the responsibility for monitoring the flow of resources from various sectors into women's programmes.

The Department of Women & Child Development, being the national machinery for empowering the women in the country was made responsible for mainstreaming women in the national development by raising their overall status on par with that of men. The Department, in its nodal capacity, formulates policies, plans and programmes, and enacts or recommends legislation affecting women and guides/coordinates/streamlines the efforts of both governmental and non-governmental organizations working to improve the lot of women in the country. The programmes of the Department include - continuing education and training, employment and income generation; welfare and support services and gender sensitisation and awareness generation. These programmes of an innovative nature play the role of being both supplementary and complementary to the other general development plans in the sectors of health, education, labour and employment, rural and urban development etc.

The Central Social Welfare Board, which is an apex organization at the national level, acts as an umbrella institution networking through State Social Welfare Boards and through them with thousands

of voluntary organizations working for welfare and development of women and children in the country. In order to address the need for providing micro-finance services to poor women, the Rashtriya Mahila Kosh (RMK) was set up in 1993 as a registered society. The National Institute of Public Cooperation and Child Development (NIPCCD) assists the Department in the area of research and training related to women and children. The National Commission for Women was set up in 1992 as the highest statutory body for overseeing and safeguarding and protection of women's rights and privileges. Similar Commissions were set up in many States also. The Women's Cells set up in the Central Ministries/ Departments of Labour, Industry, Rural Development, Science and Technology are expected to develop linkages between the national machinery located in the Department of Women and Child Development and all other women related Ministries/Departments.

Within the Women and Child Department, a Committee on Gender Mainstreaming under the supervision of Prime Minister's Office (PMO) monitors 47 beneficiary oriented schemes. This is facilitated by the gender focal points in other departments. Also in March, 1997, a Parliamentary Committee on Empowerment of Women was set up to monitor the progress towards gender equity and empowerment of women.

Committees

From time to time, various committees were set up to evaluate the impact of constitutional and statutory provisions and the different schemes for social and economic development of women implemented by the departments of central and state governments and to identify gaps or deficiencies. Many of these committees made very searching analyses of the status of women and the efficacy of the framework of policies and laws and schemes in meeting the new aspirations and goals which were espoused by women within the country or abroad. We may look at the work done by some of the important committees in the past several decades because many of the Plans and schemes have emerged as a response to the findings or recommendations of these committees.

The following important Committees are concerned directly or indirectly with the welfare or development of women:-

- (i) National Committee on Women's Education (1958-59).
- (ii) The Committee on Status of Women (CSWI), 1974.
- (iii) The National Committee on Role and Participation of Women in Agriculture and Rural Development (1977-78).
- (iv) The National Committee on Women Prisoners (1986).
- (v) The National Committee on Self-Employed Women and Women in the Informal Sector, (1988).

The Report of the National Committee on Women's Education underlined the need to prioritise women's education. This influenced the priorities of the 3rd and 4th Five Year Plans in the vital area of education for women and girls.

The Committee on Status of Women was set up by the Government in 1971 under the Chairmanship of Ms. Phulrenu Guha. The task of the Committee was to examine all questions relating

to the rights and status of women in the context of the changing social and economic conditions in the country. The Committee comprising, among others, eminent representatives of the women's movement, made a thorough study of women in various aspects of their life. It raised basic questions about the socialization process inherent in a hierarchical society, about the resource, power and assets distribution patterns and about diverse cultural values of this country. The report finally made several seminal recommendations on both the schematic set up of the field as well as the organizational and institutional framework for planning, implementing and monitoring the schemes. It also stressed the need for special measures to transform the *de jure* equality guaranteed by the constitution and the legal edifice into *de facto* equality.

The National Committee on the Role and Participation of Women in Agriculture and Rural Development, which gave its report in 1977-78, reviewed the policies in these areas.

The National Expert Committee on Women Prisoners examined the condition of women prisoners in the criminal correctional justice system and made a series of recommendations relating to necessary legislative reforms, prison reforms and the reforms of other custodial institutions and for the rehabilitation of prisoners in so far as women convicts are concerned.

The National Commission for Self Employed Women and Women in the Informal Sector (Shram Shakti Report) examined the entire gamut of issues facing women in the unorganized sector and made a number of recommendations relating to employment, occupational hazards, legislative protection, training and skill development, marketing and credit for women in the informal sector.

Action Plans and Policies

Similarly from time to time various action plans or perspective plans were brought out by successive governments either in response to their own election manifestos or as a result of important committee reports. Likewise, various other policy documents having a bearing on women's lives also appeared now and then and these also deserve a place in the chronological saga of the development of women. The more important ones are enumerated below:-

The National Policy on Education, (1968).

The National Policy for Children, (1974).

The National Plan of Action (For Women), (1976).

National Health Policy, (1983).

National Policy on Education and Programme of Action (1986 - Revised in 1992).

National Perspective Plan for Women (1988-2000).

National Plan of Action for the Girl Child (1991).

National Nutritional Policy (1993).

National Population Policy (2000).

National Policy for Empowerment of Women (2001).

The NPE emphasized the role of education as an instrument with of social justice and social transformation.

The National Policy for Children considers children as the country's supreme asset and the State accepts their nurture as its own responsibility. The policy provided the required framework for assigning priority to different needs of a child. The programme of Integrated Child Development Services (ICDS) was launched in 1975 seeking to provide an integrated package of services in a convergent manner for the holistic development of the child. It also takes care of the needs of expectant and nursing mothers.

The National Plan of Action adopted in 1976 became a guiding document for the development of women till 1988. The National Health Policy of 1983 sets specific targets like bringing down high rates of infant and maternal mortality and for universal immunization by the year 2002. The MCH services were further strengthened by launching the programmes of Child Survival and Safe Motherhood, (CSSM) in 1992-93.

The National Policy on Education (NPE) was formulated in 1986 and further updated in 1992. It emphasized universal enrollment and retention of children, especially girl children. It affirms that a new structure of equality between sexes must rest on the corner stone of education for girls. It aims at removing traditional discrimination and sex stereotyping by diversifying school curricula and promoting the access of girls to vocational and professional courses. Special features were incorporated into existing schemes in favour of women, like the Operation Black Board scheme where at least 50 per cent of the teachers have to be women. This document emphasized Education for Women's Equality, not just in terms of full and equal access of girls and women to education and the removal of gender disparities but the major responsibility and importance of education, with all its institutions, for the general empowerment of women by changing the social construction of gender. These documents influenced the approach to health and education of girls and women in the concerned Plan periods.

The National Perspective Plan for Women (NPP) was drafted by a core group of experts as more or less a long term policy document advocating a holistic approach for development of women. It was an effort at evaluating the impact of development plans and programmes on Indian women. It sought to review the policies and programmes as they existed, plan document as they had evolved and studies and reports that had been attempted. The NPP recommended that while programmes for women could continue to be implemented by different Ministries as part of their development plans, it was essential to have a strong inter-ministerial coordination and monitoring body along with its own supporting facilities serviced by the Department of Women and Child Development. This plan laid down a map towards gender equality. It wanted increase in women's participation and presence at decision-making levels and local self-government bodies, State Assemblies and Parliament. It suggested a 30 per cent reservation for women at all these levels but proposed that the seats may have to be filled up by nomination in the early years. It also suggested a three tier structure for implementing the programmes in the women's field, the Department of Women and Child Development as the founthead of policy, the Central Social Welfare Board, and Women's Development Corporation as nodal agencies for implementation of welfare and economic programmes respectively and the Commissioner for Women to look after the enforcement of provisions for the protection of women. Sections of the women's movement were however critical of the perspective Plan for its failure to critique "mainstream development policies" and their adverse impact on women and to address the issue of resources for participatory human development.

The National Nutrition Policy identifies short term and long term measures necessary to improve the nutritional status of women and children in the country as a whole. The policy was specifically drawn up to tackle the problem of malnutrition both through direct nutrition intervention for specially vulnerable groups as well as through other means like nutrition education for improving nutrition intake. It emphasizes a change of feeding practices and intrafamily food distribution. It also puts a special focus on early diagnosis and prevention of malnutrition during pregnancy and lactation, and made a series of recommendations for removing the nutritional deficiency of children and, particularly, of the girl child and also in respect of nursing and expectant mothers, specially, those from the vulnerable sections of the society.

The National Policy on Population 2000 affirms the commitment of the government towards voluntary and informed choice and consent of citizens while availing of reproductive health care services and continuation of the target free approach in administering family-planning services. The policy includes incentives or awards for those, who fulfill the requirements of ante-natal checkup, institutional delivery by a trained birth attendant, registration of birth and immunization and special reward for those who marry after the minimum legal age of (21) and (18) and use a terminal method after the birth of the second child. Basically, the objective is to address the unmet needs for contraception, health care infrastructure and health personnel and to provide integrated service delivery for basic reproductive and child health care.

The National Agriculture Policy 2000 states that appropriate structural, functional and institutional measures would be initiated to empower women, build their capabilities and improve their access to inputs, technology and other farming resources. Mainstreaming the gender concern in agriculture would receive particular attention. The approach to rural development and land reforms would focus on recognition of women's rights in land.

The National Policy for Empowerment of Women finalized in 2001 seeks to create an environment through positive economic and social policies for full development of women to enable them to realize their full potential. It seeks to secure the *de jure* and *de facto* enjoyment of all human rights and fundamental freedoms by women on an equal basis with men in all spheres - political, economic, social, cultural and civil. It emphasizes the mainstreaming of a gender perspective in the development process and economic empowerment of women through poverty eradication and micro-credit. For social empowerment, it seeks to modify education, health and nutrition policies to meet the needs of women. It emphasizes the rights of the girl-child and seeks to protect women against violence. It enjoins central and state ministries to draw up time bound action plans for translating the policies into concrete action through a participatory process in consultation with Central/State Departments of Women and Child Development and National/State Commissions for Women. This would specifically include measurable goals, commitment of resources, responsibility for implementation, structure for monitoring and introducing of a gender perspective in the budget process.

International Conventions

In the international arena also, important developments have been taking place in the area of women's rights over the past several decades and particularly since the International Year of Women 1975. The Governments had made many commitments to the progress of women, expressed

internationally through the UN Human Rights instruments, International Labour Organization conventions and the UN Conference agreements.

One of the most significant of these documents is the UN Convention on the Elimination of All forms of Discrimination against Women (CEDAW). This guarantees women equal rights with men in all spheres of life including education, employment, health care, voting, nationality and marriage. All SAARC countries are signatories. India has also signed this document with some reservations. The Commission on CEDAW reviews the reports submitted by all the countries, who are signatories.

Similarly, the World Conference on Human Rights in Vienna in 1993 refuted the distinction sometimes made in human rights discourses between public and private spheres declaring for the first time that women's rights must be protected not only in courts, prisons and other areas of public life but also in the privacy of the home.

Similarly, various ILO conventions embody standards agreed upon by recognized worker groups, employer groups and government representatives and define women's rights in terms of remuneration, working conditions and freedom from exploitation.

The First UN World Conference on Women held in 1975 in Mexico City, marked the beginning of the International Decade of the Woman (UN Development Decade for Women 1975-1985). Since then, World Conferences on Women have been held in Copenhagen in 1980, in Nairobi in 1985 and in Beijing, China, in September 1995.

While stressing on equality of rights/human rights, the Mexico Plan of Action (POA) called for the ratification and implementation of the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) referred to earlier. It declared 1975 as the International Women's Year and called for measures to grant and protect women's rights, including property rights within marriage, reallocate Government funds through programmes elevating the status of women, formulate policies and programmes for equal opportunity and treatment of women workers and equal pay for equal work, adhere to standards for equality and conditions set by the International Labour Organization, accommodate family and work responsibilities through adequate child care and transportation facilities and recognize the substantial role of women in development and place higher value on domestic/family work.

The Copenhagen World Conference of 1980, interpreted equality not only as legal equality but also as equality of rights, responsibilities and opportunities for the participation of women in development both as beneficiaries and as active agents. It urged States to enact legislation guaranteeing women the right to vote, to be elected or appointed to political office and to exercise public functions on equal terms with men. It also called for placing value on women's unpaid work for inclusion in GNP, provision of maternity and parental leave, protection against any sexually oriented practice that endangers a woman's access to jobs or undermines her job performance.

The Nairobi Forward Looking Strategies for the Advancement of Women, 1985 emphasised integration of women in the development process and the need to establish specific targets at each level to increase the participation of women in professional, management and decision making positions in their countries. They also call for promotion of women to position of power at every level within all

political and legislative bodies in order to achieve parity with men. The document urges recognition of the extent and value of women's unpaid work, inside and outside the home, and its inclusion in national accounts and economic statistics. Further, it calls for sharing of domestic responsibilities and establishment of flexible working hours to encourage the same.

The International Conference on Population and Development (ICPD) at Cairo in 1994 affirmed that women's rights are an integral part of all human rights. It stresses that the population and development programme are most effective when steps have simultaneously been taken to improve the status of women. ICPD was the first international forum to acknowledge that the enjoyment of sexual health is an integral part of reproductive rights. Men's rights and responsibilities to their partners were noted. The conference established an international consensus on a comprehensive approach to population stabilization wherein family welfare services are to be provided in the context of Reproductive Child Health Services. It calls for efforts to reduce infant mortality by one third and maternal mortality by one half by 2000. According to its principles, advancing gender equity and equality and the empowerment of women, the elimination of all kinds of violence against women and ensuring women's ability to control their own fertility are cornerstones of population and development related programmes.

The United Nations Fourth World Conference at Beijing 1995, and the Platform of Action adopted at the Conference recognized that all Governments, irrespective of their economic and cultural systems, are responsible for the promotion and protection of women's human rights, since rights of women and the girl child are an inalienable, integral and indivisible part of human rights. The document also specifically stated that violence is an obstacle to the achievement of women's human rights. The Platform of Action deals with twelve areas, namely poverty, education and training, health, violence against women, armed conflict, economy, power and decision making, institutional mechanism, human rights, media, environment and the girl child.

The twenty third special session of the General Assembly "Women 2000 : Gender Equality, Development and Peace for the Twenty-first Century" concluded with governments reaffirming their commitment to the goals and objectives contained in the Beijing Declaration and Platform for Action adopted at the Conference.

These conferences have strengthened the agenda of women's movement all over the world. Convened at the initiative of international bodies these conferences bring together national governments as well as non-governmental organizations and leading academics for an interchange of ideas across political borders. These events have been of a highly participatory character in which NGOs have played an equal part with government agencies. Very significant declarations and commitments have been made on these fora and these documents are expected to be ratified by the national governments. India has always been a leading participant in these conferences and her representatives, both officials and non-officials, contributed significantly to the framing of the agenda, to the deliberations on the floor as well as the drafting of their concluding statements, declarations, or communiqués. Very often these conferences also provided an opportunity, at the preparatory stage, for national delegations, comprising both officials as well as non-official participants, to take stock of the situation at home, expedite decisions on many pending matters and arrive at a consensus on some contentious matters in advance of the conference. In this sense, these international events have also helped to advance the feminist

movement in India, both by involving a large number of NGOs and giving a spur to government thinking and action on the issues concerned. For example, the establishment of the National Commission for Women was also largely a response to the 25th Report of the UN Committee on the Status of Women.

The role of the NGOs in the sector has always been very important. One could say that even the reform movement of the nineteenth century was an initiative of the civil society to tackle problems relating to women. The welfare tradition has been fairly strong in India, where many charitable organizations have provided succour to abandoned women or to women in distress. Immediately, after independence the State also laid great stress on the role of the voluntary agencies in tackling problems relating to social welfare including the welfare of women. References have already been made to the establishment of Central Social Welfare Board which has been giving assistance to a large number of NGOs working mainly in the areas of women and child welfare. In recent decades, many women groups have acquired great prominence in advocating women's causes. Many of them have played very significant role both at the national as well as international levels. But this has been largely an urban phenomenon. The absence of strong women's groups in rural areas to protect the rights of women has been one reason why the pantheon of forces constraining equality – institutional, social and cultural – has still to be countered effectively.

Where have all these plans and programmes, influenced by the myriad forces, national and international, taken the women of India, 50 years after independence? How has the trust with destiny worked out?

Developmental policies and programmes, both in women – specific and women – related sectors, put into action through various Five Year Plans, have made a difference to the socio-economic status of women in the country. Women's life expectancy has risen steadily from 37 years in 1951 to 59.7 years in 1989-93 and overtaken the male life expectancy of 59.0 years during the same period. This is no small achievement. The mean age for marriage for females has also increased from 15.6 years in 1951 to 18.3 years in 1991, thanks partly to the Child Marriage Restraint Act, 1976. The crude birth rate has declined from 40.8 per thousand in 1951 to 27.5 in 1996 and the crude death rate from 15.6 per thousand in 1970 to 8.9 in 1996.

On the other hand, the maternal mortality stood at a high of 437 per hundred thousand live births in 1993 – a very high figure indeed. The sex ratio, the summary indicator of women's status, has shown a continuously declining trend. The ratio which stood at 946 in 1951 declined to 927 in 1991, though there has been a marginal rise to 933 in the latest census of 2001.

In the field of education, the female literacy rate has risen from 7.9 per cent in 1951 to 39.3 in 1991. The fact that the growth rate is double that of male literacy is particularly reassuring. But, it cannot obliterate the disappointing fact that over 60% of women are still illiterate. However, enrolment rates for girls at the primary and secondary levels as also the number of girls in higher educational institutions, including professional institutions, have shown considerable improvement. At the same time, the dropout rates for girls at school remain high.

The female work participation rate has shown consistent rise but more than 95% of women workers are in the unorganized sector, where there are no legislative safeguards, leave alone other benefits. Women's representation in services like the IAS, IPS, IFS has shown an upward trend but

even now ranges within 10-12% as per 1997 figures and cannot be considered adequate. Similarly, in the public arena, reservation of 1/3rd seats for women in local bodies has given a boost to women's representation in grass-root institutions, the figure being as high as 43% in Karnataka. But in the higher reaches of power i.e. in the State Legislative Assemblies and the Lok Sabha, the percentage of women members rose from 2.5 to a bare 3.9 over a 20 year period between 1977 and 1997, in respect of the State Legislatures, and from 4.4 to 7.5 between 1952 and 1998 in the Lok Sabha.

Similarly, the efforts of government and non-government women's organizations and activists to contain violence against women have not borne much fruit. As such, the incidence of atrocities against women has been increasing.

The Human Development Index (HDI) places India at 128 rank (value 0.563) among 174 countries of the world with a life expectancy at birth of 62.9 years, adult literacy of 55.7 per cent and combined primary, secondary and tertiary gross enrollment ratio at 54 per cent. The GDP per capita is 2,077 (PPPS\$) the gender related development under (GDI) rank of India is 108, an improvement over the HDI rank of 128. The life expectancy at birth is 63.3 years (females) and 62.5 years (male). Adult literacy rate is 43.5 per cent (female) and 67.1 per cent (male) for age 15 years and above.

Therefore, all in all, the picture is, like the curate's egg, a mixed one. There is advance on several fronts; obstruction or regression on some. Many of the old pernicious social systems are weakening; many others are resisting change. Many new problems are arising either because of new technologies, (making foeticide easy) or new economic forces (global forces marginalizing women in their traditional occupations) and internationalization of crime (giving a fillip to immoral traffic). New challenges are bound to arise in women's field as indeed in all other fields and they have to be met by the united will and action of the entire people. A problem as multifaceted as women's self actualization, is too important to be left to the government alone. All sections of civil society - the academia, the NGOs, the corporate world - must join hands with the government at all levels, from the Panchayati Raj institutions to the federal polity, and the women and their self help groups to usher in the new dawn of freedom, dignity and opportunity for all.

.... There is a rainbow out there and we have to keep reaching out.

ANNEXURE - A

Important Social Legislations Relating To Women

1. The Indian Divorce Act, 1869 (4 of 1869)
2. The Christian Marriage Act, 1872 (15 of 1872)
3. The Married Women's Property Act, 1874 (3 of 1874)
4. The Guardians and Wards Act, 1890 (8 of 1890)
5. The Legal Practitioners (Women) Act, 1923 (23 of 1923)
6. The Workmen's Compensation Act, 1923 (8 of 1923)
7. The Child Marriage Restraint Act, 1929 (19 of 1929)
8. The Payment of Wages Act, 1936 (4 of 1936)
9. The Indian Succession Act, 1925 (39 of 1925)
10. The Muslim Personal Law (Shariat) Application Act, 1937 (26 of 1937)
11. The Factories Act, 1948 (63 of 1948) as amended in 1976
12. The Minimum Wages Act, 1948 (11 of 1948)
13. The Employees State Insurance Act, 1948 (34 of 1948)
14. The Plantations Labour Act, 1951 (69 of 1951)
15. The Mines Act, 1952 (35 of 1952)
16. The Special Marriage Act, 1954 (43 of 1954)
17. The Hindu Marriage Act, 1955 (25 of 1955)
18. The Hindu Succession Act, 1956 (3 of 1956)
19. The Immoral Traffic (Prevention) Act, 1956
20. The Hindu Minority & Guardianship Act, 1956 (32 of 1956)
21. The Hindu Adoptions and Maintenance Act, 1956 (78 of 1956)
22. The Maternity Benefit Act, 1961 (53 of 1961)
23. The Dowry Prohibition Act, 1961 (28 of 1961)
24. The Christian Marriage Dissolution Act, 1966 (21 of 1966)
25. The Beedi and Cigarette Workers (Conditions of Employment) Act, 1966 (32 of 1966)
26. The Foreign Marriage Act, 1969 (33 of 1969)

27. The Medical Termination of Pregnancy Act, 1971 (34 of 1971)
28. The Bonded Labour System (Abolition) Act, 1976 (19 of 1976)
29. The Equal Remuneration Act, 1976 (25 of 1976)
30. The Contract Labour (Regulation and Abolition) Act, 1979 (37 of 1970)
31. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (30 of 1979)
32. The Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act 1981 (50 of 1981)
33. The Family Courts Act, 1984
34. The Child Labour (Prohibition and Regulation) Act, 1986 (61 of 1986)
35. The Indecent Representation of Women (Prohibition) Act, 1986
36. The Juvenile Justice Act, 1986
37. The Commission of Sati (Prevention) Act, 1987 (3 of 1988)
38. The Mental Health Act, 1987 (14 of 1987)
39. National Commission for Women Act, (20 of 1990)
40. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992
41. The Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994

VII. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

(Adopted 1979; entered into force 1981)

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, of all forms of racism, discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among

countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the *Declaration on the Elimination of Discrimination Against Women* and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following

PART I

Article 1.

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2.

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3.

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4.

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5.

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6.

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II.

Article 7.

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8.

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9.

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10.

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in preschool, general, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education; Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular :
 - (a) The right to work as an inalienable right of all human beings;
 - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
 - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
 - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
 - (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
 - (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the ground of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures :
 - (a) To prohibit, subject to the imposition of sanctions, dismissal on the ground of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
 - (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
 - (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligation with work responsibilities and participation in the public life, in particular through promoting the establishment and development of a network of child-care facilities;
 - (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provision of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13.

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right of family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14.

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provision of this Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
 - (a) To participate in the elaboration and implementation of development planning at all levels;
 - (b) To have access to adequate health care facilities, including information, counseling and services in family planning;
 - (c) To benefit directly from social security programmes;
 - (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
 - (e) To organize groups and co-operatives in order to obtain equal access to economic opportunities through employment;
 - (f) To participate in all community activities;
 - (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
 - (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.

PART IV

Article 15.

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular; they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women :
 - (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - (c) The same rights and responsibilities during marriage and at its dissolution;
 - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
 - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
 - (f) The same rights and responsibilities with regard to guardianship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
 - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
 - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17.

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.
6. The election of the five additional members of the Committee shall be held in accordance with the provision of paragraphs 2, 3, and 4 of this article following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.
7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18.

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect :
 - (a) Within one year after the entry into force for the State concerned; and
 - (b) Thereafter at least every four years and further whenever the Committee so requests.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligation under the present Convention.

Article 19.

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.

Article 20.

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present convention.
2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21.

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
2. The Secretary-General shall transmit the reports of the Committee to the Commission on the status of women for its information.

Article 22.

1. The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23.

Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained :

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

Article 24.

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25.

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26.

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27.

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28.

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29.

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the

parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court

2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30.

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

PA RT - III

**DYNAMICS OF GENDER JUSTICE :
CRIMES AGAINST W O M E N**

VIII. DYNAMICS OF GENDER JUSTICE : CRIMES AGAINST WOMEN*

Dr. A.S. Anand, Chief Justice of India

Gender inequities throughout the world are among the most all pervasive, though deceptively subtle forms of inequality. Gender equality concerns each and every member of the society and forms the very basis of a just society. Human rights issues, which affect women in particular, play a vital role in maintaining peace and prosperity of a just society. It is an established fact that women represent very kernel of the human society around which social change must take place. The last decade of the last century has seen a growing recognition of women's rights as human rights and as an integral and indivisible part of universal human rights. The promotion and protection of human rights of women, will however, remain a challenge to all countries in the 21st Century. Traditionally human rights theory primarily focuses on violations perpetrated by the State. This distinction between State responsibility in relation to public and private acts has, to my mind, contributed to failure to recognise many violations of women's rights as human rights violations and that has contributed to proper focus not being addressed to the real issues.

Crimes against women have existed invariably with time and place. Even periods of transformation have never been comfortable for them. Types and trends of crimes, however, kept changing with change in mind-set and techniques. Unfortunately, women were not only accorded a lower status in the society but they also came to be used as objects of enjoyment and pleasure. Its culmination has been their regular exploitation and victimization. On the continuation of this practice, exploiters became culturally violent, having opted violence as a way of life. Besides, there also developed situational and institutional violence against women along with the new demands of the time where they have to step out of the confines of their homes to earn a living. Thus, crime against women is outcome of their long history of deprivation of socio-economic has remained a distant goal to be achieved. All too often, universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. We must realize that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights. Violation against women is manifestation of historical unequal power relations between women and men which have led to domination over and discrimination against women and is a social mechanism by which the 'subordinate' position of women is sought to be perpetuated. Women suffer even today, though they constitute more than half of the world population.

In a 1980 UN Report, it was reported that

"Women constitute half the world's population, perform nearly two-thirds of its work hours, receive one-tenth of the world's income and less than one-hundredth of the world's property!"

Women comprise 66 per cent of the world's illiterates and 70 per cent of the world's poor. Violence against women, clubbed with these inequalities/deprivations is, to my mind, total denial of her human rights.

* Adapted from Bodh Raj Sawhny Memorial Oration delivered at New Delhi on 2nd December, 2001.

Is it not a sad state of affairs?

The problem therefore needs to be examined in the context of rights for establishment of just and equitable social order, where nobody can be treated or exploited by another as unequal. No law, custom, tradition, culture or religious consideration should be invoked to excuse discrimination against women.

With this backdrop, when we have a glimpse on the developments since 'renaissance', we find that the thrust has appropriately been on conferment of rights rather than recognition of rights of women. Same is true about the United Nations instruments since its inception, starting with the UN Charter, Universal Declaration of Human Rights (UDHR) to Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and later Beijing and other conferences. It is this process of conferment of rights on women and their empowerment that has come to be recognized as gender justice and peace through empowerment of women, is basically another description of the same process. This process has many dimensions, each corresponding to a particular sphere of activity of life, ranging from private sphere (home) to public sphere (outside the home). The process of gender justice, broadly speaking, covers the rights of women against exploitation and victimization. Through law and policy, women have now secured for themselves from crimes committed against them, which negates the whole premises of gender justice. Unless we recognise her rights – her basic human rights – gender justice would only be "lip-service" with no tangible results. For a woman having undergone a criminal assault, all material wealth and status symbols are meaningless. In fact, the incidents of violence or crimes against them are a total negation of their human rights in which gender justice resides. Time and again have we in the Supreme Court of India extended the ambit of Article 21 of the constitution of India and held that mere existence is not the right to live – it is the right to live with dignity. Thus, wherever crimes are committed against women the same should be viewed in the context of violation of her right under Article 21 of the constitution and not merely as a crime against the society.

Is it not ironical that when Indian mythology places women on a very high pedestal and they are worshipped and honoured – Goddess of Learning is **Saraswati**, of wealth **Laxmi**, of power **Parvati** – we adopt double standards in so far as her guaranteed rights are concerned. There has been over the decades an alarming decline in moral values all around and that today is a great challenge which we face particularly in our country. In the name of progress and advancement, we are losing out on our moral values. It is rather sad that while we keep celebrating women's rights in all spheres, we show no concern for her honour and her dignity. It is a sorry reflection on the attitude of indifference of the society.

In India, in spite of special constitutional guarantees and other legislations, crimes against women are rampant. They are on the increase. The constitution imposes a fundamental duty on every citizen through Article 15 (A) (e) to renounce the practices derogatory to the dignity of women. How many of us are aware of this Fundamental Duty? Not many, I suppose. We take pride in talking of our Constitution making special provision in favour of women – yes, indeed such provisions do exist – they were provided by the founding fathers, after great deliberations. But the question is: Have the women been able to reap the benefits provided for them under the constitution of India? The answer,

unfortunately, is not encouraging. There is still a long way to go to achieve the goals enshrined in the Constitution.

In tune with various provisions of the Constitution, the State has enacted many women-specific and women-related legislations to protect women against social discrimination, violence and atrocities and also to prevent social evils like child marriages, dowry, rape, practice of Sati, etc. – the problem, however, is in non-implementation of such laws. Besides patriarchy is essentially based in the household in which men dominate women, economically, sexually and culturally. More narrowly, women exchange their unpaid domestic services for their upkeep. In this perspective, the marriage becomes essentially a labour contract through which the husband controls the labour of his wife. Patriarchal social order is also responsible for discrimination and violence against women. This includes domestic violence, beating, torture, harassment and dowry death. This social order based on putative qualities of "maleness" and "femaleness" needs to be changed. Women, no less than men, require to be treated as "person, not statistical abstraction."

Though women can be subject to all types of crimes but some crimes are specific to women, such as rape, molestation, eve-teasing, trafficking etc. In India, crimes against women broadly fall in two categories : (a) Crimes identified under IPC, and (b) Crimes identified under special laws.

The crimes identified under the Indian Penal Code (IPC) are : (1) rape (sec. 376 IPC), (2) Kidnapping & abduction for different purposes (sec. 363-373 IPC), (3) homicide for dowry, dowry deaths, or their attempts (sec. 302/204B IPC), (4) torture, both mental and physical (sec. 498A IPC), (7) importation of girls (upto 21 years of age), (sec. 366B IPC), (8) molestation (Sec. 354 IPC), and (9) sexual harassment (sec. 509 IPC).

