The idea of a value-loaded law acting as loadstar for Social Change and Social-Justice was beyond the ken of law. Courts and Lawyers during the British rule in India¹. Law and Justice smacked despotism, absolutism and tyranny to enslave people, never intended to serve them². Gandhiji condemned British rule over India as "Satanik", "Adharmik" (Unjust) and coercively violent (Hinsa)³. Therefore, he expounded the theory of peaceful resistance (satyagraha) to fight British Government, its Laws and Courts for they deprived Indians of a meaningful life, liberty and national independence (swaraj). Gandhiji favoured the idea of open society based on non-violence, social equality, human-dignity, class-harmony, non-multiplication of wants and service to the poor⁴. Likewise Nehruji⁵ and Gandhi too, condemned the un-Indianness of British law which failed to move with changing needs of times and place due to its stricter adherence to the doctrine of judicial precedent. He too believed in making the law as an instrument of Socio-Economic change and progress⁶.

² Ibid.
⁴ Ibid.
⁵ Ibid.
⁶ Ibid.
So in the backdrop of Gandhian Humanism and Nehru's scientific temper, the new Constitution was enacted and adopted in 1950 which helped in ushering a new legal and constitutional philosophy embodying ideals of liberty, equality and human dignity. Influenced by the scientific approach, the Indian judges have started interpreting the law in its contextual and social setting and no more draw their inspiration from unknown alien soil and system which has different life style and social milieu.7

The latest judicial trend reveals that Indian courts are quite enthusiastic in using the law as a tool of social revolution. What is being realized is that the process of social change through law involves not only the legislature but law-courts also interact and react through interpretative device. That is why judiciary is expected to act as catalytic agent of social control and quite successfully hammer out Human Rights jurisprudence in the light of the philosophy envisaged in our National Charter. It is perhaps with this philosophy in mind that Courts in India have been endeavouring to shield the cause of the poor and wage war against the plight conditions of prisoners8, destitute-women9, bonded-labour10, agricultural and industrial labour11, etc. Public Interest Litigation12 strategy is

11 Ibid.
showing signs of warming up and shaping legal ideology in consonance with the philosophy of Human Rights.

Chief Justice Bhagwati has rightly observed that the Courts in India should not be guided by any verbal or formalistic canons of Construction but by the paramount object and purpose for which this Constitution has been enacted\textsuperscript{11}. He too has made law as a tool of social transformation for creating a new social order imbued with social justice\textsuperscript{14}. He made a prophetic observation which has inspired the poor, the weak and the destitute to seek protection of the court against exploitation, injustice and tyranny. Chief Justice Bhagwati Highlighted the new-swing and significance of Judicial process in these words\textsuperscript{15}:

"Today a vast revolution is taking place in the Judicial process, the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to the justice to large masses of the people who are denied their basic human rights and to whom, freedom and liberty has no meaning".

There is a deep felt need to acquire a firm social philosophy founded to humanism, socialism and secularism of the Constitution. The cry of the time is that the judges are required to be fully alive to the new wind of change and reform


\textsuperscript{14} Ibid.

\textsuperscript{15} Ibid.
and desist from measuring India's law from Austinian philosophy. We need to resurrect the Judicial Conscience on the line of social philosophy envisaged in our National Charter, rather than to toe the line of erstwhile British colonial rulers. It has now become imperative for the Courts that their decisions are animated with the philosophy of human rights enshrined in the Constitution. What is expected from the Courts is that Courts weave a home-spun jurisprudence shaking its link from Anglo Saxon jurisprudence by making law and legal institutions the delivery system of Human liberty, social equality and social justice.

Judiciary in India is playing a significant role now in protecting Human Rights of the people. The latest trend available depicts that Courts are using law as a tool of social revolution. Indian judges have started interpreting law in its contextual and social setting. They are now no longer being guided by any formalistic consigns of construction. What is evident from judicial approach is that the apex Court is using law as a tool of social transformation for creating a new social order imbued with social justice.

It is also apparent from the foregoing discussion that the public spirited people are now feeling inspired to watch and safeguard the interests of the poor, the weak and the destitute. The truth is that a vast change is taking place in the judicial process, the theatre of law is changing and the problems of the poor are coming up unhesitatingly. The judges appear fully alive to resurrect the judicial

16 Ibid.
conscience on the line of Human Rights jurisprudence imbibed in our National Charter. The Courts are innovating new methods for the purpose of providing access to justice to large masses of people who were denied their basic human rights and to whom freedom and liberty had no meaning. Homespun jurisprudence is quite visible from an array of decisions of the apex court. It is also crystal clear from the various decisions of the Courts that they are gradually shaking their link with Anglo-Saxon jurisprudence by making law and legal institutions the delivery system of Human Liberty, Social equality and Social justice. The Courts have in their mind a strong conviction that they are meant not only for the rich but exist also for the poor, the down-trodden, the have-nots, the handicapped and the half-hungry countrymen. It also testifies the truth that Indian Courts have now become the Courts of the poor and struggling masses and have left open their portals to the poor and the ignorant and illiterates.

The strategy of social action litigation has been evolved to give the common people of this country access to the Courts so that the adversely affected persons are able to vindicate their rights against the mighty hands of the society. There is no denying the fact that for the first time in India the shrine of justice has been thrown open for the poor, exploited and deprived sections of the community. It has generated a hope and confidence in the poor people believing that 'Law and Justice' is meant for the poor and not vice versa. The judges are boldly interpreting the Charter of Human Rights jurisprudence. The very idea to relax
the traditional rule of *locus standi* is that justice becomes available to the lowly and the lost.

It is also quite visible that Indian Courts through judicial activism have been able to bring astonishing results by vindicating the rights of the degraded bonded labourers, tortured-undertrials, blinded prisoners, child-workers, helpless pensioners, poor hawkers, depressed women, etc. It is because of the judicial endeavour that it has become possible to each and every human being in India to lead a life full of dignity, enjoy rights to privacy, shelter, health and medical assistance, and healthy environment. The real success of Indian Courts lies in the fact that they have to a great extent abandoned their mechanical role of interpreting law inherited from the British and have embarked on extensive judicial legislation in the area of Criminal law, Industrial law, labour law and property law. The functioning of Indian judiciary discloses that it has through progressive and humanistic interpretation been able to enlarge the rights of the suspects and the accused with a zeal to protect the interests of the innocent and prevent abuse and misuse of Police powers. The entire traditional philosophy of self incrimination jurisprudence has undergone a vast change because of judicial Endeavour. The scope of Art. 21 of the Constitution has been widened in the light of changing values of Indian Society. The new interpretation of Art. 21 has brought about a vital change in the field of Human Rights jurisprudence. All this ultimately enables us to conclude that Indian judiciary has endeavored hard to uphold the spirit of Universal Declaration of Human Rights, 1948. International

Keeping in view the significance of constitutional philosophy of human rights in mind, the present chapter has been devoted to throw light on the efforts being made by the Indian courts in actualizing the philosophy of human rights in India. The main concern here would be to highlight the judicial endeavour to show how far it has succeeded in shaping out the contours and parameters of Human Rights jurisprudence as envisioned by the wise founding fathers of our Constitution and ultimately achieved success in translating the philosophy of Human Rights jurisprudence into reality. What is true is that human rights would remain safe so long as its judges are strong and independent, do not come into pressure of influence of centre of power and are committed to the cause of human rights. The main focus here would be to give wide coverage to the functional aspect of the judiciary and see how far it is responsible in safeguarding human rights in the light of our constitutional commitment.

5.1 Indian Judiciary and Rights of Women

It is now proposed to analyze some of the leading cases on various aspects relating to the promotion and protection of women’s rights by the judiciary in the

\footnote{See Mool Chand Sharma, Justice P.N. Bhagwati, Court, Constitution and Human Rights (1995), pp. 92-93}
recent past. Even though several enactments have been passed, but for the active role played by the judiciary, women in our country could have only dreamt getting justice in the hands of implementing authorities. It has not been possible also found has not necessary to list out each and every case on the point. The analysis would indicate the latest position on certain legal issues interpreted and explained by the judiciary for the benefit of victim women in India.

Freedom from discrimination and inequality still remains an unfulfilled hope for the vast millions of Indian women. Our constitution guarantees equality and equal protection for women. It also states that no citizen of this country shall be discriminated against by the State on the ground of sex. Despite all this, the so-called "Personal Laws" continue to flout the constitutional mandate of equality. While the essence, content and quality of discrimination against all Indian women are the same, different personal laws stipulate how and to what extent if at all women can seek redress from their exploitation. These laws to varying extent make a mockery of the women's cry for equality and all their hopes and aspirations to live in their country free from discrimination. Article 44 of the Constitution of India places a duty on the State to secure for all citizens of the country a uniform civil code throughout the territory of India. It is interesting to note, however, that even after almost 40 years of independence our Legislature has not even tried to legislate upon this article. Reforms under the various personal laws have also been resisted by vested interests in the different communities while women continue to be the sufferers.
The criminal laws of the country, despite the recent amendments in the rape and dowry laws, are still full of loopholes and continue to be governed by obsolete laws of evidence. These laws do not take into consideration the social and economic realities of Indian women and the situation. The most progressive divorce laws still depend heavily on the fault theory. The barbarous and uncivilized remedy of restitution of conjugal rights remains part of our statute. Women continue to be deprived of an equal right in property. If a marriage breaks up, they can be turned out of the matrimonial home without any right in the immovable and movable property acquired by it as this is often bought by their husbands who are deemed to be the owners thereof.

It is in this context that we must see and analyse how far the judiciary, specially the Supreme Court, has been able to give redress through enlightened interpretation and according to the constitutional mandate of equality to the oppressed mass of Indian women. An activist judiciary can play an important role as “a socially sensitized judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into it”. In this study an attempt has been made to trace the development of judicial awareness of women’s problems during the last decade through some major Supreme Court judgments in some specific area.

5.2 Dowry

Dowry or Dahej is the payment in cash or/and kind by the bride's family to the bridegroom's family along with the giving away of the bride (called
Kanyadaan in Indian marriage. Kanyadana is an important part of Hindu marital rites. Kanya means daughter, and dana means gift. Dowry originated in upper caste families as the wedding gift to the bride from her family. The dowry was later given to help with marriage expenses and became a form of insurance in the case that her in-laws mistreated her. Although the dowry was legally prohibited in 1961, it continues to be highly institutionalized. The groom often demands a dowry consisting of a large sum of money, farm animals, furniture, and electronic goods. The practice of dowry abuse is rising in India. The most severe in “bride burning”, the burning of women whose dowries were not considered sufficient by their husband or in-laws. Most of these incidents are reported as accidental burns in the kitchen or are disguised as suicide. It is evident that there exist deep rooted prejudices against women in India. Cultural practices such as the payment of dowry tend to subordinate women in Indian society.

It is ironical that a woman’s status in the matrimonial home hinges on the goods and financial benefits that she brings in the form of dowry. This practice of dowry has become the root cause of innumerable social evils in the Hindu Society such as economic exploitation of girl’s parents, adopting foul means of earning, indebtedness of middle and lower classes, female foeticide, female

19 For the concept of dowry- Historical perspectives see Prof. Vijaya Sharma, “Protection to Women in Matrimonial Home” at 48.
infanticide, child marriages, unequal marriages, conjugal disharmony\textsuperscript{20} etc. This practice is the symbol of women’s oppression that perpetuates the inferior status of women in their matrimonial home and has even been resulting in self immolation, suicide, death more often than not.

An attempt to control the evil practice of dowry through the mechanism of law, the Dowry Prohibition Act, 1961 was enacted. This Act was amended in 1984. To make the provisions more effective and stringent it was further amended in 1986 by the Dowry Prohibition (Amendment) Act, 1986. Section 2 of the Act defines ‘dowry’ as any property or valuable security given or agreed to be given either directly or indirectly, by one party to the other party or by the parents of either party to the other party either at or before or any time after the marriage of the said parities. The definition does not include dower or mehar given as per the Muslim Personal Law (Shariat).

The definition does not include the wedding presents. The fact is that the traditional gifts made at or about the time of marriage is an accepted practice not merely among Hindus but also among non – Hindus. They have been made by the Hindus from ancient times. The definition exempts presents of a ‘customary nature’. It also exempts gifts and presents given “without any demand having been made.” It is submitted that, in the garb of the custom giving a whole range of gifts in cash and kind, the continuing expectations of gifts thereafter do lead to dowry violence. Many offenders go scot free due to these loopholes in the Act.

\textsuperscript{20} Ibid. at 52
According to this Act giving and taking dowry or demanding dowry is treated as an offence. Section 3 emphasizes that if any person, after the commencement of the Act gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value such dowry, whichever is more.

The gifts in the form of cash, ornaments, clothes or other articles made to the bride at or before or after the marriage were exclusively for her benefits which should be listed and registered in her name. Such presents should neither be allowed to be transferred nor disposed of for a minimum of 5 years from the date of her marriage without prior permission of the Family Court. The main weakness in the Act is that it holds the giver as well as the acceptor of dowry equally guilty. The provisions inhibit parents of women from coming forward and complaining about the fact that they were compelled to give dowry. It is true that giving of dowry must be discouraged but if a person who himself is considered guilty, one cannot expect him to give the evidence.

