Proceedings of

A NATIONAL SEMINAR ON WOMEN & LAW

3 - 4 December, 1994

Organised by

Institute of Social Studies Trust,
New Delhi, India

Sponsored by

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PREFACE

The Institute of Social Studies Trust organized the two-day seminar on 'Women & Law' with a focus on two major objectives. Firstly, the aim was to bring together in one platform experts and activists from diverse areas, not traditionally involved with gender issues, to deliberate on the question of legal empowerment of women. The seminar provided the forum for civil rights activists, human rights experts, senior lawyers specializing in public interest litigation, as well as researchers, legal experts and activists involved in the women's movement, to share views on the problems and potentials of using law as an instrument of social transformation. This has also been one of the few seminars we know of, which has brought together a wide range of people - from sitting judges to grassroot activists.

A second major objective of the seminar has been to open up new areas of feminist discourse in the context of law. The legal context of issues like women's health, or institutionalization of women have not been systematically explored before. The attempt in this seminar to subject these topics under systematic inquiry has essentially expanded the discourse to situations where law affects, or does not affect, women as human beings, - not only, or not necessarily, as victims of crime.

This seminar was one of the activities that ISST had undertaken under the multi-country project titled 'Promotion of Legal Awareness among Women', funded by the United Nations Economic and Social Commission for Asia and the Pacific (UN-ESCAP), Bangkok. Under the same project, ISST has also held Legal Literacy Camps in three Delhi Colleges in December 1994. (Cf. the companion Volume 'ISST/ESCAP Legal Literacy Camps for Women, 1994 : A Report'). While the focus in the seminar was to get together judges and lawyers in the same platform with researchers and activists from the feminist movement, the Legal Literacy Camps were designed to spread the awareness about women's legal rights and judicial processes for accessing them at the level of the students, as well as among the communities that the students regularly interact with.

We would like to thank ESCAP, especially Ms. Meena Patel, Director of the Rural and Urban Development Division of ESCAP, for providing ISST with the resources for undertaking these activities. Our sincere thanks also go out to all the seminar participants for making the seminar such a lively and enriching experience for us. Ms. Seema Midha, Advocate, Supreme Court acted as the rapporteur for the seminar. We would like to thank her for helping us put together this report. And finally, I would want to put on record my deep appreciation for the committed effort put in by my colleagues at ISST for the success of the seminar.

Swapna Mukhopadhyay

Swapna Mukhopadhyay
Director, ISST

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Summary Recommendations arising out of the deliberation in the ISST/ESCAP Seminar on Women and Law at the India International Centre, 3-4 December 1994.

The potential of law to liberate and emancipate women from oppressive social structures has to be explored relentlessly despite impediments imposed by the limitations of the legal system. With this preamble, the seminar makes the following recommendations:-

* There is a need to define and explore the feminist identity and strategies of feminism in the legal context in India at the current juncture. A feminist jurisprudence needs to be evolved through a reinterpretation of the concepts of equality, protection and status.

* An independent mechanism to ensure accountability has to be evolved to check inadequacies in the letter of the law as well as in the delivery of justice.

* There is a greater need to monitor judicial decisions and administrative actions closely in order to identify the problem areas. Involvement of Women's organizations with proven commitment and integrity should be a continuing feature of this monitoring process.

* The women's movement should evolve a mechanism to ensure responsiveness and accountability in state and non-state institutions, groups and professional bodies like the Bar Council and the Medical Council of India.

* The movement should identify the nature of legal reform needed in different areas and design its strategies accordingly. Legal reforms to weed out discriminatory potential of existing laws and statutory provisions that are state-empowering rather than people-empowering need to be undertaken.

* There is considerable scope for legislative innovations in areas of constitutional rights, as in case of the right to holistic health, which needs to be investigated and articulated adequately.

* The women's movement can think in terms of creating and supporting new alternatives to family and marriage, especially in case of women who are rejected by the family and society.

* There is as yet considerable scope for working out more effective operational methods for sensitizing strategic groups like the police, the judiciary and the administration.

* Legal reforms should be one dimension of a package of strategies for women's empowerment.

A G E N D A

December 3, 1994

0930 - 1000 hrs.	:	Registration
1000 - 1015 hrs.	:	Welcome address by **Prof. Swapna Mukhopadhyay, Director, ISST**
1015 - 1025 hrs.	:	Inaugural address by **Prof. Madhava Menon, Director, National Law School of India University**
1025 - 1030 hrs.	:	Vote of Thanks
1030 - 1045 hrs.	:	TEA/COFFEE.

SESSION-I

1045 - 1300 hrs.	:	**"Rights & Justice from a Gender Perspective"**

Chairperson : **Justice Rajendra Sachar**
Theme paper writer : **Nivedita Menon**
Commentators: **Rajiv Dhavan**
Chhatrapati Singh

1300 - 1400 hrs.	:	LUNCH

SESSION-II

1400 - 1530 hrs.	:	**Women & Health Under the Law"**

Chairperson : **Prof. Madhava Menon**
Theme paper writer : **Geeta Ramaseshan**
Commentators : **Dr. Arundhati Ritupriya**

1530 - 1545 hrs.	:	TEA/COFFEE.
1545 - 1630 hrs.	:	Discussion

Contd.

December 4, 1994

SESSION-III

1000 - 1115 hrs.	:	"Institutionalization of Women Under the Law"
		Chairperson : Smt. V.S. Rama Devi Theme paper writer : Usha Ramanathan Presenter : S. Murlidhar Commentators: Gopal Subramanium Amita Dhanda
1115 - 1130 hrs.	:	TEA/COFFEE
1130 - 1300 hrs.	:	Discussion
1300 - 1400 hrs.	:	LUNCH

SESSION-IV

1400 - 1530 HRS.	:	"Law & Violence Against Women"
		Chairperson : Justice Ruma Pal Theme paper writer : Flavia Agnes Commentators : Meenakshi Arora Maja Daruwala
1530 - 1545 hrs.	:	TEA/COFFEE
1545 - 1640 hrs.	:	Discussion
1630 - 1700 hrs.	:	Recommendations & Vote of Thanks.

NATIONAL SEMINAR ON WOMEN AND LAW

INTRODUCTION :

1.0 Background

The Institute of Social Studies Trust (ISST), New Delhi and the United Nations Economic and Social Commission for Asia and Pacific (UN-ESCAP) jointly organised **NATIONAL SEMINAR ON WOMEN AND LAW at New Delhi on December 3-4, 1994.** The seminar was held at the India International Centre, Lodhi Road, New Delhi-3. Over 40 participants, representing various professional groups, NGOs, judges, lawyers and activists, deliberated on the scope of law and legal system to give expression to women's rights and aspirations and deliver gender justice. The unique contribution of the seminar was in its choice of as yet little explored subjects i.e. feminist rights, women's health rights, institutionalisation and violence. The emphasis that emerged in deliberations was more on assertion of feminist rights rather than mere non-discrimination; on gender equality rather than gender protectionism; on gender justice rather than correctional justice, in keeping with the fast changing role and perceptions of woman's identity in Indian society.

1.1 Objectives of the Seminar

The Director, ISST, Dr. Swapna Mukhopadhyaya opened the seminar with a welcome speech and briefly dwelt upon the objectives of holding 'yet another' programme on women's issues. Though a spate of seminars and conferences had been held in the recent past vocalising gender inequalities and gender injustice, a need has been felt, in the face of persisting societal oppression and discrimination, to undertake a more in-depth examination of feminist rights and feminist identity; to evaluate the capacity of law and legal system to deliver gender justice in terms of emerging value system, structures and processes; State's responsiveness to gender-specific issues; to explore alternative options to State action; and, if need be, to give a new direction to the women's movement.

1.2 The Four Plenary Sessions

The seminar was divided into four sessions, each session focussing on a specific issue. There were two experts invited to comment upon the issues and perspectives thrown open by presentation of each theme paper. Thereafter, interventions and discussion by participants were invited, followed by concluding remarks by the chairperson.

The four theme papers focused on :

(a) Rights and laws from a feminist perspective - the ability of law to express the language of feminism - efficacy of State-Centric interpretation and implementation of the legal structure given its patriarchial bias - the moral basis of rights - judicial efforts and ability to transform power relations.

(b) Women's health as a legal right-gender specific legislations in the area of health and their efficacy - areas of deficiencies in the operational context of laws - relevance of State intervention - responsibility of non-governmental organisations - gender aspects of STD's and AIDS, sex-specific foecticide, artificial insemination, surrogate motherhood etc.

(c) Institutionalisation of women and law - efficacy of institutionalisation as a curative process - the anomaly of 'safe custody' - interchangeability of punitive and protective institutionalisation - unlawful practices by the police and other coercive agencies - absence of after-care and rehabilitative structures and policies - abdication of responsibility by both family and state - juristic activism.

(d) Violence against women - inability of legal reform so far to tackle issues of violence against women - conservative judicial response - deficiencies in procedural laws - voyeurism in rape trials - dowry law - a mis placed campaign - necessity for delinkage of domestic violence from property issues - growing compexities.

2.0 Inauguration

The seminar was inaugurated by Prof. N.R. Madhava Menon, Principal, National School of Law at Bangalore and a distinguished scholar. In his inaugural address, Prof. Madhava Menon stressed that in the new emerging legal order, which is more market-friendly and less people-friendly, it is vital for women to articulate issues of gender justice in the language of law and push it high in the public agenda with the force of law and human rights. In the present set up wherein the executive enjoys enormous powers necessary for reallocation of resources for distributive and social justice, women's active participation in the governance of the country through the Panchayati Raj system can help women become masters of their destiny, provided they do not lose opportunity to participate in the political process. [Annexure - I]

First Plenary Session - 'Rights & Justice from a Gender Perspective'

3.0 The First Plenary Session was chaired by Justice Rajendra Sachar. The theme paper was written and presented by Ms. Nivedita Menon titled **'Rights, Law and Feminist Politics : Rethinking our Practice'**. Expert comments were invited from Mr. Rajiv Dhavan, Senior Advocate, Supreme Court, Mr. Chhatrapati Singh, Director, Centre for Environmental Law, and Mr. L. C. Jain, Development Expert. This session addressed itself to the fundamental problem of the inability of law to give expression to feminist rights.

3.1 Brief Resume of Theme Paper

3.1.1 Nivedita opined that at this point of history, feminism must re-evaluate its relationship with language of rights and the law. The experience of the last decade has shown the incapacity of law to act as an instrument of change. There is a growing feminist unease on the law's capacity to deliver justice in feminist terms, given its patriarchial structures and biases. Questioning the myth of neutrality of law and the efficacy of state as an agent of change and executor of laws, in a society which is preoccupied with manifestations of poverty and under-development, the writer concludes that feminism has exhausted the potential of legal reform to initiate societal change.

3.1.2 The critique of the Welfare State to incorporate the language of feminism in the background of patriarchial biases, rests on two grounds :-

(a) State-centric implementations of 'rights' and 'law' reject individualism and uphold community welfare. Such a position installs family beyond the sphere of operational law and justice defeating the emancipatory impulse of feminism.

(b) Secondly, in the operational context of law, feminist rights take on the colour of male interpretations. For example, law permitting women's access to abortion results in selective abortion of female foetuses.

3.1.3 Nivedita's pessimism about law's inability to incorporate the language of feminism also arises from the premise that modern legal system tends to be certain and uniform, and is flexible only to the extent that it permits change through judicial decisions. However, judicial decisions are subject to individual biases. Even the liberal approach ends up treating women as gender-neutral persons denying the uniqueness

of feminist needs and perspectives. Hence the conclusion that the law infact re-entrenches patriarchial values.

3.2 Highlights of Comments and Deliberations

3.2.1 Dr. Chhatrapati Singh stressed the need to reflect more deeply upon the notions of feminism in the legal context and if the legal discourse has reached its limit, what other non-violent options are available for social emancipation.

3.2.2 Mr. Rajiv Dhavan talked about the 'Abhimanyu' type of predicament of women's organisations who rely on legal system to achieve feminist rights and end up by being entrapped by the legal system itself. He held that law created by vested interests is cruel, it cannot liberate, it can only regulate. It creates defensive jurisprudence whereas there is a need for a creative jurisprudence. Hence, essentially the language of law is not the language of rights. He yet believes that the redeeming factor is in law's malleability to change, for law is not certain as the theme paper upholds and one should take off from there. The potential of legal discourse to achieve women's rights is not exhausted. Personal law has to be subjected to Article 14 of the Constitution to bring gender equality. Concepts of status, property, opportunity and equality need to be rewritten and reinterpreted to evolve feminist jurisprudence.

3.2.3 Mr. Virendra Dayal, Member, Human Rights Commission of India, exhorted that activism should not end up being a lament of a trapped activist. As human rights' activists we have no right to be discouraged and law has to be supplemented by other fields of activism. Mr. L.C. Jain, noted Development Expert, said that in a democracy, law can be a powerful instrument of change, provided it is enforced and implemnted effectively. The law on untouchability has been enforced in this country for a number of years. Yet there is hardly any conviction under this law. Thus statutory law needs to be supplemented with effective enforcement.

3.2.4 Participants generally agreed on the point that more than its substantive aspect it is in its operational and implementation context that law has failed to meet gender specific needs and demands.

3.3 Recommentations for specific action

3.3.1 Suggestions for actions required to be taken by women's organisations both within and beyond the legal context emerged as follows :-

- Need to define more clearly the feminist legal structure - identify the areas needing protectionism and those where equality needs to be pressed for, as also the areas of darkness - injustice and inequality - and work towards a more egalitarian legal order wherein feminist perceptions of social reality can take a more concrete shape.

- Need to explore areas of malleability in the law and legal system for evolving a feminist jurisprudence. For example, by subjecting personal law to fundamental law to equality under Article 14 of the Constitution.

- Need to evolve a pressure mechanism for a more responsible and responsive State machinery implementing the laws.

Second Plenary Session - 'Women & Health Under the Law'

4.0 This session was chaired by Prof. N.R. Madhava Menon, Principal, National School of Law, Bangalore. The theme paper titled **'Women & Health under the Law'** was presented by Ms. Geeta Ramaseshan, Madras based advocate and Legal Expert, Expert comments came from Dr. Arundhati of the Voluntary Health Association of India and Ms. Ritupriya of the Centre for Social Medicine and Community Health at the Jawaharlal Nehru University. This session focused on health as an enforceable right, weaknesses in the existing laws on health and future strategies for securing accountability from State and non-State institutions concerned with health.

4.1 Brief Resume of Theme Paper

4.1.1 Ms. Geeta Ramaseshan highlighted the fact that very few gender specific legislation exist in the area of health and even these have proved detrimental to the interests of women, operating as they are in the praxis of societal inequalities and unequal situations. The language and implementation of beneficiary legislations, like Maternity Benefit Act, Medical Termination of Pregnancy Act, Immoral Traffic Prevention Act and Labour Laws often end up affecting women more adversely. For example, barring the employment of women between 10 P.M. to 5 A.M. may bring economic

disadvantage to women workers. In such cases, State's role as a protector becomes irrelevant and even undesirable.

4.1.2 Judicial decisions under Medical Termination of Pregnancy Act invariably reflect social and traditional prejudices and do not uphold women's natural right over her body. There have been judgements holding abortions without the consent of the husband as cruelty and a ground for divorce under the Hindu Marriage Act.

4.1.3 Law has miserably failed to take note of the need for a separate legislation for the mentally retarded who are lumped alongwith the mentally ill by both society and State in its treatment and attitudes towards them. Recent incidents of forcible hysterectomies conducted on mentally retarded in a 'Home' in Pune denotes the extent of misuse and misinterpretation of law by administrators.

4.1.4 Government policies and programmes on family planning have also refracted from the enforcement of beneficiary legislations expressedly enacted for the benefit of women. Legislations in the field of reproductive technology need to be re-examined. Easy availability of spurious and potentially harmful drugs and injections for the purpose of contraception have seriously impaired the health of women.

4.1.5 The extraordinary and rapid advance of biological and genetic technology is going to give rise to new and complicated legal issues in the future like the status of children born of artificial insemination and the legal status of surrogate motherhood.

4.1.6 Very little has been achieved in the past in the arena of health and law. There is a need to evolve strategies for future course of action in this area.

4.2 Highlights of Comments and Deliberations

4.2.1 Law as it exists today does not take a holistic approach to women's health and well-being. Piecemeal legislations in certain employment and family-planning related fields, are inadequate to deal with the complexities of women's mental and physical health.

4.2.2 In the area of health, focus is required on the section of women suffering from economic and

social deprivations, rural and tribal women for whom medical facilities are inadequate and inaccessible.

4.2.3 There is a lack of awareness of health rights among women. Medical profession should be sensitised to work for underprivileged sections of society.

4.2.4 The unorganised sector which includes the vast majority of women workers, does not come under the purview of protective legislation. State abdication of its constitutional duty to look after the health of women and children is evident in many areas. In beneficiary legislation, responsibility to provide for women's health is passed on to Welfare Schemes, and from there on to family planning. This process has reduced health rights to mere charity. Even the right to information is systematically denied to women in many instances - as in the case of pushing unsafe contraceptives on to unsuspecting women.

4.2.5 State accountability in areas of health and sanitation is negligible. There is a great need for involvement on the part of community based organizations and NGOs in this area to ensure administrative responsibility.

4.2.6 Legal system suffers from serious limitations in the domain of health which need to be rectified. Legal reforms should be supplemented by greater sensitivity and responsiveness from the medical profession. Doctors as healers and providers of health care share the responsibility for the prevalent inadequacies in the state health services in the country. The Medical Council should define its social role clearly and take on the job of instilling such responsibility among its members.

4.3 Recommentations for Specific Actions

- State should be made to play a more positive and pervasive role in the domain of health. The unstated premise that it is for the individual to look after his/her health, and that the State has no obligation in this respect, must change. Where the State is found to be actually jeopardising the health of women, it should be held accountable under the law.

- Concept of health should be holistic and should not merely mean absence of disease. Strategies need to be formulated to bring the neglected areas of social and mental health of women within the fold of administrative and legal action.

- Need to ensure that State policies and programmes like family planning do not end up impinging on women's health adversely, and that maternal health is viewed in the context of health over the entire life cycle of women.

- Access to inexpensive health services, a constant monitoring of drug market and drug policy and awareness of health rights should be the joint responsibility of the State and non-State medical profession.

- Though the medical profession has been brought under the purview of Consumer Protection Act, a pressure mechanism needs to be built up to inculcate social responsibilities in medical profession. A medical audit to control quality medical profession needs to be built into the system.

Third Plenary Session - 'Institutionalization of Women Under the Law'

This session was chaired by Smt. V.S. Rama Devi, Secretary General of the Rajya Sabha and former Member Secretary, Law Commission of India. The theme paper titled '**Institutionalization of Women Under the Law**' was written by Ms. Usha Ramanathan, Legal Researcher, and was presented by Mr. S. Murlidhar, Advocate, Supreme Court of India. Expert comments were made by Mr. Gopal Subramanium, Senior Advocate, Supreme Court and Ms. Amita Dhanda, Faculty Member at the Indian Law Institute. This session addressed itself to the relevance and legitimacy of the State machinery of institutionalization and the abuses and anomalies built into this sytem.

5.1 Brief Resume of Theme Paper

5.1.1 The paper reflected on the legitimacy and propriety of institutionalization as a means of corrective justice for women. Institutionalisation as it exists today makes no distinction between the convict, the undertrial, the mentally retarded, the mentally ill, the wanderer and the destitute, the runaway or abandoned girls and the prostitute - subjecting them all equally to the physical and mental trauma of closed confinement and the neglect and abuse, sexual and other kinds, that go with it. Institutionalized women suffer a complete severence of ties with the outside world and all legal rights - right to dignity, right to health and right to access to justice, are taken away from them.

5.1.2 Law abjugates its responsibility towards an institutionalized woman, leaving her at the mercy of an autocratic and effectively lawless State machinery empowered with police powers. The Lunacy Act 1912

gives power of 'discriminating between a sane person and a wandering or dangerous lunatic' to the police. The arbitrary exercise of powers by the police under this Act, as well as under the Prevention of Immoral Traffic Act to apprehend a vulnerable person, coupled with the callous neglect of the victim's rights by lower judiciary, denotes the dangers of an inept and inane system of justice delivery. Instances abound where respectable and innocent women, destitutes and wanderers have been picked up and sent to mental institutions.

5.1.3 The State functionaries are protected from accountability and can afford irresponsibility or even criminality. Cases from Assam which came up recently before the Supreme Court exposed abominable misuse of institutionalization. Innocent and sane persons were found to be confined within the prisons for a number of years with the connivance of politically & financially influential people without any process of justice initiated for them. This is merely one example of a systematic malaise. The fault lies not merely in the working of law but in its very statement of control without accountability.

5.1.4 The inter-changeability between punitive and the protective or curative institutions makes prison cells places of 'safe custody'. This enables State to use penal institutions beyond the limits of law's prescription. While a convict may leave upon serving a sentence, a woman in 'protective custody' could be made to stay indefinitely imprisoned!

5.1.5 The incapacity that law enforces upon institutionalized women is further aggravated in the case of mentally ill women. Since the discharge of women depends upon her acceptance by the family, which rarely ever happens, law offers her no redemption. The alienation that institutionalization represents and the stigma that attaches to being institutionalized, are sufficient reasons debarring her re-entry into the family and society.