The crimes identified under the special law are : (1) Commission of Sati (Prevention) Act, 1987, (2) Dowry (Prohibition) Act, 1961, (3) Immoral Traffic (Prevention) Act, 1956, (4) Indecent Representation of Women (Prohibition) Act, 1986, (5) the Medical Termination of Pregnancy Act, 1971 and so on.

Notwithstanding the enactment of the laws relating to dowry, rape, violence against women, the ground reality is rather distressing. An article on 'Status of women in India – A depressing scenario' which appeared in the Tribune of Chandigarh edition on 15th April, 1999 points out that rape takes place once in every 54 minutes; eve-teasing in every 51 minutes; molestation once in every 26 minutes and dowry deaths in every 1000 minutes. Misuse of the test to determine the sex of the child in the womb and the termination of pregnancy in the event of a female foetus gives an indication of the despicable behaviour pattern. The evil of abortive female foetus presents a grim reality. According to 1981 census there were 933 women per 1000 men. According to 1991 census report there were 929 women per 1000 men. Maternal mortality accounts for the largest number of deaths among women in general and of the women in reproductive age group in particular.

The reported incidence are much less than the real happenings. During 1998 only, in the State of Kerala 564 cases of rape, 1768 molestations, 132 kidnapping incidents, 87 cases of eve-teasing, 21 cases under section 304B, 2013 violations under section 498A and 2870 other offences were reported.

The crime figures from 1989-1995 show that the rate of violence against women is increasing rapidly. It increased from 67,079 in 1989 to 1,06,471 in 1995 under different crime heads.

According to the recent 1998, National Crimes Records Bureau Report noted an increase of 8.3 per cent and 4.8 per cent over the years 1997 and 1996 respectively in crimes against women. In absolute numbers, an increase of 10,073 cases was reported at the all India level in 1998 over 1997.

According to recent reports, during the year 2000, upto September 30, 2000, 350 rape cases have been reported only on Delhi [The Hindustan Times, 24 October, 2000].

Should the flag of civilisation in a civilised society not fly "half-mast" to awaken the consciousness of the society?

It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars.

There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provision of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the fact on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime.

Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self esteem and dignity – it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.

Crimes in the form of trafficking of the girl child, prostitution, domestic violence and incest are on the increase. It is an area of concern. Child sex is a rapidly growing business in India, where nearly five hundred thousand children are prostituted. Children do not come flocking to the brothels, they are brought through illegally but highly systematic, organized trafficking networks run by experienced individuals who buy, transport and sell children into prostitution. Approximately 75,000 girls and women enter the trade every year, 80% of them do it out of situational compulsions.

The Immoral Traffic (Prevention) Act, 1956 (amended in 1986) had been enacted to combat prostitution but the prostitution is on the rise. Police is unable to keep a check on the brothel-keepers and pimps. Many unfortunate teenaged female children are being sold in various parts of the country for paltry sums even by their own parents, compelled by poverty, who find themselves unable to maintain their children hoping that their children would be engaged in household duties or manual labour. But they are actually selling them to the broker in the flesh trade, who brutally treat them till they succumb to his wishes. Thus, girls and women in large number in the prime of their youth are being forcibly pushed into the flesh trade which flourishes in utter violence of all canons of morality, decency and dignity of a human being.

Prostitution is not prohibited under the amended Prevention of Immoral Trafficking Act, 1986. Despite the amendment, the legislation falls short of its objective and has not proved to be an effective measure to check commercialized flesh trade. It acts more as supplement to the provisions of the IPC concerning kidnapping, sale, abduction, wrongful restraint of women and children, emphasizing only the punitive aspects of the problem. The Act does not provide for punishment to the client and makes no provision for the rehabilitation of commercial sex workers who are rescued from the brothel. Instead of aiming at the abolition of prostitution as such, the Act makes it per se a criminal offence or punishes a woman because she prostitutes herself. Maybe it is because of a weak law enforcement mechanism and inadequacies in the criminal justice system, but the situation in every case invites attention of all concerned agencies : legislature, judiciary and other enforcers of law. It appears that our society is becoming a psycho-sick society with an uncivilized behavior. Whenever crime is committed against women and that too a violent crime, it sends shock waves to the society but those shock waves burst like bubbles in a very short time. The society must change its attitude.

Internationally also, the World Conference on Human Rights (1993) at Vienna, which was one of the main turning points in women's right declared that human rights of women and of the girl child are inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on ground of sex are priority objectives of the international community. The Conference urged upon governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for protection and promotion of human rights of women and the girl child [Vienna Declaration and Programme of Action, June 1993]. It, for the first time, recognized the gender based violence against women in public and private life as a human rights concern. The Vienna Declaration specifically condemned gender based violence and all forms of sexual harassment and exploitation. The conference concluded that :

"The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of international community ... The world conference on human rights urges governments to intensify their efforts for the protection and promotion of human rights of women and the girl-child."

The subsequent UN Conference and regional meetings, especially the Fourth World Conference on Women held in Beijing in September, 1995, concluded that issues critical to the future well being of the women of the world in terms of resource development, protection of environment, establishment of peace, improvement of health and education depend on the adjustment of the status of women. For this it suggested a multi-pronged, integrated approach.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the main foundation of rights in respect of women to which 166 countries are members till date (including India). While contribution of women to economy, family and society are not recognised by the states, the Convention recognises that discrimination against women in these areas hampers economic growth and prosperity and detrimentally affects the society in general. It brings into focus the role of education of both men and women in changing the attitudes, which can lead to the equality of rights and responsibility for them and can help in overcoming the prejudices and practices to the goal of actual as well as legal equality and encourages adoption of temporary and special measures directed at accelerating de facto equality between men and women. The UN General Assembly adopted an Optional Protocol to the Convention on October 6, 1999 and called on all states parties to become party to it as early as possible. It has now been ratified by required number of countries and will come into force on December 22 2000.

Regarding crimes against women in different nation-states, the committee on CEDAW places much emphasis on incidence of violence against women. The UN appointed a Special Rapporteur on violence against women and adopted a Declaration on the Elimination of Violence Against Women in 1994 [GA Res 48/104 (1994)]. It defines violence against women as "Any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

With a view to convert the equality of women from de jure to de facto, educating females would play an important role. Most of the women in our country are illiterate, and in comparison to males, are ignorant of the basic law. Most of the times, they do not register a case against those persons who violate their person or commit crimes against them. Lack of awareness, political participation, poverty, traditional oppression and customs, place an Indian woman at a receiving end. Though violence stalks women's lives everywhere, law can do little unless present cultural and social perceptions change. This calls for a resolve from all of us. As regards education of women, according to the census of 1991, the general literacy rate was 52.11 per cent. The female literacy rate was 39.42 per cent as compared to the male literacy rate of 63.86 per cent. These figures indicate that 60 per cent of our female population i.e. six out of every ten females – still remain illiterate. So long as there is disparity between the male and female in education level, the difference between the position of men and women would continue to exist. It is unfortunately true that a woman has, even in her own home been given a rather 'subordinate' role to play. Her major concern is expected to be catering to the comforts of the family as a dutiful daughter, loving mother, obedient daughter-in-law and faithful submissive wife. She is perhaps everything except a human being on par with her counterpart – the man. The society has unfortunately made her dependant either on father, mother, husband or son. To usher in gender equality all this must change.

For the emancipation for women in every field, economic independence is of paramount importance. Along with economic independence, equal emphasis must also be laid on the total development of women – creating awareness among them about their rights and responsibilities – the recognition of their vital role and the work they do at home. It is necessary, that a new social system must evolve. The society must respond and change its attitude. Major surgery is required and not merely cosmetic changes. In *Kundula Bala Subrahmanyam v. State of A.P.*, 1993 (2) SCC 684, a case of bride burning, I said :

"Of late there has been an alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides, This growing cult of violence and exploitation of the young brides, though keeps on sending shock waves to the civilised society whenever it happens, continues unabated. There is constant erosion of the basic human values of tolerance and the spirit of "live and let live". Lack of education and economic dependence of women have encouraged the greedy perpetrators of the crime. It is more disturbing and sad that in most of such reported cases it is the woman who plays a pivotal role in this crime against the younger women, as in the case, with the husband either acting as a mute spectator or even an active participant in the crime, in utter disregard of his matrimonial obligations. In many cases, it has been noticed that the husband, even after marriage, continues to be 'Mamma's baby' and the umbilical cord appears not to have been cut even at that state!"

Awakening of the collective consciousness is the need of the day. Change of heart and attitude is what is needed. If man were to regain his harmony with others and replace hatred, greed, selfishness and anger by mutual love, trust and understanding and if women were to receive education and become economically independent, the possibility of this pernicious social evil dying a natural death may not remain a dream only. The legislature, realising the gravity of the situation has amended the laws and provided for stringent punishments in such cases and even permitted the raising of presumptions against an accused in cases of unnatural deaths of the bridges within the first seven years of their marriage. The Dowry Prohibition Act was enacted in 1961 and has been amended from time to time, but this piece of social legislation, keeping in view the growing menace of the social evil, also does not appear to have served much purpose as dowry seekers are hardly brought to book the convictions recorded are rather few. Laws are not enough to combat the evil. A wider social movement of educating women of their rights to conquer the menace, is what is needed more particularly in rural areas where women are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation. The role of courts under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner. A socially sensitive judge, in my opinion is a better statutory armour in cases of crimes against women than long clauses of penal provisions, containing complex exceptions and provisos.

Let me, however, caution that fight for justice by females or cry for gender equity should not be treated as if it is a fight against men. It is a fight against traditions that have chained them – a fight against attitude that are ingrained in the society – it is a fight against proverbial Lakshman Rekha which is different for men and different for women. Therefore, men must rise to the occasion. They must recognise and accept the fact that women are equal partners in life. They are individuals who have their own identity. Over the centuries of human civilization, clear-cut gender roles have emerged, based on the stereotype conceptions of feminine and masculine characteristics. Society needs to change its attitude. It is high time that Human Rights of Women are given proper priority.

Primarily, it is for the men folk to bring about a change and I hope it would happen sooner than later.

IX. VIOLENCE AGAINST WOMEN : REVIEW OF RECENT ENACTMENTS

Flavia Agnes

Introduction

If oppression were to be tackled by enacting laws, then the last decade (1980-89) could be declared as the golden era for Indian women, when laws were given on a platter. During this period every single issue concerning violence against women taken up by the women's movement resulted in legislative reform.

The enactments conveyed a positive picture of achievement but the statistics revealed a different story (Table 1). Each year the number of reported cases of rape and unnatural death increased. The rate of convictions under the lofty and laudable legislation were dismal (Table 2) and hence, their deterrent value was lost. Some enactments turned out to be mere ornamental legislation or paper tigers.

The question foremost in the public mind was why the enactments were ineffective in tackling the problem. The answer would lead one to a complex analysis of the processes involved.

Table 1. Reported Cases of Domestic Violence in the City of Greater Bombay

Year	Murders U/S 302 IPC	Suicides U/S 306 IPC r/w S. 304B IPC	Harassment U/S 498A and U/S 3, 4, 5 of Dowry Prevention Act
1986	4	38	41
1987	12	45	143
1988	2	56	152
1989	13	103	177
1990	9	72	143

Source : Social Service Branch, CID, Bombay

Table 2. Disposal of Rape in Bombay 1985-1989

Description	1985	1986	1987	1988	1989
Registered	101	102	85	108	108
Charge Sheeted	93	96	76	104	100
Convicted	8	1	2	1	1
Acquitted	4	3	1	-	2
Pending Trial	81	91	72	102	95

Source : The Lawyers, April 1991

First, the laws, callously framed, more as a token gesture than due to any genuine concern in changing the status quo of women, were full of loopholes. There was a wide disparity between the initial demands raised by the movement as well as the recommendations by Law Commissions and the final enactments. Many positive recommendations of the expert committees did not find a place in the Bills presented to Parliament. While one organ of the State, the legislature, was over-eager to portray a progressive pro-women image by passing laws for the asking, the other organs - the executive and the judiciary, did not express even this token measure of concern. Their functioning was totally contradictory to the spirit of the enactment.

The defective laws were welcomed by the movement as a first stepping stone towards women's empowerment. But the motive beneath the superficial concern of the State went unnoticed. The question as to who would ultimately benefit by these enactments was seldom asked. The campaigns with a thrust on law reform could not maintain the pressure, once the legislation was enacted. There was a lull and a false sense of achievement resulting in complacency. Hence, the impact of the enactments in court proceedings was not monitored with the same zeal.

The campaigns themselves were limited in scope. At times, the issues which were raised, addressed only the superficial symptoms and not the basic questions of power balance between men and women, women's economic rights within the family and their status quo within society. The solutions were sought within the existing patriarchal framework and did not transcend into a new feminist analysis of the issue. They seldom questioned the conservative notions of women's chastity, virginity, servility and the concept of the good and bad woman in society. For instance, the rape campaign subscribed to the traditional notion of rape as the ultimate violation of a woman and a state worse than death. It did not transcend the conservative definition of forcible penis penetration of the vagina by a man who is not her husband.

The campaign against dowry tried to artificially link dowry which is property related and death which is an act of violence. If the campaign had succeeded it could have benefitted the woman's brother and father. Neither would it have elevated the woman's status in her matrimonial home nor could it have ended domestic violence. Any remedy, to check the superficial malady, no matter how effective and foolproof, could not effectively arrest the basic trend of violence against women which is the result of women's powerlessness in a male-dominated society.

The campaigns and the ensuing legal reforms have certain commonalities. The campaigns were highly visible and had received wide media publicity. Government response was prompt. Law Commissions or expert committees were set up with a mandate to solicit public opinion and submit their recommendations to Parliament. But the recommendations which would have had far-reaching impact and could have changed the status quo in favour of women, did not find a place in the final enactment. The enactments uniformly focused on stringent punishment rather than plugging procedural loopholes, evolving guidelines for strict implementation, adequate compensation to the victims and a time limit for deciding cases.

The apprehension of legal experts both within and outside the women's movement that stricter punishment would lead to fewer convictions proved right. The question confronting us today is whether social change and gender justice can be brought about merely by enacting stricter laws.

Each law vests more power with the State enforcement machinery. Each enactment stipulates more stringent punishment which is contrary to progressive legal reform theory of leniency to the accused. Can progressive legal changes for women's rights exist in a vacuum, in direct contrast to other progressive legal theories of civil rights? So long as basic attitudes of the powers-that-be remain anti-women, anti-minority and anti-poor, to what extent can these laws bring about social justice? At best they can be an eyewash and a way of evading more basic issues of economic rights and at worse a weapon of State co-option and manipulation to further its own ends.

The rape campaign is a classic example of the impact of public pressure on the judiciary. As can be observed from the discussion on the rape campaign, favourable judgements were delivered before the amendment when the campaign was at its peak as compared to the post-amendment period. Perhaps pressure is a better safeguard to ensure justice than ineffective enactments.

The Maharashtra Regulation of Prenatal Diagnostic Techniques Act, 1988, had a greater participation of activists at the initial stage of formulation of the Bill. But it did not involve the activists at the implementation level and has remained only on paper. The Sati Prevention Bill, a decorative piece of legislation, is a cover-up for State inaction at the crucial stage of preventing the public murder of a teenaged widow.

The worst among these is the Immoral Traffic (Prevention) Act, 1956 which was amended in 1986. This amendment was not even in response to any demand for change. The Act does more harm to women in general and prostitutes in particular. Under this Act, any woman who is out at night can be picked up by the police. The only aim of the amendment seems to be to enforce more stringent punishment.

Ironically, three of the laws discussed here which are supposedly for protecting women from violence actually penalize the woman. Instead of empowering women, the laws have served to strengthen the State. A powerful State conversely means weaker citizens, which includes women. And the weaker the women, the more vulnerable they will be to male violence. The cycle is vicious.

This paper reviews the laws relating to three areas affecting women's lives, i.e. rape, dowry and domestic violence. It does so against the backdrop of changing perception towards penal enactments within the women's movement.

Campaign for Reforms in Rape Laws and Legal Response to Rape

The Campaign : The amendment to rape laws, enacted in 1983, was the predecessor to all the later amendments which followed during this decade. Sections 375 and 376 of the Indian Penal Code, which deal with the issue of rape, had remained unchanged in the statute books since 1860. The amendment was the result of a sustained campaign against these antiquated laws following the infamous Supreme Court judgement in the Mathura case.

Mathura, a 16-year-old tribal girl, was raped by two policemen within a police compound. The sessions court acquitted the policemen on the ground that Mathura was habituated to sexual intercourse and hence she could not be raped. The High Court convicted the policemen and held that mere passive consent given under threat cannot be deemed as consent. The Supreme Court set aside the High Court judgement on the grounds that Mathura had not raised any alarm and there were no visible marks of injury on her body.¹

The judgement triggered off a campaign for changes in rape laws. Redefining consent in a rape trial was one of the major thrusts of the campaign. The Mathura judgement had highlighted the fact that in a rape trial it is extremely difficult for a woman to prove that she did not consent beyond all reasonable doubt as was required under the criminal law.

The major demand was that once sexual intercourse is proved, if the woman states that it was without her consent, then the court must presume that she did not consent. The burden of proving that she had consented should be on the accused. The second major demand was that a woman's past sexual history and general character should not be used as evidence (Agnes 1990).

The State Response : The government's response to the campaign was prompt. The Law Commission was asked to look into the demands and consequently prepared a report incorporating the major demands of the anti-rape campaign.

The Commission also recommended certain pre-trial procedures - that women should not be arrested at night, a policeman should not touch a woman when he is arresting her, that the statements of women should be recorded in the presence of a relative, friend or a social worker and that a police officer's refusal to register a complaint of rape should be treated as an offence.

Based on these recommendations, the government presented a Bill to Parliament in August 1980. But surprisingly, the Bill did not include any of the positive recommendations of the Law Commission regulating police power or about women's past sexual history. The demand that the onus of proof regarding consent should be shifted to the accused was accepted partially, only in cases of custodial rape, i.e. rape by policemen, public servants, managers of public hospitals and remand homes and wardens of jails.

The Bill had certain regressive elements which were not recommended by the Law Commission. It sought to make publishing anything relating to a rape trial a non-bailable offence which meant a virtual press censorship of rape trials. This was ironical because the public pressure during the campaign was built up mainly through media publicity and public protests. This provision met with a lot of criticism. Thereafter, the regressive provisions were made slightly milder. For instance, publication of rape trials was made into a bailable offence. The important provisions of the amendment were :

- Addition of a new section which made sexual intercourse by persons in a custodial situation an offence even if it was with the woman's consent.
- Introduction of a minimum punishment for rape - ten years in cases of custodial rape, gang rape, rape of pregnant women and minor girls under twelve years of age, and seven years in all other cases. Even though this was not the major demand, it turned out to be the most important ingredient of the amendment.

Although inadequate, the amendment was welcomed as a progressive move - a beginning. There was a general presumption within the movement that the courts would follow the spirit of the amendment and give women a better deal in rape trials.

After the amendment, the campaign lost its alertness. There were hardly any efforts to systematically monitor its impact in rape trials. So the Supreme Court judgement in 1989 in a case

of custodial rape by police men (popularly known as the Suman Rani rape case) came as a jolt. The Supreme Court had reduced the sentence from the minimum of ten years to five years.² The review petition filed by women's groups against the reduction of sentence was also rejected.³ This brought into focus the need to review judicial trends in rape trials since the amendment.

A scrutiny of the judgements during the decade revealed that the judgement in the Suman Rani case was not an exception. It was merely adhering to the norm of routinely awarding less than the minimum mandatory sentence introduced by the amendment. Hence the main component of the amendment, i.e. the deterrent provision of stringent punishment, was rendered meaningless. The amendment also did not bring about a positive change in the attitude of the judiciary despite the well-publicized campaign.

Here are excerpts of some important judgements which reveal the trends in sentencing patterns and expose the inherent judicial biases in rape trials.

The Judgement during the Campaign : It would come as a surprise to many that the settled legal position regarding consent before the Mathura trial was not as adverse as one would assume. In fact, the Mathura judgement had expressed a view which was contradictory to the settled legal position in the Rao Harnarain Singh case where the Supreme Court, way back in 1958 had held :

A mere act of helpless resignation in the face of inevitable compulsion, quiescence and non-resistance when volitional faculty is either crowded by fear or vitiated by duress cannot be deemed to be consent. Consent on the part of the woman as a defence to an allegation of rape, requires voluntary participation, after having fully exercised the choice between resistance and assent. Submission of her body under the influence of terror is not consent. There is a difference between consent and submission. Every consent involves submission but the converse does not always follow.⁴

This was the settled legal position and was relied upon by many later judgements during the pre-amendment period. But there was no uniformity in court decisions. No one could predict with certainty the outcome of a rape trial. Much would depend upon the views and attitude of individual judges.

The judiciary viewed rape as an offence of man's uncontrollable lust rather than as an act of sexual violence against women. The following Supreme Court judgement of 1979 by Justice Krishna Iyer is an indication of this trend. The description of the offence in the judgement is as follows : 'A philanderer of 22 years overpowered by sex stress hoisted himself into his cousin's home next door in broad daylight, overpowered the temptingly lonely prosecutrix, raped her in hurried heat and made an urgent exit having fulfilled his erotic sortie'.

The reasoning for the reduction of sentence was : 'Youth overpowered by sex stress in excess. Hypersexed *homo sapiens* cannot be rehabilitated by humiliating or harsh treatment ... Given correctional course his erotic aberrations may wither away.'⁵ This judgement was relied upon in several later judgements to reduce the sentences of young offenders.

But from another judgement of Justice Krishna Iyer delivered a few months later, i.e. in early 1980, a new sensitivity regarding the issue of rape within the judiciary can be discerned which can safely be attributed to the newly evolving anti-rape campaign. Regarding uncorroborated testimony of

the victim it was held : 'The Court must bear in mind human psychology and behavioural probability when assessing the credibility of the victim's version.'⁶

In the same judgement, the court also cautioned against stricter laws and said that a socially sensitized judge was a better statutory armour against gender outrage than long clauses of a complex section. The judgements of the post-amendment period have proved these apprehensions to be correct.⁷

In a judgement case reported in 1981, where a 16-year-old was gang-raped, the court held : 'The fact that there is no injury and the girl is used to sexual intercourse is immaterial in a rape trial.'⁸

In 1982, in a case of gang rape, relying upon the Rao Harnarain Singh judgement, the Orissa High Court held that the consent must be voluntary. A mere non-resistance or passive giving in under duress cannot be construed as consent.⁹

In a landmark judgement of 1983 the Supreme Court held that corroboration of a victim's evidence is not necessary: 'In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration is adding insult to injury'.¹⁰

The judgements reflect the concern expressed by the women's organizations during the anti-rape campaign. But there was no uniformity and the pendulum swung from one extreme to the other as in the case of Mathura. The amendment was supposed to rectify the situation by bringing a certain degree of uniformity and changing the attitude of the judiciary regarding women during rape trials. Unfortunately, the judgements in the post-amendment period convey a dismal picture.

The Judgements during the Post-Amendment Period

The year 1984 started off with a judgement which reflects an extremely negative view of women's sexuality. A school teacher had seduced a young girl but when she conceived he refused to marry her. A case of rape was filed. The Calcutta High Court held : 'Failure to keep the promise at a future uncertain date does not amount to misconception of fact. If a fully grown girl consents to sexual intercourse on the promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity'.¹¹

This judgement was relied upon in several later cases where girls were seduced with a false promise of marriage, to acquit the accused. In fact, there is only one positive judgement on this issue which has held that consent given under a promise of marriage is tainted consent and has clarified further that no one should be permitted to reap the benefits of fraud in sexual matters.¹²

In another disturbing judgement reported in 1989, the Bombay High Court set aside a conviction by the sessions court in Kolhapur. The girl who was in love with the accused had voluntarily accompanied him to his friend's house. At night they slept in a small room along with the hosts. The accused overcame the girl's resistance and raped her twice during the night. The medical examination revealed that the girl's hymen was ruptured. The sessions court convicted him as the girl was under 16 years of age and so her consent was immaterial.

In appeal, the High Court held that since there was a discrepancy between the school certificate and birth certificate, the benefit of doubt should go to the accused and hence the girl was deemed a minor. Regarding penetration, it held : In a small room in the presence of other people, the girl would

have felt ashamed and it is difficult to believe that the accused could have intercourse with her twice.¹³ Hence it acquitted the accused.

Forcible penetration of finger does not amount to rape, under the patriarchal scheme of things. But in this case, even while the judge admitted that the hymen was ruptured because of forcible finger penetration, it did not even amount to assault. Further, the judge seems to, have assumed that in a rape case, the girl can exercise her choice as to when and in whose presence to get raped and the option of feeling shy during the rape.

In another case, a tribal woman was raped by a police constable who entered her house at night while her husband was away at work. The Bombay High Court acquitted the accused by stating that: 'Probability of the prosecutrix who was alone in her hut, her husband being out, having consented to sexual intercourse cannot be ruled out.'¹⁴

One of the most important ingredients of the 1983 amendment is the clause regarding minimum punishment of ten years in case of custodial rape and child rape. But it appears that this clause was incorporated merely to appease the activists rather than with any serious intention of adhering to it, as this provision is in direct contrast with the progressive legal theory of leniency towards offenders.

Usually, in child molestation cases, the offenders are the youth. This brings about a clash between the two theories of minimum mandatory punishment and leniency towards youth offenders. In such a situation, since our criminal jurisprudence grants all advantages to the accused, leniency towards youth offenders will prevail. Hence, the statutory provision of a mandatory minimum sentence is overruled. Some important cases where this clash of legal theories is evident are mentioned below.

In a case reported in 1984, a 7-year-old girl was raped by a boy of 18. She was severely injured and was left in an unconscious condition. The appeal to the High Court to enhance the sentence was dismissed on the following ground: 'Although rape warrants a more severe sentence, considering that the accused was only 18 years of age, it would not be in the interest of justice to enhance the sentence of five years imposed by the trial court.'¹⁵

In another case, a 9-year-old was raped by a 21-year-old youth in a pit near the bus stop. Medical evidence substantiated the rape. The Delhi High Court set aside the conviction of the sessions court on the ground that there was injury to the accused only on the body and not on the penis. The court ruled that in a rape of a minor by a fully developed male, injury to the penis is essential.

While Mathura was expected to put up sufficient resistance to suffer injuries on her own person, the situation seems to have deteriorated and now the victim is expected to put up even more resistance to the extent that the accused also sustains injuries - not just on his body but even on his penis! It needs to be pointed out that the girl in question was only nine years old, while her assaulter was a robust man of 21 years.¹⁶

In the case discussed above, the High Courts had shown leniency towards youth offenders. But in rare cases, the courts express a contrary view and concern over such leniency in sentencing. For example, in a rape case of a 10-year-old girl, the High Court commented on the lower court's sentence as follows: 'Imposing a sentence of three years is like sending the accused to a picnic. The judge erred in his duty in not imposing a deterrent punishment.'¹⁷

The rare positive judgements are those where young girls were brutally attacked and had received multiple injuries, so that rape could be proved with relative ease. But even in such cases, the concern of the judiciary is limited to the loss of virginity and prospects of marriage and not to the trauma suffered by the minor girl.

In the following case a young girl was dragged into the forest and was raped. She received severe injuries. While upholding the conviction by the sessions court, the High Court held: 'It is difficult to imagine that an unmarried girl would willingly surrender her virtue. Virginity is the most precious possession of an Indian girl and she would never willingly part with this proud and precious possession.'¹⁸

In a 1988 judgement concerning a case where a 10-year-old was raped by a 45-year-old man, the court imposed a fine on the accused and ordered that the amount should be paid to the girl as compensation as the amount would be useful for her marriage expenses and if married would wipe out the anguish in her heart¹⁹

One wonders whether there is an implicit statement that the marriage expenses would be higher because the girl is a victim of rape. One also wonders why the anguish in her heart is linked to her marriage.

In another case of gang rape, five men raped a 17-year-old. The Kerala High Court imposed a fine on the accused person, stating that: 'The court must compensate the victim for the deprivation of the prospect of marriage and a serene family life, which a girl of her kind must have looked forward to'.²⁰ The Court, however, reduced the sentence from five years to three years while the stipulated minimum sentence for a case of gang rape is ten years.

The judgement hints that there are certain type of girls who value their chastity more than others - that there are good women who need to be protected and the bad women who can be violated. This attitude is expressed routinely in rape cases by all courts including the Supreme Court²¹

The preoccupation of the judiciary regarding prospects of marriage extends from the victim to the rapist's daughter as the following judgement indicates. The accused had raped two girls aged 10 and 12. The High Court upheld the conviction of the sessions court. The Supreme Court reduced the sentence on the ground that the prospect of getting a suitable match for the daughter of the accused would have been married due to the stigma attached to a conviction for an offence of rape.²²

Further, if the woman gets married while the case is pending in court the court presumes that the damage caused by rape has been reduced and elicits reduction of sentence. In a case concerning a tribal girl, two persons entered the house in her father's absence and forcibly took her to a nearby jungle and raped her. The High Court upheld the sessions court's conviction for rape, but reduced the sentence on the ground that the rape did not result in any serious stigma to the girl. In a shocking statement the court ruled: 'Sexual morals of the tribe to which the girl belonged are to be taken into consideration to assess the seriousness of the crime'.²³ This judgement was reported in the *Law Journal* in the year 1992.

The judgements discussed above reveal that the campaign has not succeeded in evolving a new definition of rape beyond the parameters of a patriarchal framework. In fact, the same old notions of chastity, virginity, premium on marriage and a basic distrust of women and their sexuality are reflected in the judgements of the post-amendment period.

Penis penetration continues to be the governing ingredient in the offence of rape. The concept of penis penetration is based on the control men exercise over their women. Rape violates these property rights and may lead to pregnancies by other men and threaten the patriarchal power structures. The campaign did not succeed in transcending these archaic values.

Within this framework of penis penetration, an offence of sexual assault can be tried under three different categories, i.e. rape, attempt to rape and molestation. The categorization is based on the proximity to penetration. For instance, an unsuccessful attempt to penetrate is categorized as attempt to rape (S 376 r/w S 511 of IPC) which warrants only half of the punishment which can be awarded for a successful penetration.

Further, every case of indecent assault upon a woman does not amount to an attempt to rape. The prosecution has to prove that there was a determination in the accused to gratify his passion at all events and in spite of all resistance. When the accused could not go beyond the state of preparation, it will be viewed as merely an act of violating a woman's modesty.

