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IN THE NAME OF JUSTICE

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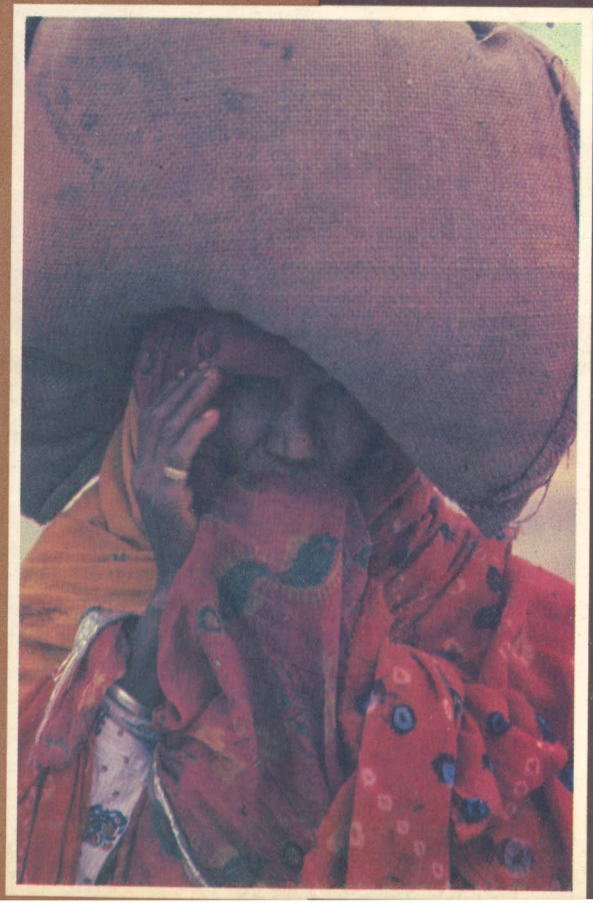
women and law in society

EDITOR
SWAPNA MUKHOPADHYAY



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Edited by
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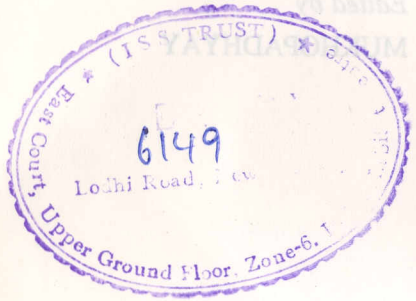

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SWAPNA MUKHOPADHYAY

Law as an Instrument of Social Change: The Feminist Dilemma

SWAPNA MUKHOPADHYAY

Legal reforms have been at the centre of the agenda for strategizing gender justice in India. This has been so, right from the time of nineteenth century social reforms movements, through the period of nationalist struggles, down to the contemporary women's movement. In more recent times, this reliance on the efficacy of law and legal reforms to initiate changes in the social order towards a gender just and egalitarian society gets voiced in what might be termed the first comprehensive document marking the contemporary feminist movement in India, i.e. the *Report of the Committee on the Status of Women in India*. The committee viewed legislation as on of the major instruments for ushering in changes in the social order in the post-colonial state. Legislation, it was felt, can '*act directly as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable*'.[1] Building a gender-just society was perceived as part of the task of nation building, of development and social reconstruction. The role of law in the whole process is perceived as *non-ambivalent*, *well-defined* and *positive*.

Two decades and many struggles later, the answers are no longer so clear-cut, in spite of the fact that the contemporary women's movement in India had in fact coalesced into a *movement* by mobilizing public opinion around the need for legal reforms for redressing individual cases of atrocities against women. The Mathura rape case of 1979, the Shah Bano case on divorce under the Muslim personal law in 1985 or the Bhanwari rape case in 1994 are landmarks that in many ways determined the course and content of the contemporary feminist movement in India.

The Mathura rape case had ushered in a wave of public outcry and was instrumental in bringing about wide-ranging changes in rape laws in

the country.[2] However, even under the changed legal regime, hardly any substantive improvements seem to have taken place in the ground conditions. Although punishments have become more stringent, the rate of conviction has dropped significantly in the post-reform years. The insensitivity of the justice delivery mechanism and the trauma of the rape victim under an unsympathetic system continues unabated.

The Shah Bano case typifies an attempt at societal change aborted at the altar of political exigency. In this case, the Supreme Court had held that a divorced Muslim woman, like divorced Indian women from other religions, has the right to receive a regular maintenance allowance from her husband under Section 125 of the Criminal Procedure Code of India. This judgement had provoked strong reactions from conservative Muslim segments of the country as it was perceived as an encroachment by the state into the arena of Islamic law. The Indian government subsequently buckled under the pressure and passed a new law negating the Supreme Court judgement.

The Shah Bano case not merely exposed the importance of the state in bringing about societal reforms in the face of fundamentalist opposition, it also brought out the multifarious ways in which such situations can be usurped by divisive forces to press for various sectarian goals. In this case, conservative right-wing Hindutva forces started pressing for a Uniform Civil Code, ostensibly to further the rights of Muslim women, although it was clear that a Uniform Civil Code by itself is unlikely to better women's position, unless such a code is also actually empowering for women.[3] It is well known that as personal laws under all religions stand today, they are stacked up against women.[4] As has been argued by some progressive Islamic scholars, Muslim personal laws can be reformed for greater gender justice even without recourse to a uniform civil code.[5] This is exemplified by a recent judgement delivered by the Bangladesh High Court, which calls for a progressive reinterpretation of Muslim personal law in line with modern social values.[6]

In the Bhanwari Devi case an enlightened 'Sathin' under the Women's Development Programme of the Rajasthan Government was subjected to mass rape for opposing the practice of child marriage in the community. The culprits are yet to be brought to book. This case continues to typify the near-impossibility under certain circumstances of successfully challenging deeply entrenched patriarchal power structures through legal channels alone.[7]

The contemporary women's movement is at the crossroads now. In

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the light of the experience of the last twenty years, the question that keeps recurring is whether legal reforms are capable of bringing about gender justice in society. Has law been instrumental in ushering in any change in the gender balance? Can legal reforms or litigation indeed ever deliver the goods? Law has in fact been often used to reinforce the social subjugation of women.[8] Some believe that given the patriarchal nature of the state, and given the reflection of such bias in the framing and dispensation of justice by the judiciary and its functionaries, it is not sensible to expect that law can ever be a potent force for change in the existing social structure: that the hope of ensuring gender justice using law as an instrument of social engineering is an altogether impossible dream.

In a way this ambivalence about law and legal reforms in matters of securing gender justice is nothing new in the history of women's movement in India. Back in the nineteenth century, when social reformers like Raja Rammohun Roy and nationalists like Bal Gangadhar Tilak were concerned with oppressive social practices like 'sati' or child marriage, the tensions between the indigenous scriptural dicta and the colonial heritage of the British legal system always lurked in the background. While Rammohun's denunciation of the practice of sati had been based primarily on his reading of the scriptural text, Tilak's refusal to address social issues through legal instruments laid down by the foreign rulers was based on the perceived illegitimacy of the colonial hegemony in all its ramifications. The social history of the period is replete with the tensions between the liberalist strain of thinking of the pre-independence era which was geared to adopt and adapt from Western liberalist traditions on the one hand and the nationalist revivalist movements which aimed at social reforms working from within indigenous traditions on the other. Much of this tension can be attributed to the dominant political climate of the era.

In the context of the contemporary women's movement, the ambivalence that marks feminist engagements with law as an instrument of ensuring gender justice has a somewhat different character. While demand for legal reforms has been one of the major foci for mobilizing popular support, and specific cases of atrocities on women have been used to further the aims of the movement, the disenchantment with the potential of law as an instrument of social transformation has been triggered by two simultaneous developments. On the one hand, last twenty years' experience of the effect of legal reforms has been perceived to be not altogether positive. At least two essays in this collection

strongly conform to this view. The meticulously researched documentation by Flavia Agnes in this volume on the effects of legal reforms in the area of violence against women covering rape and domestic violence as well as dowry-related violence, suggests that laws, old and new, are structured to operate against the larger interests of women. The treatment of women under institutionalization as argued by Usha Ramanathan in her paper reinforces this view. Neither litigation, nor legal reforms have, in the opinion of the authors been able to deliver gender justice. The dominant social culture within which such justice is sought to be mediated have proved to be much too strong for legislation or judicial activism alone.[9]

The second development can be traced to the growing engagement of feminist research with the post-modernist wave in Western academic thinking and its deconstructionist implications for a monolithic, linear strategy for women's empowerment. Nivedita Menon's paper in this volume reflects some of the analytical complexities that arise in the context of cross cutting discourses in the field of law for gender justice. Menon's paper exhibits the undercurrent of tension between conflicting compulsions of contemporary research in feminist jurisprudence and feminist practice and activism in the legal arena. However, recent thinking in the area has made considerable progress in addressing such tensions squarely by laying bare the complex and contradictory nature of law, and the need for such understanding for successful accessing of law as an instrument of social change. The arena of law is seen as a site for discursive struggles, where the dominant notions of gender, tradition and culture are challenged from a multiplicity of perspectives, including the feminist perspective. The extent to which law is made to serve as an instrument of gender justice depends to a large extent on an informed understanding of the strength, and the potential weaknesses of the dominant ideology of gender and the ability to engage with tenacity and wisdom, to explore the moral and substantive weaknesses of the familial ideology in the legal arena.[10]

A relatively new area of legal discourse in the context of gender is social rights of women, such as the right to health. Usha Ramanathan's paper included in this volume recounts the current status of law on women's health. What it does not explore in depth is the whole range of issues that are linked with women's reproductive rights and their legal ramifications. The Indian Penal Code does not admit of the notion of marital rape, thereby signifying a negation of a major dimension of such rights to women. The link between this negation and the role of

the dominant familial ideology that shapes the contours of women's substantive legal rights in the country is fairly obvious.

The rights discourse does open up new dimensions of analysis and investigation. Social movements which aim at fighting exploitative practices may utilize the moral strength of individual dignity to strategize the fight for justice. However, in order to invest such strategization with some substantive content, it has to be properly contextualized. For instance, the whole issue of reproductive health rights for women in India needs to be seen in the perspective of the dismal status of primary health care in the country, as also the rampant poverty of the masses that negates access to basic needs irrespective of gender.

The papers included in this volume were presented as theme papers in a national seminar on 'Women and Law'. The seminar brought together in one platform a wide range of people—from sitting judges to senior practising lawyers and legal experts, people from civil rights and human rights backgrounds, as well as feminist scholars and activists—to deliberate on the potential of law as an instrument of gender justice. A second major achievement of the seminar was in the area of opening up of new dimensions in the legal discourse on gender issues, such as women's health and law, and institutionalization of women under the law. It is hoped that this collection of papers and the discussions that took place in the seminar will provide added fillip to the quest for gender justice with the help of legal instruments.

NOTES

1. *Towards Equality: Report of the Committee on the Status of Women in India* (1975), p. 102, n. 2.
2. The Criminal Law (Amendment) Act of 1983. See also Annexure 3 in Vasudha Dhagamwar, *Law, Power and Justice: The Protection of Personal Rights in the Indian Penal Code*, rev. edn., Sage, New Delhi (1992) for the text of 'An Open Letter to the Chief Justice of India', dated 16 September 1979 in which four legal experts question a Supreme Court decision to acquit the accused in the Mathura rape case. *Tukaram* v. *State of Maharashtra* (1979) 2 SCC 143. Also see Chapter 8 in Dhagamwar.
3. Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagement with Law in India*, Sage, New Delhi (1996), pp. 65-7.
4. Kirti Singh, 'Unequal Personal Laws', *The Pioneer*, 28 February 1996.
5. Asghar Ali Engineer, 'A Model for Change in Personal Law', *Times of India*, 25 July 1995.
6. Rashid Talib, 'Echoes of Shah Bano Case', *Hindustan Times*, 5 July 1997.
7. See Kavita Srivastava and Sanjoy Ghosh, 'Against Our Will', *Humanscape*, February 1996.

8. Amita Dhanda's work, among others, has shown how the invocation of insanity has been used in India to reinforce women's subjugation in the arena of personal law, and how expressions of dissent under oppressive familial conditions have been interpreted as insanity in divorce proceedings. The examples of cases where deviations from role-models have been interpreted as manifestations of mental disorder that are cited by Dhanda are truly mind-boggling. They include utterly frivolous reasons such as not being able to do housework, acting familiar with strangers, crying in front of guests, receiving gifts with the left hand, not taking daily bath, putting too much salt and pepper in the food, making paranthas when asked to make chapatis, boiling two packets of milk when asked to boil one, etc. See Amita Dhanda, 'Insanity, Gender and the Law', in Patricia Uberoi (ed.), *Social Reform, Sexuality and the State*, Sage, New Delhi (1996). For a critical evaluation of a wide sample of judgements involving all aspects of personal law from the point of view of women's rights, see the collection of articles in Indira Jaising (ed.), *Justice for Women: Personal Laws, Women's Rights and Law Reform*, The Other India Press, Mapusa, Goa (1996).
9. N. Haksar and A. Singh, *The Demystification for Women*, Lancer Press, New Delhi (1986).
10. For a very readable account of this position see Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagement with Law in India*, Sage, New Delhi (1996).

Rights, Law and Feminist Politics: Rethinking our Practice

NIVEDITA MENON

RIGHTS, LAW AND WOMEN: THE GROWING UNEASE

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 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?

RIGHTS AND LAW: EXPLORING THE LINKS

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 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, neither in the realm of the State nor 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.

The source of rights shifted to civil law, with customs, traditions and usages being gradually marginalized. 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 sections 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: 86-7). Thus Marxist critiques attack the illusory nature of rights in capitalist society, not the understanding that the concept of 'rights' has emancipatory potential.

RIGHTS, LAW AND THE STATE: A FEMINIST CRITIQUE

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 'authorize 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 eroticizing the putatively prohibited, pornography law will putatively prohibit pornography enough to maintain its desirability without making it unavailable or truly illegitimate' (MacKinnon 1983: 643-4). MacKinnon's critique of the law and her understanding of gender as dominance of women by men (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 harassment and pornography, formulated in terms of employment rights and civil rights respectively (MacKinnon 1987: 103-16, 163-97). Her critique of abstract rights is based on an understanding of 'the intractability of maleness as a form of dominance' (idem 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 (ibid.). But in that case, where is the feminist critique 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, counterpoising 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 sociogenic 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 approach 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 nationwide 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: 190-5).

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 here 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: 182-3).

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 divisions of caste, gender, class and so on. 'Social antagonism' can only be rendered invisible, not obliterated.[1] Feminists in particular, find this position deeply problematic because the CLS critique of individualism installs the family as beyond justice, as a sphere embodying love, generosity and unselfishness, qualities that are above justice. This mystification of the family as a sphere of love and harmony has been a primary focus 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 conceptualize rights so that they embody connectedness between autonomy and responsibility (Minow 1985a,

1985b, 1983 discussed in Schneider 1991: 311; Fraser 1989: 312-16). 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 do so only 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 new (Weinreb 1991; Feinberg 1992). Agnes Heller for example, argues that rights are 'the institutionalized 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 universal 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). The notion of 'universal values' is certainly not, however, 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 marginalized 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 materialized 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 (Kingdom 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 (Barrett 1984: 171).

A more thoroughgoing feminist critique of rights is provided by Carol Smart. She holds that first-wave feminists needed the concept of equal rights to fight legally imposed impediments. In the late twentieth

century, however, while the law remains oppressive 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' (Smart 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 (ibid.: 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 (ibid.: 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 realization, its denial will negatively affect the people who had held that right. Smart's critique remains, however, 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' (ibid.: 159). What form will these 'demands' take and on whom will they be made? It is not clear how Smart's 'demands' will differ from 'rights' after all. Moreover, the formulation of rights-as-abstract versus experience-as-concrete is misleading. After all, rights are derived precisely from within a universe of shared 'experiences'.

LIMITS OF THE RIGHTS DISCOURSE

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 disfranchised large numbers of Africans who are migrant labour and not citizens of the countries in which they live. 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-determination 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' (Mamdani 1992: 2228-32). 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. As an example one may cite the issues of abortion and rape as they appear within feminist and legal discourse in India.

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 from 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 (MTP) 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 1980s 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 passed in Maharashtra in 1988, and attempts to plug its loopholes and to make it more effective.

Two crucial questions arise from 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 the 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?

Secondly, 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 she is 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 make 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 realized 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 appears 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 characterize 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 reconfirms 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: 166-71). The implication, however, is far more serious than feminist critiques tend to recognize—it is not simply that in such decisions 'the Court passively accepts rather than challenges patriarchal values' (ibid.: 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? 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 and 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 political 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 contextualizing it within a historical framework of current inequalities (Fudge 1987: 49-50).

At the heart of any exercise to locate sexual violence within the law, lies the irresolvable 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: THE INFLEXIBILITY OF LAW

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 object other than 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 inductions 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 institutionalized if it is to be legitimate. The paradoxical nature of this formulation itself points to its impossibility. Without such institutionalization, 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 Hoggett 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 Cossman 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. Nevertheless, 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 Cossman 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 Cossman 1993: 20-1). 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 universalize one such moral universe through law. Both conceptually as well as in terms of political practice, however, 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 constitute 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 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' (ibid.: 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 Cossman 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 reser-

vations 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 . . .' (Douzinas *et al.* 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 over-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' (ibid.: 28). In other words, 'the task of post-modern jurisprudence is to reconstruct the centrality of reason and law in the texts of the law' (ibid.: 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 extent 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 re-situates 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: THE FEMINIST DILEMMA

In liberal theory the distinction between 'public' and 'private' answers 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' (Engels 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 work force.

