CHAPTER 5
PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE
UNDER OTHER LEGISLATIONS IN INDIA

5.1 Introduction

In our society, girls are socialized from their tender age to be dependent on males. Her existence is always subject to men. In her childhood, she is under protection of her father, after marriage under the protection of her husband and in old age at the mercy of her sons. The patriarchal system in India made women to live at the mercy of men, who exercise unlimited power over them. In order to ameliorate the condition of women in India Legislature enacted the large volume of enactments and some of them are-

- The Dowry Prohibition Act, 1961
- The Medical Termination of Pregnancy Act, 1971
- The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
- The Commission of Sati (Prevention) Act, 1987

5.2 The Dowry Prohibition Act, 1961

(i) Introduction

The dowry system is a distinctive feature of the sub-continent. At the time of marriage, the bride’s family is expected to give gifts, in cash or in kind, to the groom. Often the bride’s side commits to deferred presentations. In such situations, the bride is often
subjected to domestic violence if the gifts are not made as promised. In recognition of the fact that this dowry is the genesis of domestic violence in the matrimonial home, the Dowry Prohibition Act criminalises the giving and taking of dowry.¹ We are a developing State and limited resources before the community and the society at large has been responsible to keep a very low standard of living of most of the people and the spouses who happen to face the financial crisis become prompt to matrimonial disability causing a conflict between the spouses and such an imbalance is brought by mainly the economic condition either one of the spouses or of both of them taken into consideration of the members of the family. This economic disorder right from the beginning has brought the cases of conflict, having the question of dowry, imbedded in it. Some of the groups or communities have made it a sort of business, from the side of the males to bargain the taking of a girl in marriage with huge money and such a vicious circle goes on in the society and economic factors become the prerequisite of the social order and whenever the economic prerequisites are either not fulfilled or are carried out inadequately or disturbed in future, it also causes a matrimonial disorder correspondingly.² Dowry system prevalent in our society is a curse which has ruined, or even ended millions of innocent lives. The dowry system has taken such a deep root in our system that the legislative measures, the pledges and the protest have not been of much avail.³ There has been increased of cases of killing and burning

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of young brides for non-fulfillment of demands or insufficient offer of dowry. They are murdered for not bringing adequate dowry.\(^4\)

Marriage is very essential for an Indian girl who is treated sympathetically otherwise. The husband is supposed to own her. She enters his house “for which she is groomed” shrouded with doubts whether her parents will be able to fulfill her in-laws’ expectations of dowry etc. More than the husband, other members of his family have more demands from her.\(^5\) When she marries, she has to be obedient to her husband and also to all other marital relations. The degree of satisfying her in-laws lies in the fact as to how much ‘dowry’ she is able to procure from her parents. In this process of proving and satisfying, she never comes unscathed and this makes her timid, helpless, stressed and ultimately inferior to her counterpart.\(^6\)

Dowry is one of the worst evils that prevails in our society. It is the custom of demanding and giving of property by the bride’s family to the bridegroom and his family at the time of marriage.\(^7\) To the women’s parents, dowry demands loom largest because this is the one form of harassment which has to be borne by them.\(^8\) The nature of dowry has also undergone a change. No longer it is confined to clothes, utensils and jewellery etc. Today the transaction is in lakhs of rupees with the demands ranging from investing money in the business, to building a house for the boy etc. The fact that the educated and advanced groups of the society follow this hideous

\(^5\) A Study of Domestic Violence and Torture among Females of Urban Area conducted by SCRVTV at 15.
\(^6\) Id. at 17.
practice only bespeaks of society’s moral degeneration.\(^9\) Dowry serves as the foundation on which explanation for discrimination against women have been built, it has the conceptual richness to satisfy a variety of analytical tastes over time.\(^{10}\) The concept and practice of dowry in Hindu marriage, not only poses threat to the fabric of Hindu society and it’s marriage institution but has rather already damaged it enormously, which if not taken care of imminently and that too at war footing by the society, law giving and implementing wing of the State, it would disrupt the Hindu society forever and by giving a death blow to it’s ideal marriage – institution mainly based on religious and human emotions to which it’s form and consideration prevalent during vedic and post vedic eras bear ample testimony.\(^{11}\)

(ii) Origin of Dowry

The institution of dowry is not of recent origin. It may be traced to the ancient practice of marriage by purchase of wife, which appears to have been transformed later into the practice of purchasing the husband. Texts of Hindu Law speak of the bridegroom giving as much wealth as he could for gladdening the bride’s father in the asura form of marriage in India. Manu considered this practice as amounting to the sale of the girl and condemned it. He, however, regarded gifts in the form of money or jewels given to the bride as not rendering it a sale.\(^{12}\) Subsequently, a practice of returning all that was received by the bride to bridegroom

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\(^{10}\) *Supra* note 8.
developed and payment of the price to the bride became only symbolic.\(^{13}\) From this practice, it appears, the duty of giving dowry gradually developed and the fact that the price was to be returned to the intended husband of the bride pointed to the origin of the dowry system.\(^{14}\)

The ancient marriage rites in the Vedic period are associated with Kanyadan. It is laid down in Dharamshastra that the meritorious act of Kanyadan is not complete till the bridegroom was given a dakshina. So when a bride is given over to the bridegroom, he has to be given something in cash or kind which constitute varadakshina. Thus kanyadan became associated with varadakshina i.e. the cash or gifts in kind by the parents or guardian of the bride to the bridegroom. The varadakshina was offered out of affection and did not constitute any kind of compulsion or consideration for the marriage. It was a voluntary practice without any coercive overtones. In the course of time the voluntary element in varadakshina has disappeared and the coercive element has crept in. It has taken deep roots not only in the marriage ceremony but also post-marital relationship. What was originally intended to be taken dakshina for the bridegroom has now gone out of proportions and has assumed the nomenclature ‘dowry’.\(^{15}\)

In Roman Law, a woman had the right to demand dos or dowry from her father, but it was meant for her husband as a contribution towards expenses of joint household (pater familias) – ad matrimony

\(^{13}\) J.D. Mayne, *Hindu Law and Usage*, (131-132) 1952.

\(^{14}\) *Supra* note 2 at 617.

onera fornada — and was also intended to be a provision in the interest of the wife.  

In so far as the Hindu joint family system may be said to have directly descended from the Roman system of pater familias- the Roman practice of dos or dowry might have influenced development of the dowry system in India. Whatever be its origin, dowry system, though condemned as a social evil, has come to stay in the modern Hindu society.

In some countries, weddings are preceded by the payment of an agreed-upon dowry by the bride’s family. Failure to pay the dowry can lead to violence. In India, an average of five women a day are burnt in dowry-related disputes and many more cases are never reported.

(a) Origin of the term ‘Dowry Death’

The term ‘dowry death’ and ‘dowry murder’ first began to be used around 1977-78 when investigations revealed that deaths of married women, which for years had been camouflaged by the police as accidents or suicides, were actually murders or abetted suicides, preceded by prolonged physical and mental torture by the husband and in-laws in connection with dowry demands. Instead of describing them as ‘wife murders’ or ‘abetted suicide’ women’s organizations began calling them ‘dowry death’.

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17 Supra note 12 at 618.
19 Id. at 10.
Almost a decade before India became independent, the provincial Govt. of Sindh passed an enactment know as Sind Deti-Leti Act, 1939. The aim of the Act was to deal effectively with the system. The Act contained exhaustive provisions which inter-alia prohibited giving and taking of dowry as part of contract of bethrol or marriage, prescribed limits for giving and taking of dowry etc, but the Act neither an impact nor could create the desired effect. After independence, the State Government of Bihar and Andhra Pradesh failed to check the acute problem of the dowry system in the respective States. Therefore Bihar passed an Act, entitled Bihar Dowry Restraint Act, 1950, similarly, Andhra Pradesh also passed an Act known as The Andhra Pradesh Dowry Prohibition Act, 1958. These two Acts were passed with the main purposes of eradicating the practice of the dowry system from their respective States.

The Bihar Dowry Restraint Act defined dowry as anything paid or delivered as consideration of a contract of any bethrol or marriage. It prescribed limitation on the amount to be paid in cash or kind on different occasions but excluded voluntary marriage gifts. It also made the act of taking dowry punishable with simple imprisonment upto six months or fine upto the changed value of the property on account of modernization, urbanization and industrialization. The Act also provided that no prosecution in respect of any offence was to commence against any person without giving a show cause notice.

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22 *Id.* at 87.
Similarly, the Andhra Pradesh Prohibition Act, 1958, defined dowry as any property or valuable security given or agreed to be given as consideration for any bethrol or marriage. It made the act of giving or taking of dowry as unlawful and any agreement in that regard is void. It was also made the act of giving or taking or abetting the giving or taking of dowry punishable with imprisonment upto 6 months or fine upto Rs. 1000 or with both.24 Both the Acts failed to achieve their objectives. In the first place, it was not possible to prove that any amount so paid or any property so given was as consideration for a bethrol or marriage and secondly, the absence of any agencies for initiating actions for the contravention of the provision of the said Act the provisions had no significance. And then of course the bride’s parents would not in the interest of their daughter prefer a complaint.

A need was felt for a central enactment for dowry. A step was taken in this direction when, on December 5, 1958, Jugal Kishore of Uttar Pradesh introduced a bill in the Rajya Sabha entitled ‘The Dowry Prohibition Restraint Bill, 1958.25 The object of this Bill was to prohibit the evil practice of giving and taking dowry. The Bill excluded the customary presents from its ambit. As the problem was assuming enormous proportion, it started agitating the minds of people both outside and inside the State legislature and parliament. The government finally decided to process the legislation. As a result, the Dowry Prohibition Bill 1959, with the main object of eradicating the evils of dowry system, was introduced by the government in the Lok Sabha on 24th April 1959. After some

24 Ibid.
discussions, the Bill was referred to a Joint Committee of both Houses of Parliament in September 1959. At the joint sitting of both Houses of Parliament, held on 6th and 9th May 1961 was passed the Dowry Prohibition Act, 1961 which came into force on 1st July, 1961, but the statute hardly cut any ice.

A Joint Parliament Committee on dowry was constituted which submitted its report in August 1982. On the basis of the recommendation of the Committee the Act was amended in 1984 (No. 63 of 1984) and again in 1986 (Act 43 of 1986) to provide teeth to the Act.27

Thus taking into account the loopholes in the 1961 Act and on the basis of the following recommendations of the Joint Committee, the Amendment Act of 1984 was passed:

1. Joint Committee recommended that the definition of dowry as contained in Section 2 of 1961 Act should be modified by omitting the expression ‘as consideration for marriage’ used therein on the ground that it is impossible to prove that anything given was a consideration for the marriage. Hence, it was proposed to substitute the words ‘in connection with the marriage’ for the words ‘as consideration for the marriage’.