5.1.6 There is no scheme of rehabilitation or after-care built into the system of institutionalization, exposing the victims to further rejection and re-institutionalization.

5.1.7 Judicial activism has tried to restore to some extent the constitutional rights of institutionalized persons to live with human dignity and 'all that goes along with it, namely, adequate nutrition, clothing & shelter, facilities for reading, writing and expressing oneself in diverse forms,

mixing with fellow human-beings'. However, the closed nature of the institutions defies change and the conditions remain as deplorable as ever.

Where institutions have been seen as a solution to family and societal rejections they have emerged as a repository of State power, control and authority, paving the way for further victimization of an already victimised population.

5.2 Highlights of Comments and Deliberations

5.2.1 In his comments on the issue of institutionalization of women, Mr. Gopal Subramaniam recounted in vivid detail the appalling conditions of such women that he encountered in his recent investigative visit to Assam as Commissioner appointed by the Supreme Court. The pervasive corruption and insensitivity at all levels of the state machinery compound with the provisions of archaic laws to ruin the lives of institutionalized women, he said.

5.2.2 Prof. Amita Dhanda said that there is a deep chasm between the spirit of the law and its implementation. In the name of enforcement of law what is actually being done is to degrade, dehumanise, exploit and assault human beings mercilessly.

5.2.3 It was felt that there is a complete absence of alternative options to State institutionalization. Neither women's organisation nor human rights missions have come up with sincere and viable alternatives to State custody. This has been as much for the lack of will, as from lack of funds and infrastructure.

5.2.4 From a gender perspective institutionalization as it operates today, merely represents an exchange of the mode of oppression - from private to public. Victims of family rejection end up in institutions. Family, society and State can prove to be equally oppressive. So for many, there is virtually no viable option left.

5.2.5 It was felt by some that the notion of 'protective custody' is unconstitutional. There is no legislative sanction to indefinite 'safe custody'. Juxtaposition and inter-changeability of protective and punitive institutionalization makes no differentiation between criminal conduct and mental illness in the system.

5.2.6 There was a suggestion that the component of compensation for innocent victims of institutionalization can be explored to ensure State accountability.

5.2.7 There was a general agreement that under the present circumstances, institutionalization as an option cannot be given up altogether in the absence of viable alternatives. A policy of mix and match, opening up of institutionalization with the family sharing the responsibility, more humane conditions within the institutions and introduction of effective rehabilitative programmes into the system, can make institutionalization a more acceptable solution in cases of the mentally ill, utter destitutes and those convicted of minor crimes.

5.3 Recommentations for Specific Actions

- Institutionalization as a means of curative process and protective custody needs to be re-examined and alternative options need to be formulated.

- Rehabilitation strategies to inform the law on institutionalization.

- Laws on custody like Prevention of Immoral Traffic Act, Lunacy Act and Juvenile Justice Act need to be re-interpreted from the victim's point of view.

- A more prompt system of remedial justice is needed making the necessity for 'safe custody' short-lived.

- An independent machinery is required for detection of unlawful practices by the police and other coercive agencies.

- Constitutional and other legal rights of the institutionalized should be ensured through effective legal-aid schemes for women in custody.

- It is necessary to think in terms of creating alternative support structures to family and marriage for women who are rejected by the latter.

Fourth Plenary Session - 'Law & Violence Against Women'

6.0 This plenary session was chaired by Justice Ruma Pal of the Calcutta High Court. The theme paper titled '**Violence Against Women - Review of Recent Enactments**' was presented by Lawyer/Activist from Bombay, Ms. Flavia Agnes. Invitee commentators were Ms. Meenakshi Arora, Advocate, Supreme Court and Ms. Maja Daruwala from Ford Foundation, New Delhi. In this session, reasons for the failure of legal system to address itself to the sensitive issue of violence against women, within and outside the family structure, were discussed.

6.1 Brief Resume of Theme Paper

6.1.1 The last decade saw a spate of women's laws as women's movement gained momentum. During this period every single issue taken up by women's movement concerning violence against women resulted in legislative reform, generating a false sense of achievement promising quick redressal of wrongs against women through the legal process. Statistics so far, however, reveal a different story. It has been discovered that reforms in the legal systems and processes are not as easy to accomplish as changes in the letter of the law. Each year, while the number of reported cases of rape and unnatural deaths of women increased, the rate of convictions under the new enactments remained as dismal as ever.

6.1.2 A sense of disillusionment has set in amongst women regarding the potential of law as a means of delivery of gender justice. The reasons for this disillusionment with legal reform are many. Firstly, it is being felt that changes in the substantive law itself paid only a lip-service to the women's cause. There was a wide disparity between initial demands raised by the movement and supported by the Law Commission, and the final enactments. Secondly, at the procedural level, the executive and the judiciary failed to rise to the occasion and remained status-quoist in their attitudes, perceptions and functioning. Thirdly, the campaigns themselves addressed only the superficial symptoms and not to the basic questions of power balance between men and women. Solutions were sought within the patriarchial framework and did not transcend into a new feminist analysis of the issue aiming at empowerment of women. The conservative notions of women's chastity, virginity and servility within the patriarchial set-up, were seldom questioned. Rape campaign upheld the traditional notion that rape is an ultimate violation of women's virtue and a state worse than death. Dowry campaign linked property issue with domestic violence and death, thus relying on the economic angle instead of focusing on women's powerlessness in a male-dominated society. Fourthly, the false sense of complacency after having achieved desired change in the substantive law, led to a lull in the women's movement. The impact of enactments in court proceedings was not monitored with the same zeal. Suman Rani's custodial rape case wherein sentence of minimum ten years was reduced by five years by the Supreme Court, came as a jolt. It finally made women activists aware of the need to review judicial trends in rape trials since the amendments in the law.

6.1.3 Citing a battery of case law, the author asserted that the settled legal position regarding 'consent' in rape which presumes that a women enjoys the freedom to exercise her choice; biases against rape victims; fuzzy distinction between sexual offenses of rape, attempt to rape and violation of modesty; leniency shown towards the accused; voyeurism and titillation in rape trials; lack of social accountability and absence of compensation component -- are some of the areas in the process which need careful examination and reform.

6.1.4 Similarly, in case of dowry deaths, women's movement needs to address itself to the value system of parents who disinherit their daughters, deprive them of education and equal opportunity, force them into marriage alliances for their own vested interests and even willingly kill their daughters before they are born.

6.1.5 In Criminal Law reform, domestic violence has been linked with demands for dowry. In Sections 498-A and 304-B of Indian Penal Code this has turned out to be a narrow, short-sighted strategy. A separate legislation on domestic violence has never been pressed for. The police refuses to register cases under Section 498-A unless specific allegations of dowry harassment are made, with the result that vague allegations are made by the victims of violence even in genuine cases, but the entire case falls through on legal scrutiny.

6.1.6 New perspectives have to be inculcated in the legal and judicial systems if women and children trapped within a violent marriage have to be protected.

6.2 Highlights of Comments and Deliberations

6.2.1 In her comments on the issue of violence, Ms. Meenakshi Arora said tht the legal system operating within the hegemony of patriarchial values has failed to control crimes against women. There are glaring defects in the procedural law. Voyeurism in rape case is a serious flaw in the court system subjecting women to humiliation and loss of dignity.

6.2.2 It was felt that the complexities of the legal system work against the interests of women. It is not possible for women's organisations, or even by committed women lawyers, to follow-up cases which extend over inordinately long periods.

6.2.3 Judgements on cases of violence are subjective and inconsistent. There is no uniform sentencing policy. Punishment in cases of violence varies according to whims of judges.

6.3 Recommendations for Specific Actions

6.3.1 Judiciary needs to be sensitised to women's issues through seminars and conferences, educating judges on women's perspectives and defects in the existing legal system.

6.3.2 Sensitive issues like rape trials should be dealt with exclusively by women judges and in camara to prevent abuses such as voyeurism.

6.3.3 Women should be made aware of laws and rights and be empowered with the capacity to agitate for their legal rights. Women's organisations need to play a more vigorous role in the area of legal awareness and also as support and counselling agencies for women in distress.

6.3.4 A constant monitoring of judicial pronouncements and a strict vigilance is necessary to control and counter-check the subversive tendencies in the legal system.

6.3.5 A separate legislation on domestic violence should be agitated for, to protect women and children trapped in violent marriage and family.

7.0 CONCLUDING REMARKS :

7.1 The two-day seminar came to an end with concluding remarks and a vote of thanks from Prof. Mukhopadhyay, Director of ISST. Prof. Mukhopadhyay thanked the chairpersons for the sessions, the paper writers, expert commentators and all other participants for making the seminar such an intense and informative learning experience. She thanked the Economic and Social Commission for Asia and the Pacific for financial assistance to make it possible for ISST to hold the Seminar.

7.2 Prof. Mukhopadhyay observed that the seminar has succeeded in bringing together in one platform a whole range of people concerned with legal empowerment of women ----- from sitting and retired judges, senior practising lawyers and legal experts, to researchers and activists within the women's movement, as well as people with a civil and human rights background. The deliberations in the seminar were enriched by the process of interaction among the diverse groups of people.

7.3 A second major achievement in the seminar has been in the area of opening up new issues for gender debate in the context of law. The area of women's health and law for instance is something that is quite new to discourses on women and law. The institutionalization of women under law is another area which opened up new dimensions in the legal discourse on gender issues. Issues such as the moral and ethical basis of law and the potential of the rights platform to strategize the fight for ensuring gender rights in the legal arena which were debated in the seminar have brought together progressive scholars and professionals from outside the women's movement and have persuaded them to deliberate on legal rights of women within the larger context of human rights and civil liberities. This by all accounts has been an immensely enriching experience.

7.4 Prof. Mukhopadhyay put forward a set of summary recommendations that have emerged from the Seminar proceedings (cf. Page 1 above) and concluded the session with a vote of thanks to all those who have contributed to the success of the seminar.

Annexure I

INAUGURAL SPEECH BY PROF. MADHAVA MENON

Women and law has been the subject of a thousand seminars and conferences since independence, particularly after the Status of Women Committee Report in the early 70's. What has this public discourse achieved so far? Why is the subject coming up again and again at different levels involving sometimes the same people or the same categories of people? Are the issues the same or different? What is the seminar going to achieve particularly when it has a good mix of lawyers, judges, academics, social activists, media persons and policy planners in government? These were some of the questions which came to my mind when I was asked by Dr. Mukhopadhyay yesterday to speak at the inaugural session in addition to my assignment in the Health and Law session later in the day.

I believe that we are at a time when unprecedented changes are overtaking the world and new legal order which is more Market-friendly and less People-friendly is emerging with concomitant changes in power structure within the country and outside.

When we became independent, the country, of course had many problems and challenges. Poverty was the major issue which confronted the people and the government. Poverty had and continues to have many forms, shapes and dimensions. The weaker sections who were at the receiving end for several centuries during the colonial period were promised Justice (social, economic and political), Equality of status and of opportunity and Fraternity assuring the dignity of the individual and the integrity of the Nation. A Constitutional scheme was designed to realize this Preambular promise. Did we go wrong in the design or in the execution of it? Did we structure a society in the last 40 years and more, where the rich became richer and the poor, the poorer? Why did equality and non-discrimination remained such an elusive ideal?

There are some who argue that is relegating the right to basic necessities of life (like food, housing, health and education) to the Directive Principles of State Policy expressly making it non-enforceable through courts, like the Fundamental Rights, the Constitution-makers had legitimized the perpetuation of illiteracy, poverty and decease for the millions of Indians who could not get from the power structure their legitimate share of the national cake. Of course, the Fathers of the constitution intended otherwise and they had agreed to keep the social and economic rights as Directive Principles partly because of the nature of problems the country was facing at that time and partly because of their faith in the political leadership who they thought would exercise public power to the maximum benefit of the under-privileged and marginalised sections of society including women.

The consequence has been a system of governance under which executive was endorsed with enormous powers necessary for the re-allocation of resources for distributive and social justice. For sometime the aura of sacrifice and service of the leadership of Freedom Movement and philosophy of Mahatama Gandhi made the common people believe that Government represents public interest and whatever the Government does is to be taken as in public good. With lack of education and basic means of livelihood to a growing number of people particularly among women, the Dalits and the rural people, the checks and balances normally available in a civil society did not emerge in India at least to the desirable extent. Power concentrated in the political government and in the civil services started corrupting the system leading to further exploitation of weaker sections including women. The inequality which prevailed continued and discrimination became more aggressive and organized, leaving women generally, almost helpless even to understand what was going on.

It is in this context, the rights discourse came up from some sections of women within the country and several rights organizations internationally. Courts were moved on extreme manifestations of discrimination and Article 14 and 21 proved to be a veritable fountain head for new rights mainly left earlier as non-enforcable Directive Principles. Internationally Conventions on Rights of women added strength to the women's movement and created ripples in the Government Secretariats indicating that administration will have to respond quickly and decisively if parties want to be in government. Even Manifestoes of political parties started devoting a segment on issues concerning women. Central Government set up a Commission for Women and several State Governments followed in setting up Women's Commissions, Women's Corporations etc. A spate of legislations followed giving the impression that gender inequality is a major concern of the government. Government itself started organizing seminars on women's issues and attempted to hijack the movement to the government camp.

After all these, when the balance sheet is taken, we find that women's ratio in population has decreased, more female foetuses are aborted after sex-tests, female infanticide has increased, illiteracy of women continue to be far higher than men, atrocities against women have assumed more brutal forms and dimensions and women are likely to be further marginalised with the withdrawal of the government to the market economy. It was in this rather desperate situation, the 73rd and 74th Constitutional Amendments came as a ray of hope, that after all everything is not lost and women can become masters of their destiny(!) atleast in a limited way if the Panchayati Raj System is allowed to function as intended by Parliament.

It is not necessary at the present moment to dilate on what the future holds out for women in the context of the new dispensation under Panchayat Raj Institutions. But I do want to say that democracy is a powerful instrument for people-oriented governance and, as Marx would have liked it said, "Women of the country, standup unite and fight - You have nothing to lose but your chains". The opportunity is knocking at your doors and if you fail to take the reigns of power, the so-called market forces

that are emerging all around will make life more difficult and unbearable than it has been so far. Governments may give you more laws increasing perhaps the range of rights and entitlements but will not back it up with the resources to support their implementation. Courts may give you more and more favourable judgments though after much fight and a long delay, but actual benefits may still elude the beneficiaries. Direct action is good; but it is a double-edged weapon and in a democracy it can be counter-productive at times. Changing of attitudes and developing a civil society for safeguarding women's rights is easier said than done. With entrenched inequality and distorted perceptions going round with varying degrees of legitimacy, attitudinal changes will take a long time. Of course, efforts must continue in this direction. This Seminar is therefore significant in this regard. If seminars like this can help articulate issues of gender justice in the language of law and with the force of law and human rights, push it high in the public agenda, I believe our Constitution which is one of the finest instruments for a just social order can make a desirable difference in the status of women in society and in promoting equal justice for women.

I hope our deliberations in the next two days will provide the right directions and take the women's agenda, one step ahead in the national agenda. In the process, we would have made rule of law a living faith for thousands of our sisters and justice according to law, a more realistic instrument for human rights and social justice.

RIGHTS, LAW AND FEMINIST POLITICS : RETHINKING OUR PRACTICE

Nivedita Menon

At this historical moment feminism must reconsider its engagement with the language of rights and the law. The experience of the last decade not only raises questions about the capacity of the law to act as a transformative instrument, but more fundamentally, points to the possibility that functioning in a manner compatible with legal discourse can radically refract the ethical and emancipatory impulse of feminism itself. There is growing feminist unease at the interface of the law with sexuality. The failure of the law to deliver justice in feminist terms is understood to be a result of the interpretation of the law in sexist ways, so that the solution is seen to lie in plugging up all possible loopholes. Thus, it is believed, the law's capacity to be just would be freed from the biases of individuals.

This paper argues that the flexibility of legal discourse is not the reason why it fails to be "just". On the contrary, law functions by assuming certainty and exactitude, through the creation of uniform categories out of a multiplicity of identities and meaning.Indeed, appeals to the law are made on the assumption that rights are self-evident and universally applicable. However, an examination of rights claims invariably reveals them to assume a shared universe. It would appear, in other words, that while the law demands exactitude and universally applicable principles, rights,which are used to enter the arena of law,are constituted differently by different discourses. What are the implications for feminist theory and practice in the contradiction set up by this formulation ?

Questioning Rights

Both at a conceptual as well as at a political level, Rights and Law are quite distinctly connected. On the one hand, a social movement operating in the realm of law is constrained to use the language of rights because legal discourse is animated by the weighing of competing rights. In other words, to enter into the realm of law, rights-talk becomes obligatory. On the other hand, when a social movement makes claims based on rights, at some level these claims are predicated on the assumption that these rights should be protected by law. The language of rights thus tends to privilege the sphere of the state and its institutions.

We can trace the evolution of the understanding of rights from the first systematic development of the concept in ancient Rome, when rights were created by the law. For Roman jurists rights, law and justice were inseparable, and the law was considered to be an expression of the community's conception of justice. Nevertheless rights did not imply absolute control, nor were they unlimited in scope. rights operated in the realm of civil society, not in the realm of the state or the family, and governed relationships between individuals, not between individuals and the state. During the centuries of feudalism in Europe, rights continued to be conceived of in much the same way, with both individuals as well as communities and groups being the bearers of rights. Indeed, the "individual" was not clearly demarcated from her community, work or land. The process of individuation which was to be both empowering as well as severely alienating, began later. Moreover, rights were derived from customs and traditions as well as from law, and all sources of rights had equal validity.

From the seventeenth century rights began to be seen as inhering in individuals, rather than in groups or communities. This individual was detached from his social context and conceived

of as constituted by the limits of his body. The Individual as the bearer of rights was also male, as feminist critiques have pointed out, for male bodies were considered perfect, being clearly bounded. Female bodies were seen as permeable, subject to cyclical changes and with unlimitable boundaries. They could never be the rational, indivisible, unambiguous individual (Landes ?).

The source of rights shifted to the civil law, with customs, traditions and usages being gradually marginalised. Most significantly, the scope of rights changed radically at this time. The natural world was no longer part of a whole in which human beings acquire their sense of self. Rather, it was external and alien to the individual who was to master it and tame it to his ends. This meant that everything in the external world was an object over which men could have rights. not only the external world, but each of his capacities became quantifiable and alienable while at the same time, man had somehow to be considered separable from his capacities so that his "self" could remain "his" even as he sold or alienated aspects of himself. Man's "self" then, was seen to reside in his capacity to choose, and as long as he chose freely, he was an autonomous individual, regardless of the ways in which his ability to choose was constrained (Parikh 1987:5-9).

We see then, that the idea of individuals as bearers of rights in their own capacities is barely four hundred years old. These centuries have seen the expansion of democratic rights to more and more sectioms of people, and the discourse of rights has empowered social movements of different kinds. Thus, while Marxists have critiqued "rights" as juridical conceptions which mask substantial inequality, they have argued that the rights themselves are not illusions. The formal recognition by the doctrine of equal rights of the equal dignity of all human beings, embodies what Poulantzas calls the " real rights of the dominated classes", which are the " material concessions imposed on the dominant classes by popular struggle" (Poulantzas 1978:84). The struggle then, is to transform these empty juridical rights into real rights by

transforming the structural conditions which disempower the labouring classes. Rights are considered to have a powerful emancipatory potential, both at the level of rhetoric and symbol as well as substantively, with the revolutionary transformation of material conditions. Christine Sypnowich argues that any worthwhile socialist society would require legal institutions to adjudicate disputes between socialist citizens and between citizen and community. A socialist jurisprudence must draw from the liberal tradition, she holds, and herself using Ronald Dworkin's phrase, argues that it must retrieve the idea of the individual with rights which "trump" society's policies (Sypnowich 1992:86-87). Thus Marxist critiques attack the illusory nature of rights in capitalist society, not the understanding that the concept of "rights" has emancipatory potential.

A powerful and influential critique of rights, law and the state has come from Catharine MacKinnon who argues that liberalism supports state intervention on behalf of women as abstract persons with abstract rights while in reality "the state is male in the feminist sense." Abstract rights only "authorise the male experience of the world." As a result, she holds, feminist understandings of the world have been "schizoid" - on the one hand recognizing the world as patriarchal and oppressive, and on the other, turning to the law to make the law less sexist. She sees the state as embodying and ensuring male control over female sexuality even while it juridically prohibits excesses. In fact the legal prohibition of and controls over pornography and prostitution are meant to enhance their eroticism - "if part of the kick of pornography involves eroticising the putatively prohibited, pornography law will putatively prohibit pornography enough to maintain its desirability without making it unavailable or truly illegitimate" (MacKinnon 1983:643-644). MacKinnon's critique of the law and her understanding of gender as dominance of women by men (MacKinnon 1987:32-45) has certainly served the purpose of radically questioning the myth of the neutrality of the law which continues to have a powerful hold over the feminist imagination.

Yet MacKinnon herself makes the law the focus of her feminist politics in the USA. She has been the pioneer of legislation against sexual harrassment and pornography, formulated in terms of employment rights and civil rights respectively (See MacKinnon 1987:103-116, 163-197). Her critique of abstract rights is based on an understanding of "the intractability of maleness as a form of dominance" (MacKinnon 1983:636) which leaves no space for women let alone for feminist politics. If male dominance is so dauntingly seamless then indeed, "it may be easier to change biology than society" as she gloomily concludes (MacKinnon 1983:636). But in that case, where is the feminist critique of MacKinnon herself generated ? Clearly there cannot be a perfect fit between the "intention" of male dominance as MacKinnon sees it, and its effect.

