

THE LAW IN INDIA; FROM GIRL CHILD TO WOMAN

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*"She has the right to participate in the minute details of the activities of man and she is entitled to a supreme place in her own sphere of activity as man is in his."*¹

Introduction

India occupies a strategic position in Asia, being the largest of the South Asian countries, with a population of over one billion. Women constitute a population of 495.74 million, with 360.52 million in the rural areas and 135.22 million in the urban areas. The human development status of women shows wide interstate and intrastate variations. India's human development is marked by a paradox that has seen a systematic decline in women's social status despite recent advances in women's education and economic status. It is indeed puzzling that the economic development of the women has not brought commensurate change in their social development.²

India became a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") in 1980 and ratified it in 1993. However, India submitted a declaration regarding Articles 5(a) and 16(1) that reiterates India's commitment to abiding by the provisions "in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent." India also registered a declaration regarding Article 16(2) on minimum marriage ages and compulsory registration; although India fully supports the principle, "it is not practical in a vast country like India with its variety of customs, religions and level of literacy."

India acceded to the United Nations Convention on the Rights of the Child ("CRC") in 1992, with a declaration regarding the progressive implementation of Article 32 thereof on child labour, particularly with reference to paragraph 2(a) on the provision of a minimum employment age.

India declared year 2001 as Women's Empowerment Year for the country, and the National Policy for Empowerment of Women of India was released also in 2001. Women's empowerment depends to a large extent on the degree of access to and control of women over different means of communication or mass media. The oppressed and marginalised groups, including women,

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¹ M.K. Gandhi, *Women and Social Injustice*, Ahmedabad: Navjeevan Publishing House. 1947, 4

² Prasad, Kiran, "Preface", in Kiran Prasad (Ed), *Communication and Empowerment of Women: Strategies and Policy Insights from India*, New Delhi: The Women Press, 2004.

are often excluded in the coverage by communication channels. Communication for women's empowerment is a participatory process wherein women activists and women's groups have begun to break away from their state of powerlessness to question the status quo that oppresses them when negative social values and cultural norms are disseminated through different media. India's National Policy for Empowerment of Women, an official policy document of the Government of India, includes measures to promote societal awareness to gender issues and human rights, and the use of different forms of mass media to communicate social messages related to women's equality and empowerment.

Women in India continue to labour under the brunt of oppressive traditions, exploitation, and lack of self-worth or identity. This article is an effort to underline the current collision between strong women's rights expressions prevailing in India and a static view on law and legislations.

I. Indian History and the Woman

There is a widespread view among scholars that the best way to judge a nation's progress is to find out how the nation holds the status of women. Indeed, many researchers have equated levels of cultural development with the types of treatment meted out to women and have found that there is a strong correlation between law and status of women, and sometimes maybe the cultural levels of a society.³

Many have traced the enunciation of liberal social attitude vis-à-vis women to the pristine sources of the Hindu Vedic philosophy.⁴ The late nineteenth century's research has marked the high status of women in the Vedic period, when women participated fully in religious rituals, had freedom of movement, were educated like boys, married fairly late, and had a right to decide whom to marry. Widow remarriage was permitted and unmarried or married women also enjoyed an honoured position in family and society.⁵ The woman in the Vedic age was the husband's companion in weal and woe, an equal partner in all activities.

Degradation in the position of women, however, was a fact when famous jurists like Manu remarked as follows:⁶

³ D.N. Majumdar, *Races and Cultures of India*, Bombay: Asia Publishing House, 1989, 251.

⁴ The Vedic civilization is the Indo-Aryan culture associated with the Vedas, the earliest known records of Indian history. Mainstream scholarship places the Vedic civilization into the 2nd and 1st millennia BC, while some Hindu scholars date its beginnings as early as the 5th millennium BC based on alleged astronomical information in the Vedas.

⁵ A.S. Altekar, *The Position of Women in Hindu Civilisation*, Delhi: Motilal Banarasi Dass Publishers, 1989, 235.