2. Presents made voluntarily (with condition) at or before or after marriage should not be deemed as dowry for the purposes of Section 3. However, the value of gift should not

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26 Supra note 21 at 88.
exceed twenty percent of the income or fifteen thousand rupees, whichever is less.

3. For making the Act more deterrent, Section 4 of the Dowry Prohibition Act relating to punishment was recommended to be amended to make punishment more stringent.28

4. The time-limit29 within which dowry received should be restored to the woman was recommended to be reduced from one year to three months and for failure to do so the punishment was made more stringent. Under a special provision30 where a person is convicted for failure to restore the dowry to the woman concerned within the specified period, the court may in addition to punishment issue a direction requiring him to restore the property to the woman within the period specified in the direction. In case of non-compliance the value of the property would be recoverable from such person as if it were a fine and the amount so recovered may be paid to the woman concerned or her heirs.

5. The offence was recommended to be made cognizable.

On the basis of above recommendations the Dowry Prohibition Act, 1961 was amended in 1984. But, even after these amendments the Dowry Prohibition Act was found inadequate in the existing circumstances.

The amendment of 1986 was introduced to incorporate the provisions mentioned below:

29 To be Included in Section 6.
30 Substituted by Act 43 of 1984 (w.e.f 19.11.1986) and Further Amended by Act 43 of 1986.
1. Raising the minimum punishment for taking or abetting the taking of dowry;

2. Shifting the burden of proof on the person who makes or abets the taking of dowry, that there was no demand for dowry;

3. Not subjecting to prosecution, the statement made by the person aggrieved by the offence;

4. Banning any advertisement by any person offering any share in the property or any money in consideration of the marriage of the son or daughter and making it punishable.

5. Making the offence non-bailable;

6. Appointing of Dowry Prohibition Officers by State Governments to be assisted by Advisory Board;

7. Including ‘dowry death’ as a new offence by suitably amending the Indian Penal Code, Code of Criminal Procedure and Indian Evidence Act, 1872.31

(iii) Meaning of Dowry

According to Webster’s New Dictionary,32 dowry means:

1. The money, goods or estate which a woman brings to her husband in marriage; the portion given with the wife;

2. A natural talent, gift or endowment: as poetry was her dowry;

3. A gift given to or for a wife

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The law Lexicon of British India,\(^{33}\) says Dowry or Dote (Dos Mulieris) was in ancient times applied to that which the wife brings to her husband in marriage; otherwise called maritagium or marriage goods; but these are termed mere property goods given in marriage and the marriage portion.

(iv) Causes of Dowry

In recent years, the dowry system in India has spread both horizontally and vertically—horizontally in the sense that it has spread to such regions and communities which, until recently, did not have it and which in fact, had the bride price system, vertically in the sense that there has been a sharp increase in the amount of dowry demanded and given.

(a) Age Old Practice

Some amount of wealth always changed hands in Indian marriages—this may be bride price in the form of cash or kind, or dowry known as ‘stridhan’ among Hindus and as Mehr amongst Muslims, in form of cash, Utensil, Jewellery, etc. It was willingly given and accordingly accepted as part of stridhan. It was not extorted or demanded as in case of dowry.\(^{34}\)

(b) Educational Inequality

There are variety of reasons for educational inequality between males and females. A greater proportion of males than females in India are educated. Although literacy is not the same

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\(^{33}\) Law Lexicon of British India, 364 (1950).

things as education, the difference in the proportion of literacy among males and females has been increasing steadily.  

(c) Economic Disparity

Although, it is difficult to produce hard data, it is common knowledge that there exists economic inequality among marriageable males and females. Educations being equal, males with moveable/immoveable property demand a larger dowry. Likewise, males with an education that is likely to enable them to earn more money demand a larger dowry. Medical and engineering graduates fall in this category.  

(v) Law Pertaining to Dowry

In India we are having the Dowry Prohibition Act, 1961 along with its two amendments (1984 and 1986) prohibits demanding and taking of dowry. Along with this was formulated the Indecent Representation of Women (Prohibition) Act, 1986. Taking and giving of dowry was declared illegal.

Section 2 of the Dowry Prohibition Act, 1961 defines dowry as any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage; or

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35 Ibid.
(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person,

at or before (or any time after the marriage) (in connection with the marriage of the said parties, but does not include) dower or mahr in the case of persons to whom the Muslim Personal law (Shariat) applies.

Dowry need not be directly given. For example, property given in someone else’s name or given by someone who is not woman’s parents or her husband’s parents is still considered. An agreement to give property may count as dowry even it has been negotiated between people who are not related to her.39

In Arujn Dhondiba Kamble v. State of Maharashtra,40 case it was held that ‘Dowry’ in the sense of the expression contemplated by Dowry Prohibition Act is a demand for property or valuable security having an inextricable nexus with the marriage, i.e., is a consideration from the side of the bride’s parents or relatives to the groom or his parents and/or guardian for the agreement to wed the bride-to-be. But where the demand for property or valuable security has no connection with the consideration for the marriage, it will not amount to a demand for dowry.

In Vemuri Venkateswara Rao v. State of Andhra Pradesh,41 case, it was held that definition of dowry is wide enough to include

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40 1995 CrLJ 273.
41 1992 CrLJ 563.
all sorts of properties, valuable securities, etc. given or agreed to be given directly or indirectly.

In *Satbir Singh v. State of Punjab,* 42 case it was held that word dowry should be any property or valuable given or agreed to be given in connection with the marriage. The customary payments in connection with birth of child or other ceremonies are not involved within ambit of dowry.

In *State of Andhra Pradesh v. Raj Gopal Asawa,* 43 case it was held that definition of ‘dowry’ is not restricted to agreement or demand for payment of dowry before and at the marriage but also includes demands made subsequent to marriage.

In *Reema Aggarwal v. Anupam,* 44 case it was held that demand of dowry in respect of invalid marriage would not be legally recognizable.

In *State of H.P. v. Nikku Ram,* 45 case it was stated by the Supreme Court that: addition of the words ‘anything’ before the expression ‘after the marriage’ would clearly show that even if the demand is long after the marriage, the same would be constituting ‘dowry’, if other requirements of Section are satisfied.

**A Setback for The Battlement Against Dowry**

A recent Supreme Court judgment in the case of *Appasaheb v. State of Maharashtra,* 46 stating that money demanded on account of financial stringency or to meet urgent domestic expenses does not

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42 AIR 2001 SC 2828.
43 AIR 2004 SC 1566.
44 AIR 2004 SC 1418.
46 2007(1) SCALE 50.
constitute dowry has serious repercussions for ongoing and future dowry-related cases.

The facts of case were at the time of the marriage of Bhimabai to Appasaheb, a sum of Rs 5,000 and some gold ornaments were given to the family of the bridegroom. After her marriage, Bhimabai was treated well for around six months. Thereafter, Appasaheb and his mother Kadubai started asking Bhimabai to bring Rs 1,000-1,200 from her parents to meet the household expenses and to buy manure. Whenever Bhimabai went to her parents’ home she used to tell them that her husband and her mother-in-law were harassing her and would occasionally even beat her.

Bhimabai’s father and relatives went to Appasaheb’s house and tried to persuade them not to ill-treat Bhimabai. Subsequently, Bhimabai was treated well for about four months. Then the harassment began all over again. A few days before the festival of Nag Panchami, Bhimabai visited her parents’ home and complained that her husband and mother-in-law were not giving her adequate food, clothing and footwear. She also said that her husband had asked her to return with Rs. 1,000-1,200 to meet the household expenses and the cost of buying manure.

On the evening of September 15, 1991, Bhimabai’s father Tukaram was told that his daughter was unwell. Tukaram and his relatives immediately went to the in-laws’ house. There they saw Bhimabai lying dead with froth coming out of her mouth, indicating that she may have consumed poison. The police lodged a report of accidental death and the body was sent for post-mortem.
On September 16, 1991, Tukaram lodged a First Information Report (FIR) on the incident. A case of dowry death (Section 304 B of the Indian Penal Code [IPC]), abetment to suicide (Section 306 of the IPC) and cruelty to a woman by her husband or his relatives (Section 498 A of the IPC) was registered against Appasaheb and his mother Kadubai.

Following an investigation, a chargesheet was submitted against the husband and mother-in-law. The Sessions judge framed charges for dowry death, abetment to suicide, and subjecting a woman to cruelty. The prosecution examined six witnesses and placed documentary material to establish the case. The Sessions judge convicted the husband and mother-in-law for dowry death, under Section 304 B of the IPC, and sentenced them to seven years' rigorous imprisonment. However, the judge acquitted them of the charges of abetment to suicide and cruelty to a woman, under Sections 306 and 498 A of the IPC, respectively.

Appasaheb and the mother-in-law's appeal against a conviction for dowry death was dismissed by the Bombay High Court in February 2005. Following the dismissal, the matter reached the Supreme Court on an appeal filed by the husband and mother-in-law against the conviction for dowry death.

The Supreme Court noted that the post-mortem report did not find any sign of external or internal injury; it stated that the cause of death was insecticide poisoning. The court examined the evidence of the father and mother. It noted that the mother had deposed that Bhimabai had complained of ill-treatment by her husband and mother-in-law, accompanied by demands for money from the
parental home. That on the last visit before her death, on the occasion of Nag Panchami, Bhimabai complained again of ill-treatment and beatings for not bringing money from her parents. The court noted that the father had said that his daughter had complained of harassment due to “domestic reasons”. That the mother had said that her daughter was being ill-treated for not fulfilling the demand for money to meet household expenses and the cost of buying manure, etc.

The judgment observes that the mother’s statement to the police, recorded on September 16, 1991, did not mention that the cause for ill-treatment was “a demand for money and consequent beating”. However, Bhimabai’s mother deposed before the sessions court that she had clearly told the police that the ill-treatment was due to non-fulfilment of the demand for money. The Supreme Court judgment observes that the accused are from a humble background and could not have exerted any kind of influence on the police to omit the statement.