Ultimately, MacKinnon's rejection of abstract rights and their illusoriness in an overarching system of male dominance from which nothing escapes, can only leave feminist politics in a state of paralysis. Given her analysis, it is impossible to justify or understand her legal activism, where she continues to expect to be able to force "women's experience" into the law. It would seem that so state-focused has our vision of political transformation become, that the most radical critiques of the state and its institutions end up merely realigning themselves once again on its territory.

This is particularly characteristic of analyses which suggest that the purposes of justice would be served better by stressing the relative importance of "needs" as compared to "rights". Upendra Baxi,counterposing human rights to basic human needs, problematizes the liberal conception of rights in a situation of mass poverty. He argues that the notion of Human Rights must be fused into a discussion of developmental processes - development in the sense of value for human dignity, both in an economic as well as in a political sense. He recognizes that needs are socio-genic and culture-specific, and therefore that questions will arise about the hierarchy of needs, who determines this hierarchy, and the conflict between human rights

and needs. Nevertheless he holds that the needs-aproach is still the most just way of understanding the possibilities of a just society. However, Baxi's analysis continues to focus on the State as the agent of change. For instance, he asks, "Should not continued drought or famine in one state in India ... justify a nation-wide ban on the conspicuous consumption of food on social events ?" There is an inability here to come to terms with the State and the law as deeply implicated in the processes which make famines, uneven development, and enclaves of wealth intrinsic parts of the Indian system (Baxi 1987:190-195).

Nancy Fraser believes that needs-claims can balance the competing claims of mutual responsibility and individual rights even though there exists the danger of playing into the hands of conservatives who prefer to distribute aid as a matter of need rather than right precisely to avoid any assumption of entitlement. Since her analysis is geared towards retrieving aspects of the Welfare State while critiquing its paternalism and androcentrism, she is quite unambiguously state-focused. Moreover she concludes by arguing that "justified needs claims" must be translated into social rights. This suggests a hierarchy - that needs must graduate into rights if they are to be taken seriously. It would seem then, that she sees needs-claims not as an improvement on rights-claims but merely as a preliminary stage to making rights-claims (Fraser 1989:182-183).

The only arguments that consistently reject the state-centric implications of "rights" and "law" come from a position that rejects individualism, but at the cost of valorizing "the community". Scholars of the Critical Legal Studies (CLS) Movement hold that rights discourse magnifies social antagonism by pitting one set of rights against another and question whether it can facilitate social reconstruction. Such an understanding obscures the fact that "the community" is marked by exclusion along the axes of caste, gender, class and so on. "Social antagonism" can only be rendered invisible, not obliterated. Feminists in particular, find this position deeply problematic because the CLS critque of individualism instals the family as beyond

justice, as a sphere embodying love, generosity and unselfishness, qualities that are above justice.[1] This mystification of the family as a sphere of love and harmony has been one of the primary foci of feminist critique over the last three decades. If the rejection of rights as individualistic entails reinstating the family as moral community,clearly it would be self-defeating for feminism. Feminists therefore, have attempted to redefine rights so that they need not be understood as purely individualist. For example, Martha Minow and Nancy Fraser have both tried to conceptualise rights so that they embody connectedness between autonomy and responsibility (Minow 1985a, 1985b, 1983, discussed in Schneider 1991:311; Fraser 1989:312-316). Similarly, Elizabeth Schneider argues that the experience of the women's movement has shown that a claim of right is a moral claim about how human beings should act towards one another.

Analyses of this kind, which attempt to rescue the emancipatory impulse of the rights discourse from its individualistic thrust, can only do so by introducing the dimension of morality.

The Moral Basis of Rights

The idea that there are rights sanctioned by a moral order whether or not they have legal existence is not a new one (Weinreb 1991; Feinberg 1992). Agnes Heller for example, argues that rights are "the institutionalised forms of the concretization of universal values". A value is universal if its opposite cannot be chosen as a value. In this sense freedom is a universal value because "no one is publicly committed to unfreedom as a value." She adds "the value of life" as another value which "comes close to attaining a universl status." Rights are derived from these values and stem from the conception of justice. Therefore rights language is and should be, she concludes, "the lingua franca" of modern democracy (Heller 1990:1384).

Similarly, Ronald Dworkin's conception of rights as "trumps" - that is, certain irreducible

individual rights as having the moral authority to prevail over what is perceived as the community's interest - is based on the understanding of a shared morality (Dworkin 1977). However, the notion of "universal values" is clearly not the kind of morality feminists have in mind when they reinscribe rights on to moral terrain. Such a notion only obscures the power dynamics by which some values are assigned greater status and others are marginalised and silenced. This kind of analysis also allows no room to conceive of conflict among "Universal Values" themselves - for instance, it is precisely the opposition between "freedom" and "the right to life" that operates in the abortion debate. But at the same time when feminists refigure rights through morality, they do invoke what is assumed should be universal values, that is, feminist values.These values are not at present dominant, but they should be, and can be, made universally applicable through law. As Nancy Fraser puts it, rights talk is not necessarily individualistic and androcentric. It becomes so "only when societies establish the wrong rights, for example when the (putative) right to private property is allowed to trump other, social rights" (Fraser 1989:183, emphasis in original).

Clearly, what one "ought" to do, or what constitutes a "moral" action, makes sense only within shared sets of understandings on "justice", "equality" and so on. Thus, rights are constituted by shared moral boundaries. What happens to them in the realm of legal discourse? Appeals to the law are made on the assumption that rights are self-evident, universally comprehended and universally applicable, but some slippage in meaning takes place once they are in the legal arena where diverse discourses of rights converge. That is, what appears to be a right empowering women within feminist discourse can take on an entirely different significance once it is materialised in the legal realm. One example that comes readily to mind is the law permitting women's access to abortion, which also would (and does) facilitate the selective abortion of female foetuses.

Elizabeth Kingdom's feminist critique of rights questions the desirability of generalizing on

a whole range of issues grouped together under the heading of "women's rights". She urges instead that specific legislations be analysed from both "feminist" and "socialist" perspectives. She argues that this model allows for a more complex analysis of the issues covered by "women's rights". She takes up as an instance, the case of protective legislation (restrictions on the employment of women in hazardous work, night work, overtime, and so on), in which the protection of women's rights is inseparable from the struggle to improve working conditions for both men and women (1991:26-45).

While Kingdom recognizes the problematic nature of "women's rights", she fails to take her analysis far enough by problematizing the notion of "rights" itself. As a result, she assumes that it would always be possible to apply a "feminist" or a "socialist" understanding to specific legislations without the possibility of conflict between the two. For instance, the example she suggests, that of protective legislation, has been the focus of other socialist-feminist studies as exemplifying the conflict within the working class between the rights of male and female workers (Alexander 1976; Barrett 1984). Michele Barrett, discussing the position taken by British trade unions on protective legislation, that such measures should be retained, argues that this was a deliberate strategy to reduce competition for male workers. She notes that such legislation was introduced in areas of competition rather than in all areas of work (1984:171).

A more thoroughgoing feminist critique of rights is provided by Carol Smart (1989). She holds that first-wave feminists needed the concept of equal rights to fight against legally imposed impediments. In the late twentieth century however, while law remains oppresive of women, it no longer takes the form of denial of formal rights reserved for men. Continuing the demand for formal rights now is problematic. She suggests that "the rhetoric of rights has become exhausted, and may even be detrimental" (1989:139). Rights can be appropriated by the more powerful, for example, the Sex Discrimination Act may be used as much by men

as by women. She also points out that rights are often formulated to deal with a social wrong, but in practice become focused on the individual who must prove that her rights have been violated. Any redress too, will affect only that particular woman (1989:145).

Posing a problem in terms of rights simply transposes that problem into one that is defined as having a legal solution. While accepting that rights do amount to "legal and political power resources", Smart holds that the value of these resources seems to be ascertainable more in terms of the losses if such rights diminish, than in terms of gains if they are sustained (1989:143). This distinction that Smart makes is crucial to developing any critique of rights, for it forces a confrontation of the fact that while the existence of a given right does not guarantee its realisation, its denial will negatively affect the people who had held that right. However, Smart's critique remains in the terrain of the state, for she urges in place of rights, a reformulation of "demands" grounded in "women's experiences" rather than in "abstract notions like rights" (1989:159). What form will these "demands" take and on whom will they be made? It is not clear how Smart's "demands" will differ fron "rights" after all. Moreover the formulation of rights-as-abstract versus experience-as-concrete is misleading. We have seen how rights are derived precisely from within a universe of shared "experiences". The difference between "rights" and "experience" cannot be sustained.

Finally, Smart assumes that the continued existence of a right on the statute books can do no harm although its removal can mean a reduction of power. This is to leave unquestioned the fundamentally problematic nature of rights situated in the legal arena. As we pointed out in the case of the right to abortion, rights can operate in a way radically opposed to the moral principle on which they are based. Or as Mahmood Mamdani points out in the case of Africa, the notion of "rights" of "citizens" has effectively disenfranchised large numbers of Africans who are migrant labour and not citizens of the countries in which they live (Mamdani 1992).

We come then, to a point where we must go further than saying simply this: the language of

rights can be alienating and individualistic but since it refers to some desirable capacities and powers the oppressed should have, it can be empowering. We ask rather - is it possible that the experience of feminist politics pushes us towards the recognition that social movements may have reached the limits of the discourse of rights and of "justice" as a metanarrative? This recognition is emerging from within other contexts as well. Mamdani, in the work referred to above, argues that in Africa the liberal notion of rights as an attribute of citizenship has increasingly anti-democratic consequences for large numbers of Africans who are migrant labour and do not live in the countries of their birth. Mamdani points to the "statist" character of the liberal theory of rights and urges a re-examination of the claims that the right to self-determinaton is not possible without the establishment of a state and that the bearer of "human rights" should be a member of "the political (state) community" (1992:2228-2232). While Mamdani does not reject altogether the emancipatory potential of rights , and would work towards reinstituting them in a non-state context, the implications of this project are clear. To suggest that rights be abstracted from the arena of the state and its institutions is to radically question the understanding of rights that social movements operate with, and the possibility of having reached the limits of rights discourse is once again foregrounded. The next section will briefly examine the issues of abortion and rape as they appear within feminist and legal discourse in India, in the context of the questions raised above.

Abortion and Rape as Legal and feminist Issues

In India the issue of abortion has been placed on the feminist agenda in a manner quite different to its positioning in the West. Since poverty is understood to be a result of overpopulation, abortion has long been accepted as a measure of "family planning". The Medical Termination of Pregnancy Act was passed in 1971 amidst Parliamentary rhetoric of Choice and Women's Rights, but it was clearly intended as a population control measure, as

several Members of Parliament pointed out during the debate (Lok Sabha Debates, Fifth Series, V 7:159-202). Nor had the Bill been preceded by a feminist campaign or public discussion. Abortion has become an issue for Indian feminists over the eighties with the growing practice of the selective abortion of female foetuses after sex-determination tests during pregnancy. The Forum Against Sex Determination and Sex Preselection (FASDSP), formed in 1984, has been lobbying for central legislation to ban the practice, and such a Bill is ready in draft form. It is based on the experience of an Act pased in Maharashtra in 1988, and attempts to plug its loopholes and to make it more effective.

Two crucial questions arise for feminists from this issue, debate on which is far from closed within the movement. One, at the level of feminist politics - the contradiction involved in pushing for legislation which can restrict the access to abortion itself. A study of the Bill shows that it could open up entirely new ways of reviewing many routine abortions carried out under the MTP Act (Menon 1993). Further, the FASDSP calls for a ban on all technologies which could be used for sex preselection at the time of conception and for th regulation of all new technologies in future. What does it mean for feminist democratic politics to demand legal and bureaucratic control over entire areas of science and knowledge? Two, at the level of feminist philosophy, if abortion is a right over one's body, how are feminists to deny this right to women when it comes to the selective abortion of female foetuses. the FASDSP's position is that women who make this choice are constrained by social and family pressures and are not really exercising their free will. This argument leaves unproblematized the decisions to abort in all other circumstances - surely these are as informed by cultural and social values? Why is it assumed that only when a woman chooses to abort a female foetus is she not acting on her "own" will? If we unravel the underlying thread of reasoning which makes this argument a logical one to many feminists, we arrive at an argument which looks like this - the very constraints of a patriarchal society which makes

abortions necessary in most cases (including the low priority given to research on safe contraceptive methods), would be much greater if fewer and fewer women were born. So abortion must be available to women who want it, while selective abortion of female foetuses must be stopped.

Clearly then, "rights" over "our" bodies are not natural, timeless and self-evident. They are constituted as legitimate only within specific discursive political practices. Social movements cannot expect therefore, that rights can be unproblematically realised on a terrain where their specificity cannot be retained. Feminist outrage over technologies to control the sex of foetuses, and over the practice of the selective abortion of female foetuses, arises from the ethical and moral vision of feminism. However, to translate this concern into the language of rights and the law apears to threaten this very vision.

In the case of sexual violence, an analysis of judgements in rape trials and of legal discourse on rape reveals the impossibility of capturing the complexity of sexual experience within what Carol Smart calls "the binary logic" of the law (1989:33). There is no room within legal discourse to conceive of women's sexual experience except in terms of consenting / not consenting to male pressure. " Consent" itself, a state of mind constituted in a complex way, has to be pegged rigidly to a linear notion of physical growth if it is to make sense within legal discourse. Below the Age of Consent a woman cannot be assumed to have acted on her own agency in sexual interaction, she can only be understood as Victim or Dupe. Above this age, even if it is by a few months, she is radically transformed from Victim to Accomplice. Thus, while recognizing the relative powerlessness and lack of autonomy that characterise women's relations with men, the point is to radically question the possibility of addressing this experience in the realm of legal discourse.

Even when justice appears to be done, that is, when a conviction is secured, the very demonstration through legal discourse of the violation of the woman re-enacts and

resediments dominant patriarchal and misogynist values. In India, feminists have begun to view with concern, judgements which have taken a progressive position on the issue of corroborative evidence in rape trials, but based on the most patriarchal notions of women's "chastity" and the "traditions" of "Indian society" (National Law School Journal 1993:166-171). The implication however, is far more serious than feminist critiques tend to recognise - it is not simply that in such decisions "the Court passively accepts rather than challenges pariarchal values" (NLSJ 1993:170). The seriousness lies in recognizing that if the "tradition-bound" Indian society is understood to make "innocent " women reluctant to level false accusation of rape, it can equally be understood to motivate "promiscuous" women to hide their "promiscuity " precisely through such accusations. In other words, convictions can be secured only at the cost of turning the case once more on the axis of the "guilt" or "innocence" of the raped woman. A feminist legal activist said at a workshop that she would rather lose a rape case if in the process the right kind of debate was made possible.[2] Are these two eventualities compatible with each other? If the case were conducted in such a way that the "right" issues were raised from a feminist perspective, and conviction was not secured, would not this "prove" to society that those values are not "right" but "wrong"? It would appear to be impossible to engage with legal discourse except on its own terms.

In the context of the Canadian Charter of Rights aand Freedoms of 1982, Judy Fudge makes a similar point. She concludes that once the demand for substantive equality for women is translated into legal rights, it becomes divorced from broader poltical demands - "Instead of directly addressing the question of how best to promote women's sexual autonomy under social relations which result in women's sexual subordination, feminists who invoke the Charter must couch their arguments in terms of the rhetoric of equality rights." And courts interpret "equality" as formal equality rather than contextualising it within a historical framework of current inequalities (Fudge 1989:49-50).

At the heart of any exercise to locate sexual violence within the law, lies the irresolveable conflict involved in defining the harm of sexual assault so exactly that legal discourse can comprehend it and so retaining ambivalences that the ethical impulse of feminism is undamaged.[3]

Legal Discourse and the Fixing of Meaning

In India the understanding of "law" was fundamentally changed with the British conquest - Legality replaced Authority. Whereas in the classical system the judgement had no other object but to put an end to the dispute, it now began to constitute a precedent, a source of law. Even in the mediaeval period, there was great flexibility in the attachment of particular regions to one or the other school of interpretation. Sastric law was as likely to modify its principles to match local custom as custom was, in deference to Sastric law. Islamic law too, was based on revelation as Dharma was, and in neither were decisions of the court the source of law. In both, interpretation and custom had the same importance (Altekar 1952; Lingat 1973; Baxi 1986).[4]

Under the British system the judge fixed interpretation once and for all, and further development of the law could take place only through cases. Even where custom was accepted as prevailing over Sastric law, it was fixed as legal rule. Once identified, "custom" was understood to be fixed, and rigidly codified. Thus, the dynamic interplay between custom and Sastric law was halted.

Modern legal systems, Upendra Baxi points out, are marked by "a quest for ... certainty, consistency and uniformity" (Baxi 1986. Emphasis in original). Baxi does not consider these goals to be desirable and urges in fact, departures from them to ensure "legal growth". However, he does not address the question of how such departures are to be effected. The legitimacy of the law rests on the concept of Rule of Law, that is, the due observance of the

procedures prescribed for making a valid decision. Thus when Ronald Dworkin questions the rationalist and positivist certainties of law, affirming law rather, as interpretation and meaning, he is clear that such interpretation has to follow "the injunctions of a grammar of principles". Such principles are drawn from the moral ideals of a subject assumed to be universal (See discussion in Douzinas et al 1991:24-30). Clearly, any attempt to build into the law, an openness to multivalence, would have to be institutionalised if it is to be legitimate. The paradoxical nature of this formulation itself points to its impossibility. Without such institutionalisation, departures from consistency and uniformity can only be at the whim of individual judges.

Such departures are in fact, precisely the focus of one school of feminist critique of the law. The perspective of "legal realist rule scepticism" is that in actual practice, decisions are at the mercy of individual judges who make "law" through their interpretation of ambiguous and open-ended practices. These interpretations reflect social and individual biases and practices, and the law is thus distorted from its purpose of neutral arbitration in the interests of social justice (Sachs and Wilson 1978; Atkins and Hogget 1984). This understanding has been attacked from within feminism for reinstating the assumption that bias and prejudice are external to the law, that law proceeding from its Parliamentary source is just and untainted by the values which influence individual judges (Kingdom 1991; Brown 1991).

The fixity of meaning required by legal discourse has generated a dilemma for feminists which can be formulated as the Difference-versus-Sameness approach. When "equality before the law" is interpreted as men and women being the same as each other, courts do not uphold any legislation intended either to compensate for past discrimination or to take into account gender-specific differences like maternity. Thus the Sameness approach cannot distinguish between "differential treatment that disadvantages and differential treatment that advantages" as Kapur and Crossman put it (1993:61). Liberal feminists who subscribe to the sameness

approach however, continue to insist that the only way for women to achieve legal recognition of their equal status to men is to deny the legal relevance of their difference to the degree that it exists. Women should be recognized as gender-neutral legal persons.

The opposing position from within feminism is that this accepts the masculine as the norm, and prevents the visibility of the unique experience of women. To consider ourselves as gender-neutral "persons" can only marginalize us and devalidate our experience. However, the Difference approach in law has at best been protectionist, thus denying women the claim to equality altogether. It has also been used by courts to justify discriminatory treatment on the grounds that women are different from men (Kapur and Crossman 1993; Frug 1992).

To put it in Frug's words, "Sameness feminists have been thwarted by the repeated recognition of difference; difference feminists by the devaluing of women's difference" (Frug 1992:xv. Emphasis in original).

In other words, feminists seeking social justice through the law have come up against the limits set by the criterion that law be uniform and consistent. It can either recognize sameness (which disadvantages women) or difference (which justifies discrimination). An alternative approach suggested is that of "substantive equality" (Kapur and Crossman 1993:20-21). The focus of this approach is not on equal treatment under the law, but on the impact of the law. This is an attempt to make the law more sensitive to a more complex notion of equality which takes into account the comparative disadvantages of persons under existing unequal conditions. Its proponents hold that in some contexts, the substantive model will require a sameness approach, in others, a corrective approach to take into account difference as well as disadvantage.

This model quite clearly, is an understanding of how the law ought to function, and bears out the argument that is central to this paper, that rights are constituted within shared moral universes. The "substantive equality" approach is an attempt to universalise one such moral

universe through law. However, both conceptually as well as in terms of political practice, this approach is illustrative of the problematic nature of the discourse of legal rights.

It assumes, to begin with, the separateness of the judiciary and legal system from the institutions of the state and the social and cultural practices which constituts present conditions of inequality. It seems to suggest that all that is required is for judges to be sensitized to the notion of substantive equality, for social conditions to be gradually transformed by law. To put it very simply, if the morality underlying the notion of substantive equality were so self-evident and unthreatening to the dominant social order, we would not need the law to bring about social justice. One feminist teacher of law and legal activist has come to the conclusion that legal method may be "impervious to a feminist perspective" (Mossman 1991:297).

She urges coming to terms with the fact that "... because there is so much resistance in legal method itself to ideas which challenge the status quo, there is no solution for feminists ... except to confront the reality that gender and power are inextricably linked in the legal method we use" (1991:298).