Feminist scholarship emerging from both liberal and Marxist traditions has 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 universalizes 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' (Spivak 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 harassment, 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 the 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. The focus on legislation is, however, restricted to the realm of the 'private', that is, family and sexuality. There has been no comparable campaign for legislation 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 organize independently of the State. Government initiatives on gender issues are likely to be in the arena of economic issues (Katzenstein 1991). 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 the privatization of the latter. 'To make public' can, however, 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 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. As the 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 reconstruct the public/private dichotomy. They assume 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 individual control over the symbolic interpretation of the body (1993). This argument assumes, however, 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 recesses 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 been to tighten the net of regulation (Snider 1985, discussed in Smart 1989). As Foucault points out, 'silence and secrecy are a shelter for power, anchoring its prohibitions' but they also loosen its holds and provide for relatively obscure areas of tolerance' (1978: 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. 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. The government insisted, however, 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 insisted 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.

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' (1978: 101), the specificity and concretization brought about by law may not necessarily be liberatory.

LAW, JUSTICE AND THE FEMINIST AGENDA

It is generally assumed, as Marc Galanter points out, that law should be the institutionalized 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 in a universal sense as suggested for example, by the term 'social justice'. Both questions seem to evince a negative answer. The first, whether law has the capacity to pursue justice, assumes that power, the unequal dynamics

of which constitute injustice, is juridically derived. But as Foucault points out, while many juridical forms of power 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' (1978: 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 thus: 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 is, however, at odds with law which must take a general form, as norm and as rule. In Derrida's understanding of justice, the very 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'. Derrida emphasizes 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' (ibid.: 955). That is, the responsibility to recall the history, the origin and subsequent direction, of concepts of justice and the law. We would thus be dislodging 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 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 (ibid.: 921-57).

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 thus understands the practice of emancipatory politics, it would seem that 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 establish dominant and oppressive possibilities rather than marginal and emancipatory ones. To move away from legal and State-centred 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.

NOTES

1. CLS scholars include Roberto Unger ('The Critical Legal Studies Movement', *Harvard Law Review* 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), Ch. 6.
2. Ratna Kapur, Workshop at Action India, New Delhi, 9 December 1993.
3. See discussion in Nivedita Menon, 'Embodying "The Self": Feminism, Sexual Violence and the Law', in Partha Chatterjee and Pradeep Jegannathan (eds), *Community, Gender and Violence* (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 'Quranic' 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 Shariat law.
5. See discussion in Ernesto Laclau, 'Letter to Aletta', in *New Reflections on the Revolution of Our Time*, Verso, London (1990), pp. 168-73.

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Some Reflections on Women and Health under the Law

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Unlike the right to a livelihood or the right to non-discrimination on grounds of religion, caste or sex, the right to basic health does not figure in the Directive Principles of State Policy of the Constitution of India. Perhaps operationally it would not have mattered much even if it did, for Directive Principles are non-justiciable in any case. However, the non-recognition of health as a citizen's social right only underscores the low priority it has had in the shaping of public policy.

It is 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. Nevertheless, social and cultural factors affect woman more adversely than man. She is the last to eat, and eats the least. She does strenuous work, within the home or outside. She works mostly in conditions 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.

The gender role assigned to her predisposes woman to stress within the family. In the so-called productive work also, socially constructed genderization makes an impact. Certain occupations, which have associated health hazards such as 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 in these occupations are exposed to physical stresses and chemical toxins, the resultant health problems being aggravated by the prevalent malnutrition, anaemia, parasitic infection, frequent childbirth, longer working hours, climatic extremes—features common

to most Third World countries. Domestic chores involving use of substandard fuels and detergent and cooking in poorly ventilated kitchens also pose health problems. The report adds: 'As the harmful effects of toxic substances vary in males and females, there is a need to understand the variations in the exenobiotic stress.'

With few exceptions, most legislation in India makes no distinction between male and female in the area of health. Some legislation, taking note of the specific features of our society, is, however, protectionist in nature. This paper proposes to focus on certain legislation and the judicial approach to cases arising from it. It also seeks to highlight certain legislation whose language and implementation affects woman's health more adversely than man's. The protectionist kind of legislation would include Maternity Benefit Act, Medical Termination of Pregnancy Act and the Prevention of Immoral Traffic Act. Legislation that adversely impinges on women's health would include family laws, certain areas of criminal law, and employment laws.

The Constitution provides: 'The State shall make provision for securing just and humane conditions of work and for maternity relief' (Article 42). And further: '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' (Article 47). These provisions form part of the Directive Principles of State Policy, not enforceable by any court. The Supreme Court has, however, held that these directives are fundamental in the governance of the country and it shall be the duty of the State to apply them in making laws. In the judicial view, 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 (AIR 1979 SC 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.' We may consider the relevance of such a positive approach to matters relating to population control drugs. We may also bear in mind that the importance of any legislation

is with reference to its implementation. Especially in labour legislation violations continue in many areas. Women being less organized do not have enough bargaining power, which often deprives them of even existing benefits.

LABOUR LAWS

(i) *Maternity Benefit Act.* The Act prohibits the employer from engaging or making a woman work for six weeks after her delivery or miscarriage. The employer is also required not to engage a woman in an arduous task, one which involves long hours of standing or which in any way is likely to interfere with her pregnancy, the normal development of the foetus or is likely to cause miscarriage or otherwise adversely affect her health provided she requests the employer to this effect. This stipulation applies to one month before the date of her expected delivery, or any six weeks before the expected delivery for which the pregnant woman does not avail her leave. The Act gives her the right to claim maternity benefit for twelve weeks of which not more than six weeks shall precede the date of her expected delivery. Woman has a right to payment of maternity benefit for three months. To claim this benefit of wages, however, she must have been in employment for at least eighty days in the twelve months immediately preceding the date of her expected delivery. A woman is also entitled to a medical bonus of Rs 250 if no pre-natal confinement and post-natal care is provided free of charge by the employer. This applies also to a woman who has a miscarriage. She is entitled to leave for a month for any illness arising out of the pregnancy, delivery, premature delivery or miscarriage. The Act also stipulates that she be allowed two nursing breaks in the course of her work till the child attains fifteen months.

The Act is applicable to factories, mines and plantations. 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 establishments covered by the Shops and Establishments Act.

Maternity benefit is calculated by the average daily wage for the period of actual absence immediately preceding and including the day of her delivery and for the six weeks thereafter. The average wage is calculated in terms of the average of the wage payable to the woman during the three calendar months preceding, or one rupee a day, whichever is higher. In *B. Shah* v. *Presiding Officer, Labour Court, Coimbatore* (AIR 1978 SC 12), a plantation company while calculating

the maternity benefit, excluded twelve Sundays being wageless holidays, and gave her the benefit for seventy-two days. The worker claimed for eighty-four days, including Sundays. The employer's contention was that the liability imposed by the statute cannot exceed the amount that the worker would have actually earned in the absence of the contingency of maternity. The Supreme Court upheld the worker's claim on the basis that the term 'week' has to be taken to signify a cycle of seven days including Sundays. In interpreting provisions of beneficial pieces of legislation intended to achieve the object or doing social justice to women workers which squarely fall within the purview of Article 42, the court took into account that the legislation was intended to 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 her previous efficiency and output.

Strangely, the statute provides for forfeiture of maternity benefit. If a woman works in the establishment during the period of authorized absence, her claim to maternity benefit can be forfeited. In the prevailing unequal situation some employers force their employees to work and take refuge under this provision. The Act provides for inspectors empowered to examine its violation. Voluntary organizations may also file a complaint about violation under the Act.

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

(ii) *The Beedi and Coir Workers (Conditions of Employment Act, 1996).* The Act prohibits the employment of women in an industrial premise except between 6 a.m. and 7 p.m. It also seeks to provide creches for children below six years if the establishment employs more than thirty female employees. The Factories Act similarly prohibits the employment of women in factories except between 6 a.m. and 7 p.m. State governments may, however, 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. As stated earlier, however, in many establishments the laws are blatantly violated.

WOMEN AND 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. Previously, abortion was an offence under the Indian Penal Code except when it was done to save the life of the woman. This led to illegal abortions. According to the objects and reasons of the MTPA, doctors had often been confronted with gravely ill or pregnant women whose uterus had been tampered with a view to causing an abortion who consequently suffered very severely. The legislation was 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 was raped, etc., and (3) eugenic grounds where there is a substantial risk that the offspring would suffer from deformities and diseases.

The MTPA allows abortion if the doctor is of the opinion that the continuance of the pregnancy would endanger the life of the pregnant woman or involve grave injury to her physical or mental health; or there is a substantial risk that the child would suffer from disabling physical or mental abnormalities. The anguish caused by pregnancy as a result of rape, or as a result of failure of any device or method used by a married couple for the purpose of limiting the number of children, may be presumed to constitute a grave injury to the woman's mental health. The medical practitioner can take into account the pregnant woman's actual or reasonable foreseeable environment to determine the advisability of abortion. If the pregnancy is twelve weeks old, the opinion of one registered medical practitioner is sufficient; for pregnancy of between twelve and twenty-four weeks, the opinion of two registered medical practitioners is required. In theory the law recognizes the woman's right, as the medical practitioner has to consider only her environment. The matter is thus purely between the two and even the husband's consent becomes unnecessary. In reality, however, a woman's right to abortion is very restricted, and mostly, it turns out to be a family decision. Various court judgements have held that aborting a foetus without the husband's consent would amount to cruelty under the Hindu Marriage Act and hence is a ground for divorce. In *Satya* v. *Siri Ram* (AIR 1983 Punjab and Haryana 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 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 names of his

ancestors'. In *Sushil Kumar Varma* v. *Usha* (1987 Delhi 86) the Delhi High Court opined 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 husband's consent would amount to cruelty. Courts have thus chosen to restrict the absolute right given under the statute.

Cases where permission has been obtained from the court for abortion have been very few. In *Kamalavalli* v. *C.R. Nair and others*, a 28-year-old woman from Madras, 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 *V. Krishnan* v. *G. Rajan and another* (*Law Weekly* 1994: 16), the father of a minor girl sought permission to abort her foetus on the ground that she was kidnapped and was a victim of rape. Under the MTPA, the pregnancy of a girl below 18 years or that of a lunatic can be terminated only with the consent in writing of her guardian. The minor girl did not wish for an abortion. The Madras High Court dismissed the application. It observed that abortion against the girl's will would undoubtedly affect her mental health and possibly her physical health as well. The court observed that the Constitution does not make any distinction between a major and minor in the matter of fundamental rights. The judgement while safeguarding the rights of a minor, however, referred in the process to various religious texts relating to sanction against abortion, and 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.'

One positive feature of the MTPA is that it recognizes 'failure of contraceptives' as a ground for seeking abortion. This relief is restricted, however, to married women. Unwed pregnant women are forced to mention rape or grave injury to mental or physical health in order to seek abortion. Since the rules in government hospitals are rigid, such women prefer to go to private clinics or quacks. This points to the need to extend the MTPA relief in practice to all women irrespective of marital status.

In Shirur, Pune, hysterectomy was conducted on mentally disabled women in 1995 by the home where they were inmates. The episode 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 disabled. As yet, no separate legislation exists for the mentally retarded. The Mental Health Act has yet to be notified in the states and as of now the outdated Lunacy Act applies to both categories. This law 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 mentally disabled) 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. No law permits sterilization to be performed on the mentally ill or disabled.

The issue is complex, involving a woman's right over her body. Besides, given our utter callousness towards the underprivileged, any such freedom to perform sterilization will be misused. Besides, there are degrees of retardation and some women are capable of taking care of themselves though in a limited way. At the same time, there is genuine anguish of many parents that their mentally retarded daughters might become victims of pregnancy due to sexual abuse and about their daughters' hygiene after their lifetime. These are areas which have not been explored.

The MTPA, enacted with a different objective, has also become a tool for aggressively implementing the government's family planning programme. The services of an air-hostess were recently terminated by the Indian Airlines for having a third child in violation of service rules. While the matter has been challenged and is in court, it is a pointer to 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 a 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. It is to be used for improving public health and sanitation, prevention of disease, to provide and improve medical and educational facilities, housing, etc. In 1987, the provision of family welfare including family planning education

and services was added to the list of the objects of the fund. Similar is the case of the Iron Ore Mines, Labour Welfare Fund Act, 1976; the Limestone and Dolomite Mines Labour Welfare Fund Act, 1972; and the Mica Mines Labour Welfare Fund Act, 1946. In all these pieces of legislation, family planning education and services have been added to the objects of the welfare fund. Thus funds meant to improve the conditions of workers having very unsatisfactory living standards are now being used 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 1960s, was considered safe for long, 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 available over the counter and marketed with an aggressive advertising campaign by the government-sponsored media. 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 a large number of our people. In such a case a rigid rule might make even the existing facilities inaccessible to the average woman who does not want a pregnancy.

The Injectable Contraceptives. Net-en is a bimonthly injection that inhibits the production of gonadotropin. 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 available 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 court.

In a public interest litigation filed in the Supreme Court by three women's organizations, 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 Shakti Sangathana—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 organized to inaugurate a twelve-

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 organizers who had brought the women told the women activists that if they informed any of the women about its side-effects, they would not 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 with which the government went about 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 about Net-en that have been listed by WHO. They further state:

> Net-en can be misused by the 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 at least 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 transgressing the Helsinki Declaration on Human Experimentation to which India is a signatory.

The petitioners contend that the government's action is violative of Article 21 of the Constitution. 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 beings from becoming guinea pigs. The campaign and the litigation were among the first to have focused on preventive action in the area of women and health before the courts. The high-dose Estrogen Progesterone (EP) formulations contain a high dosage of female sex hormones. They have a host of after-effects. The low-dosage EP drugs are also considered unsafe but are available without a prescription and are used by many to postpone menstruation. Health activists have sought a ban on 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 to in Parliament. In addition, a campaign was built up against the use of drugs. The government sought

a review from the ICMR which then recommended a ban. The ban was challenged by drug companies in the Calcutta and Bombay High Courts. A stay was granted on the ban, and a public enquiry committee conducted meetings to elicit opinion. The drug industry sought to give an impression that a ban was being demanded on all EP drugs whereas the campaign was only against high-dose EP drugs. After a restrained and watchful campaign when the government showed apathy and the drug companies their muscle power by pitting the health workers against the employees, high-dose EP formulations were finally banned. But the notification for the ban was only for the tablets and not for the injections. A consumer group filed a suit 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 of substandard 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 form is concerned mainly with regulating the import, manufacture, distribution and sale of drugs in the country and does not concern itself with the moral dimension. Another suit was filed before the Supreme Court by the Drug Technical Advisory Board to examine the 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 included are Depo-provera and Net-en. The court has directed the Board to submit its report within three months after considering the relevant materials submitted by both parties and after the results of the clinical trials (*The Hindu*, 19 November 1994).

Failure of contraceptives as a result of which pregnancies have taken place has attracted at least two writ petitions in the Madras High Court seeking compensation from the government on grounds of negligence. While the matter is pending it is indicative of the manner in which the

judicial system is being used in the absence of any other forum of redressal. The above instances indicate the nature of interventions made by the court into some new areas. While the judicial system has given prominence to these cases, it has also had a tendency to restrict the litigation into the use or abuse of a specific type of contraceptive rather than on a critique of the family planning programme in general. Nevertheless, it has become essential to bring such issues to the court owing to the apathy of the official machinery.

FAMILY LAW

Early marriage and frequent childbirths adversely affect women's health. But except for the Special Marriages Act, all child marriage are legal. The Child Marriage Restraint Act merely seeks to restrain child marriages and punish those who solemnize such marriages or are connected with it in any way. The Hindu Marriage Act requires that the bride and the bridegroom should be above 18 years and 21 years respectively. But even if the condition is violated the marriage is legal. A girl marrying below 15 years has the right to repudiate the marriage provided she does it before she is 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 the 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 void would create more problems than it sought 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.

Closely 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 will become rape only if she is below 15 years. The notion of forced sex within marriage is not recognized in the Indian Penal Code.

Under the Hindu Marriage Act and the Special Marriage Act if a party to a marriage is subject to recurrent attacks of epilepsy 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 most instances it has been found to affect women more adversely. One comes across more men seeking a decree of nullity from their wives under this provision. 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.

A few years ago, the Tamil Nadu police conducted a raid in the red light areas of Bombay to set free 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. 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 the writ of *habeas corpus*. But the litigation exposed the fear and ignorance of the illness that existed among the authorities.

The Immoral Traffic (Prevention) Act merely seeks to prevent commercialized prostitutes or 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 355) in a judgement upheld a Goa legislation that gave powers to a health officer to hospitalize 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/her 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 necessary. The court while giving the right of representation against the action of isolation observed.

> This policy decision is taken by those 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, the field of exercise being very limited.