⁶ The Manu Smriti ("Laws of Manu" or "Institutions of Manu"), is a foundational work of Hindu law and ancient Indian society, written c. 200 in India. It is one of the eighteen Smritis of the Dharma Sastra (or "laws of righteous conduct"). Smriti means "what is remembered" and is applied to a Hindu text other than the Vedas, including traditional Indian epics, the Puranas, and science and grammar treatises. Unlike the Vedas which are considered of divine origin, the Smritis are considered to be of human origin. They contain laws, rules and codes of conduct to be applied by individuals, communities and nations. Some of these laws, for example, codify the Hindu caste system and discuss the "Stages of life for a twice-born man".

Women [sic] in her childhood must remain under the custody of her father, in youth she must remain under the custody of her husband and when widowed she must remain under the custody of her sons. She must never be independent. Women whether minor or young or old, must not act independently in the house. It is sin for women to offer sacrifice or fast. Her duty is only to serve her husband and in case of his death she must never think of second husband. She must eat less to pass rest of her life.⁷ To tell lies is the nature of women.⁸

Manu continues:

“The truth, however, is that the male is the enjoyer and female a thing to be enjoyed”. The bride is given to the Bridegroom with a solemn declaration “Like a dinning leaf (which cannot be used by another person), she is unfit to be enjoyed by another person.”⁹

It is evident from Sanskrit works that women were jealously and strictly guarded, and in no state of life were they independent. However, at the same time there was not want of the feeling that it is the moral, and not the physical, means which serve as a safeguard against temptation.

During the golden periods of Indian history under the *Mauryas*¹⁰ and the *Guptas*,¹¹ there was a gradual erosion of women's rights. Regressive customs like child marriage, *pardah*,¹² and *sati*¹³ began in the turbulent times that followed.¹⁴ The position of common women did not improve during the rule of the Mughals, who were Muslim.¹⁵ At the time of the advent of the British rule, the position of women in India was at its lowest ebb. Child marriage was in vogue. Sati was prevalent. Female literacy was considered a source of moral danger. Dancing girls¹⁶ had lucrative professions.¹⁷

By the end of nineteenth century, women had emerged as leaders of the women's movements. In the 1920s and 1930s women participated in the non-cooperation and civil disobedience movements against the British oppression in India, and many served jail sentences. The All India Women's Conference¹⁸ became the major vehicle for the women's movement, shifting

⁷ This means that a woman who is a widow should pass her life on minimum resources; she must not become a burden on her family or those she is dependent on, since dependency is the very nature of a woman, according to Manu's principles.

⁸ *Manu Smriti*, Chapter V, Sloka, 147-157.

⁹ Ibid.

¹⁰ The Mauryan Empire lasted from 321 to 185 BCE.

¹¹ The Gupta Empire lasted from 320 to 550.

¹² The wearing of the veil.

¹³ Self-immolation by the widow on the funeral pyre of the husband, a social practice among some Hindu communities.

¹⁴ Verma and Verma, *Indian Women through the Ages*, New Delhi: Great India Publishers, 1976, 11.

¹⁵ The Mughal Empire lasted from 1526 until British rule began in 1857.

¹⁶ Dancing girls traditionally were also courtesans.

¹⁷ Azim Sherwani, *The Girl Child in Crisis*, New Delhi: Indian Social Institute, 1988, 13.

¹⁸ A women's rights group.

from welfare requests to demands of full political and legal equality in all areas. When India finally became independent, the Congress Government, implemented many demands of the All India Women's Conference, which included legislation for prohibiting polygamy, liberalising divorce, and granting equal inheritance rights to women.¹⁹

Mahatma Gandhi placed the question of women's emancipation in its proper perspective, as an integral part of a larger process of social transformation. For Mahatma Gandhi, freedom of the nation was the sum total of the freedom of all individuals.²⁰