One of the important causes for harassment of woman in the matrimonial home arises from the practice of misappropriating the dowry property. To check the abuse of bride’s property, the Parliament has amended the D.P. Act by treating the in-laws as trustees to her dowry after her marriage. Thus See 6 of D.P. Act concerns restoration of dowry. It runs:

21 The present punishment for giving and taking dowry is enhanced by 1986 Amendment Act.
(a) The period for restoration of dowry of the concerned woman has been reduced from one year to three months. Pending such transfer, the dowry forms a trust in the hands of the person holding it and he or she would be answerable as a trustee.

(b) Failure to restore dowry to the heirs of the woman in case she is dead, has been made punishable.

(c) If a woman dies within seven years of her marriage due to unnatural causes, the dowry has to be transferred to her children, in their absence, to her parents.

The Amendment Act of 1984 makes two significant changes – firstly, there is no period of limitation for filing the complaint under the Act and secondly, the court is empowered to act on its own knowledge or on a police report or by complaint made by the woman or her parents or recognized women’s organizations. Another significant change in the Amended Act 1986 is a new section is introduced. It provides that those who have given dowry on demand shall not be prosecuted on the basis of their statement to that effect made in the court during prosecution and then only the taker is responsible. The Act is strict with those who demand dowry. The 1984 Amendment makes the offence cognizable, non-compoundable and non-bailable. To ensure the effective implementation of the Act, the Amendment Act of 1986 provides for the

22 Secs. 7 and 8 of the 1961 Act as substituted by Secs. 6 and 7 of Amending Act of 1964.
21 Sec. 8-A was inserted.
24 Sec. 8 was substituted by Amendment Act, 1984.
appointment of ‘Dowry of Prohibition officers’ by the State Governments. These officers will be assisted by the advisory board having at least two woman members.

The role of the judiciary in relation to dowry related offences is discussed to assess the worth of judicial process in preventing domestic violence in general and dowry deaths in particular. The study is not designed to be merely a digest of the cases decided by the Supreme Court and various High Courts, but is based on selected cases which have a relevance to the subject matter of the study. An attempt is also made to assess the impact of the decisions of the court on the problem of dowry - related violence. It is not always possible to appreciate the scope of the legislative provision relating to prevention of domestic violence by simply reading it analyzing its provisions. It is only by studying carefully the way in which the relevant enactments are actually enforced and interpreted in practice – particularly the court decisions by which effect is given to the law so that one can be certain that the standards laid down by the legislative process are really being observed. Judicial decisions do have a tremendous impact on the formulation and implementation of national policies.

The inferior socio-economic and political position of women in society is precursor of gender violence against them which takes various forms and occurs

at various stages in the life span of a woman. The occurrence of 'dowry offences' is one such manifestation of imbalanced power equations and gender violence, to which the married women are subjected. The combination of inflation and commercialization of the institution of marriage, aggravated by the insufficient earning capacity of the groom has contributed to the hardening of the extortionate and ugly demands for dowry, which may be limitless and endless in time. The failure of bride's parents to meet such demands may result in coercion, harassment, infliction of mental and physical cruelty to her and in extreme cases she may be strangulated, poisoned or burnt alive. Still a novel way adapted in some cases is forced and abetted suicide preceded by unendurable mental and physical violence.

The alarming rate at which dowry deaths are taking place in the country seem to suggest that the Dowry Prohibition Act, 1961 is still not a foolproof legislation. The definition of dowry in Sec.2 is still defective in the sense that it must be shown to have been "given or agreed to be given in connection with the marriage". In other words, mere demand for dowry would not constitute an offence unless it was accepted by the other party. However, in Baulat Man Singh v. C.R. Bansij the Bombay High Court observed that the offence of demanding dowry is constituted the moment demand is made, irrespective of the fact whether it was accepted by the other party or not. The same view has been confirmed by

1 1980, Crl.L.J. 1171 (Bom)
the Supreme Court in *L.V. Judhav v. Shankar Rao*.\(^27\) Hence, demand for dowry whether agreed to or not by the other party should be punished as an attempt to obtain dowry under sec. 4 of the Act.

Furthermore, the Act forbids one from giving or taking of dowry in connection with the marriage. Dowry can still be demanded not in connection with the marriage but for a 'collateral purpose' like cost of education of the bridegroom, foreign trips etc. It is submitted that this aspect has not been covered under the Act. Presents, in the form of money and or ornaments given otherwise than on demand were also not covered by the Act.

*State by Rural Police v. Siddaraj*\(^28\) is another case that highlights the plight of married women. Being extremely vulnerable at the hands of the unscrupulous husbands, who think it their legitimate right to practice polygamy and torture their wives, these women are left with no option but to end their lives. It is amazing that the court needed a high degree of gravity of cruelty. Nothing can be more humiliating and insulting for a wife than her husband dumping her at her parent's place and taking her back when her parents are able to quench his thirst for more money\(^29\). It happened in the case under study despite the fact that she bore him a child and suffered an abortion. It makes a woman a mere chattle to be used, to be exploited, to be used as a channel for extracting more money


\(^{28}\) 2000, *Cri.L.J.* 4220

\(^{29}\) See *State v. K. Sridhar*, 2000, *Cri.L.J.* 328 (Kant)
from her parents and then to be dumped when he no longer needs her. If she commits suicide who else but the husband is responsible for it. What more gravity does the judge want? Except that he himself is seen attempting to save the husband for throwing the wife into the jaws of death. The judgment shows utter indifference and typical derogatory patriarchal mind set from which the judiciary cannot liberate itself. Documentary proof of the demands for dowry made by the husband are sufficient to prove his guilt under section 304-B and 498-A IPC.

Dowry has become a social evil that the Parliament tried to curb by enacting the Dowry Prohibition Act, 1961, prohibiting the practices of giving and taking dowry. But various indirect and sophisticated methods have been used to demand dowry and to avoid the application of the Act. Furthermore, despite the enactment of the Act, the increasing number of cases of cruelty by the husband and his relatives related to dowry, culminating in suicide or murder of the helpless woman were (and unfortunately still are) a matter of serious concern. This has led to several other legislative measures in the continuous battle to combat the evil of dowry, such as; successive amendments of the Dowry Prohibition act (D.P.A), 1961, by Acts No.63 of 1984 and No. 43 of 1986, insertion of Sections 498-A and 304-B in the Indian Penal Code (I.P.C.) and consequential amendments in the Criminal Procedure code (Section 174(3) and 176) and in the Indian Evidence act (Sections 113-A and 113-B).

See Nandala v. St. of Madhya Pradesh 2000, Cri L.J. 794 (M.P.)
Section 304-B of the Indian Penal Code introduced in the I.P.C. by the Dowry prohibition (Amendment) Act, 1986 (Act No. 43 of 1986) punishes dowry deaths (and especially to curb the evil of bride burning).

Section 113-B of the Indian Evidence Act introduced consequent to Section 304-B raises, in certain circumstances, a presumption of dowry death of a woman (see below on section 304-B). Section 498-A of the Indian Penal Code introduced in the I.P.C. by the Criminal Law (Second Amendment) Act, 1983 (Act No. 46 of 1983) punishes cruelty and harassment, by husband or his relatives, of a married woman. Section 113-A of the Indian Evidence Act introduced to give effect to Sections 498-A and 306 raises, in certain circumstances, a presumption that the commission of suicide by a married woman has been abetted by the husband or his relatives. Section 174(3) of Criminal Procedure Code as amended by the criminal law (Second Amendment) Act, 1983 (Act No. 46 of 1983) refers to enquiry and report by police in case of suicide or death in abnormal circumstances, secures post-mortem notably when:

- The case involves the suicide of a woman within seven years of her marriage.
- The case relates to the death of a woman within seven years of her marriage in circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman.
- The case involves the death of a woman within seven years of marriage and if any relative of the woman so requests.
Section 176 of Criminal Procedure Code as amended by the Criminal Law (Second Amendment) Act, 1983 (Act No.46 of 1983) refers to inquiry by a Magistrate in addition to, the investigation of the police officer, and to secure for post-mortem in all cases where a woman has, within seven years of her marriage:

- Committed suicide, or
- Died in circumstances raising a reasonable suspicion that some other person has committed an offence and the commission of Sati Prevention act, 1987 (Act 3 of 1988 punishes the attempt to commit Sati, the abetment of Sati and the glorification of Sati.

As pointed earlier dowry has been one of the main issues which still is lingering and making the life of women especially married women miserable.

Any demand of dowry made before, at or after the marriage, where such demand is made as a consideration for the marriage, falls under Section 4 of Dowry Prohibition Act - definition of "dowry" not confined merely to the demand of money, property or valuable security. The curse of dowry has been raising its ugly head every now and then but the evil has been flourishing beyond imaginable proportions and hence, the word 'dowry' wherever used in the Act needs to be liberally construed. Thus, any 'demand' of money property or valuable security made from the bride or her parents or other relatives or vice versa would fall within the mischief of 'dowry' under the Act where such demand is not property referable to any legally recognized claim and is relatable to any legally recognized claim and is relatable only to the consideration of marriage.
At marriage and any demand made prior to marriage would not amount to dowry. This may not hold good. Where definition has been given in a statute itself, it is neither proper nor desirable to look to the dictionaries etc. to find out the meaning of the expression. The definition given in the statute is the determinative factor. The Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made before or at the time or after the marriage where such demand is referable to the consideration of marriage. Dowry as a quid pro quo for marriage is prohibited and not the giving of traditional presents to the bride or the bridegroom by friends and relatives. Thus, voluntary presents given at or before or after the marriage to the bride or the bridegroom, as the case may be, of a traditional nature, which are given not as a consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression 'dowry' made punishable under the Act.

Keeping in view the object of the Act, "demand of dowry" as a consideration for a proposed marriage would also come within the meaning of the expression dowry under the Act. Therefore, interpreting the expression 'dowry' and 'demand' in the context of the scheme of the Act, we are of the opinion that any 'demand' of 'dowry' made before, at or after the marriage, where such demand is made as a consideration for marriage would attract the provisions of Section 4 of the Act.
The alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides has always sent shock waves to the civilized society but unfortunately the evil still continues unabated. Awakening of the collective consciousness is the need of the day. Change of heart and attitude is needed. A wider social movement not only of educating women of their rights but also of the menfolk to respect and recognize the basic human values is essentially needed to bury this pernicious social evil. The role of the courts, under the circumstances, assumes a great importance. The courts are expected to deal with such cases in a realistic manner so as to further the object of the legislation. Demands made after the marriage could also be a part of the consideration, according to us, because an implied agreement has to be read to give property or valuable securities, even if asked after the marriage, as a part of consideration for marriage. The definition as amended by the aforesaid two Acts does not however leave anything to doubt that demands made after the solemnization of marriage would be dowry. The aforesaid definition makes it clear that the property or the valuable security need not be as a consideration for marriage, as was required to be under the unamended definition. The apart, the addition of the words 'any time' before the expression "after the marriage" would clearly show that even if the demand is made long after the marriage the same could constitute dowry, if other requirements of the section are satisfied.
In Madhu Sudan Malhotra v. Kishore Chand Bhandari and others the court held that furnishing of a list of ornaments and other household articles such as refrigerator, furniture, electric appliances etc. at the time of the settlement of the marriage would amount to demand of dowry within the meaning of Section 2(1) of the Dowry Prohibition Act, 1961. In Vasant Pawar v. State of Maharashtra, the Supreme Court while upholding the conviction of the appellant found guilty of burning his wife by the Bombay High Court, observed:

"Wife-burning tragedies are becoming too frequent for the country to be complacent. Police sensitization mechanisms which will prevent the commission of such crimes must be set up if these horrendous crimes are to be avoided. Likewise, special provisions facilitating easier proof of such special class of murders on establishing certain basic facts must be provided for by appropriate legislation. Law must rise to the challenge of shocking criminology especially when helpless women are the victims and the crime is committed in the secrecy of the husband’s home. We hope the state’s concern for the weaker sections of the community will be activated into appropriate machinery and procedure."

Virbham Singh v. State of U.P. is a case wherein the apex court was advocating for deterrent punishment in cases of bride-killing. While upholding the conviction of husband and mother-in-law, the Supreme Court held that while most of the instances of bride-killing can be traced to dowry demands, in this case

11 1988 (SUPP) S.C.C. 424
12 A.I.R. 1980 Supreme Court 1270
13 A.I.R. 1983 S.C. 1002
torture led to killing of the innocent wife as she was considered "inauspicious" for not bearing children. *L.V. JadHAV v. Shankar Rao Pawar*\(^{34}\) is an important judgment in which the Supreme Court gave a new twist to dowry demand syndrome. In that case the court observed that keeping in mind the dominant object of the Act namely to stamp out the practice of demanding dowry, a liberal construction should be given to the word "dowry". It further held that the mere act of making a demand would constitute an offence. *Bhagwant Singh v. Commissioner of police, Delhi.\(^ {15}\)* is a case of complaint against the police that they were not investigating the case of bride burning after the dowry harassment properly. The apex court while passing severe strictures on the investigating agency for their negligence, it dwelt at length on the evil of dowry, the toll it took of young lives and that it was obvious that the Dowry Prohibition Act had failed to achieve its purpose. The court suggested that female police officers should be deputed to handle such cases which might help particularly in recording dying declarations and also for understanding the "nuances of feminine psychology".