After the above observations, the Supreme Court accepts the statements of the mother and father of the deceased Bhimabai and observes that the “utmost which can be said is that the appellant No 1 had asked his wife Bhimabai to bring money for meeting domestic expenses and for purchasing manure”. The judgment goes on to examine the ingredients of the offence of a dowry death. It notes that the death of a woman should have been caused by burns or bodily injury, or occurred otherwise than under normal circumstances and that she should have been subjected to cruelty or harassment in connection with a demand for dowry.

- 232 -
Thereafter, the judgment examines the Dowry Prohibition Act and observes that the giving or taking of property, directly or indirectly, should have a connection with the marriage of the parties for it to constitute 'dowry'. The court notes that the provision for dowry death is a penal provision and therefore the definition of dowry should be construed narrowly. The judgment further declares that the principle of interpretation to be followed is that if an Act is passed with reference to a particular trade, business or transaction, then the words in the legislation should be construed as having the same meaning as generally understood in that trade, business or transaction.

Observing that "dowry is a fairly well-known social custom or practice in India," the judgment indicates that the definition of 'dowry' should be construed as having a meaning that is generally understood. The judgment lays down that a "demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood".

Applying the law laid down to the facts of the present case, the judgment observes that the evidence adduced by the prosecution does not show any demand for 'dowry' being made, as money to meet domestic expenses and to purchase manure was asked for by the accused persons. The essential ingredient of a demand for dowry was held to be not established in the case, and the husband and mother-in-law were acquitted of the charge of dowry death. Noting that the trial court had acquitted the accused for the offences of abetment to suicide and cruelty to a woman by her husband or relatives, under Sections 306 and 498 A of the IPC respectively, and
observing that the State had not filed any appeal against the acquittal, the Supreme Court refused to go into the question of culpability for the offences under these sections. The court directed the release forthwith of the husband and discharged the sureties and bonds of the mother-in-law who was already on bail.

Ever since Independence there has been concern and distress with regard to the murdering of women for dowry, or harassing them to the point of suicide. The enactment of the Dowry Prohibition Act in 1961, a review of the workings of the Act, suggestions and amendments in the definition of dowry, the creation of the offences of dowry death and cruelty towards women within seven years of marriage, and insertions introducing presumption with regard to abetment to suicide and dowry death in the law of evidence are all part of serious attempts by society and Parliament to check dowry-related crimes. It is against this background that the provisions of an enactment like the Dowry Prohibition Act and dowry death offences are to be interpreted by courts of law. Unfortunately, in the present case, the Supreme Court seems to have disregarded the entire context -- the social evil to be tackled, the objective sought to be achieved, the continuing number of horrific cases of dowry death/suicide, and attempts at devising more effective provisions -- and gone in for an interpretation totally at odds with the whole purpose of the legislation. Rather than looking at the enactment as social reform legislation, the judgment equates it with legislation in the area of any trade, business or transaction.

The law declared by the Supreme Court that money demanded on account of financial stringency, or to meet urgent domestic expenses or purchase manure is not dowry is binding on all courts in
India. This retrograde judgment has serious repercussions for ongoing and future dowry-related cases, as well as attempts to check the menace of dowry harassment, death and suicide. It needs to be reviewed at the earliest by a larger bench of the court.

(vi) Dowry and Stridhan

In modern Hindu Law, stridhan denotes not only the specific kinds of property enumerated in the smritis, but also other species of property acquired or owned by a woman over which she has absolute control. Stridhan is supposed to pass from mother to daughter and not travel via the male line, as does most other property. Dowry payments are currently made, however, are rarely considered female-owned or inherited property.

According to Mayne, the kinds of stridhan in the Smritis are:

What is given before the nuptial fire, adhyagni;

1. What a woman receives while she is conducted from her father’s house to her husband’s dwelling, adhyavahanika;

2. What is bestowed in token of love, pritidatta or bhartrudaya;

3. Pritidatta or affectionate present, as defined by Katyayana is:

“Whatever has been given to a woman through affection by her mother-in-law or her father-in-law as also wealth termed

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47 Supra note 31 at 88.
49 Supra note 13 at 968.
padavandanika, that is, which is received by a woman at the time of bowing at the feet of elders”.

4. Gifts made by father, mother or brother;

5. Gifts subsequent, that is, that which is received from her husband’s family or her father’s family subsequent to marriage, anvadheyaka;

6. Gift on supersession, adhivedanika;

7. Gift by bandhus, bandhudatta;

8. Shulka or the fee which is variously described:
   (i) as the gratuity for the receipt of which a girl is given in marriage;
   (ii) as being a special present to the bride to induce her to go cheerfully to the mansion of her lord;
   (iii) as what is received as the price of household furniture, conveyance, cattle and ornament.

The Supreme Court examined the entire concept of stridhan in the light of old textual law as well as existing provisions under the Hindu Succession Act, 1956 in its famous pronouncement made in the case of Pratibha Rani v. Suraj Kumar, the Court observed that all the gifts, including jewellery and clothes, furniture and utensils, given to the bride constitute her stridhan. By no stretch of imagination could it be said that the ornaments and sarees and other articles given to the bride for her use would belong to her husband too.

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50 (1985) 2 SCC 370.
(vii) **Property or Valuable Security**

The word 'property' in the Section 2 of the Dowry Prohibition Act, 1961 has been used in a very wide sense. It includes both moveable and immovable property. It will have the same meaning as was given to it by the Supreme Court in *Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co.*,\(^{51}\) i.e., it must be understood both in the corporeal sense as having reference to those specific things that are susceptible of private appropriation and enjoyment as well as in its judicial or legal sense as a bundle of rights which the owner can exercise under the municipal law with respect to the use and enjoyment of those things to the exclusion of others.

The term 'valuable security' has been defined in Section 30 of the Indian Penal Code, 1860, as under:

The words 'valuable security' denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released or whereby any person acknowledge that he lies under legal liability, or has not a certain legal right.

Thus, for instance, where a person 'A' writes his name on the back of a bill of exchange, the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it. The endorsement is a valuable security. The words 'purports to be' signify that if for want of registration or any other reason, a document is not admissible in evidence, if it purports to create, extend, transfer, etc., any legal right, the document will be

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\(^{51}\) AIR 1954 SC 119.
valuable security. A copy of a document is not a valuable security.

(viii) Dowry and Dower (Mahr)

Section 2 of the Act lays down that the definition of dowry does not include dower or mahr in the case of person to whom the Muslim Personal Law (Shariat) applies. Dower or mahr is a unique concept of Islamic Law. No other system of law in the world recognizes anything like mahr. There is a wide misconception that dower (mahr) is considered as dowry. But the dower (mahr) is entirely different from dowry and should not be confused with it.

It is pertinent to point out here that only mahr is protected under Section 2 of the Act. As the Act applies to all, irrespective of religion, so if a Muslim male or female gets, gives, demands or abets dowry within the meaning of the Dowry Prohibition Act, he or she will be punishable like any other person.

(ix) Central Government Servants and Dowry

The Central Government employees have been barred from giving or taking dowry. Rule 13-A of the Civil Services (Conduct) Rules, 1964 which were amended on Feb 13, 1976, specifically prohibits Central Government servants from giving and taking dowry or abetting the giving and taking of dowry.

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55 Government of India, Cabinet Secretariat, Department of Personal and Administrative Reforms, Notification No. 11013/12/75 Estt.(A) dated Feb 13, 1976.
(x) List of Presents

Before the Amendment Act of 1984, Explanation 1 to Section 2 provided that any presents made at the time of marriage to either party to marriage in the form of cash, ornaments, clothes or other articles shall not be deemed to be dowry unless they are made in consideration of marriage. Thus, the giving of presents was exempted from the purview of the definition of dowry. Although by the 1984 amendment, Explanation 1 to Section 2 has been deleted but has been redrafted with some changes in sub-Section (2) of Section 3. Resultantly, the wedding presents by parents, relatives, friends and acquaintances at or about the time of marriage can still be given and their giving does not constitute any offence under the Act. The fact of the matter is that the traditional gifts made at or about the time of marriage is an accepted practice among all sections of our society. Such presents are made to the bride, bridegroom and their parents and relatives. The Joint Committee too was fully aware of this, and therefore it said that it is neither desirable to put a complete ban on these presents nor does it seem reasonable to prescribe a standard ceiling thereon for different sections of society for the reasons that it would be neither possible to implement it nor would it be acceptable to the society. The parliament has accepted the recommendations of the Committee in this regard, though has not agreed to any upper limit of Rs. 15000 or 20 percent income for marriage expenses and presents.

The provision of listing of presents is very salutory one. When a marriage breaks down and the wife is expelled from the matrimonial home or is forced to leave it behind all her properties in the matrimonial home, and thereafter when she makes a demand for
the recovery of her stridhan, it sometimes becomes impossible to prove as to which are her stridhan items, which are the articles of presents made to her at the time of marriage, and more often than not, she is the loser. Sub-Section (2) of Section 3 lays down that all presents given to the bride and bridegroom at the time of marriage should be listed in two separate lists, one containing the items of presents given to the bridegroom and other containing items given to the bride. The bride should keep her list and the bridegroom should keep his list. However, the Act does not provide for registration of the lists. Nor does it lay down that the gifts made to the bride could not be alienated during the first five years of the marriage without her permission.56

The Dowry Prohibition (Maintenance of the List of Presents to the Bride and Bridegroom) Rules, 1985 provides for the maintenance of the following two lists:

(a) list of the presents given to the bride which is to be maintained by her, and

(b) the list of the presents given to the bridegroom to be maintained by him.

The Rules lay down that each list of presents should be prepared at the time of marriage or as soon as possible after the marriage. The Rule 2(3) provides that –

(i) lists should be in writing, and

(ii) list should contain-

a. a brief description of each present,

56 Supra note 27 at 25-26.
b. the approximate value of present,
c. the name of the person who has given the present, and
d. where the person giving the present is related to the bride or bridegroom, a description of the relationship.

It is the option of the bride and the bridegroom to obtain the signatures of the other party to the marriage or any other person or persons present at the time of the marriage on the lists.\(^{57}\)

It is obvious that where the bride or bridegroom is unable to sign, on account of illiteracy or any other reason, she or he may affix her or his thumb – impression in lieu of her or his signatures after having the list read out to her or him and on obtaining the signatures on the list of the person who has to read out the particulars contained in the list.\(^{58}\)

It should be realized that in the social context how much realistic it would be to list the presents. If the people from the bride’s side insists that presents should be listed and signed, in most of the cases it would not be done and seeds of dissension and unhappiness to the married couple might be sown thereby.