The observation to some extent explains the view 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 unknown in our country. The status of children born by artificial insemination, the legal status of surrogate mothers, 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 legislation 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:

> State 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 that are parties shall ensure to women appropriate services in connection with pregnancy, confinement and post-natal care, 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. Legislation in itself cannot, however, curb deep-rooted prejudices and traditional custom that are detrimental to women's well-being. A discussion on the area of women's health and the law will help us in fashioning strategies for future course of action.

Women and Institutionalization

USHA RAMANATHAN

> 'Are prisoners persons? Yes, of course.'
>
> —Krishna Iyer J., in *Sunil Batra (II)* v. *Delhi Admn.* (1980) 3 SCC 488 @ 504: 28

Law making is an exercise which exerts the genius of the legislature and the judiciary. Generally stated, legislated law is in recognition of a problem,[1] definitional of its constituency, and empowering of its functionaries. It sets out processes for action, and prescribes sanctions for breach of its provisions. This law effectively legitimates the perspective, the reach, and the power and control dictates that is built into it. Law defines the contours of State power and aligns the rights of persons in consonance with this definition.

Judiciary-made law is essentially interpretative, and is built upon the bricks of legislated law or of the Constitution. In their juristic endeavour, courts may widen their role as interpreters and constitutional guards-persons to become conscience-keepers of the law and the justicing system. They may attempt to bridge the distance between law and morality, and law and justice; in this effort, they may transplant their notions of justice, fair play and equity, along with their subjective understanding of what constitutes morality and justice.[2]

It is within these generalizations that the law of institutions is positioned. Prisons,[3] protective homes,[4] corrective institutions,[5] children's homes,[6] hospitals for the mentally[7] and physically ill[8] and incapacitated—the common denominator is that they either owe their right to exist to statutes,[9] or are governed in some of their facets by the law.[10] The walls of these institutions adapt themselves to a varied range of meanings—from protection, care and shelter to custody, punishment and a response to 'dissent' and 'deviance'. Yet, the distinction between the different purposes of institutionalization is threatened with obliteration when its inherent nature is explored, and its effects assessed.

The denial of liberty is the most evident consequence of institutionalization. The closing in of the walls around the inmates and the machinery of the institution, goes beyond restraint on movement.[11] In the interaction between women in institutions and the law, is the subsuming of privacy; the relegation of dignity, intimacy, creativity and social and physical mobility to a subservient position; the stigmatizing that is automatic on entry into an institution and the effacing of women's autonomy.[12] The dominant motif is of authority, control and uniformity. With the sanction of the 'procedure established by law',[13] this process acquires constitutional clearance.

The law envisions both voluntary and involuntary entry into institutions: voluntary where she may be kept within the confines of State institutions for her protection;[14] or where the family may require the State to help them with a mentally ill relative;[15] or a recalcitrant child;[16] or where a woman appeals for shelter while she finds her feet in changed circumstances.[17]

Apprehension and detention of beggars,[18] neglected children,[19] wandering mentally ill,[20] alleged offenders, women who are a nuisance in the eye of the law[21]—may find themselves in involuntary incarceration. Ingress into institutions is a matter of relative ease.

The law ordains that exiting from an institution be an ordeal for any woman.[22] There is a denial of autonomy which, in conjunction with choicelessness, requires a support structure beyond the institution to receive the woman upon her leaving the institution. The presumption of incapacity—to make decisions for herself, and to care for herself—is entrenched in the law. The possibility of vulnerability and exploitation which may pursue a woman who leaves an institution is converted into a certainty by the law. This paternalistic concern begins with bringing the woman within the confining-protecting walls of an institution and does not extend to the vulnerability and exploitation of the woman who does not encounter the institutional system.

Security, care and protection are an integral part of the troika of law, women and institutions in their interactive manifestation. The absence of standards of care and conditions within institutions is stark.[23] The criminality[24] that becomes possible in the guise of legitimated activity within the institution, and the nature of legislated law which fails to prevent it, is of significance. Sexual exploitation of women in institutions, extraction of involuntary labour ignoring legality[25] and the repression that is made possible by those with control within the institution[26] negates the relevance of institutions as places of, and for, safety. The institution as systemic support for women is then set against

the helplessness that the system engenders for the institutionalized woman.

A perhaps unintended, but invariable, effect of institutionalization of women is the endorsement of the notion of 'deviance' to escape which judgement she may have had to resort to institutional shelter. The law is staid, and the laws' functionaries necessarily conservative. Breaking through stereotypifications is not natural to them. The stated purpose of institutionalization is, in many contexts, the normalization of the institutionalized person.[27] This 'normalizing' of 'deviance' may run counter to the reason for which the woman seeks the institution's support. Yet, this anomaly seems inherent in the law itself.

It appears that the existence of law which creates structures of authority, and provides control and power to State functionaries, within institutions, while it denies liberty and autonomy in all its facets to the institutionalized women, could be a prescription for injustice and oppression. Yet, it is to the institution that a woman may have to turn when she faces rejection from within her family, or she needs to dissent, or to break out of oppressive stereotypes which may gain for her the reputation of being deviant.[28] The institution as a stopping place in a woman's journey to breaking out of socially prescribed confinement cannot be discounted. The remedy lies not in dispensing with the institution altogether. It lies in understanding the nature of law, of empowerment, of the closing in and opening out of institutions, and of reorienting the law and law's processes to ensure protection and justice to the institutionalized woman.

The inadequacies and illegalities in the implementation of the law on institutionalization would constitute one sphere of inquiry. More fundamental still is the statement within the law which appears to encourage, and legitimate, an unimaginative institutional order. This essay is a preliminary exercise in providing an illustrated exploration of the law on institutionalization.

I

A prison is a soundproof planet, walled from view and visits regulated, and so, rights of prisoners are hardly visible, checking is more difficult and the official position of the repository of power inspires little credibility. . . .

—*Sunil Batra* v. *Delhi Admn.* (1978) 4 SCC 494 @ 551: 161

There are a variety of guises in which women inhabit the universe of the institution: as 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. . . . The prison, the hospital, the 'home' and the lock-up provide the institutional setting. As for the woman herself, she is almost invariably characterized by a combination of 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 bureaucratized 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 institutionalization—penal or 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

[I]t is surprising that the Government of Bihar should have come forward with the explanation that they were constrained to keep women in 'protective custody' in jail because a welfare home maintained by the State was shut down.

—*Hussainara Khatoon (III)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 93 @ 96: 2

It is declared that admission of non-criminal mentally ill persons to jails is illegal and unconstitutional.

—*Sheela Barse* v. *Union of India* (1993) 4 SCC 204 @ 211: 12

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.[29] The deliberate misuse of this power, backed by the presumption of 'good faith'[30] 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 to the police this power of discriminating between a sane person and a 'wandering or dangerous lunatic'.[31] 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.[32] The guardians of the law were not even aware that time and legislative will had replaced the old law with a more recent enactment—the Mental Health Act, 1987—and that the Lunacy Act had ceased to exist.[33] The existence of this power, sanctioned by a naive law touching in its faith that it would be used in the interests of humanity, is characteristic of a blindness to the reality of the abuse of power, and its encashability.[34]

The interchangeability between the punitive and the protective or curative institution informs what followed. For, the traumatized 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 lunatic' (NCL) persons in jails.[35] The anomaly 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: this in a polity which goes by the dictum that ignorance of law is no excuse! Such is the Rule of Law.[36]

It was intervention from the Supreme Court, assisted by a Commissioner, which ensured an end to the incarceration of 225 of the alleged NCLs; 141 were released even before the Commissioner could reach them.[37] 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 even 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 unrecognizable change.[38]

III

In cases where the parent, relative, husband or guardian of the discharged inmate fails to make his own arrangement to take charge of the inmate at the protective home or corrective institution, the inmate on discharge shall be sent under the charge of an official of the home or institution who shall be responsible for the care and safety of the inmate until she is handed over to such parent, relative, husband or guardian. . . .

—R.39(5), Suppression of Immoral Traffic in Women and Girls (Gujarat) Rules, 1985

The reluctance of the law and law's processes to discharge women once they are drawn into custody lends another dimension to institutionalization. Access to justice and the resourcefulness of the institutionalized woman influence her attempts to leave the institution. In *Hussainara Khatoon*,[39] it was the judicial device of Public Interest Litigation (PIL) which reintroduced 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 had to serve if convicted. At one time, there were 18,133 persons, men and women, who were resident in the jails of just one state—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, who 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 anguish, 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.

A woman's inability to furnish surety after she had been granted bail by a court continues to keep her in prison for prolonged periods.[40] Being picked up on drug trafficking charges under the Narcotics Drugs and Psychotropic Substances Act (NDPS), 1988 can keep a person in prison—without bail, and whether trial commences or not—for periods up to half the maximum sentence prescribed for the offence if she were convicted. And a hefty surety has then to be provided.[41] It is significant that a large percentage of women arrested are suspected offenders under the NDPS Act.

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

'Juvenile' means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.

If any police officer or any other person or organization . . . is of the opinion that a person is apparently a neglected juvenile, such police officer or other person or organization may take charge of that person. . . .

—Ss. 2(h) and 13(1), Juvenile Justice Act, 1986

'Child' means a person who has not completed his fourteenth year of age.

1. No child shall be required or permitted to work in any establishment in excess of such number of hours as may be prescribed for such establishment or class of establishments.
2. The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour.
3. The period of work of a child shall be so arranged that inclusive of his interval for rest, under subsection (2), it shall not be spread over more than six hours, including the time spent in waiting for work on any day.
4. No child shall be permitted to work between 7 p.m. and 8 a.m.
5. No child shall be required or permitted to work overtime.

6. No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.

—Ss. 2(ii) and 7, Child Labour (Prohibition and Regulation) Act, 1986

The anomaly of institutionalization pervades law, even where it may not be patent. Take child labour. Labour laws do not merely do nothing to prohibit child labour, they actually encourage it.[42] 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.[43] This effectively alters the meaning of 'minority' for certain purposes, casting a load of responsibility on the child.[44] 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.[45] There is an expectation of responsible conduct and resistance to exploitation that is manifest in labour laws which make little distinction between child labour and adult labour. The child at work is expected to possess the attributes of responsible, income-earning adulthood. Yet, this is in contradiction with the denial of autonomy and of decision-making for oneself that constitutes the fundamentals of the Juvenile Justice Act. Where a child is picked up on the presumption of being a neglected juvenile, it is no protection that she has spent years working for wages. The institution is authorized to engulf her.

The need for harmonizing such obvious dissonance in the law seems to have escaped the legislator. The working child could find herself institutionalized 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 capacity and, therefore, her right to re-enter society. The plight of street children who are easy victims of exploitation both without, and within, institutions is particularly poignant.

V

There have been repeated allegations that the lady patients who have been cured are not being released from the hospital. At one stage the explanation offered by the hospital authorities and the state administration was that the relations, even though notified, are not taking them back.

—*Rakesh Chandra Narayan* v. *State of Bihar*, 1989 Supp (1) SCC 644 @ 655: 23

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 twelve persons in Alipore jail who had been declared mentally fit in December 1991 still inhabiting the jail.[46] The reason was that the wheels of law creak into action in their own time, if they do so at all. The Mental Health Act, 1987, and the Indian Lunacy Act, 1912 before it, involve the judiciary in endorsing an order of restraint on a person who is seen as requiring institutionalization due to unsoundness of mind.[47] 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.[48] Four such inmates were awaiting discharge orders from the SDM, Barrackpore. Dhanda and Murthy record in their report their efforts to convince the SDM of the need for expedition. That was on 20 August 1992. On 21 September 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.[49]

It is more involved than even this where the institutionalized person is a woman. For there is no recognition of self-sufficiency or autonomy in a woman. The release of a woman 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.[50]

The fact that she was taken into custody for no misdemeanour or offence adds to the injustice of this situation.[51] It is aggravated by the non-responsibility of the institutional authority in ensuring contact with her family or community.[52] 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 institutionalization 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 in 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.[53] 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 address.[54] And Tara, a dumb girl, yearning to return to her family, but without an address to help her.[55] 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 24 November 1992, and continuing in prison till Gopal reached her in May 1994 because police reported that her address was not known.[56] 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.[57] In each of these cases the irresponsibility of the detaining authorities is in complete discord with the 'good faith' that is presumed by the law, and which protects the State's agent from accountability. Differently located, Dhanda and Murthy speak of this graduate woman lodged in Behrampore jail who was escorted to her parents' home. They refused to take her back. And she was brought right back to the jail because the law knows no means of permitting her own risk and responsibility.[58]

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 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 this option. 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:[59] these premises being seen in-

variably as two parts of one truth. Poverty, minority and being a woman find a similarity of treatment. Vulnerability, particularly because of poverty and presumed 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

All institutions that hold people against their wishes need outside supervision, for, by definition, they lack internal checks and balances. . . .

—*Sunil Batra* v. *Delhi Admn.* (1978) 4 SCC 494 @ 556: 184

No inmate shall be allowed to see visitors or receive letters without the express permission of the Superintendent and no male visitor shall be permitted to interview any of the inmates except in the presence of the Superintendent or any other member of the staff of the home so authorized by the Superintendent in this behalf.

No letter shall be delivered or sent by an inmate unless the Superintendent has satisfied himself/herself that its transmission is unobjectionable. With the previous sanction of the Chief Inspector and in very special cases, the Superintendent may grant to any inmate leave of absence for a period not exceeding a week on the death of parent or guardian or to visit the parent or guardian who is seriously ill. The Chief Inspector may extend the leave granted by a period not exceeding two weeks. The leave granted may at any time be cancelled without assigning any reasons and the inmate recalled.

Discipline and Punishment

(1) The following acts are forbidden in a protective home and every inmate who wilfully commits any of them shall be deemed to have disobeyed the regulations of the protective home:
   (a) quarrelling with any other inmate . . .
   (b) use of insulting, abusive or threatening language . . .
   (c) feigning illness;
   (d) wilfully bringing a false accusation against any officer or inmate . . .
(2) The Superintendent may award any of the following punishments for the act or acts specified in sub-rule (1):
   (a) deprivation of play hours;
   (b) temporary cessation of visits from parents or guardians; and
   (c) change to labour of severe nature for a period not exceeding three months.

—Rr. 31, 32 and 33, Suppression of Immoral Traffic in Women and Girls (Jammu & Kashmir) Rules, 1959

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 bureaucratization, the control, the regimen and the interdependence of the executive-judiciary combine in the functioning of both institutions, as well as their relationship to statutes and statutory power leave 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.[60] 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 under 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.[61] The power of a magistrate extends to making enquiries about her antecedents, her personality, conditions of home and prospects of rehabilitation and to making 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 are significant. The inmate of a corrective institution has to demonstrate 'a reasonable probability' that she 'will lead a useful and industrious life'.[62] When an 'offender' who is in a corrective institution is discharged, the Act legitimates State surveillance of her 'activities and movements'![63] A denial of fundamental rights which extends even beyond her incarceration.

These legal prescriptions for interchangeability merge the identity of an offending woman with the woman seeking refuge, once they are within the institution. The corrective institutions, housing 'offenders' and intending to subject them to 'such instruction and discipline as are conducive to her correction'[64] blend 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.[65] It was also an object lesson on the use of statutory institutions as perceived by State authorities.

The Home was established as a protective home under the erstwhile Suppression of Immoral Traffic Act (SITA) [now ITPA]. 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, tuberculosis, skin infections, mental retardation, mental derangement. . . . The lackadaisical maintenance of records makes supervision of institutional functioning extremely difficult. The impenetrable walls of closed institutions hide a range of exploitation. If not for the 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 institutionalization into a less restrictive alternative. An exercise in 'management jurisprudence' that the Supreme Court initiated in the case of the Ranchi Mansik Arogyashala[66] which converted issues of liberty into stodgy arrangements is representative of the hazards that could deflect judicial attention and bureaucratic concerns.

VIII

From the materials available, we find that there is no drug treatment for patients who are unruly or not physically controllable otherwise and as a rule such patients are usually tied up with iron chains to some fixed pillar or doorframe, until in due course normalcy is restored.

—*Chandan Kumar Banik* v. *State of West Bengal,* 1995 Supp (4) SCC 505 @ 506: 4

State control over the inmates of institutions holds the potential for unchecked violations of basic rights. The perception of threat,[67] convenience,[68] practicability[69] or economics[70] may occasion such violations. Or they may be instances of blatant abuse of power.[71]

The hysterectomy controversy that erupted in a home in Pune is representative of the role of discretion and judgement in State action.[72]

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 disabled 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 childbearing. 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 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 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-advisedness of segregation and isolation when a person is detected as being HIV positive, the misplaced emphasis on high risk groups. . . . 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 their HIV status.[73] The Supreme Court, too, has not shown particular interest in distinguishing between a HIV positive status and the contracting of AIDS. At one stage in the proceedings, the court ordered segregation of all inmates of the home who were HIV positive.[74] 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.[75] The uninformed response to AIDS has meant one constitutional mandate lost to institutionalized 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 from the Home, submitted to the court and therefore a public document, reveals the HIV status of each inmate, column after column (see Table 1).

TABLE 1. MEDICAL EXAMINATION REPORT
GOVERNMENT PROTECTIVE HOME, AGRA

Name of Inmate	*HIV Report*	*VDRL Report*	*Gynaecology Examination*	*TB*	*Psychiatric Examination*
Kaveri	Negative	NAD	NAD	NAD	NAD
Padma	Negative	NAD	NAD	NAD	NAD
Kalpana	Positive	NAD	NAD	NAD	NAD
Seema	Negative	NAD	NAD	NAD	NAD

Note: Names of the inmates have been changed in this table.
NAD = no abnormalities detected.