In this case after a few days of the marriage, there was demand of scooter and fridge, which when not being met lead to repetitive taunts and maltreatment. Holding that such demand could not be said to be not in connection with the marriage, the court proceeded to observe: "A girl dreams a great days ahead with hope and aspiration when entering into a marriage, and if from the very next day

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\(^{34}\) A.I.R. 1983 S.C. 1219

\(^{15}\) A.I.R. 1983 S.C. 826
the husband starts taunting for not bringing dowry and calling her ugly, there
cannot be greater mental torture, harassment or cruelty for any bride. There was a
quarrel a day before her death. This by itself, in our considered opinion, would
constitute to be a willful act to be a cruelty both within the meaning of Section
498-A and Section 304-B IPC.16 This is yet another unfortunate instance of
gruesome murder of a young wife by the barbaric process of pouring kerosene oil
over the body and setting her on fire as the culmination of a long process of
physical and mental harassment for extraction of more dowry. The dying
declaration made by the deceased had the ring of truth and the testimony of the
doctor – PW 2 and of the Head Constable – PW 7 clearly established that she was
in a fit condition to make the statement. Not withstanding, the apex court
regretted that the Sessions Judge did not treat this as a fit case for awarding the
maximum penalty under the law and ironically, no steps were taken by the State
Government to prefer an appeal before the High Court seeking enhancement of
the sentence.17

It is a case of one Asha Rani murdered, sadly for Rs.5,000 or an
autorickshaw which her father, of seven daughters, could not afford even though
he suffered the ignominy of her being beaten in his presence by her in-laws at his
own house. Delay in sending injury report to the police station on 13th instead of
9th despite request by Police Inspector was attempted to be highlighted as casting
suspicion on its genuineness. The High Court had gone into this aspect in detail

16 Pawan Kumar and others v. State of Haryana
and found that negligence on the part of the investigating officer, who, despite having received the information, neither took care to preserve the site nor did he record the statement of any of the doctors before August 14. Upholding the order of the High Court, the apex court observed that in its opinion rightly the High Court did not discard prosecution evidence due to remissness of investigating officer on ratio laid down by this Court in _Chandrakant v. State of Maharashtra_, (1974) 3 S.C.C. 626: 1974 S.C.C. (Cri) 116: A.I.R. 1974 S.C. 220.  

In _Om Prakash v. State of Punjab_ 19, the apex court held that unless there were materials on the record to show that victim was not in a position to make a statement it was not possible to reject her statement which could be treated as dying declaration. This was sequel to the plea raised before the Supreme Court that a person with burn injuries could not make such a detailed statement. Whenever the victim of torture commits suicide, she leaves behind some evidence - maybe circumstantial in nature to indicate that it is not a case of homicide but a suicide. The apex court then elaborated the role of the court in a case of death because of torture and demand for dowry observing that it was the duty of the court to examine the circumstances of each case and evidence adduced on behalf of the parties, for recording a finding on the question as to how the death had taken place. In _Paniben (Smt.) v. State of Gujarat_ 20, three dying declarations of the victim formed the basis of conviction of the accused. In this case, the theory

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19 (1992) 4 S.C.C. 212  
20 (1992) 2 S.C.C. 474
of suicide was outright rejected and the apex court having regard to the drastic nature of the crime, even on sentence, no sympathy could be shown. The Supreme Court summarized the following principle of laws laid down from time to time in dowry death cases.


3. This Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, promoting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. *(K. Ramachandra Reddy v. Public Prosecutor,* (1976) 3 S.C.C. 618: 1976 S.C.C. (Cri) 473: A.I.R. 1976 S.C. 1994).


9. Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. *(Nanahau Ram v. State of M.P., 1988 Supp S.C.C. 152: 1988 S.C.C. (Cri) 342: A.I.R. 1988 S.C. 912).*
10. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.


The curse of dowry had claimed yet another victim. The tenor of her letters disclosed the distressing state of affairs at the house of her-in-laws. These letters coupled with the evidence of her mother established the harassment to which the deceased was subjected to by her in-laws. On the admissibility of dying declaration as a crucial piece of evidence under Section 32 of the Evidence Act, the apex court observed: "A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations then the court has also to scrutinize all the dying declarations to find out if each of these passes the test of being trustworthy". 41

In this case, the courts of law came across two dying declarations similar in material particulars. Notwithstanding the existence of minor discrepancies in the two dying declarations, they were held to be sufficient. The apex court also found the second dying declaration was recorded by Taluka Magistrate after obtaining a certificate from the doctor that the deceased was in a fit state of mind to make the statement. However, the court was not convinced with the contention and the declaration was to be discarded for the simple reason that the Magistrate did not put a direct question to the deceased as to whether she was in a fit state of mind to make the statement. It was also not inclined to agree with the submissions made that a pregnant woman was likely to be hysterical and mentally imbalanced and there was a possibility of committing suicide because of the imbalanced mind during the state of pregnancy. The deceased was in an advanced stage of pregnancy and it was rather unlikely that a would-be mother would commit suicide at the stage for not only killing herself but also the child in her womb. Holding that the report of the chemical analyst it was clear that burnt clothes found on the body of the deceased contained kerosene as distinguished from the blanket which was put on her body for extinguishing the fire did not contain kerosene upheld the conviction of the accused.42

The apex court reiterated the well settled principle of law that the conviction could be based on the dying declaration itself provided it was satisfactory and reliable and only if there were any infirmities of such nature

warranting further assurance, then alone the courts had to look for corroboration.

In this case, the Supreme Court rejected any inquiry into the motive, since there were direct witnesses as well as dying declarations.\textsuperscript{43} In \textit{Lakhi Ram v. Sita Devi and others}, the Supreme Court held that where married woman died under mysterious circumstances and the real culprits could not be properly prosecuted due to police inaction as well as various interim orders of courts, the courts of law must be influenced more by a sense of justice than by mere technicalities of law.

This is yet another significant case wherein the Supreme Court categorically held that no one could get away by casting aspersions on a woman to serve their ends and to silence her. In this case, the husband resorted to mud-slinging and character assassination. This led to bitterness which eventually culminated in the filling of two separate complaints of defamation under Section 500 of Indian Penal Code by the wife. In addition thereto a complaint was also lodged under Section 498-A, Indian Penal Code.\textsuperscript{45} In \textit{Reema Aggarwal v. Anupam},\textsuperscript{46} the question arose for consideration was whether a person could get away the allegation of dowry harassment on the ground that that marriage with the victim was invalid. It was alleged that the wife was harassed by the husband and the in-laws for not bringing sufficient dowry. In response to it was pleaded by the accused that since the marriage with the victim was not valid, they could not

\textsuperscript{43} Jose \& others. v. State of Kerala 1994 SUPP (3) S.C.C. 1

\textsuperscript{44} (1987) 3 S.C.C. 555

\textsuperscript{45} Mukund Martand Chitnis v/s Madhuri Mukund Chitnis and anr 1991 SUPP (2) S.C.C. 359

\textsuperscript{46} A.I.R. 2004 S.C.1418
be prosecuted for the offences under Sections 307 and 498A of the Indian Penal Code. Replying in negative, the Supreme Court held that if such a restricted meaning was given, it would not further the legislative intent and it would be against the concerned shown by the Legislature for avoiding harassment to the women over demand of money in relation to marriages. The following observations of the Supreme Court are specifically pertinent in this context (at p.1422): “The concept of marriage to constitute the relationship of ‘husband’ and ‘wife’ may require strict interpretation where claims for civil rights, right to property etc., may follow or flow and liberal approach and different perception cannot be an anthema when the prison of curbing a social evil is concerned.”

5.3 Rape

In the Indian setting, rape is an unique offence in which the victim and not the accused is the one seen at fault in our society. The victim of rape is often isolated from our society which instead of providing the sympathy and reassurance which the victim sorely needs; leaves her with a sense of guilt and ‘impurity’. Thus the victim besides going through the trauma of rape and the subsequent trial has also to live in and face people who do not even begin to understand why a rape victim does not and some – times does so after a great deal of hesitation. The Supreme Court in two cases, has, therefore, rightly held that delay in lodging a first information report is not fatal to the case of the
prosecution. In one the explanation of the prosecutrix that the FIR was lodged after a delay of ten days as the honour of the family was involved, and its members had to decide whether or not the matter should be taken to court was accepted. In a later judgment the delay in lodging the complaint was also not questioned as the family of the minor prosecutrix wanted to at first hush up the matter.

Rape is often committed when there are no eyewitnesses because of the very nature of the crime. Thus, the only corroboration which is often available in the medical report and what the victim herself has narrated to others after the incident. Sometimes, the medical report is also not available if the victim resides in a rural area without easy access to a doctor. It is also not unknown that witnesses who are not related to the victim do not turn up to give evidence or turn hostile because of inducements offered by the accused and his family members. It must also be pointed out that a large number of rapes are committed by men who are in a position of social and economic dominance over the victim. Custodial rape is also a grim reality which has now been recognized under the amended rape law and a much harsher punishment and fine has been prescribed. It has also now been recognized that in cases of custodial rape "if sexual intercourse is

50 Imprisonment for a term not less than 10 years or life and fine unless there are adequate and special reasons which must be mentioned in the judgment.
proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent".51

In the case of rape of minor girls, it is often difficult to establish accurately the age of the girl as often no official/public records are available since the birth is seldom registered. The Supreme Court in Lalita Prasad v. State of M.P.52 held that though the victim Shakuntala was alleged to be a minor, her age was not proved by the prosecution. In coming to this conclusion, the Supreme Court relied upon the fact that doctors giving evidence for the prosecution and defence had differed. The Supreme Court also relied upon the statement of the prosecutrix endorsed in the Panchnama that she was 19 years old though this differed from her statement in court where she said that she was 14 years old. It is interesting to note that the Supreme Court refused to rely upon the school certificate which stated that at the time of admission Shakuntala’s deceased father had given her date of birth in court where she said that she was 14 years old. It is interesting to note that the Supreme Court refused to rely upon the school certificate which stated that at the time of admission application form and according to this her age would have been less than 14 years. The Supreme Court also observed that this certificate was only from a private school. This makes us wonder why the Supreme Court should not to rely upon the only impartial evidence, as at the time

of making the application for admission to the school. Shakuntala’s father could have hardly contemplated that some day his daughter would be a victim of rape. However, in a later case the Supreme Court held the doctors evidence that the girl was about 15 years of age and an entry in the admission register of the victim’s Government school was sufficient to establish age.

The famous Mathura case which shocked and out raged the sensibilities of many and became the pivotal point for a demand to change the law relating to rape and certain sections of a law of evidence, raised various important issues. Mathura, a young girl, was alleged to have been raped at the Police Station where she had been called in the night for interrogation along with her husband on a complaint lodged by her own brother against Ashok and her and some others. Mathura’s case was that after the interrogation had been done, the police constable Ganpath asked Mathura to wait at the police station and told her companions to go out. Thereafter the said Ganpath took Mathura into a latrine situated on the rear of the main building and proceeded to rape her. After coming out from the police station, Mathura had immediately narrated the incident to her brothers, Ashok and his relatives and others. Thereafter, a complaint was lodged with the police station. It is pertinent to note that the medical examination of Mathura done after 20 hours of the incident, revealed that she had no injury on her person and that her hymen revealed old ruptures. Presence of semen was,

however, detected on the girl’s clothes and on the accused Ganpath’s pyjama. The doctor also estimated that the age of Mathura was between 15 and 16 years. The Sessions Judge held that there was no satisfactory evidence providing Mathura’s age and she was a shocking liar and at the most one could believe was that Mathura had sexual intercourse with the said Ganpath but there was a world of difference between ‘sexual intercourse’ and ‘rape’. He further held that Mathura was habituated to sexual intercourse and that Ganpath may have stained his pyjama while having sexual intercourse with someone else. The High Court, however, reversed the finding of the Sessions Judge and stated that the presence of semen on the clothes of the girl and Ganpath proved that she had sexual intercourse with him. The High Court further held that as the girl had been medically examined 20 hours after the event, the fact that semen was not found either on the pubic hair or the vaginal-smears was of no consequence as in all probability she had taken a bath in the meantime. The most important observation of the High Court related to the fact that the Sessions Judge did not seem to have appreciated the difference between ‘consent’ and ‘passive submission’. The High Court in fact appreciated the situation in which Mathura was at the relevant time. The Court noted the fact that the both accused were strangers to Mathura; that it was highly improbable that Mathura would make any overtures or invited the accused to satisfy her sexual desires at that time when she went to the police station. The High Court further held that since she had gone to the police station in connection with a complaint which had been filed against her by her brother
she would feel helpless in the presence of the accused and would have to submit. The High Court further held that "mere passive or helpless surrender of the body and its resignation to the others lust induced by threats or fear cannot be equated with the desire or will, nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or violation".