Violating a woman's modesty (S 354 IPC) is a lesser offence. It is bailable and the trial will be conducted by a magistrate's court. The maximum punishment which can be awarded for violating a woman's modesty is two years. As rape and attempt to rape are deemed grievous offences, they are non-bailable and the trial is conducted by the sessions court. The maximum punishment for an offence of rape is life imprisonment.

Since the difference between rape, attempt to rape and violating modesty is one of degree only, to prove determination on the part of the accused, the description of the offence has to be graphic bordering on the obscene, as the judgements discussed in this section indicate. The first two judgements were reported in 1927 and the third one in 1933.

1. An 18-year-old youth stripped a five-and-a-half-year-old and made her sit on his thigh. There was no bleeding or redness of the vagina or any other marks of injury. The hymen of the girl was intact and the child had not cried. But the court held that it was an attempt, although unsuccessful, to penetrate and it amounted to an attempt to commit rape and not merely violating the modesty.²⁴
2. The accused had slipped into the house of his neighbour through the roof and untied the strings of the *salwar* of the daughter, aged around 10-11 years, who was sleeping. The accused was struggling with the girl, when her mother, hearing her screams entered the room. At this point the accused ran away. The court held that there was determination on the part of the accused to commit rape and convicted him of the offence of an attempt to commit rape.²⁵
3. The accused caught hold of the girl, threw her down, put sand in her mouth, got on to her chest and attempted to have intercourse with her. He could not succeed on account of the resistance offered by the girl. Hearing her screams people arrived on the scene and the accused ran away. The court held that the accused had gone beyond the state of preparation and his act amounted to an attempt to commit rape and not merely violating the woman's modesty.²⁶

In order to draw a comparison between the judgements of this era and the later period, here is a judgement of 1967. It gives a vivid description of the difference between attempt to rape and molestation in the following words: Where the accused felled the woman on the ground, made her

naked, exposed his private parts and actually laid himself on the girl and tried to introduce his male organ into her private parts despite strong resistance from her, the act amounted to an attempt to commit rape. But when there is no injury found on the private parts or any other part of the body of the woman, but the accused found lying over her, it was held that the act amounts only to an offence under S 354 IPC and not an attempt to rape.²⁷

A comparison of the judgements of 1927 and 1967 reveals that if at all there is any change in judicial attitudes it is for the worse. But our concern here is to assess the attitude of the judiciary in recent years. Hence a random sampling of judgements in the last decade is given below :

1982 : A lady doctor was travelling by bus at night. She felt the hand of a man sitting behind her on her belly. The man was deliberately trying to touch her breasts. The accused was convicted for the offence of molestation with six months imprisonment.

Since he would have lost his job because of the conviction, he filed an appeal, which resulted in an acquittal on the following grounds : Merely putting a hand on the belly of a female cannot be construed as using criminal force for the purpose of committing an offence or injury or annoyance. Use of criminal force or assault against a woman is essential for the purpose of outraging her modesty. There should also be an intention to outrage the modesty of a woman. The court held that the touch could have been accidental or with an intention to draw her attention.²⁸

1984 : A young college student attempted to rape her neighbour. But while opening the strings of her *salwar*, she grabbed a *kulhari* and gave him a blow on his thighs. The boy ran away. The high court reversed the sessions court's order of conviction on the ground that : Since the wounded accused did not come back, he was not determined to have sexual intercourse at all events. Hence it was not an attempt to rape but merely violation of a woman's modesty.²⁹

1989 : The accused dragged a 9-year-old near the bushes and tried to penetrate. The girl was severely injured. Due to the pain the girl did not permit the doctors to carry out an internal examination. Hence the exact extent to the vaginal tear could not be determined. Giving maximum benefit of doubt to the accused, the trial court convicted the accused only of an attempt to commit rape. On appeal the High Court commented that the accused had erroneously escaped punishment for rape but held that since the State had not appealed against it, it was not proper to look into this question.³⁰

1990 : Two persons went to a school, dragged a girl, kicked her, slapped her and snatched her watch. The High Court reversed the sessions court's order of conviction for violating the girl's modesty and held that it is not enough if the woman was pushed or beaten. The assault should be with the intention to outrage her modesty or knowing it would outrage her modesty.³¹

The offence which is termed attempt to rape is precariously perched between successful penetration and beyond the stage of preparation, which is extremely difficult to prove as the following case reported in 1991 indicates. The accused had loosened the petticoat cord of the woman and was about to sit on her waist, when she woke up and cried out for help. The sessions court had convicted the accused for attempt to rape. But on appeal, the high court acquitted him on the ground that the act had not advanced to the stage of attempt to rape but was only at the stage or preparation for the same.³²

In another case, while the girl and her mother were asleep, a police officer entered the police barracks and attempted to rape the girl. The girl gave the accused blows and he fled. The sessions court convicted the accused. The high court acquitted him on the ground that despite an intention or expression, an indecent assault upon a woman would not amount to attempt to rape unless there is determination on the part of the accused to fulfil his desire in spite of resistance.³³

Absurd Notion of Modesty and its Violation : One can observe from the above discussion that the categorization of sexual offences with the centrality of penis penetration is not only absurd but also results in grave injustice to women.

The ridiculous extent to which this absurdity can be stretched is emphasized by the following judgement. The range of opinions within the judiciary towards women and their sexuality are also revealed in it.

The case concerned the molestation of a 7½ month old by one Major Singh. The sessions court convicted the accused. On appeal, a full bench (three judges) judgement of the Punjab High Court acquitted the accused. The views of the judges, however, differed.

Majority View : Appellant having fingered the private parts of the victim girl causing injury to those parts did not commit an offence under S 354. There is no abstract concept of modesty which can apply to all cases. Modesty has relation to the sense of propriety of behaviour in relation to the woman against whom the offence is committed. In addition to the intention, knowledge and physical assault, a subjective element, as far as the woman against whom the assault is committed, is essential.

Minority View : (Which perhaps offers the most sound analysis amongst the range of opinions expressed). Any act which is offensive to the sense of modesty and decency and repugnant to womanly virtue or propriety of behaviour would be an outrage or insult to the modesty of a woman. It will not avail the offender to contend that the victim was too old or too young to understand the purpose or significance of this Act.

The State appealed against the acquittal to the Supreme Court. The three judges who heard the case expressed three different viewpoints.

First View : When the action of the accused in interfering with the vagina of the child was deliberate he must be deemed to have intended to outrage her modesty. The intention or knowledge is the crucial factor and not the woman's feelings.

Second View : (Which supported the first view but on a totally different basis). The essence of a woman's modesty is her sex. From her very birth, a woman possesses the modesty which is the attribute of her sex and hence it can be violated.

Third View : (Expressed by the Chief Justice, which differed from the other two judges). To say that every female of whatever age is possessed of modesty capable of being outraged seems to be laying down a rigid rule which may be divorced from reality. There obviously is no universal standard of modesty. A female baby is not possessed of womanly modesty. If she does not, there could be no question of the respondent having intended to outrage her modesty or having known that his act was likely to have that result.

And after the long and tortuous journey, finally when there was a conviction by the Supreme Court, the maximum sentence that could be awarded is two years imprisonment.

Delays in Court Rooms : Usually it takes around five to ten years for a rape case which has resulted in conviction to be decided by the high court. If the purpose of the rape trial is to act as a deterrent, rather than a prolonged sentence of life imprisonment, a less severe sentence within a stipulated time limit would serve the purpose.

While there are delays, the benefit of such delays is awarded to the accused as the sentence is reduced on this ground even when the conviction is upheld. This is adding insult to injury.

Lapses in Investigation : Most rape cases do not result in conviction due to lapses in investigation and medical reports. Slipshod investigation, delayed and indifferent medical reports and lack of vigilance during the trial are the major causes of acquittals in rape trials.

The burden of conducting the prosecution is the sole responsibility of the State. Only in a rare case will the woman be appointed a public prosecutor of her choice. Hence, a victim has absolutely no control over the judicial processes in a rape trial. Unless the procedural lapses are plugged, merely enhancing the sentence will not have any value as a deterrence. This fact has been amply proved by the cases cited here.

Custodial Rape : The amendment of 1983 tried to address the issue of custodial rape by shifting the burden of proof. But the section which has laid down a new category of sexual offences has gone unnoticed by the judiciary. Even in well-publicized cases like the Suman Rani rape case, the discussion has been more on the conduct and character of the girl rather than the issue of custodial gang rape. This trend is disturbing. Unless specific case law is evolved by the higher judiciary, this new offence will be of no use while dealing with rape trials in trial courts. In a span of ten years since the amendment, hardly any case has commented upon this section, which is rather perturbing.

Table 3. Acquittals and Convictions in Appeal Courts in the Decade 1980 to 1989 in Bombay

	80	81	82	83	84	85	86	87	88	89
Reported cases	5	6	4	5	5	2	3	11	7	17
1. Sessions Court										
(a) Acquittal	—	—	—	—	2	—	1	3	1	3
(b) Conviction	5	6	4	5	3	2	2	8	6	14
2. High Court										
(a) Acquittal upheld	—	—	—	—	2	—	—	1	1	1
(b) Acquittal reversed	—	—	—	—	—	—	1	2	—	2
(c) Acquitted	—	2	1	2	1	—	1	2	5	
(d) Conviction upheld	5	4	3	3	2	1	2	7	4	8
(e) Sentence reduced/ modified	1	2	1	1	—	1	1	3	1	6

Source : *The Lawyers*, February 1990.

Rapes in Situation of Emotional and Economic Dependency : The 1983 amendment defined custodial rape only in reference to the State power and has excluded a whole range of sexual offences committed by family members from its purview. Between 1991 and 1993, in six of the reported cases the accused persons were fathers, or persons in authority. Unless these offences are defined under a special category, it will be difficult to secure conviction in cases of rape committed by persons in authority, both within the family and outside.

Many countries have defined marital rape as an offence. But in our country, the definition of rape excludes marital rape in specific terms, i.e. forced sexual intercourse by husband does not amount to rape. The 1983 amendment laid down that a rape by a husband who is legally separated amounts to rape. But surprisingly, while in other cases the minimum sentence was seven years, in this case the Act laid down a sentence of two years under a strange and perverse logic that it (i.e. forced sexual intercourse - an act against which the woman has registered a criminal case!) might lead to reconciliation.

Rape of Minor Girls Aged Between 16 and 18 : Proof of age of the rape victim is crucial since the consent of the victim is immaterial in cases where she is below 16. The burden of proving the age is squarely placed on the prosecution. If the prosecution fails to prove that the girl was below 16, it would have the additional burden of proving that the girl did not consent to the sexual intercourse. Difficulty arises in proving the age in cases where no birth certificate can be produced. Courts have given contradictory opinions on the weightage to be given to school certificates, ossification tests (approximate determination of age based on development of the bones) and the like. The difficulty is further heightened by the judicial pronouncements that ossification tests carry a margin of error of two years and the benefit of doubt is to be given to the accused. As a result, unless the girl is clearly below 14, no conviction can take place without irrefutable proof of absence of consent.

This results in grave injustice to teenage girls bordering on the age of majority. Hence determination of the girl's age should not be left to judicial discretion.

Further, there is a discrepancy between the age of majority for all other legal purposes (18 years) and for the offence of rape (16 years). This has led to an anomalous situation in which a girl is presumed to be incapable of taking independent decisions in other matters unless she is 18, but is capable of consenting to sexual intercourse if she is above 16.

Salient Features of the Proposed Bill : Some of the concerns discussed above are reflected in a draft prepared by a committee, on behalf of the National Commission for Women. Some salient features of this draft Bill titled 'Sexual Violence Against Women and Children Bill 1993' are stated below.

The committee, which consisted of members of women's organisations, expressed concern regarding the grievous injuries caused by a variety of sexual assaults on minors and the need to expand the definition of rape to include a range of assaults.

Violations in Addition to Actual Penetration : The committee has proposed renaming S 375 IPC as Sexual Offence and defining it as penetration into any orifice by a penis or any other object as well as the touching, gesturing and exhibiting of any part of the body. If the persons to whom these acts are done are minors then the act in and of itself is an offence and punishable under the provisions

of the proposed law. If the person is an adult it may be proved that the act was done without the consent of that person.

A new section i.e. S. 375A, further defines categories of sexual offences as grievous offences and includes sexual assaults committed by those in positions of power or authority. Some of the salient features of the proposed legislation relate to the following :

- Sexual assaults on a minor, mentally or physically disabled person or a pregnant woman. Two members, however, expressed concern regarding treating pregnant women *per se* as a more vulnerable category rather than sentencing according to the degree of harm a woman, pregnant or non-pregnant, may suffer.
- Sexual assault which causes grievous bodily harm. Protracted sexual assault is also deemed aggravated form of sexual assault. This section aims to address the vulnerability of children and women who are trapped in a situation of economic dependency upon their assaulters within family situations.
- The proposed Bill has raised the age of consent to 18 and has further distinguished between children under 12 regarding punishment. The Bill proposes that rape of children under 12 and protracted sexual assault are to be punished with a sentence of life imprisonment.
- The most important area which the Bill proposes to cover is to plug procedural loopholes in rape trials in the following areas :

Conduct and Character of the Woman : At present under Section 155(4) of the Indian Evidence Act, a woman's past sexual history can be used as evidence to discredit her evidence. The Bill seeks to delete this clause. Further under Section 146, the Bill proposes to forbid any questions regarding the woman's character, conduct or previous sexual experiences. Through an amendment to Section 54 of the Evidence Act, the character of the accused is made relevant in a rape trial.

Recording of Evidence : The Bill also lays down protective measures regarding the correct recording of the woman's evidence. It stipulates that in cases where the victim is under 12, her evidence should be recorded by a female officer or a social worker in the presence of a relative or friend, at her home or a place of her choice. For the violation of this procedural rule a maximum punishment of one year is proposed. Similarly, non-recording of the medical evidence by a registered medical practitioner in cases of sexual assault would be a penal offence.

Guidelines for Medical Examination : Immediate examination of victim by a registered medical practitioner (RMP) is stipulated. The report should give explicit reasons for each conclusion and also include the address of the victim and the persons who brought her, the state of the genitals, marks of injuries, general mental condition of the victim and other material factors. The report should be forwarded by the RMP to the investigating officer who must then forward it to the magistrate. The same procedure to be followed by the RMP for the accused.

These amendments, if and when they are brought about, may help to plug some of the lacunae in the existing rape law. But patriarchy has a resiliency to remould and adopt itself to changing conditions. With the introduction of newer factors like liberalization and a boom in the tourist and sex

trade, sexual assaults on women and children are bound to take a new turn. The recent sex scandal of Jalgaon and other places in Maharashtra is perhaps an indication of this trend. Whether the reformed law will be adequate to meet these trends and will arrest the trend of increasing sexual violence upon women is anyone's guess.

Campaign Against Dowry and Legal Response

The Act - A Paper Tiger : The Dowry Prohibition Act of 1961 is a very small Act which consists of only eight sections (two more sections were added later during the amendments), full of contradictions and loopholes and not meant to be taken seriously. The Act laid down a very narrow definition of dowry as 'property given in consideration of marriage and as a condition of the marriage taking place'. The definition excluded presents in the form of cash, ornaments, clothes and other articles from its purview. The definition also did not cover money asked for and given after marriage.

Both giving and taking dowry was an offence under the Act. The offence was non-cognizable and bailable. In legal parlance, this makes it a trivial offence. The maximum punishment was six months and/or a fine of Rs. 5,000. To make matters more complicated, prior sanction of the government was necessary for prosecuting, a husband who demanded dowry. Complaints had to be filed within a year of the offence and only by the aggrieved person.

The ineffectiveness of the Act was manifested at different levels. First, there were hardly any cases filed under this Act and there were less than half a dozen convictions in the period between the enactment and the amendment. So the purpose of the enactment as a deterrent factor was totally lost. The Bombay High Court in *Shankar Rao v. L.V. Jadhav* held that a demand for Rs. 50,000 from the girl's parents to send the couple abroad did not constitute dowry.³⁴ The judgement held that since the girl's parents had not agreed to give the amount demanded at the time of marriage, it would not be deemed as 'consideration for marriage'. Anything given after the marriage would be dowry if only it was agreed or promised to be given as consideration for the marriage. The absurd interpretation was in total contrast to the spirit of the Act and defeated the very purpose for which it was enacted.

Secondly, in total defiance of the Act, the custom of dowry has percolated down the social scale and communities which had hitherto practised the custom of bride price are now resorting to dowry. Thirdly, all the violence faced by women in their husband's home is being attributed to dowry and the term 'dowry death' has become synonymous with suicides and wife murders.

A Misplaced Campaign : During the early 1980s, most cities in India witnessed public protests against the increasing number of dowry deaths, which received wide media coverage. It was accepted both nationally as well as internationally that dowry death or bride-burning as it was termed, was a unique form of violence experienced by Indian women, more specifically Hindu women and that a more stringent law against dowry would, in effect, curb domestic violence and stop wife murders. An oversimplified analysis of domestic violence which is a far more complex and universal phenomenon was put forward by activists and responded to by law-makers.

The media coverage of dowry deaths also led to further presumptions. One among them was that while in other cultures men murder their wives for more complex reasons, i.e. stress of a technologically

advanced life-style or breakdown of the support of joint family due to urbanization, etc., in India men burn their wives for dowry.

It needs to be mentioned here that since a Hindu marriage is not required to be registered either within a religious institution or a civil registry, it is relatively easy for a Hindu man to commit bigamy, although it is legally prohibited. So in order to take a second wife, a man need not murder his first one. He can either divorce her or just merely desert her, which is quite common. And further, in a culture where arranged marriages are still the norm, why would another man offer his daughter in marriage to a wife murderer and further offer a huge amount of dowry? The rationale for the economic motive of the dowry deaths does not sound very convincing. Before we discuss the premise upon which the legislation was based, however, we need to take a look at the legislation itself.

The Dowry Prohibition Act, enacted in 1961, was full of loopholes. To plug some of these, a Bill was introduced in Parliament in June 1980, and was referred to a joint committee of both Houses. The findings of the Committee, *inter alia*, were as follows (Singh 1986a) :

- The definition of 'dowry' was too narrow and vague.
- The Act was not being rigorously enforced.
- The stipulation that complaints could be filed only by the aggrieved party within a year from the date of the offence.
- Punishment of imprisonment for six months and/or fine up to Rs. 5,000 is not formidable enough to serve as a deterrent.
- The words 'in consideration for the marriage' ought to be deleted from the definition of dowry.
- The explanation which excluded presents from the definition of dowry nullified the objectives of the Act.
- Gifts given to the bride should be listed and registered in her name.
- In case she dies during this period, the gifts should revert to her parents. In case she is divorced, the gifts should revert to her.
- The presents could not be transferred or disposed of for a minimum period of five years from the date of marriage without the prior permission of the Family Court on an application made by the wife, to ensure the bride's control over the gifts.
- Dowry Prohibition Officers should be appointed for the enforcement of the Act.

Retrospectively, it appears that the recommendations were based on an erroneous premise that girls can exercise a choice either at the time of marriage or later, in their husband's home. It also did not take into account the parents desperation to get their daughters married and keep them in their husband's home at all costs. It glossed over the fact that most women in this country are not aware of their legal rights.

A Stringent Law No Solution : Unfortunately, the Bill introduced in 1984 failed to consider some positive recommendations of the committee. The main feature of the Act was that it substituted the

words 'in connection with marriage' for the words 'as consideration for the marriage'. It was felt that the omission of the words 'as consideration for the marriage' without anything more would make the definition too wide. The suggestion of imposing a ceiling on gifts and marriage expenses did not find a place in the Act.

The important features of the amended Act are as follows :

- Increase in punishment to five years and a fine up to Rs. 10,000 or the value of dowry, whichever is more. (The section excluded presents given to the bride or the bridegroom).
- Removal of the one year limitation period.
- Introduction of provision for the girl's parents, relative or a social work institute to file a complaint on her behalf.
- Removal of the requirement of prior sanction of the government for prosecuting a husband who demands dowry.
- Making dowry a cognizable offence.

Before the impact of the amendment could be gauged, the Act was amended again in 1986 with the aim of making the Act even more stringent. The main features of the 1986 amendment are as follows :

- The fine was increased to Rs. 15,000.
- The burden of proving the offence was shifted to the accused.
- Dowry was made a non-bailable offence.
- A ban was imposed on advertisements.
- If the woman died an unnatural death, her property would devolve on her children and in the event of her dying childless, it would revert to her parents.

In fact all the loopholes pointed out by the committee were now plugged. So the stage was all set to abolish 'dowry death'. [The Act also amended the IPC and created a new category of offences called Dowry Death (S 304B).

The Process of Questioning : Despite these amendments, nothing changed. Women continued to get burnt in their homes and dowry demands continued. Reported cases of suicides and murders spiralled in every major city (Table 1). Parents of girls, who would not spend money on educating them or in making them independent, spent huge amounts of money on lavish weddings in the hope that the girl would never return to the native home and become a 'stigma'. The young girls, suddenly discovering that they had no place left in their parents home, resorted to suicide in a desperate bid to escape the humiliation and violence. At times when they had a premonition of the impending disaster, and had sought the parents help just before the murder, the parents had sent them back, which had resulted in the murder.

The cases were filed not at the time of the marriage but only after the girls had died, to avenge their death and retrieve the gifts. The daughter's death did not in any way change the reactionary and

conservative approach to marriage and the parents were all set to marry their next daughter with an equal amount of dowry to a boy of their choice. Tremendous pressure would be exerted on girls who wished to acquire professional skills, live independently or marry a boy from a different class, caste or religious background. In such cases the parents who cried hoarse against dowry would go all out and disinherit their daughter (Kishwar 1985).

The protests against dowry were held at the instance of people who conformed to this value system. They would usually have a total contempt for the ideology, values or life-style of the members of women's organisations whose help they sought to organise the dowry protests.

These factors made the activists reassess their stand on the issue of dowry. The articles in *Manushi* by Madhu Kishwar 'Rethinking Dowry Boycott' created a lot of controversy and a public debate (Kishwar 1988). Women's organisations began questioning the role of the girl's parents in driving her to death. Organising dowry protests was no longer a simple issue. Individuals and groups began to think that the campaign against dowry was wrongly formulated because it did not link the issue of dowry with that of a woman's property rights in her parent's home. If violence is a manifestation of a woman's powerlessness, not receiving any money or gifts from her parents would make her even more vulnerable to violence and humiliation.

A movement for protecting women's rights cannot align itself with parents who would go to any extent to disinherit their daughters, deprive them of education and equal opportunities in life under the pretext of preserving the 'family honour', force them into marriage alliances for their own vested interests or worse, willingly kill their daughters even before they are born in order to save the expenses of their marriage later in life!

Law on Dowry Death - Limited in Scope : But this comes after a series of negative judgements in interpreting S 498A, delivered by various high courts, including the Bombay High Court

Before analysing the judgements, it is necessary to mention the second amendment to the IPC which was enacted in 1986. Both the amendments have also amended the CrPC and Evidence Act (see Appendix 3 for exact provisions). The amendment of 1986 introduced a new offence of dowry death.

S 304B IPC - Dowry Death

Where the death of a woman is caused by any burns or bodily injury or occurs otherwise under normal circumstances within seven years of her marriage and if it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any other relative of her husband for or in connection with any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death.

The offence is punishable with a minimum of seven years and a maximum of life imprisonment. The presumption of guilt is on the accused and he would have to prove that he is innocent.

This section, unlike S 498A, gives no scope to be used in situations where the violence is not linked to dowry. Since no record is maintained and no complaints are made at the time of meeting the dowry demands, while the girl is alive, it is extremely difficult to prove a dowry death under this section. The section also presumes that women are harassed for dowry only within the first seven years of marriage. So overall, this section is not likely to benefit women to deal with domestic violence.³⁵

The other sections of the IPC which have been used in cases of wife murder are S 302 - punishment for murder, and S 306 - abetment to suicide. Here are some judgments where these sections as well as S 498A have been negatively interpreted by the courts in cases of wife murder.

Negative Judgements : In the case of abetment to suicide under S 306 IPC, the Punjab and Haryana High Court set aside the conviction and acquitted the husband on the ground that presumption as to abetment to suicide is available only if the husband is proved guilty of cruelty towards wife.³⁶

In another case, the Madhya Pradesh High Court set aside the conviction of three years and acquitted the mother-in-law. The court held that since the deceased ended her life by self-immolation when neither of the in-laws were present in the house, suicide in all probability was committed out of frustration and pessimism due to her own sensitiveness. It held that harassment and humiliation was not proved.³⁷

In a case under S 498A IPC, the Bombay High Court held that it is not every harassment or every type of cruelty that could attract S 498A. It must be established that beating and harassment was with a view to force the wife to commit suicide or to fulfil illegal demands of husband or in-laws, which, in the court's opinion, the prosecution failed to prove in this case.³⁸

In the Manjushree Sarada case, the sessions court, Pune, convicted the husband of murdering his wife by poisoning. The Bombay High Court upheld the conviction. But the husband was acquitted by the Supreme Court on the ground that the husband's guilt was not proved beyond reasonable doubt and that the wife might have committed suicide out of depression.³⁹

In another well-publicised case, the woman, Vibha Shukla, was found burnt while the husband was present in the house. A huge amount of dowry was paid at the time of the wedding and there were several subsequent demands for dowry. Vibha had delivered a daughter, the family did not accept the child and she was left behind in her parents house. The Bombay High Court set aside the order of conviction of the sessions court, acquitting the husband of the charge of murder and harassment under S 498A. The court held that the offence of murder could not be proved beyond reasonable doubt and that occasional cruelty and harassment cannot be construed as cruelty under the section.⁴⁰

In another case decided by the Bombay High Court in March 1991 - Geeta Gandhi's death, the court set aside the conviction by the session court, Nagpur, and acquitted the husband and father-in-law of the charge of murder under S 302 IPC. Geeta Gandhi's body was burnt beyond recognition and the flesh was roasted and charred right up to the bones. Her body was recovered from the bathroom at around 5.30 a.m. The father-in-law and the husband who were admittedly sleeping in the very next room had made no attempt to extinguish the fire. (instead the brother-in-law had called the fire brigade).

Geeta, a post-graduate in microbiology, who stood first in the M.Sc. examination, was in the process of setting up her own pathology clinic. She was married in January 1984 and died in April 1985. At the time of her death she was four months pregnant. She had a previous miscarriage when she had jaundice and also occasionally suffered from minor ailments. The court, while acquitting the husband and father-in-law, presumed that Geeta might have committed suicide because of depression caused by her ill-health (Sethi and Anand 1988).

Growing Complexity: While laws have proved inadequate to deal with this blatant violence, newer forms of violence against women are coming to light. The debate can no longer be restricted to violence by husbands and mothers-in-law. The decade has witnessed not only newer forms of killing female children through sophisticated means like sex determination tests but also the well-planned suicide pact by the Sahu sisters of Kanpur (Singh 1986a), followed by similar instances in other parts of the country. The well-known case of the Thakkar sisters - two unmarried women killing their married sister-in-law - indicates yet another facet of the issue of domestic violence (Kishwar and Vanita 1985b). These incidents are an indication of the complexities of domestic violence and the need for a new approach to tackle the issue.

Two more cases may be highlighted here as possibly relevant while planning future strategy. In the first instance, a man was sentenced to death by the Jaipur High Court in a case of wife murder and it decided that he be publicly hanged. The judgement received widespread approval. It was generally felt that women's organizations would see this as a victory. *Manushi*, a women's journal, expressed its shock at the judgement and was highly critical of it. It expressed the view that the solution to domestic violence does not lie in death sentence to the accused but in creating alternatives for women whereby they are strengthened.

The second case concerns a woman who strangled her husband with a rope when he was attempting to rape their 14-year-old daughter. The woman, her daughter and the younger son were convicted under S 302 of IPC by the sessions court. In appeal the Madras High Court acquitted them and held that the murder was committed in self-defence. If the courts and society fail to protect women and children trapped within a violent marriage and in a vicious cycle of violence, it may only lead to escalation of this phenomenon which our legislators and the judiciary need to take note of.

Concluding Observations

Rape, dowry-related violence and other forms of domestic violence against women are different manifestations of the same malaise. To the extent that judicial decisions and their implementation on the ground continue to be coloured by patriarchal values, the effect of legal reform will necessarily be unsatisfactory. The campaign for legal reform by the women's movement has so far attacked primarily superficial symptoms. The thrust in the campaign has to be reoriented at this point of time if better results are to follow.

Abbreviations

AIR	All India Reporter	Mah	Maharashtra
AP	Andhra Pradesh	M P	Madhya Pradesh
Bom	Bombay	N O C	Notes on Cases
CAL	Calcutta High	Ori	Orissa
CrLJ	Criminal Law Journal	Ors.	Others
CrPC	Criminal Procedure Code	Raj.	Rajasthan
D M C	Divorce and Matrimonial Cases	r/w	read with
H C	High Court	S	Section
IPC	Indian Penal Code	S C	Supreme Court
Mad	Madras		

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4. *Rao Harnarain Singh v. State of Punjab*, 1985 CrLJ 563.
5. *Phul Singh v. State of Haryana*, 1980 CrLJ 8.
6. *Krishnalal v. State of Haryana*, AIR 1980 SC 926.
7. *Rafiq v. State of Uttar Pradesh*, 1980 CrLJ 1344.
8. *Harpal Singh & Anr. v. Himachal Pradesh*, 1981 CrLJ 1.
9. *Bijoy Kumar Mohapatra & Ors. v. State of Orissa*, 1982 CrLJ 2161.
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11. *Jayanti Rani Panda v. State of West Bengal*, 1984 CrLJ 1535.
12. *Saleha Khatoon v. State of Bihar*, 1989 CrLJ 202.
13. *Ravindra Dinkar v. State of Maharashtra*, 1989 CrLJ 394.
14. *State of Maharashtra v. Vasanth Madhav Devre*, 1989 CrLJ 2004.
15. *Bhansingh v. State of Haryana*, 1984 CrLJ 786.
16. *Mohammed Habib v. State*, 1989 CrLJ 137.
17. *Imratlal v. State of Madhya Pradesh*, 1987 CrLJ 557.
18. *Babu v. State of Rajasthan*, 1984 CrLJ 74.
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34. *L.V. Jadhav v. Shalakar Rao A. Saheb Pawar*, 1983 4 SCC 231.
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37. *Padmavati v. State of Madhya Pradesh*, 1987 CrLJ 1573.
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40. *State of Maharashtra v. Ashok Chhotelal Shukla* (unreported)-Bombay High Court Judgement dated 14 January, 1986, 11986 in conformation case no. 4 of 1986 9. *Dilip Kumar Tarachand Gandhi & Anr. v. State of Maharashtra* - Bombay High Court Judgement dated 6 March 1991 in Criminal Appeal no. 51 of 1991.