At a conceptual level, the substantive equality model presents the problem of positing rights, which once made legally enforceable, acquire a fixity of meaning which can undermine the very morality on which they are based. For instance, Kapur and Crossman cite the right to own land as a "basic civil and political right" in relation to which the sameness approach should be used, that is, gender should be considered irrelevant. It bears repeating here that the norms validated by law become relevant and binding in all cases in which similar issues are raised. What then, would be the implications of using the sameness approach towards the right to own land, in the context of land reform legislation? Here gender identity would be complicated by class, and the sameness approach would disadvantage the weaker party, in this case, the landless.

Marc Galanter's work (1984) is an acknowledgement of the need to confront the tendency of the law to fix meaning. He attempts to build into the law a conception of identity not as a fixed, natural or inherent quality, but as something constituted by interaction and negotiation with other components of society. It is Galanter's view that this understanding would require courts to adopt an "empirical" as opposed to a "formal" approach. The latter sees individuals as members of one group only, and therefore, as having the rights that group alone is entitled to. Thus, for example, one who attains caste status loses tribal affiliation as far as the law is concerned. The empirical approach on the other hand, does not attempt to resolve the blurring and overlap between categories and accepts multiple affiliations. It addresses itself to the particular legislation involved and tries to determine which affiliation is acceptable in the particular context. Galanter accepts that in this approach, some slippage is inevitable between judicial formulations and actual administration, for the courts must make subtle distinctions which must be translated into workable rules capable of being administered at lower levels. Galanter applies his understanding of identity as relative and shifting only to "people", not to "courts" or "government". The latter are assumed to be outside this grid of affiliations, to have a superior understanding of it, and to be capable of choosing the "correct" perspective, whether empirical or formal. For example, he writes, "It is beyond the courts to rescue these policies (reservation policies) from systematic cognitive distortion, for courts cannot control the way that various actors and audiences perceive judicial (and other) pronouncements" (1984:357). Moreover, government intention in framing and implementing reservations is assumed to be identical with the official stated intention - that is, promotion of social justice. Groups are then seen to relate to these policies in their own particularistic ways, while apparently, the government and courts have the overall and universal picture.

Thus, Galanter's attempt to contest law's rigid codifying procedures is unsuccessful as he must retain the notion of the law itself as the unified and self-transparent agency which will

interpret the multiplicity of identities around it.

An attempt to develop a "post-modern jurisprudence" has been made by Douzinas, Warrington and McVeigh (1991). They reject the orthodox jurisprudence of modernity which portrays the law as a coherent body of rules and principles. Dominant jurisprudence has always linked its claims to unity with the legitimation of power,that is, power is legitimate if it follows the law and if the law follows reason. Douzinas et al argue that on the contrary, legal language games have proliferated endlessly and cannot be presented as "the embodiment of the public good ... or of some coherent system of principle..." (1991:27). In other words, their position is that the law is not the coherent system based on uniform principles it claims to be but rather,that its structures and institutions are multiple and work at different levels.

Their analysis seems to suggest that the ensemble of modern law is already "post-modern" in the sense of embodying multiple principles and functioning at a variety of levels in open-ended ways. The critique then, is aimed at the pretensions of the law to coherence and unity, not at its functioning in a way that tends to impose coherence and unity. If this is so, "post-modern" jurisprudence merely involves uncovering the actually contingent and unstable nature of the law's functioning and bringing out "the consequences of this for the legal subject" (1991:28).In other words, "the task of post-modern jurisprudence is to deconstruct the centrality of reason and law in the texts of the law" (1991:27).

It is difficult to accept that the law does not attempt to impose unity and coherence through its functioning. All judgements, judicial and quasi-judicial decisions and any form of adjudication in the formal legal sphere tend to codify conflicting meanings and identities, to regulate them and render them uniform, as the studies discussed in this paper establish. To the exent that Douzinas et al are questioning the neutrality of the law in this process, and its claim to embody the General Will, their argument is well founded. But neither theoretically nor empirically do they satisfactorily establish that the law actually functions in an

unpredictable and arbitrary manner. Since this conception of the law is central to their explication of a "post-modern jurisprudence", their project fails to address the question it attempts to ask.

If then, the law functions through the assertion of certainty and the creation of uniform categories, there is a contradiction generated at its interface with rights, which we have argued are constituted by particular discourses. This resituates rights in a realm of complexity, ambiguity and undecidability. The contradiction implied by this has special significance for feminist theory and practice where the public/private distinction is sought to be addressed.

The Public/Private Distinction

In liberal theory the distinction between "public" and "private" amswers the question of the legitimate extent of government authority. The public realm is understood in this context to be open to government regulation while the private realm is to be protected from such action - sexuality and the family being understood to be private. In marxist theory too, this distinction is central, although from a different point of view. Engels argued that women are oppressed because "the administration of the household lost its public character ... It became a private service" (1977:73). The "private" here, is the arena of oppression, only when women emerge into the public sphere of production will they be truly emancipated. Since the motor force of history is provided by changes in the relations of production (defined, in the context of capitalism, as the relations between capital and labour), housework is not "work". Women participate in history only to the extent that they emerge from the "private" and enter the industrial workforce.

Feminist scholarship emerging from both liberal and marxist traditions have contested this distinction as being conceptually flawed and politically oppressive. From within the liberal tradition comes the argument that the dichotomy assumed between "public" (non-domestic)

and "private" (domestic) has enabled the family to be excluded from the values of "justice" and "equality" which have animated liberal thought since the seventeenth century-beginnings of liberalism. The "individual" was the adult male head of the household, and thus his right to be free from interference by the state or church included his rights over those in his control in the private realm - women, children, servants.

The socialist-feminist critique of the public/private distinction is focused on the model of political economy based on "production", defined as economic production for the capitalist market. This model ignores the "private" sphere of reproduction, where women are responsible for reproducing both humans and labour power (Mitchell 1971; Eisenstein 1979; Barrett 1984; Hartsock 1983). A more fundamental point is made by Linda Nicholson who establishes that the public/private distinction forms the very core of the marxian understanding of production insofar as "production" is understood to be conceptually different from "reproduction". This distinction historically evolves with capitalism since in pre-capitalist societies child-rearing practices, sexual relations and "productive"activities were organized conjointly through the medium of kinship. The marxian model of political economy therefore, falsely universalises aspects peculiar to capitalism. Thus the marxist theory of history is fundamentally flawed to the extent that it assumes class to be the primary basis of exploitation when the distinction between class and gender is an aspect of capitalist relations of production alone (Nicholson 1987).

Clearly, feminists across the political spectrum are agreed that the public and the private are not two distinct and separate spheres, for the "public" is enabled to maintain itself precisely by the construction of certain areas of experience as "private". As Gayatri Spivak puts it, the feminist reversal of the public-private hierarchy is more than a reversal - it is a displacement of the opposition itself. "For if the fabric of the so-called public sector is woven of the so-called private, the definition of the private is marked by a public potential since it is the

weave, or texture. of public activity" (1987;103). However, the consequences of this understanding for feminist practice are not so clear. From one kind of position it is possible then to argue that many claims important to feminists, from reproductive rights to protection against sexual harrassment, are most effectively grounded on claims to privacy (Allen 1988). In fact the rhetoric of the individual's right to privacy has been used to secure some rights for women against the patriarchal family. For example in the USA, the landmark judgement on abortion in Roe v. Wade (1972) is based on the belief in the individual woman's right to privacy (MacKinnon 1987:96). So was the judgement in 1965 that the right of married couples to use contraceptives is part of "a right to privacy older than the Bill of Rights" (Okin 1991:86). So from this point of view, while the traditional public/private dichotomy is challenged, the argument being made is that the virtues of privacy have not been available to women since they did not have the status of individuals in the public sphere. In this view therefore, the task of feminist practice is to transform the institutions and practices of gender so that a genuine sphere of privacy, free of governmental and legal intrusion, can be ensured for both men and women (Okin 1991; Allen 1988).

Diametrically opposed to this is the position arising from the slogan "the personal is political" which has brought into the public arena issues such as domestic violence against women, child abuse and rape. Feminist pressure for legislation on these issues has meant the recognition that violence of various kinds against women in the "private" realm of the family and sexuality is in principle as actionable as violence in the "public" arena.

The logical extension of this line of thinking is that privacy and the family are areas of "judicial void" or "judicial weakness" to the extent that they are outside the application of the law (Stang Dahl 1987:75). Issues arising from sexuality and family should take on legal significance. Although adherents to this position do hold that the state is paternalistic and masculine, they are confident that if a law is designed by feminists from the standpoint of

women, it can be of advantage to women. They denounce the right to privacy therefore, as a means to protect the existing structures of power and access to resources in the private sphere. For example, it is argued that by sanctioning abortion as a right of privacy, the state has ensured that the control women won out of this legislation has gone to men - husbands and fathers. Further, when abortion is framed as a right of privacy, the State has no obligation to provide public funding for abortion (MacKinnon 1987:93-102).

Indian feminists function from the second point of view, that it is possible to force a patriarchal and class state and its legal system to feminist ends. However, the focus on legislation is restricted to the realm of the "private", that is, family and sexuality. There has been no campaign for legislation comparable to this on any issues relating to the "public" sphere, such as for the enforcement of the Equal Remuneration Act of 1976, or for creche facilities at the workplace and so on. Nor have legal campaigns on these issues been launched by any other political groups. So in effect, the only national-level legal campaigns conducted have been on issues related to the family and sexuality. Mary Fainsod Katzenstein points out that all over the world, "body politics", that is, sexual/reproductive issues, reach the public agenda only when women's groups organise independently of the state. Government initiatives on gender issues is likely to be in the arena of economic issues (Katzenstein 1992). This is not surprising, because economic issues have always been "public" in the sense of being accessible to reflection by society, and therefore very much on the agenda of the state while sexual/reproductive issues have not. Naturally, then, the feminist project has been to combat he privatization of the latter. However, "to make public" can be understood in two senses, to use a distinction formulated by Seyla Benhabib - "making public" in the sense of questioning life forms and values that have been oppressive for women, making them accessible to reflection and revealing their socially constituted character, and "making public" in the sense of making these issues subject to legislative and state action (Benhabib 1987:177).The

experience of Indian feminism has been that we have tended to conflate the two. That is, sexual/reproductive issues have been put on the public agenda in the form of demanding legislative action.

It is fruitful to examine this tendency in the light of the argument offered by Nandita Gandhi and Nandita Shah that women have found it easier to fight against the State or against social custom than for their rights within the family or on "personal" issues which "bring us closer to the starkness of the inegalitarian and oppressive relationship between men and women" (Gandhi and Shah 1992:271). Is it precisely the intractability of the oppression at the level of "the body" which leads feminist practice to attempt to comprehend and contain it in the discourse of coherence and uniformity offered by the law ?

It is time to re-examine the relationship between legal discourse and the public/private distinction. Is "the private" private because the law cannot intervene and influence it ? But consider also that it is the law that constructs the private by refusing to intervene, by closing off that arena as inappropriate for its own intervention. Take, for instance, this judgement of the Delhi High court, later upheld by the Supreme Court, that "introduction of Constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship" and that " in the privacy of the home and married life, neither Article 21 (Right to Life) nor Article 14 (Right to Equality) has any place" (1984 AIR 66,Delhi, Haksar 1986:58).

Evidently, the law sees the protection of "the ordinary domestic relationship" as its business. A formulation of the public/private distinction in this manner seems to resolve what Frances Olsen sees as the "incoherence" of the language of intervention and non-intervention (Olsen 1985:835; cited in Graycar and Morgan 1990:39). Olsen's argument is that if "the private" is defined as that unregulated by law, it is difficult to hold simultaneously that the private is in fact, indirectly regulated by law. Asthe judgement mentioned above illustrates, the State's

abdication of regulation is precisely a form of regulation.

If "public" and "private" have no existence prior to political theory but are constructed by the functioning of legal discourse, what is the implication for feminist practice ? Both strategies discussed - that of valorizing the private as providing a sphere of individual freedom which has been denied to women, as well as opening up the oppression within the private to the public scrutiny of the law - fail to overcome and deconstruct the public/private dichotomy. The first reinscribes the separation of the two on the very site that this separation is being critiqued. It assumes that something called "privacy" can be made to exist by using the law to limit its own jurisdiction, when the existence of "privacy" is dependent on the same discourse which sets up "the public" as the arena of political virtue. For example, Jean Cohen argues for the right to abortion in terms of "new privacy rights", that reproductive rights are to be justified in terms of individual control over the symbolic interpretation of the body (1993). However, this argument assumes precisely what any project to radicalize reproductive freedom should confront, that is, that symbolic order which inscribes the body as body, as separate from other bodies, as gendered, as healthy/unhealthy and so on. Cohen's argument for reproductive freedom in terms of individual rights assumes the individual to be the arbiter of what shall be understood as her "own" body when the very idea of individual as separate self is generated by the same discourse which legitimates privacy rights and which constructs the gendered and heterosexual body as the norm. Surely a feminist consideration of reproductive freedom should work to contest the production of this identity ?

The second strategy sees liberatory potential in using the force of law to illuminate the darkest receses of the private, in effect pushing the law to define with greater and greater exactitude the contours of legitimate and illegitimate modes of sexuality, the family and conceptions of the body. Does this effectively plug in the interstices in dominant discourses through which the intended meaning of "the body" escapes, precisely those interstices in

which subversive discourses like feminism operate to recuperate meaning ? For example the experience of feminists in Canada after rape law reforms has been that the feminist proposals became part of a package of greater regulation over sexual behaviour deemed undesirable - such as homosexuality and under-age sex. So feminist legal reforms coincided with other demands for greater control over sexual behaviour, and the overall impact has ben to tighten the net of regulation (Snider 1985, discused in Smart 1989). As Foucault points out, "silence and secrecy are a shelter for power, anchoring tis prohibitions; but they also loosen its holds and provide for relatively obscure areas of tolerance" (1984:101).

In this context it is interesting to consider studies of "abducted" women and children in the Partition riots on the Indian subcontinent (Menon and Bhasin 1993; Butalia 1993). The governments of India and Pakistan set up administrative machineries to recover on behalf of their families, these women and children. However, in the Indian case, which these studies examine, many of the (now Pakistani) Muslim women who had been abducted by (Indian) Hindu and Sikh men had been absorbed into the families of their abductors. However, the government insisted on recovering these women and repatriating them to Pakistan regardless of the pleas of their new families and of the women themselves that they be allowed to remain in India. As Veena Das insightfully comments, "It was not the order of the family which was scandalized by the threats to purity that the presence of Muslim women posed, for the strategies of practical kinship knew how to absorb them within the family itself, but rather, the ideology of the nation that insistd upon this purification." Das points to the variety of strategic practices within the family, which were flexible enough to accommodate a wide variety of behaviours, in contrast to the order of the State in which identity had to be firmly fixed. The fact that both orders were repressive for women is not in question here. The point is that the entry of the State into a realm it prohibited to itself under "normal" circumstances necessitated the freezing of identities into exact categories which were non-negotiable. For

the State, the identity of the women could be cast in terms of citizenship alone, whereas "the exigencies of practical kinship" allowed for considerable flexibility under extraordinary conditions (Das ?).

Thus it would seem that the juxtaposition of rights as understood to be discursively constituted (hence ambiguous, flexible in significance), and the law (which demands and creates certainty and exactitude) presents a problem for feminist practice with regard to the "private." In a realm which retains some shades of grey, or in Foucault's words, "some obscure areas of tolerance" (1984:101), the specificity and concretization brought about by law may not necessarily be liberatory.

Law and Justice

It is generally assumed, as Marc Galanter points out, that law should be the institutionalised pursuit of justice (1989:302). The questions this paper addresses are - does law have the capacity to pursue justice, and more fundamentally, whether "justice" can be conceived of in a universal sense as suggested for example, by the term "social justice". Both questions seem to require a negative answer. The first, as to whether law has the capacity to pursue justice, asumes that power, the unequal dynamics of which constitue injustice, is juridically derived. But as Foucault points out, while many of the juridical forms of power continue to persist, these have "gradually been penetrated by quite new mechanisms of power that are probably irreducible to the representation of the law ... We have engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, of serving as its system of representation " (1984:89). This is why, I would argue, our attempts to transform power relations through the law tend rather to resediment them and to reassert dominant values.

The second question can be addressed in the following manner. If, as this paper seeks to

establish, rights are constituted by the values derived from specific moral universes, there is a singularity to justice, a uniqueness which as Derrida puts it, must always concern "individuals, irreplaceable groups and lives, the other or myself as the other in a unique situation" (1990:949. Emphasis in original). This uniqueness however, is at odds with law which must take a general form, as norm and as rule. In Derrida's understanding of justice, the vey condition of justice is that one must address oneself to the other in the language of the other. There is violence involved in judging persons in an idiom they do not share, perhaps do not even understand. But this violence is obscured by the appeal to "justice" as a universal value, as to a third party "who suspends the unilaterality or singularity of the idioms" (1990:949). Derrida emphasises that to recognize this is not to abdicate before the question of justice, or to deny the opposition between just and unjust. Rather, it involves a responsibility to "a historical and interpretative memory" (1990:955). That is, the responsibility to recall the history, the origin and subsequent direction, of concepts of justice and the law. In this way we would be desedimenting the values embedded in the idea of "justice" as a universal concept. These values have assumed the status of natural presuppositions and the violence of the moment of their imposition has been rendered invisible through a kind of historical amnesia. To interrogate points of origin constantly, to question the grounds of the norms which underlie notions of justice at historically specific moments, is not to surrender an interest in justice. On the contrary, "it hyperbolically raises the stakes of exacting justice" (Derrida 1990:955).

Derrida goes on to suggest that the very notion of responsibility involved in "the responsibility to memory" is crucial to any conception of justice. It is an understanding of "responsibility" that underlies the belief that justice is possible at all - we believe that to ensure that our behaviour is just, we must act with responsibility. And responsibility in this sense he points out, is inseparable from a network of related concepts such as intentionality,

will, conscience, self-consciousness, self-awareness and so on. A responsibility to memory then, involves a responsibility to deconstruct the very notion of responsibility itself, so that we are open constantly to radical questioning of the values we assume in our discursive practice (1990:921-957).

This suggests the impossibility of fixing meaning, but this is by no means the final statement. For as Laclau puts it, "A discourse in which meaning cannot possibly be fixed is nothing but the discourse of the psychotic" (1990:90). The next step therefore is to attempt that ultimately impossible fixation, but simultaneously to recognize that the "meaning" achieved is not simply recovered from a field of pre-existing meanings. The identities on which social movements base themselves do not, in other words, represent some positive essence, but are precariously constituted by the political act of hegemonizing meaning. We constitute identity in and through our political practice. Democracy exists then, in the movement towards the elimination of oppression. The elimination of oppression itself is impossible, because at every step,the practice of democratic politics sets up new antagonisms between freshly realigned identities.[5]

If one understands the practice of emancipatory politics in this way, it would seem tha the achievement of "justice" in a universal sense is an impossibility. At particular historical moments "justice" is constituted by specific moral visions, but the discourse of the law is predicated upon the assumption that justice can be attained once and for all by the fixing of identity and meaning. The meaning delivered by legal discourse as the "just" one then gets articulated in complex ways with other discourses constituting identity, and tends to sediment dominant and oppressive possibilities rather than marginal and emancipatory ones. To move away from legal and State-centered conceptions of political practice and to recognize political practice as the perpetual attempt to eliminate indeterminacy rather than the achievement of this elimination is to inscribe the democratic project with a deep anxiety. But it might be that

this anxiety has more potential to be just than the politics of certainty.

1.CLS scholars include Roberto Unger, " The Critical Legal Studies Movement", Harvard Law Review, Vol.96, 1983; Michael Sandel, Liberalism and the Limits of Justice, Cambridge University Press, 1982; Peter Gabel and Paul Harris, "Building power and Breaking Images : Critical Legal Theory and the Practice of Law " New York University Review of law and Social Change 11, 1982-3.
For a feminist critique of the feminist position on the family, see Susam Moller Okin, Justice, gender and the Family, Basic Books, New York, 1993, Chapter 6.

2.Ratna Kapur, Workshop at Action India, New Delhi, December 9, 1993.

3.See discussion in Nivedita Menon, "Embodying 'The Self': Feminism, Sexual Violence and the Law", in Ania Loomba (ed.) Women and Sexuality in India, Kali for Women (forthcoming).

4.Tahir Mahmood (1986) argues that custom is not an independent source of law in the legal theory of Islam. He claims that British administrators misunderstood custom to have the same significance as within Hindu law. The references to "usages" may have been inspired, according to him, by the practices of Hindu converts to Islam, who continued to follow certain aspects of Hindu law and custom. But if this was prevalent, and if Hindu converts to Islam continued to follow local customary practices (as for example, the practice of matriliny by some Muslim communities of North Kerala) then to what extent did a pure "Quoranic" law operate for Muslims any more than "Sastric" law did for Hindus? It was only at the beginning of the twentieth century that the ulema began to compulsorily enforce Shari'a law.

5.See discussion in Ernesto Laclau, "Letter to Aletta", in New Reflections on the Revolution of Our Time, London, Verso, 1990:168-173.