Source: Inspection Report dated 24 January 1997 filed by the District Judge, Agra with the Supreme Court in the matter of *Upendra Baxi* v. *State of Uttar Pradesh*, W.P. (Crl.) no. 1900 of 1981.

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*.[76] 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 internalize. 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.[77] 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 untrammelled abuse in the treatment of persons in restraint.

The immobilizing and hounding of any person who challenges the exploitation that institutionalization facilitates was witnessed in Radha Bai's case.[78] As Assistant Director in the Social Welfare Department of the Government of Pondicherry, Radha Bai received complaints that a protective and shelter home under her jurisdiction was being used by a Minister, with the connivance of the Superintendent of the Home, for what is euphemistically termed 'illegal and immoral purposes'. She

protested. This was in 1973. Her adversaries included the Home Minister of Pondicherry who, as the court recorded, 'continued to use the women's institutions as before for his immoral activities with the help of some officials'. She was molested, transferred, criminally charged, suspended from service and attempts were made to commit her to prison on the ground that she was a lunatic. She undertook a fast, until she extracted assurances from the Chief Minister and Union Minister for Tourism that action would be taken. In 1978, she sought the Governor's intervention, but the Governor's direction that an enquiry be held was ignored. Her attempt to enlist the support of the Madras High Court, in 1979, failed when, in 1983, it held the Governor's direction incomplete and inexecutable, and washed its hands of the affair. In 1984, she approached the Supreme Court. In 1986, the court ordered expeditious hearing. It was 1995 before the court ordered the District Judge, Pondicherry, to enquire into her allegations. And, in 1995, acknowledging the plausibility of her version of the events, and the credibility of such allegations, the court ordered that the benefits of service, including pension, be restored to her. Also, as 'compensation for the loss of her reputation and honour and the agony she had to suffer in the long battle', the court awarded a lump sum of Rs 3 lakhs, payable by the Pondicherry Government and the erstwhile Home Minister, jointly. A vindication such as this is not often witnessed in the law!

Yet, the court's circumambulation around the plight of the captive women in institutions is painfully evident.

The helplessness engendered by institutionalization is, again, reflected in 12-year-old Parminder Kaur's pitiable experience, which is an indictment of the system that permits institutionalization to abet such abuse.[79] 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, and 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 gutter. When she attempted to re-enter the institution—for where else could she go?—she was threatened and chased away by the staff. It was a rickshaw puller who helped her to an all-women police station, at which point the press picked up her story.

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. It also makes them easy prey. 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 in 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. Any person entering an institution is reduced to a condition of powerlessness and dispensability. 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

Class actions, community litigations, representative suits, test cases and public interest proceedings are an advance on our traditional court processes and foster people's vicarious involvement in our justice system with a broad-based concept of *locus standi* so necessary in a democracy where the masses are in many senses weak.

—*Sunil Batra* v. *Delhi Admn.* (1978) 4 SCC 494 @ 508: 23

This is not an adversarial litigation and the State Government must, therefore, be aware of that position and open up in an appropriate degree to help in solving the problem with an adequate dose of humanitarian responsibility.

—*Chandan Kumar Banik* v. *State of West Bengal* 1995 Supp (4) SCC 505 @ 506: 7

Juristic activism attempted to remedy the insides of institutions when it redrew the contours of identity, and rights, of prisoners. It was in Francis Coralie Mullin[80] 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 recognized. 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 commingling 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. In 1994, the Director of Medical Services, Madhya Pradesh, admitted on affidavit that in the Gwalior Mental Hospital 'sometimes medical attendants have no option but to chain a particular violent patient on medical advice'; that 'it is not true that certain wards have only naked inmates. But sometimes an inmate may be naked because of unsound mental condition and 'may even become violent and tear his clothes'. This was the State's response in a PIL[81] which followed a news report, with accompanying photographs[82] showing inmates of the hospital in a state of complete undress. It needed the Supreme Court to condemn the 'uncivilized practice of chaining of these inmates' and to 'take up remedial measures post haste' in the matter of the naked inmates.

The need to reconcile the law with this constitutional scheme is urgent and apparent. The closed nature of the institutions, however, defies change. More than mere 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.

This is an appropriate juncture to investigate the importance of understanding the content of human suffering, and of basic rights as they are understood in Social Action Litigation (SAL). SAL represents the 'compassionate jurisdiction' of the court. Compassion, however, is a subjective emotion, much as justice oftentimes proves to be a matter of perspective. And judgements rendered by courts are no less binding for being unimaginative, uninformed, inadequately formed or arising from an understanding which excludes justice to the affected class of persons. The case of the Agra Protective Home where every inmate is awarded an AIDS status, and the court endorses the continuance of this order of treatment has been mentioned. Judicial power which permits the court to ignore, or negative, the existence of the complexities of an issue enabled the court to authorize segregation of persons found to be HIV positive or suffering from AIDS—and the distinction was not appreciated.[83] It is in the nature of things that the recalling of an order, or its watering down, calls for a greater effort at convincing the court, which perhaps accounts for the limited revision of the order which permitted

segregation if the attending doctor deemed it necessary[84]—placing the onus and ethical responsibility on the doctor, while not addressing the fundamental issue of the juridical rightness of segregation.

The extraordinary energies and legal imagination that SAL demands may well be beyond the sustained effort of a court. The collapse of judicial energies while dealing with an issue of some scale—and the relevance of SAL originated in the persistence of systemic problems affecting large classes of people who would otherwise have no remedy in law—could result in an abrupt conclusion to a case which, while premature, may end up reinforcing those very structures of power, control and accountability that the case sought to dislodge. In the range of cases relating to mental health institutions, Shahdara highlighted the lack of protection that women faced within the institution, leading to their callous and unquestioned (till a SAL brought it to court) exploitation;[85] Ranchi was a litany of maladministration and abysmal conditions of care and treatment within an institution;[86] West Bengal and Assam represented the complete—and unconstitutional and illegal—merger of the prison with all other institutions of 'safe custody' and mental health care;[87] Gwalior was an admission that the mentally ill are lesser beings in the eye of the State;[88] and the Pune hysterectomies gave an added dimension to State power, pragmatism and efficiency.[89] There were clearly at least two things that were wrong with these institutions: one, that they entertained a flawed understanding of the existence, and meaning, of the rights of the residents of these institutions. The other problem lay in the bureaucratization of the institutional apparatus, which gave a tertiary position to humanity even while it gave status and empowerment to those controlling the institutions.

Yet, after years of grappling with conditions of neglect and attitudes of disinterest, it was 'requisite changes in the administrative set-up' at the Ranchi Mansik Arogyashala that was the court's closing response.[90] The designation, the scales of pay, the service rules for the institutional bureaucracy, the appointment of a Director. . . . In substance, the recommendations adopted by the court had not a jot to do with the victims of the system: they merely created additional status openings in institutional positions! Some additional construction and renovation was advocated, quickly followed up by a scheme to sell surplus land to raise capital. And the necessity to make the hospital an autonomous institution was 'overemphasized'. Impressed with its prescription in the Ranchi case, the court pronounced similar orders in the matters of the Gwalior Mansik Arogyashala[91] and the Agra Mansik Arogyashala[92]—

only, the portion relating to improving the construction and services was lost in the reiteration! The use of SAL to add on to an administration, while yet doing nothing about making it accountable—particularly following upon the harrowing tales that had been reported to the court from within these institutions—is inexplicable.

It must be stated that these are words intended to introduce caution and awareness into the justicing system. They are an affirmation of the need for responsibility and responsiveness while dealing with issues of human suffering and not an indictment of SAL. For, SAL represents the legitimation of the judicial system in providing access to the justicing system to large segments of the population who have thus far been excluded from asserting their legal and constitutional rights, and in providing an avenue for the judiciary's participation in taking law, justice and constitutionalism to those it could not otherwise reach.

X

It is in the nature of the law to continue unchanged, to remain entrenched in statute books, unless prompted by interests that provide it with kinetic energy. Years of disuse does not wither it. Law has an infinite capacity for waiting in patient dormancy. That is, there may be no actual use of the law for long periods of its existence. Its inertness could be mistaken for its having become non-existent, yet its empowerment structures continue unimpaired. The law's capacity to be selectively activated by those empowered by it remains so long as the law itself stays on the statute books.

The existence of the Epidemic Diseases Act (EDA), virtually unchanged since its enactment in 1897, is a case in point. It was the spread of the 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'.[93]

It is telling 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.[94]

It was this Act that was invoked in 1994 by the Delhi government 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.[95]

This experience of institutionalization, which finds its legality in a law tucked into the folds of history, and culled out as expediency dictated, shares the characteristics of the rest. It is involuntary, protective of society while callous about the victim, ill-informed and frightening. Arising from colonial consciousness of disease and protection, antedating medical advance, and constructed at a time when rights awareness was yet to evolve and the urge to curtail State power had pre-World War meaning—its silent bursting on to the scene in 1994 is testimony to the survival capacity of legislated law.

A Citizen's Report[96] narrates the anxieties of the father of a 15-year-old girl who had been sent to the IDH on the faint suspicion raised by a slight swelling in the arm. A 10-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 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 to 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.[97]

This compulsory institutionalization, however, is not attended by the right to treatment, the right to information, the right to informed consent, or to confidentiality. There is a denial of other rights which lie entombed in the Constitution. Institutionalization in this context too is a statement of control, and strictly a one-way process. An institutionalized person, by this understanding, is a victim who with institutionalization is further victimized.

With the subsidence in the fear following the plague scare, the debate on the blanket powers under the EDA has also abated—perhaps to become an issue only when the next assumption of powers by the State

occurs, pitting the fear of the epidemic against the fear of the legitimated might of the State. There is no denying the truth in the dictum that public memory is short.

XI

The Government in a social welfare State must set up rescue and welfare homes for the purpose of taking care of women and children who have nowhere else to go and who are otherwise uncared for by society. . . .

—*Hussainara Khatoon (III)* v. *Secretary, State of Bihar* (1980) 1 SCC 93 @ 96: 2

We think that the right to life includes 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 commingling with fellow human beings.

—*Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi* (1981) 1 SCC 608 @ 618-19: 8

There is a lack of imagination that pursues institutionalization.

It is evident in the dearth of halfway homes, the closing in of institutions and the irrelevance of the skills imparted to the resident women in coping with life beyond the institution. The open jails advocated for men[98] are not considered an option for women, for there are too few women in prison to make this proposition feasible! The continued reliance on the family of the institutionalized woman is oblivious to the reasons which oftentimes lead women to the institution. The established institutionalized order appears to reinforce lay notions of dissent and deviance, and therefore close in on the woman. Stigmatization is a natural corollary of institutionalization.

The law, and its empowerment—and disempowerment—mechanisms, contribute to this unequal, inequitous order. An understanding of the character of law, the effect it has on institutionalization and the mould in which it may better the position of the woman in an institution, or needing one, is essential. The nature of State power, and the relationship between law and State power, has to be recognized before a change can be effected. The role of the institution in the lives of women who become its inmates needs explicit acknowledgement. The interface between law, women and the institution must needs be accordingly reordered if justice for the woman is to cease to be a casualty.

NOTES

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1. The creation of statutory bodies under the Bureau of Indian Standards Act, 1986 or the All India Council for Technical Education Act, 1987 are instances of exception to this general rule. The control over material resources that the State acquires under the Coal Bearing Areas, 1957 (Nationalization) Act constitutes another kind of exception.
2. See e.g. *Union Carbide Corporation* v. *Union of India* (1989) 3 SCC 38, where the court used the plight of the victims of the Bhopal Gas Disaster as justification for endorsing an inherently unjust settlement: *Charan Lal Sahu* v. *Union of India* (1990) 1 SCC 613, p. 705, para 124 where the Supreme Court said: 'To do a great right', after all, it is permissible sometimes 'to do a little wrong'. See also, Article 142 of the Constitution.
3. See e.g. S. 266(b), Code of Criminal Procedure, 1973.
4. Ss. 2(g) and 21, Immoral Traffic (Prevention) Act, 1956 (ITPA).
5. Ibid., Ss. 2(b) and 21.
6. Ss. 9 to 11, Juvenile Justice Act, 1986 (JJA).
7. Mental Health Act, 1987 (MHA).
8. S.376D, Indian Penal Code. See, especially, the powers under the Epidemic Diseases Act, 1897 (EDA).
9. See e.g. supra notes 3, 4, 5 and 6.
10. See e.g. supra notes 7 and 8.
11. See generally, Erving Goffman, *Asylums—Essays on the Social Situation of Mental Patients and other Inmates* (1961).
12. Chandra Murthy, Sudha Bharath and R.S. Murthy, in 'Information for Women Undertrials and Convicted Individuals' (1995) identify loss of autonomy, intimacy, privacy, physical activity and personal autonomy as losses occasioned by imprisonment. This forms part of a draft manual prepared by the Department of Psychiatry at NIMHANS, with support from the National Commission for Women as part of a mental health care programme for women in custody. The experiment was started in some jails in Karnataka.
13. Article 21, Constitution of India.
14. ITPA.
15. MHA.
16. JJA.
17. There is no statutory institution in which such a person may seek shelter. The 'protective home' under ITPA therefore becomes a catch-all institution.
18. See e.g. Bombay Prevention of Begging Act, 1959 cited in B.B. Pande, 'Vagrants, Beggars and Status Offenders', in Upendra Baxi (ed.), *Law and Poverty* (1988), p. 265, n. 30.

19. Ss. 2(g), 13 and 14, JJA.
20. MHA.
21. Ss. 7 and 8, ITPA.
22. See e.g. S. 17A, ITPA.
23. *Rakesh Chandra Narayan* v. *State of Bihar* 1989 Supp (1) SCC 644.
24. Ss. 376B, 376C and 376D IPC are instances of recognition of this criminality. Custodial rape and custodial death are other examples. Radha Bai's case highlights the problem of exploitation of women in custodial institutions by Ministers in governments, who use their position to abuse their power and to get beyond the reach of the law: *Radha Bai* v. *Union Territory of Pondicherry*, (1995) 4 SCC 141: see infra.
25. The piles of dirty clothes which the matron of Ambala jail would not get 'washed by jail dhobis, who could not do the job half as well as these young women (prisoners), and who would have to be paid besides'; the fine embroidery the women prisoners worked on as a 'labour of love', are graphically described in Primila Lewis, *Reason Wounded: An Experience of India's Emergency* (1978), p. 116.
26. Ibid. is replete with this experience. See also Ss. 376B, 376C and 376D, IPC and S. 9, ITPA which are in statutory recognition of sexual exploitation within institutions.
27. S. 10A(3), ITPA, for instance, places a woman in a corrective institution till there is a 'reasonable probability' that she will lead 'a useful and industrious life' before she is discharged.
28. There is the case of Sampa Singh 'who wished to marry a boy of her own choice against the wishes of her brothers and was brutally beaten by them for her assertion. She made a criminal complaint against her brothers and they countered her complaint by alleging insanity.' When she became 'extremely abusive' at the police station, she started on the process of being legally branded a Non-Criminal Lunatic (NCL) entitling the State to deprive her of her liberty and autonomy altogether: Amita Dhanda and Srinivasa Murthy, 'Unlock the Padlock: Mental Health Care in West Bengal' (1993) vol. I, p. 67. The authors were Commissioners who presented the report to the Supreme Court in the matter of *Sheela Barse* v. *Union of India*, WP (Cri) 237 of 1989.
29. Supra notes 18 to 21.
30. MHA reads:

(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules, regulations or orders made thereunder. No suit or other legal proceeding shall lie against the government for any damage caused or likely to be caused for anything which is in good faith done or intended to be done in pursuance of this Act or any rules, regulations or orders made thereunder.

This is the kind of provision that with regularity, finds place in statutes, eroding accountability and increasing empowerment of State agencies. See also, S. 4, EDA and S. 61, JJA.

31. Indian Lunacy Act, 1912.
32. Gopal Subramanium, 'Justitia Virtutum Regina' (1994), pp. 382-6. This is a report on the mentally ill being illegally detained in the jails of Assam. It was prepared at the behest of the Supreme Court in the matter of *Sheela Barse* v. *Union of India* supra note 28. It is an unqualified indictment of the lower judiciary, the police, the bureaucracy, the prison administration and the relevant parts of the medical establishment. The report has been accepted by the Supreme Court by order dated 3 October 1994.
33. Ibid., p. 507.
34. Ibid., p. 235.

35. 4 SCC 204.
36. This affidavit prompted the court to appoint a Commissioner to investigate. For report of Commissioner, see supra note 32.
37. Supra note 32, p. 440.
38. See supra note 30.
39. The series of orders are reported in (1980) 1 SCC 81 *et seq*.
40. In *Susheela* v. *State of Tamil Nadu* Cri.A No. 501 of 1994, it took her over a month and a half to obtain her release despite an order of the Supreme Court granting her bail because she could not arrange for the money any earlier.
41. In a petition, which was apparently intended to reduce the period of loss of liberty of undertrials, the Supreme Court *inter alia* directed:

'where an undertrial is charged of an offence under the Narcotic Drugs and Psychotropic Substances Act, 1986 (NDPS) punishable with imprisonment of 10 years and a fine of Rs 1 lakh, he shall be released on bail if he has been in jail for not less than five years provided he furnishes a bond of Rs 1 lakh with 2 sureties of like amount.'