The Supreme Court, however, held that since Mathura had not raised any alarm her allegations were untrue. They refused to believe that Mathura could be so over-awed that she would not make out a case of fear on the part of the girl, the High Court should have given a finding that such fear was shown to be that of death or hurt and that in the absence of such a finding, the alleged fear would not vitiate the consent. They held that "onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and that such onus never shift". The Court, therefore, held that the sexual intercourse in question was not proved to amount to rape. It was indeed surprising that the Supreme Court did not realize that Mathura would in fact have no reason to state a lie, that the fear of persons in authority and specially of the police in the circumstances that she was it would be enough to make her submit passively, that such passive submission does not in fact amounts to free and voluntarily consent. The Supreme Court also failed to note that the police was not even allowed under the law to interrogate Mathura at the police station at the night time. As stated earlier, this case resulted in raising an unprecedented amount of protests. This led to a change in the laws of rape and a recognition that custodial rape by people in
authority, including a policeman was a special specie of rape and that in such a case if sexual intercourse was proved and the victim stated that she did not consent, it would be presumed that she did not consent. Thus, the Supreme Court was instrumental in leading to these changes in law by taking too technical a view of the laws of rape and refusing to appreciate the social situation of the victim of rape in the Indian setting.

In a later case, however, the Supreme Court, Krishna Lal v. State of Haryana\textsuperscript{35} in which a girl below 16 years of age had been picked up while sleeping outside her house at night and raped. “That no girl would foist a false rape charge on a stranger unless a remarkable set of fact or clearest motives were made out”. The Supreme Court further observed that a girl would in fact tend to conceal the outrage and that the injury on the person of victim specially her private parts had corroborative value. It held that the complaint to her parents also had corroborative value. The court further observed “to forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called ‘judicial’ probability. Indeed the court loses its credibility if it rebels against realism”.

In a later case\textsuperscript{36} also the Supreme Court again held that the Judge should not “reject the testimony of a rape victim unless there are very strong circumstances mitigating against its veracity”. The court further held that not

\textsuperscript{35} 1980 (3) S.C.R 503.

merely physical injury but "the deep sense of some deathless shame" is inflicted in rape and that this crime should be treated as the gravest crime against human dignity.

However, in another case the court held that "in the case of a married woman it is always safe to insist on corroboration from either direct evidence or circumstantial evidence". It is relevant to mention that in this case a 25-years old woman belonging to the Santhal Tribe had been raped on the field and no medical report had been procured as there was no access to a doctor. Fortunately there was an eyewitness, who had arrived at the scene of the crime on hearing the cries of the woman. The Mukhiya of the village, who had also narrated the story, however, turned hostile, while the police refused to lodge the FIR as the rapist was an influential man. The court accepted the evidence of the husband and the eyewitness saying that there was sufficient corroboration. One wonders that would have happened if there had been no eyewitness.

In yet another case the court held that corroboration is not the sine-qua-non for a conviction in a rape case. It further held that "in the Indian setting refusal to act on the testimony of a victim to sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of a girl/woman who complains of rape/sexual molestation be viewed with the aid of spectacles fitted with lenses, tinged and with doubt, dis-belief or suspicion. To do

so, is to justify the charge of male chauvinism in a male dominated society”. The court held that a girl in the tradition-bound Indian society would be extremely reluctant to admit the evidence which is from the society. The court rightly stated that to insist on corroboration in the Indian setting would be quite wrong as rule had been devised by courts in the Western world and that if the evidence of the victim did not suffer from any basic infirmity and the “probabilities-factors does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration, except from medical evidence, where having regard to the circumstances of the case, medical evidence can be expected to be forthwith”.

Thus the zig-zag course of judicial decisions shows that while some Judges have laid emphasis on technical rules of evidence, the others have had their feet firmly embedded in the Indian social setting and have been sensitive to the inequalities and oppression faced by women.

Rape and the rape law were not prominent issues in India at the beginning of the Women’s decade. It is doubtful if women’s groups were even fully aware of the built-in injustices of the law which protect the rapist. Rape did not become an issue even when in 1978 the Supreme Court reversed the Bombay High Court’s conviction of the accused in the Mathura rape case. It achieved prominence one year later after four layers wrote an open letter to the Supreme Court asking for a review of the judgment in the Mathura rape case. To my knowledge neither the judgment not the letter were immediately or widely reported by the press. Suddenly, when women’s groups all over the country
began to mobilize public opinion, using the open letter as a take-off point, the press woke up to the rape issue, in large capitals. Today every letter by individuals or public interest groups which the Supreme Court treats as a writ petition is invariably covered prominently by the press. But the famous open letter which stands as a model document and example of public interest litigation, which indeed set in motion a trend now very much a part of the activist ethos of this country, escaped the serious attention of the press until the anti-rape movement began in earnest.

Briefly, the aftermath of Mathura was that the Government responded to the pressure of public opinion, the Law Commission was asked to submit proposals for amending the rape law, a bill was introduced in parliament in 1980, then referred to a select committee, and passed by the Lok Sabha in 1983. The Mathura case itself was not reviewed because ultimately the Supreme Court held that it was time-barred. But the change in judicial approach since the acquittal of the accused constables in 1979 is seen in two important judgments and convictions in 1983. However the bias of the court remains unchanged in cases where the victim's sexual history is not considered "moral" by patriarchal standards as is seen in the acquittal of the rapists in the Rameeza Bee case by the Karnataka High Court in 1984.
Bharwada Hirjibhai v. State of Gujarat 99

Since judgments like this have been rare, it is worth quoting in detail. A two-judge bench of the Supreme Court consisting of Justice A.P. Sen and M.P. Thakkar heard the case. The case related to molestation and rape of two young girls, aged 10 and 12, by the father of their friend who lured them into his house and assaulted them. The Sessions Judge found the accused, a government servant, guilty of sexual misbehaviour and convicted him of rape, outraging the modesty of the girls and wrongful confinement. The High Court affirmed the order of conviction for outraging the modesty and wrongful confinement of the two girls. With regard to the more serious charge of rape, the High Court concluded that the evidence only established attempt to rape and not the offence of rape. Accordingly the conviction under Section-376 was altered to one under Section-376 read with Section 511 of the Indian Penal Code.

It is also important to note that while the S.C. set an important precedent regarding uncorroborated evidence, the judges actually reduced the sentence. The court held: "The need of the hour is to mould and evolve the law so as to make it more sensitive and responsive to the demands of the time in order to resolve the basic problems: whether, when and to what extent corroboration to the testimony of rape is essential to establish the charge. And the problem has special significance for the women in India, for while they have often been idolized, adored and even worshipped, for ages they have also been exploited and denied

99 A.I.R. 1983 S.C. 753
even handed justice – sixty crores anxious eyes of Indian women are therefore focused on this problem”. The court further held: “The accused has lost his job in view of the conviction recorded by the High Court. The incident occurred some seven years back. The accused must have suffered great humiliation in the society. The prospects of getting a suitable match for his own daughter have perhaps been marred. Taking into account the cumulative view of these circumstances, and an overall view of the matter, the ends of justice will be satisfied if the substantive sentence imposed by the High Court is reduced from one of two and a half years R.I. to one of 15 months R.I”.

The Supreme Court’s pronouncements on this last aspect are that the necessity of corroboration of a rape victim’s evidence as required by law need not always apply. Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration, as a rule, is adding insult to injury. Why should the evidence of a girl or woman who complains of rape be viewed with doubt, disbelief and suspicion? To do so is to justify the charge of male chauvinism in a male-dominated society. A girl or woman in the tradition-bound, non-permissive society of India would be extremely reluctant to admit that any incident which is likely to reflect on her chastity had ever occurred. She would fear ostracism by society, family and friends and face the risk of being rejected by husband and relatives. If unmarried, she would fear that her chances of marriage would be destroyed. Because of this victims and their relatives are often not keen
to bring the culprit to book. When in the face of these factors, the crime is brought to light, there is a built-in assurance that the charge is genuine rather than fabricated.

In *Phul Singh v. State of Haryana* the sentence on the rapist was reduced by the Supreme Court from four years R.I. to two years R.I. The court said the rapist was barely 22 years old with no criminal antecedents save this offence. He had committed rape on a relative in moment of passion and his own family had expressed readiness to take a lenient view. Justice Iyer again commented on the corrupting erotic influences around and says the sentence should be corrective rather than convert the rapist into a hardened criminal. He also added that the man had a young wife and a farm to look after and given correctional therapy he might shape into a balanced person.

In 1975 the Report of the Committee on the Status of Women in India had only a brief reference to the penal laws on rape and mentions that the Law Commission in its 42nd report had recommended certain welcome provisions related to consent under duress or fraud. Clause 157 of the Indian Penal Code (Amendment) Bill, 1972 had proposed the addition of three new sections to cover custodial rape. The CSWI welcomed this proposal. There were no references in the report to past judicial decisions or the attitudes of court towards rape, rapists and the victim. If the committee were to write another report at the end of the decade, a chapter on rape would certainly comprise the largest part of the section.

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40 A.I.R. 1980 S.C. 249
on women and the law. It is significant that as long ago as 1971-72 the Law Commission had made some of the suggestions which were taken up as major demands after Mathura. Clearly nothing would have changed but for the public pressure which was mounted.

5.4 Bigamy

The Supreme Court has consistently held that in order to prove bigamy, it is essential for the prosecution to prove that the second marriage has been solemnized with proper ceremonies and in due form. In Bhurao v. State of Maharashtra61 the court held “if a marriage is not a valid marriage, it is not a marriage in the eye of law. The bare fact of man and woman living as husband and wife does not, at any rate normally, give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife”. It is for the prosecution to establish that the second marriage has been performed in accordance with the customary rites as provided by the act or in accordance with the essential requirements for a valid marriage under Hindu law and if not so, bigamy is not proved not to attract bigamy, both marriages must be valid and strictly according to the law governing the parties. It is submitted that if a person wants to commit bigamy he is not likely to do so in open view as he knows that he is about to commit an offence. The Supreme Court has taken too technical a view and a

61 A.I.R. 1965, S.C. 1564
complainant has to factually prove that the second marriage was performed strictly in accordance with all the requirements of a valid marriage under the law.

5.5 Restitution of Conjugal Rights

In a landmark judgment *T. Sareetha v. T. Venkata Subbaiah*\(^{62}\), Justice Choudary of the Andhra Pradesh High Court held that the remedy of restitution of conjugal rights "violates the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution". It was pointed out by the learned Judge that the purpose of the remedy was to 'coerce' through the judicial process the unwilling party to have 'sex' against the person's consent and free will' since conjugal right necessarily connotes 'the right which husband and wife have to each other's society' and 'marital intercourse'. It further stated that a 'decree for restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It "deprives a woman of control over her choice as to when and by whom the various parts of her body would be allowed to be sensed" and "when and how her body is to become the vehicle for the procreation of another human being'. This judgment is significant because it makes a clear break from the earlier judgments and upholds the right of Indian women to live with dignity and lays stress on an individual's happiness and her right to decide when with whom she wants to live with.

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\(^{62}\) A.I.R. 1983 AP 356
The Supreme Court, however, in a later judgment Sarojrani v. Sudarshan Kumar⁶³, held that there were sufficient safeguards in Section 9 of the Hindu Marriage Act to prevent it from being a tyranny and only financial sanctions would be applied to the erring spouse who willfully refused to obey the decree for restitution of conjugal rights. The Supreme Court also held that the decree "serves a social purpose as an aid to the prevention of break up of marriage". In upholding the remedy the Supreme Court totally ignored the effect such a decree can have on an Indian woman who under the threat of judicial and social pressure and financial sanctions may well be forced to go back to the matrimonial home and because of her vulnerable position in it be forced to have sex and live a life of misery in an atmosphere she obviously abhors. This judgment is thus a denial of the fundamental right of every human being's right to privacy and right to decide at least with whom they want or wish to cohabitate. It is also relevant to mention that quite a few of the earlier judgments of the various High Courts had taken the extremely backward view that a Hindu women's duty is to live with her husband in the matrimonial home ignoring that this would be at the cost of her personal happiness her being a person in her own right with the right to control her own body. The said judgments, therefore, overlook the fact that marriage should be a voluntary union and the state cannot force matrimonial harmony which is entirely dependent on the two persons who are married.