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ANNEXURE III

WOMEN AND HEALTH UNDER THE LAW

- GEETA RAMASESHAN

It is very difficult to write about women's health without taking into account the reality of poor health and the lack of basic amenities for the average Indian. However, social and cultural factors affect the woman more adversely when compared to the man. She is always the last to eat, and eats the least. She is involved in strenuous work, whether in the home or outside. Most of her task are performed in poor conditions and account for a lot of health and occupational hazards. She has a double burden of work. Due to the degradation and misuse of natural resources she has to walk miles every day to get a few pots of water and to collect fuel.

Certain occupations like cashewnut processing, retting of coir and jute, textiles, handlooms, dyeing, printing, glazing of pottery, rubber tapping, cotton and tea plucking, hospital and laboratory work employ women in large numbers. According to the "STATE-OF-THE-ART" report prepared by the Department of Science and Technology. (Government of India - Occupational and Environmental Health problems of Indian Women, 1984) women engaged in these occupations are exposed to physical stresses and chemical toxins leading to health problems, which are further aggravated because of the prevalence of malnutrition, anaemia, parasitic infection, frequent child birth, longer working shifts, climatic extremes - features common to most third world countries. Domestic chores involving use of sub-standard fuels and detergent and cooking in poorly ventilated kitchens also pose health problems. The report further states "As the harmful effects of toxic substances vary in males and females, there is a need to understand the variations in the exenobiotic stress."

Except for certain legislations that are gender specific in most other areas the laws in India do not make any distinction between the male and the female in the area of health. However, taking note of the specific features of our society, some legislations are protectionist in nature. This paper proposes to focus on certain legislations and the approach of the courts to cases arising from these legislations. It also seeks to highlight certain legislations whose language and implementation in terms of health affect the woman more adversely when compared to the man. Under the first category would come specific legislations like Maternity Benefit Act, Medical Termination of Pregnancy Act and the Prevention of Immoral Traffic Act. Under the second category are included family laws, certain areas of criminal law, besides laws in the area of employment.

Article 42 of the Constitution of India provides, "The state shall make provision for securing just and humane conditions of work and for maternity relief." Article 47 of the Constitution further provides, "The State shall regard the raising of the

level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health." These articles form part of the Directive Principles of State Policy. They are thus not enforceable by any court. The Supreme Court has held that the principles are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Addressed to the Court, what the injunctions mean is that while courts are not free to direct the making of any legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. (AIR 1979SC 65) The Supreme Court has also extended the scope of Article 21 which protects life and liberty (The article reads, No person shall be deprived of his life and liberty except according to procedure established by law.) to include the right of environment and public health. In a case relating to alcoholic drinks the court has observed, "it is not possible to accept any privilege of the State having the right to trade on goods obnoxious and injurious to public health." While these have not been cases involving women's health in particular the approach of the court is of great relevance on matters relating to drugs pertaining to family planning.

Before discussing any legislation an important factor has to be borne in mind and that is with reference to the implementation of the law. There is a great difference between theory and practice especially with labour legislations as violations of the law continue in many areas. Women are less organised and hence do not have enough bargaining power. Hence one comes across many cases where the existing benefits do not reach the woman.

LABOUR LAWS:

Maternity Benefit Act:

The Act prohibits the employer from engaging or making a woman work during the six weeks immediately following the day of her delivery or her miscarriage. The employer is also required not to make the woman perform any task that is arduous in nature or which involves long hours of standing or 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 provided she requests the employer in this regard. The above stipulation is for the period of one month immediately preceding the six weeks before the date of her expected delivery, or any period during a period of six weeks for which the pregnant woman does not avail her leave. The Act gives her the right to claim maternity benefit for a maximum period of twelve weeks of which not more than six weeks shall precede the date of her expected delivery. The woman has a right to payment of maternity benefit for a maximum period of three months. However in order to claim this benefit of wages the woman must have been in employment for a minimum period of eighty days in the twelve months immediately preceding the date of her expected

delivery. A woman is also entitled to a medical bonus of a sum of two hundred and fifty rupees if no prenatal confinement and post natal care is provided free of charge by the employer. A women is entitled to the same benefit if she has a miscarriage. She is entitled to leave for a period of a maximum period of a month if she is suffering from any illness arising out of the pregnancy, delivery, premature birth of child or miscarriage in addi tion to the 3 months. The Act also stipulates that the woman be allowed to have two nursing breaks in the course of her work till the child attain fifteen month.

The Act is applicable to factories, mines and plantations. The Government can also by notification extend its applicability to other classes of establishment, industrial, commercial, agricultural or otherwise (In Tamil Nadu it has been extended to commercial establishments covered by the Shops and Establishment Act).

The Act thus splits up maternity benefit to two periods viz., pre-natal and post-natal. The benefit is at the rate of the average daily wage for the period of actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day. The term average wage is further defined as the average of the woman's wage payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, or one rupee a day, whichever is higher. In B. Shah vs Presiding Officer, Labour Court, Coimbatore (AIR 1978 S.C. p 12), a plantation company while calculating the maternity benefit, excluded twelve Sundays being wageless holidays, which fell during the period of a worker's absence and gave her the benefit for 72 days. The worker claimed for the entire period stipulated under the Act viz for a total of 84 days on the ground that a week consisted of seven days. The employer's contention was the liability which is imposed by the Statute cannot exceed the amount that the worker would have earned if she had not been compelled to avail of the maternity leave and since Sunday is a non-working wageless day, the employer cannot be made to pay for that day. Rejecting this contention, the Supreme Court held, "the term "week" has to be taken to signify a cycle of seven days including Sundays.... It has to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Art. 42 of the Constitution the beneficent rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court."

Strangely the Statute provides for forfeiture of maternity benefit. If a woman works in the establishment after her employer has permitted her to absent herself for the period during such authorised absence, her claim to maternity benefit can be forfeited. There are instances where employers force their employees to work and take refuge under this provision. In an unequal

situation such a proviso can at times prove detrimental to the woman.

The Act provides for inspectors who have the power to examine its violation. Voluntary organisations can file a complaint about violation under the Act.

A few years ago a circular was issued to Central Government employees restricting the benefits only to married women. This caused various protests and the circulars were withdrawn. Such a move was clearly against the spirit of the Act which recognises the women's right to health and does not concern itself with morality and is truly a welfare legislation.

The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 prohibits the employment of women in an industrial premise except between 6 a.m. and 7 p.m. It also seeks to provide for creches for the use of children below six years if the establishment employs more than thirty female employees.

The Factories Act has similar provisions. It prohibits the employment of women in factories except between 6 a.m. and 7 p.m. However the State Government may by notification vary the time limit but such variation in any event cannot be between 10 p.m. and 5 a.m. The Act provides an elaborate chapter on health. It seeks to provide a clean work environment, effective ventilation and temperature, and all other amenities. It also seeks to provide for creches if the establishment employs more than thirty women. However as stated earlier in many establishments the laws are blatantly violated.

WOMEN & FAMILY PLANNING

Medical Termination of Pregnancy Act (MTPA): The MTPA was enacted purely to safeguard the rights of women and the doctors who performed abortion. Prior to the Act, abortion was an offense under the Indian Penal Code except when it had to be induced in order to save the life of the woman. The strict law led to illegal abortions. According to the Objects and Reasons of the MTPA: "In recent years when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have often been confronted with gravely ill or pregnant women whose uterus have been tampered with a view to causing an abortion and consequently suffered very severely. There is thus avoidable wastage of the mother's health and sometimes life. The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy have been conceived-(1) as a health measure-where there is danger to the life or risk to physical or mental health of the woman, and (2) on humanitarian grounds such as when a lunatic woman etc. and (3) eugenic grounds-where there is a substantial risk that the child, if born would suffer from deformities and diseases."

The MTPA approves of abortion under certain conditions. The pregnancy can be terminated if the doctor if of the opinion that the continuance of the pregnancy would involve a risk to the life

of the pregnant woman or of grave injury to her physical or mental health; or there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Under the Act if the pregnancy was alleged to have been caused by rape, the anguish caused by such pregnancy is presumed to constitute a grave injury to the mental health of the woman. Again, if the pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may also be presumed to constitute a grave injury to the mental health of the pregnant woman. The medical practitioner can take into account the pregnant woman's actual or reasonable foreseeable environment in order to determine whether the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. If the duration of the pregnancy is 12 weeks the opinion of one registered Medical Practitioner is sufficient for termination, whereas if the duration of the pregnancy is more than 12 but within 24 weeks the opinion of two registered medical practitioners is required. In theory the law recognises the woman's right as the medical practitioner has to consider only the woman's environment. The matter is thus purely between the doctor and the woman and even the consent of the husband becomes unnecessary. In reality however, a woman's right to abortion is very restricted, and in most instances it is invariably the family's decision. Various judgements of Courts have held that aborting a foetus without the consent of the husband would amount to cruelty under the Hindu Marriage Act and hence is a ground for divorce. In Satya vs Siri Ram (AIR 1983 Punjab and Haryana p 252) the High Court observed, "In this sort of a case, the court has to attach due weight to the general principle underlying the Hindu law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son who can offer a funeral cake and libation of water to the manes of his ancestors." In Sushil Kumar Varma vs Usha (1987 Delhi p 86) the Delhi High Court opened that whether or not an abortion would amount to cruelty would also depend upon whether one of the parties desired a child and did not consent to it. The court further held that aborting a foetus in the very first pregnancy without the conset of the husband would amount to cruelty. Courts have thus chosen to restrict the absolute right given under the Statute.

In our country cases where permission has been obtained from Court for abortion have been very few. In one case from Madras (Kamalavalli vs C.R. Nair and others 1983 Law Weekly Cr Vol 1 pg. 190) a 28 year old woman who was a victim of rape, sought permission from the court to terminate the pregnancy which was granted subject to the doctor's opinion. the court observed, "the petitioner has been impregnated against her will and that unless the pregnancy is terminated, the petitioner will suffer traumatic and psychological shock." In another case, V. Krishnan vs G. Rajan and another (Law Weekly 1994 p16), the father of a minor girl sought the termination of the minor girl's foetus on the ground that she was kidnapped and was a victim of rape. Under the MTPA, the pregnancy of a girl below eighteen years or that of a lunatic can be terminated only with the consent in writing of her guard-

ian. The minor girl however refused to agree to the abortion. The Madras High Court dismissed the application of the father holding that the life of the child in the embryo cannot be taken away for the reasons urged by the father. The Court further observed that termination of pregnancy against the will of the minor girl will undoubtedly affect her mental health and there is a likelihood of her physical health also being affected and that the Constitution of India does not make any distinction between a major and a minor in the matter of fundamental rights. The judgement no doubt safeguarded the rights of a minor by holding that if the minor wants to have a child the guardian cannot impose an abortion. But in the process by referring to various religious texts relating to sanction against abortion it has restricted the right by observing that "Even during the first trimester, the woman cannot abort at her will and pleasure.... There is no question of abortion on demand."

Abortion is thus perfectly legal and the legislation does not raise any moral or religious issues. The MTPA with its exceptions recognises the right of the woman over her body, at least in theory. Despite legislation illegal abortions continue due to various socio-economic factors.

One positive feature of this Act is that it recognises "failure of contraceptives" as a ground for seeking abortion. However, such a relief is restricted to married women. Unwed pregnant women are forced to mention rape or grave injury to mental or physical health in order to seek abortions. Since the rules in Government hospitals are rigid such women prefer to go to private clinics or quacks and hence there is a need to extend this relief to all women irrespective of marital status.

In Shirur, Pune, this year, forcible hysterectomies were conducted on mentally retarded women by the home were they were inmates. The action rightly caused a furore. It also exposed the loopholes in the law. In 1987, Parliament enacted the Mental Health Act and for the first time in our laws the term "mental illness" came to be used. A mentally ill person, under the enactment, is defined as one who is in need of treatment by reason of any disorder other than mental retardation. Thus, for the first time a distinction has been made between the mentally ill and the mentally retarded. However, no separate legislation exists for the mentally retarded. The mental health Act has yet to be notified in the States and as on date the outdated Lunacy Act applies to both categories. The law as on date fails to take into note the various degrees of mental illness and mental retardation. The MTPA permits the termination of pregnancy of a "lunatic" (as defined under the Lunacy Act and hence will include the mentally ill and the mentally retarded) with the written consent of her guardian provided the Doctor is of the opinion that the pregnancy will cause injury to the woman's physical or mental health. However, no law permits sterilization to be performed on the mentally ill or the retarded.

The issue is complex because it has to take into note the right of a woman over her body. Besides, given our utter callousness towards the underprivileged any such freedom to perform sterilization will be totally misused. Besides, there are degrees

of retardation and some women are capable of taking care of themselves though in a limited way. However, at the other angle is the genuine anguish of many parents who permit their mentally retarded daughters to be sterilised for fear of pregnancy due to sexual abuse or who fear about their daughter's health after their lifetime. These are areas which have not been explored.

While the MTPA was enacted with a different objective a series of measures and rules havesought to aggressively implement the family planning programme of the Government. An air-hostess was recently terminated from the services of Indian Airlines for having a third child in violation of their rules. While the matter has been challenged and is in court, it clearly indicates the shape of things to come.

The Beedi Workers Welfare Fund Act, 1976 provides for the establishment of a fund to finance measures to promote the welfare of persons engaged in beedi establishments. Beedi workers are one of the most exploited lot. The welfare measures for them are not satisfactory a fact conceded by the objects and reasons of the Act. The fund is intended to supplement the efforts of the employers and the State Governments to ameliorate the living conditions of the workers. The fund is to be used for improving public health and sanitation, for the prevention of disease, to provide and improve medical facilities, to provide and improve water facilities, educational facilities, housing etc. In 1987, the provision of family welfare, including family planning education and services was also added to the above for which the fund was to be put to use. Similar provisions exist under The Iron Ore Mines (Manganese Ore Mines and Chrome Ore Mines), Labour Welfare Fund Act, 1976, which is for the welfare of the workers employed in these mines. The Limestone and Dolomite Mines Labour Welfare Fund Act, 1972 which is for the welfare of workers in limestoneand dolomite mines, and the Mica Mines Labour Welfare Fund Act, 1946 which is for the welfare of the workers employed in the Mica industry. In all these legislations family planning education and services have been added for which the funds should be put to use.

Thus funds which are meant for the welfare of the workers and to improve the conditions of those who live in very unsatisfactory living standards are being now put to implement the Government policy of family planning.

The one area where there is a need to examine a legislation is in the field of reproductive technology. The pill which has been in the market since the 60s, was considered safe for a long period of time as the side effects came to be known much later. Unlike in the West where it is not available without a Doctor's prescription in India Pills like Mala-D are easily available over the counter and marketed with an aggressive advertising campaign carried on even in Government sponsored media. Two important issues arise in the event of any regulation whereby pills are made available only under a Doctor's prescription. While this will no doubt be beneficial to the woman as she would be examined on an individual basis, in reality medical facilities are unavailable or difficult to reach for large numbers of our people.

In such a case a rigid rule might make even the existing facilities unreachable to the average woman who does not want a pregnancy.

The Injectable Contraceptives:

Net-en, is a bi-monthly injection that inhibits the production of gonadotropin, a pituitary gland hormone which in turn prevents ovulation. It does not need any chart as in the case of the pill or periodic check ups as in IUDS. Depo Provera, is another injectable contraceptive that is easily available in the market over the counter without a prescription. Both these drugs are the subject matter of litigation. In the absence of any legislation to define and regulate such contraceptives (many of them prohibited in the countries of their origin or sold under strict conditions), activist groups have been forced to take these issues to courts.

In a public interest litigation filed in the Supreme Court by three women's organisations, five medical practitioners and a journalist the petitioners have challenged the action of the Andhra Pradesh Government, the Union of India and the Indian Council of Medical Research and have sought to restrain them from testing recommending or administering Net-en. This petition filed in 1986 is still pending but the drug is not available in the market. In 1985 members of the Stree Shakthi Sanghatana a Hyderabad based women's group and one of the petitioners before the Supreme Court visited a village medical camp at Patancheru Primary Health Centre which was organised to inaugurate a 12 month trial programme on Net-en. The women who had assembled there were from the poorer classes and were merely informed that if they took the injection they would not have any children. The organisers who had brought the women told the women activists that if they had informed any of the women about the side effects of Net-en they would not have come for the trial. The activists then explained to the women about the side effects of the drug and the purpose of the camp which was to make them participate in an experiment the outcome of which was uncertain. After this only five women stayed. The utter callousness by which the Government went about in conducting experiments prompted the groups to take the matter to court. In the writ pending before the Supreme Court, the petitioners have demanded full and complete information about the contraceptive and other issues. In a detailed petition before the Court they have pointed out the possible effects of Net-en that have been listed by WHO. They further state, "Net-en can be misused in the hands of health personnel under the pressure of targets and quotas for family planning... Unless the entire approach to family planning is changed, the introduction of Net-en is a real and definite risk. Unlike other birth control methods, the injectable is relatively irreversible atleast for a duration of two or three months. Thus women have little choice to change their minds... Net-en trials are being conducted without the informed consent of participants in violation of the ICMR's own stated criteria of ethics and also transgressed the Helsinki Declaration on Human Experimentation to

which India is a signatory." The petitioners contend that the action of the Government is violative of Article 21 of the Constitution of India.

According to the guidelines of the Helsinki Declaration, in any research on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort it may entail. This is to prevent human-being from becoming guinea-pigs.

The campaign and the litigation and the first one that focused preventive action in the area of women and health before the courts.

High Dose Estrogen Progesterone formulations: EP drugs contain a high in dosage of female sex hormones. They have host of after effects. The low dosage EP drugs are also considered unsafe but are easily available over the counter without any prescription. These are used by many in postpone menstruation. Health activities sought a total ban on the High dose EP formulations. A petition was filed in the Supreme Court by Vincent Pannikulangara against the continued use of hazardous drugs including the High Dose EP combination. The matter was also referred in Parliament. In addition to this a campaign was built up against the use of the drugs. The Government sought a review from the ICMR which then recommended a total ban. The ban was challenged by the drug companies in the Calcutta and the Bombay high court. A stay was granted on the ban, and a public enquiry committee conducted meetings in order to elicit opinion. The drug industry sought to give an impression that a complete ban was being demanded on all EP drugs instead of the highdose ones. After a big and watchful campaign when the Government showed apathy and the drug companies their muscle power by pitting the health workers against the employees the High Dose EP formulations were finally banned up the Government after the hearings and on the basis of ICMR recommendations. But the notification for the ban was only for the tablets and not for the injections. A consumer group filed a litigation seeking a fresh notification of the order which is still pending.

The Drugs and Cosmetics Act, regulates the import, manufacture, distribution and sale of drugs and cosmetics in the country. It was amended in 1982 mainly to impose more stringent penalties on the anti-social elements indulging in the manufacture or sale of adulterated or spurious drugs or drugs not of standard quality which are likely to cause death or grievous hurt to the user. The Act covers Ayurvedic, Siddha and Unani medicines. A drug defined under the Act includes all medicines whether used internally or externally on human beings or animals including preparations applied on the human body for the purpose of repelling insects; and such substances (other than food) intended to affect the structure or any function of the human body. The Act provides for a Drugs Technical Advisory Board, to advise the Central Government and the State Governments on technical matters arising out of the administration of the Act. The Act in its present structure is mainly concerned with regulating

the import, manufacture distribution and sale of drugs in the country and does not concern itself about the right or wrong of a drug. In another litigation filed before the Supreme Court by the Drug Action Forum the Supreme Court has directed the Drug Technical Advisory Board to examine a plea of the petitioner seeking banning or restrictive use of hazardous or irrational drugs on the ground that they are harmful to the public. Among the drugs are included depoprovera and Netal. The court has directed the Board in submit its report within three months after considering the relevant materials submitting by both parties and after the results of the clinical trials. (The Hindu November 19th 94).

Failure of contraceptives as a result of which pregnancy have taken place have attracted atleast two writ petitions in the Madras High Court seeking compensation from the Government on the grounds of negligence. While the matter is pending it is indicative of the use of the judicial system in the absence of any other forum for redressal.

The above instances indicate the few times that the court has had to intervene into new areas. While this has highlighted the issue it has also had a tendency to restrict the litigation into the use or abuse of a type of contraceptive rather than on a critique of the family planning programme. Nevertheless it has become essential to bring such issues to the court owing to the apathy of the official machinery.

Family Law :

Early marriages and frequent child births affect the health of the woman adversely. But except for the Special Marriages Act all child marriages are legal. The Child Marriage Restraint Act merely seeks to restrain child marriages and punish those who solemnise such marriages or are connected with it in one way or other. The Hindu Marriage Act requires that the bride and the bridegroom should be above 18 years and 21 years respectively. But if the condition is violated the marriage is perfectly legal. A girl marrying below 15 years has the right to repudiate the marriage provided the does it before attaining the age of 18. Hardly any cases are filed under this provision as it is very rare to find girls below 18 years taking recourse to the law while still under the control of their guardian. The relief is not available to a girl who is above 15 years at the time of marriage. under Muslim law, a child below the age of puberty can be married legally by the father or guardian. The Indian Christian Marriage Act requires the parties to be above 18 and 21 years but violation of this provision does not nullify the marriage nor is it a ground for divorce. With the consent of a parent or a guardian a minor can be married. The 59th Law Commission while considering the status of such marriages was of the opinion that the validity of such marriages should be left undisturbed. The report on the Status of Women in India was also of the opinion that rendering such marriages as void would create more problems than it seeks to solve due to the socio-economic conditions prevailing in our country. The situation has not changed much since the committee gave its report in 1974. Close-

ly linked with the concept of child marriage is the definition of Rape in the Indian Penal Code where sexual intercourse by a man with his wife becomes rape only if she is below fifteen years.