II. The Girl Child and the Law

The inherent right of the child to life is a fundamental principle in International Law, both in regard to child rights specifically and human rights in general. What differentiates the child's right to life from the general human right to life is that the child's right goes beyond a mere right to not have its life taken. The child's right to life includes the fact that a child, by its very definition, is an evolving and growing person. Therefore, in order to ensure and guarantee a child's normal growth and development it is only natural that a constant consideration for a child's mental health should be included in laws and enactments where child rights are discussed. This means that the child also has a right to grow and develop. The CRC states that "State Parties shall ensure to the maximum extent possible the survival and development of the child." Article 25 states:

State Parties recognize the right of a child who has been placed by the competent authorities for the purpose of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment and all other circumstances relevant to his or her placement.

Remarkable developments have taken place both internationally and in India when it comes to prioritising child rights, but the links between child abuse, child labour and the care for a child's mental health are still absent. In India there is no separate law with regards to sexual assault of children. The general law on rape contained in the Indian Penal Code ("IPC") covers child sexual abuse and assault.²¹ The most decisive evidence in child sexual abuse cases is the medical report, which has the core aim of tracing the offender. The duty of the medical professional is to examine the child victim and gather information that will protect and/or validate the traumatised child. In the cases of refusal to undergo a medical examination the child is referred to a therapist, but only for issues that are making the child uncooperative.²² Similarly, the Juvenile Justice Act 1986 and the amended Act of 2000 have impressive preambles, despite

¹⁹ Ibid.

²⁰ M.K. Gandhi, "Constructive Programme quoted in the U.N" in *Harijan*, 25 March 1939.

²¹ Marukh Adenwalla, *Child Sexual Abuse and the Law*, Mumbai: India Centre for Human Rights and Law, 2000, 45.

²² Adenwalla, op. cit., 85.

which the Act scarcely touches upon the subject of child sexual abuse, and completely leaves aside therapy and mental health considerations:

An act to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles.

Several aspects within women's rights and child rights issues highlight the insensitivity and disinterest amongst law and policy makers when it comes to real victimology, and the psychological understanding for a victim's trauma. With regard to the victim and the application of psychological considerations and support, such criticism indicates how the application of the capital punishment is viewed to be the settler of justice for victims, however, applying this punishment and completely disregarding rehabilitation and social assistance as recommended in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985, cannot be a matter of a justice system, which should balance the rights of the victims with the rights of the offenders. What is important to note here is the definition of "victims" and their "assistance" put forth under section A. *Victims of Crime*: (selected provisions)

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Furthermore, with guidance from the restorative theory, the Declaration has elaborated on particular assistance factors, which are mentioned below.

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

Different Indian laws define a child variously. This variety in defining a child demonstrates the unpreparedness of the Indian legislator to deal with the added responsibility the moment a law is formed for a child. This unpreparedness has turned into a dreadful insensitivity - with trauma not dealt with and affecting generations. From a larger perspective, all of us should fear the devastating after-effects of sexual abuse and other crimes against children behind closed doors.

Social scientists are now coming to believe that sexual abuse of children in India is far more prevalent than most people realise. The enormity of the problem can be realised by the fact that in India alone, at least 25 percent of the adult population has been molested before the age of 16. At least 27 million females are adult survivors of child sexual abuse. Incest is the most common form of child abuse.²³ Furthermore, a report on the implementation of the CRC in India, prepared by the Department of Women and Child Development for the United Nations Committee on the Rights of the Child, has identified child sexual abuse as a priority issue for immediate action. It is crucial to note that, in a survey conducted by Sakshi²⁴ in 1996, 50% of 109 judges felt that child sexual abuse is not common, and that this "uncommon offence existed only amongst uneducated, depressed, and over-sexed people or people with a prostate gland problem". Furthermore, these judges felt that abuses were mostly carried out by servants and least commonly within families.