This prescription of spending at least half the period of sentence is repeated in each case where bail has been seen as a possibility, as has a bail amount up to 50 per cent of the fine. *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* v. *Union of India* (1994) 6 SCC 731.

42. U. Ramanathan, 'Child Labour and the Law in India' (1994, mimeo).
43. Child Labour (Prohibition and Regulation) Act, 1986.
44. The Indian Majority Act, 1875, generally places majority at 18 years.
45. First Proviso JJA.
46. Supra note 28, p. 80.
47. See e.g. the provision for inquisition in S. 4, ILA or reception orders in S. 20, MHA.
48. Supra note 46.
49. Ibid., p. 81.
50. Supra note 32, p. 330.
51. Ibid., pp. 345-9 is one instance. The Report is replete with such experiences. Of the 397 persons held in the jails of Assam as mentally ill, Gopal Subramanium found only about 25 required any form of institutionalized care and, even in such event, only the least restrictive alternative was seen as apt.
52. Putni Rajbonkshi's family could not be traced, because the authorities did not have the address on their records. She was returned to jail: ibid., pp. 334-5.
53. Ibid., p. 334.
54. Ibid.
55. Ibid., p. 335.
56. Ibid., p. 345.
57. Ibid., p. 350.
58. Supra note 28, p. 82.
59. 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 take away their right to pursue their own remedies! This is one kind of protection which statutorily denudes its subject of the right of self-help.
60. Ss. 2(b), 2(g) and 21, ITPA.
61. ITPA.
62. S. 10A(3), ITPA.
63. S. 10A(4), ITPA.

64. S. 10A(1)(b), ITPA.
65. *Dr Upendra Baxi* v. *State of Uttar Pradesh* (1983) 2 SCC 308 and subsequent orders. This was in the nature of public interest litigation (PIL), or Social Action Litigation (SAL) as Professor Baxi would more rightly have it termed.
66. Supra note 23.
67. See the case of women kept in solitary confinement in a 6'x6' cage in Presidency Jail, Calcutta where it was feared they might turn violent. Supra note 28, pp. 65-6.
68. See e.g. the use of the Infectious Diseases Hospital (IDH) in Delhi as a dumping ground of plague suspects: *Is Plague Over? A Citizen's Report on the Plague Epidemic* (1994).
69. Housing in prisons persons said to be of unsound mind constitutes an instance: supra notes 28 and 32.
70. For example the incarceration of women held in 'protective custody' so that protection need not be taken out to them: supra note 39.
71. As in cases of custodial rape: *B.R. Kapoor* v. *Union of India* WP (Cri) Nos. 1777-8 of 1983, dated 29 April 1987 where a criminal assault on one Rajni was recorded, as was the death of her child.
72. U. Ramanathan, 'Victimology: As if People Mattered' (1994), paper presented at the First Biennial Conference of the Indian Society of Victimology held in Madras, 11-13 August 1994.
73. The reports have been submitted to the Supreme Court in the case of Dr Upendra Baxi, supra note 65, making them matters of public record.
74. By order dated 9 November 1992 in Dr Upendra Baxi's case, ibid.
75. Ibid., by order dated 3 October 1994.
76. Primila Lewis, *Reason Wounded: An Experience of India's Emergency* (1978), p. 107.
77. Ibid.
78. Supra note 24.
79. '12 year old's Journey to Hell', *Hindustan Times*, 24 May 1994.
80. 1 SCC 608.
81. *Supreme Court Legal Aid Committee* v. *State of Madhya Pradesh* (1994) 5 SCC 27.
82. 'The Naked Truth', *Sunday*, 17-23 October 1993, pp. 10-12.
83. Supra note 74.
84. Supra note 75.
85. Supra note 71.
86. Supra note 23.
87. Supra note 28.
88. Supra note 81.
89. Ibid.
90. *Rakesh Chandra Narayan* v. *State of Bihar* 1994 Supp 3 SCC 478.
91. *Supreme Court Legal Aid Committee* v. *State of Madhya Pradesh* (1994) Supp 3 SCC 489.
92. *Aman Hingorani* v. *Union of India* 1994 Supp 3 SCC 601.
93. EDA.
94. Statement of Objects and Reasons of the EDA.
95. Supra note 68, p. 26.
96. Ibid.
97. These experiences are documented at ibid., pp. 10-15.
98. *Report of the All India Committee on Jail Reforms 1980-83* (Chairperson) A.N. Mulla, vol. I, pp. 229-38.

Violence Against Women: Review of Recent Enactments

FLAVIA AGNES

INTRODUCTION

If oppression were to be tackled by enacting laws, then the last decade (1980-9) could be declared as the golden era for Indian women, when laws were given on a platter. During this period every single issue concerning violence against women taken up by the women's movement resulted in legislative reform.

The enactments conveyed a positive picture of achievement but the statistics revealed a different story (Table 1). Each year the number of reported cases of rape and unnatural death increased. The rate of convictions under the lofty and laudable legislation were dismal (Table 2) and hence, their deterrent value was lost. Some enactments turned out to be mere ornamental legislation or paper tigers.

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

First, the laws, callously framed, more as a token gesture than due to any genuine concern in changing the status quo of women, were full of loopholes. There was a wide disparity between the initial demands raised by the movement as well as the recommendations by Law Commissions and the final enactments. Many positive recommendations of the expert committees did not find a place in the Bills presented to Parliament. While one organ of the State, the legislature, was over-eager to portray a progressive pro-women image by passing laws for the asking, the other organs—the executive and the judiciary, did not express even this token measure of concern. Their functioning was totally contradictory to the spirit of the enactment.

The defective laws were welcomed by the movement as a first stepping stone towards women's empowerment. But the motive beneath the superficial concern of the State went unnoticed. The question as to who

TABLE 1. REPORTED CASES OF DOMESTIC VIOLENCE IN THE CITY OF GREATER BOMBAY

Year	*Murders U/S 302 IPC*	*Suicides U/S 306 IPC r/w S. 304B IPC*	*Harassment U/S 498A and U/S 3,4,5 of Dowry Prevention Act*
1986	4	38	41
1987	12	45	143
1988	2	56	152
1989	13	103	177
1990	9	72	143

Source: Social Service Branch, CID, Bombay.

TABLE 2. DISPOSAL OF RAPE IN BOMBAY 1985-1989

Description	*1985*	*1986*	*1987*	*1988*	*1989*
Registered	101	102	85	108	108
Charge Sheeted	93	96	76	104	100
Convicted	8	1	2	1	1
Acquitted	4	3	1	-	2
Pending Trial	81	91	72	102	95

Source: *The Lawyers*, April 1991.

would ultimately benefit by these enactments was seldom asked. The campaigns with a thrust on law reform could not maintain the pressure, once the legislation was enacted. There was a lull and a false sense of achievement resulting in complacency. Hence, the impact of the enactments in court proceedings was not monitored with the same zeal.

The campaigns themselves were limited in scope. At times, the issues which were raised, addressed only the superficial symptoms and not the basic questions of power balance between men and women, women's economic rights within the family and their status quo within society. The solutions were sought within the existing patriarchal framework and did not transcend into a new feminist analysis of the issue. They seldom questioned the conservative notions of women's chastity, virginity, servility and the concept of the good and bad woman in society. For instance, the rape campaign subscribed to the traditional notion of rape as the ultimate violation of a woman and a state worse than death. It did not transcend the conservative definition of forcible penis penetration of the vagina by a man who is not her husband.

The campaign against dowry tried to artificially link dowry which is property related and death which is an act of violence. If the campaign

had succeeded it could have 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 commonalties. The campaigns were highly visible and had received wide media publicity. Government response was prompt. Law Commissions or expert committees were set up with a mandate to solicit public opinion and submit their recommendations to Parliament. But the recommendations which would have had far-reaching impact and could have changed the status quo in favour of women, did not find a place in the final enactment. The enactments uniformly focused on stringent punishment rather than plugging procedural loopholes, evolving guidelines for strict implementation, adequate compensation to the victims and a time limit for deciding cases.

The apprehension of legal experts both within and outside the women's movement that stricter punishment would lead to fewer convictions proved right. The question confronting us today is whether social change and gender justice can be brought about merely by enacting stricter laws.

Each law vests more power with the State enforcement machinery. Each enactment stipulates more stringent punishment which is contrary to progressive legal reform theory of leniency to the accused. Can progressive legal changes for women's rights exist in a vacuum, in direct contrast to other progressive legal theories of civil rights? So long as basic attitudes of the powers-that-be remain anti-women, anti-minority and anti-poor, to what extent can these laws bring about social justice? At best they can be an eyewash and a way of evading more basic issues of economic rights and at worse a weapon of State co-option and manipulation to further its own ends.

The rape campaign is a classic example of the impact of public pressure on the judiciary. As can be observed from the discussion on the rape campaign, favourable judgements were delivered before the amendment when the campaign was at its peak as compared to the post-amendment period. Perhaps 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 State inaction at the crucial stage of preventing the public murder of a teenaged widow.

The worst among these is the Immoral Traffic (Prevention) Act, 1956 which was amended in 1986. This amendment was not even in response to any demand for change. The Act does more harm to women in general and prostitutes in particular. Under this Act, any woman who is out at night can be picked up by the police. The only aim of the amendment seems to be to enforce more stringent punishment.

Ironically, three of the laws discussed here which are supposedly for protecting women from violence actually penalize the woman. Instead of empowering women, the laws have served to strengthen the State. A powerful State conversely means weaker citizens, which includes women. And the weaker the women, the more vulnerable they will be to male violence. The cycle is vicious.

This paper reviews the laws relating to three areas affecting women's lives, i.e. rape, dowry and domestic violence. It does so against the backdrop of changing perceptions towards penal enactments within the women's movement.

CAMPAIGN FOR REFORMS IN RAPE LAWS AND LEGAL RESPONSE TO RAPE

The Campaign. The amendment to rape laws, enacted in 1983, was the predecessor to all the later amendments which followed during this decade. Sections 375 and 376 of the Indian Penal Code, which deal with the issue of rape, had remained unchanged in the statute books since 1860. The amendment was the result of a sustained campaign against these antiquated laws following the infamous Supreme Court judgement in the Mathura case.

Mathura, a 16-year-old tribal girl, was raped by two policemen within a police compound. The sessions court acquitted the policemen on the ground that Mathura was habituated to sexual intercourse and hence she could not be raped. The High Court convicted the policemen and held that mere passive consent given under threat cannot be deemed as consent. The Supreme Court set aside the High Court judgement on the grounds that Mathura had not raised any alarm and there were no visible marks of injury on her body.[1]

The judgement triggered off a campaign for changes in rape laws. Redefining consent in a rape trial was one of the major thrusts of the campaign. The Mathura judgement had highlighted the fact that in a rape

trial it is extremely difficult for a woman to prove that she did not consent beyond all reasonable doubt as was required under the criminal law.

The major demand was that once sexual intercourse is proved, if the woman states that it was without her consent, then the court must presume that she did not consent. The burden of proving that she had consented should be on the accused. The second major demand was that a woman's past sexual history and general character should not be used as evidence (Agnes 1990).

The State Response. The government's response to the campaign was prompt. The Law Commission was asked to look into the demands and consequently prepared a report incorporating the major demands of the anti-rape campaign.

The Commission also recommended certain pre-trial procedures—that women should not be arrested at night, a policeman should not touch a woman when he is arresting her, that the statements of women should be recorded in the presence of a relative, friend or a social worker and that a police officer's refusal to register a complaint of rape should be treated as an offence.

Based on these recommendations, the government presented a Bill to Parliament in August 1980. But surprisingly, the Bill did not include any of the positive recommendations of the Law Commission regulating police power or about women's past sexual history. The demand that the onus of proof regarding consent should be shifted to the accused was accepted partially, only in cases of custodial rape, i.e. rape by policemen, public servants, managers of public hospitals and remand homes and wardens of jails.

The Bill had certain regressive elements which were not recommended by the Law Commission. It sought to make publishing anything relating to a rape trial a non-bailable offence which meant a virtual press censorship of rape trials. This was ironical because the public pressure during the campaign was built up mainly through media publicity and public protests. This provision met with a lot of criticism. Thereafter, the regressive provisions were made slightly milder. For instance, publication of rape trials was made into a bailable offence. The important provisions of the amendment were:

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

— Introduction of a minimum punishment for rape—ten years in cases of custodial rape, gang rape, rape of pregnant women and minor girls under twelve years of age, and seven years in all other cases. Even though this was not the major demand, it turned out to be the most important ingredient of the amendment.

Although inadequate, the amendment was welcomed as a progressive move—a beginning. There was a general presumption within the movement that the courts would follow the spirit of the amendment and give women a better deal in rape trials.

After the amendment, the campaign lost its alertness. There were hardly any efforts to systematically monitor its impact in rape trials. So the Supreme Court judgement in 1989 in a case of custodial rape by policemen (popularly known as the Suman Rani rape case) came as a jolt. The Supreme Court had reduced the sentence from the minimum of ten years to five years.[2] The review petition filed by women's groups against the reduction of sentence was also rejected.[3] This brought into focus the need to review judicial trends in rape trials since the amendment.

A scrutiny of the judgements during the decade revealed that the judgement in the Suman Rani case was not an exception. It was merely adhering to the norm of routinely awarding less than the minimum mandatory sentence introduced by the amendment. Hence the main component of the amendment, i.e. the deterrent provision of stringent punishment, was rendered meaningless. The amendment also did not bring about a positive change in the attitude of the judiciary despite the well-publicized campaign.

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

The 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 non-resistance when volitional faculty is either crowded by fear or vitiated by duress cannot be deemed to be consent. Consent on the part of the woman as a defence to an allegation of rape, requires voluntary participation, after having fully exercised the choice between resistance and assent. Submission of her body under the influence of terror is not consent. There is a difference between consent and submission. Every consent involves submission but the converse does not always follow.[4]

This was the settled legal position and was relied upon by many later judgements during the pre-amendment period. But there was no uniformity in court decisions. No one could predict with certainty the outcome of a rape trial. Much would depend upon the views and attitude of individual judges.

The judiciary viewed rape as an offence of man's uncontrollable lust rather than as an act of sexual violence against women. The following Supreme Court judgement of 1979 by Justice Krishna Iyer is an indication of this trend. The description of the offence in the judgement is as follows: 'A philanderer of 22 years overpowered by sex stress hoisted himself into his cousin's home next door in broad daylight, overpowered the temptingly lonely prosecutrix, raped her in hurried heat and made an urgent exit having fulfilled his erotic sortie.'

The reasoning for the reduction of sentence was: 'Youth overpowered by sex stress in excess. Hypersexed *homo sapiens* cannot be habilitated by humiliating or harsh treatment. . . . Given correctional course his erotic aberrations may wither away.'[5] This judgement was relied upon in several later judgements to reduce the sentences of young offenders.

But from another judgement of Justice Krishna Iyer delivered a few months later, i.e. in early 1980, a new sensitivity regarding the issue of rape within the judiciary can be discerned which can safely be attributed to the newly evolving anti-rape campaign. Regarding uncorroborated testimony of the victim it was held: 'The Court must bear in mind human psychology and behavioural probability when assessing the credibility of the victim's version.'[6]

In the same judgement, the court also cautioned against stricter laws and said that a socially sensitized judge was a better statutory armour against gender outrage than long clauses of a complex section. The judgements of the post-amendment period have proved these apprehensions to be correct.[7]

In a judgement case reported in 1981, where a 16-year-old was gang-raped, the court held: 'The fact that there is no injury and the girl is used to sexual intercourse is immaterial in a rape trial.'[8]

In 1982, in a case of gang rape, relying upon the Rao Harnarain Singh judgement, the Orissa High Court held that the consent must be

voluntary. A mere non-resistance or passive giving in under duress cannot be construed as consent.[9]

In a landmark judgement of 1983 the Supreme Court held that corroboration of a victim's evidence is not necessary: 'In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration is adding insult to injury.'[10]

The judgements reflect the concern expressed by the women's organizations during the anti-rape campaign. But there was no uniformity and the pendulum swung from one extreme to the other as in the case of Mathura. The amendment was supposed to rectify the situation by bringing a certain degree of uniformity and changing the attitude of the judiciary regarding women during rape trials. Unfortunately, the judgements in the post-amendment period convey a dismal picture.

THE JUDGEMENTS DURING THE POST-AMENDMENT PERIOD

Conservative Notions Regarding Women's Sexuality. The year 1984 started off with a judgement which reflects an extremely negative view of women's sexuality. A school teacher had seduced a young girl but when she conceived he refused to marry her. A case of rape was filed. The Calcutta High Court held: 'Failure to keep the promise at a future uncertain date does not amount to misconception of fact. If a fully grown girl consents to sexual intercourse on the promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity.'[11]

This judgement was relied upon in several later cases where girls were seduced with a false promise of marriage, to acquit the accused. In fact, there is only one positive judgement on this issue which has held that consent given under a promise of marriage is tainted consent and has clarified further that no one should be permitted to reap the benefits of fraud in sexual matters.[12]

In another disturbing judgement reported in 1989, the Bombay High Court set aside a conviction by the sessions court in Kolhapur. The girl who was in love with the accused had voluntarily accompanied him to his friend's house. At night they slept in a small room along with the hosts. The accused overcame the girl's resistance and raped her twice during the night. The medical examination revealed that the girl's hymen was ruptured. The sessions court convicted him as the girl was under 16 years of age and so her consent was immaterial.