Under the Hindu Marriage Act and the Special Marriage Act if a party to a marriage is subject to recurrent attacks of epilepsy then the marriage is null and void. Epilepsy is clubbed along with insanity in the statutes. Though this provision is similar to both the parties in many instances it has been found to affect the woman more adversely. One comes across more men seeking a decree of nullify from their wives under this provision when compared to women. The provision is also not in tune with modern times when epilepsy can be kept under control. Such provisions do not exist under other personal laws.

The threat of AIDS : A few years ago, the Tamil Nadu police conducted raids in the red light areas of Bombay in order to set free some women from Tamil Nadu who were kept in confinement in the brothels. When the women were brought to Madras and tests were conducted on them some of them were found to be HIV positive. As a result of this they were kept in detention in the Government Vigilance Home where female offenders are confined. A journalist filed a public interest litigation seeking their release from detention on the ground that they were not offenders and hence their confinement was illegal. The Madras High Court allowed her petition and set the women at liberty at a writ of habeas Corpus. But the litigation exposed the fear and ignorance of the illness that exited among the authorities. The Immoral Traffic (Prevention) Act merely seeks to prevent commercialised prostitution and to punish those who live on the earnings of prostitutes or exploit them. To that extent it is an improvement over the earlier legislation. Because of its limited scope the Act does not consider aspects relating to the health of the prostitute.

The Bombay High Court (AIR 1990 Bombay pg. 355) in a judgment upheld a Goa legislation that gave powers to a health officer to hospitalise a patient suffering from an infectious disease if that person was without proper lodging or without medical supervision, or was lodging in a place occupied by more than one family, or if his presence was a danger to the people in the neighbourhood. The legislation also gave powers to the Government to isolate a person who tested positive for AIDS for whatever period if cheque necessary. The court while giving a right of representation against the action of isolation observed. "This policy decision is taken by those who are in charge of advancing public health and who are equipped with the requisite know how. The Court would be too ill equipped to doubt the correctness of legislative wisdom. Even if there is any doubt about its correctness, its benefit must go in favour of the policy maker, the Courts are not powerless to examine the correctness of a policy decision. But such power has to be very cautiously exercised, field of exercise being very limited." The observation to some extent explains the rule of courts in the field of health.

CONCLUSION : The extraordinary and rapid advance of biological and genetic technology is going to give rise to new and complicated legal issues in the future that were hitherto unknown in

our country. The Status of children born by Artificial Insemination, the legal status of Surrogate Motherhood, are just some of the issues that might come to the courts in the future. We already have the misuse of technology in pre-natal diagnostic techniques to determine the sex of the foetus and then its selective abortion. Amniocentesis is carried on in many parts of the country despite legislations in certain states to regulate the tests. The Pre-natal Diagnostic Techniques (Regulations and prevention of misuse) Bill, 1991 has yet to become law.

Article 12 of the Convention on the Elimination of all forms of discrimination against women states. "States parties shall take appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning. Notwithstanding the provisions of paragraph 1 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." While some of these find place in our laws there is scope for changes in various areas. However, legislation by itself cannot curb deep-rooted prejudices and traditional customs that are detrimental to the well being of the woman. Nevertheless, a discussion on the area of women's health and the law, will help us in fashioning strategies for future course of action the area of women's health.

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ANNEXURE IV

WOMEN INSTITUTIONALISATION AND THE LAW

Usha Ramanathan

I

There is a case for the introduction of the woman in the institution into the constitutional scheme. An attempt to describe her marginalisation reads like a tale of horror, aggravated by the random, episodical and chancy acknowledgment of her plight. There is though a pattern of neglect and abuse that is struggling to emerge, screaming silently for attention. Legislation, seeing solutions in institutionalisation, has not responded. In the arena of law, it has been in the province of the courts that the relationship between the state and the woman has been recognised, as an integral part of human rights jurisprudence. The import of protection, empowerment, rehabilitation, dignity, and the perceptions of morality, stigma and responsibility, invariably shape the destiny of the institutionalised woman.

Convict, undertrial, the mentally disabled, the epidemic-struck, the crime suspect, the wanderer with no visible means of support, the beggar, the refuge-seeker, the abandoned girl-woman, the prostitute woman ..... It is in these guises that they are seen to inhabit the universe within the institution. The prison, the hospital, the 'home'and the lock-up provide the institutional setting. As for the woman herself, she is almost invariably characterised by poverty, powerlessness, ignorance of her rights and the inability to assert them even where she is aware, and as follows naturally from this description, an easy subject of exploitation. The high walls of the institution, paired with the impenetrable shield of those empowered and bureaucratised by the law, hide the woman as also her condition from view. Her access to justice is, then, virtually non-existent. And the possibilities of victim-creation are enhanced by her mere presence in the institution: a sobering thought when one reflects that she may be in the institution for protection, and that it may be her 'protectors' who represent the threat.

The most poignant effect of institutionalisation -- penal and protective -- is the closing of the outside world to the woman. Her relationship with her family, work, community is at least temporarily severed, and irretrievably changed. Her autonomy is a casualty within the institution. The stigma that attaches to life in an institution is not easily erased. And, whatever the reason for entry into an institution, and however voluntary or otherwise it may be, the legal hurdles to her leaving the institution are insuperable.

II

There is a choicelessness in the making of an inmate. An involuntariness. The arrest of a suspect, or the picking up of a wanderer is cause enough for anxiety about the exercise of police power by the ubiquitous state. The deliberate misuse of this power, backed by the presumption of 'good faith' of the state functionary and strengthened by the powerlessness of the victim-person lends a different complexion to this concern. Instances abound even within the law. The branding of uncomfortable persons as being of 'unsound mind' or a 'wandering lunatic' is sanctioned by law. The Lunacy Act, 1912 for instance, gave this power of discriminating between a sane person and a 'wandering or dangerous lunatic' to the police. It was this seal of authority that the police invoked when they drew into their net, and out of circulation from everyday society, a 70 year old woman in Assam. The incentive for effecting this incarceration was provided by her landlord who, finding her without support or protection, her husband and son having recently died, worked out the economics of her eviction thus. The price for active connivance of the police, and the callousness and neglect of the lower judiciary --to put the most charitable construction on events -- apparently suited the landlord's purse and convenience. That the guardians of the law were not even aware that they were exercising their powers under a more recent enactment - the Mental Health Act 1987 -- and that the Lunacy Act had ceased to exist made no difference. The existence of this power, sanctioned by a naive law touching in its faith that it will be used in the interests of humanity, is characteristic of a blindness to the reality of the abuse of power, and its encashability.

The interchangeability between the punitive and the protective or curative institution informs what followed. For, the traumatised woman was then sent to prison by the magistracy. In August 1993, the Supreme Court had outlawed the detention of what is known as "non-criminal lunatics" (NCL) persons in jails. The anamoly of calling prison cells places of 'safe custody' caused the court to forbid their use to house NCLs. Yet, the lower judiciary in Assam claiming an ignorance of this ruling, continued to provide jails with inmates. In fact, the state swore on affidavit before the Supreme Court that it had 387 persons in jails on the ground that they were NCLs -- 109 of them women. And most of them had been imprisoned **after** the order of the Supreme Court. Such is the Rule of Law.

It was intervention from the Supreme Court, assisted by a Commissioner, which ensured the end to the incarceration of 225 of the alleged NCLs : 141 were released even before the Commissioner could reach them.The stigma that mere labelling brings with it is starkly demonstrated in this experience of the working of the law. Once detained as being of unsound mind, the presumption of insanity persists.

There is a Kafkaesque bewilderment in this process. The entry into an institution represents the final subjugation of the weak. The organs of state are protected from accountability and can afford irresponsibility or criminality. The Assam experience is merely one example of a systemic malaise. The fault lies not

in the working of the law alone, but in its very statement. Where empowerment is unattended by accountability, it is little wonder that abuse is the result. The 'good faith' protection must undergo unrecognisable change.

III

The reluctance of the law and law's processes to discharge women once they are drawn into custody lends another dimension to institutionalisation. Access to justice and the resourcefulness of the institutionalised woman influence her attempts to leave the institution. In **Hussainara Khatoon**, it was the judicial device of Public Interst Litigation (PIL) which re-introduced imprisoned women into the constitutional agenda. The issue was of pre-trial detention and speedy trial. The search into the jails in Bihar demonstrated the perception of jails as the junkyard of society. Undertrials, unable to furnish bail or lying forgotten behind towering walls that cause public amnesia, had spent long periods in prison - sometimes for periods longer than the maximum sentence they may have to serve if convicted. At one time, there were 18,133 persons, men and women who were resident in the jails of Bihar as undertrials. Children of undertrials were part of the prison population too. The uniformity of prison life with its denial of autonomy, liberty and concourse with the world was visited upon, among others, women who were being held in 'protective custody' - a euphemism for victims of offences or witnesses needed the protection of the state. The efficiency of bringing the woman into state custody being greater than taking security out to her, it was economics and a partiality for the "practical" that found her spending long years in prison : though this interpretation of "protection" finds no support in the law. While a convict may leave upon serving his sentence, a woman in 'protective custody' could be made to stay indefinitely imprisoned!

The question is of state power that permits the use of penal institutions beyond the limits of law's prescriptions. This was an utterly illegal exercise of state power followed by a criminal lapse of attention which kept the women in custody for long periods.

The Supreme Court expressed horrification, and ordered the release of the women. The state promised to comply. And, when the dust had settled, there was the old legal order, unchanged and unyielding.

The recognition that power over institutions had been extended to mean control over the lives and liberty of persons drawn voluntarily or involuntarily into state custody has not been acknowledged in any restructuring of answerability being built into the law.

IV

The anamoly of institutionalisation invades law, even where it may not be patent. Take the case of child labour. Labour laws not merely do not prohibit child labour, they actually encourage

it. Even after the Child Labour(Prohibition and Regulation) Act became law in 1986, which was meant to be a statement of concern at the loss of childhood of the child, the 'child' in labour laws is essentially below 14 years of age. Passed in the same year, the Juvenile Justice Act takes within its parens patriae fold a girl below 18, with the power to continuing control over her till she is 20. The expectations of responsible conduct and resistance to exploitation that is manifest in labour laws is in contradiction to the denial of autonomy and of decision - making for oneself that constitutes the fundaments of the Juvenile Justice Act.

The need for harmonising such obvious dissonance in the law seems to have escaped the legislator. The working child could find herself institutionalised and brought under the 'protective' power of the state from which she cannot escape without definite and committed support of her family. Where poverty and distance intervene, she could well lose her right to re-enter society.

V

The incapacity that law enforces on a woman is never more obvious than in the case of the mentally ill person who is unfortunate enough to be sent to an institution. In August 1992, when Amita Dhanda and Srinivasa Murthy reported to the Supreme Court from the jails in West Bengal, they found at least 12 persons in Alipore jail who had been declared mentally fit in December ,1991 still inhabiting the jail. The reason was that the wheels of law creak into action in its own time, if it does so at all. The Mental Health Act, 1987 and the Indian Lunacy Act, 1912 before it, involves the judiciary in endorsing an order of restraint on a person who is seen as requiring institutionalisation due to unsoundness of mind. This intervention is expected to ensure that it is the rule of law which prevails. The jail authorities, then, naturally expressed their inability to discharge those who had been detained in jails without an order from the court despite the knowledge that the reason for restraint had disappeared. Four of these were awaiting discharge orders from the SDM, Barrackpore. Amita and Murthy record in their report their efforts to convince the SDM of the need for expedition. That was on August 20, 1992. On September 21, 1992, a full month later, nothing had happened: the incarceration continued, the jail authorities continued the endless wait for discharge orders, and the courts continued in their inexcusable indolence.

It is more involved than even this where the institutionalised person is a woman. For there is no recognition of self-sufficiency or autonomy in a woman. The release of women dragged into this process is dependent on the support that exists for her in the world outside the prison. For the woman will only be handed over to relatives who go to the jail to receive her. Or she may be sent with an escort to her family when an escort is available. Her family must then accept her. For if her family rejects her, or she can be taken to no traceable address, she may have to continue within the confines of an institution - indefinitely - being transferred, perhaps, from a jail to a 'protective' home.

The fact she was taken into custody for no misdemeanour or offence adds to the injustice of this situation. It is aggravated by the non-responsibility of the institutional authority in ensuring contact with the family or community of the woman. Law's silence on executive responsibility in this regard, despite the knowledge that both law and executive process place heavy dependence on the family to provide her with a lifeline from the institution, is more than mere callousness.

The alienation that institutionalisation represents, and the stigma that attaches to being in an institution are sufficient to make re-entry into her former world difficult. Once in an institution, she does not have it in her power to keep in contact with her family and the "disappearance" of known family when the state finds itself ready and willing to release her is patently cruel. In Gopal Subramanium's report the matter of keeping alleged NCLs in the jails of Assam, we meet Simanti Nag, 50 years of age, lodged in a Nari Sadan for three and a half years, not charged with any offence, and abandoned by her family. We also meet Putni Rajbongshi, also in 'safe custody' in the Nari Sadan, keen to go home but unable to trace her family for want of an .pl70address. And Tara, a dumb girl, yearning to return to her family, but without an address to help her. And Madhuri, also in 'safe custody' in District Jail Silchar, admitted for treatment in May, 1991, declared by a visiting psychiatrist to be fit on November 24, 1992, and continuing in prison till Gopal reached her in May, 1994 because police reported that her address was not known. And Mili Das, with her six-month old child. She had been sent into jail on the advice of a Professor of Psychiatry who neither had the legal authority nor ethical justification for asserting this power. Dhanda and Murthy speak of this graduate woman lodged in Behrampore jail who was escorted to her parents' home. They however refused to take her back. And she was brought right back to the jail because the law knows no means of permitting her her own risk and responsibility.

VI

Where instances such as these are legion, there is no explanation for why the law does not exercise its imagination to provide for alternatives which will allow the women to regain their liberty, dignity and self-esteem. The only option, if it can be termed such, is the movement from one institution to another.

The Women and Children Institutions (Licensing) Act, 1956 in fact reinforces these options. It presumes a parity between women and children, and prescribes that, in the event of an institution losing its licence, the women and children in the institution may be either restored to the custody of a parent,husband or lawful guardian as the case may be; or be transferred to another institution.

There is a commonality of treatment that is meted out to all those whom the state declares by law to require its protection, and as being incapable of fending for themselves: these premises

being seen invariably as two parts of one truth. The Bonded Labour (Abolition) Act, 1976 or the Contract Labour (Regulation and Abolition) Act, 1970 not merely place a responsibility on state functionaries to prosecute and pursue remedies on behalf of the exploited labour, but takes away their right to pursue their own remedies ! Vulnerability, particularly because of poverty and powerlessness, is all too often envisioned by the law as a reason for denying the right to take responsibility and act on behalf of oneself.

VII

That there is no distinction between a 'protective' home and a prison is evident from the reports that emanate from within. The bars, the closed system, the bureaucratisation, the control, the regimen and the inter-dependence of the executive - judiciary combine in the functioning of both institutions, as well as their relationship to statutes and statutory power leaves little room for distinctness. Yet while one is essentially a penal institution, with its detenues, and its undertrials and its convict population, the other is supposedly a shelter and a refuge for the insecure and the refugee, even as it is a reformation ground for those whom the law sees as 'morally' abandoned.

This is explained, for instance, by the obliteration of the distinction between the 'protective home' and the 'corrective institutions' that the Immoral Traffic Prevention Act (ITPA) witnesses. This Act terms as a 'corrective institution' an institution established or licensed by its authority, in which persons in need of correction may be detained, and includes a shelter for undertrials prosecuted by this Act. A 'protective home' on the other hand, is for those in need of care and protection, where appropriate technically qualified persons, equipment and other facilities have been provided; it does not include in its definition a corrective institution or a shelter for undertrials by this Act. The distinction ends with the definition . As illustrated by a section in the Act which provides for the possibility of a person making an application to a magistrate asking to be kept in a protective home or to be otherwise provided care and protection. The power of a magistrate to make enquiries about her antecedents, her personality, conditions of home and prospects of rehabilitation" and make an order that she " be kept (i) in a protective home, or (ii) in a corrective institution, or (iii) under the supervision of a person appointed by the magistrate, for such period as may be specified in the order". Detention in a protective home being seen as synonymous with detention in a corrective institution, the expectations of the Act of what happens during her stay in the institution is significant. The inmate of a corrective institution has to demonstrate " a reasonable probability" that she "will lead a useful industrious life". When an 'offender' who is in a corrective institution is discharged, the Act legitimates state surveillance of her "activities and movements"! A denial of fundamental rights which extends even beyond her incarceration.

The offender and the unprotected are intermixed by the legal prescriptions for interchangeability. The corrective institu-

tions, housing 'offenders' and intending to subject them to "such instruction and discipline as are conducive to her correction" blends with the colour and character of penal institutions, explaining the blurring of distinctions.

The conditions that exist within these institutions have caused judicial dismay and plainly hold no promise of protection, and no possibility at all of rehabilitation. The Agra Protective Home, which came under judicial scrutiny, has entered the annals of judicial history for the exposure of the inhuman and degrading conditions that prevailed within. It was also an object lesson on the use of statutory institutions that the state authorities perceive. The Home was established as a protective home under the erstwhile Suppression of Immoral Traffic Act (SITA) [now ITPA]. Yet, not one of the women or the girls housed in the Home had been detained under the Act.

The neglect of basic conditions of hygiene, health and safety is an underlying theme in this case. No taps, inadequate toilets, no bathroom; a virtual epidemic of venereal diseases among young girls not yet 18, TB, skin infections, mental retardation, mental derangement..... The lackadaisical maintenance of records makes supervision of institutional functioning extremely difficult. The impenetrable walls of closed institutions hides a range of criminal neglect that converts a refuge into a den of exploitation. If not for the forced entry engineered by this PIL, then, the Home would have founded its own traditions of making rejects of already helpless women. If the protection the walls provide is merely facilitative in hiding the sins of omission and commission of the state, lowering the walls is an imperative to make institutionalisation into a less restrictive alternative.

An exercise in 'management jurisprudence' that the Supreme Court initiated in the case of the Ranchi Mansik Arogyashala lends itself to a similar understanding.

VIII

State control over the inmates of institutions holds the potential for unchecked violations of basic rights. The perception of threat, convenience, practicability or economics may occasion such violations. Or they may be instances of blatant abuse of power.

The hysterectomy controversy that erupted in a home in Pune is representative of the role of discretion and judgment in state action. The removal of uteri from eleven women before public outcry prevented the mass de-wombing that the state justified on the grounds of hygiene is a case in point. The inmates were mentally retarded with varying capacities of self-help. Evidently, they needed institutional care, and shelter. Their hygiene was a matter of concern for the administrators. Eugenics and realism did not see scope for child-bearing. The uterus was then a useless and dispensable part of the girl - woman, and its removal would make no difference to her life unlike it would make caring for her life unlike it would make caring for her and maintaining her hygiene more manageable.

The public horror, and the articulate defences and the counter-attacks that ensued could not check the meaning that state power could assume within the close confines of an institution.

The compulsory testing of inmates of institutions for the dreaded AIDS virus or for detecting their HIV status has defied the logic that has dogged the making of AIDS law in India. The AIDS (Prevention) Bill, when it was introduced in 1989 raised serious questions about confidentiality in the doctor-patient relationship, informed consent, the right to privacy, the meaninglessness and ill-advisednesss of segregation and isolation when a person is detected as being HIV positive, the wrongness of high risk groups instead of high risk activities..... The public debate raised sufficient doubts about the wisdom and constitutionality of much of what the Bill proposed. Parliament, the relatively representative organ of state, dropped the proposal to enact it into law.

Yet, every month, the women in the Agra Protective Home are subjected to compulsory testing to determine the HIV status. The Supreme Court, too, has not shown particular interest in distinguishing between a HIV positive status and contracting of AIDS. At one stage in the proceedings, the court ordered segregation of all inmates of the Home who were HIV positive. With the petitioners protesting, and with a doctor testifying that segregation is no medical need nor justification if there is no evidence of AIDS complex being developed, the Court stepped back somewhat. But only to say that the doctor on the spot could decide on the question of segregation. The uninformed response to AIDS has meant one constitutional mandate lost to institutionalised women, only because they are in institutions : a classification that is unreasonable in the eye of the principle of equality that will not have equals treated unequally. Or is the message that persons in institutions are less equal than the others ?

And the monthly report, submitted to the court and therefore a public document, reveals the HIV status of each inmate, column after column.

The control within an institution is so complete as to allow blatant abuse and evidence of this has surfaced with startling regularity. The reputation that jails, and particularly ITPA institutions have earned, of trafficking in women, has not found convincing refutation. This stigma attaches itself to every inmate and adds to the problem of re-entering the world outside.

The directness of the abuse is graphically presented in Lewis' Reason Wounded. The physical battering, the crushing of dignity, the breaking down of character, the evidence of repeated and brutal rape and physical abuse....the defiling and destructive nature of the institution is difficult to internalise. The duty of the prison staff to deliver a letter to the family, buy bidis, recommend remission for work done and maintain the ticket which would have a bearing on the actual sentence to be served gets converted into a power. The corruption, the venting of frustration, the abuse of the prisoners' labour constitutes the

norm. Perhaps Mrs.Singh of Reason Wounded is not replicated in every prison; we don't know for sure. But it is certain that the law seems to stop at the institution gates, allowing for its untrammeled abuse in the treatment of persons in restraint.