Despite the gravity of the problem, the various facets of child abuse are never discussed within the educational system. The aforesaid becomes even more questionable when Indian society and its various institutions constantly lecture its citizens on rights and wrongs, moral and ethics. Strangely, the educational system has missed out on informing its children that, the moment an abuse has taken place, something wrong has taken place. Doing so would not be at all unusual - most civilised nations use the educational system as a crucial means to inform its children about what amounts to a crime against a minor, and about the various victim

²³ See Sairam Bhat, "Too little for the little ones", December 2004, available at: <http://indiatogether.org/2004/dec/chi-abuse.htm>

²⁴ An NGO working extensively for women's rights.

support systems. Maybe it is immature to believe that sensitive issues such as incest would be dealt with in a set-up which does not even believe in sex education in schools. There is a lack of a system of awareness, and the adult's accountability towards a child fails. A couple of years ago Ram Chandra Purbey, the former state primary education minister for the northern state of Bihar, exclaimed the following; "Our society is not an open one. Inclusion of sex education in the syllabus can also have an adverse effect". This statement clearly indicates the government position taken on the issue of sex education.

The laws dealing with sexual offences do not specifically address child sexual abuse. It is disconcerting but true that the IPC 1860 does not recognise child abuse. Only rape and sodomy can lead to criminal conviction. Anything "less than rape", as defined by the law, amounts to 'outraging the modesty'. These laws are problematic when applied to adult women, but they are even more difficult when applied to children. While section 376 IPC seeks to provide women redress against rape, it is rarely interpreted to cover the broad range of sexual abuses particularly of children that actually takes place. The word 'rape' is too specific, this does not include abuse on 'boys'; moreover, 'intercourse' is often interpreted to mean with an 'adult'.

In *Sakshi v Union of India*, the Supreme Court of India asked the Law Commission to consider certain important issues regarding sexual abuse of children submitted by the petitioner and the feasibility of amendment to sections 375 and 376 IPC.²⁵ Hopefully, the forthcoming amendment will also deal with issues of the aftermath of child sexual abuse. The abused children commonly suffer from serious mental and physical effects, either immediately or later in life, from emotional and behavioural problems to abnormal sexual behaviour and psychiatric disorders. Suicidal tendencies and drug abuse are common long-term effects as well. Child related concepts are gravely missing in the Indian laws. A victim of crime, and more so if the victim is a child who is under going trauma, needs to be treated with care. The facilities with regard to emergency reception of victims of crime are lacking to a great extent. There are no mental health professionals to deal with the trauma stricken victims. Moreover, the victims who do not have signs of serious physical injury are released immediately without any psychiatric treatment. There are also no provisions in the Indian Mental Health Act to admit a person suffering from psychiatric illness for treatment in emergency.

Furthermore, in *Majlis Manch v State of Maharashtra & Others*, a 9-year-old deaf and mute girl, institutionalised in an observation home, was raped. The medical examination indicated "[s]kin injury mark. Bite mark on right cheek and multiple abrasion marks over skin, buttocks and both legs". Even in such a dreadful case, where the child is not able to express pain or explain even minimally what has happened to her, there has been no realization or will to make mental health considerations an inextricable component of law.²⁶

²⁵ Case no: (1999) 8 SCC 591.

²⁶ Criminal Writ Petition No.585 of 2000-Bombay High Court

It is appalling to find the debate surrounding legislations on children and their mental health virtually absent, and opinions of legal experts almost non-existent. Aspects such as psychological assistance and mental health concerns as a means to regain the 'lost innocence' of a child, and how such rehabilitation can break the cycle of violence, have been missed out in the lawmakers' priorities and in the training of lawyers and judges.