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X. RECOMMENDATIONS OF THE NATIONAL EXPERT COMMITTEE ON WOMEN PRISONERS : AN AGENDA FOR REFORM

Towards© A Concerted Approach

458. A system's efficiency depends on its cohesiveness and on the success with which the sub-systems can relate to and mesh with the body politic. The process of meshing is itself reliant upon clearly stated corporate objectives. In custodial correctional administration unfortunately such clearly stated objectives are hard to come by. The entire field of criminal justice infact suffer from the lack of a clearly defined concerted statement on the concerted principal objectives of crime prevention, custodialization, correctional treatment, and rehabilitation.

459. As the preceding discussion has demonstrated, the existing malpractices and the delinquencies in the various forms of custody tend to effect women more adversely than men. This is on account of the fact that the women are still a marginal group in the custodial population and tend to be less vocal, demanding and violent in demonstrating against custodial or other injustice. With this in mind, *specific and specialized* interventions are necessary to restore the existing imbalance in the criminal correctional justice system vis-a-vis women. The recommendations that follows represent the essence of the Committee's perceptions regarding a reform approach to dispensing custodial justice to women and to protecting her dignity and her person in custody. The proposed interventions are addressed to the policy making, reviewing, enforcement, and organizational and infrastructural levels.

I. POLICY MAKING AND MONITORING

Policy Guidelines

460. A set of concrete guidelines evolved to meet the special needs and disabilities of women in the criminal correctional process, will enable the functionaries of the system (police, prosecution, courts, prison and correctional personnel) to reorganize their approaches and procedures in a functionally meaningful manner to serve gender justice.

461. Policy guidelines should be developed, among others, on the arrest, interrogations, search and detention of women, bail and sentencing, pre-sentence investigation, use of socio-legal counselling, psychiatric services and scientific classification in the pre-trial and conviction process, presence of legal aid cells for women in every police district, diversion of women offenders to separate and specialized trial processes and to non-institutional correctional options, association of volunteers and voluntary agencies working in the field of women's development in the investigation and trial of offences and watching over custodial conditions, etc.

National Policy on Custodial Justice to Women

462. Keeping the above in mind, the present Committee wishes to recommend the formulation and adoption of *National Policy on Custodial Justice to Women*. A draft policy statement is enclosed in Part II of the present report. The Committee has tried to incorporate in the draft the key elements that have emerged from the body of its deliberations as reported in Part I. It is urged that the draft be debated widely by the various components of the criminal justice system as well as women's groups, legal aid,

social welfare, mental health and other interested groups. It should then be endorsed and adopted for enforcement *nationally*.

National Authority on Custodial Justice to Women

363. No policy is effective unless it has an enforcing mechanism. In order to assist the process of national concerted action, and to specifically overview the implementation of the proposed policy, the Committee recommends the creation of a statutory autonomous body to be designated as the *National Authority on Custodial Justice to Women (NACJW)*.

Composition on NACJW

464. NACJW should have the representation of every component of the criminal justice system namely the judiciary, law, legal aid, police, prisons, probation and aftercare, and social welfare and mental health custodial institutions. It should also include representatives of medicine, psychiatry, law schools, schools of social work, women's groups, human rights and civil rights groups, the media, professional research and training bodies in criminology and social defence, etc. This statutory body will enable various governmental ministries and departments and institutions like NISD, BPRD, NCRB, National Police Academy, Institute for Criminology and Forensic Science and other to get together on a routine basis with various operators of the criminal justice process, and with key non-governmental individuals and groups dealing with custodial conditions and the status of those in custody.

465. NACJW should be presided over by a distinguished personality, who should be selected solely on merit and commitment. Other than small nucleus of paid secretarial staff, the NACJW should consist of only honorary members.

Terms of Reference

466. The purpose of this body should be to monitor custodial conditions, to serve a vigilance cell, to spot and highlight unjust procedure and to assist in remedying them and generally to serve as brains trust in promoting preventive and rehabilitative action for women offenders as well as non-offenders.

466.1 A key function of this national body will be to assist in evolving and maintaining high standard of professional competence. For this purpose, NACJW, will have the assistance of an association composed of practitioners, academicians and individuals with relevant experience authorized to enforce professional standards through the instrumentality of accreditation.

Monitoring

467. The apex body (NACJW), as one of its main functions, will be responsible for the compilation of an annual state of the art report to be presented yearly to the Parliament and disseminated widely. The annual report will be in the nature of a critical assessment of the quantitative and qualitative parameters of the status of women and girls in custody. It will also evaluate progress in achieving the goals enshrined in the National Policy on Custodial Justice to Women and in enforcing existing legislation rules, manuals, etc. The Annual Report will contain chapters on :

1. Administration of Justice including disposal of cases concerning women and girls, pendency, nature of sentencing and related matters.
2. Enforcement of legislation relating to women and girls and an assessment of its relevance and efficacy.

3. State of prisons and police lock-ups, crime, arrest and prisoner data, including data on probation and aftercare.
4. State of social welfare custodial institutions and extramural programmes for women and girls.
5. State of mental health custodial institutions and extramural programmes for detection, treatment and rehabilitation of mentally affected.
6. Performance review in respect of legal aid by non-governmental institutions and individuals.

In addition, to the aforesaid chapters, the views of prisoners and custodial inmates as well as of voluntary agencies and individuals on custodial excess or lack of success of enforcement of the National Policy could also be included in the manual report.

467.1 The above is an indicative list and the actual contents, format and modalities for gathering information should be devised by the NACJW after it is created. For this purpose, necessary enabling power may be provided in the statute incorporating NACJW.

467.2 For facilitating the compilation of the annual reports, NACJW should be empowered, under the statute incorporating it, to co-opt the officers of the Central Ministries such as Law and Justice, Home Affairs, Human Resources Development, Welfare, etc., for the purpose of gathering the necessary data and for coordination between different Ministries. The officers co-opted on the NACJW will be responsible for making available to the NACJW the relevant information from the required data sources of the concerned Ministries so as to enable NACJW to compile the Annual Report in time. The Annual Reports prepared by NACJW will be submitted to the Ministry of Human Resources Development which in turn will cause the Reports to be laid before both houses of Parliament.

Ombudsman for Custodial Institutions for Women

468. The Committee further proposes that one member be designated from the NACJW as the *Ombudsman for Custodial Institutions for Women in India*. This can be done on a rotating basis for a fixed items which can allow for continuity without sacrificing efficiency. The ombudsman's specific role will be to focus on delinquent custodial practices and procedures and to enforce remedial action. As far as possible, this function could be reserved for a woman member of the NACJW.

Counterparts at State Level

469. It is recommended that there should be counterparts of the National Authority on Custodial Justice to women and of the ombudsman for custodial Institutions in the States. The State level set will have functions similar to the Central Authority. It will also present an annual report on the status of women in custody to the state legislature and disseminate it widely. The States report will be routinely made available to the Central Authority and furnish a basis for the compilation of the annual review by the latter.

II. ENFORCEMENT

470. The preceding represents policy making and monitoring mechanisms. At the operational level, certain specialized structure are envisaged which embrace various components of the criminal justice system as follows.

A. JUDICIAL

Family Court versus Separate Courts for Women

471. Keeping in view the pendency of cases and noting that this tends to affect women more adversely than men, the present Committee feels that specialized courts must be set up to dispense justice *separately and speedily* to women.

472. In specifying a modality, the Committee is faced with some difficulty. Under the existing Family Court Act, 1984, a mechanism is already available to dispense justice to women. Moreover the Act has an inbuilt provision for expanding the jurisdiction of the Family Court *vide* Section 7(2)(b). With appropriate additional provisions regulating the presence of lawyers and witnesses etc., the Family Court's jurisdiction can be enlarged to include *all* cases pertaining to *offender and non-offender* women. There is also a strategic advantage in proposing an existing mechanism as anchor and building around it, rather than risking the undue delay and uncertainty associated with creating a mechanism which is altogether new.

473. The hesitation in unilaterally proposing the Family Court is on three accounts. One, the progress under the Act has been very slow. Since it was enacted in 1984, only 3 such courts are operating in the country. As a modality the Family Court is thus still new and untested and the Committee is justifiably wary to recommend a central role for it in dispensing comprehensive justice to women. Another objection is on substantive grounds. The Family Court is an informal, conciliatory mechanism whose attraction and strength, is its non-litigative approach. The Committee's apprehension is that in arming it with criminal jurisdiction, the entire approach to adjudication may have to change. A third constraint arises from cases where a joint trial of women with men may be involved and the procedural difficulty of separating the two co-accused.

474. As an alternative, the Committee has considered the modality of creating special courts for women or *Mahila Nyayalayas* which also have their merit and demerits. These exclusive courts can serve the purpose of rendering criminal justice to the women better than the normal courts do, and certainly with greater speed and sensitivity. Moreover, since the women's courts represent an entirely new structure, it can be moulded to the specific approaches appropriate to women. On the other hand, because it is a new institution, it is more likely to suffer from lack of acceptance and tardy enforcement.

475. Faced with these pros and cons, the Committee has taken a neutral stance and recommends that depending on the individual preference of States, either the Family Court with its amended jurisdiction, or the Women's Court should be instituted to dispense justice to women. Syphoning off women to either of these two institutions from the regular system will bring down its case load to some extent but that will only be a marginal gain. The main gain will be by way of quicker, more sensitive and less callous processual justice rendered to women.

476. It is interesting that at the time of writing, a concrete proposal for setting up a women's court has in fact been announced in a Southern State. Known as the *Mahila Court*, this institution will deal exclusively with offences against women. It is being set up as an experimental measure. A copy of the State Government's notification is appended.

Separate and Specialized Modalities for Dispensing Justice to Women

477. The thrust of the present recommendation thus is to make it mandatory for the State to create a *separate and specialized justice dispensing modality* but to leave the actual choice of the modality to the individual preference of each State. As an annotation, it may be emphasized that whatever the modality, when dispensing justice, the court(s) in question should rely heavily on the services of the social welfare agencies and professionals from other relevant disciplines in order to achieve enlightened and informed processing and sentencing.

Nari Bandigriha Adalats (Women Prison Courts)

478. In addition to the separate Women's Courts or Family Courts it is recommended that *Nari Bandigriha Adalats* be held in the nature of mobile judicial camps as an immediate modality for rendering speedy redress to women in custody. Whereas the Family Court or Women's Courts can be the stable permanent mechanism, the mobile *adalats* or court is required as an immediate as well as instant corrective step. Such camps and courts should be held urgently and routinely in social welfare and mental health custodial institutions also to clear the backlog of pending cases, and to render speedy justice. The mobile *adalats* should be conducted on a district-wise or cluster basis so as to cover all prisons and non-prison custodial institutions. Its objectives should be to provide speedy justice.

Supportive Measures

479. To support the processual mechanism outlined above, there should be legislative and administrative arrangements which should help in the enforcement of fair custodial procedures and practices.

B. LEGISLATIVE

480. On the *legislative* side, the main recommendations are:

480.1 *Prison administration and administration of allied institutions* have been a matter of considerable debate. A frequent recommendation by JRC and other prison reform study groups has been that the subject of prisons should be brought into the *Concurrent List* of the Seventh Schedule of the Indian Constitution in order to strengthen the process of standardized and uniform national approaches to reform of custodial conditions. While some members of the present Committee have also felt that the cause of justice within prison administration will be advanced by including the subject of prisons in the Concurrent List, this is a matter which has many profound implications and may raise opposition as in our own Committee. Therefore, reliance upon Article 252 of the Constitution may be a good expedient where the object of uniform legislation can be achieved without interfering with the legislative lists. The modality of Article 253 can also be explored according to which, where India is a signatory to any international convention or any decision made at any international conference, association or other body, Parliament has power to make any law for the whole or any part of India. Whatever the modality, the present Committee wishes to strongly endorse the undeniable merit in uniform judicial and correctional processes and equitable custodial conditions for all citizens irrespective of where they live. This is the essence also of the equality clause in the Constitution.

480.2 There is need to have a *Comprehensive Prison and Prisoners Act* which can bring together in a single Act the provisions presently dispersed in several Acts. The JRC outlined a scheme for chapters

for such national prison legislation (*vide* p 45-46 of JRC's Report). *Annotations affecting custody of women* need to be added to the JRC's draft. These should touch particularly on the special needs peculiar to women in prison, legal aid to women, and the rights *per se* of children of women prisoners.

480.3 An additional recommendation is to have a *comprehensive code* to cover the *administration of all custodial institutions* and the treatment of inmates of such institutions, with special provisions for the treatment and handling of women. A *draft proposal* containing suggestions for a legislative cum administrative code for custodial, correctional and rehabilitative justice to women (and girls) has been compiled by some members of the Committee which is enclosed in Part II* for consideration of individual States as well as the Central Government. Should more than two States show interest in adopting such a code, the modality of Art. 252** could be utilized toward its gradual acceptance nationally with each State exercising its own discretion whether or not to adopt the Code.

The onus of activating such a process will lie with women's and welfare groups and relevant departments in the State governments which will need to play an activist steering role.

480.4 A *critical assessment* of the efficacy and relevance of various *legislations bearing on women's status in custody* and their criminality should be undertaken by the Law Commission in consultation with other legal social science and social defense bodies of repute and their findings should form the basis for concrete reform by way of depenalization, decriminalization, de-institutionalization, etc.

480.5 Until the above occurs, on an immediate basis, *appropriate amendments and additional provisions* should be introduced in the *IPC* and *Cr. PC* as well as in the *Prison Act, 1894* and *Police Act, 1861* to reflect the special needs of women in custody. The sentencing strategies appropriate to women, particularly girls, are not now found in the *IPC* which adopts uniform tariffs of imprisonment and fine ignoring the general needs of gender justice. Similarly the *Procedure Code* does not note the special concession in the matter of arrest which deserves to be shown to women and also the facilities including legal aid women require in the police lockups and prisons. Some of these directives are available in the case law on the subject, among others, the *Barse* case. The resultant recommendations of the present Committee that women need not be arrested between sunset and sunrise and shall not be arrested except in the presence of women must be woven into the *Police Acts* and the *Cr. PC*. Even the radical recommendations that women need not be arrested at all but may be directed on their own bond to appear before an appropriate authority also calls for appropriate amendments to *Cr. PC* and *Police Acts*. Police stations serving women only and exclusive lockups under control of women police and like provisions for women's jails obviously demand suitable amendments to the *Prison Act* and the *Police Act*.

480.6 With regard to the *Police Act 1861*, the present Committee would like to endorse the recommendation of the *Police Commission* to "replace the existing outmoded Act with a new Act" (See *Eighth and Concluding Report* of the *National Police Commission*, Appendix I for the draft of the new Act). The present Committee endorses that draft with the proviso that its own recommendations concerning the *administration of police* and *police lockups* and the *handling of women by the police*

* Two members of the Committee were not in favour of presenting the draft proposal.

** This is also the advice rendered by the Attorney General of India to whom the Committee had referred the matter. A copy of his opinion is included at the end of this volume.

should be appropriately *incorporated in the Act*. The duties of the police towards women and children, for instance, can be inserted in chapter IV of the draft, after item 44. A section on people and the police may also be usefully added to that draft, as well as to the preamble of the proposed bill.

480.7 The present Committee would like to recommend as an interim step, i.e. until 480.3 is undertaken, additional provisions in the existing legislation* bearing on visitatorial rights of recognized individuals and institutions, including access to institutional and inmate records; and institutional and individual accountability for any custodial lapses and excesses, especially any violation of the inmate's dignity or person or in respect of inmates who have absconded or disappeared.

480.8 The right of dependent children of custodialized women also need to be clearly outlined in the present legislation.

480.9 The Committee would like the new *Mental Health Bill* to *reflect the specific recommendations* made by the Committee in respect of the custody and treatment of *non-criminal and criminal lunatic women* and mentally distressed women in custody. The right to habilitation of the retardate or the mentally ill has to be duly acknowledged in Indian jurisprudence and specific provisions bearing on arrest, handling, custodialization, treatment and habilitation of the mentally ill need to be introduced in the proposed Act.

C. ADMINISTRATIVE

481. On the *administrative* side, the Committee has made several recommendations which have already surfaced in previous chapters. These are recapitulated below in a capsule form for easy reference :

482. *Prisons* :

482.1 A *cadre of prison service* should be set up with recruitment and promotion from within the cadre.

482.2 There should be *enhanced and protected representation of women* in the prison cadre with appropriate recruitment, training, deployment and promotion provisions.

482.3 Apart from female staff in women's jails, there should be a women D.I.G. in the State Headquarters preferably from the prison services, particularly to look after the work relating to women prisons, women prison staff and women prisoners.

482.4 *Women superintendents* of separate prisons for women (currently six in number) should be made *fully autonomous* and the same principle should apply to all future independent institutions.

482.5 There should be *permanent warders and matrons* in institutions and it should be mandatory to recruit them rather than to rely on make shift substitute arrangements.

482.6 Any existing *discriminatory practices* arising from absence of 482.2, 482.4, 482.5, should be immediately corrected and further discrimination aschewed.

482.7 Prisoners' Councils or *Bandi Sabhas* should be set up in every prison to enable prisoners to interface meaningfully with other prisoners and with prison staff. These councils should also help to

routinely air prisoners' grievances and difficulties and to serve as orientation sessions on rights and duties of prisoners, and of prison staff.

482.8 *Socio-legal counselling cells* should be set up in *every prison* which can assist the process of enforcing custodial justice and the adjustment, reform and habilitation of the woman inmate.

482.9 *Released Prisoners' Aid Societies* should operate *in every district* which can provide a single-window assistance toward the habilitation and mainstreaming of the released prisoner (whether on completion of sentence or those released on parole, probation, etc.). These societies should have the close involvement of relevant government departments and non-government resources in the area.

482.10 The States must agree to enforce a *uniform prison manual*. Prison amenities for women and for their children, and the rights and *duties of women* prisoners should be clearly identified preferably in a *separate volume* of the prison manual. (A draft manual concerning women prisoners is recommended by the present Committee, *vide* Part II).

483. Police

483.1 A *cadre of women police* (Vanita Police) should be set up with much greater representation of women in the national police than their current strength (at well below one percent). There should be appropriate recruitment, training, deployment and promotion provisions governing this cadre.

483.2 *Separate police lockups* should be established along the criteria recommended by the present Committee and in consultation with State IGs of Police. It should be mandatory for each police station to provide enclosed space for holding all arrestees and separated space for female arrestees. Separate Women's police stations where they exist should be suitably reinforced with adequate training and tools of the trade. In addition, separate booths for receiving women and dealing with their problems should be set up selectively on an experimental basis in areas where crime against women and/or female criminality are endemic. Such booths can function independently or be integrated with general police stations. In either case, they should be managed by an integrated cadre of men and women police specially trained to deal with women.

483.3 A *Model police manual* should be compiled on the lines of the model prison manual and it should be strictly and uniformly enforced by all States. The manual should carry indicative standards of minimum space and other facilities and procedures applicable to women when in police custody. The police should be widely consulted in the preparation of the manual.

483.4 A special unit known as *Women's Assistance Police Unit (WAPU)* should be combined cadre of men and women police. It should deal specifically with crime preventive work and assistance to women at the time of arrest and in custody, as well as with the enforcement of social legislation.

484. Social Welfare and Mental Health Custodial Institutions

484.1 A *manual* to guide the management of these institutions should be compiled and uniformly enforced. It must specify *minimum indicative standards*.

484.2 Greater *grant flexibility* accompanied by *tighter inspecting and monitoring* mechanisms, should be devised which will help improve the efficacy of these institutions. Grants encompassing a longer

tenure (three years rather than one year) and allowing flexibility vis-a-vis heads of expenditure, and performance evaluation related to persons rehabilitated rather than amounts spent should prove more worthwhile.

484.3 A *national evaluative profile* should be attempted to help streamline social welfare custodial institutions and their clientele, objectives, coverage, activities, etc. Similar profiles should be compiled at the state level. This evaluative assessment should be uniform annual exercise. A similar *reporting exercise* should encompass all *mental health custodial institutions*.

484.4 *Judicial camps* should be convened in these institutions to provide effective and speedy justice to the inmates consistent with the principle of public trial.

484.5 *Socio-legal counselling cells* should operate in these institutions to aid the inmates.

484.6 Sanstha Sabhas or inmates' councils should be set up in these custodial institutions which can help generate a more interactive custodial environment.

484.7 It is recommended that an *escort corps* invested with the necessary police powers should be developed to operate under the jurisdiction of the social welfare or women's welfare department at the state level. This corps should service the escorting requirements for inmates in social welfare custodial institutions. The members of the corps should be selected and given the appropriate training for carrying out this specialized function in a sensitive, efficient and responsible manner.

D. PARTICIPATIVE STRUCTURE

485. Laws without popular understanding and support, and organizational structures without people's helping hand, are innocuous gestures that can deceive none. On the other hand, the will of the people like the will of the administrator, can carry even a faulty law or a faltering organization to a fulfilling end.

486. In the context of custodial care and justice people's understanding, cooperation, and invigilation are the principal expectations. The objectives of custody and correctional administration must be understood and respected by the people. It is they who must fully accept the preventive and deterrent as well as the corrective and rehabilitative functions of custody. With that awareness, they can cooperate and be associated more meaningfully with the custodial and correctional process.

487. The main input from people and the voluntary organizations is invigilation. For that role to be fully effective, there must be access for recognized individuals and groups to custodial institutions along with full rights to inspect institutional records and interview inmates in confidence provided they have no objection and with appropriate safeguards to prevent mischief or abuse. Absence of such entitlements has undermined the successful functioning of legal aid for instance.

488. The Committee believes that access by such groups can be institutionalised and should be given due standing in laws as has been done in case of the Family Court (*vide* Section 5 of the Act which provides for the association of social welfare agencies, workers and other specialists as can help the court to exercise its jurisdiction more effectively in accordance with the purpose of the Act).

489. The Committee is aware of the practice of appointing visitors to institutions and the dissatisfying experience with many such visitors who tend to be half hearted, indifferent, passive or not sufficiently

activist in their approach. The selection of such visitors must be based on merit, commitment, and the time which the persons are *actually* able to devote to their function, rather than 'social' eminence, at the same time ensuring larger representation of women visitors. The Committee also feels that including individual in their professional capacity will be more helpful in mobilizing institutional support through individual appointment. The selection must also represent a broad mix of all relevant disciplines. The setting up of such boards must be mandatory for all custodial institutions viz., prisons, police lockups, social welfare and mental health institutions, and any other. The approach of the visitors, however, should not be adversarial but assist the custodial authorities to deal more constructively with the inmates.

490. Whether the visitors' boards or with public generally, the custodial system must discard the stance of hostile suspicion and mistrust. Appropriate linkage should be fostered between custodial authorities and voluntary groups/individuals in protecting the rights and dignity of women not only in custody but also outside.

491. One sizeable source to supplement the corporate custodial resources is represented by the student and faculties of law schools and schools of social work. The enthusiasm for public interest causes is relatively easy to drum up in the younger generation who should be provided legitimate means of associating meaningfully with the criminal justice and correctional system. The present Committee has made a specific recommendations for the creation of socio-legal cells to be jointly run by law schools and schools of social work. Such cells should be attached to every custodial centre or a cluster of centres. Placement with these cells should be accredited course work and be graded. The objective should be to take socio-legal consulting to those who are in most need of it, and to internalize its availability to those in custody. The counselling cell should also encompass the custodial staff serving a useful safety valve functions.

492. People's participations has one other indispensable dimension. It is to motivate those who operate the system to manage the system better. For this, they must *believe* in the purpose for which the system was set up and in the modalities established to achieve that purpose. In the context of present report, the main crunch of stringent enforcement lies with pushing system's operators to get actively into the task of promoting the objectives of custodial and gender justice. It is they who need to understand that 19th century precepts are unfit for current aims for custodialization. When they take a person, especially a women or a child in their charge, they are morally responsible for making it better adjusted in custody and eventually in society. Any departure from or aberration of this corporate custodial philosophy must be met with the strictest deterrent action, just as any visible success in implementing that philosophy should be rewarded with due recognition and wide publicity. A conglomeration of workers can be turned into a cadre with steady committed performance only when the rewarding system is as lucidly clear as the disciplinary measures that apply to managerial deviance. The current criminal justice and correctional system suffers from a gap between presumed objectives and enforcement. Ambiguity is counter-productive and presumptions and assumptions should be clarified in the form of clearly stated objectives, which is the recommendations.

NATIONAL POLICY FOR CUSTODIAL JUSTICE TO WOMEN

Preamble

Recognising the value revolution enshrined in the Constitution of India especially in the field of human rights and gender justice and finding the need to extend the application of these within incarcerative and quasi-custodial circumstances;

Expressing appreciative acceptance of the exposition by the Supreme Court of India and the high courts of the Principles, rules of conduct and State obligations flowing from constitutional provisions bearing on Fundamental Rights and Directive Principles of State Policy vis-a-vis women in custody;

Taking note of the prescriptions in international instruments, with special focus on human rights and prison standards and objectives, and acknowledging India's respect for such paradigms of an emerging world jural order;

Understanding the biological vulnerability, as well as socio-economic and cultural disabilities of women and sharing the constitutional perspective of special provisions for women as integral to the achievement of equality between men and women in Indian Society;

Recognizing the small but growing numbers of women in custody and the risk of greater female participation in criminality;

Keeping in view the pivotal role of the woman in the family, her relative non-violence and the lesser security risk posed by her;

Appreciating the importance of creative institutional and non-institutional experiments in preventing further demoralisation due to custodial distress;

Realising the need to re-examine the statutory provisions, prison and police manuals and other administrative regulations the majority of which are of pre-independence vintage, in order to redress operational deficiencies and to prevent custodial excess and injustice;

And convinced that setting out State's practical creed, and presenting fresh proposals pertinent to custodial institutions is imperative, the object being to express Government's concern and specific intention to all sections of society and the relevant civil services;

To, therefore, assist and guide a vital restructuring of the laws and procedures with respect to women in custody, the Government of India is pleased to adopt the following National Policy for Custodial Justice to Women:

ARTICLE I

Respect for gender dignity and habilitative concern for women must inform all relevant institutions and personnel in the criminal justice and correctional system.

ARTICLE II

The State shall endeavour, as far as possible to set up specialized service and institutions with exclusive jurisdiction for meeting the needs of women coming in contact with the criminal justice and

correctional system. Separate prisons and police lockups, correctional centres, and separate courts *inter alia* shall be set up to exclusively deal with women.

ARTICLE III

Recognising that women's equality in life and in law are inseparable the present separation between the criminal and correctional justice system and the social service delivery system shall be replaced by an integrated and fused approach to developing services to women. Health, welfare, education, functional and legal literacy, employment training and emotional and cultural mainstreaming programmes shall encompass women in custody, as well as those released back into the community.

ARTICLE IV

All substantive and procedural laws pertaining to custodialization of women, shall meticulously respect women's need to remain a parent and the child's for a parent.

Recognizing that children of custodialized women are innocent, the State shall conscientiously respect the rights and privileges of the children accompanying the women in custody.

ARTICLE V

Institutions authorized to keep women and children in custody, and their staff, shall be inspired by same ideals and governed by the same values as above spelt out. The police prison, correctional, probation and judicial personnel involved in the handling of women shall be specially trained and their knowledge updated in the law and procedure applicable to women.

ARTICLE VI

Bearing in mind the pathological circumstances that bring women into conflict with the law, institutional treatment shall be informed by an insight into the human personality and the social causes of women's deviance. A cadre of staff specially trained in appropriate disciplines and skills shall be ensured by government for achieving the goals of correction.

ARTICLE VII

Accepting their innocence in law and their special needs, and recognizing its moral obligation to them, the State shall set up expert service for the care and habilitation of mentally, physically and socially handicapped women.

ARTICLE VIII

The State shall consistently pursue a policy of enhanced representation of women in the criminal justice and correctional system to instill greater confidence in women coming in contact with the system. The status accorded to custodial and correctional personnel shall adequately and appropriately reflect the significance of their input and the unusually demanding and stressful nature of their work

ARTICLE IX

Taking account of the special role of women in family life and societal development, and the vulnerability of girls, the State shall endeavour to avoid the arrest and detention of females to the extent

possible and without threatening the safety of the State in any manner. Save in the rarest of rare cases, to be specified, women shall not be arrested between the sunset and sunrise. Likewise, the arrest of women by the men of the police force acting alone shall be avoided.

ARTICLE X

Arrest and search of women, including interrogation, shall be conducted according to strict standards of decency, and in a manner not to violate the modesty and dignity of womanhood.

In all cases when a woman is taken into custody, all existing provisions regarding protection of her person and her rights shall be scrupulously adhered to. At no stage during and after arrest, will a woman arrestee be left unguarded by police women or another woman authorised by government.

ARTICLE XI

Bail, and not jail, shall be the rule of law, save in rare exceptions necessitated by nature of offence, investigation and trial. At the same time, wise circumspection shall play upon the policy of enlargement of dangerous or endangered women in custody specially in those cases where the interest of the society, and considerations of the arrestee's safety and freedom from ensnarement by anti-social elements are to be reconciled. Protective custody is preferable to release to exploitative elements that use bail policy as cover-up strategy.

ARTICLE XII

To usher in humanism wherever women are detained, in penal or other custody in addition to basic amenities and privacy, the State shall provide the essentials for meeting women's special needs, including those promotive of her dignity.

ARTICLE XIII

The State shall ensure that victims, witnesses and all other citizens who come in contact with the criminal justice and correctional system, shall receive fair, concerned consideration and assistance including restitution and compensation wherever appropriate.

ARTICLE XIV

Sentences and sentencing of female offenders shall assume a pronounced rehabilitative goal in view of women's special place in family and society. Incarceration shall be the last choice in the sentencing of women offenders. Short-term imprisonment shall be avoided for women offenders, in favour of non-custodial and community based options.

Welfare of children coming in contact with the criminal justice and correctional process shall be a relevant consideration in the sentencing and disposition of women, and such children shall enjoy protection from the detrimental effects of their mothers' arrest and incarceration.

ARTICLE XV

The State wide Art 39 A of the Constitution, is pledged to secure that the operation of the legal system promotes justice, including custodial justice. Fundamental to this rule of governance is the obligation of the State to provide free legal aid to all women in custodial circumstances, including while

in police lock-up, prison, welfare home, mental asylum or other, in order to ensure the rights of those in custody.

ARTICLE XVI

The rights of inmates and remedial procedure shall be properly brought to the notice of those in custody. Practices derogatory to women shall be scrupulously avoided and any violation brought to the notice of the authorities shall be sternly and promptly dealt with.