In appeal, the High Court held that since there was a discrepancy between the school certificate and birth certificate, the benefit of doubt should go to the accused and hence the girl was deemed a 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.[13] Hence it acquitted the accused.

Forcible penetration of finger does not amount to rape, under the patriarchal scheme of things. But in this case, even while the judge admitted that the hymen was ruptured because of forcible finger penetration, it did not even amount to assault. Further, the judge seems to have assumed that in a rape case, the girl can exercise her choice as to when and in whose presence to get raped and the option of feeling shy during the rape.

In another case, a tribal woman was raped by a police constable who entered her house at night while her husband was away at work. The Bombay High Court acquitted the accused by stating that: 'Probability of the prosecutrix who was alone in her hut, her husband being out, having consented to sexual intercourse cannot be ruled out.'[14]

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 rape and child rape. But it appears that this clause was incorporated merely to appease the activists rather than with any serious intention of adhering to it, as this provision is in direct contrast with the progressive legal theory of leniency towards offenders.

Usually, in child molestation cases, the offenders are the youth. This brings about a clash between the two theories of minimum mandatory punishment and leniency towards youth offenders. In such a situation, since our criminal jurisprudence grants all advantages to the accused, leniency towards youth offenders will prevail. Hence, the statutory provision of a mandatory minimum sentence is overruled. Some important cases where this clash of legal theories is evident are mentioned below.

In a case reported in 1984, a 7-year-old girl was raped by a boy of 18. She was severely injured and was left in an unconscious condition. The appeal to the High Court to enhance the sentence was dismissed on the following ground: 'Although rape warrants a more severe sentence, considering that the accused was only 18 years of age, it would not be

in the interest of justice to enhance the sentence of five years imposed by the trial court.'[15]

In another case, a 9-year-old was raped by a 21-year-old youth in a pit near the bus stop. Medical evidence substantiated the rape. The Delhi High Court set aside the conviction of the sessions court on the ground that there was injury to the accused only on the body and not on the penis. The court ruled that in a rape of a minor by a fully developed male, injury to the penis is essential.

While Mathura was expected to put up sufficient resistance to suffer injuries on her own person, the situation seems to have deteriorated and now the victim is expected to put up even more resistance to the extent that the accused also sustains injuries—not just on his body but even on his penis! It needs to be pointed out that the girl in question was only nine years old, while her assaulter was a robust man of 21 years.[16]

In the 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 10-year-old girl, the High Court commented on the lower court's sentence as follows: 'Imposing a sentence of three years is like sending the accused to a picnic. The judge erred in his duty in not imposing a deterrent punishment.'[17]

Concern Over Loss of Virginity and Prospects of Marriage. The rare positive judgements are those where young girls were brutally attacked and had received multiple injuries, so that rape could be proved with relative ease. But even in such cases, the concern of the judiciary is limited to the loss of virginity and prospects of marriage and not to the trauma suffered by the minor girl.

In the following case a young girl was dragged into the forest and was raped. She received severe injuries. While upholding the conviction by the sessions court, the High Court held: 'It is difficult to imagine that an unmarried girl would willingly surrender her virtue. Virginity is the most precious possession of an Indian girl and she would never willingly part with this proud and precious possession.'[18]

In a 1988 judgement concerning a case where a 10-year-old was raped by a 45-year-old man, the court imposed a fine on the accused and ordered that the amount should be paid to the girl as compensation as the amount would be useful for her marriage expenses and if married would wipe out the anguish in her heart.[19]

One wonders whether there is an implicit statement that the marriage expenses would be higher because the girl is a victim of rape. One also wonders why the anguish in her heart is linked to her marriage.

In another case of gang rape, five men raped a 17-year-old. The Kerala High Court imposed a fine on the accused 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.'[20] The court, however, reduced the sentence from five years to three years while the stipulated minimum sentence for a case of gang rape is ten years.

The judgement hints that there are certain type of girls who value their chastity more than others—that there are good women who need to be protected and the bad women who can be violated. This attitude is expressed routinely in rape cases by all courts including the Supreme Court.[21]

The preoccupation of the judiciary regarding prospects of marriage extends from the victim to the rapist's daughter as the following judgement indicates. The accused had raped two girls aged 10 and 12. The High Court upheld the conviction of the sessions court. The Supreme Court reduced the sentence on the ground that the prospect of getting a suitable match for the daughter of the accused would have been marred due to the stigma attached to a conviction for an offence of rape.[22]

Further, if the woman gets married while the case is pending in court, the court presumes that the damage caused by rape has been reduced and elicits reduction of sentence. In a case concerning a tribal girl, two persons entered the house in her father's absence and forcibly took her to a nearby jungle and raped her. The High Court upheld the sessions court's conviction for rape, but reduced the sentence on the ground that the rape did not result in any serious stigma to the girl. In a shocking statement the court ruled: 'Sexual morals of the tribe to which the girl belonged are to be taken into consideration to assess the seriousness of the crime.'[23] This judgement was reported in the *Law Journal* in the year 1992.

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 categorization is based on the proximity to penetration. For instance, an unsuccessful attempt to penetrate is categorized as attempt to rape (S 376 r/w S 511 of IPC) which warrants only half of the punishment which can be awarded for a successful penetration.

Further, every case of indecent assault upon a woman does not amount to an attempt to rape. The prosecution has to prove that there was a determination in the accused to gratify his passion at all events and in spite of all resistance. When the accused could not go beyond the state of preparation, it will be viewed as merely an act of violating a woman's modesty.

Violating a woman's modesty (S 354 IPC) is a lesser offence. It is bailable and the trial will be conducted by a magistrate's court. The maximum punishment which can be awarded for violating a woman's modesty is two years. As rape and attempt to rape are deemed grievous offences, they are non-bailable and the trial is conducted by the sessions court. The maximum punishment for an offence of rape is life imprisonment.

Since the difference between rape, attempt to rape and violating modesty is one of degree only, to prove determination on the part of the accused, the description of the offence has to be graphic bordering on the obscene, as the judgements discussed in this section indicate. The first two judgements were reported in 1927 and the third one in 1933.

1. An 18-year-old youth stripped a five-and-a-half-year-old and made her sit on his thigh. There was no bleeding or redness of the vagina or any other marks of injury. The hymen of the girl was intact and the child had not cried. But the court held that it was an attempt, although unsuccessful, to penetrate and it amounted to an attempt to commit rape and not merely violating the modesty.[24]
2. The accused had slipped into the house of his neighbour through the roof and untied the strings of the *salwar* of the daughter, aged around 10-11 years, who was sleeping. The accused was struggling with the girl, when her mother, hearing her screams entered the room. At this point the accused ran away. The court held that there was determination on the part of the accused to commit rape and convicted him of the offence of an attempt to commit rape.[25]
3. The accused caught hold of the girl, threw her down, put sand in her mouth, got on to her chest and attempted to have intercourse with her. He could not succeed on account of the resistance offered by the girl. Hearing her screams people arrived on the scene and the accused ran away. The court held that the accused had gone beyond the state of preparation and his act amounted to an attempt to commit rape and not merely violating the woman's modesty.[26]

In order to draw a comparison between the judgements of this era and the later period, here is a judgement of 1967. It gives a vivid description of the difference between attempt to rape and molestation in the following words: Where the accused felled the woman on the ground, made her naked, exposed his private parts and actually laid himself on the girl and tried to introduce his male organ into her private parts despite strong resistance from her, the act amounted to an attempt to commit rape. But when there is no injury found on the private parts or any other part of the body of the woman, but the accused found lying over her, it was held that the act amounts only to an offence under S 354 IPC and not an attempt to rape.[27]

A comparison of the judgements of 1927 and 1967 reveals that if at all there is any change in judicial attitudes it is for the worse. But our concern here is to assess the attitude of the judiciary in recent years. Hence a random sampling of judgements in the last decade is given below:

1982: A lady doctor was travelling by bus at night. She felt the hand of a man sitting behind her on her belly. The man was deliberately trying to touch her breasts. The accused was convicted for the offence of molestation with six months' imprisonment.

Since he would have lost his job because of the conviction, he filed an appeal, which resulted in an acquittal on the following grounds: Merely putting a hand on the belly of a female cannot be construed as using criminal force for the purpose of committing an offence or injury or annoyance. Use of criminal force or assault against a woman is essential for the purpose of outraging her modesty. There should also be an intention to outrage the modesty

of a woman. The court held that the touch could have been accidental or with an intention to draw her attention.[28]

1984: A young college student attempted to rape 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.[29]

1989: The accused dragged a 9-year-old near the bushes and tried to penetrate. The girl was severely injured. Due to the pain the girl did not permit the doctors to carry out an internal examination. Hence the exact extent 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.[30]

1990: Two persons went to a school, dragged a girl, kicked her, slapped her and snatched her watch. The High Court reversed the sessions court's order of conviction for violating the girl's modesty and held that it is not enough if the woman was pushed or beaten. The assault should be with the intention to outrage her modesty or knowing it would outrage her modesty.[31]

The offence which is termed attempt to rape is precariously perched between successful penetration and beyond the stage of preparation, which is extremely difficult to prove as the following case reported in 1991 indicates. The accused had loosened the petticoat cord of the woman and was about to sit on her waist, when she woke up and cried out for help. The sessions court had convicted the accused for attempt to rape. But on appeal, the high court acquitted him on the ground that the act had not advanced to the stage of attempt to rape but was only at the stage of preparation for the same.[32]

In another case, while the girl and her mother were asleep, a police officer entered the police barracks and attempted to rape the girl. The girl gave the accused blows and he fled. The sessions court convicted the accused. The high court acquitted him on the ground that despite an intention or expression, an indecent assault upon a woman would not amount to attempt to rape unless there is determination on the part of the accused to fulfil his desire in spite of resistance.[33]

Absurd Notions of Modesty and its Violation. One can observe from the above discussion that the categorization 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 also revealed in it.

The case concerned the molestation of a seven-and-a-half-month-old by one Major Singh. The sessions court convicted the accused. On appeal, a full bench (three judges) judgement of the Punjab High Court acquitted the accused. The views of the judges, however, differed.

Majority View. Appellant having fingered the private parts of the victim girl causing injury to those parts did not commit an offence under S 354. There is no abstract concept of modesty which can apply to all cases. Modesty has relation to the sense of propriety of behaviour in relation to the woman against whom the offence is committed. In addition to the intention, knowledge and physical assault, a subjective element, as far as the woman against whom the assault is committed, is essential.

Minority View (which perhaps offers the most sound analysis amongst the range of opinions expressed). Any act which is offensive to the sense of modesty and decency and repugnant to womanly virtue or propriety of behaviour would be an outrage or insult to the modesty of a woman. It will not avail the offender to contend that the victim was too old or too young to understand the purpose or significance of this Act.

The State appealed against the acquittal to the Supreme Court. The three judges who heard the case expressed three different viewpoints.

First View. When the action of the accused in interfering with the vagina of the child was deliberate he must be deemed to have intended to outrage her modesty. The intention or knowledge is the crucial factor and not the woman's feelings.

Second View (which supported the first view but on a totally different basis). The essence of a woman's modesty is her sex. From her very birth, a woman possesses the modesty which is the attribute of her sex and hence it can be violated.

Third View (expressed by the Chief Justice, which differed from the other two judges). To say that every female of whatever age is possessed

of modesty capable of being outraged seems to be laying down a rigid rule which may be divorced from reality. There obviously is no universal standard of modesty. A female baby is not possessed of womanly modesty. If she does not, there could be no question of the respondent having intended to outrage her modesty or having known that his act was likely to have that result.

And after the long and tortuous journey, finally when there was a conviction by the Supreme Court, the maximum sentence that could be awarded is two years imprisonment!

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. But embarking on this task, certain factors will have to be kept in view.

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 Criminal 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.

Voyeurism and Titillation 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 the early 1980s—Mathura was raped twice, first by the police and then by the court—is as relevant today as 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 civilization 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.' The case concerned the gang rape of a 17-year-old suffering from epilepsy by five men while she was sleep walking.

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.

Social Accountability and Compensation. The amendments to the rape laws focused 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 judgements 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.

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 the sentence is routinely done. Out of the sixty-five cases reported during the period 1980-9 there was conviction in the trial

court in fifty-five cases (Table 3). But in appeal, the High Court upheld the conviction only in thirty-nine cases. In seventeen of these cases, while upholding the conviction, the court reduced the sentence. There was hardly any case where the court 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.'

Delays in Court Rooms. Usually it takes around five to ten years for a rape case which has resulted in conviction to be decided by the high court. If the purpose of the rape trial is to act as a deterrent, rather than a prolonged sentence of life imprisonment, a less severe sentence within a stipulated time limit would serve the purpose.

While there are delays, the benefit of such delays is awarded to the accused as the sentence is reduced on this ground even when the conviction is upheld. This is adding insult to injury.

Lapses in Investigation. Most rape cases do not result in conviction due to lapses in investigation and medical reports. Slipshod investigation, delayed and indifferent medical reports and lack of vigilance during the trial are the major causes of acquittals in rape trials.

The burden of conducting the prosecution is the sole responsibility of the State. Only in a rare case will the woman be appointed a public prosecutor of her choice. Hence, a victim has absolutely no control over the judicial processes in a rape trial. Unless the procedural lapses are plugged, merely enhancing the sentence will not have any value as a deterrence. This fact has been amply proved by the cases cited here.

Custodial Rape. The amendment of 1983 tried to address the issue of custodial rape by shifting the burden of proof. But the section which has laid down a new category of sexual offences has gone unnoticed by the judiciary. Even in well-publicized cases like the Suman Rani rape case, the discussion has been more on the conduct and character of the girl rather than the issue of custodial gang rape. This trend is disturbing. Unless specific case law is evolved by the higher judiciary, this new offence will be of no use while dealing with rape trials in trial courts. In a span of ten years since the amendment, hardly any case has commented upon this section, which is rather perturbing.

TABLE 3. ACQUITTALS AND CONVICTIONS IN APPEAL COURTS IN THE DECADE 1980 TO 1989 IN BOMBAY

	80	*81*	*82*	*83*	*84*	*85*	*86*	*87*	*88*	*89*
Reported cases	5	6	4	5	5	2	3	11	7	17
1. Sessions Court										
(a) Acquittal	-	-	-	-	2	-	1	3	1	3
(b) Conviction	5	6	4	5	3	2	2	8	6	14
2. High Court										
(a) Acquittal upheld	-	-	-	-	2	-	-	1	1	1
(b) Acquittal reversed	-	-	-	-	-	-	1	2	-	2
(c) Acquitted	-	2	1	2	1	1	-	1	2	5
(d) Conviction upheld	5	4	3	3	2	1	2	7	4	8
(e) Sentence reduced/ modified	1	2	1	1	-	1	1	3	1	6

Source: *The Lawyers*, February 1990.

Rapes in 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 1991 and 1993, in six of the reported cases the accused persons were fathers, or persons in authority. Unless these offences are defined under a special category, it will be difficult to secure conviction in cases of rape committed by persons in authority, both within the family and outside.

Many countries have defined marital rape as an offence. But in our country, the definition of rape excludes marital rape in specific terms, i.e. forced sexual intercourse by husband does not amount to rape. The 1983 amendment laid down that a rape by a husband who is legally separated amounts to rape. But surprisingly, while in other cases the minimum sentence was seven years, in this case the Act laid down a sentence of two years under a strange and perverse logic that it (i.e. forced sexual intercourse—an act against which the woman has registered a criminal case!) might lead to reconciliation.

Rape of Minor Girls Aged Between 16 and 18. Proof of age of the rape victim is crucial since the consent of the victim is immaterial in cases where she is below 16. The burden of proving the age is squarely

placed on the prosecution. If the prosecution fails to prove that the girl was below 16, it would have the additional burden of proving that the girl did not consent to the sexual intercourse. Difficulty arises in proving the age in cases where no birth certificate can be produced. Courts have given contradictory opinions on the weightage to be given to school certificates, ossification tests (approximate determination of age based on development of the bones) and the like. The difficulty is further heightened by the judicial pronouncements that ossification tests carry a margin of error of two years and the benefit of doubt is to be given to the accused. As a result, unless the girl is clearly below 14, no conviction can take place without irrefutable proof of absence of consent.

This results in grave injustice to teenage girls bordering on the age of majority. Hence determination of the girl's age should not be left to judicial discretion.

Further, there is a discrepancy between the age of majority for all other legal purposes (18 years) and for the offence of rape (16 years). This has led to an anomalous situation in which a girl is presumed to be incapable of taking independent decisions in other matters unless she is 18, but is capable of consenting to sexual intercourse if she is above 16.

Salient Features of the Proposed Bill. Some of the concerns discussed above are reflected in a draft prepared by a committee, on behalf of the National Commission for Women. Some salient features of this draft Bill titled 'Sexual Violence Against Women and Children Bill 1993' are stated below.