Sub-Section (3) of Section 3 speaks of the presents made at the time of the marriage and does not speak of presents made ‘before’ or ‘after the marriage’. Thus, a present given after a month of marriage in connection with marriage may not be saved by Section 3(2) and would amount to dowry and the giver and the taker of such present

\(^{57}\) Rule 2(4), The Dowry Prohibition (Maintenance of the List of Presents to the Bride and Bridegroom) Rules, 1985.

\(^{58}\) Explanations 1 and 2 to Rule 2, The Dowry Prohibition (Maintenance of the List of Presents to the Bride and Bridegroom) Rules, 1985.
are liable to suffer imprisonment of not less than six months and will also be liable to fine.

It is submitted that in our country where most of the people are illiterate and even printed copies of latest laws are also not readily available nor public is properly appraised of them through means of communications, such conditions seems to be only theoretical.

It is submitted that these provisions are well intentioned but impractical as everyone would try to use this protective umbrella to save oneself from the penalty for the offence of giving and taking of dowry.

(xii) Penalty for Giving or Taking Dowry

Section 3 provides

1. If any person, after the commencement of this Act, gives or takes or abets the giving or taking 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 of such dowry, whichever is more.

   Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years.

2. Nothing in sub-Section (1) shall apply to, or in relation to;

   (a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf).
In *Muthummal v. Maruthal,* 59 case it was held that abetment is a preparatory act and connotes active complicity on the part of the abettor at a point of time prior to the actual commission of the offence. Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;

(b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf).

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act:

Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.

(xii) **Penalty for Demanding Dowry**

Section 4 provides that if any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees.

59 1981 CrLJ 833 (Mad).
Provided that the Court may, for adequate and special reasons to be mentioned in the judgement impose a sentence of imprisonment for a term of less than six months.

In *Daulat Man Singh v. C.R. Bans*¹ where demand of dowry was made through the elder brother of the accused who was the son-in-law of the complainant. He wrote a letter addressed to his father-in-law that the accused demanded dowry. Thus, the demand of dowry was made indirectly through the agency of the brother. It was held that the demand for dowry constituted an offence since the letter was received by the complainant. It may be noted that the letter was written from Agarthala where the brother resided and he addressed it at the Bombay address of the complainant. It was held that the offence was committed in Bombay. It is not necessary that the demand of dowry should be made at or near about the date of marriage. If demand for dowry has been made earlier when the parties were negotiating marriage, it would nonetheless constitute the offence of demanding dowry, even if negotiation broke down and no engagement of marriage took place.²

In *Pandurang Shivram Kawathkar v. State of Maharashtra*,³ case it was held that mere demand of dowry before marriage is an offence irrespective of the fact whether it was accepted or not.

(xiii) *Ban on Advertisement*

Section 4A provides that if any person-

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¹ *1980 CrLJ 1171.*  
³ *2001 CrLJ 2792 (SC).*
(a) offers through any advertisement in any newspaper, periodical, journal or through any other media, any share in his property or of any money or both as a share in any business or other interest as consideration for the marriage of his son or daughter or any other relative;

(b) prints or publishes or circulates any advertisement referred to in clause (a),

he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to five years, or with fine which may extend to fifteen thousand rupees.

Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than six months.

(xiv) Agreement for Giving or Taking Dowry to be Void

Section 5 provides that any agreement for the giving or taking of dowry shall be void. It expressly and unequivocally declares any agreement for the giving or taking of dowry to be void. It means, if under such an agreement the giver has not given the dowry to the taker, the agreement cannot be enforced. But it does not mean that if a person has received the dowry on behalf of the bride he can retain it. He is bound to return it to the bride as is apparent from Section 6 of the Act.

The Patna High Court in *Ramekbal Singh v. Harihar Singh*,

on the basis of in- pari delicto, posterior est condition possidentis, i.e., in equal fault the condition of the defendant is more favourable,
dismissed the claim of the plaintiff for recovery of dowry. But Kerala High Court in *Moltiakirath Abbas v. Meeyanathan Kunhipath*, held that if money or any valuable thing is given then the transaction is not invalid. The beneficial interest is with the woman and the taker is only a trustee. The Court answered the problem on the basis of Section 6 of the Act.

It is submitted that the Patna case noted above was decided on the basis of the Bihar Dowry Restraint Act, 1950 which had no provision corresponding to Section 6 of the Dowry Prohibition Act, 1961. This case, therefore, does not lay down the correct law and the Kerala view is the correct one.

(xv) **Dowry to be for the Benefit of the Wife or her Heirs**

In most of the marriages, it may be that dowry has actually been given but its actual receiver is not the wife, but either husband, or father-in-law or mother-in-law or some other person from among the in-laws. Section 6 provides that whosoever, the husband, his parents or any other person, has received the dowry, it must be held in trust for the wife and must be transferred to her within the stipulated time. In short this Section lays down that under no circumstances, any person who has got the dowry can retain it with him or her.

The Amending Act of 1984 has reduced the time limit within which the dowry is to be transferred to the wife. The unamended Section 6 provided a period of one year for the return of dowry in all the three clauses of sub-Section (1) of Section 6 of the Act. Now the period has been reduced to three months. The shrinking of the period

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64 AIR 1975 Ker 129.
in each of these clauses in intended to emphasis the urgency. Besides, the longer the time-lag the greater in the mental lethargy and staleness of the transaction. Furthermore, the period of one year had the danger of truth being mutilated either intentionally or for lapse of memory. In Prithichand v. Des Raj Bansal,\textsuperscript{65} the wife had died within less than three months of her marriage, therefore not leaving behind any issue and the contention of the husband that he was the heir of the dowry articles was negatived and dowry articles were transferred to the parents of the wife.

Under this Section, prior to the 1984 amendment, the prescribed punishment was imprisonment for a period of six months, or with fine upto rupees five thousands, or with both. Now from 02.10.1985 the minimum sentence prescribed in for six months and the maximum is for two years and the limit of fine has been increased from rupees five thousands to rupees ten thousands. No return of dowry articles has been declared by the Supreme Court an offence of criminal breach of trust.\textsuperscript{66}

(xvi) Cognizance of Offences

Section 7 of the Act deals with cognizance of the offence. In Darshan Singh v. State of Maharashtra,\textsuperscript{67} case it was held by the Court, the expression ‘to take cognizance’ has not been defined in this Act nor in the Code of Criminal Procedure. The word ‘cognizance’ is, however, used in the Code to indicate the point when the Magistrate takes judicial notice of an offence. It is word of

\textsuperscript{65} (1990) DMC 368 P&H.
\textsuperscript{66} Pratibha Rani v. Suraj Kumar, AIR 1985 SC 628.
\textsuperscript{67} AIR 1971 SC 2372.
indefinite import and is perhaps not always used in exactly the same sense.

Under the unamended Section it was not stated as to who could file a complaint for the prosecution of a dowry offence and it created difficulties of interpretation. It was vehemently propounded that only an aggrieved party would file the complaint. Under the original Section, the Court had no power to take cognizance of a case suo moto or on the report of the police.

To remove these difficulties and to make the law more practical the Section was amended extensively by the Dowry Prohibition (Amendment) Act, 1984 as to whom a complaint could be made and non-applicability of the limitation bar to such offences. By the Dowry Prohibition (Amendment) Act, 1986 sub-Section (3) has been added to Section 7.

Section 7(1)(a) lays down that no Court inferior to that of Metropolitan Magistrate or a Judicial Magistrate of the first class has jurisdiction to entertain a case relating to any dowry offence.

(a) Cognizance by a Magistrate

The Magistrate on his own knowledge can take cognizance of the offence suo moto. In *R.R. Chariv v. State of Uttar Pradesh*,68 Allahabad High Court observed that taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as Magistrate as such applies his mind to the suspected commission of an offence.

68 AIR 1950 All 207.
(b) **Cognizance of the Offence on the Basis of Police Report**

Section 7(1)(b)(i) specifically lays down that cognizance of the dowry offence can be taken by the Court on the basis of police report.

Under the unamended Section it was laid down by Patna High Court in *Jhansi Choudhari v. State of Bihar*,⁶⁹ that cognizance of an offence under the Dowry Prohibition Act could be taken only on the basis of a petition of complainant as the Act specifically provides for it and not on the basis of police report.

After the amendment of Section 7 by the Act of 1984 now there is no scope for any such conflicts. The Court can now take cognizance of the offence on the basis of police report of the facts which constitute a dowry offence.

(c) **Cognizance on the Basis of Complaint by the Aggrieved Party and other Relatives**

At the first instance the bride or bridegroom, on whose behalf dowry is given or agreed to be given seems to be the aggrieved party in dowry offence.

(xvii) **Complaints by Welfare Institutions**

Sometimes a dowry offence is committed but neither the aggrieved party nor the parents or relatives come forward to file a complaint due to lack of means, ignorance or out of fear. Resultantly, in such a case the offender may go unpunished. Under Section 7(1)(b)(ii), the voluntary welfare institutions and organizations have now also been empowered to file the complaint in

⁶⁹ 1983 Pat LJR 395.
dowry offences. It is submitted that making of complaint in dowry offences should not be limited only to persons specified under this Section. Keeping in view the backwardness, ignorance & reluctance of women to be complainants, the scope of the Section should be enlarged to include friends, public spirited neighbours and even unrecognized welfare institution in appropriate cases.

(xviii) Limitation for Filing a Complaint

The Code of Criminal Procedure, 1973, as a matter of fact introduced for the first time period of limitation for launching criminal prosecution in regard to offences not punishable with imprisonment for a term exceeding three years. Under the unamended Section 7 of the Act also no complaint could be filed if one had elapsed from the date of the commission of a dowry offence.

Keeping in view the gravity of the offences under the Dowry Prohibition Act, 1961, the bar of limitations of one year was removed by the Amendment of 1984. Section 7 has done away with the limitation for taking cognizance of an offence under the Act by specifically introducing sub-Section (2) according to which the chapter XXXVI of the Code of Criminal Procedure, prescribing limitation for taking cognizance of certain offences, shall not apply to any offence punishable under the Act. Therefore, under this amended Section 7, the question of bar limitation for taking cognizance shall not arise.

(xix) Offences to be Cognizable, Non-Bailable and Non-Compoundable

Section 8 of the Act deals with cognizance, bail matters and compounding of dowry offences. Under the old Section 8, dowry
offences were non-cognizable, bailable and non-compoundable. At one time the Joint Parliamentary Committee wanted to make these offences cognizable, but finally both the Committee and the Parliament agreed to that these will be cognizable:

(a) for the purpose of investigation of such offences;

(b) for the purpose and matter other than-

(i) matter referred to in Section 42 of the Code of Criminal Procedure, 1973, and

(ii) the arrest of a person without a warrant or without an order of Magistrate.