ARTICLE XVII

The object of the custodialization of women not being merely either the protection of the society or herself, but ultimate self-reliance, this shall be nurtured by a policy of progressive and supervised inmate participation in, and partial responsibility for, a variety of activities. Accomplishment of economic independence will be pursued through a plurality of flexible programmes in which help from credit and suitable institutions will be sought. Wages of rehabilitative value, and not discriminatory between men and women, will progressively govern the system.

ARTICLE XVIII

In the operation of welfare measure for women in custody, Government realise the legitimacy of responsible citizen participation. Provision shall, therefore, be made to induct, recognise and enhance the involvement particularly of women's organisations; activists, lawyers and social workers at every stage of the criminal justice process. Such voluntary participation as receives recognition from the State shall be bound by same values, norms, discipline and training as required of government agencies and personnel.

ARTICLE XIX

In pursuance of the citizen's rights to information, the State shall ensure access to institutions and information regarding custodial conditions and institutional management. Such access shall not prejudice the inmate's right to assert privacy as also the specified requirements of individual, institutional or State security.

ARTICLE XX

Research and development in every field of administration is a pre-requisite for social advancement. It is essential, therefore that systematic enquiry into the nature and extent of women's involvement in crime, as well as women's interaction with social welfare and law-enforcement systems and the efficacy of custodial and correctional modalities vis-a-vis women is actively undertaken. Government purpose, through research bureaus in the police, prison and social welfare departments, to thus pursue a policy of investigation, innovation and evaluation. The enforcement and relevance of this policy pronouncement itself shall be periodically evaluated.

ARTICLE XXI

Government are aware that only a holistic perspective can ensure a scientific and humanistic approach to the treatment of women in custody. The ensemble of correctional processes is so intricate and multi-dimensional that success cannot be achieved only through bureaucratic processes. Government

therefore, shall set up a National Authority on Custodial Justice to Women. This shall be an apex monitoring and advisory body for coordinating policy implementation by the various ministries and departments concerned with women's welfare home, justice, law, social welfare and social defense. There shall be similar bodies at the State level as well, linked with the National Authority, and have the power to monitor, introduce tonic changes, and engender a sense of accountability in the various infrastructures representing governmental and non-governmental agencies.

In the composition of the above Authority, representation of voluntary organizations and individuals of independent merit shall be necessarily provided for.

ARTICLE XXII

In recognition of the need to evolve and maintain high standards of professional competence, Government propose to authorize an association, composed of practitioners, academicians and individuals with active current experience in the correctional discipline to assist the proposed National Authority. Such association shall also be delegated the function of accrediting or withdrawing recognition to correctional and custodial institutions for women.

SUGGESTIONS FOR A LEGISLATIVE CUM ADMINISTRATIVE CODE FOR CUSTODIAL, CORRECTIONAL AND HABILITATIVE JUSTICE TO WOMEN

I Background

Several committees, commissions and academic investigations have focussed on prison and correctional reform and on the status of prisoners generally. The National Expert Committee on women prisoners which was the first exclusive official enquiry into women in the penal and correctional system has brought out a variety of disabilities women and girls suffer because of their gender in the criminal justice and correctional processes and in various custodial situations. It has also recommended beneficial provisions for women in the administration of criminal and correctional justice. Drawing on relevant recommendations of previous committees and commissions and its own observations and taking into account constitutional provisions, existing case law, and executive directives on the subject, the National Expert Committee proposed a Declaration of a National Policy on Custodial Justice to Women. The Policy outlines the broad objectives and procedures which should regulate the custody of women and the treatment meted out to them at various stages of the criminal justice and correctional process. The present proposal is a sequel to the policy. The suggestions made here are of a recommendatory nature and some of them may partake the character of rules and may not be strictly part of a Code or Law.

I Objects and Reasons

A number of legal and other provisions currently exist which bear on the penal and non-penal custody of women, but no comprehensive law has been written specifically about the penal and correctional system in relation to women. The situation therefore calls for the adoption of a code containing comprehensive guidelines for the handling and treatment of women in judicial, correctional and rehabilitative process.

The present proposals partake of legislative and administrative provisions and are calculated to clarify the scope of gender justice and to streamline administrative discretion in the larger interest of equal justice and protection under law to women.

Article 15 (3) of the Constitution empowers the State to make special provisions in favour of women in order to realize the right to equality before law guaranteed in Article 14. Article 39 A further makes it obligatory for the state to promote equal justice. Article 51A (e) casts a fundamental duty on citizens including public functionaries to renounce practices derogatory to the dignity of the women. There is therefore a clear and persuasive mandate for formulating a specific code for protecting gender dignity and ensuring gender justice to women. The adoption of such a code moreover is necessary to counter the recognized discrimination against women in the criminal justice and correctional process and the denial of equal justice to them.

III Usage and Utility

The term 'code' is not used here in the sense it is understood in common law for which there are examples in our law in the form of Indian Penal Code, Code of Criminal Procedure etc. In the present context, 'Code' seeks to convey a comprehensive statement of principles, objects and intent of the Constitution, the legislature, and the judiciary on the subject of women in the criminal justice and correctional processes. The adoption of the Code will enable the administration and the judiciary to develop the application of the National Policy on Custodial Justice to Women in a manner consistent with the legislative objectives. Admittedly, many of the provisions in the proposed Code already exist in the law either of the Centre or of the State. They are also found in judicial directives and executives instructions. It is considered necessary to codify them and relevant additional provisions in a single document for convenience and easy access as well as for integrated application. The Code can even serve situations not anticipated by the legislature.

Marking a departure for the complex style in which legislation is conventionally drafted in our country, the present Code is deliberately worded in a simple manner so as to be widely understandable to the people and to the administrator. While attempting to be comprehensive, the Code is not intended to stifle state, non-governmental or individual initiative furthering the objectives of the Code and of the National Policy on Custodial Justice to Women. Although strictly speaking a Code may be understood as a legislative project here it is used to cover a compendium of mandates regardless of their character as falling within legislative or administrative spheres. The appropriate authority may legislate a comprehensive Code and supplement it with rules, regulations and administrative instructions.

IV. Preamble

Recognizing the value orientation and gender solicitude enshrined in the Constitution of India and the need to extend their application to the law and practice within the incarcerative and quasi-custodial situations;

Taking meaningful note of the solemn commitment on criminal justice, and custodial, correctional and rehabilitative standards contained in international instruments;

Acknowledging the wholesome directions and interpretations on human rights and Constitutional guarantees arising from the court decisions vis-a-vis custodial care;

Fulfilling the Constitutional promise of special provisions for women in providing equal justice;

Considering the small but growing numbers of women in custody and the need for the protection of womanhood in various custodial situations;

Realizing the inadequacies of existing law and practice in criminal justice and correctional administration; and

Pursuing the goals enshrined in the National Policy Statement on Custodial Justice to Women approved by Parliament on.....

It is proposed to promulgate the following Code for the guidance of all concerned in the criminal justice and correctional system.

V. Interpretation

The Declaration contained in the National Policy Statement on Custodial Justice to Women and the United Nations Conventions and Declarations on status and treatment of women to which India is a signatory shall inform the interpretation and application of the provisions of this Code. For the sake of convenience, these relevant documents along with excerpts from key legislations bearing on women in custody are incorporated as appendices* to this Code and shall be treated as part of the Code.

Without prejudice to the principles and policies enshrined in the above mentioned documents, in all cases of doubt, such interpretation may be adopted which is favourable to the special status and dignity of the woman. In general, a construction which would promote the broad legislative purpose will be preferred to one which does not.

VI. Purpose

The purpose of this Code is to eliminate discriminatory and deleterious practices in judicial, custodial and correctional processes which handicap women in the enjoyment of their human rights or undermine their correction and habilitations. Measures which seek to restore women to their social, familial and economic potential and personality and protect their dignity when under State care and custody shall be taken as statutory mandate.

VII. Women and The Police

1. Taking note of the special role of the women in the family, the greater probability of her being available for assisting the criminal process, the potential for abuse of her person in custody, and the lesser threat posed by her to the security of the society; it shall be the policy of the State including the police to avoid the arrest and detention of females excepting when there are special reasons recorded in writing to disregard this policy in specific situations.
2. Whenever arrest is to be made, women's submission to custody shall be presumed unless proved otherwise; there should be no occasion for a male police officer arresting a woman to touch her person.
3. Except in unavoidable circumstances, no woman need to be arrested between sunset and sunrise.
4. Only officers of and above the rank of Assistant Sub-Inspector should effect the arrest of a woman.
5. In all cases of bailable offences, bail on her bond shall be granted forthwith by the police themselves.

6. As far as possible, in non-bailable cases also, bail should be granted unless special circumstances warrant a different course, in which case, the arrested woman shall be remanded to judicial custody with utmost expedition.
7. Such custody shall only be in a separate police lock-up for women and, where such facility is not available, in a special home or institution designated under any law for the time being in force to receive women. At no time shall a woman arrestee be left unguarded by a woman guard or surrogate.
8. In all places of police custody, basic amenities such as living space, water, toilet, food, medical examination and care, and provisions to meet the special needs of women shall be provided.
9. The State shall, as soon as may be, draw up a charter of minimum standards of treatment, including amenities which shall obtain in police custody for custodial inmates as well as staff. The standards shall also spell out the rights and duties of inmates and staff, and shall serve as a manual of instructions and be enforceable in the manner indicated.
10. When arresting a woman, proper arrangements for the protection and care of her children shall be the responsibility of the State. Children who need to be custodialized jointly with their mothers shall enjoy rights justly needed, while in custody, in terms of food, living space, health, clothing and visitation.
11. The person of a woman shall not be searched except by a woman duly authorised by law, and in a manner strictly in accordance with the requirement of decency. Whether in custody or in transit, the arrested woman must always be guarded by a woman police or a female surrogate. While escorting, a relative may be permitted to accompany the female arrestee.
12. Whenever a woman is to be examined by the police or other investigative agency as a witness, it should be done only at her residence; nor should she be summoned to the police or investigative station unless she expresses her preference to be examined in the station.
13. Before taking a woman into custody, the police shall record the fact in relevant records and responsible officers shall ensure that 'detention' without making formal entries is strictly avoided.
14. All senior police officers visiting police stations in their official rounds must, as a working rule, enquire personally into conditions of woman taken into custody and check the promptness with which entries are made, information forwarded, grounds of arrest furnished to the accused, etc. The result of the enquiry must be recorded by the officers.
15. Information on women in custody should be made available to recognized social organisations and individuals on request. Persons and institutions accredited as visitors should be allowed, as of right, free access to police stations and records.
16. Whenever a woman is arrested by the police without warrant, she must be immediately informed of the grounds of arrest and the right of bail.
17. In exceptional circumstances when a woman arrestee is taken to a police lock-up, the police should immediately give intimation to the nearest Legal Aid Committee or recognised legal services body which must render all necessary legal services at State expense.

18. On arrest, the police should immediately obtain from the arrestee the name of a relative or friend to whom the intimation of her arrest should be promptly given.
19. A substantial increase shall be effected in the woman component of the police force at all levels and adequate training given.
20. In endemic female crime areas, or wherever otherwise desirable exclusive police stations, or booths and counter within police stations, shall be set up to deal with women needing protection of, or coming in conflict with, law. Such booths and police stations shall be managed by an integrated cadre of men and women police specially trained and sensitized to deal with women.
21. Crime and arrest data gathered by the police should maintain separate streams of information on men and women. Sex-wise data should be compulsarily compiled and displayed in all police stations and reflected in all reports on crime, arrest and disposal.
22. Any violation or deviation or action on the part of any officer which defeats the policy of the above provisions shall be punished after due enquiry by a judicial magistrate of the first class. The nature and quantum of the punishment shall be decided by the sessions judge having the requisite jurisdiction. An appeal to the high court shall be available for any aggrieved party.
23. Where the wrong is proved, the wrong-doer and whether proved or not, the State shall make fair reparation to the victim to be determined by the sessions judge.

VIII. Women and The Judiciary

1. In protecting the rights of the women in the criminal justice process from arrest through release, the judiciary has special responsibility to ensure that the principles and purposes of this Code are implemented. Judicial officer shall always respond to the distressed call of women in custody irrespective of their jurisdiction or status in the judicial hierarchy.
2. When produced before the magistrate, he or she shall invariably ask the woman of the treatment given to her by the police and of any other special problems she encounters in her situation. Every effort shall be made to resolve those special difficulties and in cases where an immediate solution is not possible within the law, the Magistrate may explain the position to her, and initiate appropriate action for redress.
3. Except in extreme situations when detention is desired, the Magistrate shall release the woman on her own bond, the conditions of which shall be explained to her by the Magistrate.
4. No judicial remand of women will be allowed except into those institutions which are completely under the control of women officials.
5. If considerations of arrestee's own safety and freedom from ensnarement by anti-social elements, demand detention in public institutions, bail shall be refused to the woman in her own interest, unless she specifically states her willingness to be thus released even after being alerted to the above considerations.
6. In the disposition of women to custody or otherwise the Magistrate must enquire and direct that suitable arrangements for the welfare of her children be made in a manner that protects the rights of children.

7. Speedy trial of all cases involving women is a legal and moral requirement. All magistrates shall proceed with such trials with utmost expedition, with due regard to the principle of limitation where applicable. Special tribunals and procedures to carry out this directive shall be organized by Government in consultation with the High Court
8. To the extent possible, the State shall set up Women's Courts to try women offenders. Where joint trial with man is involved, the Courts may use their discretionary power whether to hold joint or separate hearings.
9. Rights to legal aid in criminal proceedings is a fundamental right. In the case of women, free legal aid shall be given from the time of arrest and Magistrate shall ensure that adequate legal services are provided.
10. Magistrate shall inform women, when first produced, of their right to legal aid at State expense and direct the provision of necessary services. They shall also explain the nature and scope of the proceedings against her and her rights in it.
11. When women are examined in court as accused or as witnesses, due courtesy and decency shall be shown. If circumstances so demand in the interest of modesty and privacy of women, the trial may be held *in camera* or the woman may be examined on commission through women advocates.
12. Long cross-examinations and repeated examinations may be avoided in the case of women and if necessary, information may be sought by affidavit and/or interrogatories.
13. Representation of women at all levels in the judiciary is essential to promote gender justice and women may be appointed in adequate numbers, among others, for processing cases involving women.
14. In courts processing cases involving women, the court staff should consist of sufficient number of women employees in order to avoid personal difficulties which women accused or women witnesses may face the male dominated institutions and cadres.
15. Sentences and sentencing in respect of women offenders may have to take note of the solidarity of the family and the woman's unique role and needs. Except when unavoidable, custodialization shall not be resorted to. Community based treatment of women being ideal for them, their children and society, it is desirable to prefer such disposition.
16. While sentencing women to imprisonment or any form of custodialization, suitable arrangements should be made for the custody and welfare of their children.
17. Courts will take continuing interest in the welfare of women in custody and ensure that they receive proper treatment, including psychiatric and rehabilitative services.
18. Magistrates shall make frequent visits to jails and custodial institutions within their jurisdiction and shall file periodic reports to the superior judicial officers on the status and condition of women in such institutions.*

19. In case of women in custody for long periods, premature release by reducing the sentence by courts may be considered. Parole, furlough and other forms of supervised release may be widely resorted to.
20. Short term sentences of less than 6 months may be totally avoided in case of women. Similarly simple imprisonment which is demoralizing and wasteful shall be avoided.
21. Where, owing to small numbers, the woman's custodialization amounts to solitary confinement, the court shall move for her immediate release unconditionally, or on probation or parole as may be deemed fit.
22. In the disposition of women offenders, courts should mandatorily call for and give due regard to the probation officer's report and to the report of medical/psychiatric examination. Where probation officers are not available, probation investigation should be entrusted to recognized and accredited institutions and individuals.
23. Women, unless economically independent, shall not be sentenced to fine and alternatives such as admonition, conditional discharge, probation under supervision etc. should be resorted to.
24. The courts shall not sentence any mentally sick woman or retardates to prison and shall ensure the immediate transfer of any existing cases of non-criminal and criminal lunatics to mental homes for therapeutic and habilitative care.
25. Insufficient escorting staff or facilities shall not be used as grounds for postponing the hearing or disposition of women. Whenever necessary surrogate escorts should be used. In addition, the State Government through the Social Welfare Department should develop an escort corps to serve the escorting requirements of female inmates in various custodial situations.

IX Women and Prison Administration

1. All custodial premises for women prisoners should have a private, secured and therapeutic environment.
2. As far as possible each State should have at least one or more separate jail for women.
3. There should be separate custodial facilities for convict and undertrial women. Separate institutions or reception centres where undertrial and remanded women when necessary may be kept, should be set up in larger cities, district headquarters, and in female crime endemic areas. Where convicts and undertrials are currently housed in one institution, they must be kept apart in separate wings until independent facilities are set up.
4. Proper medical facilities and medical examination of women inmates on admission and periodically thereafter are to be ensured in all custodial centres including prisons, jails, sub-jails, etc.
5. Qualified lady doctors and nurses should be attached on a visiting basis to every female prison and custodial centre with women inmates.
6. Expectant mothers in custody shall be shown special consideration by way of medical and nutritional care, education in child rearing and mother craft and assigned work in accordance with their expectant status.

7. Women suffering from contagious diseases shall be placed in isolated care or at a health facility if necessary until they recover.
8. Scale of diet for women prisoners shall be strictly according to medical norms and special extra diet shall be given if medically prescribed.
9. Standard clothing should be allowed to every female prisoner and extra clothing to sick and old may be granted as medically advised.
10. For personal hygiene, female prisoners may be provided with comb, mirror, washing soap, bath soap, oil, sanitary napkins, etc.
11. The accommodation, cleanliness and sanitation provided to female prisoners shall conform to prescribed standard and norms.
12. Work in prison shall not be treated as punishment but as rehabilitative therapy.
13. Female prisoners shall be paid equitable remuneration for their work in prison. Wages paid shall be of a rehabilitative value. Out of their earnings, they will be allowed to purchase essential articles for their use while in custody, and to save and/or remit to their families.
14. The menial duties in the female prisons or ward shall not be assigned to inmates and no monetary or non-monetary incentive should be applied to such work. The prison budget should provide for this function as a routine staff expense.
15. As far as practicable, women prisoners shall be imparted training which will make them economically self-sufficient and capable of functioning independently in society. Choice of skill taught will be related to marketability and independent earning potential. Some representative trades are: home science, mother craft, nursing, handloom weaving, hosiery, toy-making, ceramics, stationery articles, gardening, fruit preservation, electronics, etc. In addition, socially useful knowledge such as use of bank, post office, health centre, employment exchange, saving schemes, etc., will be imparted to the prisoners. Educating women in their rights, status, role and capabilities will be mandatory.
16. A reasonable number of interviews with the relatives and unlimited opportunities to write letters to them and receive letters from them should be allowed to the female prisoners.
17. Compulsory education for illiterate prisoners shall be provided. Literate prisoners will be motivated to pursue further learning.
18. Recreational facilities, books and reading materials, etc., should be provided to female prisoners and they should be encouraged to use them. This should include the use of religious books of the prisoner's choice. Pursuit of painting, music, theatre, etc., shall be encouraged as part of correctional therapy.
19. Female prisoners shall be classified on the basis of the age groups, nature of crime, type and length of sentence, etc., and correctional treatment of prisoner shall be related to her specific problem and situation. For this purpose, treatment personnel trained in correctional approaches shall be appointed.

20. In no circumstances should girls be imprisoned or kept in mixed custody with adult women.
21. Habitual offender, prostitutes and brothel keepers must be kept separate from other inmates in prisons.
22. No mentally afflicted women should be placed in prison and steps for their immediate transfer to mental homes must be effected.
23. Women and children held as victims or in protective custody or required for purpose of giving evidence must not be kept in jails and should be transferred to designated welfare and protective homes.
24. Inmates with children require special attention of prison authorities and suitable orders may be taken from court to ensure the interest of both mother and child.
25. As far as possible, children of inmates may not be kept within adult jails and visits by children to the inmates may be liberally allowed. In cases where imprisonment is unavoidable, children of prisoners must have rights per se in terms of food, spare clothing, education, recreation, visitations, etc.
26. At the time of release of the child, on account of reaching maximum permissible age, the court and the prison/custodial management shall ensure that the mother-child link is not severed.
27. Probation, parole and other non-institutional modalities of corrective treatment shall be widely used in case of women offenders, save in exceptional cases where specified considerations of prisoner's or state security limit such options.
28. Women who pose no security risk and meet other suitability criteria may be housed in open jails where work facilities related to their agricultural or other occupational background should be available.
29. Women illegally detained in jails on grounds of destitution, begging or vagrancy may be rehabilitated in appropriate institutional and community based services and modalities.
30. No female prisoner shall be liable to any form of corporal punishment or use of handcuffs, fetters or isolation as a form of disciplining.
31. No female prisoners shall be punished without being informed of her offence and allowed an opportunity to explain her conduct. Exceeding the sentence is illegal. For any custodial excess of neglect, the responsible staff shall be dealt with severely and promptly.
32. Female prisoners shall be searched by female wardens in the presence of other senior women personnel with strict compliance to privacy and decency.
33. Complaints from female prisoners shall be registered, investigated and promptly remedied. A grievance box may be provided for this purpose. No harm should come to any complainant as a result of articulating her grievance or for deposing against custodial staff.
34. The prison manual must be physically available in every jail for easy reference by inmate and staff or accredited visitors.

35. A separate volume of the prison manual should deal with the custody and treatment of female and should be circulated amongst staff and inmates or for reference by accredited visitors.
36. Rights, special privileges and duties of women prisoners, should be widely publicised within the prison and each inmate should have full right of access to information in this regard.
37. Before a female prisoner is released, her relatives shall be informed and where no relative exists or shows up, the released prisoner shall be sent with a female escort.
38. Appropriate assistance shall be rendered to every female prisoner on release whether during or after completion of sentence. For this purpose, a centre for assisting released prisoner shall be set to service a cluster of prisons and custodial institutions on an area-wise basis. Even without the centre, the prison authorities shall take necessary steps to arrange the rehabilitation of the released prisoner either through the family, the relief centre of a voluntary organization.
39. Aftercare and short-stay homes for women prisoners may be established in every state to serve those prisoners who are homeless or rejected by their families.
40. Women's representation in prison services must be enhanced and adequate compensation given to them in lieu of lack of promotion opportunities on account of fewer job opening and in recognition of the demanding and stressful nature of their work. Adequate training and retraining should be provided for female custodial and prison staff to enable them to update their skills.
41. Apart from female staff in women's jail, there shall be a women D.I.G. in the State Headquarters, preferably from the prison service, to specially look after the work relating to women prisoners.
42. Democratization of prison administration must be systematically engendered and a new prison culture based on human and constitutional values developed. For this purpose, both pre-service and in-service training and sensitization are necessary of male and female cadres associated with the administration of prisons.
43. Legal aid and counselling through professional bodies assisted by para-legal and social workers should be institutionalized in every prison and custodial institutions. Law schools and schools of social work should be encouraged and permitted to render socio-legal counselling service to the inmates.
44. Visiting Committee's to jails should be constituted in consultation with professional bodies and university departments of law, criminology, social work and social sciences from the neighbouring areas. Visitor should be nominated on the basis of merit, public spiritedness, activist and actual time likely to be made available to the visitorial function.

X. Women and Non-Penal Custodial Institutions

1. The custodial conditions in non-penal institutions shall be superior to those in penal institutions and in no event shall be below the standard prescribed for female prisons.
2. A manual for non-penal custodial institutions shall be developed and all institutions and their inmates, as well as accredited visitors shall have access to copies of it.

3. Institutions shall be set up to service specified client groups in a specialized manner. No indiscriminate mixing of various categories of client shall be allowed. Udertrial or convicted women shall not be placed in such institutions under any circumstances.
4. Model rescue homes and the beggar homes shall be set up for women in every metropolitan area and in such urban or district centres where the need to service these categories of women is greater.
5. Beggar homes for women and like institutions shall be centres of corrective treatment and rehabilitation and not for mere detention.
6. All existing programmes of socio-economic assistance to women shall also encompass women in non-penal custodial institutions both while in custody and on release.
7. Inmate's Councils or *Sanstha Sabhas* should be set up in every custodial institution to enable inmates to interface meaningfully with each other and with the custodial staff.
8. Socio-legal counselling cells should be set up in every non-penal custodial facility for women to assist in their socio-economic and emotional rehabilitation.
9. Legal aid camps and wherever possible *Lok Adalats* should be organised periodically in custodial centres. Voluntary agencies may be encouraged to give legal literacy and to assist in securing redress for inmates both in civil and legal matters.
10. Accredited voluntary organizations should be allowed to visit and invigilate the wholesome enforcement of the Code and the manual in the institutions.
11. Visitors appointed should be eminent people and should be selected in consultation with professional bodies and university departments of law and social works, and with due regard to active, activist record and actual availability of time.
12. Women students of law and social work, and women's groups should be encouraged and permitted to render services to inmates of non-penal custodial institutions.
13. Special steps should be taken by custodial authorities at the time of release of inmates to assist in their rehabilitation through close liaison with their families and/or recognized voluntary organizations.
14. A very strict accreditation process and machinery should be operative in order to discourage delinquent institutions and honour competence.
15. Children of women inmates require considerable handling and all endeavours in custody shall be toward reinforcing the inmate's links with the child.
16. Wherever children need to be custodialized with the inmate mother, the institution shall make adequate provisions either in the institution or elsewhere. In all such cases, the custodialized child shall enjoy rights per se to food, space, clothing, care, education, etc.
17. Literacy and skills training shall be mandatory for all inmates irrespective of their grounds or nature of custody.

18. Custodial staff shall be sensitized toward a humanist approach to management of the inmates and to pay due regard to their innocence in law.
19. Custodial neglect, abuse or excess shall be dealt with due severity and the management or the State shall be liable for compensation to the victim.
20. The state social welfare departments should develop and escort corps of specially trained persons who can service the escorting needs of various institutions.

XI. Women and Mental Health Custodial Institutions

1. Mentally disturbed women are entitled to proper medical care and to education, training and rehabilitation. A companion right of the female retardate is freedom from sexual or their exploitation.
2. Mentally disturbed women shall not be detained in prison and they shall be given proper treatment in mental hospitals. Those that are currently in prison shall be immediately transferred to a mental health facility.
3. At no time shall mentally ill women be left unguarded by women escort or guards.
4. Juvenile girls who are mentally sick must receive special therapeutic attention and protection from physical or other exploitation, and be custodialized separately from adult female retardates.
5. Institutional facilities in accordance with the Mental Health Act should be established in every state for rendering psychiatric justice to patients.
6. Conditions in mental hospitals should strictly conform to the medical standards and supervisory staff should be personally responsible for ensuring them.
7. Watchdog committees of social activists should be constituted for each mental home or hospital and they should file reports after periodic inspection. Such reports should be a basis for continued recognition and accreditation of the concerned institutions.
8. Medical and custodial staff in mental homes and hospitals found negligent must be severely dealt with.
9. Legal aid camps must be organised in mental homes and all reprocessual and legal help rendered to inmates to overcome any difficulties arising from their custodialization.
10. The present distinction between criminal and non-criminal lunatics is unsatisfactory and ought to be substantiated or disproved through appropriate mental health research. The State should encourage research in that direction.
11. The State may utilize the services of a nationally reputed mental health institution (NIMHANS) to streamline and upgrade mental health facilities and approaches.
12. Custodialization and treatment of the mentally distressed should appropriately reflect the new care and therapeutic approaches. Greater use of community based and supervised options, including day care centres for the mentally ill, and open, non-cellular custodial residences, etc., should be promoted.

13. In the therapy and habilitation of the mentally ill women, their families shall be consulted and closely associated wherever possible.
14. Training should be given to custodial as well as medical staff in mental homes and hospitals to understand and deal sensitively with the mentally ill. Similar sensitization will be necessary in case of staff of all penal and non-penal custodial centres (viz., police, prisons, welfare homes, etc.)

XII. Women in Custody and Legal Aid

1. Free legal aid at state expense is the fundamental right of every woman in custody. All custodial institutions should arrange for systematic delivery of legal services to every inmate in need of such service.
2. Legal aid includes access to medical justice rehabilitative justice and informational justice in addition to processual justice.
3. Legal aid is to be provided not only during trial but also in the pre-trial and post-conviction stages.
4. All women in custody must be informed of their rights in custody including their right to demand legal aid if needed.
5. Legal literacy programmes, *Bandi Adalats* and legal aid camps should form custodial modalities for rendering services to women in prison and other custodial centres.
6. Legal aid boards should devise and implement schemes to prevent custodial injustices, and to recommend modalities for redress and victim's compensation, as well as deterrent punishment to delinquent custodial staff.
7. Legal aid workers and para-legal workers should ensure strict compliance of the provisions of this Code and promote humane approaches among all operators of the criminal justice and correctional system.
8. Taking note of the continuing need for legal services in custodial conditions, State governments may set a regular aid counters in larger custodial institutions, or to serve as cluster of institutions. Such counters to be run as socio-legal cells may be managed jointly by law schools and schools of social work under supervision of Legal Aid Boards. Placement with such cells may be given accredited status as graded field work by the concerned faculties.
9. Legal aid Committees and legal aid clinics based in law colleges must be encouraged and permitted to extend legal services to women in custody.
10. There should be increased representation of women in the legal aid machinery. Legal aid workers deputed to women's institutions should be preferably women.
11. Women's organisations and activist women must have consultative status with legal aid committees.

XI. SELECT COMMENTS OF COURTS IN RAPE AND DOWRY CASES

State of Punjab v. Gurmeet Singh and others, (1996) 2 SCC 384

Duty of the Court to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statements of the prosecutrix should not be ground for throwing out and otherwise reliable prosecution case.

Chiddarma v. State, 1992 Cri L.J 4073

No corroboration is necessary if the case inspires confidence, in context of a rape case.

State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207

Police Inspector entered the hutment of the complainant woman and tried to ravish her. During enquiry he took the plea that she was a woman of easy virtue. Inquiry Officer dropped the charges against the accused. Bombay High Court upheld the action taken by the Inquiry Officer.

Even a woman of easy virtue is entitled to privacy and no one can invade her privacy when one likes. So also it is not open to any every person to violate her person as and when he wishes. She is equally entitled to protection of law.

Bharveada Bhoginbhai Hirji bhai v. State of Gujarat, AIR 1983 SC 75

Government servant guilty of serious charges of sexual misbehaviour with two young girls aged about 10 or 12.

Corroboration is not the sine qua non for a conviction in a rape case, In the Indian settings, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule id adding insult to injury.