III. The Indian Proposed Commission for the Protection of Child Rights Bill, 2005: a Critique

The Commission is proposed to be a legal mechanism to oversee and review the implementation of the National Policy for Children. It will also help improve the survival rate, health, nutrition and education of children, particularly girls, and equip them to become economically productive adults. An analysis of Chapter II of the Commissions of Protection of Child Rights Bill 2005, as introduced in the Lok Sabha,²⁷ suggests the inherent difficulty in determining the needs of a child who has come out of a traumatic experience. Chapter II Section 3(2) puts forth the profile of the Commission's members as follows: a Chairperson, who is a person of eminence and has done outstanding work for the promotion of children, and six members, to be appointed by the Central Government from amongst persons of eminence, ability, integrity, standing and experience, one from each of the following fields: education; child health, care, welfare, or child welfare; juvenile justice or care of neglected or marginalized children or children with disabilities; elimination of child labour or children in distress child psychology or sociology; and laws relating to children

This particular chapter abruptly demonstrates the generalisation of the special needs of the individual child. By mixing special needs of for instance child health and child welfare as interchangeable areas, or child psychology and sociology as filling the same functions in all situations for all children, the legislator and policy maker have again indicated an inability to understand the importance of specialised representation in the form of experts as Sociologists, **and** Psychologists, **and** experts in Child Health **and** Child Welfare.

The proposed Bill also allows for the declaration of Children's Courts by a state government, regulates the constitution and functions of the Children's Courts and provides for a Special Public Prosecutor to be appointed.²⁸

In *Vishal Jeet v Union of India*, the Supreme Court directed steps to be taken against child prostitution.²⁹ One directive was on establishing advisory committees with experts from all fields to make suggestions regarding measures for a number of matters including eradicating

²⁷ The Lok Sabha (House of the People) is the lower house of Parliament of India. Members of the Lok Sabha are direct representatives of the people of India as they are directly elected by the electorate consisting of all adult citizens of India.

²⁸ Parul Sharma, "Critical Case: Child Rights Bill" in *Tehelka the People's Paper*, 17 September 2005.

²⁹ AIR 1990 SC 1412.

child prostitution; care and rehabilitation of rescued girls, and setting up of rehabilitation homes. The judgment did indicate a good understanding of the sensitive situation of children coming out of prostitution. However again, the judiciary failed to understand the importance of defining 'rehabilitation' in the judgment. Experts may argue that defining such terminology is not within the mandate of the court. However, when directions concerning child rights are formulated it must be required by law either that expert opinions are included or that judges are sensitised towards issues such as child psychology. This should also be made applicable to the Juvenile Court, where a permanent position of a psychologist/mental health professional can be created alongside the judge to identify and precisely define directions on rehabilitation.

The vague mandate of the planned Children's Court is a repeat of the vague mandate expressed in the Indian Protection of Human Rights Act, 1993, where human rights law could be "anything under the sky".³⁰ Again, a general sessions court will act as a guarantor for the implementation of rights; whether human rights or child rights. Another unfortunate fact is the weight put on, and importance given to, the prosecution side where the appointment of a special prosecutor has been declared, but no appointment with regard to the growing and developing child has been taken care of, for instance, the expertise of child psychology within the court of law.

IV. Socio-legal Discrimination Against Women

Social discrimination appeared in an Indian Court room on the 3rd of May 2005, when a convicted rapist offered his victim a marriage proposal. The man had been convicted of raping and seriously injuring the 22-year-old nurse in September 2003 at the hospital where they both worked. Minutes before sentencing was due on Tuesday 3rd of May 2005, the man issued his marriage proposal. She had been asked in court whether she would accept the proposal from her attacker who had hoped it might lower his sentence. The judge postponed sentencing until the next day, when the rape victim told the court she had rejected the petition. There are so many questions which come to any person's mind; did the court as a "law-making" institution at all consider the dangers to women caused by such a precedent? The convicted rapist said he was offering to marry the woman because the stigma of rape in India meant no one else would. Does the court of law have the same thinking pattern? What social responsibility was the court fulfilling? According to Brinda Karat, general secretary of the All India Democratic Women's Association, "the request and the actions of the court were highly objectionable and demeaning to the victim".³¹

A similar case in the western city of Jaipur eight years ago, where a court ruled "that five upper caste Hindu men were unlikely to have raped a lower caste woman", shows yet another plagued delivery of "justice". The five were cleared of the gang rape of the 43-year-old woman, who was campaigning against the traditional practice of child marriage in the state of Rajasthan. The

³⁰ Parul Sharma, "Child Rights Bill 2005: lacks a clear understanding of the problems of abused children" in *TEHELKA the People's Paper*, 17 September 2005.