Twelve year old Parminder Kaur's is a pitiable tale, and an indictment of the system that permits institutionalisation to abet such abuse. A victim of child abuse, abandoned by her father when she became epileptic, she was taken by the police to a Nari Niketan in Meerut. reportedly, she was a cause of nuisance to the institution staff because of her epilepsy - the disability that made her a shelterless waif in the first place. She was in the institution for three months, when she was allegedly the subject of constant harassment. One evening, she was accused of stealing a tea packet. Four employees, it is reported, set upon her, belabouring her. They stripped her, showered her with blows, branded her and threw her into a nullah. When she attempted to re-enter the institution - for where else could she go ? - she was threatened and chase away by the staff. It was a rickshaw puller who helped her to an all-women police station.

The role of an institution remains vague and ill-defined, as do its powers. The fact that its inmates are people who have not succeeded in coping with the world around them has branded them as deviants. The institution has then been created, not to assist in the adjustment of the person seeking help, but to save society the bother of having to keep them their midst. The world stops at the gate of the institution. It has a deep disinterest in what happens within as long as it is spared the responsibility of having to carry the load of the criminal, mentally ill, retarded, accused, weak, vulnerable, abandoned, orphaned or abused person. If this is not the logic of the institution, it is difficult to explain the logic of the law which does not respond either to experience or to the knowledge it has of the nature of state power.

IX

Juristic activism attempted to remedy the insides of institutions when it re-drew the contours of identity, and rights, of prisoners. It was in Francis Coralie Mullin (1981) 1 SCC 608 that the Supreme Court sought to reconcile the right to life and personal liberty with the Universal Declaration of Human Rights and the personhood of the prisoner in jail. Imprisonment is **as** punishment and not **for** punishment. That is, the imprisonment is itself the punishment . This deprivation of liberty cannot be a blanket permit to deny all other rights that the constitution guarantees. The right to consult a legal adviser of her choice and to meet family members and friends was recognised. Importantly, the right to life was understood to include "the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings". "Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live", the court said. This was in 1981.

Yet, the conditions in jails, homes and asylums have been found, repeatedly, to be deplorable. The need to reconcile the law with this constitutional scheme is urgent and apparent. The closed nature of the institutions, however, defy change. More than bridges are needed to span the chasm between the institution and the outside world. Institutions, must, of necessity, shed their closedness, even as accountability gets injected into them. And the law has to shed its status quoist propensities and effect the change.

X

The reluctance of the law to change, unless prompted by political manoeuverings, is notorious. The existence of the Epidemic Diseases Act on the statute books, practically unchanged since its enactment in 1897, is proof. It was the spread of bubonic plague in Bombay that was the immediate reason for enacting the Epidemic Diseases Act. Under this Act, the state may assume extraordinary powers where it thinks a "dangerous epidemic" exists, or where it believes an outbreak is threatened. Empowering "any person" to act, the state may permit "segregation, in hospital, temporary accommodation or otherwise of persons suspected by the inspecting officer of being infected with any such disease."

It is noteworthy that the Act was expressly based on provisions in the Bombay Municipal Corporation Act 1888 which deals with "special sanitary measures"; and provides power to act where there is a threat, or an outbreak of a dangerous disease **amongst cattle.**

It was this Act that was invoked to empower the state when the suspicions of a plague epidemic had reached fever pitch. The Infectious Diseases Hospital (IDH) in Delhi was set apart to receive all plague suspects. This, despite the WHO guidelines which recommend that patients not be moved far from their homes, apart from other reasons because this may actually spread the infection, and for the danger it may pose to the patient.

This experience of institutionalisation shares the characteristics of the rest. It is involuntary, protective of society while callous about the victim, ill-informed and frightening.

A Citizen's Report narrates the anxieties of the father of a fifteen year old girl who had been sent to the IDH on the faint suspicion raised by a slight swelling in the arm. A ten-year old who had been under treatment for some years for a few swollen glands, was suddenly bundled off to the IDH, much to the consternation of her parents. A day-old mother, who had delivered through caesarean operation, had had a speck of blood in her sputum. She was wheeled in by ambulance, but managed her escape when her husband was cautioned by a hospital employee and a visiting medical person that the IDH was a place where she was more likely than not tot pick up infections ! While the laxity that blights administrations aided her escape, it did not prevent doctors, accompanied by policemen, from tracking down and forcibly bringing back two patients who had run away.

This compulsory institutionalisation, however is not attended by the right to treatment, the right to information, the right to informed consent, or of confidentiality. There is a denial of the other rights lying enshrined in the constitution. Institutionalisation in this context too is a statement of control,and strictly a one-way process.

An institutionalised person, by this person is a victim who with institutionalisation is further victimised.

XI

Custodial rape, solitary confinement, wageless labour.....the faces of institutional abuse abound. The meaning of institutionalisation is narrowed by the unproductive skills which are, at best, imparted to the inmate.The unimaginative absence of half-way homes, after-care services, counselling and de-stigmatising processes is further evidence that pessimism about institutions is justified. Where institutions have to perform to provide alternatives to women who have none, they have emerged as a repository of state power, control and authority, making further victims of an already victimised population.

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Annexure V

I. VIOLENCE AGAINST WOMEN - REVIEW OF RECENT ENACTMENTS

- FLAVIA AGNES

Introduction

1. Rape

1.1. The Campaign

1.2. The State Response

1.3. The Judgements During the Campaign

1.4. The Judgements During the Post amendment period
1.4.1. Conservative Notions Regarding Women's Sexuality
1.4.2. Leniency Towards Youth Offenders
1.4.3. Concern Over Loss of Virginity and Prospects of Marriage

1.5. Categories of Sexual Offences

1.6. Absurd Notions of Modesty and its Violation

1.7. Towards a New Definition
1.7.1. Basic Premise of the Criminal Legal System
1.7.2. Voyeurism and Titillation in Rape Trials
1.7.3. Sexual Assaults of a Varied Range
1.7.4. Social Accountability and Compensation
1.7.5. Reversing the Convictions only in Exceptional Cases
1.7.6. Delays in Court Rooms
1.7.7. Lapses in Investigations
1.7.8. Custodial Rapes
1.7.9. Rapes in Situations of Emotional and Economic Dependency
1.7.10. Rape of Minor Girls Between 16 & 18 Years of Age

1.8. Salient Features of the Proposed Bill

2. Campaign Against Domestic Violence

2.1. The Act - A Paper Tiger

2.2. The Campaign - A Misplaced One

2.3. A Stringent Law - No Solution

2.4. The Process of Requestioning

2.5. Domestic Violence and Criminal Law

2.6. Placing Dowry Violence on a Pedestal - a Wrong Strategy

2.7. Cruelty to Wives Added on to a Sexist Provision

2.8. Application to Domestic Violence by Default

2.9. The Myth of the Misuse

2.10. Positive Judgement - A Welcome Respite

2.11. Law on Dowry Death - Limited in Scope

2.12. Negative Judgements

2.13. Growing Complexity

ABBREVIATIONS

AIR	-	All India Reporter
A.P	-	Andhra Pradesh
Bom	-	Bombay
CAL	-	Calcutta High
Cri.LJ	-	Criminal Law Journal
CrPC	-	Criminal Procedure Code
DMC	-	Divorce and Matrimonial Cases
HC	-	High Court
i.e.	-	that is
IPC	-	Indian Penal Code
Mad	-	Madras
Mah	-	Maharashtra
M.P.	-	Madhya Pradesh
NOC	-	Notes on Cases
Ori	-	Orissa
ors.	-	Others
Raj	-	Rajasthan
r/w	-	read with
S.	-	Section
Sc.	-	Section
SC	-	Supreme Court
Yrs.	-	Years

VIOLENCE AGAINST WOMEN - REVIEW OF RECENT ENACTMENTS

Introduction

If oppression was 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 rapes and unnatural deaths increased. The rate of convictions under the lofty and laudable legislations were dismal. (Table 2) Hence their deterrent value was lost. Some enactments turned out to be mere ornamental legislations or paper tigers.

The question foremost in the public mind was why the legislations were ineffective in tackling the problem. The answer to this query would lead one to a complex analysis of the processes involved.

Firstly, 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 the 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 legislations was seldom asked. The campaigns with a thrust on law reform could not maintain the pressure, once the legislations were 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, the women's economic rights within the family and their status quo within the society. The solutions were sought within the existing patriarchal framework and did not transcend into a new feminist analysis of the issue, leading to empowerment of women. They seldom questioned the conservative notions of women's chastity, virginity, servility and the concept of the good and the 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 benefited 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. The government response was prompt. Law Commissions or expert committees were set up with a mandate to solicit public opinion and submit their recommendations to the 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 focussed 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 eye wash 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 public 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 the state inaction at the crucial stage of preventing the public murder of a teenaged widow.

The worse 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 penalise 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 weaker the women, the more vulnerable they will be to male violence. The cycle is vicious.

This is an attempt to review the laws relating to rape, dowry and domestic violence, and their impact on women against the backdrop of changing perceptions towards penal enactments within the women's movement.

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Table I

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, C.I.D., Bombay

Cited in **The Lawyers** April 1991

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

I. Campaign for Reforms in Rape Laws

1.1. 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 years 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.[2]

1.2. The State response

The response of the government to the campaign was prompt. The Law Commission was asked to look into the demands. It 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 the 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. This 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:

1. Addition of a new section which made sexual intercourse by persons in a custodial situation an offence even if it was with the consent of the woman.

2. Introduction of a minimum punishment for rape - ten years in cases of custodial rape, gang rapes, 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 the amendment was inadequate, it 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.[3] The review petition filed by women's groups against the reduction of sentence was also rejected.[5] 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-publicised campaign.

Here are excerpts of some important judgements which reveal the trends in sentencing patterns and expose the inherent judicial biases in rape trials.

1.3. The Judgements 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 nonresistance 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.[5]

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 judgment 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 day light, overpowered the tempting-

ly 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. Hyper sexed homosapiens cannot be habilitated by humiliating or harsh treatment.... Given correctional course his erotic aberrations may wither away.[6] 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.[7]

In the same judgement, the court also cautioned against stricter laws and said that a socially sensitised 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.

In a judgement case reported in 1981, where a 16 year old girl was gang raped, the court held: The fact that there in no injury and the girl is used to sexual intercourse is immaterial in a rape trial.[9]

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.[10]

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.[11]

The judgements reflect the concern expressed by the women's organisations 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 judiciary regarding women during rape trials. Unfortunately, the judgements in the post-amendment period convey a dismal picture.

1.4. The Judgements During the Post-amendment Period:

1.4.1. Conservative Notions Regarding Women's Sexuality:

1984 started off with a judgment 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.[12]

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.[13]

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 torn. The sessions court convicted him as the girl was under sixteen 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 major. 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.[14] 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 assume 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. [15]

1.4.2. Leniency Towards Youth Offenders:

One of the most important ingredients of the 1983 amendment is the clause regarding minimum punishment of ten years in cases of custodial rapes and child rapes. 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 over ruled. Some important cases where this clash of legal theories is evident are mentioned below.

In a case reported in 1984, a seven year old girl was raped by a boy of 18. She was severely injured and was left in an unconscious condition. The appeal to 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. [16]

In another case, a nine 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.[17]

In the cases 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 ten 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.[18]

1.4.3. Concern Over Loss of Virginity and Prospects of Marriage:

The rare positive judgments 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.[19]

In a 1988 judgement, a ten year old girl was raped by a 45 year old man. While convicting the accused, the court imposed a fine and ordered that the amount should be paid to

the girl as compensation as The amount will be useful for her marriage expenses and if married will wipe out the anguish in her heart.[20]

One wonders whether there is an implicit statement that the marriage expenses will 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 seventeen year old girl. The Kerala High Court imposed a fine on the accused persons, 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.[21]

However, the High Court reduced the sentence from five years to three years while the stipulated minimum sentence for a case of gang rape is ten years.

The judgment hints that there are certain type of girls who value their chastity more than others - that there aregood 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 Court.[22]

The preoccupation of the judiciary regarding prospects of marriage extends from the victim to the daughter of the rapist as the following judgement indicates. The accused had raped two girls aged 10 and 12 years. 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 marred due to the stigmas attached to a conviction for an offence of rape.[23]

Further, if the woman gets married to another man while the case is pending in court, the court presumes that since the rape did not 'mar the chances of marriage', the offence is less grievous and merits 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.[24] This judgement was reported in the law journal in the year 1992!

1.5. Categories of Sexual Offences:

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 or 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 categorisation is based on the proximity to penetration. For instance, an unsuccessful attempt to penetrate is categorised 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.

i. An 18 year old youth stripped a five and a half year old girl 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.[25]

ii. 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.[26]

iii. 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.[27]

In order to draw a comparison between the judgements of this era and the later period, here is 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.[28]

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 judgments 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 by putting a hand on the belly of a female it 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.[29]

1984: A young college student attempted to rape his 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.[30]

1989: The accused dragged a nine year old girl 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 of 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.[31]

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.[32]

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 of preparation for the same.[33]

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.[34]

1.6. Absurd Notions of Modesty and its Violation:

One can observe from the above discussion that the categorisation of sexual offences with the centripetality 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 revealed in the judgement.

The case concerned the molestation of a seven and a half month old baby 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. But the majority view differed from the minority view.

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.[35]

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.[36]

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!

1.7. Towards a New Definition:

Today, the women's movement is in the process of evolving a definition which is broad enough to encompass the range of sexual violence to which women and children are subjected to. But embarking on this task, certain factors will have to be kept in view.

1.7.1. Basic Premise of the Criminal Legal System:

In a criminal trial, the state is the party which is prosecuting. The accused is the defendant. Since an individual who is vulnerable and powerless has to fight against the all powerful state machinery, the Crimi-

nal Procedure Code and the Evidence Act lay down strict procedural rules so that there is no abuse of power resulting in the denial of justice to the individual. All advantages during the trial have to be granted to the accused. This is the basic premise upon which the civil society rests.

To protect the individual against the might of the state power, the burden of proving the offence beyond reasonable doubt rests entirely upon the prosecution. If the prosecution fails in this venture, the benefit of doubt must go to the accused.

While redefining the offence of sexual assault, the challenge before the women's movement is to ensure that the delicate balance between the state and the individual is not tilted in favour of the state and simultaneously, strict adherence of the rules of natural justice do not result in miscarriage of justice to victims of sexual offences.

1.7.2. Voyeurism and Titilation in Rape Trials:

Unfortunately, in a rape trial, the accused, his advocate, the public prosecutor and the trial judge share a similar attitude of voyeurism and a rape trial becomes a titillating sexual farce. A slogan coined during the Mathura campaign in early eighties Mathura was raped twice, first by the police and then by the court is as relevant today as it was then. Very few judgements comment upon the humiliation and indignity a woman faces in a rape trial. The following is one such rare judgement, which indicates the level to which the defence lawyers can stoop.The mark of civilisation of our system is reflected in the way the witness is treated. I can see no reason why the victim was asked as to which organ is used to copulate, how she felt when accused No.1 inserted his organ, whether she felt warmth of seminal discharge of all five accused and so on.[37] The case concerned the gang rape of a seventeen year old girl suffering from epilepsy by five men while she sleep walking.

1.7.3. Sexual Assaults of a Varied Range:

In all criminal offences, injury and hurt caused by using weapons is more grievous than the one caused by the use of limbs but in the

case of rape, the injury caused by the use of iron rods, bottles and sticks does not even amount to rape. Many Western countries have totally abolished the term, rape and renamed it as sexual offences. The British Parliament passed a Sexual Offences Act in 1956. Through this, the distinction between rape, attempt to rape and violation of woman's modesty is abolished and these are treated as offence of a similar category and punishment is based on the severity of the offence. But in India we have continued with the archaic British definition of the Victorian era.

1.7.4. Social Accountability and Compensation:

The amendments to the rape laws focussed mainly on increasing sentence and laying down a minimum sentence which was meant to act as a deterrent. But as can be ascertained from the judgments discussed above, when there is a clash between two modern theories - leniency towards youth offenders and strict punishment for sexual offenders, the former will prevail over the latter. The judgements of the post-amendment period have proved that more stringent punishment would result in fewer convictions.

An individual should be made accountable for the offence not merely by imposing a very high sentence but by evolving relevant forms of social accountability. One way of dealing with the issue would be to impose a fine which would be given to the woman as compensation. Some judgements discussed above have resorted to this measure.

1.7.5. Reversing the Convictions only in Exceptional Cases:

While the High Courts in appeal express great caution in enhancing the sentence or reversing the order of acquittal, reversing the order of conviction and reducing th sentence is routinely done. Out of the 65 cases reported during the period 1980 -1989 there was conviction in the trial court in 55 cases. (Table 3) But in appeal, the High Court upheld the conviction only in 39 cases. Of these 39 cases, in 17 cases while upholding the conviction, the court reduced the sentence. There was hardly any case where the court had awarded the minimum sentence stipulated by the amendment. Regarding

acquittals by the higher judiciary, Justice Krishna Iyer has commented: unless very strong circumstances can be shown to reject the verdict of the trial courts, confirmation of conviction by courts below should be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry.[38]

1.7.6. 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. (See Table 4). 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 amounts to adding insult to injury.

1.7.7. Lapses in Investigations:

Most rape cases do not result in conviction due to lapses in investigations and medical reports. Slipshod investigations, 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 in this chapter.

1.7.8. Custodial Rapes:

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-publicised 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.

1.7.9. Rapes in Situations 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 the years 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 convictions 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.

1.7.10. Rape of Minor Girls between 16 and 18 years of age:

Proof of age of the rape victim is crucial since the consent of the victim is immaterial in cases where she is below 16 years of age. The burden of proving the age is squarely placed on the prosecution. If the prosecution fails to prove that the girl was below 16 years of age, then 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 years of age, 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 (which is 18 years) and for the offence of rape (which is 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 years old, but is capable of consenting to sexual intercourse if she is above 16 years of age.

1.8. 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 define 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 person 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 my 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.

Two important areas this section attempts to cover is:

1. Sexual assaults on a minor, mentally or physically disabled person or a pregnant woman. [However two members 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.

2. Sexual assault which cases 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.

3. 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:

i. 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.

ii. 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 years of age, her evidence should be recorded by a female officer or a social worker and the same to be recorded in the presence of a relative or friend and it should be recorded 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 a penal offence.

iii. Guidelines for Medical Examination: Immediate examination of victim by a Registered Medical Practioner (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. 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 liberalisaion and a boom in tourist and sex trade, the 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.

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Table 3

Acquittals and convictions in appeal courts in the decade 1980 to 1989

	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	-	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**

Table 4

Delays in Court 1991 -1993

Time span between Incident of Rape and High Court Judgement

3 yrs and less	4-5 yrs	6-10yrs	11-15yrs	15 yrs and more
12	9	19	6	1

2. CAMPAIGN AGAINST DOWRY

2.1. The Act - A Paper Tiger

The Dowry Prohibition Act of 1961 is a very small Act which consists of only 8 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 means that it is 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. Firstly, 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 vs. 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.[1] 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 only if 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 had percolated down the social scale and communities which had hitherto practised the custom of bride price were now resorting to dowry. Thirdly, all the violence faced by women in their husband's home was being attributed to dowry and the term 'dowry death' became synonymous with suicides and wife murders.

2.2. The Campaign - A Misplaced One

During the early eighties, 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 urbanisation 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. However, before we discuss the premise upon which the legislation was based, one needs 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 the Parliament in June, 1980,[2] and was referred to a Joint Committee of both the Houses. The findings of the Committee, interlia, were as follows:

1. The definition of 'dowry ' was too narrow and vague;

2. The Act was not being rigorously enforced.

3. The stipulation that complaints could be filed only by the aggrieved party within a year from the date of the offence.

4. Punishment of imprisonment for six months and/or fine upto Rs. 5,000/- is not formidable enough to serve as a deterrent;

5. The words 'in consideration for the marriage' from the definition of dowry ought to be totally deleted;

6. The explanation which excluded presents from the definition of dowry nullified the objective of the Act;

7. The gifts given to the bride should be listed and registered in her name.

8. In case she dies during this period, the gifts should revert back to her parents. In case she is divorced, the gifts should revert back.

9. 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; and

10. The appointment of Dowry Prohibition Officers for the enforcement of the Act.

Retrospectively, it appears that the recommendations were based on an erroneous premise that the girls can exercise a choice either at the time of marriage or later, in their husband's home. It also did not take into consideration the desperation of parents to get their daughters married and keep them in their husband's home at all costs. It glossed over the fact that most of the women in this country have no awareness of their legal rights.

2.3. A Stringent Law - No Solution

Unfortunately, the Bill that was introduced in 1984 failed to take into consideration some of the 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 of 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:

1. Increase in punishment to five years and a fine upto Rs. 10,000/- or the value of dowry, whichever is more. (The section excluded presents given to the bride or the bridegroom).

2. Removal of the one year limitation period.

3. Introduction of provision for the girl's parents, relative or a social work institute to file a complaint on her behalf.