- a. On principal the evidence of a victim of sexual assault stands at par with evidence of an injured witness. Just as a witness who has sustained injury (not self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender. The evidence of a victim of a sex offence is entitled to greater weight, absence of corroboration withstanding.
- b. A girl or a woman in the tradition bound non permissive society of India would be extremely reluctant even to admit that ay incident which is likely to reflect on her chastity had ever occurred...

- In view of these and similar factors the victims and their relatives are not too keen to bring the culprits to book, And when in the face of these factors the crime is brought to light, there is built-in assurance that the charge is genuine rather than fabricated.

State of Harayana v. Prem Chand, AIR 1990 SC 538

The factor like character or reputation of the victim are wholly alien to very scope of object of sec. 376 and can never serve either as mitigating or extenuating circumstances for imposing the sub-minimum sentence with the aid of provision to s. 376 (2).

Tukaram v. State of Maharashtra, AIR 1979 SC 185

The Supreme Court overruled the Bombay High Courts conviction of two police officers for the rape of Mathura, a 26 year old tribal girl in police custody. The court held that though there was sexual intercourse there was no rape because there was no mark of physical injury and hence no proof that Mathura had physically resisted.

Prem Chand v. State of Haryana, AIR 1989 SC 937

The mandatory minimum sentence of ten years awarded to two police officers for raping a woman was reduced by the Supreme Court to five years only because the woman was of easy virtue and there was no proof of physical resistance.

Delhi Domestic Worker's Forum v. Union of India, (1995) ISCC 14

We should be more victim oriented. Continued legal, medical and psychological support is to be given. Suggested setting up a Criminal Injuries Compensation Board.

Arjun Ram v. State of Punjab, 1960 Cr.LJ. 489

It was held, "Where no marks of injury were found on the person of the girl victim after the incident, their absence goes a long way to indicate that the illegal sexual intercourse by the accused was a peaceful affair, the story of having put up a stiff resistance advanced by the girl is false."

Maharaj Bux Singh v. State of U.P., 1989 All L.J.617

It was held, "Where all that the accused had done was to put his penis on the private part of the woman and according to evidence there was no attempt to penetrate the same, the act was held not to amount to the commission of rape."

Jawaharlal Das v. State of Orissa, (1991) 3 SCC 27

The trial court and the High Court had convicted the accused on the 'last seen' theory. The Supreme Court reversed the decision that the fact of the recovery of the body at the instance of the accused was not mentioned in the inquest report, and the crime was not proved. The Court asserted "Even if the offence is shocking, the gravity of the offence by itself cannot outweigh as far as legal proof is concerned. In this case we are conscious that a grave and heinous crime has been committed, but then there is no satisfactory proof of guilt, we have no other opinion but to give benefit of doubt to accused. Our hands are tied under the law of circumstantial evidence. Key links in the chain of evidence are missing."

Suman Rani v. State, AIR 1989 SC 937

The Supreme Court reduced from 10 years to 5 years, the sentence awarded to two police constables accused of raping a woman in the police station, on the ground that the woman was of questionable character and easy virtue. In this case the learned counsel for the accused rested his arguments on a medical examination, to surmise that the victim was used to sexual intercourse. Since she had a boyfriend the counsel concluded that she was of questionable character and easy virtue with lewd and lascivious behaviour. There was no other evidence forwarded to aid this moral

certification. Surprisingly the defence counsel for the accused was none other than the Civil Liberties Lawyer and President of People's Union of Democratic Rights.

Indian Express Legal News, March 14, 1992, P. 11

On March 13, 1992 Justice Kuldip Singh and Jeevan Reddy of the Supreme Court reduced the sentence in the case of rape on a minor girl while disposing the appeal of the M.P. government. The Trial Court had convicted Sunder Lal and sentenced him to 3 and 5 years rigorous imprisonment on charges of taking a 13 years old girl forcibly from her house and raping her. The Supreme Court without giving any reason from her house and raping her. The Supreme Court without giving any reason said, "We reduce the sentence on both the above counts to the period of imprisonment already undergone." No other reason was given for in the judgement for the reduction of the sentence for this ghastly crime.

Kaushalya v. Baisakhi Ram, AIR 1961 Punj. 520

The husband though guilty was able to escape punishment for criminal cruelty as the judges did not consider wife battering as a crime.

Smt. Sarla Prabhakar Waghmare v. State of Maharashtra, 1990 Cr.LJ. 407 (Bom)

It was pointed out that it is not every harassment or every type of cruelty that attracts Section 498-A. It must be established that the beating and harassment was with a view to fulfil some illegal demands of the husband or the in-laws. In this particular case soon after marriage there was a demand for a motor cycle which could not be given, consequently the wife was subjected to all types of harassment and cruelty including beatings. The wife went back to her parents but came back to the husband on the assurance that he will not ill-treat her but the same harassment continued. The trial court held that no offence was made out. This decision was challenged by the State through a revision petition but the relief under Section 498-A was not granted since the incident took place before the passing of this Section, It was held that the evidence was not consistent so the accused could not be punished.

Basant Kumar v. State of M.P., 1990 Cr.LJ. NOC 45

The husband was accused of beating his wife frequently. The mother-in-law and the sister-in-law also joined in assaulting her mercilessly. The inhuman treatment made the wife so depressed and one day she committed suicide. The court held that the husband or the in-laws cannot be guilty of abetment to suicide because the beatings were much prior to the act of suicide.

Wazir Chand v. State of Haryana, AIR 1989 SC 379

The court did not punish the accused as there was no evidence to support the charge of abetment to commit suicide. The accused is innocent, not because there are no witnesses but because they do not want to come forward and testify.

Vibha Shukla murder case

The husband was acquitted of the charge of murder as cruelty under Section 498-A IPC. Vibha had delivered a female child and her in-laws had not accepted the child. Vibha's father was asked to

pay an additional sum of Rs. 30,000 because of which Vibha had left her matrimonial home 6 months prior to death, but the judges felt that these acts do not amount to cruelty under Section 498-A IPC. The judges stated, "what is forgotten is that both the clauses (a) and (b) of the explanation require a consistent course of conduct. It is a series of acts and not a single or isolated acts which constitutes cruelty for the purpose of both the clauses. The acts relied upon by the learned trial judge do not satisfy this test either. Thus we are of the view that conviction of the accused under any of the clauses of Section 498-A is also not justified.

PART - IV

**MARRIAGE DISPUTES AND
GENDER JUSTICE**

XII. MARRIAGE DISPUTES AND GENDER JUSTICE

GENDER JUSTICE IN FAMILY COURTS

– *NLSU*

The day to day life of women is most directly governed by the existing structure of the family, the patterns of which vary according to religion, class and region. In Indian context, the predominant position given to men in the family structure leads to discrimination against women members of the family in almost all matters that regulate their existence. The structure of the family, and the social norms and values that are built around are thus completely against the democratic principles that our republic stands for. This system of gender based inequality, often referred to as patriarchy, does retardation to the growth of women's personality and affects her mentally, socially and psychologically. For, the systematic violation of the rights of women is institutionalised in prevailing family system. The inequality of women within the family extends to and is related with their socio-economic and legal position, each reinforcing the other.

The laws that affect women most closely are those relating to the family that is, marriage, divorce, maintenance and inheritance etc. known as family or personal law. Laws such as those in the Indian Penal Code and the Code of Criminal Procedure as well as most positions in civil law, apply to all citizens. But personal law ever since its codification has been based on the religious practices of different communities. Even after nearly four and a half decades of independence, and inspite of article 44 in part IV of the constitution regarding the Uniform Civil Code has remained to be a dead letter till date. Even though many progressive social legislation have been passed there are still certain practices and coersions against women which remain widespread because of religious and social sanctions. At present five sets of personal laws exist pertaining to the Hindu,¹ Muslim, Christian, Parsi and Jewish communities. A score of legal statutes and Acts regulate marriage, divorce, maintenance and adoption. The essential feature of these laws has been the assertion of male dominance over women.

We are all aware that law is an instrument, primarily for, administering justice, resolving disputes and even ordering socio-economic relations in a manner conducive to the development, in civilised societies, as envisaged by the collective will of the people in their respective constitutions.

Notwithstanding the societal position of women as detailed above, the family as a composite unit performs certain gregarious functions in community, because of which collective duties of family unit prevails over the individual rights of the members of unit. The various studies undertaken in west show that most ills of the society arise whenever there is discord in this unit. Therefore, it has always been the task of the society to protect and preserve this unit. Thus the Family Courts Act of 1984 was passed keeping in view the recommendations made by various commissions. The law commission in its various reports as well as the Committee on status of women in India made several recommendations with regard to changes in substantive laws and procedural laws so as to remove disabilities of women seeking justice.

This has been done due to the reason that this class has been suppressed through the ages, using social sanctions and religious cults etc. Gender equality can become reality if dynamic projects

are designed for the removal of disabilities which are put into operation with special care through reverse discrimination.² This discrimination would mean measures used by the State to protect the traditionally weaker and historically handicapped sections. This dynamic process of equalisation is more than a mere declaration of equality. Despite the well meaning provisions in the constitution of India as envisaged by our founding fathers for substantive equality between both the sexes, in actual implementation of the social legislations, only formal equality between sexes exist. We also know that 'end' is as important as 'means' is, the 'procedures' and the forum' to vindicate ones' own rights and obligations become important to realise substantive equality of sexes in the society.

As the existing forum dealing with family disputes had been inadequate to meet the demands for justice to women even in terms of processual justice leave alone substantive justice, the Family Courts Act, 1984 was passed with a view to creating an appropriate forum for rendering justice to women. Though, in disputes relating to family matters both men and women are adversely effected, yet in the process of disorganisation of family and its reorganisation, it is the women and children who are worst effected. In order to circumvent the disorganisation of family, a conciliatory mechanism is set up under the Family courts Act 1984 to resolve and reconcile the difference and provide speedier and inexpensive justice to women.

As pointed out earlier, the traditional Justice delivery system has proved to be ineffective, as the courts resort to mechanical and technical disposal of cases in an anxiety to reduce the pendency of cases in courts. The FCs are not to be considered as mere machinery for disposing of cases but as social illustrations finding solutions for problems bearing in mind the welfare of the family and children.

The Family Courts Act of 1984 provided for various 'means' enumerated below for achieving the 'end' of Gender Justice.

1. The courts are directed to adopt a policy of reconciliation and speedier settlement of cases. Even though the basic human want is for food, clothing and shelter, yet for women they being vulnerable sex in the society it is the housing alone which is of prime importance. Thus, the process of reconciliation achieves this objective. Besides, it also prevents the possible occurrence of destitution and vagrancy among women and children as there is economic interdependence among family members.
2. The Act has rightly appreciated that the women personnel namely the Lady Judges would be in a better position to empathise with women as they may be more sensitive to women issues than men resulting in rendering justice to women. Hence, a suitable provision has been made in the Act, to give preference to the appointment of women Judges.
3. In order to facilitate the early settlement of the case by the court, the Act makes it mandatory to provide the essential infra-structural facilities such as the appointment of Counsellors, Psychologists, Psychiatrists, Medical experts and other supporting staff.
4. Besides the mandatory infra-structural facilities, stated in para 3 above, the court has also discretionary power to identify social workers or social welfare organisations for helping the court to achieve the objective of reconciliation in family disputes.

5. For enabling the women litigants to divulge the true facts of the case, it is necessary to make them at home with the atmosphere prevailing in the courts. The Act envisages the flexible rules regarding the place of sitting, conducting proceedings in camera and informal court atmosphere.
6. The Act also takes into consideration oral evidence deposed and also accepts affidavits as evidence for expediting the adjudicatory process. The court has also discretionary power to record evidence in summary.
7. To make the divorce litigation as less acrimonious as possible, the court adopts inquisitorial procedures by eliminating adversarial procedure. This process also helps the women litigants particularly as it lessens the financial burden on her.

For assessing the Gender Justice achieved in Family Courts, the available data has been obtained from Family Courts at Bangalore. This is also supported by the data obtained from Family Courts at Madras and Jaipur. The information furnished below can be taken as indicating achievement of Gender Justice through Family Courts.

The category wise detailed information relating to Family Courts at Bangalore is given below:

Under the category of suits or proceedings between the parties to a marriage for a decree of nullity of marriage, or restitution of conjugal rights or judicial separation or dissolution of marriage, the total number of cases (including pending and new) to be handled during the year 1987 was 1369. Out of these, 486 were filed by women litigants and this formed 35.51% of the total. During the year 341 were disposed of constituting nearly 25% of the total cases. The number of cases to be handled during the quinquennium 1987-1991 varied between 1369 in 1987 and 1808 in 1990. During the same period the number of cases filed by women varied from only 86 in 1989 to 486 in 1987. These numbers constituted only 12.2% and 35.51% respectively. The number of cases disposed of during these years ranged between 268 in 1991 and 701 in 1988 which work out to 17.3% and 41.7% respectively. It is pertinent to mention here that the number of women filing cases in different categories is available only for this category but not for others.

While considering the aspect of Gender Justice, the percentage of cases going in favour of women are undoubtedly rendering gender justice. In addition, where the cases are decided by reconciliation also the women can be deemed to have benefited. Hence, the data has been examined on these aspects. Out of the total number of cases disposed of during the five year period, it was found that the percentage of cases which decided in favour of women were more than 50% in all the years except in 1989 when it was slightly less being 45.32%. In 1990, the percentage of cases decided in favour of women was highest being 71.7%. As regards the percentage of cases disposed of by reconciliation it is found that they varied from 7.04% in 1987 to 22% in 1991. On the whole, during the five years, the annual average of the percentage of decisions going in favour of women was 56.65 and percentage of cases decided through reconciliation were only 14.35%.

Under the category of suits or proceedings between the parties to a marriage with respect to the property of the parties or of either of them, the number of suits or proceedings to be handled during the quinquennium varied between 139 in 1987 and 298 in 1990. The number of suits disposed during these years varied from 10 in the first year to 87 in 1989, which was the year with second highest number of cases to be handled i.e. 273. The percentage of decisions favouring women under

this category varied between 68% in 1989 and 92% in 1988. Besides the percentage of cases decided through reconciliation varied from 5.2% in 1990 and 30% in 1987. The overall annual average percentage of decisions favouring women worked out to 81.78% whereas percentage of cases decided by reconciliation was only 19.9.

Under the category of suits or proceedings for an order or injunction arising out of marital relations were as low as 9 in 1988 and as high as 58 in 1987. The number of cases disposed, however, were as low as 1 in 1988 and as high as 14 in 1990. Thus, the percentage of disposals to the total in the category varied between 8.7% in 1990 and 33.33% in 1989. The decisions were as low as 21.4% in 1990 and as high as 100% in 1989. It was 80% in 1991. There were no cases disposed either by reconciliation or any in favour of women during the first two years i.e. 1987 and 1988. In the subsequent years there was only one case each reconciled which worked out 16.7% in 1989, 7.2% in 1990, and 20% in last year 1991. The quinquennium average of percentage of cases decided in favour of women was 40.3% and percentage of cases reconciled was 8.8%

Under the Category of suits or proceedings for maintenance, the total number of cases to be handled were 895 in 1987 and it gradually increased to 1435 in 1990. The total number of cases disposed during this period was 133 in 1987 in contrast to 416 being the highest in 1988. The percentage of cases in which decisions were favouring women under this category was uniformly more than 90% in all the years, particularly in 1989 it was 98.3%. As regards the percentage of cases disposed by way of reconciliation it is seen that it was as low as 2.8 in 1990 as high as 44.1 in 1991. While it was laudable achievement in granting Maintenance to over 90% of women in the quinquennium, it is however, unfortunate to observe that the percentage of cases granting Interim Maintenance from as low as 12.3 in 1991 and 46.7 in 1987. The annual average of percentage of cases decided during quinquennium was 94.25 in the case of decisions favouring women while it was 16.4 in the cases decided through reconciliation.

Under the category of suits or proceedings in relation to guardianship of and or custody of person, the total number of cases to be handled during the period 1987-1991 was the lowest being 88 in 1987 and the highest being 251 in the year 1990. The percentage of cases disposed of under this category varied between (from) 26.1 in 1987 and 62.2 in 1990. In three out of the five years, the percentage of decisions favouring women were 82.6, 95.3 and 59.6 in the remaining two years, these percentages were 43.1 and 31.1. Besides, the percentage of cases decided through reconciliation ranged between 0.00 in 1989 and 11.8 in 1988. During this five year period on an annual average of 62.4% of the disposals were decided in favour of women while the average percentage of cases reconciled was as low as 4.9 only.

In addition to the five specific categories of cases discussed above, there are few other categories also which are not discussed here. Total number of cases taking all categories into consideration varied between 2674 in 1987 and 4331-in 1990. The number of cases disposed during this period ranged from 542 in 1987 to 1408 in 1990. The number of cases decided in favour of women was 365 in 1987, 928 in 1988, 886 in 1989, 1068 in 1990 and 422 in 1991. Thus the percentage of decisions favouring women out of total disposal during this period varied from 67.3 in 1987 to 75.9 in 1990. On the whole 69.8 of disposals during this quinquennium were decided in favour of women. The percentage of cases disposed by way of reconciliation was the lowest at 6.8 of total disposals in 1990 and it was highest in 1991 being the 24.33. The annual average percentage of reconciliation was 13.2.

The information given in above paragraphs can be considered as an evidence of Gender Justice rendered in Bangalore Family Courts. Besides, in the Family courts of Madras and Jaipur also it can be inferred that gender justice being rendered as the rate of reconciliation in those courts on an average is as high as about 50% in Madras and 40% in Jaipur. It may also be concurrently noted that the courts at Madras and Jaipur rank high with regard to the performance of the courts considering the speedier disposal of cases. Moreover, it is relevant to focus here that in Madras when the Metropolitan Magistrates were disbursing maintenance amount, it was about Rs. 45,000 to Rs. 50,000 per month but after Family Courts started to function it has risen to Rs. 2,00,000 in 1989, Rs. 3,00,000 in 1990 and Rs. 5,00,000 in 1991 and was also being disbursed directly to the women and children. The Principal Judge here feels that the purposefulness of the orders passed in these courts are more about the persons concerned. Hence, under Chapter IX of Criminal procedure code if maintenance is ordered directing the husbands to pay maintenance amounts to wives deserted and discarded by them, adequate steps are being taken to realise the maintenance amounts from husbands and to pay the same to the persons concerned. This is unique achievement of the Madras Family Court

If, Gender Justice, is assessed qualitatively then the basic issues which need to be considered are (i) the access to justice by women i.e. in terms of women having direct access to judge to redress their grievances in sensitive family disputes, (ii) whether the courts are deciding the matters as per the wishes of the women litigates i.e., where a couple is involved in three different category of cases (1) divorce (2) maintenance and (3) custody and access of children, whether in these type of cases the Judge is disposing the matters as per his own convenience, or as per the convenience of the litigants. The Judge may find it inconvenient to dispose cases relating to maintainance as it takes lesser time compared to the other two categories whereas the litigant would like the custody/access matters relating to children are decided first and the counsellors may give emphasise to Family Solidarity. In this process of prioritisation of issues there is a need to be a consensus among all the actors in the system. These issues are quite difficult to be answered satisfactorily, it would not be apt to make general statements. It is apt in this regard to ascertain the general attitude/behaviour of the court staff towards litigants in general and women litigants in particular. In this regard, an appropriate issue which comes to my mind is whether a women litigant, who is constantly intimidated by lawyers presence in the courts, and puts up with the humiliating court experiences, will it be a consonance with our idea of gender justice even if the court decision goes in her favour? Then, in this case I think 'means' as well as 'ends' are equally important to render gender justice.

References

1. Section 2 of Hindu Marriage Act, 1955.
2. Art 15(3) of the Constitution of India.

XIII. SELECT CASES ON GENDER JUSTICE IN FAMILY RELATIONS LAW

– NUJS

Rajendra Kumar v. Kalyan, 2000 AIR SCW 3537 (2)

Validity of adoption of a child by widow to her husband. In the absence of authority given by the husband, such adoption by the widow is invalid.

S.P.Jain v. Neena Jain, AIR 1992 SC 24

After getting a divorce on grounds of cruelty the wife had secured an order against the husband and entered the matrimonial home. The High Court dismissed the case when the husband appealed, it called the re-entry a forcible capture of the premises' and asserted that the court cannot allow this re-entry even in the name of feminism as a vindication for the cruel treatment or the husband of for the protection of the deserving.

Shakila Parveen v. Hyder Ali, (1999) 9 SCC 544

Taking into consideration the objects and reasons for enacting the Muslim Women "Protection of Rights on Divorce" Act as well as the preamble and the plain language of Section 3 it can not be said that the Muslim Women Act in any way adversely affects the personal rights of a Muslim divorced woman. Nowhere in the Act is it provided that the rights which are conferred upon the Muslim divorced wife under the personal law are aggravated.

The expression "during iddat period" should not be strictly construed, as only during that period but it should be extended till a divorced Muslim female enters into remarriage.

Padmaja Sharma v. Ratanlal Sharma, (2000) 4 SCC 266

The law coded for the Hindus are to be read in conjunction with one another unless context contra-indicates definition of words may be lifted from any of these Acts in order to interpret the provision of any other Act.

Suresh Nathumal Rathi v. State of Maharashtra, 1992 Cri L.J 2106

Institution of marriage is the very foundation of civilisation, In our common experience minor fictions which get distorted into disruptions are really the wear and tear of the wedded life. Stability of marriage being in the interest of individuals, family and society, the spouses be allowed to forget their differences and lead their marital lives.

This decision marginalizes concern for lesser degree of matrimonial cruelty. Preservation of marriage presumes rigid gender roles. It is rooted in Indian values and overlooks the woman in the changing society.

Harishchandra v. State of M.P., 1987 Cri L.J 1724

Excessive drinking does not amount to cruelty. Deceased wife's inability to adjust to her husband's habits.

The alcohol related violence is excused. Mitigates the man's responsibility.

Sharad Burdhi Chand v. State of Maharashtra, 1984 Cri L.J 1738

Wife deprived of husband's company, husband's behaviour cruel, wife extremely unhappy, dies within four months of marriage by consuming poison.

Non appreciation of the wife's predicament by the court

Public Prosecutor v. Tota Basava Punnaiah and others, 1989 Cri L.J 2330

The deceased might have committed suicide due to strange domestic quarrels in the joint family and her own extreme sensitiveness, sentimentalism and the accused cannot be blamed for this.

Undermines the acts of cruelty and shifts the blame on the woman.

Arab Ahmediah Abdulla v. Arba Bail Mohmuna, AIR 1988 Guj. 141

"Reasonable and fair provision of maintenance" is to be paid to the wife. The parliament intended to see that the divorced wife gets sufficient means of livelihood after the divorce and that she is not thrown out on the streets without roof on her head and any means of sustaining herself and her children. The word "provision" itself indicates something provided in advance for meeting some needs.

Pratibha Rani v. Suraj Kumar, AIR 1985 SC 628

It cannot be said that upon entering the matrimonial home the ownership of Stridhan property of married women is placed in the custody of her husband or in -laws, even if that were to be so, they would be deemed to be the trustees of the same and return the property to her when demanded.

T. Sareetha v. Venkatasubbaiah, AIR 1983 AP 356

No positive act of sex can be forced upon an unwilling person because nothing can conceivably more degrading to human dignity and monstrous to human spirit than to subject a person by long arm of the law to a positive sex act.

Saroj Rani v. Sudarshan Kumar Chaddha, AIR 1984 SC 1562

Section 9 of the Hindu Marriage Act is not Ultra vires the Constitution. It may be borne in mind that conjugal right of the spouse that is right of husband or the wife to the society is not merely a creature of statute. Such a right is inherent in the very institution of the marriage itself.

Bakulabai v. Ganguram, (1988) 1 SCC 537

Hindu Marriage Act does not provide any penalty for such mock marriages.

The Supreme Court made this remark with respect to second marriages i.e. void marriages.

Ya munabai v. Anant Rao, (1988) 1 SCC 530

The victim of a second to a second marriage is not entitled to any maintenance or matrimonial relief.

Bhaurao Shankar Lokhande v. State of Maharashtra, AIR 1956 SC 1564

The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before the society

as husband and wife. In order to prove that they were husband and wife it is necessary to show that both the marriages were 'solemnised' according to the law applicable to them.

Alka Bhaskar Bakre v. Bhaskar Bakre, AIR 1991 Bom. 164

Matrimonial Home is not necessarily the house of the husband or the house of husband's parents. It is the house where husband and wife are equal partners and the wife has an equal say in the matter of determining the place of their matrimonial Home.

Githa Hariharan v. Reserve Bank of India, JT 99(1) SC 524

The use of the word "after" in section 6 of Hindu Minority and Guardianship meant that the mother could not be the guardian in the lifetime of the father. The Supreme Court ruled that "in the absence" of the father the mother can be the natural guardian even during the lifetime of the father. The judgement still retains the prioritisation of guardianship.

Jorden Diengdeh v. S.S. Chopra, AIR 1985 SC 935

Suggested that a time has come for the intervention of legislature to provide for a uniform law of marriage and divorce.

Nalini Ranjan Singh and others v The State of Bihar and others, AIR 1977 Patna 171

Constitution of India, Art 15- Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 2(ee) (as amended by Act 1 of 1973)- provision not violative of Art 15.

While it is true that under the Mitakshara School of Hindu Law every co-parcener has an interest in the co-parcenary property from birth or ever since when he has been begotten, it is not correct to say that a daughter is a member of the coparcenary having any right in Praesenti even in respect of her father's self-acquired property. Even after coming into force of the Hindu Succession Act, 1956 the daughter is merely entitled to a share in her parent's property on partition on his or her death. No female can be coparcener under a Mitakshara law. Even S. 6 of the Hindu Succession Act, 1956 recognises this with an exception in the shape of proviso thereto read with the explanation. This section makes it clear that this Act does not interfere with the social rights of those who are members of a Mitakshara coparcenary except to the extent that it ensures the female heirs and the daughter's son specified in class I of the Schedule a share in the interest of a coparcenary in the event of his death by introducing the concept of a fictional partition immediately before his death and the carving out of his aliquot in the coparcenary property as on that date. It cannot, however, be said that a female heir or a male claiming through her specified in Class I of the Schedule has any acquisition of right in the coparcenary by birth. Although a daughter can be member of a joint Hindu undivided family, she cannot be given a status of a coparcener in a coparcenary even after the commencement of the constitution of India, and that by itself cannot be said to attract the constitutional inhibitions contained in Art 15. There are various factors which sanction that while a son may be a member of co-parcenary, daughter may not. As a necessary corollary it follows that the very same reasons which justify the discrimination

between a son and a daughter in a coparcenary apply with force to any attack on the validity of the impugned Act as being violative of Art 15(1). The definition of 'family' in S. 2(ee) cannot be construed as to embrace a major daughter who ought to be held entitled to claim a separate unit for herself like any major son. AIR 1974 Punj & Har 162 (FB), Rel. on. (Paras 8-A, 9)

N.R. Radha Krishna v. N. Dhana Lakshmi, AIR 1975 Mad 331

Under pristine Hindu Law, a Hindu wife's first duty to her husband is to submit herself obediently and to remain under his roof and protection. But then legislative enactments like the Hindu Marriage Act have made considerable inroads upon the unqualified rights that the Hindu husband previously enjoyed over the wife. The Court cannot in every case when the wife withdraws from the society of the husband pass a decree for restitution of conjugal rights against her unless she has done so without reasonable cause. The withdrawal from the society of the husband may be merely physical without any intention to shun his company, as in this case, where the wife is gainfully employed in a place away from the husband's home without the least intention of denying to her husband her society and company.

Mrs. Swaraj Garg v. K.M. Garg, AIR 1978 Delhi 296

There is no warrant in Hindu law to regard the Hindu wife as having no say in choosing the place of matrimonial home. Article 14 of the Constitution guarantees equality before law and equal protection of the law to the husband and the wife. Any law which would give the exclusive right to the husband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife would be contrary to Art 14 and un-constitutional for that reason.

Mary Sonia Zachariah v. Union of India, 1995 (1) KLT 644 (F.B)

Divorce Act, 1869, s.10-There is no constitutionally justifiable reason for denying a right of dissolution of marriage on the ground of cruelty and desertion to Christian wives alone when spouses belonging to all, other religions are granted dissolution on those grounds also independent of adultery- Constitution of India, Arts, 14, 15, & 21.

PART - V

**WOMEN, EMPLOYMENT AND
EQUAL JUSTICE**

XIV. WOMEN, EMPLOYMENT AND EQUAL JUSTICE

WOMEN IN EMPLOYMENT

Rehana Jhabvala

Employment in India must be seen in the context of the existence of two sectors of the workforce – the organised and the unorganised sector. The organised sector consists of factories and offices, both public and private, where there is a clear relationship of employer and employee and where the labour laws are more or less enforced.

In India the size of the workforce, is 313 million (1994, NSSO figures) of which only 27 million, about 8%, are in the organised sector. The remaining 92 per cent are in the unorganised sector. Unfortunately, when discrimination against women in the workforce is discussed the focus is usually on the organised sector where most of the statistics are available and most of the laws apply and are more or less enforced. However, here we will concentrate mainly on the unorganised sector.

Provision to Eliminate Discrimination against Women in Employment

The main law to protect women against discrimination in employment is the Equal Remuneration Act of 1975. This Act has been used in the case of some organised sector workers successfully. For example, the Indian Airlines hostesses had fought and won a case in the Supreme Court against discrimination in service conditions.

An innovative provision of this Act is that certain women's organisation have been given the power to file cases in the labour court on behalf of workers under this Act. In all other laws this power is only with the Government. Unfortunately, there has been no case filed under this Act for unorganised sector workers.

Women in the Workforce

Statistics from different sources yield different answers regarding this percentage, depending on the method used to collect the information. The 1991 Census reports the total working population in India to be 314 million, with 28.6% or 89.8 million, being women. The National Sample Survey from 1987-88 states a rate of 32.3% in rural areas and 15.2% in urban areas. If women working, working in activities defined as 'gainful' are included, these rates increase to 49.4% for rural areas and 21.5% for urban areas. Finally, there are large differences in estimates of homebased workers. The Census estimates the number at 2.2 million, while SEWA estimates the total at 20 million with 90% (18 million), being women (SSAI, NCW and Stiftung, 1994).

There are a number of sectors where there is very low representation of women such as the transport and power industries. The main sectors where women workers are concentrated are;

1. Agriculture,
2. Forestry,
3. Livestock,
4. Textiles and textile products.
5. Food and tobacco products,
6. Construction
7. Retail Trade

In all of these sectors, women tend to be employed in the lowest paid, most menial tasks, using the least technology. In agriculture, for example, women do not plough, but engage in labour intensive tasks such as transplanting and weeding.