³¹ Parul Sharma, "Mental Health needs Help" in *India Together*, 23 June 2005.

capital of India, New Delhi, is to set up special courts to deal with cases of rape that will be prosecuted and judged by women. However, the question is, will the delivery of justice be based on justice or social discrimination even with a woman judge sitting on the bench? Is the issue about gender inequality or is it about socio-cultural perceptions? The result is yet to be seen.

The social reform movement in India targets several social practices that are against women such as child marriage, *sati*, widow remarriage restriction, polygamy, the *purdah* system and female infanticide. In 1929, an all-India Act banning *sati* was passed. It is truly paradoxical that Roop Kanwar, a young widow, was burnt alive to become a *sati* in 1987 in Deorala, Rajasthan. The tradition of *sati* thrives in parts of North and North West India where women worship the patron female god of *sati* in temples. The gender discrimination and violence against women have had a profound effect on the sex ratio in India. The child sex ratio (female children per 1000 male children under five years of age) has been dropping for the past 50 years with the decade of 1991-2001 registering a steep decline from 945 to 927. The existing social relations have reinforced crimes on girl-children and women beginning, in many cases, even before birth in the form of foeticide, infanticide, dowry deaths, and honour killings.³²

In another unprecedented incident in the Indian city Nagpur in August 2004, a huge mob of women lynched serial rapist and dreaded criminal Akku Yadav and killed him on his way to a local court. When the court arrested four women for the crime, four hundred women volunteered to surrender before the court to secure the release of the women who were charged with the criminal's murder. Most media presented the incident as a "bizarre legal case" rather than focusing on the suffering and anger of the women against the legal-judicial system that gives little justice to women affected by violence, such as rape and torture. However, even women's groups are divided on the emerging power of women to settle scores with criminals using violent means. Some regard this response as a powerful strategy to restructure the insensitive police and legal structures. Others believe that there is the danger of women also being branded criminals if they engage in murder as justice for the crimes suffered by them.³³

V. Secondary Victimisation of Women

Currently, one issue prevailing in India is to prescribe capital punishment for rapists. The former Deputy Prime Minister, LK Advani, proposed the death penalty for rapists. It is incredible how politicians constantly talk of the death penalty for sexual offenders and completely overlook the right to mental health of the victim/survivor. The Minister further stated that the Indian government held the view that rape should attract the most deterrent penalty.³⁴ A crucial part of sentencing must be an overall victim's perspective, where the law-maker constantly scrutinises

³² Kiran Prasad, "Women's Movement and Media in India: Reshaping Notions of Power" in *Women in Action*, 1 (2002).

³³ Ibid.

³⁴ The Times of India, "Capital punishment for rapists soon says Advani," 28 October 1998.

and balances the offender's rights with the victim's rights. All aspects concerning victimology must be understood as a direct link to the questions of right to life and livelihood of the victim of crime. Arguments of deterrence and severe punishments are viewed in a legal and social context, as the sole consolation for a victim.

Research and professional experience shows that secondary victimisation, generated either by institutions or individuals, is often experienced by victims in the aftermath of crime and leaves them in need of help. Secondary victimisation involves a lack of understanding of the suffering of victims which can leave them feeling both isolated and insecure, losing faith in the help available from their communities and the professional agencies. The experience of secondary victimisation intensifies the immediate consequences of crime by prolonging or aggravating the victim's trauma. Attitudes, behaviour, acts or omissions can leave victims feeling alienated from society as a whole.