⁶³ A.I.R. 1984 S.C. 1562
Section 9 of the Hindu Marriage Act provides for a decree for "restitution of conjugal rights" if it is proved that a spouse has withdrawn from the society of the other "without reasonable cause". This issue has come in for much debate during 1983-84 after a controversial judgment of the A.P. High Court in July 1983 striking down Section 9 as unconstitutional in the now famous Sarita case. In Nov. 1983 the Delhi High Court upheld the constitutional validity of Section 9 and differed with the ruling of the A.P. High Court. And in August 1984 the Supreme Court upheld the Delhi High Court's interpretation. The questions which have been widely debated in wake of these three judgments are: Does Section 9 discriminate against women? Would it be a progressive measure to scrap the section? Before discussing the above three judgments and the public responses, given below are judgments related to Section – 9 during the 1979-84 period, which are examples of the judicial attitude in ordering the decree whereby the High Courts have interpreted the section in a manner that has helped women. It can also be seen how the lower courts have often adopted a narrow and rigid stand and it was only when the women concerned pursued their appeals with higher judicial authorities that they could get justice.

Sarojranv. Sudarshan Kumar

This was a wife's petition for restitution of conjugal rights. The parties were married in 1975 and had two daughters in quick succession (unfortunately the second daughter died when she was just six months old) and as alleged by her.

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44 A.I.R. 1983 AP 356
45 A.I.R. 1987 S.C. 2220
in May 1977, the husband turned her out of the house and withdrew himself from her society. The wife also alleged several mal-treatments, both by the husband as well as by her in-laws. The husband denied the allegations but made a statement in the trial court that the wife's application for restitution be granted. Accordingly, a decree for restitution was passed in March 1978. A little over a year later in, April 1979, the husband filed a petition for divorce under section 13(1A)(ii) on the ground that one year had passed since the decree of restitution but no actual cohabitation had taken place between the parties. The wife denied this and stated that she was taken to the husband's house by her parents but the husband turned her out after two days. She further stated that she had also filed an application under section 28A of the Hindu Marriage Act in the court of Sub-Judge, Jalandhar in 1979, with the request that the husband should be directed to comply with the restitution decree. The District Judge, while holding on the basis of evidence that there was no resumption of conjugal rights between the parties after the decree, held that in view of the provision of section 23 and in view of the fact that the restitution decree was a consent decree and at the time there was no provision like provision in section 13B i.e., divorce by mutual consent - the husband was not entitled to relief by way of divorce decree. Against this, the husband filed an appeal before the Punjab and Haryana High Court which held that, in view of the decision in Dharmendra Kumar v. Usha Kumar66, it could not be said that the husband was taking advantage of his "wrong". The conduct

66 A.I.R. 1977 S.C. 2218
alleged to be a wrong had to be something more than mere disinclination to agree to an offer of reunion; it must be misconduct serious enough to justify denial of the relief to which the petitioner was otherwise entitled. It, however, held that the decree for restitution of conjugal rights could not be passed with the consent of the parties and, therefore, being collusive disentitled the husband to a decree for divorce. The matter then came up before a Division Bench, which held that a consent decree could not be termed to be a collusive decree so as to disentitle the husband to relief. The Full Bench decision of the Punjab and Haryana High Court in Joginder Singh v. Pushpa\textsuperscript{67}, was relied upon wherein it was held that consent decree in all cases could not be said to be collusive decree, and where the parties had agreed to passing of a decree after attempts had been made to settle the matter, in view of the language of section 23 if the court had tried to make conciliation between the parties and conciliation had been ordered, nonetheless the husband was not disentitled to get a decree. On wife's appeal to the apex Court, it was held that a consent decree cannot be said to be collusive in all cases; further it did not accept the wife's contention that the conduct of the husband amounted to a wrong within the meaning of section 23(1)(a) of the Hindu Marriage Act. Approving Harvinder Kaur\textsuperscript{68}, the court observed that financial sanction by way of attachment of properties was only an inducement for the parties to live together in order to give them an opportunity to settle their

\textsuperscript{67} A.I.R. 1969 P & H 397
\textsuperscript{68} A.I.R. 1984 Del 66
differences amicably. It is submitted that while the legality of section 9 cannot be assailed, it cannot be denied that it serves practically no purpose as an order for restoring conjugal rights. It is only a circuitous route to obtaining a divorce. It would be a useful study to find out how many restitution orders really end up to meaningful resumption of cohabitation.

*Mohinder Kaur v. Bhag Ram* 69

The trial court had granted relief on a husband’s petition for restitution of conjugal rights and dismissed a wife’s application for judicial separation. In its consideration of the evidence the court had recorded a clear finding that the husband’s allegations against the wife were baseless and yet decided that the wife had not proved that she had withdrawn from his society with sufficient cause. In her application for judicial separation the wife had leveled charges of cruelty and a specific ground that the husband had made false allegation in his petition that she was living in adultery. The High Court reversed the trial court’s judgment and ruled in favour of the wife, granting her a decree of judicial separation. The court said that the fact that the allegation of adultery was not substantiated was itself sufficient proof of mental cruelty, entitling the wife to withdraw from the husband’s society. It is discernible from the above opinion of the court that the very act of leveling such allegations is tantamount to perpetrating mental cruelty on the other party.

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69 A.I.R. 1979 Punjab 71
Rabindranath Barik v. Pramila Barik\textsuperscript{70}

The husband had applied for restitution of conjugal rights to the subordinate judge, Balasore. The wife contended that because of intense cruelty and ill treatment by her mother-in-law she had become ill and could not go back to live in the husband’s parental home. The judge proceeded on the footing that the wife had a legal duty to live with her husband and had failed to prove her plea of cruelty and granted a decree for restitution of conjugal rights to the husband. The wife then appealed to the High Court. The court found that the husband himself was working as a teacher in a place distant from his parental home, the mother-in-law was abusive and the husband was not much interested in resuming marital life as he was insisting that the wife should return to the in-laws’ house. With attempts at reconciliation by the judge, the wife agreed to live with the husband provided he could arrange a separate residence. The decree for restitution was reversed.

Mohinder Singh v. P. Kaur.\textsuperscript{71}

Barely six months after their marriage in 1974 the husband met with violence from his brother as a result of which he became totally blind. The wife went back to her parental home and never returned to her husband. The husband sued her for restitution of conjugal rights. The lower court dismissed the application on the ground that in the circumstances the wife had a “reasonable excuse” for withdrawing from the society of her husband. The High Court upheld

\textsuperscript{70} A.I.R. 1979 Orissa 85
\textsuperscript{71} A.I.R. 1981 Jammu & Kashmir 25
this ruling. Quoting the trial court's observations in this regard, the High Court expressed total approval of the approach taken: "the decree for restitution of conjugal right has always been passed with abundant caution. It is not an ordinary matter to compel an unwilling wife to live with a husband with whom she cannot live a happy life. The conjugal relations are meant for happiness and not for disaster and misery. No situation can afford happiness when she is forced to live as a wife of a blind unprotected man. The refusal of the wife is not due to obstinacy, nor is her conduct improper, unjust or unreasonable. She is not devoid of compassion but she is asked to pay too high a price for the compassion. The husband too is expected to have sympathy for her. The sympathy of the wife cannot restore eyes to the husband but the sympathy of the husband can restore the charm of life to the wife in the present case. They have had a very short span of marital life and such a short period cannot grow deep roots of attachment. These are facts which indicate that compulsion cannot yield a happy marital life between the couple and in these circumstances the discretion of the court cannot be exercised in favour of a decree for restitution of conjugal rights".

Agreeing with these remarks of the trial court, the High Court added: "The object of marriage is not simply to satisfy the sexual urge of a couple or to fulfill their desire to procreate children. It has much wider significance. It is intended to bring about a union of hearts so that the couple may live in happiness and enjoy all the good things of this world. It is difficult to see that this object can be served by wedlock between a young couple where the husband is totally
blind. Happiness apart, the husband is totally blind. Happiness apart, the husband, even with the help of various schemes for the welfare of the blind, may not be able to earn a decent living for himself and his wife children. We agree with the trial court that the wife was justified in withdrawing from the society of the husband and there is reasonable excuse for her to refuse to live with him".

Smt. Bitto v. Ram Deo 72

This is a wife's second appeal to the High Court against a decree for restitution of conjugal rights that was passed against her originally by two lower courts on the ground of desertion by the wife without lawful excuse. On the other hand, the High Court reversed the lower court's ruling and dismissed the husband's petition saying although it was the wife who had physically left the husband's house, yet it was the husband who would be said to have withdrawn from her society. In a suit for restitution by the husband against the wife alleging that she left the house, he must prove that she left the house voluntarily. In the same petition he also sought divorce on the false ground of suspected unchastity. He was obviously doing so to avoid payment of maintenance which his wife had applied for under Section 125 of the Cr. P. Code. In reply, the wife alleged that she was turned out of the house.

The High Court criticized the lower courts for placing an unduly heavy burden on the wife to prove that she had been living separately by force of circumstances and for accepting the highly unsatisfactory evidence of the husband.

72 A.I.R. 1983 Allahabad 371
that she had left voluntarily. Describing the husband's allegation as amounting to the worst kind the High Court said: "A husband cannot say that he suspects the fidelity of his wife and yet demand to live with her by restitution of conjugal rights". The High Court further observed: "In the patriarchal state of society in which we live, it is the husband's house which is regarded as the matrimonial home and in almost all cases where the husband alleges that the wife has voluntarily left his house and the wife alleges that she was turned out... although physically the wife may leave her husband's house, yet it may be the husband who has turned her out with the intention of bringing cohabitation to an end. The burden of proof would in such circumstances be on the husband.

_T. Sareetha v. T. Venkatasubbaiah_73

The film actress Saritha had appealed to the High Court against an order passed by the Cuddapah sub-judge rejecting her preliminary objection to the jurisdiction of the court to hear her husband's petition for a restitution of conjugal rights. She had also questioned the constitutional validity of Section 9 of the Hindu Marriage Act which provides for a restitution decree. The High Court ruled that Section 9 violated Articles 14 and 21 of the Constitution and prohibited the lower court from disposing of the husband's petition. This was the first time that the question of the constitutional validity of Section 9 had been raised in a court.

Justice Chowdhary's ruling, which runs into many pages, is rich in arguments spelling out the meaning of human dignity and privacy with many

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73 A.I.R. 1983 Andhra Pradesh 356
references to judgments in the British and American courts, the writings of Havelock Ellis and Bertrand Russel, as well as one quotation from the Telugu poet, Shri Sri who described forced sex as Rakshasa Rati. The main theme of this voluminous judgment is that a restitution decree implies that by an order of the State, a woman can have sex forced on her against her will which violates her fundamental right to life and liberty under Article 21. Finally the judgment also ruled that Section 9 violates Article 14, by discriminating against the female sex since in practice it is almost always used by a husband against his wife. The main points of the judgment are condensed below.

The remedy of restitution of conjugal rights is a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Hence Section 9 is constitutionally void. Any statutory provision which abridges any of the rights guaranteed by the Constitution will have to be declared void in terms of Article 131 of the constitution. Article 21 protects the right to privacy and promotes the individual dignity mentioned in the preamble to the constitution.

A decree for restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprives a woman of control over her choice as to whether and by whom the various parts of her body should be allowed to be sensed. The woman loses her control over the
most intimate decisions. Clearly her right to privacy guaranteed by Article 21 is flagrantly violated by a decree for restitution of conjugal rights. At a time when she may be contemplating a divorce action, the enforcement of Section -9 against an estranged wife could irretrievably alter her position by bringing about forced conception.

A court decree enforcing restitution of conjugal rights constitutes the starkest form of governmental invasion of personal identity and individual’s zone of intimate decision. It is of constitutional significance to note that the ancient Hindu society and its culture never approved such a forcible marital intercourse. The only usefulness of Section 9 is that it can provide evidence for a subsequent divorce sanction. But the usefulness of this remedy can only be obtained at enormous expense to human dignity. After considering all these factors the Scarman commission in Britain recommended abolition of this matrimonial remedy and the British law has now scrapped it.

Sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights. A decree under Section 9 therefore transfers the choice to have marital intercourse to the state from the concerned individual. Although Section 9 does not in form offend the equality test (it makes no discrimination between husband and wife), the question is how does this remedy work in actual life. In our social reality it is almost exclusively used by the husband, rarely by the wife. Enforcement of the decree can irretrievably alter a wife’s life-pattern but a husband’s can remain almost unchanged. A wife alone can beget and bear a
child. This practical but inevitable consequence of the enforcement of the decree can cripple a wife's future plans of life and prevent her from using that destructive remedy. Thus in reality the use of the remedy is partial and one sided and available only to the husband. It works in practice as an oppression to be operated by the husband against the wife. By treating the wife and the husband who are inherently unequal as equals, Section 9 offends the rule of equal protection of laws, and is violative of Article 14 of the Constitution. Besides, it promotes no legitimate public purpose not sub serve any social good.

The judgment's references to Hindu norms is instructive. "Our ancient Hindu system of matrimonial law never recognized the institution of conjugal rights although it fully upheld the duty of the wife to surrender to her husband". Thus the court does not question the Hindu wife's so-called duty "to submit" but merely asserts that the laws cannot compel her to perform her duty against her will. The judgment also observes that this matrimonial remedy was thoughtlessly imported into India and enforced among the Hindus and Muslims and that it has remained in the statute even though the country from where it originated has abolished it.