The committee, which consisted of members of women's organizations, expressed concern regarding the grievous injuries caused by a variety of sexual assaults on minors and the need to expand the definition of rape to include a range of assaults.

Violations in Addition to Actual Penetration. The committee has proposed renaming S 375 IPC as Sexual Offence and defining it as penetration into any orifice by a penis or any other object as well as the touching, gesturing and exhibiting of any part of the body. If the persons to whom these acts are done are minors then the act in and of itself is an offence and punishable under the provisions of the proposed law. If the person is an adult it 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. Some of the salient features of the proposed legislation relate to the following:

— Sexual assaults on a minor, mentally or physically disabled person or a pregnant woman. Two members, however, expressed concern regarding treating pregnant women *per se* as a more vulnerable category rather than sentencing according to the degree of harm a woman, pregnant or non-pregnant, may suffer.
— Sexual assault which causes grievous bodily harm. Protracted sexual assault is also deemed aggravated form of sexual assault. This section aims to address the vulnerability of children and women who are trapped in a situation of economic dependency upon their assaulters within family situations.
— The proposed Bill has raised the age of consent to 18 and has further distinguished between children under 12 regarding punishment. The Bill proposes that rape of children under 12 and protracted sexual assault are to be punished with a sentence of life imprisonment.
— The most important area which the Bill proposes to cover is to plug procedural loopholes in rape trials in the following areas:

Conduct and Character of the Woman. At present under Section 155(4) of the Indian Evidence Act, a woman's past sexual history can be used as evidence to discredit her evidence. The Bill seeks to delete this clause. Further under Section 146, the Bill proposes to forbid any questions regarding the woman's character, conduct or previous sexual experiences. Through an amendment to Section 54 of the Evidence Act, the character of the accused is made relevant in a rape trial.

Recording of Evidence. The Bill also lays down protective measures regarding the correct recording of the woman's evidence. It stipulates that in cases where the victim is under 12, her evidence should be recorded by a female officer or a social worker in the presence of a relative or friend, at her home or a place of her choice. For the violation of this procedural rule a maximum punishment of one year is proposed. Similarly, non-recording of the medical evidence by a registered medical practitioner in cases of sexual assault would be a penal offence.

Guidelines for Medical Examination. Immediate examination of victim by a registered medical practitioner (RMP) is stipulated. The report should give explicit reasons for each conclusion and also include the address of the victim and the persons who brought her, the state of the

genitals, marks of injuries, general mental condition of the victim and other material factors. The report should be forwarded by the RMP to the investigating officer who must then forward it to the magistrate. The same procedure to be followed by the RMP for the accused.

These amendments, if and when they are brought about, may help to plug some of the lacunae in the existing rape law. But patriarchy has a resiliency to remould and adopt itself to changing conditions. With the introduction of newer factors like liberalization and a boom in the tourist and sex trade, sexual assaults on women and children are bound to take a new turn. The recent sex scandal of Jalgaon and other places in Maharashtra is perhaps an indication of this trend. Whether the reformed law will be adequate to meet these trends and will arrest the trend of increasing sexual violence upon women is anyone's guess.

CAMPAIGN AGAINST DOWRY AND LEGAL RESPONSE

The Act—A Paper Tiger. The Dowry Prohibition Act of 1961 is a very small Act which consists of only eight sections (two more sections were added later during the amendments), full of contradictions and loopholes and not meant to be taken seriously. The Act laid down a very narrow definition of dowry as 'property given in consideration of marriage and as a condition of the marriage taking place'. The definition excluded presents in the form of cash, ornaments, clothes and other articles from its purview. The definition also did not cover money asked for and given after marriage.

Both giving and taking dowry was an offence under the Act. The offence was non-cognizable and bailable. In legal parlance, this makes it a trivial offence. The maximum punishment was six months and/or a fine of Rs 5,000. To make matters more complicated, prior sanction of the government was necessary for prosecuting a husband who demanded dowry. Complaints had to be filed within a year of the offence and only by the aggrieved person.

The ineffectiveness of the Act was manifested at different levels. First, there were hardly any cases filed under this Act and there were less than half a dozen convictions in the period between the enactment and the amendment. So the purpose of the enactment as a deterrent factor was totally lost. The Bombay High Court in *Shankar Rao* v. *L.V. Jadhav* held that a demand for Rs 50,000 from the girl's parents to send the couple abroad did not constitute dowry.[34] The judgement held

that since the girl's parents had not agreed to give the amount demanded at the time of marriage, it would not be deemed as 'consideration for marriage'. Anything given after the marriage would be dowry if only it was agreed or promised to be given as consideration for the marriage. The absurd interpretation was in total contrast to the spirit of the Act and defeated the very purpose for which it was enacted.

Secondly, in total defiance of the Act, the custom of dowry has percolated down the social scale and communities which had hitherto practised the custom of bride price are now resorting to dowry. Thirdly, all the violence faced by women in their husband's home is being attributed to dowry and the term 'dowry death' has become synonymous with suicides and wife murders.

A Misplaced Campaign. During the early 1980s, most cities in India witnessed public protests against the increasing number of dowry deaths, which received wide media coverage. It was accepted both nationally as well as internationally that dowry death or bride-burning as it was termed, was a unique form of violence experienced by Indian women, more specifically Hindu women and that a more stringent law against dowry would, in effect, curb domestic violence and stop wife murders. An oversimplified analysis of domestic violence which is a far more complex and universal phenomenon was put forward by activists and responded to by law-makers.

The media coverage of dowry deaths also led to further presumptions. One among them was that while in other cultures men murder their wives for more complex reasons, i.e. stress of a technologically advanced life-style or breakdown of the support of joint family due to urbanization, etc., in India men burn their wives for dowry.

It needs to be mentioned here that since a Hindu marriage is not required to be registered either within a religious institution or a civil registry, it is relatively easy for a Hindu man to commit bigamy, although it is legally prohibited. So in order to take a second wife, a man need not murder his first one. He can either divorce her or just merely desert her, which is quite common. And further, in a culture where arranged marriages are still the norm, why would another man offer his daughter in marriage to a wife murderer and further offer a huge amount of dowry? The rationale for the economic motive of the dowry deaths does not sound very convincing. Before we discuss the premise upon which the legislation was based, however, we need to take a look at the legislation itself.

The Dowry Prohibition Act, enacted in 1961, was full of loopholes. To plug some of these, a Bill was introduced in Parliament in June 1980, and was referred to a joint committee of both Houses. The findings of the Committee, *inter alia*, were as follows (Singh 1986a):

— The definition of 'dowry' was too narrow and vague.
— The Act was not being rigorously enforced.
— The stipulation that complaints could be filed only by the aggrieved party within a year from the date of the offence.
— Punishment of imprisonment for six months and/or fine up to Rs 5,000 is not formidable enough to serve as a deterrent.
— The words 'in consideration for the marriage' ought to be deleted from the definition of dowry.
— The explanation which excluded presents from the definition of dowry nullified the objective of the Act.
— Gifts given to the bride should be listed and registered in her name.
— In case she dies during this period, the gifts should revert to her parents. In case she is divorced, the gifts should revert to her.
— The presents could not be transferred or disposed of for a minimum period of five years from the date of marriage without the prior permission of the Family Court on an application made by the wife, to ensure the bride's control over the gifts.
— Dowry Prohibition Officers should be appointed for the enforcement of the Act.

Retrospectively, it appears that the recommendations were based on an erroneous premise that girls can exercise a choice either at the time of marriage or later, in their husband's home. It also did not take into account the parents' desperation to get their daughters married and keep them in their husband's home at all costs. It glossed over the fact that most women in this country are not aware of their legal rights.

A Stringent Law No Solution. Unfortunately, the Bill introduced in 1984 failed to consider some positive recommendations of the committee. The main feature of the Act was that it substituted the words 'in connection with marriage' for the words 'as consideration for the marriage'. It was felt that the omission of the words 'as consideration for the marriage' without anything more would make the definition too wide. The suggestion of imposing a ceiling on gifts and marriage expenses did not find a place in the Act.

The important features of the amended Act are as follows:

— Increase in punishment to five years and a fine up to Rs 10,000 or the value of dowry, whichever is more. (The section excluded presents given to the bride or the bridegroom.)
— Removal of the one year limitation period.
— Introduction of provision for the girl's parents, relative or a social work institute to file a complaint on her behalf.
— Removal of the requirement of prior sanction of the government for prosecuting a husband who demands dowry.
— Making dowry a cognizable offence.

Before the impact of the amendment could be gauged, the Act was amended again in 1986 with the aim of making the Act even more stringent. The main features of the 1986 amendment are as follows:

— The fine was increased to Rs 15,000.
— The burden of proving the offence was shifted to the accused.
— Dowry was made a non-bailable offence.
— A ban was imposed on advertisements.
— If the woman died an unnatural death, her property would devolve on her children and in the event of her dying childless, it would revert to her parents.

In fact all the loopholes pointed out by the committee were now plugged. So the stage was all set to abolish 'dowry death'. [The Act also amended the IPC and created a new category of offences called Dowry Death (S 304B).]

The Process of Requestioning. Despite these amendments, nothing changed. Women continued to get burnt in their homes and dowry demands continued. Reported cases of suicides and murders spiralled in every major city (Table 1). Parents of girls, who would not spend money on educating them or in making them independent, spent huge amounts of money on lavish weddings in the hope that the girl would never return to the native home and become a 'stigma'. The young girls, suddenly discovering that they had no place left in their parents' home, resorted to suicide in a desperate bid to escape the humiliation and violence. At times when they had a premonition of the impending disaster, and had sought the parents' help just before the murder, the parents had sent them back, which had resulted in the murder.

The cases were filed not at the time of the marriage but only after the girls had died, to avenge their death and retrieve the gifts. The

daughter's death did not in any way change the reactionary and conservative approach to marriage and the parents were all set to marry their next daughter with an equal amount of dowry to a boy of their choice. Tremendous pressure would be exerted on girls who wished to acquire professional skills, live independently or marry a boy from a different class, caste or religious background. In such cases the parents who cried hoarse against dowry would go all out and disinherit their daughter (Kishwar 1985).

The protests against dowry were held at the instance of people who conformed to this value system. They would usually have a total contempt for the ideology, values or life-style of the members of women's organizations whose help they sought to organize the dowry protests.

These factors made the activists reassess their stand on the issue of dowry. The articles in *Manushi* by Madhu Kishwar 'Rethinking Dowry Boycott' created a lot of controversy and a public debate (Kishwar 1988). Women's organizations began questioning the role of the girl's parents in driving her to death. Organizing dowry protests was no longer a simple issue. Individuals and groups began to think that the campaign against dowry was wrongly formulated because it did not link the issue of dowry with that of a woman's property rights in her parents' 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!

DOMESTIC VIOLENCE AND THE VACUUM IN LAW

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 murder 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 investigation have to be followed and the rules of evidence have to be strictly adhered to.

The three major Acts which govern criminal trials are: (1) the Indian Penal Code (IPC), which lays down categories of offences and stipulates punishment; (2) the Criminal Procedural Code (CrPC), which lays down procedural rules for investigation and trial; and (3) the Indian Evidence Act, which prescribes the rules of evidence to be followed during a trial.

Before 1983 there were no specific provisions pertaining to violence within the home. 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 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) their evidence as the offences are 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. All the existing laws and statutory provisions that are State-empowering rather than people-empowering need to be undertaken.

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 Sections 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 courage to approach a police station would be viewed as brazen and deviant. Instead of regis-

tering her complaint, the police would counsel her 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 (Kishwar and Vanita 1985a).

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 1980s and a 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 1970s. 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 was 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.

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:

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.—Sections 299 to 318. The next part deals with hurt which includes simple and grievous hurt with or without weapons (Sections 323-8); wrongful restraint and wrongful confinement (Sections 341-8); 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. (Sections 352-77).

Within the IPC, the first amendment—cruelty to wives—is placed not within Chapter XVI—offences affecting the human body—or under the sections dealing with assault, where it would have been more appropriate, but as an appendix to Section 498, an obnoxious and derogatory provision which treats women as the property of men. The section gives the husband a right to prosecute any man who takes away his wife even though this has been done with the wife's consent. Sections 497 and 498 are a constant reminder to women about their subordinate status within the IPC. Terming this new and important section as Section 498A ought to have been a cause for protest. Surprisingly, it did not raise any criticism from legal experts within or outside the movement.

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 on 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 the 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 a 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 erroneously 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.

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 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 rebuilding 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.

Because of these complexities, most cases filed by women under S 498A 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 498A, 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.

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 amounted 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. The wife filed an appeal in the Bombay High Court against the reduction of sentence on the ground that it had resulted in miscarriage of justice. Herself an advocate, she appeared in person and argued that the degree of leniency shown to the husband could not 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 (around 50) 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 upheld the judgement and commended the Bombay High Court for the progressive stand on woman's issues (Agnes 1987).

Law on Dowry Death—Limited in Scope. But this comes after a series of negative judgements in interpreting S 498A, delivered by various high courts, including the Bombay High Court.

Before analysing the judgements, it is necessary to mention the second amendment to the IPC which was enacted in 1986. Both the amendments have also amended the CrPC and Evidence Act (see Appendix 3 for exact provisions). The amendment of 1986 introduced a new offence of dowry death.

S 304B IPC—Dowry death:

> Where the death of a woman is caused by any burns or bodily injury or occurs otherwise under normal circumstances within seven years of her marriage and if it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any other relative of her husband for or in connection with any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death.

The offence is punishable with a minimum of seven years and a maximum of life imprisonment. The presumption of guilt is on the accused and he would have to prove that he is innocent.

This section, unlike S 498A, gives no scope to be used in situations where the violence is not linked to dowry. Since no record is maintained and no complaints are made at the time of meeting the dowry demands, while the girl is alive, it is extremely difficult to prove a dowry death under this section. The section also presumes that women are harassed for dowry only within the first seven years of marriage. So overall, this section is not likely to benefit women to deal with domestic violence.[35]

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

Negative Judgements. In the case of abetment to suicide under S 306 IPC, the Punjab and Haryana High Court set aside the conviction and acquitted the husband on the ground that presumption as to abetment to suicide is available only if the husband is proved guilty of cruelty towards wife.[36]

In another case, the Madhya Pradesh High Court set aside the conviction of three years and acquitted the mother-in-law. The court held that since the deceased ended her life by self-immolation when neither of the in-laws were present in the house, suicide in all probability was committed out of frustration and pessimism due to her own sensitiveness. It held that harassment and humiliation was not proved.[37]

In a case under S 498A IPC, the Bombay High Court held that it is not every harassment or every type of cruelty that could attract S 498A. It must be established that beating and harassment was with a view to force the wife to commit suicide or to fulfil illegal demands of husband or in-laws, which, in the court's opinion, the prosecution failed to prove in this case.[38]

In the Manjushree 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 husband's guilt was not proved beyond reasonable doubt and that the wife might have committed suicide out of depression.[39]

In another well-publicized case, the woman, Vibha Shukla, was found burnt while the husband was present in the house. A huge amount of dowry was paid at the time of the wedding and there were several subsequent demands for dowry. Vibha'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.[40]

In another case decided by the Bombay High Court in March 1991—Geeta Gandhi's death, the court set aside the conviction by the session court, Nagpur, and acquitted the husband and father-in-law of the charge of murder under S 302 IPC. Geeta Gandhi's body was burnt beyond recognition and the flesh was roasted and charred right up to the bones. Her body was recovered from the bathroom at around 5.30 a.m. The father-in-law and the husband who were admittedly sleeping in the very

next room had made no attempt to extinguish the fire. (Instead the brother-in-law had called the fire brigade.)

Geeta, a post-graduate in microbiology, who stood first in the M.Sc. examination, was in the process of setting up her own pathology clinic. She was married in January 1984 and died in April 1985. At the time of her death she was four months pregnant. She had a previous miscarriage when she had jaundice and also occasionally suffered from minor ailments. The court, while acquitting the husband and father-in-law, presumed that Geeta might have committed suicide because of depression caused by her ill-health (Sethi and Anand 1988).

Growing Complexity. While laws have proved inadequate to deal with this blatant violence, newer forms of violence against women are coming to light. The debate can no longer be restricted to violence by husbands and mothers-in-law. The decade has witnessed not only newer forms of killing female children through sophisticated means like sex determination tests but also the well-planned suicide pact by the Sahu sisters of Kanpur (Singh 1986a), followed by similar instances in other parts of the country. The well-known case of the Thakkar sisters—two unmarried women killing their married sister-in-law—indicates yet another facet of the issue of domestic violence (Kishwar and Vanita 1985b). These incidents are an indication of the complexities of domestic violence and the need for a new approach to tackle the issue.

Two more cases may be highlighted here as possibly relevant while planning future strategy. In the first instance, a man was sentenced to death by the Jaipur High Court in a case of wife murder and it decided that he be publicly hanged. The judgement received widespread approval. It was generally felt that women's organizations would see this as a victory. *Manushi*, a women's journal, expressed its shock at the judgement and was highly critical of it. It expressed the view that the solution to domestic violence does not lie in death sentence to the accused but in creating alternatives for women whereby they are strengthened.