4. Removal of the requirement of prior sanction of the government for prosecuting a husband who demands dowry.

5. 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:

1. The fine was increased to Rs.15,000/-.

2. The burden of proving the offence was shifted to the accused.

3. Dowry was made into a non-bailable offence.

4. A ban was imposed on advertisements.

5. 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 back 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).

2.4. The Process of Requestioning:

Despite these amendments, nothing changed. Women continued to get burnt in their homes and dowry demands continued. Reported cases of suicides and murders spriralled in every major city. (Table 1). The parents of the girls, who would not spend money on educating them or in making them independent, spent huge amounts of money on lavish weddings with the hope that the girl never returns to the native home and becomes a 'stigma'. The young girls, suddenly discovering that they have no place left in their parents' home, resorted to committing suicides 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 not only after the girls had died, in order to avenge their deaths and retrieve the gifts. The death of the daughter 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 cry hoarse against dowry would go all out and disinherit their daughter.[3]

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.[4] The 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 feel 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 their 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!

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3. Domestic Violence

3.1. The crying need for a law

The discussion on the two amendments to the criminal laws (with a specific context to Sections 498A and 304B of the Indian Penal Code) are usually carried on as an appendix to the discussion on dowry. But here a conscious effort is made to evaluate them within the framework of domestic violence because they in fact deal with (or at least ought to deal with) the issue of domestic violence - cruelty, harassment and murders of wives.

In criminal offences it is the State which is the prosecuting body. Hence it is extremely important to safeguard the right of an individual accused against the state machinery during a criminal trial. So strict procedures of investigations have to be followed and the rules of evidence have to be strictly adhered to.

The three major criminal acts which govern criminal trials are as follows: The Indian Penal Code (IPC) lays down categories of offences and stipulates punishment. The Criminal Procedural Code (CrPC) lays down procedural rules for investigation and trial. The Indian Evidence Act prescribes the rules of evidence to be followed during a trial.

Prior to 1983 there were no specific provisions pertaining to violence within the home. But husbands could be convicted under the general provisions of murder, abetment to suicide, causing hurt and wrongful confinement. But these general provisions of criminal law do not take into account the specific situation of a woman facing violence within the home as against assault by a stranger. The offence which is committed within the privacy of the home by a person on whom the woman is emotionally dependent needs to be dealt with on a different plane.

It was extremely difficult for women to prove violence by husbands and in-laws 'beyond reasonable doubt' as was required by criminal jurisprudence. There would be no witnesses to corroborate (support) the woman's evidence as the offence is committed behind closed doors. Secondly even if the beating did not result in grievous hurt, as stipulated by the IPC, the routine and persistent beatings would cause grave injury and mental trauma to the woman and her children. So different criteria had to be evolved to measure injury and hurt in a domestic situation.

Generally complaints can be registered only after an offence has been committed. But in a domestic situation a woman would need protection even before the crime, when she apprehends danger to her life, as she is living with and is dependent on her assaulter.

Even when provisions of the IPC could be used against the husband for assaulting the wife, it is very seldom done. The police, being as much a part of the value system which condones wife beating, would not register a complaint against a husband for assaulting the wife even when it had resulted in serious injury under Ss. 323, 324 of IPC. It is generally assumed that a husband has a right to beat his wife/ward.

On the contrary, a wife who actually mustered enough courage to approach a police station would be viewed as brazen and deviant. Instead of registering her complaint, the police would counsel the woman about her role in the house, that she must please her husband and obey him. She would be sent back without even registering a complaint. So a special law was needed to protect a woman in her own home.[1]

3.2. Placing Dowry Violence on a Pedestal - A Wrong Strategy

There were public protests in cases of rape and dowry deaths in all major cities and towns in India during the early eighties and large number of women came out of their cloistered silence and started seeking help to prevent domestic violence. Since the police refused to register their complaints under the existing provisions of the IPC, a demand was raised for a special enactment to deal with the issue.

Many Western countries had passed laws against domestic violence in the seventies. Unfortunately, in India, the women's movement did not raise the demand for a similar law. Initially, only dowry-related violence was being highlighted during the campaign. And all violence faced by women within homes was being attributed to dowry, both by activists and the State. So the initial demand was for a law to prevent only dowry-related violence. This turned out to be a narrow, short-sighted and wrongly formulated strategy. Placing the dowry violence on a special pedestal, the general violence faced by women of every class, community and religion was denied recognition and legitimacy.

3.3. Cruelty to Wives Added on to a Sexist Provision

While the State was over eager to pass laws even when there were adequate provisions within the IPC for crimes such as sati, obscenity and procuring minors for

prostitution, in the case of domestic violence, instead of a new legislation, the State was content to amend the provisions of the Criminal Acts. The Criminal Acts were amended twice during the decade - first in 1983 and again in 1986, to create special categories of offences to deal with cruelty to wives, dowry harassment and dowry deaths.

Prior to the amendments, although the IPC did not specifically deal with violence in a domestic situation, it had a chapter which dealt with offences against marriage. Another chapter dealt with offences affecting the human body - murder, suicide, causing hurt etc. The relevant chapters are briefly discussed here:

Chapter - XX Offences Related to Marriage

S.493 - Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.S.494

- Marrying again during the lifetime of husband or wife.

S.495 - Concealment of former marriage from person with whom subsequent marriage is contracted.

S.496 - Going through a fraudulent marriage ceremony without lawful marriage.

S.497 - Adultery (only a man is punishable under this section for committing adultery with a married woman.)

S.498 - Enticing or taking away or detaining with criminal intent a married woman.

Chapter XVI of the IPC deals with offences affecting the human body. This is further divided into offences affecting life - murder, suicide, abetment to murder and suicide, abortion etc. - Ss 299 to 318. The next part deals with hurt which includes simple and grievous hurt with or without weapons (Ss. 323 -328); wrongful restraint and wrongful confinement (Ss. 341 - 348); assault, indecent assault (molestation), kidnapping, abduction of minors, buying or selling a minor for the purpose of prostitution, unlawful labour, rape and unnatural sex etc. (Ss. 352 - 377).

It is interesting to study where the first amendment - cruelty to wives - is placed within the IPC. It is not situated within Chapter XVI - offences affecting the human body, or under the sections dealing with assault, where it would have been more appropriate. Instead it is ironically placed as an appendix to S. 498. This section, i.e S. 498, is an obnoxious and extremely derogatory provision which treats women as the property of men. The section gives every husband a right to prosecute any man who

takes away his wife even though this has been done with the wife's consent. Ss 497 and 498 are a constant reminder to women about their subordinate status within the IPC. Terming this new and important section as S.498A ought to have been a cause for protest. Surprisingly, it did not raise any criticism from legal experts both within or outside the movement.

3.4. Application to Domestic Violence by Default

Fortunately, through some lapse, the section was wide enough to apply to situations of domestic violence. The section is worded thus:

'Whoever, being husband or the relative of the husband of a woman, subjects such women to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation - for the purpose of this section 'cruelty' means

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or death whether mental or physical of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or account of failure by her or any person related to her to meet such a demand.

So although the aim was to deal with dowry harassment and suicide, explanation (a) does not use the word dowry to define cruelty. It also includes mental cruelty. Hence it is wide enough to be used in situations of domestic violence and mental cruelty. Where it falls short is by the use of 'grave' in explanation (a). This precludes the everyday violence suffered by majority of women. Even with this limitation, the section can be an effective deterrent to violent husbands if only the judiciary and the police had interpreted and enforced it in the right spirit.

Initially, the police refused to register cases under this section unless specific allegations of dowry harassment were made. But through constant agitations and interventions with the police it is now accepted that the section ought to be used in all situations of cruelty and domestic violence. This was a small victory to those who have been campaigning for law on domestic violence. The refusal of the police to register a complaint under this section unless dowry harassment is specifically mentioned, has affected the women adversely. Vague allegations of dowry demands are

added on to genuine complaints of wife beating which tend to caste aspersions on the credibility of the whole complaint. The case cannot then stand through the legal scrutiny in a criminal court and results in acquittal of the husband. At the other level, statistics compiled by the police department erronously convey the impression that all violence is dowry-related, which leads to a false premise that if dowry is curbed, violence on women will end.

3.5. The Myth of the Misuse

There is a misconception among the police and the lawyers that the section is misused by women. While it is true that a significant number of cases filed under this section are subsequently withdrawn, the complexities of women's lives, particularly within a violent marriage, have to be comprehended beyond the context of popular ethics. The conviction of the husband may not be the best solution to her problems.

The various alternatives that she has to choose from, each one in itself a compromise, may make it impossible for her to follow up the criminal case. Let us examine some of them. Since the section does not protect a woman's right to the matrimonial home, or offer her shelter during the proceedings, she may have no other choice but to work out a reconciliation. At this point she would be forced to withdraw the complaint as the husband would make it a precondition for any negotiations. If she has decided to opt for a divorce and the husband is willing for a settlement and a mutual consent divorce, again withdrawing the complaint would be a precondition for such settlement.

Thirdly, if she wants to separate or divorce on the ground of cruelty, she would have to follow two cases - one in a civil court and the other in a criminal court. Anyone who has followed up a case in court would well understand the tremendous pressure this would exert, specially when she is at a stage of re-building her life, finding shelter, job and child care facility. Under the civil law she would at least be entitled for maintenance which would be her greater priority. So if she has to choose between the two proceedings, in most cases, a woman would opt for the civil case where she would be entitled to maintenance, child custody, injunction against harassment and finally a divorce which would set her free from her violent husband.

Due to the above-mentioned complexities, most cases filed by women under S. 498 A are subsequently withdrawn. The cases which are followed up are the ones where the woman has died and the case is followed up by her relatives, and where the issues involved are not so complex.

But this is not to imply that S. 498 A, IPC, has no use for women. Most women find it extremely useful as a deterrent. Women may not be in a position to see their complaint through, to its logical end. But this is not to deny its usefulness in bringing husbands to the negotiating table. Since the offence is non-bailable, the initial imprisonment for a day or two helps to convey to the husbands the message that their wives are not going to take the violence lying down.

3.6. Positive Judgement - A Welcome Respite

In this context the recent judgement of the Bombay High Court comes as a welcome respite. In a case where the husband had initiated criminal proceedings against the wife and made baseless allegations against her character, the wife filed a complaint under S. 498A, IPC, stating that it amounts to cruelty. The husband was convicted by the judicial magistrate, Pune, and was awarded six months' imprisonment and a fine of Rs. 3,000/-.

On appeal, the sessions court set aside the imprisonment and enhanced the fine to Rs. 6,000/-. Ms. Madhuri Chitnis, the wife, filed an appeal in the Bombay High Court against the reduction of sentence on the ground that it has resulted in miscarriage of justice. The wife, herself an advocate, appeared in person and argued that the degree of leniency shown to the husband cannot pass the test of judicial scrutiny and that it would be a mockery of justice to permit the accused husband to escape the penalty of law when faced with evidence of such cruelty. To reduce the sentence would render the judicial system suspect and the common man would lose faith in its course, she submitted.

The High Court upheld the conviction but considering the age of the husband (which was around 50 years) did not impose imprisonment but enhanced the fine to Rs. 30,000/-. This amount was awarded to the wife as compensation. Subsequently, the Supreme Court has upheld the Bombay High Court judgement and commended the Bombay High Court for the progressive stand on woman's issues.[2]

3.7. 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 however, 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.[3]

The other sections of the IPC which have been used in cases of wife murder are Ss. 302 - punishment for murder and S.306 - abetment to suicide. Here are some judgements where these sections as well as S.498A have been negatively interpreted by the courts in cases of wife murder.

3.8. 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 husband is proved guilty of cruelty towards wife.[4]

In another case, the M.P 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.[5]

In a case under S.498 A 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.[6]

In the famous Manjushree Sarda 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 guilt of the husband was not proved beyond reasonable doubt and that the wife might have committed suicide out of depression.[7]

In another well-publicized case, the woman, Vibha Shukla, was found burnt while the husband was present in the the house. A huge amount of dowry was paid at the time of the wedding and there were several subsequent demands for dowry. Vibha's father-in-law was a senior police officer in Bombay. When 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.[8]

In another case decided by the Bombay High Court in March, 1991 - the case of Geeta Gandhi's murder, 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. The body of Geeta Gandhi was burnt beyond recognition and the flesh was roasted and charred right upto 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 Ist in the M.Sc.exam, 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.[9]

3.9. Growing Complexity

While laws have proved inadequate to deal with this blatant form of 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[10], followed by similar instances in other parts of 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 the domestic violence.[11] These incidences are an indication of the complexities of domestic violence and the need for a new approach to tackle the issue.

Perhaps it will be relevant to discuss two more cases which mightbe relevant while planning future strategies.

In the first instance, a man was sentenced to death by 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 organisations would see this as a victory. Manushi, a woman's journal, expressed its shock at the judgement and was highly critical of it. It felt 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.[12]

The second case concerns a woman who had killed her husband by strangulating him 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.[13]

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.

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ANNEXURE IV

ISST/ESCAP NATIONAL SEMINAR ON WOMEN AND LAW
3-4 December, 1994

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ANNEXURE VII

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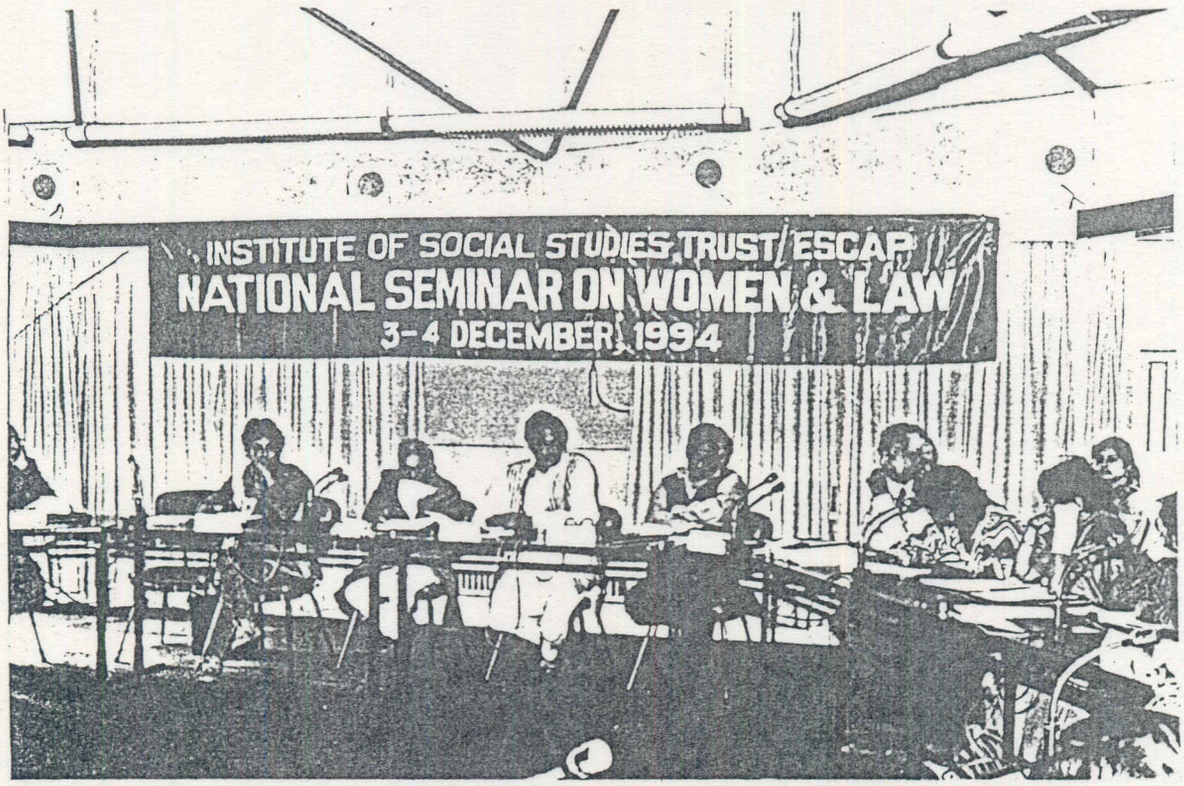

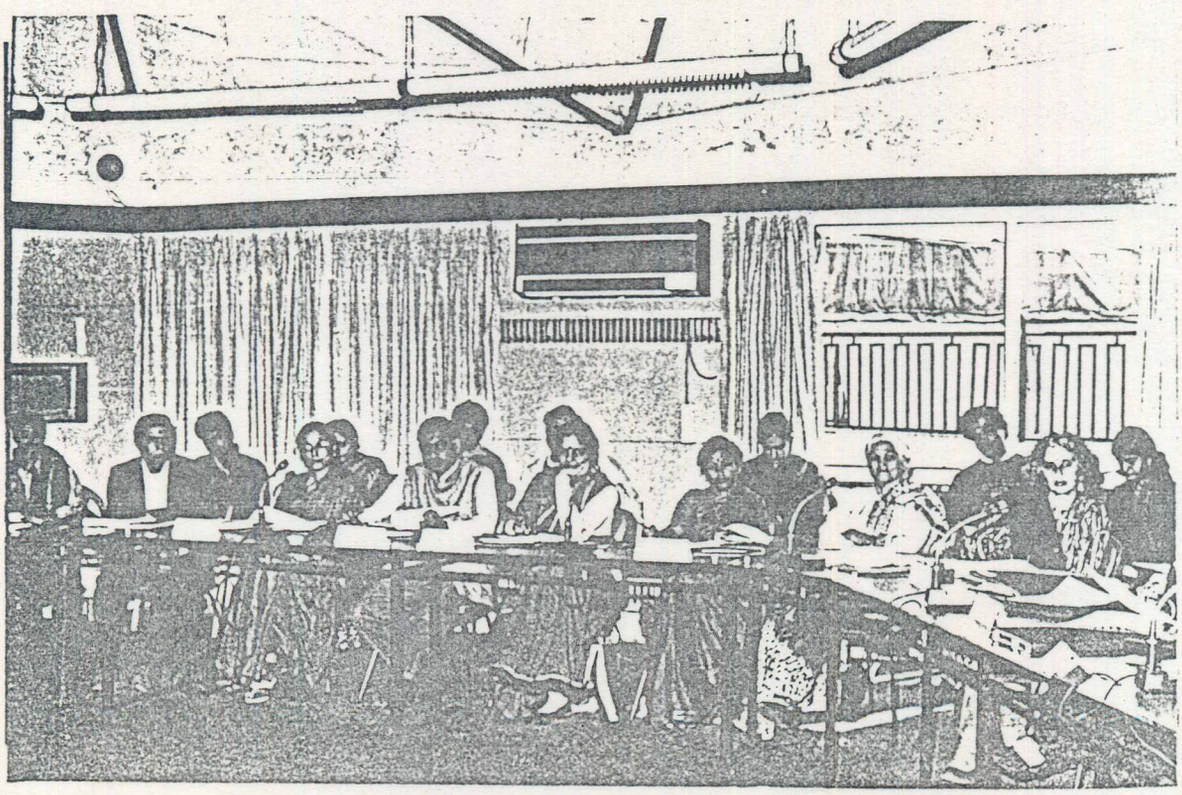

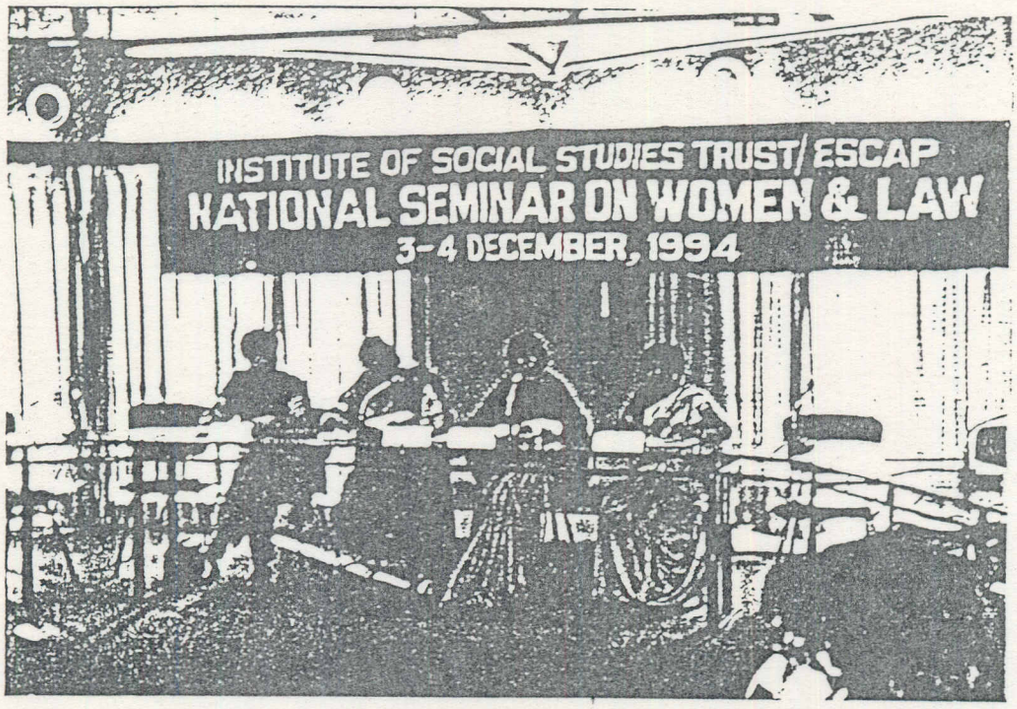
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