Saroj v. Sudarshan Kumar

This is an interesting instance where it was the wife who had originally petitioned for restitution. This was not complied with by the husband. On expiry of the statutory one-year period of living apart, after the decree, the husband

4 A.I.R. 1984 S.C. 1562
petitioned for divorce under Section 13 which was dismissed by the lower court but granted by the Punjab High Court. In the appeal against the divorce decree to the Supreme Court the wife's counsel drew attention to the constitutional validity of Section 9 as ruled in the A.P. high Court i.e. the argument was that if Section 9 was unconstitutional then Section -13 which creates a ground for divorce and which stems from Section 9 would also be invalidated. The Supreme Court overruling the A.P. High Court's ruling of 1983 upheld the constitutional validity of Section 9 and observed: "Conjugal rights cannot be enforced by the act of either party and a husband cannot seize and detain his wife by force. In India conjugal rights is not merely a creature of the statute but inherent in the very institution of marriage itself. There are sufficient safeguards in Section 9 to prevent it from being a tyranny. Section 9 serves a social purpose as an aid to prevent the break up of marriage. It is not violative of either Article 21 or Article 14 if the purpose of the decree is understood in its execution in cases of disobedience kept in view". The significance of this case stems not so much from the actual facts of the separation of the parties concerned, or the relative merits of their arguments, but from the Supreme Court's stand on the constitutional validity of Section 9 and the precedent thus laid on this issue which will be mandatory now for all other courts to follow. The Supreme Court upheld the divorce decree passed by the Punjab High Court and said that it was very obvious that the marriage had broken down totally. The court further gave direction for payment of maintenance to the divorced wife until she remarried.
5.6 Sexual Harassment at Work Places

Sexual harassment of any women at the work place is a gross violation of the fundamental rights of general equality and the right to life and liberty under Articles 14, 15 and 21 of the constitution. It also violate the fundamental rights and article 19(1)(g) "to practice any profession or to carry out any occupation trade or business", and therefore attracts remedy under Article 32 for the enforcement of these fundamental rights of women. Article 42 also provides for just and humane conditions of work and maternity relief. India is party to various international conventions and human rights instrument aimed at protecting the rights of women. CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) adopted by the united nations in 1979 which was occupied by the Govt. of India in the year 1993 with some observations. The CEDAW does not categorically mention violence against women or sexual harassment. It does however prohibit discrimination employment under Article 11, the committee created a CEDAW in 1992 issued general recommendation 19, addresses violence against women and sexual harassment in employment. Equality in employment can be seriously impaired when women are subjected to gender specific violence such as sexual harassment in the work place. The recommendation also recognizes both quid pro quo sexual harassment and hostile work environment sexual harassment has forms of discrimination. The government of India has made an official commitment to formulate and execute a national policy on women which will continuously guide
at every level and every sector: to set up a commission for women's right and to institutionalize a national level mechanism to monitor the implementation of the platform for action. Beijing. So, it had become a mandatory on the part of the state to protect women who are subjected to sexual harassment.

_Vishaka Judgment_⁷³

The case is that a women field worker when gang raped in the early 90's a village in Rajasthan, brought this issue to the forefront of the women's movement in India. This village level field worker, employed in the government sponsored women's development programme, was raped by members of an upper caste family as 'punishment' for her efforts to stop a child marriage in that household. Before the actual rape, the field worker had complained about sexual harassment by the accused; complaints which went unheeded by the local authorities, leaving the field worker to fend for herself. One question which arose from the case was, whether apart form the incident of gang rape, the state could camouflage its own prior accountability in the matter? The state's failure to have any functional policy on sexual harassment for its village department workers appeared to cast some degree of liability on the state. This amongst other issues became the basis of a public interest litigation filed by women's organizations in the Supreme Court of India. Following this, the Supreme Court of India passed a judgment establishing guidelines regarding sexual harassment at work.

⁷³ Vishaka and Others v. State of Rajasthan and others 1997(7) S.C.323
In the absence of an enacted law to provide for the effective enforcement of the basic human right of general equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places or institutions, the Vishakas guidelines are to be treated as the law under article 141 of the constitution which states that the law declared by the Supreme Court is binding on all the course.

The guidelines have just begun to receive visibility at the work place especially in light of a subsequent decision of the Supreme Court of India which reaffirms sexual harassment as human rights violation. Strategies in different work contexts are only beginning to emerge but are not as yet sufficiently broad based to allow for general examples. Whatever the context therefore, strategies should include examining social messages that do not fit today’s work environment.

The National Human Rights Commission after observing that the guidelines issued by the Supreme Court in its landmark judgment of Vishaka were not being implemented adequately, the Commission took initiatives to convene meetings with various departments of Government of India like the Department of Personnel and Training (DOPT), educational departments/ institutions like the Department of Secondary and Higher Education, Department of Elementary Education and Literacy of the Ministry of Human Resource Development, University Grants Commission (UGC), Central Board of Secondary Education (CBSE), Directorate of Education, National Capital Territory (NCT) of Delhi, etc.
besides meetings with the legal fraternity for the effective implementation of the guidelines envisaged by the Supreme Court for creative application to different work places to make the spirit of Vishaka come true.

The work place sexual harassment judgment is a positive step. Though it only has the limited facts, women have started using it and recently in June 1998, a person who indulged in sexual harassment was dismissed (albeit after much struggle) because of a complaint against him being taken up by the grievances cell set up at Tata Institute of Fundamental Research, Mumbai.

The government is in the process of finalizing a Bill on protection against sexual harassment. The contents of this Bill needs to be viewed in the context of years and experiences of the women's group in dealing with violence and sexual offences of implementing Vishaka guidelines. The court for the first time recognized sexual harassment as a human rights violation. The Vishaka judgment kept with India's obligation under CEDAW and their international instruments and laid down broad based guidelines.

The spirit of "Vishaka" is very positive and makes major shifts in dealing with acts of sexual harassment at work place. It lays a major responsibility on the employers to provide safe work environment to women employees and stresses on prevention. The "Vishaka" guidelines provide the scope for creative application to different work places to make the spirit of "Vishaka" come true. Thus, it stresses on clear role of employer for both prevention and resolution of sexual harassment at work place. The proposed Sexual Harassment Bill's title itself
remains incomplete in this regard as the Bill should provide for both resolution and prevention of sexual harassment. The Bill does not specify and clarify the preventive role of the employer although the title itself suggests prevention. The Bill has thrown up many concerns and leaves a lot to be desired in many areas, viz. definitions, clarity of roles of different people involved in resolution mechanism, suggested punishment among others. Although the Bill has incorporated some suggestions with regard to definitions, the definition of "women" leaves out two important categories of service users such as patients and customers.

The definition of sexual harassment has a major problematic word "avoidable sexual advances" which can lead to offenders easily getting away with any acts as against the comprehensive definition of sexual harassment given in "Vishaka". The work place leaves out many important work places such as free trade zones, special economic zones, multi national companies, offices/firms of professionals such as lawyers, doctors, chartered accountants, teachers, and many others such as religious bodies and institutes. The past experiences show that the offences of sexual harassment cannot be effectively dealt with under criminal laws as the major challenge always in such offenses is to provide the intent of the offender combined with the lack of evidence. The Bill should prove deterrent to acts of sexual harassment and stress on prevention of such offense. The Bill providing punishment of imprisonment and fine leans towards criminal justice and poses the threat of denying any actual justice. The Bill needs much detailed
and careful considerations of ground realities and clarity of purpose and means for achieving the purposes of prevention and resolution of sexual harassment at work place.

5.7 Divorce and Maintenance

5.7.1 Divorce

As for marriage, no common law governs divorce in India – Personal Law applies.

- Hindu Marriage Act (1956): applies to Hindus, Sikhs, Jains and Buddhists.
- Parsi Marriage and Divorce Act (1936): applies to Parsis.
- Indian Divorce Act (1869): applies to Indian Christians.
- Muslim Personal Law (Shariat) & Dissolution of Muslim Marriage Act, 1939: applies to Muslims.
- Goa Civil Code.
- Customary laws of various communities.

The Special Marriage Act, 1954 which is the only central statute that allows any person domiciled in India to marry irrespective of his or her religious faith, applies to all those who have chosen to be married under this Act.

Under the Indian law – personal as well as secular – divorce is essentially fault based. The only kind of divorce which is not fault based is divorce by mutual consent where both parties agree to a divorce without making any
allegations against each other. Even this is available only under certain personal laws and under the Special Marriage act. But under no law can one party approach the court and demand divorce merely on the ground that she/he does not want to live with the spouses. Though Supreme Court has at times granted divorce purely on the basis that parties have irreconcilable difference, this is a rare exercise of power and not arising out of right of any of the parties. Whether, in the Indian context, it is at all in the interest of women to have irretrievable breakdown of marriage as a ground for divorce is itself a debatable issue.

5.7.2 Maintenance

The law concerning maintenance is largely covered by the personal laws. Maintenance is of two kinds. Permanent Maintenance or alimony is granted at the conclusion of the legal proceedings between the husband and wife. During the continuance of the legal proceedings, alimony pendente lite or maintenance pending the litigation is granted. While granting permanent alimony income as well as the assets and property of the parties are taken into account. On the other hand, for determining alimony the conduct of the parties such as whether the wife is guilty of adultery, cruelty, etc. is taken into account. On the other hand, for determining alimony pendente lite, conduct of the wife is, by and large not a relevant factor. If permanent maintenance is linked to other matrimonial proceedings such as divorce, judicial separation, etc., then if the case concerning the large matrimonial relief is disallowed, no permanent alimony is granted.
The other remedy which women have is under Section 125 and related sections of the Criminal Procedure Code. However, this is considered to be a remedy not exactly for providing maintenance to women and children but to prevent them for destitution. Thus, the maximum amount which can be granted per recipient is only Rs. 500/. Shockingly this ceiling has remained unchanged for decades.

The various provisions available under different Personal Laws are:

**Hindus**

- **The Hindu Adoption and Maintenance Act, 1956 (H.A.M.A.)**
  - Hindu wife can claim maintenance as well as separate residence from her husband if he has committed any of the matrimonial offences such as desertion, cruelty... (see below). Without filing a petition for divorce (Section 18);
  - After death of husband Hindu wife is entitled to be maintained by father-in-law (Section 19);
  - Hindu legitimate or illegitimate minor children are entitled to be maintained by their mother and father (Section 20).

- **The Hindu Marriage Act, 1955 (H.M.A)**
  Hindu wife and husband can claim;
  - alimony pendente i.e. pending a suit under the Act (Section 24);
  - permanent alimony (Section 25).
• Scope of provisions under H.A.M.A. AND H.M.A.

- provisions of H.A.M.A. are meant to aid neglected, abandoned and deserted women who are left with few financial resource, while a marriage is legally in existence.

- Provisions of H.M.A. are meant to help a wife (or a husband) who has no independent income sufficient for her (his) support, pending a suit for divorce, judicial separation or restitution of conjugal rights, (alimony pendent elite) or after they are divorced (permanent alimony).

Christians

Wife can claim under the Indian Divorce Act, 1896 (I.D.A.):

• alimony pendent elite i.e. till the pendency of litigation.
  (Section 36);

• permanent alimony (Section 37)

Parsis

Wife and husband can claim, under The Parsi Marriage and Divorce Act, (P.M.D.A.):

• alimony pendente lite (Section 39);

• permanent alimony (Section 40).

For persons married under the Special Marriage Act, 1954 (S.M.A.)

Wife can claim, under S.M.A.:

• alimony pendente lite (Section 36);

• permanent alimony (Section 37).
Muslims

For Muslim wife there are no similar provisions as under H.M.A, I.D.A., P.M.D.A & S.M.A.

She can claim maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (M.W.A.) or under Section 125 of Cr. P.C.

In a recent order,\(^6\) the Supreme Court after comparing the various laws\(^7\) relating to divorce pertaining to different communities strongly urged for “a complete reform of the law of marriage and a uniform law applicable to all people irrespective of religion or cast.” The court further observed, “it is necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down.

We suggest that the time has come for the intervention of the Legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves”. It is important to point out that such differing laws, in fact, go against the very concept of equality enshrined in our Constitution. Further under the Indian Divorce Act and the Muslim Personal Law different grounds exist for the husband and wife to seek divorce and thus, these laws clearly discriminate


against women and violate Article 14 of our Constitution. Also, while it is imperative to introduce irretrievable breakdown of marriage as a ground for divorce there is an equally urgent need to introduce laws to secure the financial and economic position of women. Indian women continue to suffer great financial hardship as they do not have any right or share in the property of the matrimonial home. The social stigma notwithstanding, unless women are given an equal share in the matrimonial property and an equal share in their parental property they cannot afford the 'luxury' of divorce and or to live a life with dignity and self-respect. Thus the only right women have is a 'right to maintenance' from their husbands. The quantum of maintenance to the wife or ex-wife is largely left to the discretion of the individual judge. A reading of the various High Court judgments show that generally upto 1/3rd of the net income of the respondent is awarded to the applicant as maintenance. This is often hardly enough for the women to lead a comfortable life. Women face an immense amount of difficulty in proving the income of their husbands specially if he is not a salaried person and earns money which is not accounted for anywhere.