"Men and women did not always perform the same tasks however, Women do not usually plough the fields, and men refuse to do certain jobs. In Rajasthan, they refused the work of plucking chillies, which burns their hands, so women were the only ones earning Rs. five a day at the job. And in Madhya Pradesh, Bihar and Rajasthan, women are the only ones carrying from 12-40 kgs. of fuel and fodder on their heads everyday sometimes as far as 10 kms. This forest collection is not for home consumption. The women bring it for the small sum it will fetch on the open market or from the trader usually about Rs. 2.50 per load. The jobs takes them anywhere from 4-6 hours a day, and carries the additional hazard of harassment by the forest guards (SEWA, 1988, p.iii).

In the construction sector, women do the hard work of head load carrying while men are masons, and homebased workers tend generally to be women while men engaged in the same tasks work in workshops or factories with better tools. For example, male garment workers, whether self-employed tailors or workers, tend to make higher quality garments with better machines. Homebased women workers with access to only lower quality machines make products such as petticoats which are in the lower priced part of the market. Similarly, employees of the forest department who are paid regular wages tend to be men, while minor forest produce collectors are women.

Therefore, women often work in more labour intensive sectors with little access to technology. They work in a different segment of the labour market from men, one that is invariably lower paid. But, women also tend to be paid less than men for even the same work. Some examples follow.

"A tea plantation in Mandi, Himachal Pradesh, was the only place on the commission's entire tour where women reported getting the same wages as men. Everywhere else men were earning from 30%-150% more than the women for the same tasks and working hours (SEWA, 1988, P.iii)."

"The construction workers suffer due to irregular employment, and they are most affected during the monsoon. Their wage is Rs. 30 per day while a male helper gets Rs. 50 to 60 per day for the similar work (CLEAD, 1994, p.27)."

"The wage rates in Nagai Quaide Milleth District is Rs. 20 for women and Rs. 25 for men for weeding, transplanting, sowing and harvesting. With the present inflation, this is not enough for a family to survive (CLEAD, 1994, P.28)."

Remuneration for Work

The Equal Remuneration Act 1975 specifically mentions that men and women should receive equal pay for equal work or work of the same value. Women's wages tend to be lower than men's wages as seen from the examples. The Report of the National Commission on Rural Labour says, based on three occupational wage surveys in selected industries for the periods 1958-59, 1963-65 and 1974-79, that "the average daily money wage earnings of female workers were much lower than those of male workers in all of the 30 industries for all the three survey periods, ranging in the latest period from 40% to 100%. The differential has tended to decline over the period" (Ministry of Labour, 1991, p.133). This information is supported by data on agricultural wage rates across 15 states from 1970-71 to 1984-85.

In the earlier period, women earned from 51% to 82% of what men earned. This differential, while still very apparent, decreased in 1984-85 to between 57% and 93% of men's agricultural wages (Ghosh, 1993).

As quoted above there have been some reductions in the wage differentials of men and women, but this has been mainly due to higher awareness levels. Where women organise the differentials tend to disappear altogether.

Assessment of Women's Work Participation Rates

There has been shift in the methods of data collection by the Government in the last census due to under-reporting of women's work. The change involved the definition of work and the method of investigation used by the census (Hirway, 1991). Due to the definition of work used (excluding unpaid productive work) and cultural biases about women's work, women's work as housewives was overemphasized. Also, Census Enumerators were too ready to accept women's own categorization of their work as housewives without probing for further details about their tasks. For the 1991 Census, reforms were introduced to correct some of the problems of capturing women's work in the home. For example, a longer reference period was used to better document women's seasonal and intermittent activities. The census now asks about availability for work rather than about those seeking work. This should illustrate women's status in the labour market more accurately. Finally, a clause was added to the question about whether the respondent worked at all in the previous year. The added clause includes unpaid work on family farms or in family enterprises in the definition of work. This will increase women's inclusion in the labour force since much of their labour falls in this unpaid category (Hirway, 1991).

Due to this shift in counting methods, there has been a definite change in the female workforce participation rate. The All India Rural WFPR increased by 14.96% between 1981 and 1991 due to this change in accounting. In some areas where there was a campaign by women's groups to get women's work in the the census, the WFPR showed an even more substantial increase. For example, in the Kheda district of Gujarat where SEWA made an effort to canvass the new counting approach, the urban female WFPR increased by 14% for main workers (work more than 183 days/year) and by 40% for marginal workers between 1981 and 1991 (Hirway, 1991).

There is no retirement age or pension in the unorganised sector. In the organised sector there is the option of Provident Fund or of pensions. Men and women both contribute 8.33% of their earnings towards a Provident fund. This pension, unlike other benefits only accruing to the widow, are payable to the widow or widower. This provision recognizes women's role in the economy by accepting that women will also accrue such benefits. Men are no longer the sole breadwinners. (SSAI, NCW and Stiftung, 1994).

Maternity Benefits

There are no provisions for paternity leave. The Maternity Benefit Act exists for organised sector workers, which in Gujarat means it covers less than one half of a percent of the state's female labour force. Therefore, some believe it is only false offer of support to female workers (Hirway, 1986). Studies have also found that even in the organised sector, the coverage of Maternity Benefits is not good. This is due to different factors including the temporary nature of women's employment, poor enforcement of the Act and women's unwillingness to fight for their rights. It is estimated that only about 1.8% of the workforce is covered by the statutory provision (SSAI, NCW and Stiftung, 1994).

Recently there have been some attempts to reach maternity benefits to unorganised sector workers in various states. For example Andhra Pradesh, Karnataka and Gujarat have maternity benefit schemes of cash payments to agricultural workers. The Bidi Workers Welfare Fund Act also provide maternity benefit to bidi workers, as do a number of boards such as the Cashew workers, coir workers and handloom weavers Boards in Kerala.

Only dismissal of women during maternity leave is prohibited by law though it is done in practice. In many cases women only begin working after having all their children (organised sector). In fact, many married women workers in the organised sector have undergone a tubectomy and hold documents proving this fact. These documents are then shown to employers to prove that maternity benefits will not be required (Hirway, 1986). Thus the number of women requiring maternity benefits is made small. Another way employers avoid offering maternity benefits is to hire only temporary workers. If women work less than 160 days in a year they do not qualify for benefits. In some cases, women have worked in one place for 5-15 years but only on a temporary basis (Hirway, 1986). Dismissal of women on all of these grounds is very widespread in the unorganised sector.

Women's Safety and Health at the Workplace

There are a number of laws to protect women's health and safety in the organised sector. The main area of concern is women's employment at night. The Factories Act, Plantation Labour Act, Mines Act and the Bidi and Cigar Workers Act all place restrictions on employment of women during the night (SEWA, 1989). While it is believed that night employment is detrimental to the health of all workers, only women's night work is restricted. If women are to work at night, they must be offered transport to and from work in order to ensure their safety. It also must be kept in mind that women alone are responsible for household tasks which must be done during the day. Therefore they do not have the same opportunity for rest during the day as men have. This should not restrict women's employment choices, though. Instead it should serve to improve recognition of women's heavy workload and pave the way for a more equitable work distribution between men and women.

Another area of concern is the carrying of heavy weights by women. There are various laws restricting women from such activity. But in the unorganised sector such work is very often assigned to women because there are few provisions for the workplace health and safety of unorganised sector workers.

The Factories Act 1948, has a statutory provision for creches in factories employing more than 25 women. There are no laws for the children of unorganised sector workers, however a very limited number of creches are run under the Social Welfare boards. Voluntary Agencies such as Mobile Creches, too run a number of child care centres for these workers. However the finances available for child care in the unorganised sector are very limited.

Rural Women

Of the 89.8 million women in the working population, 90% are rural workers. This amounts to 80.8 million workers (SSAI, NCW and Stiftung, 1994). Because of their strong representation in the labour force, improved economic policies, greater economic opportunities and support mechanisms for rural women workers are very important to the economic development of India and its families. In fact, the

National Commission of Rural Labour has determined that even in families with a male earner, the wife's earnings contribution is greater than that of the husband and it contributes more to the general support of the family, affecting such things as health and nutrition (Ministry of Labour, 1991).

While India does recognise women's right to organise self-help groups and participate in cooperative, the movement has been only somewhat successful. This is due to the bureaucracy involved in forming such groups, making the process complex and time consuming. Poor leadership and a lack of training and cooperative education facilities are other obstacles to women's involvement. Even with these problems, women's participation in cooperatives and the number of strictly women's cooperative have increased. From 1987-1991 women's cooperatives as a percent of total cooperatives increased from 1.4% to 1.6% (SEWA, 1989).

Women's Self-help Groups and Cooperatives

There are different types of women's cooperatives and self help groups in rural India. Dairy cooperative have done well for women workers in rural areas. They have involved a pre cooperative phase of development including training on group organisation, training inputs regarding working with dairy animals and veterinary skills. Other income generating cooperatives and groups are also in existence in rural areas, supported by governments or NGOs. In some cases there have been problems with a lack of choice for the women regarding the income generating project. These projects have been decided by the organising agency, meaning there is a lack of participation by the women. Self-help group often develop around savings and credit groups. These groups are starting to multiply quickly as women are bypassed by formal financial institutions in the distribution of credit. Most often these Loan groups are managed by the women, with only start up support given by outside agencies. Other activities of women's self-help groups are organising to demand better village facilities, protesting against the poor treatment of women, fund raising for the construction of village clinics, protesting against dowry payments, working for equal pay for women and starting discussions about male alcoholism (World Bank, 1991).

While the number of women's cooperatives and self-help groups are increasing, supported often by women's NGOs, the number of these supporting agencies is still small. If women's cooperatives and self-help groups are to expand to their potential, these NGOs must join forces to help develop other support NGOs focussing their work on women.

Marketing Facilities

Based on a report by DWCRA (Development of Women and Children in Rural Areas), a government program, marketing products is not the problem for rural women workers, production is more of a problem (Kashyap). Income generating projects for women are increasing. This means there are more products to sell. Opportunities to sell goods exists in rural markets as well as in rural and urban fairs which bring large numbers of people together. However, the problem lies in selection appropriate products that are marketable. This requires some research into both the need of local consumers and what other projects in the area are manufacturing. Diversifying local production so that enough demand exists for all to earn an appropriate income is the key to these projects' success.

Other reports discuss the effect of mass production on marketing opportunities for self-employed women in the unorganised sector. These goods, with their lower prices and better quality, squeeze

women workers out of the marketing chain, making them move into piecemeal jobs (SEWA, 1989). In some areas where women face market place discrimination and intimidation, they have demanded separate markets for their goods and storage facilities at affordable rents (SEWA, 1988).

Agricultural Extension Services

While agriculture extension systems exist in India, they are not designed to directly reach women. In fact, "most of them do not reach women. In agriculture, even though the bulk of agricultural labourers are women, they get the lowest wages, doing the most monotonous operations. Yet, the extension system bypasses them (Azad, p.3)." This lack of access mirrors women's lack of access to most resources.

The mostly male extension staff is not efficient in providing technical services to women. The system needs modification if women's contributions in the agricultural sector is to reach their potential. This will be to the benefit of all of India, not only to women in agriculture.

One modification that has been tried with mixed results is the addition of more female extension workers. This can work to a point, but since the early stages of such programs are often donor supported, their long run success depends on government support, which has been lukewarm (World Bank, 1991). Also, this change in the system is only peripheral. It does nothing to change the whole philosophy of the agricultural extension system. It is not an integrated modification affecting all staff. Finally, results of a survey of the extension system and agriculture across India's states have determined that one strategy will not work for all areas of India or for all women in order to improve access to extension service for women (World Bank, 1991).

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XV. GENDER JUSTICE IN EMPLOYMENT

V. Jāgannathan

"Work is central to our lives. Paid or unpaid, it is the way in which we meet needs, create wealth and distribute resources. It is a source of personal identity and individual fulfillment, social status and relationships."

The above statement which finds a place in the report of 1994 Commission for Social Justice/ Institute for Public Policy Research, London is true for men as well as women. But, experience has shown that women in the past have been discriminated in the field of employment. It is being felt by several feminists that because women have been denied access to paid employment on the same terms as men, they have suffered far wider disadvantages than 'simply' the wage differentials which appear in the equal pay statistics or in the glass ceiling hampering the prospects of professional women.

In relation to the employment area, women have strongly raised their voice against gender discrimination, particularly, in the field of recruitment, promotion, wage rates for women, maternity rights.

The inclusion of womens' rights in the charter of human rights is reflected in the passing of Convention on Elimination of All Forms of Discrimination Against Women in 1981 (called CEDAW). Along with this, recent judicial decisions in the area of employment and profession concerning women have also brought the gender issue to the centre stage.

The main object of this paper is to trace the development of law in matters involving gender issues in the field of employment and profession. If one goes through the decisions rendered by the Supreme Court of India from *Mathura to Vishaka*,, one can discern two sets of cases of in which sex discrimination was challenged before the Apex Court There were cases where women challenged certain rules, regulations which prohibited employment of women and in another set of cases we find the focus being on rules, regulations which treated women preferentially.

Gender Equality

Article 14 of the constitution guarantees equality before law and equal protection under the law and it prohibits unreasonable classification. The Supreme Court has said that the principles underlying the guarantee of Article 14 is not that the same rules of law should be application to all persons within Indian territory or that the remedies should be made available to them irrespective of differences of circumstances. In only means that all persons similarly circumstanced shall be treated alike, both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another, if as regards the subjects matter of the legislation, their position is substantially the same. (AIR 1970 S.C. 21).

Article 15 of the Constitution prohibits discrimination on the grounds of religion, race, caste, sex and place of birth. It is Article 16 that is particularly important for us in so far as discussion concerning sex discrimination in the matters of employment.

For a long time women were discriminated in matters of employment and it was felt that gender equality did not find its fulfillment even at the hands of judges. That in the past judges did not concede

that men and women were equal is well illustrated from the following observations of Justice Bradley of United States Supreme Court in *Bradwell vs. Illinois* :

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life....The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."

In 1961 United States Supreme Court upheld a law placing women on the jury list only if they made special request and this was because "a woman is still regarded as the center of home and family life." (as put by Justice Harlan in *Hoyt vs. Florida*, 368 US 57).

In our country the Supreme Court by its interpretation of Articles 14, 15 and 16 has contemplated greatly to ensure substantive equality to the women in matters of employment and a new jurisprudence on gender justice itself has been evolved over the years. With the above introduction, I now proceed to deal with leading cases on the subject by the Supreme Court

C.B. Muthamma v. Union of India, (1979) 4 SCC 260 – It was in 1979 that a senior Indian Foreign Service Officer Ms. Muthamma approached the Supreme Court against gender inequality and she pointed out several rules in Indian Foreign Service (Recruitment, Seniority and Promotion) Rules, 1961 which lead to her being denied promotion to Cadre - I of the Indian Foreign Service. It was pointed out in this case that the said rules of 1961 provided that no married woman shall be entitled as of right to be appointed to the service. Under Rule 8 (2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 a woman member of the Service was required to obtain permission of the government in writing before her marriage was solemnized. It further provided that at any time after the marriage, she could be required to resign if the government was satisfied that her family and domestic commitments were likely to come in the way of the due and efficient discharge of her duties as a member of the Service.

The Supreme Court shut down the above rules on the ground that they violated fundamental right of women employees to equal treatment in matters of public employment. Justice Krishna Iyer, lamented thus :

"At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacled the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thralldom. Freedom is indivisible, so is justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity, viz. our women, is a sad reflection on the distance between Constitution in the book and law in action."

Air India v. Nargesh Meerza and others, (1981) 4 SCC 335 – This is a case of Air Hostesses claiming equality. Certain service conditions in Air India regulations were found to be discriminatory by the Air Hostesses and it was contended before the Supreme Court that the Air India regulations had made a provision that an Air Hostess could not get married before completing four years of service. The age of recruitment was 19 years and this meant that an Air Hostess could not get married till the age of 23 years. The regulations further provided that if she got married before completing four years of service, she had to resign and after reaching the age of 23 years if she continues her service as

a married woman, then she had to resign on becoming pregnant. It was further provided that if an Air Hostess survive both the above filters, then she could continue to serve until she reach age of 35 years. The Air Hostesses challenged all these regulations on the ground of sex discrimination and that similar provisions did not apply to men employees.

The Supreme Court did not accept the contention of the Air Hostesses in so far as the first requirement that a Air Hostess should not marry before completion of four years of service is concerned. The Court observed that though Article 14 forbids hostile discrimination but not reasonable classification. The said article applies where equals are treated differently without any reasonable basis and where the class or categories of service are essentially different in purport and spirit e.g., where different scales of pay, service terms, leave etc., are introduced in different or dissimilar posts, Article 14 cannot be attracted. The Court held that Air Hostesses form a separate category and therefore the circumstances of (i) termination of service on first pregnancy, (ii) restriction on marriage within the first four years, and (iii) early retirement at 35 years do not violate Article 14 on the ground of discrimination.

However, in so far as the next requirement i.e., an Air Hostess to resign after becoming pregnant is concerned, the Supreme Court observed that the provision according to which the services of Air Hostesses would stand terminated on first pregnancy is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of article 14 of the Constitution. The Court observed that the said rule amounts to compelling the Hostesses not to have any children and thus interfere with and divert the ordinary course of human nature.

The Court observed that by making pregnancy a bar to continuance in service of an Air Hostess the Corporation seems to have made an individualized approach to a woman's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach. The termination of service of an Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood. It is extremely detestable, abhorrent to the notions of a civilized society and grossly unethical in disregard of all human values. Pregnancy is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Any distinction, therefore, made on the ground of pregnancy cannot but be held to be extremely arbitrary.

Mrs. Neera Mathur v. Life Corporation of India, AIR 1992 SC 392 – In this case the Supreme recognized the right to privacy of a woman employee. Neera was appointed by the LIC without the knowledge that she was pregnant. After joining her post, she applied for maternity leave and when she came back, she was served with a termination notice. When she questioned her termination, the LIC took the plea that she had supplied them with the information which had been sought through a questionnaire from her. The Supreme Court Judges, after seeing the questionnaire were shocked to find that the questionnaire sought information about the dates of the menstrual cycles and the past pregnancies. The Supreme Court observed that such probes amounted to invasion of privacy of person and could not be made. Since the right to personal liberty guaranteed by Article 21 of the Constitution included the right to privacy and here the women's right to privacy was recognized. The information sought in the instant case by the LIC amounted to making indoors into the privacy of Neera. The

Supreme Court on examining the matter carefully that the reasons for termination of Neera was the false declaration given by her regarding the last menstrual period with a view to suppress her pregnancy. The Supreme Court held that she could not be blamed for giving false declaration when she was medically examined by the Doctor who was in the panel approved by the Corporation and was found medically fit to join the post and the Supreme Court gave direction to the LIC to delete such columns in the declaration and finally ordered the LIC to reinstate Neera into service.

Ms. Mackinnon Mackenzie and Co. Ltd., v. Audrey D'Costa and another, AIR 1987 SC 1281 – In this case a petition was filed by an erstwhile employee of a company who during the period of her employment was working as a Confidential Lady Stenographer and she complained that during the period of her employment she was being paid remuneration at the rates less favourable than those at which remuneration was being paid by the company to the Stenographers of the male sex in its establishment for performing the same or similar work. The petitioner brought to the attention of the Court the provision of Equal Remuneration Act (25 of 1976) and referred to Section 4. Section 4 of the Act requires the employer to pay equal remuneration to men and women workers for same work or work of a similar nature. The Supreme Court after considering the facts of the case and the provision of law, held that the discrimination between male Stenographers and the Confidential Lady Stenographers was only on the ground of sex and the employer is bound to pay the same remuneration to both of them irrespective of the place where they were working unless it is shown that the women are not fit to do the work of male stenographers.

Ram Bahadur Thakur (P) Ltd., v. Chief Inspector of Plantations, 1982 (2) LLJ 20 – This is a case under Maternity Benefit Act, 1961. A woman worker employed by the Pambanar Tea Estate claimed maternity benefit under the Maternity Benefit Act, 1961. But employer took the stand that the woman worker had actually worked for 157 days apart from four half days during 12 months immediately preceding the date of delivery. Under the Act the eligibility to claim maternity benefit is 160 days of actual working in the establishment. The Kerala High Court taking note of explanation to Section 5 (2) of the Act which provided that the period during which a woman worker was laid off during the 12 months immediately preceding date of expected delivery should also be taken into consideration, and further after taking note of the observations made by Supreme Court in B. Shah vs. Presiding Officer, Labour Court, Coimbatore (1978 (1) LLJ 29) that :

"Computation of maternity benefit has to be made for all the days including Sundays and rest days which may be wageless holidays comprised in the actual period of absence of the woman extending upto six weeks preceding and including the day of delivery as also for all the days falling within six weeks immediately following the day of delivery thereby ensuring that the woman worker gets for the said period not only the amount equaling 100 per cent of the wages which she was previously earning in terms of S. 3 (n) of the Act but also the benefit of the wages for all the Sundays and rest days falling within the aforesaid two periods which would ultimately be conducive to the interests of both the woman worker and her employer." held that the Maternity Benefit Act will have to be given interpretation which will advance the purpose of the act and therefore rejected the contention of the employer and held that the woman worker qualified herself to get maternity benefit act".

Omana Oomen and others v. F.A.C.T. Ltd., 1991 (2) LLJ 541 – This case is yet another example of sexual discrimination in employment. F.A.C.T. Ltd., employed number of Post-Graduates in Chemistry

for the posts of Attendant Operators. Initially all those selected were asked to undergo training in the Company for a period of three years. The trainees comprised of both males and females. Much before the training period got over, five male trainees were absorbed as technicians after an internal examination being held for that purpose. The female trainees were excluded from the internal examination only on the ground that they were females. Consequently the female trainees were not absorbed as technicians unlike their male counterparts. The matter was taken into the Court and the female employees challenged the decision of the employer in not permitting them from taking the internal examination only because they were females and contended that the said act of the employer amounted to sex discrimination violative of Article 14 and 15. The employer relied on the provision of Factories Act, 1948 which provided that no woman shall be required or allowed to work in any factory except between the hours 6.00 a.m. and 7.00 p.m. The Kerala High Court taking note of Section 66 (b) and in particular the proviso in the said section, came to the conclusion that by virtue of Sec. 66 (b) of the Factories Act the State Government is entitled to relax the rigour of Section 66 (b) so as to enable women employees to work between 5.00 a.m. and 10.00 p.m. Thus, after considering the provision of law, the Court held that non-absorption of female trainees as technicians entirely on the basis of sex is violative of Article 14 and 15 of the Constitution.

Vishaka & Others v. State of Rajasthan & Others, (1997) 6 SCC 241 – The high priority given by the Supreme Court to gender issue, reached its glorious moments in this landmark judgment and ultimately led to the passing of a legislation by the parliament against sexual harassment of working women. Women's Rights and in particular gender equality came to be included as an important aspect of human rights. The case centered on gang rape of a social worker in a village in Rajasthan. Several social activists and N.G.Os. joined hands and moved the Supreme Court by way of Public Interest Petition seeking judicial intervention and prayed for suitable methods for realizing the true concept of gender equality and to prevent sexual harassment of working women in all working places.

The Supreme Court speaking through Chief Justice J.S. Verma laid down several propositions of law of far reaching consequence and this case can be considered as a great watershed in so far as the subject of gender equality is concerned.

The Court observed that "Each incident of sexual harassment of woman at workplace results in violation of the fundamental rights of "Gender Equality" and the "Right to Life and Liberty". It is clear violation of the rights under Article 14, 15 and 21 of the constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19 (1) (g). The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facts of gender equality including prevention of sexual harassment or abuse."

The Supreme Court further held that gender equality includes protection from sexual harassment and right to work with dignity which is a usually recognized basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international convention and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Article 14, 15 15

9 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose.

The decisions rendered by our Apex Court in the above mentioned cases goes to show that the Supreme Court has struck down rules, regulation which are discriminatory and which have the colour of sexual discrimination and deep concern of the Court to restore gender equality.

Through various decisions, the judiciary in our Country has ensured that there is no gender inequality between the sexes in the matter of employment and profession and the rights of women have now been brought within the broader canvass of human rights. The Supreme Court in interpreting Article 14, 15 and 16 of the Constitution has ensured that complete gender justice is done to women and in a way our Supreme Court has shown the way to all concerned as to how gender will have to be tackled and necessity of gender sensitiveness on the part of the Judges. This step would go a long way in bringing about necessary social transformation in the society and deep study of the approach of the Supreme Court into the gender issue would certainly enable the Judicial Officers to become gender sensitive.

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**GENDER JUSTICE IN THE
PROFESSION AND JUDICIARY**

XVI. GENDER JUSTICE IN THE PROFESSION AND JUDICIARY

V.S. Elizabeth

Law schools in the last two decades have seen an increase of women in the legal profession. While there are no recent statistics on how many women are entering this profession, their numbers are still few compared to male lawyers. The legal profession being predominantly male, we sought to gauge the responses of women lawyers on what discrimination, if any, they have to face in the profession as well as their views on the courts and women litigants in situations of violence. To gather this information, Sakshi teams were asked to follow certain guidelines against which the following findings are recorded below. The survey was carried out with 80 women lawyers from Guwahati, Delhi, Jaipur, Bangalore and Madras.

Our Findings

i. In the course of your work have you ever felt patronised, ignored, demeaned, harassed and/or treated as an outsider?

Patronised	18%
Ignored	13%
Demeaned	7%
Harassed	1%
Treated like an outsider	8%
All	17%
No	36%

Sixty-four percent of women lawyers related how they often felt patronised, ignored, demeaned, harassed or treated as outsiders in both subtle and apparent ways in the course of their professional life. Such experiences included the following:

* Women lawyers are perceived as less intelligent and less serious than men - "They are viewed as simply carrying out a pasttime."

- * Woman lawyers feel they have to "work a hundred times harder than men to reach a particular level in the profession which is more easily attainable for male lawyers"; "There's an expectation that we can't do it so we have to work harder."
- * The obstacles for women lawyers are not necessarily tangible but rather invisible, "more to do with attitudes towards and about women as a whole and not just as lawyers".
- * Women in the legal profession are constantly up against "a brotherhood".
- * "I've known of women lawyers, especially at the junior level to be exploited by their seniors."
- * "Discrimination definitely exists between male and female juniors when it comes to pay benefits and emoluments" or when "women junior advocates are often allocated less serious cases than their male counterpart".
- * "There is a popular notion that criminal law is not meant for women - the one area of law that seems to impact most on women's lives."

ii. **Have you ever experienced stereotyped expectation because you are a women?**

Yes	47%
No	31%
No response	22%

Forty-seven percent of women interviewed have experienced streotyped expectations of their work largely in the form of what their peers traditionally expect of women, irrespective of their vocation. These expectations were understood to include the following:

- # Stereotypes were attached to notions of the “decent women” such as quietness, reserve, conservative dress, and those who “don’t make it a habit to talk to men”. Women who fall outside of these expectations are commonly referred to as ‘chalu’ (a fast woman).
- # Expectations of clients who are sometimes averse to engaging female criminal lawyers: “There is an expectation that criminal law is a dirty business and only male lawyers are ‘capable’ of handling it”.
- # Stereotypes which are veiled in the logic of ‘tradition’ but are really intended to degrade women as professionals. Comments such as “don’t work too much or soon you’ll be an old maid with no one to marry” have to do with the kind of threat women pose as competent professionals.
- # Women cannot be taken seriously as legal professionals. “Women are treated as these showpieces who spend a little time in court till they get married. For that reason we are often paid less and involved in less serious matters. That notion is also based on the assumption that the practice of in law depends on long hours which is not necessarily related to the volume of work but the need to be seen to be present in the office”.

iii. **As a woman advocate, have you ever experienced physical or verbal sexual harasment by judges, lawyers, court personnel, others?**

Apart from general attitudes expressed above, woman lawyers had specific things to say about more invisible forms of discrimination such as sexual harassment. Our survey indicated that 54% of female lawyers reported verbal and physical sexual harassment from both judges and other lawyers. The nature of harassment varied according to the court. In Delhi courts for example, such harassment is referred to as “white collared” (i.e. subtle) harassment when it occurs in either the High Court or the Supreme Court. In the lower courts harassing behaviour manifests itself as offensive remarks or physical contact. Verbal harassment was far more common than physical harassment and lawyers were more likely to be the source of the problem than others. **Sixty-five percent of women lawyers reported that they are always, sometimes or often subjected to, or have observed verbal or physical sexual harassment from other lawyers. Approximately 20% of those surveyed identified judges as a source of verbal sexual harassment.** Remarks from judges often include observations regarding dress, referring to female counsel by her first name and allowing sexist remarks to be passed in court without judges intervening. The nature of verbal sexual harassment experienced by women from other lawyers included:

- * **Use of steretopyed role characterisation.** This included comments such as - “a woman’s place is in her home”; “what do your husband and children think of you going to work”; “women advocates are here to mark time until they get married”; “the courts are too tough for women” and “if you can’t argue, then you’re better off cooking”.

- * **Sexual innuendo.** This referred to suggestive comments about the ‘nature’ of a young woman lawyer’s relationship with her senior. One lawyer disclosed how her “senior would gloat over my dependence and never deny rumour of having an affair with me. The personal life of women lawyer is always a part of the discussion”. Several women lawyers spoke of suggestive remarks regarding their success implying that “she slept her way up”.
- * **Devaluation of women’s work.** Male lawyers repeatedly viewed women lawyers as second income earners in a marriage. As one lawyer put it - “I’m always asked what my husband does first - it’s one way to find out if I’m married and otherwise indicates that my male colleagues don’t take my being a lawyer seriously” - observations which reaffirmed entrenched notions that the primary role of a woman is that of home-maker and not professional;
- * **Appearances and character.** Female advocates are a common target for comments on dress as well as behaviour. Such comments include: “who is she trying to impress today”; “its nice to see girls in skirts at court - makes it a better place”; and where women lawyers get favourable orders the suggestion is that she “must have managed it through a connection”.
- * **Obscene and vulgar language** as well as offensive humour addressed to women were also common occurrences.