The second case concerns a woman who strangulated her husband with a rope when he was attempting to rape their 14-year-old daughter. The woman, her daughter and the younger son were convicted under S 302 of IPC by the sessions court. In appeal the Madras High Court acquitted them and held that the murder was committed in self-defence. If the courts and society fail to protect women and children trapped within a violent marriage and in a vicious cycle of violence, it may only lead to escalation of this phenomenon which our legislators and the judiciary need to take note of.

CONCLUDING OBSERVATIONS

Rape, dowry-related violence and other forms of domestic violence against women are different manifestations of the same malaise. To the extent that judicial decisions and their implementation on the ground continue to be coloured by patriarchal values, the effect of legal reform will necessarily be unsatisfactory. The campaign for legal reform by the women's movement has so far attacked primarily superficial symptoms. The thrust in the campaign has to be reoriented at this point of time if better results are to follow.

ABBREVIATIONS

AIR	All India Reporter	Mah	Maharashtra
AP	Andhra Pradesh	MP	Madhya Pradesh
Bom	Bombay	NOC	Notes on Cases
CAL	Calcutta High	Ori	Orissa
CrLJ	Criminal Law Journal	Ors.	Others
CrPC	Criminal Procedure Code	Raj	Rajasthan
DMC	Divorce and Matrimonial Cases	r/w	read with
HC	High Court	S	Section
IPC	Indian Penal Code	SC	Supreme Court
Mad	Madras		

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2. *Premchand & Anr.* v. *State of Haryana*, 1989 CrLJ 1246.
3. *State of Haryana* v. *Premchand & Anr.*, 1990 CrLJ 454.
4. *Rao Harnarain Singh* v. *State of Punjab*, 1958 CrLJ 563.
5. *Phul Singh* v. *State of Haryana*, 1980 CrLJ 8.
6. *Krishnalal* v. *State of Haryana*, AIR 1980 SC 926.
7. *Rafiq* v. *State of Uttar Pradesh*, 1980 CrLJ 1344.
8. *Harpal Singh & Anr.* v. *Himachal Pradesh*, 1981 CrLJ 1.
9. *Bijoy Kumar Mohapatra & Ors.* v. *State of Orissa*, 1982 CrLJ 2161.
10. *Bharwada, Bhogibhai Hirjibhai* v. *State of Gujarat*, 1983 CrLJ 1096.
11. *Jayanti Rani Panda* v. *State of West Bengal*, 1984 CrLJ 1535.
12. *Saleha Khatoon* v. *State of Bihar*, 1989 CrLJ 202.
13. *Ravindra Dinkar* v. *State of Maharashtra*, 1989 CrLJ 394.
14. *State of Maharashtra* v. *Vasanth Madhav Devre*, 1989 CrLJ 2004.
15. *Bhansingh* v. *State of Haryana*, 1984 CrLJ 786.
16. *Mohammed Habib* v. *State*, 1989 CrLJ 137.
17. *Imratlal* v. *State of Madhya Pradesh*, 1987 CrLJ 557.
18. *Babu* v. *State of Rajasthan*, 1984 CrLJ 74.
19. *Sridhar Bidnani* v. *State of Orissa*, 1988 CrLJ 1022.
20. *Kunhimon alias Sainudeen & Ors.* v. *State of Kerala*, 1988 CrLJ 493.

21. Supra n. 8.
22. Supra n. 11.
23. *Darayaram & Anr.* v. *State of Madhya Pradesh*, 1992 CrLJ 3154.
24. *Maharaj Din* v. *Emperor*, AIR 1927 Lah. 222.
25. *Kishen Singh* v. *Emperor*, AIR 1927 Lah. 580.
26. *Bhartu* v. *Emperor*, 1934 (35) CrLJ 432.
27. *Sittu* v. *State*, AIR 1967 Raj. 149.
28. *S.P. Malik* v. *State of Orissa*, 1982 CrLJ 19.
29. *Rameshwar* v. *State of Haryana*, 1984 CrLJ 766.
30. *Prem Narayan* v. *State of Madhya Pradesh*, 1989 CrLJ 70734.
31. *Divender Singh* v. *Hari Ram*, 1990 CrLJ 1845.
32. *Ankariya* v. *State of Madhya Pradesh*, 1991 CrLJ 751.34. *Kandappa Thakuria* v. *State of Assam*, 1992 CrLJ 308435. *Major Singh* v. *State of Punjab*, AIR 1963 Punj. 443 FB36. *State of Punjab* v. *Major Singh*, AIR 1967 SC 6337. Supra n. 22.
33. Supra n. 8.
34. *L.V. Jadhav* v. *Shankar Rao A. Saheb Pawar*, 1983 4 SCC 231.
35. *Madhuri Mukund Chitnis* v. *Mukund Chitnis*, 1992 CrLJ 111.
36. *Ashok Kumar* v. *State of Punjab*, 1987 CrLJ 412.
37. *Padmavati* v. *State of Madhya Pradesh*, 1987 CrLJ 1573.
38. *Sarla Prabhakar Wagmare* v. *State of Maharashtra*, 1990 CrLJ 407.
39. *Sharad Sarda* v. *State of Maharashtra*, 1986 CrLJ .
40. *State of Maharashtra* v. *Ashok Chhotelal Shukla* (unreported)—Bombay High Court Judgement dated 14 January 1986, 11986 in confirmation case no. 4 of 1986 9. *Dilip Kumar Tarachand Gandhi & Anr.* v. *State of Maharashtra*—Bombay High Court Judgement dated 6 March 1991 in Criminal Appeal no. 51 of 1991.

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Seminar Proceedings

INTRODUCTION

Background. The Institute of Social Studies Trust (ISST), New Delhi and the United Nations Economic and Social Commission for Asia and the Pacific (UN-ESCAP) jointly organized National Seminar on 'Women and Law'. Over forty participants, representing various professional groups, NGOs, judges, lawyers and activists, deliberated on the scope of law and legal system 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, institutionalization 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 protection; on gender justice rather than correctional justice, in keeping with the fast changing role and perceptions of woman's identity in Indian society.

Objectives of the Seminar. The Director, ISST, Swapna Mukhopadhyay 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 vocalizing 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.

*Proceedings of the National Seminar on 'Women and Law', India International Centre, Max Mueller Road, New Delhi, 3-4 December 1994.

The Four Plenary Sessions. The seminar was divided into four sessions, each session focusing on a specific issue. Two experts were invited to comment upon the issues and perspectives thrown open by the 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; the efficacy of State-centric interpretation and implementation of the legal structure given its patriarchal bias; the moral basis of rights; judicial efforts and ability to transform power relations.
(b) *Women's Health as a Legal Right*—gender-specific legislation in the area of health and its efficacy, areas of deficiencies in the operational context of law; relevance of State intervention; responsibility of non-governmental organizations; gender aspects of STDs and AIDS; sex-specific foeticide, artificial insemination, surrogate motherhood, etc.
(c) *Institutionalization of Women and Law*—efficacy of institutionalization as a curative process; the anomaly of 'safe custody'; interchangeability of punitive and protective institutionalization; 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 misplaced campaign; necessity for delinkage of domestic violence from property issues; growing complexities.

INAUGURATION

The seminar was inaugurated by M.R. Madhav Menon, Director, National Law School of Indian University at Bangalore and a distinguished scholar. In his inaugural address, he 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 the opportunity to participate in the political process.

FIRST PLENARY SESSION—RIGHTS AND JUSTICE FROM A GENDER PERSPECTIVE

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

Brief Resume of Theme Paper

Nivedita Menon 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 patriarchal structures and biases. Questioning the myth of neutrality of law and the efficacy of the State as an agent of change and executor of laws, in a society which is preoccupied with manifestations of poverty and underdevelopment, the writer concluded that feminism has exhausted the potential of legal reform to initiate societal change.

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

(a) State-centric implementation of 'rights' and 'law' rejects individualism and upholds community welfare. Such a position installs the 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, the law permitting women's access to abortion results in selective abortion of female foetuses.

Nivedita Menon's pessimism about law's inability to incorporate the language of feminism also arises from the premise that the modern legal system tends to be certain and uniform, and is flexible only to the

extent that it permits change through judicial decisions. Judicial decisions are, however, 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 in fact re-entrenches patriarchal values.

Highlight of Comments and Deliberations

Chhatrapati Singh stressed the need to reflect more deeply upon the notions of feminism in the legal context and to explore other non-violent options available for social emancipation in case the legal discourse failed.

Rajiv Dhavan talked about the 'Abhimanyu' type of predicament of women's organizations who rely on the legal system to achieve feminist rights and end up by being entrapped by the legal system itself. He expressed the view that law created by vested interests was cruel, and incapable of liberating. He believed that the redeeming factor was in law's malleability to change. He added that the personal law should be subjected to Article 14 of the Constitution to bring gender equality and the concept of status, property, opportunity and equality rewritten and reinterpreted to evolve feminist jurisprudence.

Virendra Dayal, Member, Human Rights Commission of India, exhorted that activism should not end up being a lament of a trapped activist. He expressed the view that law should be supplemented by other fields of activism. L.C. Jain, noted development expert, said that in a democracy, law could be a powerful instrument of change, provided it is enforced and implemented 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.

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.

Recommendations for Specific Action

Suggestions for action required to be taken by women's organizations 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 AND HEALTH UNDER THE LAW

This session was chaired by M.R. Madhav Menon, Director, National Law School of Indian University at Bangalore. The theme paper titled 'Women and Health under the Law' was presented by Geeta Ramaseshan, Madras-based advocate and legal expert. Expert comments came from Arundhati of the Voluntary Health Association of India and 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.

Brief Resume of Theme Paper

Geeta Ramaseshan highlighted the fact that very few gender-specific legislation exists in the area of health and even this has 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 legislation, 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. and 5 a.m. may bring economic disadvantage to women workers. In such cases, the State's role as a protector becomes irrelevant and even undesirable.

Judicial decisions under the Medical Termination of Pregnancy Act invariably reflect social and traditional prejudices and do not uphold woman's natural right over her body. There have been judgements holding

abortion without the consent of the husband as cruelty and a ground for divorce under the Hindu Marriage Act.

The law has miserably failed to take note of the need for a separate legislation for the mentally disabled who are lumped along with the mentally ill by both society and State, in its treatment and attitudes towards them. Recent incidents of forcible hysterectomy conducted on mentally disabled in a 'home' in Pune denote the extent of misuse and misinterpretation of the law by administrators.

Government policies and programmes on family planning have also refracted from the enforcement of beneficiary legislation expressedly enacted for the benefit of women. Legislation in the field of reproductive technology needs to be re-examined. Easy availability of serious and potentially harmful drugs and injections for the purpose of contraception have seriously impaired women's health.

The extraordinary and rapid advance of biological and genetic technology will give rise to new and complicated legal issues like the status of children born of artificial insemination and the legal status of surrogate mothers.

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

Highlights of Comments and Deliberations

The law as it exists does not take a holistic approach to women's health and well-being. Piecemeal legislation in certain employment and family planning related fields is inadequate to deal with the complexities of women's mental and physical health.

In the area of health, focus is required on women suffering from economic and social deprivation, rural and tribal women for whom medical facilities are inadequate and inaccessible.

Awareness of their health rights is lacking among women. The medical profession should be sensitized to work for underprivileged sections of society.

The unorganized 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, the 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.

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

The 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.

Recommendations for Specific Action

- The 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 jeopardizing women's health, it should be held accountable under the law.
- The concept of health should be holistic and should not merely mean the absence of disease. Strategies need to be formulated to bring the neglected areas of women's social and mental health within the fold of administrative and legal action.
- There is a 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 the 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 the Consumer Protection Act, a pressure mechanism needs to be built up to inculcate social responsibilities in the 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 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 Usha Ramanathan, legal researcher, and was presented by S. Murlidhar, Advocate, Supreme Court of India. Expert comments were made by Gopal Subramanium, Senior Advocate, Supreme Court and 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 system.

Brief Resume of Theme Paper

The paper reflected on the legitimacy and propriety of institutionalization as a means of corrective justice for women. Institutionalization as it exists makes no distinction between the convict, the undertrial, the mentally disabled, the mentally ill, the wanderer and the destitute, the runaway or abandoned girl and the prostitute—subjecting them equally to the physical and mental trauma of closed confinement and the neglect and abuse, of sexual and other kinds, that go with it. Institutionalized women suffer a complete severance 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.

The 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 the 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 the lower judiciary, denotes the dangers of an inept and inane system of justice delivery. Instances abound where respectable and innocent women, destitute and wanderers have been picked up and sent to mental institutions.

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 the 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 and financially influential people without any process of justice initiated for them. This is merely one example of a systematic malaise. The fault lies not just in the working of the law but in its very statement of control without accountability.

The inter-changeability between punitive and the protective or curative institutions makes prison cells places of 'safe custody'. This enables the 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!

The incapacity that the law enforces upon institutionalized women is further aggravated in the case of mentally ill women. Since the discharge of a woman depends upon her acceptance by the family, which rarely ever happens, the 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.

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

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 and shelter, facilities for reading, writing and expressing oneself in diverse forms, with fellow human beings'. The closed nature of the institutions, however, defies change; and the conditions remain as deplorable as ever.

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

Highlights of Comments and Deliberations

In his comments on the issue of women's institutionalization, Gopal Subramanium recounted in vivid detail the appalling conditions of such women that he encountered in his recent investigative visit to Assam as Commissioner. 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 added.

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, dehumanize, exploit and assault human beings mercilessly.

It was felt that there is a complete absence of alternative options to State institutionalization. Neither women's organizations 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.

From a gender perspective institutionalization as it is 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. Hence, many have virtually no viable option left.

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

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

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.

Recommendations for Specific Action

— 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 reinterpreted 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 AND VIOLENCE AGAINST WOMEN

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 the lawyer/activist from Bombay, Flavia Agnes. Invited commentators were Meenakshi Arora, Advocate, Supreme Court and Maja Daruwala from the Ford Foundation, New Delhi. In this session, reasons for the failure of the legal system to address itself to the sensitive issue of violence against women, within and outside the family structure, were discussed.

Brief Resume of Theme Paper

The last decade saw a spate of women's laws as the women's movement gained momentum. During this period every single issue taken up by the 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, 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 death of women increases, the rate of convictions under the new enactments remains as dismal as ever.

A sense of disillusionment has set in amongst women regarding the potential of law as a means of delivery of gender justice—for many reasons. *First*, it is being felt that changes in the substantive law itself paid only lip-service to 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. *Second*, 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. *Third*, the campaigns themselves addressed only the superficial symptoms and not the basic questions of power balance between men and women. Solutions were sought within the patriarchal framework and did not transcend into a new feminist analysis of the issue aiming at the empowerment of women. The conservative notions of women's chastity, virginity and servility within the patriarchal set-up, were seldom questioned. The campaign against rape upheld the traditional notion that rape is the ultimate violation of woman's virtue, and a state worse than death. The campaign against dowry 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. *Fourth*, 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 ten years—the minimum prescribed by the law—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.

Citing a battery of case law, the author asserted that the settled legal position regarding 'consent' in rape, which presumes that a woman enjoys the freedom to exercise her choice; biases against rape victims; fuzzy distinction between sexual offences 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.

Similarly, in the case of dowry deaths, the 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.

In Criminal Law reform, domestic violence has been linked with demands for dowry. In Sections 498-A and 304-B of the 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 refuse 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.

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.

Highlights of Comments and Deliberations

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

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

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

Recommendations for Specific Actions

The judiciary needs to be sensitized to women's issues through seminars and conferences, educating judges on women's perspectives and defects in the existing legal system.

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

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

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

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

CONCLUSION

The two-day seminar came to an end with concluding remarks and a vote of thanks by Swapna Mukhopadhyay, Director of ISST. She thanked the chairpersons for the sessions, the paper writers, expert commentators and all other participants for making the seminar 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.

Swapna Mukhopadhyay observed that the seminar had succeeded in bringing together on 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 rights and human rights background. The deliberations in the seminar were enriched by the process of interaction among the diverse groups of people.

A second major achievement of the seminar was 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 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 the legal rights of women within the larger context of human rights and civil liberties. This, by all accounts, has been an immensely enriching experience.

Swapna Mukhopadhyay put forward a set of summary recommendations that emerged from the seminar proceedings and concluded the session with a vote of thanks to all those who contributed to the success of the seminar.

Summary of Recommendations

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 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 the 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.

Agenda

3 DECEMBER 1994

0930-1000 hrs.	Registration
1000-1015 hrs.	Welcome address by Swapna Mukhopadhyay, Director, Institue of Social Studies Trust
1015-1025 hrs.	Inaugural address by M.R. Madhav Menon, Director, National Law School of India University
1030-1045 hrs.	Tea/Coffee

SESSION I

1045-1300 hrs.	'Rights and 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 and Health Under the Law'
	Chairperson: M.R. Madhav Menon
	Theme Paper Writer: Geeta Ramaseshan
	Commentators: Arundhati
	Ritupriya
1530-1545 hrs.	Tea/Coffee
1545-1630 hrs.	Discussion

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SESSION III

1000-1115 hrs. 'Institutionalization of Women Under the Law'

Chairperson: V.S. Rama Devi
Theme Paper Writer: Usha Ramanathan
Commentators: Gopal Subramanium
Amita Dhanda

1115-1130 hrs. Tea/Coffee

1130-1300 hrs. Discussion

1300-1400 hrs. Lunch

SESSION IV

1400-1530 hrs. 'Law and 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 and Vote of Thanks

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