The Supreme Court\textsuperscript{78} has, however, protected the right of a woman to her maintenance even after the death of the husband by saying that "the estate is liable to be proceeded against... for the satisfaction of the decree". In the famous Shah Bano's case the Supreme Court has held that Section 125 Cr. P.C. cuts across all barriers of religion and 'personal laws' ad is meant to provide relief to indigent

women. The Supreme Court has thus, to some extent, played a protective role in upholding the rights of women.

Radha v. Mohinder Kumar

It is very short order, where a husband had obtained an annulment of the marriage. The wife filed an appeal before the Supreme Court. During the course of appeal the parties entered into a compromise and requested the court that the marriage between them might be kept dissolved but not on annulment and instead by “mutual consent” effective from the date of the High Court order (which was 29-7-1984). The court acceded to this “reasonable” request and substituted the order of the High Court as if from the date of its judgment, the marriage between the parties stood dissolved by a decree of divorce by mutual consent.

An annulled marriage wipes out all the incidents and rights in marriage and vitally affects the status of the spouses and the children. Though the short order in the case mentions no details whatsoever, the court, in converting the annulment decree into a decree of divorce by mutual consent must have taken note of this factor.

Ashok Hurra v. Rupa Bipin Zaveri

The parties were married in 1970. Fourteen years later, they filed a joint petition for divorce under section 13B of the Hindu Marriage Act, 1955 (Hindu Marriage Act). Within one year of the filling of the petition, the husband

79 (1989) 8 S.C.C. 530
80 A.I.R. 1997 S.C. 1266
remarried and also had a child. The wife filed cases for declaring the marriage (second marriage) illegal and the child illegitimate. After about 19 months of the filing of the petition for divorce, the wife withdrew her consent and sought dismissal of the petition. The husband objected and contended that she had no right to withdraw after eighteen months had elapsed. The trial court, however, held that since the wife withdrew her consent, the divorce decree could not be granted.

In the appeal before the High Court, the judges also invoked the clean hands maxim, i.e., the party who comes to court must come with clean hands, which obviously, the husband did not in this case. The Division Bench, accordingly, refused to grant the divorce. Against this, the husband approached the Supreme Court.

The Court took notice of the cumulative effect of the various circumstances and facts and came to the conclusion that the marriage was dead "emotionally and practically" with no chance of revival. It is felt that this was a case where jurisdiction could be exercised under Article 142 of the Constitution and granted divorce by mutual consent in order to meet the ends of justice. The decree was made conditional on the husband paying Rs. 10 lakh plus Rs. 50,000 as litigation expenses to the wife. One fails to understand how divorce by "mutual consent" could be granted when one of the parties had withdrawn the consent. Also, the court gave relief to the husband who had committed a wrong and an offence under the Penal Code by marrying during pendency of divorce
proceedings. It also amounts to an affront to the dignity of the court and court process that even while proceedings were pending, the husband remarried. A decree cannot be bargained by money power. Also, a marriage cannot be dissolved with retrospective effect.

_Sureshta Devi v. Om Prakash._

The issue involved here is whether a party to petition for divorce by mutual consent under section 13B of the Hindu Marriage Act can unilaterally withdraw the consent or whether the consent once given is irrevocable? The parties were married in November, 1968 and lived together for about six to seven months. On January 8, 1985 they moved a petition under section 13B for divorce by mutual consent in the District Court at Hamirput. On January 9, 1985 the court recorded the statements of the parties. On January 15, 1985 the wife filed an application in the court stating, inter alia, that her statement dated January 9, 1985 was obtained under pressure and threat of the husband and she was not even allowed to meet her relatives to consult them before filing the divorce petition. She, therefore, prayed for dismissal of the petition. Ultimately, the District Judge dismissed the divorce petition. On appeal by the husband, the High Court reversed the order and granted a decree for dissolution of the marriage by mutual consent. Hence the wife's appeal to the Supreme Court.

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81 A.I.R. 1992 S.C. 1904
In the appeal, the issue was whether it was open to one of the parties at any time till the decree of divorce is passed, to withdraw the consent given to the petition. Reference was made to Jaya Shree Ramesh Londhe v. Ramesh Bhikaji Londhe, Chander Kunta v. Hans Kumar, and Meena Dutt v. Anirudh Datta, wherein the courts held that the crucial time for consent for divorce under section 13B was when the petition was filed, and to K.I. Mohanana v. Jeejabai, Harcharan Kaur v. Nachhatar Singh, and Santosh Kumari v. Virender Kumar, where a contrary view was taken. After analyzing the cases and the statutory provision, the Supreme Court came to the conclusion that the section does not provide that if there is a change of mind it should not be by one party alone but by both. The wife’s appeal was allowed and the decree for dissolution of marriage passed by the High Court was set aside. The court was categorical that consent must continue till the time of the decree and not just the time of filing the petition. The judgment has resolved the controversy on the issue of unilateral withdrawal of consent by one of the parties. The whole idea of providing for an interregnum is to give time to the parties to think over. Meanwhile, for whatever reasons, one of the parties withdraws consent then a divorce by mutual consent cannot be decreed.

82 A.I.R. 1984 Bom 302
83 A.I.R. 1989 Del 73
84 II (1984) DMC 388
85 A.I.R. 1988 Ker 28
86 A.I.R. 1988 P&H 27
87 A.I.R. 1986 Raj 128
5.8 Protection of Women's Rights through Public Interest Litigation

The male domination in the human society was the order of the day since time immemorial. This lead the great French philosopher - Simone de Beauvoir to write "Humanity is male and man defines woman not in herself but as relative to him... he is the Subject, he is the absolute - she is the Other." We speak of women the way scholars once spoke of the 'Negro problem,' ... Women, like blacks, become an out-group, a special topic."\textsuperscript{88} Hence we discuss their rights and their status with a special emphasis at every Seminar Symposium or workshop.

Whatever be the reasons for male supremacy - whether greater strength, or bread-winner status; or any genetic peculiarity - history is a witness to the fact that male domination has been universal in nature and it has existed in all known human societies.

Women, in any country - form more or less half the chunk of the entire population. Yet, during the infancy of the society no class was placed in a position of such absolute dependence upon men as the Women. "The degree in which that dependence has been voluntarily modified and relaxed naturally serves as a rough test of the sense of justice and fair play developed in a community."\textsuperscript{89}

The legal and social status of the women in a country is measure of civilization of a country. Civilization is to a great extent the result of conscious effort of the

\textsuperscript{88} Dr. Veena Madhav Tonapi - Principal, J.S.S.S. Sakri Law College, Hubli.

\textsuperscript{89} Dr. A.S. Altekar. The Position of Women in Hindu Civilization. (Banaras: Motilal Banarasidas: 1956)
Society to control the most selfish impulses embedded in the human nature. The capacity to tame and control the basic instincts of human beings like greed, selfishness, possessiveness, hubris, bossism and the like, through a systematic and a consensual and accommodative method rather than by the method of autocratic command determine the degree of civilization of a country.

The progressive thinking of reformists coupled with the concept of equality, liberty, freedom, dignity woven into the fabric of the Constitution of every civilized nation, things did change for the better for the women. There was increasing emphasis on women education as the society realized that education was the foundation on which a woman had to build up her all-round personality. With education she too started asserting for her rights.

5.8.1 Public Interest Litigation: An instrument for procuring and preserving the dignity of women

Armed with the Constitutional ethos which guarantees gender uniformity and also makes provision for feminism the Legislature and the Judiciary have contributed their might in protecting the women's rights. Feminism is the principle that women should have the same rights and chances as men. The principle of feminism is contained in Article 15(3) of the Constitution which makes it possible to make special provisions for the women and children in order to equalize the inequalities that have crept in due to several reasons.
Thus, the Legislature has contributed by enacting several laws for the fuller and optimum development of women. The Judiciary has developed ways and means of making women's lives more meaningful – with its innovative skill and dexterity in interpreting the laws. One such innovation to the sole credit of the judiciary is the concept of public interest litigation, which is judge-made and judge induced. It is the same Article 32 of the Constitution which was given to us at the time of Independence seen in a different light which has made it possible to develop this concept of public interest litigation. Public interest litigation is a very popular concept which needs no elaboration at this juncture. Suffice it to say that this unconventional method of doing justice has taken several forms and different liberal procedures – like invoking the jurisdiction of the court by letters addressed to the Court/judge with a bonafide interest; the court/judge taking suo-motu notice of the injustice; adoption of non adversarial procedure of justice; appointment of commissioners as fact finding bodies, emergence of an activist judge rather than an umpire-judge; newspaper reports, supervisory role of the judge etc. public interest litigation has helped in ameliorating the plight of the citizens. It has helped the public spirited persons to concentrated, emphasize on the women specific problems and bring them to the notice of the judiciary without recourse to the normal court procedures which would be cumbersome.

With an imaginative and resourceful outlook towards tackling issues of gave concern, the Judiciary has experimented with bold and daring techniques – using the same old tools at their disposal and given the nation the concept of
public interest litigation – which is a strategic arm of Legal Aid Movement. Article 32, 2226, 14, 19,21, the Directive Principles have been injected with new life through their interpretation—in order to attain justice in its multi-faceted dimension. Since our Constitution is for a major portion gender—uniform it goes without saying that the women is entitled to the benefit of all the gender uniform laws and judgments whether a public interest litigation judgment or otherwise.

The emphasis in this part is only on such of the women’s rights which have been protected through public interest litigations. Some of the cases, initiated by way of PIL are cited under and discussed below:

_Bodhisatwa v. Chakraborty_ is a case where the sacred relationship of teacher—student was abused by the teacher who was a lecturer in the Baptist College, Kohima. With false assurance of marriage, he fraudulently went through certain ceremonies like putting ‘kumkum’ vermillion on the complainant’s forehead in front of the God he worshipped and he dishonestly procured sexual intercourse and on two occasions forced her to undergo abortion. Holding that it amounted to rape, the court observed “Rape is not only a crime against the victim—woman, it is a crime against the entire society. It destroys the entire psychology of woman and pushes her into deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society which on coming to know of the rape, looks down upon her in derision and contempt. Rape is therefore the most hated crime. It is a crime against basic human rights and is also violative of the

victim's most cherished of the fundamental rights contained in Article 21 of the Constitution Right to life does not mean mere animal existence but means something more namely the right to live with human dignity. The uniqueness of this case lies in the fact that the shameless and fraudulent Bodhisatwa filed a petition in Gauhati High Court for quashing the complaint of Subhra under Section 482 Cr.PC, but the same was dismissed. The appeal before the Supreme Court also failed. However, the Supreme Court acting suo-motu ordered him to pay Rs.1000 per month as interim compensation. In this sense – though not a public interest litigation at the inception stage – it is judicial concern through judicial activism of the Supreme Court judges which ultimately procures interim compensation to the victims.

In Vishal Jeet v. Union of India, Vishal Jeet – an Advocate filed a public interest litigation seeking to stop prostitution and the Devdasi and Jogin traditions, which were thriving by the inaction of the police officers under whose jurisdiction red light areas and these ill conceived traditions were thriving. The petitioner sought directions for rehabilitating the children of prostitutes and the other children found begging in the street; an enquiry against the police officers in whose jurisdiction these illegal activities were flourishing.

92 A.I.R. 1990 S.C. 1412
Following directions were given by the Supreme Court

- The State Govts. and the Union Territories were directed to take appropriate and speedy actions under the existing laws
- That Advisory Committees be set up consisting of Government officials and social workers to make suggestions on eradication of child prostitution
- Social welfare programmes to be implemented for care, protection, development rehabilitation of children and girls

_Hussainara Khatoon (I)_ arose out of a public interest litigation filed on the basis of an article appeared in the Indian Express. The said article pointed out that the undertrials including women and children were awaiting trial for years. Some were imprisoned for more than the period of their punishment if convicted of the offence charged. Directions were issued to release prisoners named in the report on their personal bonds. In Hussainara Khatoon II J. Bhagwati lamented that women were kept in ‘protective custody’ in the jail, without even being accused of any offence, merely because they were the victims of offences or because they were required for the purpose of giving evidence. Expressing anguish at the state of affairs and pointing out that the phrase ‘protective custody’ was only intended to appease the conscience, though in reality it was a ‘euphemism’ to disguise ‘punishment, they were directed to be taken to welfare homes. He pointed out that ‘protective custody’ was nothing short of a blatant

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violation of personal liberty guaranteed under Article 21 of the Constitution because there was no law which authorized a woman to be kept in jail by way of protective custody. In addition it was laid down that speedy trial was a fundamental right.