Experiences of physical harassment occurred mostly in the “lift” and “crowded” court-rooms in the narratives related to us. “In a lift, male lawyers take advantage to brush up against us.” Referring to her black lawyers coat, one female lawyer stated how “this coat covers a lot. I feel safer when I wear it. Lewd staring, objectionable remarks which have sexual overtones are the order of the day but we’ve got used to it”. That comment also reflects a common view amongst women lawyers who have grown complacent to harassment largely because “you can never prove it”. “Harassment is there but it’s subtle with the result that women lawyers are often forced to just compromise”. Put more starkly: **“Sexual favours are forced upon junior women lawyers but no one talks about it. We are such a small group, everything becomes gossip and complaining will only ruin a girls career”**. Not surprisingly, a number of women advocates interviewed admitted to experiencing some form of sexual harassment “off the record”, a response which reflects traditional behaviour patterns of women despite being in empowered professions. This preoccupation with “reputation” is what characterised two well publicised incidents of physical assault on a female advocate in a High Court and in the Supreme Court of India respectively. In the High Court incident, a woman advocate was openly punched by a male colleague on the court premises for refusing to join him for a cup of coffee. When the advocate attempted to report the incident, a senior member of the bar dissuaded the police from filing the case on the ground that “it would tarnish the reputation of the bar.”¹²³ In a related incident, a male lawyer slapped a female lawyer on the Supreme Court premises. Once again his reason for doing so was that she refused his advances. Not only was there an insufficient quorum to attend a Supreme Court Bar Association meeting summoned pursuant to the incident but the agenda for the meeting simply intended to address “whether or not action **should** be taken against the male lawyer”. Women advocates also complained of complete indifference by Bar Associations to the issue of gender discrimination: “If the matter is taken to the Bar council, it usually ends in a compromises and no action is taken against an offender”.

iv. Have you ever been subjected to comments about your physical appearance or dress (when no such comments are made about your male counterparts)?

No	44%
Yes	55%
No response	1%

The majority of women lawyers admit that they have been subjected to comments related to their physical appearance and dress mostly from male lawyers who “make fun at our expense”. In South India, senior women advocates spoke of problems encountered in the mid-eighties when they began to wear salwar kameez. “Male counterparts resorted to sarcasm and jokes in order to demean women lawyers and their ‘hep’ sense of dress”. In one instance a woman advocate described how a judge on seeing her in salwar kameez admonished her in open court stating “shame on you and your senior. You girls should wear sarees!” Questions like “whom do you want to please today or whom do you want to kill today” are commonly asked of women lawyers in reaction to their court attire.

v. Have you ever been subjected to remarks or jokes in court, your firm or in chambers which were demeaning either to you or to women in general?

No	52%
Yes (unspecified)	48%

Approximately **forty-eight percent** of the women surveyed said they either heard or experienced remarks or jokes which were demeaning to women. The respondents largely blamed male lawyers, court personnel and judges respectively. While 52% of advocates responded in the negative to this question, that view contradicted an earlier finding in which 54% of women said they had experienced physical/verbal sexual harassment. It appears that demeaning humour/remarks about women in general are not understood by the majority of women (or men) as sexual harassment. Offensive humour which sexually degrades women is socially recognised and accepted behaviour and is not commonly understood as offensive to women. It is also possible to surmise that women are subjected to more serious forms of sexual harassment than jokes or remarks. Irrespective, those remarks which were described by the respondents as demeaning included the following:

- @ A women’s integrity is often put to question if male colleagues do not find her sufficiently conservative. Comments on this score have recently been associated with Anjali Kapoor¹²⁴ - “it’s easy for a woman to become a significant advocate, look at Anjali Kapoor”.
- @ Reference to songs such as “choli ke peeche kya he” (what’s underneath the blouse) are common refrains in the language of interaction between male and female advocates.
- @ Remarks which seek to devalue women’s work as a professional: “I think discrimination in this profession is rampant. I can’t think of a single male lawyer who values the fact that a number of women who want to be in this profession have to balance that with domestic work. Instead, they are devalued for having that ability”.

vi. Do you feel judges attach more credibility to the arguments of male lawyers over female lawyers?

Yes	48%
No	52%

When looking at whether judges addressed male lawyers differently to female lawyers, nearly half of the women professionals expressed a difference. Women lawyers felt judges could be either paternalistic or patronising when it

came to women (particularly juniors) arguing cases. One reason according to some women is that “judges continue to view women as the weaker sex is in need of protection rather than as humans whose rights need to be advanced”. “We are not treated on par with male lawyers” expressed others, attributing this to a mind set where “judges do not take women lawyers seriously. They generally make us feel that we are incompetent. Though they talk about encouraging women, this attitude is largely patronising. Preference is always given to male advocates. Judges think women are weak in arguing the case as well as less intelligent”.

vii. Is there anything in the language of the court or the process of lawyering which you fell is either offensive or demeaning to women and which ought to be changed?

Yes	43%
No	55%
No response	2%

The type of language used in the court-room itself in cases of violence is, according to women advocates, “demeaning”. In cases of sexual abuse, “personal questions regarding the sexuality of the victims are constantly asked with a view to humiliate”. In one instance a victim was asked if she had ever “exhibited her personal organs/private parts with a view to imply she was of ‘loose’ character. “Even if she was, so what” protested one women lawyer - “the wrong was done to her not by her!” According to a number of women advocates in such cases “it always seems as if the woman is on trial”, a basic reason why most felt women in situations of violence are deterred from approaching the legal system. The courtroom was considered by most respondents as “extremely unhealthy and insensitive” when it comes to criminal justice for women and one which allows women to be freely ridiculed: “In the case of a woman seeking divorce, the court staff was overheard to comment “yar jitni jan yaha laga rahi hai pati par lagati to kabhi na chodta” (had she put the some effort into her marriage as she is into the case, her husband may not have left her). Such comments are deemed to be common in cases of violence against women with women lawyers taking serious exception to the fact that “judges never issue any reprimand because it’s considered acceptable to address a woman in such terms”.

viii. Have you ever observed any gender specific bias against women in the court or in chambers in a case involving violence against a woman?

Yes	38%
No	56%
No response	6%

Approximately 38% of the women advocates spoke of some form of gender specific bias. While 56% expressed not observing any gender bias, this appeared to be due to the fact that not all of the women interviewed have dealt with cases of violence against women. Those who did observe such discrimination related the following instances and examples:

- @ The courtroom atmosphere is “not conducive to women to depose openly in cases of violence against them”.
- @ The courtroom atmosphere is “unhealthy and insensitive, compounded by a majority of male advocates and court staff”.
- @ “The courtroom is unsympathetic to women and allows for women to be ridiculed and made the butt of jokes.”

- @ “Bias definitely affects the outcome in a case of violence against a woman. For example, whether or not relevant, the past character of a woman invariably surfaces as a determining factor in a case.”
- @ “Notions of family and the sanctity of marriage are paramount for most judges and that is characteristic of the kind of bias women face in the court-room. In one case a judge advised a woman plaintiff “mare ya jo bhi kare sasural hi tumhara ghar hai” (where you are beaten or whatever else is done to you, your husband’s home is your home).
- @ “The bias is so evident in the way judges punish rapists. In a case of gang rape for example, not only were the accused sentenced to less than the mandatory minimum, on appeal the judge reduced the sentence on the grounds of both “youth” and that it was their only offence to date.”

While many women did not accuse judges of indulging in such behaviour they were critical of the fact that “judges fail to put a stop to it”. **The majority of women advocates expressed the view that judges rarely if ever intervened to stop gender bias behaviour in the courtroom.** But as one District Court Judge in Guwahati told us: “I may not recognise what is gender-biased behaviour. Gender sensitisation may increase that awareness”. **In other words when judges fail to correct behaviour it may be because they are unable to characterise behaviour they observe or engage in as gender biased.** Secondly, “judges may not understand how objectionable certain kinds of behaviour is to women” stated one advocate. Given the responses to the questionnaire survey for judges, this statement is an accurate assessment of how judges rate the extent to which they consider certain kinds of behaviour towards women as discriminatory. While it is true that 72% judges did advocate scolding in open court where sexist comments or offensive humour demeaning to women are made, only 8% recorded observing any discriminatory behaviour in the courtroom. This contrasted the experience of both women advocates and women litigants. According to advocate, “judges may assess the offensiveness of a remark in light of a particular situation, if at all, but they never apply a clear standard of offensiveness”. None of the advocates we interviewed could relate to us an instance of judges intervening when they themselves were aware of sexist conduct in the courtroom. More often than not, especially in cases of VAW, advocates observed passive non-intervention. At the same time, women advocates admitted hesitancy on the part of advocates to point out or object to gender biased behaviour - “You are caught in a bind. On the one hand is your case and your client and on the other hand you will probably be laughed at”. In other words, advocates feared refocusing attention of the case to gender issues. And even where they did, the matter would generally be dealt with in a jocular fashion:

“I recall a trial court in Jaipur where the defence counsel was harassing a victim who was testifying in a rape case. The prosecution raised a meek objection. The judge simply smiled and waved his hand in a gesture which indicated that the prosecution restrain himself and not get so worked up. It was totally patronising.”

In another trial involving child rape, the defence counsels (seven in number) repeatedly laughed at every opportunity in an attempt to ridicule the very possibility of a father raping a child and reduce it to “a western phenomenon”. Once again no intervention was forthcoming from the judge hearing the case.

XVII. WITHOUT PREJUDICE?

SEX EQUALITY AT THE BAR AND IN THE JUDICIARY

Lesley Holland and Lynne Spencer

Summary

This report describes the research project commissioned by the Bar Council and Lord Chancellor's Department (LCD) into gender equality at the Independent Bar, the Employed Bar and in the Judiciary in England and Wales.

Lesley Holland and Lynne Spencer of TMS Consultants, who are specialists in equal opportunities in employment, recruitment and selection, designed and carried out the research during 1992 in co-operation with the Bar Council and LCD. The report comprises the full results of the research, together with observations and recommendations from the authors.

Methods

The main research instrument was eight variations of a postal questionnaire sent to a random stratified sample of 1000 members of the Bar and judiciary. The questionnaires contained between 50 to 80 closed and open-ended questions and were anonymous. The results of the surveys were analysed quantitatively and qualitatively and full results are given at Appendices A-F. Response rates were high for a postal questionnaire, averaging at 56% (Appendix E).

Other research methods used to supplement the questionnaires included structured interviews with members of the Bar, analysis of statistics provided by the Bar Council and LCD, and short open workshops where women barristers were invited to discuss gender equality within their profession.

Results

The results of the survey showed substantial evidence of early and continuing unequal treatment between the sexes at many levels of the profession. This earlier disadvantage, combined with the selection methods used, will affect applications for and appointment as a QC and judge.

The results also showed a discrepancy between male and female perceptions of the equality issues within the profession, and a marked tendency to fail to recognise this as a problem by those who occupy the higher levels - heads of chambers and judges.

For example, 60% of women respondents at the Independent Bar reported disadvantage on the grounds of their sex. Over 70% felt under pressure to perform better than men, and that their performance was watched more closely. Only about 30% of men felt this was true of women.

One of the biggest areas of disadvantage was at the junior level, when being selected for pupillage and tenancy. On average men had to make fewer applications for pupillage and to wait less long for a tenancy. Once established, women still felt they were directed into areas they did not necessarily wish to specialise in (such as family work), and this was often at a lower level than comparable men, which in turn affected their earnings and opportunities for future career development (Appendix D).

The questionnaires looked in some detail at maternity; of the 60% of women respondents who had children, nearly half had returned to work within three months, and almost all the rest returned within a further three months. Arranging childcare to cover the long and unpredictable hours was often a difficulty.

Turning to the higher levels of the profession, over 60% of women respondents favoured positive action (a legal measure to encourage women to apply) for silk and judicial appointment, compared with 30% of men. A large number of respondents volunteered that they were against positive discrimination (the unlawful preference of one person over another on the grounds of gender alone). Women felt that sex discrimination was the second most prevalent source of discrimination at the Bar, whereas men ranked it fifth. (Race discrimination was ranked first in both cases).

A substantial number of respondents felt that the judicial appointments system needs to be more open, and may disadvantage women.

The report concludes that gender discrimination appears to be institutionally present within the Bar and judiciary.

Recommendations

Recommendations for action by the Bar include (page 16):

- * addition of equal opportunities policies to the profession's Code of Conduct
- * the publishing of guidelines on equal opportunities and flexible working
- * monitoring of gender differences in appointments, earnings and career development
- * assistance to chambers with the adoption of a systematic approach to selection for pupils and tenants
- * training in equal opportunities for key groups, such as heads of chambers, clerks, pupil masters and selection committees
- * mentoring schemes for women, better networking and work shadowing, with senior women as role models
- * provision of a confidential complaints procedure.

The recommendations for the LCD (pages 21 & 26) include;

- * a revision of the selection criteria for QCs and judges
- * gender monitoring and targets
- * enhanced equal opportunities training for judges
- * positive action to encourage women to apply for silk and the judiciary
- * a complete review of all selection methods with the aim of making the process more open, systematic, objective and therefore fair
- * provision of a confidential complaints procedure.

PA RT - I
GENERAL

Course Curriculum on Gender Sensitisation of Judicial Personnel

**(A Training Manual including Objects,
Methods and Materials)**

Project Incharge
Dr. Poornima Advani
Member
National Commission for Women

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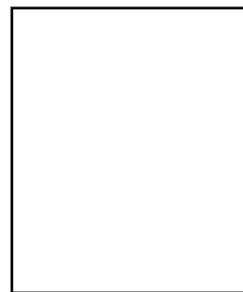
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सत्यमेव जयते

**MINISTER
LAW, JUSTICE & COMPANY AFFAIRS**



Foreword

I am glad to learn that the National Commission for Women in collaboration with the West Bengal National University of Juridical Sciences has formulated a training module for sensitizing the judicial officers of the Government to issues of gender equality. Fifty years ago, "We The People" enacted and gave unto ourselves a Constitution securing to all the citizens justice..., liberty... and equality of status and of opportunity. To translate these sentiments into reality, the Constitution spelt out various fundamental rights guaranteeing to all its citizens, men and women, equality before the law and forbade any discrimination on grounds of "religion, race, caste, sex, place of birth or any of them". It also assures equality of opportunity to all its citizens in matters relating to employment or appointment to any office under the State. And here also it specifically forbade discrimination on grounds only of "religion, race, caste, sex, descent, place of birth, residence or any one of them". One would say that the civil and economic equality for women could not have been given a more solid and sacred base. In fact, the architects of our Constitution went a step further and cast upon its citizens a fundamental duty to renounce practices derogatory to the dignity of women.

These fundamental tenets were translated into numerous laws to provide protection and promote the cause and welfare of women. Many older laws were also amended to align them better with the letter and spirit of the Constitution in the matter of status and opportunities for women.

While formally, equality is amply enshrined in our Constitution and statutes, substantive reality, however, does not corroborate it to a great extent. Majority of women are still very far from enjoying the rights and opportunities guarantee to them. This is because there is more to rights and privileges than merely scripting them in the statutes. In India, where illiteracy abounds, specially in the female population, majority of them are not even aware of the existence of such benedictions which are bestowed on them by the Constitution or the consequential statutes.

To mend the destiny of five hundred million women in India, we have not only to make the women aware of what is their due but also they have to be empowered to demand what is their due and if necessary fight for what is theirs. In order to carry

the message across the length and breadth of the country, it is very important to see that those institutions which help realize these rights are encouraged to discharge their duties in a free and unfettered atmosphere. These institutions have the important job to work incessantly towards bringing about the much needed shift in the social attitudes of our people who traditionally have lived in a male-dominated society. It is Herculean task but it has to be achieved with determination and dedication to the cause. It is in this arena that sensitization of the guardians of law - be they judges, administrators or police officials or prosecutors acquires a special significance.

This training module brought out by the National Commission for Women in collaboration with the West Bengal National University of Juridical Sciences deserves special appreciation because it fulfils this genuine need by focusing on the vital issues of gender justice without which justice would remain a far cry for half the population of this country.

New Delhi
September 10, 2001

(Arun Jaitley)

From the Chairperson's Desk

The Government of India has declared the year 2001 as "The Women's Empowerment Year". An appropriate time indeed for stock taking and introspection. There have been several policies advocating women's concerns since the first National Plan of Action for Women was adopted in 1976. In one such move towards safeguarding and protecting the interests of women in the country, in 1992, the National Commission for Women was set up by an Act of Parliament (NCW Act of 1990).

In consonance with its mandate, the NCW commissions special studies on specific problems or situations arising out of discrimination in and deprivation of rights of women. The Commission recommends strategies for appropriate changes in the laws since laws provide the most critical first step in her journey towards seeking justice.

It is commonly known however, that despite constitutional guarantees, legal entitlements and development schemes aimed at improving their lot, women remain marginalised, vulnerable and discriminated against.

The NCW interacted extensively through a series of workshops with various wings of the government, activists from the media, the academia, professions and voluntary organisations to analyse the yawning gap between promise and performance of the country's justice delivery system. These interactive workshops brought out clearly that a gender sensitive design for enforcement of laws and a programme focussing on the sensitization of the personnel of all agencies – government as well as not government – is a must. This calls for a gigantic training exercise with a positive gender perspective.

It was also seen that various academies and training institutes in the public arena, while very committed to building professional competence of their cadre, needed to include the gender angle in their curricula which has thus far been badly overlooked. NCW collaborated with the following institutions for formulating a model course curriculum on gender sensitization of the various hierarchies :

1. The SVP National Police Academy, Hyderabad - curriculum for police personnel.
2. The HCM Rajasthan State Institute of Public Administration, Jaipur, and the Lal Bahadur Shastri Administrative Academy, Mussorie - Curriculum for administrative personnel.
3. West Bengal National University of Juridical Sciences, Kolkata - curriculum for judicial personnel.
4. Indian Institute of Mass Communication, Delhi - curriculum for media personnel.

The results of this collaboration are being presented here. These curricula should go a long way in bringing down the walls of prejudice and nurturing a gender just mindset which will in turn bridge the gap between what is planned for women and what is delivered to them.

Vibha Parthasarathi
Chairperson
National Commission for Women

From the Vice Chancellor's Desk

A trainer is not a teacher in the conventional sense of the term. She is one who facilitates an individualized process of practicing one's knowledge in challenging work environments and thereby helps improve knowledge as well as its application. This is more so in the case of adult learners like judicial officers who are conscious of their status and are conditioned by their profession. The natural inclination of a judge, even if she is very junior in the hierarchy, is to assume that she knows enough and is capable of unbiased dispensation of justice. This perception is constantly strengthened by rhetorical statements of lawyers and witnesses appearing before her. As a result there is a danger of the judge being able to get away with her biases through reasoned arguments and selective emphasis of facts and interpretations. Sensitizing such judges to modern principles and gender-neutral value system is a daunting task for trainers the world over. A true professional, however, will acknowledge her limitations and try to overcome them by using opportunities that come in her way.

Discrimination against the female sex is a universal fact shared by every legal system. It reflects historical attitudes and institutionalized practices designed by males who dominate most communities for various historical reasons. After the adoption of the Universal Declaration of Human Rights (1948) and later the Convention on the Elimination of All Forms of Discrimination against Women (1979), Constitutions of most countries in the world have amended discriminatory laws and trained their officials to act in such a way as to secure equality, if necessary, through affirmative action. It has now become imperative that administration of justice not only delivers equal justice under law, but must appear to be doing so particularly when women's rights are involved. The profession is still male-dominated; hence the need is all the more to appear doing gender justice. Training in gender issues and gender-neutral resolution of disputes is therefore not only necessary but desirable in the present context.

Centre for Women and the Law, NUJS

The Centre for Women and Law of the National University of Juridical Sciences (NUJS) is privileged to have been asked by the National Commission for Women to develop a syllabus and assemble the reading materials for gender sensitization programmes for judicial officers. An attempt has been made in the following pages which requires experimentation and adaptation to suit the needs of different groups in the judiciary. The Centre at NUJS which has been doing similar courses for the West Bengal judicial officers, is keen to be a partner in this noble effort for equal justice under law through judicial education and training.

Planning and Pedagogy

A word about the pedagogy in training exercises on the subject. Obviously, gender issues can generate varied reactions in adult groups, particularly men and women who are learned in law and its processes. They are valuable starting points in achieving the goals of training, if carefully organized to avoid distrust and promote mutual respect and understanding. Therefore, planning should invariably be done to avoid resentment and to evoke interest and motivation to learn. Of course, no amount of planning can anticipate always the course of discussion and the level of participation. Yet, planning is essential even when the course has been repeated several times.

One may introduce human rights of women in terms of perceptions on status of women or experiences of violations of rights of women and raise the question of how they are different from experiences of men, the object being to inject an appreciation of the gender element in both human rights abuses and their solutions. Illustrative examples from media stories or celebrated authors can help to take off discussion. Do not start with textual material or international instruments on human rights. Tendency to stereotype should be resisted as individual experiences can vary in impact and intensity. Similarly trivializing gender issues and finding simple answers to complex human relationships will not help in developing a climate for serious analysis and quiet reflection.

It is important to assess the needs of the group early in the course and try to individualize the programme to the extent possible. Group exercises, role play and short workshops (break-up sessions) within a session are ideal to maximize participation and to internalize the collective experiences. A feeling of enrichment and ownership of the sessions can contribute significantly to learning and correction. In this regard it is always desirable to discuss the goals, methodologies and materials of the workshop at the beginning of the exercise and take on board some of the suggestions from the participants. If there are some action components in every session, it will be lively and participatory even if the theme is otherwise not interesting.

Evaluation of the Workshop generally and in respect of each of its sessions are imperative in any training programme not only to assess the extent of learning and to consolidate experiences of the learners, but also to re-design the programme for better results.

As observed by the First National Judicial Pay Commission report while training is essential to improve quality and efficiency in administration of justice, there is dearth of qualified trainers who can undertake this task on a scientific basis for the nearly 20,000 judicial officers of the country. Hopefully, the National Judicial Academy now being established will be able to fill the void and give a momentum to judicial education and training. It is also the hope that gender sensitization will form a priority in the training agenda of the proposed Academy at Bhopal.

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PREFACE

In India, society has complacently accepted crime against women as 'inevitable'. No wonder then that the crime rate and atrocities against women depict an ever-rising graph. The beleaguered women victims are looked down upon or ignored. In such an environment all round, where does the victim in need of help go? How is she to secure just and prompt response?

The first gate of the criminal justice system which a victim faces and the offender runs away from is the ordinary *thana* or police station. Therefore, the most important step to improve our system is to work on this first gate. We have to ensure that it is open, wide open and welcomes those who approach it. Next, it has to be manned, and if possible 'womanned' by a gate-keeper, a *dwarपाल*, who is Janus-faced : having one side which is sensitive to the victims and the other which is stern to the culprit; one showing *abhay*; the other showing *dand*! This is supposed to be the motto of police (in HINDI) *sad rakshanaraya; khal nagraharanaya* i.e. for the protection of the good and the destruction of the evil.

But what is the reality today? More often than not, what a female victim of violence meets there is either cold apathy or snide remarks. Sometimes the brush could be even more traumatic culminating in unlawful arrest, illegal use of force, sexual misconduct or even gang rape or some other torture while in custody. Oftentimes, such gross violations of the basic human rights of women occur because the police response and actions are inherently shaped by the stereotypical views about sexual assault, harassment or domestic violence *vis-à-vis* women which the lower constabulary and sometimes even their seniors harbour. Needless to say, this scenario has to change and that too, very fast.

In 1992, the National Commission for Women was set up with a mandate to safeguard the constitutional rights of women. It also had the responsibility to deal with cases of violation of the provisions of the Constitution and of other laws relating to women. It was given a dual role : firstly, to look into complaints and take *suo motu* notice of matters relating to the deprivation of rights of women, or non-implementation of laws enacted to provide protection to women, and, secondly to achieve for them the objectives of equality — civil and political, and development --- economic and social. In keeping with its mandate, the Commission has, from time to time, looked at various complaints and problems. Not surprisingly, the major grievances of the women were against the law enforcement agencies, the police, the judiciary, the administration, the media and finally the societal norms. The NCW decided to tackle all the trouble spots simultaneously. So far as law enforcement agencies were concerned, the NCW, decided, in order to obtain quick relief for the oppressed women, to interact directly with the Departments of Home Affairs of the Central and State Governments as well as the members of the Police Force.

In 1993 and 1996, the Commission organised two conferences, attended by Inspectors General of Prisons from all over the country, to get their views on issues relating to criminal justice as well as gender justice within the overall framework of criminal justice administration. Following these conferences, the NCW organised orientation courses for Superintendents of Jails/Remand Homes and other custodial institutions at Bangalore, Kolkata and Delhi. This led to the emergence of a consensus

that the traditional repertoire of practices and predilections of the police needed to be replaced by a new kit of knowledge, skills and attitudes based on a gender sensitive perspective of the universe around them. Subsequently, in 1997, the NCW convened the State Home Ministers' Conference to help in identifying and analysing the causes of crime against women and suggesting remedial measures. Again, one significant recommendation that emerged was that mandatory training on gender sensitisation should be organised regularly for the police and all those directly or indirectly responsible for administration of justice.

At this stage, it needs to be mentioned that the Government of India, recognising the importance of training in gender sensitisation, had already identified, from different States, members of the police force and social scientists and sponsored them for undergoing a training course on the subject in the University of Sussex, U.K. These 'trained' officers came back to the country equipped to train other individuals. Hence a series of meaningful programmes came to be initiated in about 6 to 7 States in an attempt to have more sensitised police personnel. These on-going efforts have surely aided in pushing forward the exercise needed towards sensitisation of police personnel all over the country. However, this effort threw up an acute need for a standardised curriculum which should be comprehensive in its sweep and humanistic in its perspective.

Once again, the NCW decided to step in. On a personal note, during my visits to some of the police training schools and academies, it came to light that the course curriculum for gender sensitisation of the police or even the course curriculum on gender and laws, had not been updated – in some cases for over a decade. What was most encouraging was the keenness and enthusiasm that directors of the academies and schools for training showed for incorporating such a curriculum into their training schedules. However, they did not have the requisite infrastructure. An immediate agenda glared me in the face. If course curriculum could be developed and handed over to them, the machinery would automatically begin to move. The gap needed filling. On my visits, I also found several NGOs holding gender sensitisation camps, more so with the police, but then, they had evolved their own curriculum. The gap between the need for a standardised curriculum and the desire to fulfil it anyhow, was narrowing down bit by bit. I decided to move in the matter.

With this background, the Commission readily accepted the idea of organising a workshop to discuss the contents of a gender sensitisation course curriculum for police officers. And so the ball was set rolling. During preliminary meetings, it was suggested that the constabulary level should be focussed on first, followed by inspectors and sub-inspectors and then the senior officers. This hierarchy was suggested, keeping in view the fact that it is the former who work at the grassroot level and need to interact with the women who reach the police stations, whether as victims or as social workers.

The realisation then dawned that the picture was much larger and more complex. What started at the police station through a woman knocking at its door went through the entire gamut of law enforcement mechanism i.e. the judiciary, the administration, the media and even the NGOs. Each of these institutions, has an inner dynamics, usually weighted, by design or default, against the woman. Therefore, for a truly fruitful outcome, simultaneous exercises needed to be undertaken for the judiciary, administrative personnel, NGOs and the media. What emerged was the idea of holding a two-day National Workshop at Vigyan Bhavan on 'Forging Partnership with Law Enforcement Agencies'. Five

course curricula were presented by five premier institutions. Curriculum for gender sensitisation of the police was presented by the National Police Academy, Hyderabad; that for administrative personnel was presented by Rajasthan Institute of Public Administration, Jaipur; and Lal Bahadur Shastri Administration Academy, Mussoorie; for judiciary it was presented by Andhra Pradesh Judicial Academy, Hyderabad; for NGOs it was the Gender Training Institute, Delhi, who came out with the module and for media, it was presented by the Indian Institute of Mass Communication, New Delhi. In a brain storming interactive session, the participants at the workshop discussed the strength and weakness of each curriculum module.

Subsequently, the above mentioned academies held workshops and discussed further the merits and demerits of the curriculum in the light of the above referred discussions.

So far as the judiciary is concerned, the workshop for developing the course curriculum for judicial officers was held at West Bengal National University of Juridical Sciences at Kolkata on 1st and 2nd April, 2001.

In a parallel exercise, to gain practical grassroot information and experience the reality of women's woes, and manage direct interaction of victims of crimes or the NGOs working on the subject or other concerned individuals with the police and judiciary, the National Commission for Women organised four Regional Workshops at Patna, Chandigarh, Bangalore and Bhopal. These regional events were designed to facilitate the interactive participation of victims of crimes and all officials and non-officials, i.e. NGOs, concerned with the criminal justice system. A summary of the reports of these workshops, so far as police, gender and law enforcement is concerned, have been incorporated in this report.

Subsequently, after the four workshops completed their deliberations, their reports were compiled, detailing the problems and solutions suggested. These together comprised the background material for discussion at a National Workshop on "Gender and Law Enforcement" at Vigyan Bhavan, New Delhi, on 1st and 2nd June, 2001. A summary of the report of this workshop is also included in this report.

So there are four curricula in the pipeline. A victim's journey usually begins at a *thana* and ends (hopefully) at the *kacheri* (court). It is a tribute to our judiciary that despite occasional frustrations the public still look upon the courts as their last refuge or hope. Hence this special training module for the dispensers of justice. On the one hand, the judicial personnel share the value system of the same patriarchal social set up to which the other members of the law enforcing mechanism, and even the litigants, belong. On the other hand, they are trained to be 'blind' in dealing with the adversaries appearing before them. The intent of the training module is to open the third eye of compassion and sensitivity of the judicial fraternity so that while law is not swayed by the status or station of the litigants, it always leans in support of the sentiments that permeate the constitutional basis of our legal system. Needless to say, that the curriculum has to be suitably modulated to the needs of the personnel at various levels and tuned to the socio-cultural ethos of the different regions.

I shall be failing in my duty if I do not express my grateful thanks to the Vice-Chancellor of the West Bengal National University of Juridical Sciences, Prof. Madhava Menon and the members of his faculty for their enthusiastic support and cooperation. I would also like to add a word of appreciation for the work put in by the two law teachers. Smt. Gangotri Chakraborty & Ms. V.S. Elizabeth in the preparation of the module and in compiling the reading material. I am indeed indebted to those who

attended the various workshops detailed above and gave their valuable inputs. I am particularly thankful to those who attended the workshop at the NUJS.

Nearer home, I thank the Chairperson of the National Commission for Women, Ms. Vibha Parthasarathi, for her unstinted support at every stage of this long drawn out exercise. Needless to say that the entire exercise could not have seen its fruitful culmination but for the cooperation extended by the Members of the Commission. I must add a word of gratitude to the Member Secretary Ms Reva Nayyar and the secretariat of the Commission who have all stood by this venture.

I am sure, the future generations of the newly recruited judicial officers as well as those working at all levels of the judiciary at present would find this curriculum a valuable guide, and would, in turn, provide the country with a more sensitised system of dispensing justice.

Dr Poornima Advani

Member

National Commission for Women