In short, the police cannot make arrest in connection with a dowry offence as in the case of other cognizable offences, but it has the power to investigate any offence under the Dowry Prohibition Act without waiting for a complaint to be filed. If the police comes to the conclusion that a dowry offence has been committed, it can approach the Court. At the time, no person can suffer any harassment as he cannot be arrested without warrant or an order of a Magistrate, howsoever he may be involved in the offence, in the opinion of the police. Similarly, in connection with dowry offences, arrest cannot be made under Section 42 of the Code of Criminal Procedure. This Section empowers the police to arrest a person who is involved in a non-cognizable offence and refuses to give his name and address.\(^7\)

The Dowry Prohibition (Amendment) Act, 1986 has made the offences under the Act non-bailable. So now, the granting of bail has

\(^7\) Supra note 31 at 60.
become a matter of discretion with Court and the accused cannot get bail as a matter of right.\textsuperscript{71}

Similarly, a dowry offence under the Act is also non-compoundable. Section 320(1) of the Code of Criminal Procedure, 1973 in its table lists the cases which are compoundable and the names of persons by whom such offences may be compoundable. Dowry offences are specially listed non-compoundable offences.\textsuperscript{72}

It is submitted that offences under the Dowry Prohibition Act should be made compoundable, with the permission of the Court, in very genuine cases to save institution of marriage.

(\textbf{xx}) \textbf{Burden of Proof}

Section 8A of the Dowry Prohibition Act, 1961 provides where any person is prosecuted for taking or abetting the taking of any dowry under Section 3, or on the demanding of dowry under Section 4, the burden of proving that he had not committed an offence under these Sections shall be on him.

The presumption under this Section is against the general rule of criminal jurisprudence where both mens-rea and actus-reus are to be proved by the presumption. The burden to prove mens rea never shifts to the accused.\textsuperscript{73} However, the change brought by this provision is a reversal of the well-known and uniformly accepted doctrine that it is for the accusing finger to prove its case beyond reasonable doubt. According to this change the mere statement of an

\textsuperscript{71} \textit{Ibid.}
\textsuperscript{72} Section 8(2), The Dowry Prohibition Act, 1961.
\textsuperscript{73} \textit{K.M. Nanavati v. State of Maharashtra}, AIR 1962 SC 605.
accusation under Section 8A of this Act will shift the burden of proving innocence on the accused.74

**(xxi) Dowry Prohibition Officers**

Section 8-B of the Dowry Prohibition Act, 1961 deals with the appointment and functions of Dowry Prohibition Officers. This Section has been introduced by the Dowry Prohibition (Amendment) Act, 1961. The object of this Section is to create a social instrument designed to arrest and eradicate the evil practice of dowry. The Dowry Prohibition Officer has to play an important role in the effective disposal of the aims and objectives of the Dowry Prohibition Act, their role is not merely confined to restrict the giving or taking or the demanding of dowry but to assimilate themselves in the society to know the general problems of women and assist them to find a solution.

The Dowry Prohibition Officer, it seems, will discharge the functions of Enforcement Officer who may prevent the pernicious practice of dowry. As sub-Section (3) aims the Dowry Prohibition Officers with the police powers as investigating officers to collect evidence for the prosecution of offenders, by winning confidence of the people of the area to which he is attached, he can deal with cases of dowry more effectively. The confidence of the people in them shall help in the collection of the material evidence to proceed with the prosecution.75

The weight of custom, the desire to out step the neighbour, the evil of unaccounted money, the appropriation and applause that

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74 Supra note 31 at 61.
75 Supra note 31 at 62.
ostentation receives from society, the bottomless avarice for wealth, the bad examples set by leaders of the society all comprise to defeat the machinery of law to curb the evil. However, it is hoped that dedicated Dowry Prohibition Officers appointed under these provisions shall fulfill the objective aimed at and may be able to curb the evil of dowry to some extent. But it is disheartening to note that some of the States have not yet appointed Dowry Prohibition officers.

It is submitted that dedicated persons with missionary spirit should be appointed as Dowry Prohibition officers so that they may contribute effectively to control the menace of dowry.

(xxii) Rule making Power

Sections 9 and 10 of the Dowry Prohibition Act, 1961 respectively deal with the rule making power of the Central and State Governments. Under Section 9(2) there are particularly, two subjects on which rules could be made. The first is the form and manner in which a list of presents has to be made, and the second is the better co-ordination of policy and action with respect to the administration of the Act.

Under sub-Section (3) there is an effective device for Parliament to scrutinize the rule and if it thinks so, can amend or delete the rule. It is, therefore, enough of a safeguard against the executive acting beyond powers delegated to it. This is a step towards vigilance and control of subordinate law making authority.

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77 Supra note 31.
The Central Government has made the Dowry Prohibition (Maintenance of List of Presents to the Bride and Bridegroom) Rules, 1985 under this Section of the Dowry Prohibition Act.

Section 10 of the Act provides that the State Government may make rules for carrying out the purpose of the Act. Sub-Section (3) of Section 10 which deals with procedural aspects of legislative control of the delegated legislation provide that every rule made by the State Government under this Section be laid, as soon as may be, after it is made, before the State legislature.

It is disheartening to note that some State Governments, even after 20 years of coming into force of these provisions, have not yet framed rules under this Section. It is submitted that every State Government should frame rules for the proper implementation of the provision of the Act and for effective handling of dowry offences.

5.3 Provision for Dowry Death under Indian Penal Code, 1860

As the earlier law was not sufficient to check dowry death, the legislature introduced stringent provisions under the Section 304B, Indian Penal Code and Section 113B Evidence Act in 1986. These provisions were introduced so that the person committing such human crimes on married woman could not escape liability, as evidence of a direct nature is not readily available.

Any critical analysis of Section 498A, Indian Penal Code would be incomplete without understanding the history of criminal law reform in India. The demand for criminal law reform came about

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78 Published in Gazette of India (Extraordinary), Part-II, Section 3(i), dated, 19th August, 1985.
79 Supra note 39 at 314.
because of the large number of women that were dying in their Matrimonial homes due to dowry-related harassment. Therefore, the initial demand was for a law to prevent only dowry related violence. Section 498A was thus introduced in Indian Penal Code in 1983 closely followed by Section 304B which defined the special offence of dowry-related death of woman in 1986 and the related amendments in the Indian Evidence Act, 1872. It is believed that Section 498A and Section 304B were introduced to complement each other and be part of a scheme, since Section 304B addresses the particular offence of dowry death and Section 498A sought to address the wide-scale violence against married women for dowry.  

Section 304-B states that ‘where the death of a woman is caused by burns or bodily injury, or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called ‘dowry death’, and such husband or relative shall be deemed to have caused such death.

The main ingredients of Section304-B are:

(i) The occurrence of an unnatural death,

(ii) Death within a period of seven years from the date of marriage,

(iii) Cruelty ‘soon’ before death and

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80 Economic and Political Weekly. November. 12, 2005 at 4844.
(iv) Death ‘for’ or in ‘connection’ with any demand of dowry.

The interpretation of the word ‘dowry’ and ‘the demand in consideration or in connection with marriage’ was considered in the \textit{State of Punjab v. Dalit Singh},\footnote{1999 CrLJ 2723 (P&H).} where the prosecution amply proved that the death of bride was due to poisoning and resulted from harassment for not bringing Rs. 50000/- demanded by the husband and the in-laws for sending the younger brother of the husband abroad. But the Hon’ble Court concluded that though the demand for money was proved but the purpose for which the demand was made, was also an important to be considered. Here, the demand was for sending the younger brother of the husband of the deceased abroad and according to Court, it was not related or connected with the marriage of the deceased with the accused. Thus, though the demand for money existed, it was not in consideration or in connection with their marriage, hence the accused could not be held liable either under Section 306, Indian Penal Code or under the Dowry Prohibition Act.

But it is humbly submitted that the Court failed to appreciate the fact that it was basically to protect the wife from such demands that the Dowry Prohibition Act was passed. No person should be allowed or given a right to advance in the life at the cost of his father-in-law’s purse, least of all in situation when the latter is either unwilling or unable to do so. A demand is a demand and demand from a person who is unable or unwilling to pay and tormenting that person’s daughter for achieving that demand should be taken seriously. Here, with a narrow and constrained interpretation, the
judiciary actually helped the guilty to escape punishment for such a heinous crime.

In *Reema Agarwal v. Anupam,* the Apex Court held that even in case of lack of valid marriage, the 'husband' would not be allowed to take shelter behind a smoke screen that there was no valid marriage and hence the question of dowry would not arise. Persons who contract marriages ostensibly and cohabit with women in the purported exercise of their role and status as 'husband' would come under the purview of Sections 498-A and 304-B of the Indian Penal Code

Section 498-A of the Indian Penal Code, 1860 reads as follows with its headings: Husband or relative of husband of a woman subjecting her to cruelty – whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

For the purpose of this Section, cruelty means:—

(a) Any willful conduct which is of such a nature as is likely to drive the woman to (i) commit suicide or (ii) to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman, or (b) harassing her with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security in dowry demands.  

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82 AIR 2004 SC 1418.
5.4 Provisions for Dowry Death under the Code of Criminal Procedure, 1973

Delay in filing the First Information Report (FIR), ipso facto, would not go to show that the case against the accused was false or got up. The Court, may, however, take into account all the circumstances including the one that there was delay in lodging the FIR and in the light of all the circumstances come to its own finding as regards correctness or otherwise of the prosecution case against the accused.84

The Delhi High Court said on 9th, October 2007 that the criminal justice system should not be misused for settling personal scores. Justice S.N. Dhingra of the Delhi High Court said FIR should be quashed in rarest of rare cases. FIRs can be quashed only in those cases where either the criminal justice system is being put to gross misuse and is used to tool to settle scores.85 The National Human Rights Commission (NHRC) suggested before the Delhi High Court on 5 November, 2007 that police change its way of investigating dowry related cases to ensure that no innocent is lodged in jail.