In the cases of assaults against women, statistics from year 2000 show that a woman is raped every hour in India. Still victims are often reluctant to report rape. In the court, they are supposed to prove that the rapist sexually penetrated them in order to get a conviction. This can be damaging, mainly so when defence counsel uses harsh and callous rhetoric to further victimize the survivor. Eminent judges and landmark cases talk of rape not merely being a physical assault but is often destructive of the whole personality of the victim. "...a rapist degrades the very soul of the helpless female".³⁵ Furthermore, it has also been realized that courts should shoulder a great responsibility while trying an accused on charges of rape. It has been felt that such cases must be dealt with "utmost sensitivity".³⁶ Unfortunately, following old patterns, the court has not defined what should be understood by great responsibility or sensitivity.³⁷

The Indian civil society is struggling with capacity building of judges, so that judicial pronouncements are socially conscious and empathetic. One thing which can be easily concluded, is that the road is long, maybe endless. As things are running, human rights concepts have to be left aside for the time being, and concepts of "common sense justice" have to be given to the judiciary as a large part of capacity building. In the court, rape victims are supposed to prove that the rapist sexually penetrated them in order to get a conviction. This can be damaging, mainly so when defence counsel uses harsh and callous rhetoric to further victimize the survivor. The statement "marry your rapist or go underground" ought to be added to the definition of secondary victimisation, as it adds to the trauma of a raped woman.

³⁵ Tribune Correspondent, "Life term for raping minor" in *The Tribune*, 13 January 2001, available at: <http://www.tribuneindia.com/2001/20010113/haryana.htm#3>

³⁶ Ibid.

³⁷ Parul Sharma, "Rape violence: this wound never heals" in *Tehelka the People's Paper*, 11 September 2004.

VI. Domestic Violence Against Women and the Law

Violence against women at home is the most pervasive form of human rights abuse. Domestic violence was declared a Human Rights issue for the first time at the United Nations Conference in 1994. Psychologists say domestic violence wrecks havoc on the personality of a woman. The constant threat of violence creates a feeling of helplessness, which destroys a woman's sense of self. The intermittent use of rewards creates yet more confusion in a woman's mind.

One slap a day for a woman is almost a matter of culture in some parts of our country and society, so where and how do we start sensitising people of violence against women - in all forms, mental, physical and emotional - being a crime? The International Centre for Research on Women (ICRW) suggests 80 per cent of men from Punjab think violence is justified if a wife is "disrespectful" and 60 per cent justify it if a wife "does not follow instructions". The National Human Rights Commission of India ("NHRC") has emphasised the need of opening more than one *women police thanas* (district based police offices) per district in different states, to deal with crime against women, but what is being done about the "cultural belief"? Does the law deal with this? Every six hours, a young, married woman is burnt alive, beaten to death or forced to commit suicide, and one in five continues to face domestic violence from the age of 15. This, when violence against women has been recognised as a human rights violation. Victims of violence, physical, sexual and even psychological, these women are today a statistic in the National Family Health Survey (NFHSII). What is more shocking is the fact that social customs and attitudes, which still consider women inferior, abet domestic violence.³⁸

Section 498A of the IPC covers domestic violence. Until the enactment of the recent Protection of Women from Domestic Violence Act, section 498A was the sole law to protect (married) women from domestic violence. However, 498A has been mired in controversy ever since its insertion in the IPC in 1983. Various studies (including a Tata Institute of Social Sciences study in 1999) indicated that the number of cases registered under 498A were miniscule compared to the prevalence of domestic violence. Yet, allegations of misuse of 498A have been voiced consistently by many, including the Malimath Committee on reforms of the Criminal Justice System and Justice JD Kapoor of the Delhi High Court in *Savitri Devi v Ramesh Chand*.

The government also initiated a study on the functioning and implementation of Section 498A. The Bureau of Police Research and Development under the Ministry of Home Affairs (MHA) commissioned NK Shinghal, a retired police officer, who in a 'statistically' heavy report, referred solely to "views and comments" when referring to "quite substantial" misuse of the provision. This appeared to be sufficient for the government, which, in August 2003, introduced the Criminal Law (Amendment) Bill 2003 to amend Section 498A, based on the Shinghal Report and the Malimath recommendations.³⁹ The Bill defines domestic violence as "habitually

³⁸ Parul Sharma, "Critical Case: Combating Violence" in *Tehelka the People's Paper*, 25 June 2005.