In *Sheela Barve v. State of Maharashtra*⁹⁴, a letter written by the journalist Sheela Barve complaining of custodial violence to women prisoners while in police lock-up in Bombay was treated as a writ. J. Bhagwati reiterated that legal assistance to the indigent is not only a directive principle but also a fundamental right under Article 14 and 21. J. Bhagwati gave the following directions:

1. Female and male suspects not to be kept in the same police lock-up. Female suspects to be guarded by female constables.

2. Women to be interrogated only in the presence of women police officers.

3. Grounds of arrest must be immediately made known to the person arrested. Magistrate is duty bound to inform about the right to apply for bail and enquire whether he has been tortured. Fact of arrest must be brought to the notice of the nearest Legal Aid Committee so that immediate steps can be taken for ensuring legal assistance.

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Delhi Domestic Working Women’s Forum v. Union of India⁶⁵ was a case of public interest litigation filed by the Forum for Domestic Women servants were raped by 7 army personnel in a running train. Having regard to the fact that the victims of rape were handled roughly by the police and eventually that they had to undergo psychological trauma in the courts while giving evidence, several guidelines were laid down by the S.C.:

- the complainants of sexual assaults should be provided with legal representation by a person acquainted with criminal justice and it must be ensured that the same persons who takes care of her interest in the police station must represent her till the end of the case. He must guide her not only on court matters etc but also guide her on medical assistance including the assistance from a psychiatrist.

- legal assistance must be provided at the police station itself as being a victim of sexual assault, she may be in a distressed state.

- the police should inform her that she has a right to be represented before questioning her and the police report must state that she has been so informed.

- a list of advocates willing to act in such cases must be kept in the police station for victims who did not have any particular lawyer in mind, or whose own lawyer was not available.

⁶⁵ Delhi Domestic Working Women’s Forum v. Union of India (1995) 1 S.C.C. 14
the advocate shall be appointed by the court on application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay advocates would be authorized to act at the police station before leave of the court was sought or obtained.

- anonymity of rape victims must be maintained as far as necessary.

- in view of the directive principle in Article 38, Criminal Injuries Compensation Board must be set up.

- if the offender is convicted compensation shall be awarded by the court. Criminal Injuries Compensation Board must award compensation whether or not a conviction has taken place.

*Pratula Kumar Sinha v. State of Orissa* was another public interest litigation filed by an Advocate from Nadia in West Bengal based on newspaper report in Amrit Bazaar Patrika regarding sexual exploitation of blind girl students in a Blind school in Orissa. The court directed the Chief Judicial Magistrate to proceed to the Red Cross Blind School and enquire into the allegations. No prior notice was to be given to the school authorities regarding the visit. It was a case where a student is said to have fallen a victim to the peon and to the relative of a teacher and undergoes illegal abortion with the help of a Hindi teacher. But as the credentials of the girl were questionable; it was a solitary case and the newspaper report had given an impression that sexual exploitation was rampant – the court

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decided not to enquire further into the newspaper report but directed the Union of India to be a necessary part so that proper directions can be issued.

_Gajraula Nuns Rape case_ 97 was another public interest litigation filed by three prominent Christians alleging unfair police investigation of rape of nuns. They requested that the case be handed over to the CBI for investigation. Though ordinarily it was not the stage where the Supreme Court would reopen the case, in the interest of justice – as an exceptional case the CBI was asked to investigate.

_Visakha v. State of Rajasthan_ 98 is a landmark judgment arising from a public interest litigation case filed by social activists and the NGOs to prevent sexual harassment at work place in order to realize gender equality in its true sense. There was a brutal gang rape of a social worker of Rajasthan. The court relied on International Convention on the Elimination of All Forms of Discrimination Against Women 1979 and laid down extensive guidelines to prevent sexual harassment in work place in private and public sectors

- the employer must expressly publish a notice prohibiting sexual harassment, which includes physical contact, advances, sexually coloured remarks, etc; rules relating to conduct and discipline and the Standing Orders should include rules prohibiting sexual harassment; appropriate work conditions should be provided in respect of work, leisure health and hygiene to ensure that there is no

hostile environment towards women at work place; the victims of sexual harassment must have the option of seeking transfer of the perpetrator or their own transfer. These guidelines show an anxiety to protect the working women who are easy victims of male chauvinism.

- Complaint committee to be formed by the employer. To be headed by a woman. Not less than half of its members to be women. It should have a third party – either an NGO or other body familiar with the issue of sexual harassment.

*Joint Women’s Programme v. State of Rajasthan* was a public interest litigation to seek directions from the court for investigation into the unnatural deaths of two women. States were directed to create special dowry cells at the state level to investigate into dowry deaths through specialized investigative units and associate two women social workers with such cells. In *All India Democratic Women Assn and Janwadi Samiti v. Union of India* the women organizations procured directions form the S.C. to prohibit chunn ceremony to glorify sati. In another public interest litigation filed for the purpose of creating the awareness regarding the provisions of Dowry Prohibition Act and the Rules, the S.C. directed the Central Government to furnish the details of the steps taken regarding

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**A.L.R. 1987 S.C. 2060**

100 (1989) 2 S.C.C. 411
the administration of the Act, steps to create awareness, number of cases instituted *suo motu* by Dowry Prohibition Officers for violation of the Act etc.

In *Ahmedabad Women Action Group v. Union of India*\(^{101}\): The group sought direction for a declaration that Muslim personal laws providing for polygamy and unilateral talaq by males are violative of fundamental right of the women. The court refused to interfere as that was a policy matter and it could not interfere. *Uttarkhand Mahila Kalyan Parishad v. State of UP*\(^{102}\) was case of public interest litigation for equal pay. It was a filed by the Parishad complaining of lesser salaries for lady teachers as compared to the male teachers. It was held that the same is unconstitutional.

It would be interesting to note that in almost all these public interest litigations which have viewed the woman related issues in a very sensitive manner – it is the male judges on the Bench (except Vishakha – where J. Sujata Manohar was on the Bench). This leads us to an inference that women issues can be felt and dealt by any sensitive human being for it is an issue touching humanity. Likewise laws in favour of women have been enacted with maximum number of men in the law making bodies. Therefore the question always is one of enlightenment Vs ignorance and not on Man Vs woman.

To conclude, the problem that is to be addressed is the alarming rise of crime rate against women not withstanding the intervention of the court from time

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\(^{101}\) (1997) 3 S.C.C. 573.

\(^{102}\) 1993 Supp. (1) S.C C. 480
to time. In other words the increasing incidents of violence could only be attributed to the impact - failure of the judicial intervention in such cases. This takes one to the problem of enforceability of any other direction in public interest litigation. Viz - that the credibility of the court as the ultimate forum for giving relief depends on the conviction that the relief granted by the court is enforceable. They are enforceable only when they are worded in definitive terms. But when worded as suggestions or just as sermons from higher judiciary without any permanent machinery to follow up implementation of the directions - all the stake holders tend to take the directions very coolly and lightly.

5.9 Impediments to Gender Justice

Corruption of different intensities was found in the whole of the enforcement machinery. Earlier judiciary was a competent organization having a large number of honest people and corruption was a problem at the lower level but today charges involve even those at the higher rung. This phenomenon may be due to the general decline in allegiance to the moral values of the society, 'no one can remain immune to it, still those manning the judiciary, because of their special role, have to project an image of being unbiased, with higher standards of rectitude and integrity' was the consensus of those who were questioned. One possible reason that came out was the fact that the appointment and transfers of judges are not made on the basis of the norm of merit-cum-seniority.
Corruption was in existence at each level of the enforcement machinery, amongst the police, advocates, court officials and the jail machinery, amongst the police, advocates, court officials and the jail authorities, the difference was only of degrees. Bride was a regular business. If the offender was prepared to oblige the police, the woman would have to run from pillar to post, just to get her case registered, even then there is no surety about the outcome. There were innumerable cases when the Supreme Court had to intervene and ask the SP’s how they had closed cases of heinous crimes even of dowry deaths as mere accidents, or cases of rapes and prostitution as non-existent. Several cases of eve teasing indulged in by policemen, which were not registered by their colleagues, came to light.

Cases of police brutality and custodial rape were seen to be mounting. There were several instances of close relatives of judges practicing in the same court and there were proofs of a deplorable practice of judges cultivating politicians for individual gains. High cost of litigation because of delays and corruption was a very disturbing feature. It had a very demoralizing effect on women.

Assessing the current situation, there is no exaggeration in saying the Courts are not always impartial not all judgments given on merit. A pro-rich bias was clearly visible. For some rich litigants the judges can sit in the chamber beyond working hours and give a decision, while for the poor litigants paucity of time is the reason to prolong the case. The poor litigants may keep running from
pillar to post to get the process hurried up or even for directions to be issued to the police or the C.I.D. to start investigations or initiate legal proceedings.

An analysis of the convictions for crimes shows that very few rich people get convicted; not that the rich do not commit crimes but their apprehension and conviction is not an easy task. The offenders who were interviewed had the same feeling, they were convinced that with money anything can be brought, even acquittals were not difficult with money power.

The rules of legal enactments direct that the investigation of serious crimes should be done by an officer not below the rank of Assistant Commissioner of Police (ACP) and it should be reviewed by the Deputy commissioner of Police (DCP) regularly. further it states that the investigation should not be closed without the prior appraisal of the ACP and the progress made in investigation of such cases should be regularly reviewed by the Police Commissioner every week. The DCP and the ACP are required to visit the scene of the crime on receipt of the information of bride burning or death in unnatural circumstances. They must personally satisfy themselves about the nature of the evidence. But these stipulations are never adhered to. The DCP and the ACP routinely affix their signature to the investigation done by a junior police officer without even bothering to check the work done by him or to guide in his job.

On 13 March 1992 Delhi High Court acquitted a man charged with burning his wife to death in 1984. He was acquitted because “before the deceased could make a statement to the doctor, her mother had reached the hospital so the
possibility of tutoring could not be ruled out!" In another case in March 1992 the Supreme Court reduced the sentence of the accused in a case of rape on a minor while disposing of an appeal from the Madhya Pradesh Government after nine years pendency in the apex court. The trial court had convicted the accused but the High Court did not find cogent evidence about the identity of the accused and acquitted him. Holding that a girl could not have forgotten the face of the man who had committed such a ghastly crime and agreeing with the trial court that the accused was guilty of rape, the Supreme Court just reduced the sentence to the period already undergone. No other reason was given for the reduction of sentence for this inhuman crime.

In the gruesome crime of bride burning Shalini Malhotra, had held her husband responsible for setting her on fire, in a (video taped) dying statement to the Doordarshan years ago in 1989, yet her husband managed to get a bail. This case which had created such public outcry and stirred the conscience of the nation is till dragging in the court and is only in the initial stage. Woman's organizations and other knowledgeable persons feel that the law not be able to reach the culprit because he is wealthy and influential. The feeling of being defeated by a heartless legal system was writ large on the face of parents who were interviewed, they were greatly disturbed by the news that this offender, who is under trial, is remarried and is not worried about the case.

There were many cases which clearly showed lack of sensitivity on the part of the judges, magistrates and the lawyers. They do nothing to ensure that
justice is dispensed speedily. Dates for hearing of cases are announced but they are ignored with impunity by the offenders. The case drags on in spite of repeated entreaties by the victims for a speedy trial. Even those cases which should be speedily disposed of, take years to be decided. The guidelines provided by the legislature for speedy disposal of cases are normally not adhered to. According to Section 21-B of the Hindu Marriage Act every appeal under the Act is required to be heard as expeditiously as possible, with an endeavour to conclude that hearing within three months from the date of serving of notice on the respondent, but even the apex court sidelines this stipulation. All the enforcement agencies seem to contribute in delaying the trial and creating hurdles for the victim to get justice. Cases drag on for years with no feelings for the difficulties for the indigent and harassed wife.

The Dowry Act provides for the appointment of dowry prohibition officers but till date these Dowry Prohibition Officers have not coordinated their efforts with the police and the Deputy Commissioner Police Ms. Hazarika who is in charge of the Crimes (Women) cell, was not even aware that any such regulation exists. She had to dig out these regulations from the old files to find out about the appointment of these officers.

The law-makers had recognized the role of social workers in 1986. Delhi police has appointed 28 social workers from different organizations 'to recommend the cases of women'. This was done to give voluntary agencies a
chance to play a greater role in rooting out crimes against women as envisaged in the amended Acts.

The judges blame lawyers for bench hunting and pleading for adjournments on frivolous grounds wasting the time of the courts and other litigants. The advocates and the police blame the judiciary for the dilatory process of justice and for insisting too much on evidence.

Prolonged strikes and lightening strikes by the lawyers in trivial issues without bothering about the difficulties of the litigants has brought the system in great disarray, long dates are fixed for the next hearing. The litigants who came from long distance to learn about the strike were the worst sufferers.

From the above discussions, the contribution of the judiciary in the promotion and protection of women's rights is found to be significant and the same would go a long way in enduring their dignity provided the patriarchal attitude, of the judiciary are changed.