National Human Rights Commission also recommended that Police needs to review its routine in conducting investigations in dowry cases to ensure that it is not misused.86

A new amendment of Section 174, Code of Criminal Procedure made post-mortem examination compulsory where a woman

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84 State v. Orilal Jaswal, AIR 1994 SC 1418.
86 The Political and Business Daily, Edi. Delhi, November 6, 2007.
committed suicide in suspicious circumstances within 7 years of her marriage.\(^{87}\)

5.5 **Provision for Dowry Death under Indian Evidence Act, 1872**

If all of the above conditions are present, then there is a presumption that the accused has committed the crime of dowry death. The presumption is created by Section 113-B of the Evidence Act inserted by Act 43 of 1986.\(^{88}\)

Inspite of taking a number of preventive measures by the Indian Government the dowry menace remains almost as usual. The Dowry Prohibition (Amendment) Act, 1986 has proved to be totally in effect. The present Act has several loopholes. The framers of the present Act have failed to appreciate that dowry demands are not made only in connection with marriage but they continue long after the event is over. Bride burners are rarely punished.

5.6 **The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971)**

Indian society is patriarchal in nature with inborn desire for the birth of a male child in the family. This desire, along with the many prevailing superstitions, leads to indiscriminate abortion of female foetuses. Women carrying illegitimate children also have a high abortion rate. These factors have contributed to the prevalence,


\(^{88}\) Section 113-B, Evidence Act, 1872, reads: “Presumption as to dowry death- if the evidence discloses that immediately before the death of the woman she was subjected to cruelty or harassment by her husband or relatives, in connection with any demand for dowry and the death has taken place within seven years of marriage, then, the Court shall presume that such persons had caused dowry death”.

- 260 -
in Indian society, of the menace of quacks. These unregistered medical practitioners had become a health hazard for women who were carrying unwanted or illegitimate children because they performed abortions illegally and not knowing much about termination of pregnancies. In order to prevent such illegal acts Sections 312-318 of the Indian Penal Code with the causing of miscarriage with or without consent have been introduced.89

The high risk involved in abortions of the female child or unwanted child by unqualified medical practitioners promoted Parliament to make a law to regulate termination of pregnancy in certain cases only by registered medical practitioners.90

The concern over the abortion issue came to the forefront in India in the mid-sixties. It is relevant to note that the thrust came from Central Family Planning Board (CFPB) and not from the women’s movement. According to the Central Family Planning Board meeting in August 1964, concerns were voiced over the number of illegal abortions occurring in the country, in unsafe conditions, which put the lives of numerous pregnant women in jeopardy.91

Consequently, the Government of India (GOI) set up in 1964 the Shantilal Shah Committee consisting of eleven members to study the question of legislation of abortion in all its aspects—legal, medical, social and ethical and make recommendations for the same.

89 Supra note 28 at 163.
90 Id. at 164.
The Shantilal Shah Committee deliberated for more than 2 years. The report submitted to the Government on the eve of 1966, made a learned case for a broadening and rationalization of the laws pertaining to abortion. The issue was liberalization and not legalisation as technically abortion was legally allowed under the Indian Penal Code, on the one solitary ground of saving the life of the mother.

The Committee was constituted by one half of doctors and other half was strongly linked with and influenced by medical community and hence the approach of the Committee was on conservative medical lines.\(^92\)

The report proposed that a qualified medical practitioner acting in good faith should be permitted to terminate a pregnancy, not only for the sole purpose of saving a woman's life, but also with regard to the following considerations:-

1. Serious risks to her life, or giving injury to her health – physical or mental, before or after the birth of the child;
2. Substantial risk of the possibility of a seriously, physically or mentally handicapped child being born;
3. Where the pregnancy resulted from rape or intercourse with a minor or mentally retarded girl;
4. It also allowed the woman to opt for termination of pregnancy upon the failure of contraception, accorded for the first time in the world;

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- 262 -
5. Further, it advocated a vigorous promotion of the small family norm and contraception, education on sex, marriage, parenthood and expansion of easily accessible family planning services that would aid in reducing the cases of pregnancy termination. It advised doctors to recommend sterilization methods to either spouse, in order to prevent repeat abortions;

6. Various recommendations were also made by the Committee regarding the conditions to be complied with in connection with any treatment for termination.93

Medical Termination of Pregnancy Bill was introduced in Rajya Sabha in 1969, referred to Select Committee Review and finally passed as the Medical Termination of Pregnancy Act in 1971 and implemented in April 1972.

The objective of the Medical Termination of Pregnancy Act, 1971 is to provide for the termination of pregnancy by registered medical practitioners where its continuance would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or where there is a substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Where the pregnancy is alleged to have been caused by rape or as a result of failure of a contraceptive used by a married woman or her husband, it would be presumed to constitute grave injury to the mental health of the pregnant woman.94

93 Supra note 90.
94 Supra note 28 at 164-165.
The Act contains eight Sections dealing with various aspects like the time, place and circumstances in which a pregnancy may be terminated by registered medical practitioners legally. Here registered medical practitioner means a person who possesses any recognized medical qualifications as defined in the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

(i) **Circumstances Under which Pregnancy may be Terminated**

Section 3, The Medical Termination of Pregnancy Act. 1971 provides-

when pregnancies may be terminated by registered medical practitioners:

1. Notwithstanding anything contained in the Indian Penal Code, 1860, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

2. Subject to the provisions of sub-Section (4), a pregnancy may be terminated by a registered medical practitioner-

a. Where the length of the pregnancy does not exceed twelve weeks that is three months or,
b. Where the length of pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are of opinion, formed in good faith that-

i. the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

ii. there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped.

The Bombay High Court on August 8, 2008 rejected the plea of Niketa Anand to abort her 26-week old foetus, which was diagnosed with congenital cardial disorder.

Upholding the provisions of the Medical Termination of Pregnancy Act, which bans the abortion of foetus more than 20 weeks old, a Division Bench of the Court asked the couple to seek help from the legislature.

The Judges observed:

"It is the job of the legislature to help you after the provision. We cannot legislate the provision".  

Health minister Anbunani Ramadoss categorically said an isolated case could not be treated as a ground to amend the law that had existed for many decades.

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97 *The Tribune*, August 7, 2008 at 22.

- 265 -
(ii) Grave Injury to Mental Health

Explanation I and II to Section 3 point out the circumstances where continuance of pregnancy would cause grave injury to mental health:

Explanation 1

Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2

Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. It must be remembered that termination of pregnancy under the Medical Termination of Pregnancy Act is not promoted because of the unwanted sex of the foetus. It could be a male or female foetus. The Medical Termination of Pregnancy Act does not deal with sex selection.

Explanation 3

In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-Section(2), account may be taken of the pregnant women’s actual or reasonable foreseeable environment.
(iii) **Age and Consent of Pregnant Women**

Section 3(4), the Medical Termination of Pregnancy Act, 1971 provides—

(a) No pregnancy of a woman, who has not attained the age of eighteen years, or who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

(iv) **Place where Pregnancy may be Terminated**

Pregnancy can only be terminated at

(a) a hospital established or maintained by the Government;

(b) at a place for the time being approved for the purpose of this Act by the Government.

(v) **Power to Make Rules & Regulations by the Central Government and the State Government**

Power to make rules and regulations are conferred on the Central Government and the State Government respectively under Sections 6 and 7 of Medical Termination of Pregnancy Act, 1971

(a) **Power to Make Rules**

1. The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

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98 Section 4, the Medical Termination of Pregnancy Act, 1971.
2. In particular and without prejudice to the generality of the foregoing power, rules may provide for all or any of the following matters, namely:

(a) the experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act; and

(b) such other matters as are required to be, or may be, provided by rules made under this Act.

3. Every rule made by the Central Government under this Act shall be laid, soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.99

(b) Power to Make Regulations

The State Government may, by regulations:

(a) require any such opinion as is referred to in Section 3(2) to be certified by a registered medical practitioner or practitioners concerned, in such form and at such

99 Section 6, The Medical Termination of Pregnancy Act, 1917.
time as may be specified in such regulations, and the preservation or disposal of such certificate;

(b) require any registered medical practitioner who terminates pregnancy, to give intimation of such termination and such other information relating to the termination as may be specified in such regulation; and

(c) Prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

1. The intimation given and the information furnished in pursuance of regulation made by virtue of clause (b) of sub-Section (1) shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

2. Any person who willfully contravenes or willfully fails to comply with the requirements of any regulation so made shall be liable to be punished with fine which may extend to one thousand rupees.\(^\text{100}\)

Under Section 8, the registered medical practitioners are protected against suit or legal proceedings for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

In *Vijay Sharma v. Union of India*\(^\text{101}\) case, Public Interest Litigation was filed by a Mumbai couple Vijay and Kirti Sharma who have two daughters and want a son. Challenging the legal

\(^{100}\) Section 7, The Medical Termination of Pregnancy Act, 1971.

\(^{101}\) AIR 2008 Bom 29.
validity of Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 2002, the couple claimed that the law was discriminatory and violated their fundamental right. The couple’s lawyer also contended that many countries permitted sex determination of the foetus and many couples from India were travelling overseas to undertake the tests. The judgement came from a Division Bench comprising Chief Justice Swatanter Kumar and Justice Ranjana Desai but was written by the latter who is among the few women judges in the High Court. The 32 pages judgment rejected the challenge to the constitutional validity of the provisions of the Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act, which banned pre-natal diagnostic tests to verify the sex of an unborn child. The Court said that while the Medical Termination of Pregnancy law was meant for certain cases where a mother’s life and health, both mental and physical, might be endangered or where a child may be born with a abnormalities, it is no way dealt with sex selection as a basis for the legal abortion.

Nowhere in the existing framework of legislations on abortion in India, has a right to abortion been guaranteed to women. The Medical Termination of Pregnancy Act is a progressive step in the context of the Indian Penal Code, but its contribution is essentially limited to liberalization of the conditions under which a woman can have access to abortion services provided by approved medical practitioners. The move should be towards a right to abortion keeping in mind the fact that it should be finally the woman’s choice whether or not she proposes to proceed with the pregnancy or not.
This need is felt in view of the disproportionate social and biological burdens placed by the pregnancy on the woman.

The law should also provide for ensuring access to safe abortion facilities and not just a right to abortion. Certain regulations and requirements should be put in place (regarding safety, hygiene, etc.), to be complied by the units providing Medical Termination of Pregnancy procedures and their contravention should be made punishable under the law. Presently the punishment for causing miscarriage is contained in Section 312 of the Indian Penal Code. This Section has been in existence prior to the coming into force of the Medical Termination of Pregnancy Act. After the commencement of the Medical Termination of Pregnancy Act, this Section has not been amended or redrafted in any way to take into account the fact that abortions are now permissible under the Medical Termination of Pregnancy Act under certain circumstances. Section 312 provides for punishments for women undergoing abortions that are considered illegal under the law.