³⁹ Bikram Jeet Batra, "Critical Case: Domestic Violence" in *Tehelka the People's Paper*, 15 October 2005.

assaulting or making the life of the aggrieved person miserable by cruelty of conduct, even if such conduct does not amount to physical ill-treatment, or forcing the aggrieved person to lead an immoral life or otherwise injuring or harming the aggrieved person.”

In the object and reasons of the Bill, the then Home Minister LK Advani stated, “It has been widely reported that this provision has been misused and is also harsh as it is non-compoundable.” However, when the home ministry was asked for this data on misuse in a question in Parliament in December 2003, the Minister of State for Home Affairs, ID Swami stated, “[t]here is no information available with the government...”. There is no doubt that there are cases of misuse of 498A, but that is true of any other law.

The minister’s reply in Parliament should have ended the debate. However, the constitutionality of 498A was challenged in the Supreme Court in *Sushil Kumar Sharma v Union of India and others*.⁴⁰ Not only did the court uphold the constitutionality of 498A, it also rebuked Justice JD Kapoor, asking him to save his generalised observations and views for seminars or workshops. Unfortunately, the SC too made generalisations suggesting that the misuse of 498A unleashed a “new legal terrorism”.

A recent empirical study by the Delhi-based Centre for Social Research found that no more than 6.5 percent of cases under Section 498A were found false by the investigating agency. This figure is likely to reduce further as the creation of civil remedies under the new domestic violence legislation will allow victims to deflect pressure from police, relatives and lawyers to file criminal charges where unnecessary.⁴¹

Article 21 of the Indian Constitution regulates the right to life, and article 14 asserts equality before law for all citizens. Article 14 is the article prohibiting legislative arbitrariness. In *Excel Wear v Union of India*, one of the judges underlined that the word “life” in article 21 of the Constitution does not mean mere animal existence.⁴² Furthermore, the right visualised by this article is to live a dignified life.

Yet, in *Harvinder Kaur v Harmander Singh* 1984, the Delhi High Court abruptly stated:

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

⁴⁰ 2005 6 SCC 281.

⁴¹ Bikram Jeet Batra, note 39 above.

⁴² AIR 1979 SC 25.

Seemingly, the privacy referred to and preferred by the court of law has created a silent victim of domestic violence, where constitutional principles stand outside the four walls of violence, now not even bothering to look inside.

Conclusions

Women of the new generation, particularly in the post-reform era, are facing great challenges wherein they have to reconcile their “traditional roots” with the “modern values” of a global culture. Surely, economic reforms alone cannot transform the social landscape of India. There must be a parallel attitude change, imbuing new values and progressive action that must be communicated to each and every citizen at an early age if the coming generation of women are to be empowered.

What the law and the law-making authorities forget to address most of the time is the “reason” for certain violence, and why an offender becomes an offender. There surely is some sort of violence going on the head of the potential or full-fledged offender as well. Here, it is a matter of a violation of the real culture surrounding gender equality in our country. These are questions which may amount to viable legislations and more impacting measures. Discussions and efforts such as Mahila Lok Adalats (Women’s Fast Track Courts), Family Courts, Crisis Centres and Community Policing Initiatives, are somewhat moving, but the issue of cultural beliefs is at a stand still. According to the NHRC, a value-based education system is the key to uplift women. Education can not only bring about a discernible change in the attitude of women, especially those residing in the rural areas, but can also equip them with a tool to raise their voice against domestic violence.⁴³ However, when one side is sensitised, namely the survivor/victim of domestic violence, and the offender sensitisation is not even looked at, we may find ourselves having created even a more dangerous situation for the survivor/victim.

⁴³ National Human Rights Commission India, “NHRC chairperson decries the state of mental health in the country” in *NHRC REPORT* 2003, available at: www.nhrc.nic.in/dispatcharchive.asp?fno=106.