It is thus imperative to draft a comprehensive law pertaining to abortion and other reproductive rights and health, which encapsulates all abortion-related offences in its domain, so that it does not remain fragmented into two legislations which leads to much confusion at the stage of implementation. This would also require redrafting of Sections 313-316 of the Indian Penal Code, for it to fit into the entire scheme of the law. The Medical Termination of Pregnancy Act makes no mention of the classification of offences prescribed under it. In order to take action against the commission of offence, three attributes of the offence have to be specified whether the offence is cognizable or non-cognizable, bailable or non-bailable
and compoundable or non-compoundable. There is no provision in the Act which deals with the situation where a Registered Medical Practitioner (RMP) carries out an abortion in contravention with the provision of the Act. Section 3 of the Act provides immunities to the Registered Medical Practitioner (RMP) from any proceedings under Indian Penal Code or any other law, if the Medical Termination of Pregnancy is carried out in accordance with the various provisions of the Medical Termination of Pregnancy Act.

However if such a situation were to arise, no course of action or proceedings has been visualized. So Registered Medical Practitioners (RMP) should fall within the purview of Section 312 of the Indian Penal Code as the Medical Termination of Pregnancy is silent in the issue.

5.7 The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

Recognising that the domestic violence is also perpetrated in the form of forced termination of female foetuses. The killing of women exists in various forms in society the world over. However, Indian society displays some unique and particularly brutal versions, such as dowry deaths and sati. Female foeticide is an extreme manifestation of violence against women. Female foetuses are selectively aborted after pre-natal sex determination thus avoiding the birth of girls. As a result, selective abortion, between 35 and 40 million of girls and women are missing from Indian population. In some parts of the country the sex ratio of girls to boys has dropped to less than 800:1000.102

Marriage in the Hindu fold of life is traditionally considered essential for procreation and the continuation of the family line. The birth of a son is greatly desired, and the Godly blessings for the expectant mother are that she will give birth to a male child. Even the blessings showered on the bride at the marriage ceremony is ‘May you be blessed with eight sons’. A short time after marriage, the ceremony called Garbhadhana is performed by the husband. It consists of an offering and a prayer to the sun by the husband and wife for the conception of the son. The last line of this prayer by the husband is ‘Oh faithful wife give birth to a son who will live long and perpetuate our line’. Three months after conception the Pumsavana ceremony for obtaining a son is performed. In the Atharva Veda, one of the four most sacred texts of Hinduism, mantras are prescribed for chanting so that if by chance the foetus is a female it will be transformed to a male.\textsuperscript{103}

Foeticide is an act that causes the death of a fetus. In a legal context ‘fetal homicide’ refers to the deliberate or incidental killing of a fetus due to a criminal human act, such as a punch or kick to the abdomen of a pregnant woman. As a medical term, foeticide is destruction of a fetus, for example as the first phase of a legal induced abortion. Foeticide does not refer to the death of a foetus from entirely natural causes, or through the spontaneous abortion of a pregnancy where the life of the foetus could not be maintained artificially ex utero.\textsuperscript{104} President Pratibha Devisingh Patil described the declining girl child ratio in the country as a matter of shame, and said girls should not be treated as a curse but as a boon. Launching a “Save the Girl Child” campaign of the Union Health and Family Welfare Ministry on the occasion of Gandhi Jayanti, Ms. Patil said it

\footnotesize\textsuperscript{103} Supra note 36 at 72.
\footnotesize\textsuperscript{104} \textit{www.en.wikipedia.org/wiki/feticide} accessed on 7.7.2008.
was a matter of shame that the disturbed sex ratio was not only seen in the progressive States of the country, but also among the progressive society. She said it was a matter of concern that the phenomenon was seen among those educated and having a status in society. The misuse of technology to determine the sex of foetus and easy access to it had contributed to the rapid decline in the child sex ratio. This could adversely impact the delicate balance of nature and destroy the moral and social fabric.105

Female infanticide—the killing of female infants—was a practice prevalent in India long ago. Though now this has been abolished legally, in practice we find that it is still restored to, in a different and more ‘sophisticated’ manner.106 Female infanticide may be happening in one State, in one community, but it is mirror in which all Indians must look and come face to face with the ugliness that surrounds them. The challenge of developing India into a land of social and economic justice, as Prime Minister Nehru had put it: is not the creation of factories, and machinery and grandiose schemes. Ultimately, he said ‘it is human being that counts, and if the human being counts, well, he counts more as child than a grown up’. In our country a woman is not considered an entity in her own right. In society, her limited rights, considerable duties and the treatment meted out to her, indicate that she is basically considered a handicap to the family from the time of her birth. Even her very birth is by no means assured, with the advent of amniocentesis, a test of the amniotic fluid whereby deformities as well as sex of unborn child can be determined and which is often used to abort a female embryo.107

106 Supra note 7 at 155.
Infanticide of the female children in India is usually done out of the under mentioned reasons:

1. Family vanity among the groups of warrior class.
2. Inflated dowry demand by the parents as well eligible bridegrooms and inability of the bride’s parents to meet the same.
3. Cost related to marriage.
4. Lower status of women in the society.
5. Preference for a son by family and society.
6. Widely held theory that a male child will carry forward the family line.\textsuperscript{108}

5.8 Child Sex Ratio During 1991-2001

The child sex ratio is calculated as number of girls per 1000 boys in the 0-6 year age groups.\textsuperscript{109} The National Family Health Survey-3, released on 11\textsuperscript{th} October 2007, says that sex ratio has declined to 918 girls to 1000 boys in the 0-6 age groups. The 2001 census found a sex ratio of 927 per 1000 boys.\textsuperscript{110} Highlights of 2001 census on child sex ratio are:

- During the 1991-2001 decade, the overall sex ratio increased from 927 per 1000 to 933 per 1000 in India (as increase of 6 points).

\textsuperscript{109} Pre-Birth Elimination of Female – A Handbook of Guidelines (National Commission for Women), New Delhi.
\textsuperscript{110} \textit{The Hindu}, Edition: Delhi, October 12, 2007.
During the same period, the child sex ratio declined from 945 to 927 (a decline of 18 points).\footnote{Darkness at Noon: Female Foetocide in India, Summary of Project Report on Declining Child Sex Ratio and Gender Balance with Special Reference to Punjab, Haryana and Himachal Pradesh, August 15, 2003.}

Sex Ratio (Females per 1000 males), India 1901-2001

<table>
<thead>
<tr>
<th>Year</th>
<th>Sex Ratio</th>
<th>Sex Ratio in Children (0-6 years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901</td>
<td>972</td>
<td></td>
</tr>
<tr>
<td>1911</td>
<td>964</td>
<td></td>
</tr>
<tr>
<td>1921</td>
<td>955</td>
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<tr>
<td>1931</td>
<td>950</td>
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<tr>
<td>1941</td>
<td>945</td>
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<tr>
<td>1951</td>
<td>946</td>
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<tr>
<td>1961</td>
<td>941</td>
<td>976</td>
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<tr>
<td>1971</td>
<td>930</td>
<td>964</td>
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<tr>
<td>1981</td>
<td>934</td>
<td>962</td>
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<tr>
<td>1991</td>
<td>929</td>
<td>945</td>
</tr>
<tr>
<td>2001</td>
<td>933</td>
<td>927</td>
</tr>
</tbody>
</table>
Female foeticide has become a common feature in the hill State of Himachal Pradesh that at least 7500 foeticide are carried out in every year on an average, with the gender ratio falling to be the lowed in the country. The showing factor is that despite such unchecked prevalence of foeticide only one case has been convicted so far.

“Around 7500 female foeticide are carried out in the State every year which has a total population of only six million people”.

According to findings of the Sample Registration System, the female ratio in Himachal Pradesh had dropped to 803 females per 1000 males in 2003 as compared to 896 in 2001. The more affected districts are Kangra, Bilaspur, Hamirpur and Una in the lower hills of the State. Kangra, the State’s most populous district, is the worst effected.\textsuperscript{112} The malady of sex-determination tests and the subsequent abortion of female foetuses, which is widely prevalent in Punjab and Haryana, has caught up within the people living in these Himachal Pradesh districts, which are contiguous to the plains.

Grappling with the ever-worsening problem of uneven sex ratio, four northern States- Punjab, Haryana, Himachal, Uttarakhand-and UT Chandigarh will form a Cooperative Committee to combat the menance of female foeticide jointly\textsuperscript{113}. Sex ratio in the age group of zero to six years of age, which was 851 in the year 2001 had improved to 924 in the year 2008 in the State of Himachal Pradesh.

Our society valued males as extra hands at work while regarding females as a burden. This makes it all the more mystifying

\textsuperscript{112} \url{www.medindia.net/news/view_news_main.asp} accessed on 14.8.2008.
\textsuperscript{113} \textit{The Tribune}, July 26, 2009 at 9.
that a particularly violent expression of prejudice against the girl child persists in modern India.

A baby girl tied in polythene bag and dumped in a public dustbin left to be torn away by wild stray dogs. An incident took place nowhere else but in very capital of our country.

The recovery of pieces of bones of newly born female fetuses from a hospital backyard in Ratlam district of Madhya Pradesh was deplorable. Bodies of more than 100 fetuses found outside an abortion clinic in Patran town in Punjab in August, 2007 was also deplorable.\textsuperscript{114} The shocking discovery of body parts of what appear to be fully formed female fetuses in a pit of nursing home at Nabaghanapur in Orissa is a national shame and a scandal that should outrage the conscience of every citizen.\textsuperscript{115}

The fact that society should not want a girl child, that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends of women. It undermines their importance. It violates woman’s right to life. It violates Article 39(e) of the Constitution of India which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51-A(e) of the Constitution of India which states that it shall be the duty of every citizen of India to renounce practices derogatory to dignity of woman. Sex selection is not only against the spirit of the Indian Constitution, it also insults and humiliates womanhood. It violates a women’s right to life.

\textsuperscript{114} www.merinews.com/catfull.jsp?article1D accessed on 7.7.2007.
5.9 **Foeticide and Infanticide are Human Rights Issues**

Female foeticide and infanticide are human rights issues. With the advances in the medical science now it is possible to know the sex of child in the womb of mother. People adopt this method to kill female child. It causes many problems. Abortion at any stage is harmful to the mother’s health. Early childhood care and education rights – and all the underlying protections and entitlements needed for the first 5 years of life – begin with the assurance of three simple essentials- the right to be born, the right to survive and the right to stay alive through infancy and to the fifth birthday. For half of India’s children, this assurance is at grave risk, simply because they are girls. The first early childhood right for them is to live and both negative social attitudes and new technologies are conspiring to deny them. This population law has responded to the immediate challenges presented by the rapid population growth, its ultimate concern is human rights. Family Planning is a mean to achieve a set of basic human rights, which include adequate food, health, clothing, shelter, education, and work, recreation and old age security. These inherent rights or fundamental rights are synonymous with the law of nature. United Nations recognized the family planning as the basic human right only in May 1968, when the United Nations Conference on Human Rights in Tehran proclaimed, ‘parents have a basic human right to determine freely the number and the spacing of their children. In India with a population of more than one billion people, the number of legal abortions is much less than reported cases. Therefore, destruction of the female foetus at any stage is
necessarily a human right issue not only of unborn child but also of
the mother.\textsuperscript{116}

5.10 Girl as Second Child Welcomed in Families

A baby girl as the second child when the first is a boy is more
than welcome.\textsuperscript{117}

The sex ratio per ‘second child’ is 1140 girls per 1000 boys. The sex ratio came down to 629 girls per thousand boys when the first child was a girl, while it rose to 1140 in the case of the first child being a boy (said by Jacob Puliyel, head of the Peadiatrics Department in St. Stephan’s Hospital).

The study conducted by St. Stephen’s Hospital, Delhi indicated
that people welcome a girl after a boy, but do not want a girl as their first child.\textsuperscript{118} A baby girl as the second child has better chances of being born when a boy precedes her. If she is preceded by a sister, however, her chances of making it are reduced drastically. The girl child is welcome only if the family already has a son to ‘carry on the family name’ and then her role is to ‘balance the family’. In the absence of a son, parents often have no qualms about doing away with the unborn daughter.\textsuperscript{119}

5.11 Rise in Female Foeticide may Spark Crisis

Increasing female foeticide in India could spark a demographic crisis where fewer women in society will result in a rise in sexual

\textsuperscript{118} Study Conducted by St. Stephen’s Hospital, Delhi in 2007.
\textsuperscript{119} \textit{Times of India}, Edition-Delhi, September 24, 2007.
violence and child abuse as well as wife sharing. If female foeticide is going to continue then there won’t be enough brides for men who wish to get married. Now this has already happened in some parts of Rajasthan. There are already some communities in Rajasthan which have started the practice of polyandry. Bride deficit will make men widen their ambit of search and it may even had to trafficking of women by the unscrupulous element. The United Nations Population Fund has warned that sex ratio imbalances only lead to far-reaching imbalances in society at large. French demographer Christophe Guilmoto, author of the India and regional reports, warned that future deficits of adult women would affect “the stability of the entire marriage system”. Many men, particularly the poorest will be enable to marry, creating a pool of potential social unrest and conditions likely to increase sexual violence against women.

5.12 The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

(i) Legislative History

Sex-selective abortion is a two-step process involving an initial determination of the sex of the foetus followed by abortion if it is not of the desired sex. The Indian Government opposes sex-selective abortion but it took a long time to pass legislation to combat it. In 1976, the Government banned sex-determination tests

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122 Study Covering Four Asian Countries i.e. India, China, Nepal and Vietnam Conducted by the United Nations Population Fund (UNPFA) in year 2007.
in Government facilities but not in private facilities. In 1984, a broad-based coalition of women’s group, civil liberties groups and health organizations established the Forum Against Sex Determination and Sex-Pre-Selection Headquarters in Mumbai. This organisation monitored the growing use of sex-determination tests for the purpose of sex-selective abortions and agitated to outlaw the use of the tests for this purpose. As a result of these and other efforts, the State Government of Maharashtra passed the Regulation of the use of Pre-Natal Diagnostic Techniques Act in 1998. The States of Punjab, Gujarat and Haryana subsequently followed.123 In 1994, although some clinics offered sex selection from the late 1970s onwards, it was only in the 1980s that these services received widespread publicity and formed the subject of Parliamentary debate.124

Shaken out of its slumber by the consistently deteriorating situations, as revealed by the social scientists and demographers, the Central Government in Delhi enacted the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and it came into force from January 1, 1996, covering all India.

(ii) **Objects and Reasons of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and The Medical Termination of Pregnancy Act, 1997**

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123 Robert D.Retherford and T.K. Roy in Factors Affecting Abortion in India and 17 Major States, National Family Health Survey Reports, Number 21 at 14 (January 2003).
124 *Id.* at 16.
In 1994, the Government of India passed the Pre-Conceptual and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act with the aim of preventing female foeticide. The implementation of this Act was slow. It was later amended and replaced in 2002 by the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act without ever having been properly implemented. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 2002 seeks to ban pre-conception sex selection techniques and use of pre-natal diagnostic technique for sex selective abortions. This Act prohibits sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them. It prohibits any person to cause or allowed to be caused selection of sex before or after conception. The statement of objects and reasons of Amendment Act, 2002 therefore clearly indicates that the Legislature was alarmed at the severe imbalance created in the male to female ratio on account of rampant use of pre-natal diagnostic techniques made to detect sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. The legislature categorically stated that there was a need to ban pre-conception sex selective techniques and made it clear that the 1994 Act was sought to be amended with a view to banning the use of sex selection techniques prior to conception as well as misuse of pre-natal diagnostic techniques for sex selective abortions. The Pre-conception and Pre-Natal Techniques (Amendment) Act, 2003 covers pre-conceptual techniques and the

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126 Supra note 101.
pre-natal diagnostic techniques. The following people can be charged under the Act: everyone running the diagnostic unit for sex selection, those who perform the sex selection test itself, anyone who advertises sex selection, mediators who refer pregnant women to test, and relative of the pregnant women. The pregnant woman is considered innocent under the Act, ‘unless proved guilty’. All diagnostic centers must be registered with the authorities. They are required to maintain detailed records of all the pregnant women undergoing scan there. These records must include the referring doctors, medical and other details of women, reason for doing the scan, and signatures of doctors. These records must be submitted to the authorities periodically. Penalties under the Act are imprisonment for up to three years and a fine upto Rs. 10000. This is increased to five years and fine Rs. 100000 for subsequent offences. Doctors will be reported to state medical council, which can take the necessary action including suspension. For implementing the Act, appropriate authorities are appointed at the State level and work with director of health services, a member of women’s organistion and an officer of law. At district level, the appropriate authority is senior medical officer or civil surgeon. Advisory Committees consisting of doctors, social workers and people with legal training assist appropriate authorities. Supervisory boards at the State and Central levels look at the implementation of the Act. The appropriate authority may cancel the diagnostic centre’s registration, make independent investigation, take complaints to Court, and take appropriate legal action. It may demand documentation, search
premises, and seal and seize material. Courts may respond only to complaints from the appropriate authority.  

(iii) **Definitions**

The Act defined certain Centres/Clinics where these sex-determination tests may be carried out.

(a) **Section 2(c) defines Genetic Counseling Centre**

Genetic Counseling Centre means an institute, hospital, nursing home or any place, by whatever name called, which provide for genetic counseling to patients.

(b) **Section 2(e) defines Genetic Laboratory**

Genetic Laboratory means a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for prenatal diagnostic tests.

(c) **Section 2(i) defines the Prenatal Diagnostic Procedures**

Pre-natal diagnostic procedures means all gynecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic tests.

(d) **Section 2(k) defines Pre-Natal Diagnostic Tests**

Pre-natal diagnostic tests means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue of a

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128 Supra note 116 at 38-39.
pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.

(iv) Regulation

(a) Regulation of Genetic Counseling Centres/Laboratories/Clinics

Chapter II of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 provides that no genetic counseling Centre, Laboratory or Clinic shall conduct or employ any person who does not possess the prescribed qualification to help in conducting activities relating to pre-natal diagnostic techniques unless they are registered under the Act. Such techniques have also been prohibited to be conducted at a place other than the registered place.129

(b) Regulation of Pre-Natal Diagnostic Techniques

Section 4 of Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 permits the use of pre-natal diagnostic techniques only for detecting chromosomal abnormalities, genetic metabolic diseases, haemoglobinopathias, sex-linked genetic diseases, congenital anomalies or any other abnormality that may be specified.

Section 4 also mentions the conditions on the fulfillment of any one of it only the prenatal diagnostic technique shall be used by the person qualified. The conditions are:

1. When the pregnant woman is above 35 years of age.

2. When the pregnant woman has already undergone two or more spontaneous abortions or foetal loss.

3. Where the pregnant woman has been exposed to potentially dangerous agents like drugs, radiation, infection or chemicals.

4. Where the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease.

The Act keeps it open for any other condition to be added as essential.

Thus the regulations provide that if a woman is pregnant and is tested Rh +ve pre-diagnostic technique may be legally applied to determine whether the child is also positive or not. If there is any chromosomal deformity this technique is permitted and may be of use to find out any foetal abnormality. Because the conditions have been specified, no relative or husband can seek or encourage the conduct of any prenatal diagnostic techniques.

(v) Prohibitions

(a) Determination of Sex of Foetus

Section 6, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 prohibits Genetic Centres, Laboratories and Genetic Clinics from conducting any pre-natal diagnostic techniques tests including ultrasonography for determining the sex of a foetus.
(b) **Communication of Sex of Foetus**

When otherwise, for determining any abnormality, the prenatal diagnostic technique are used and the sex of the foetus is known. Section 5 of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 specifically prohibits communication of sex of foetus to the pregnant woman or her relatives. Any form of communication by words, signs, etc is prohibited.

Thus, Sections 5 and 6 prohibit the determination or communication of the sex of the foetus.

(vi) **Guidelines Before Using Pre-Natal Diagnostic Techniques**

Section 5, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 lays down certain conditions which have to be fulfilled before carrying out a prenatal diagnostic technique on a pregnant woman. These are:

1. Obtain her consent after giving her an explanation in the language she understands.
2. Give her a copy of her written consent.
3. Explain the side effects and consequences of using the technique on the pregnant woman.

It has been specified that unless and until these conditions are fulfilled no parental diagnostic test can be carried out.

(vii) **Central Supervisory Board**

Sections 7-16, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 deal with the
Central Supervisory Board under Chapter IV. The Sections give the details of constitution, term of members, meetings of the Board, vacancies, temporary association of persons, appointment of officers, authentication of orders and other instruments of the Board, disqualification, eligibility and functions of the Central Supervisory Board.130

(a) Constitution

The Act empowers and directs the Central Government to constitute an authority called the Central Supervisory Board consisting of a Minister and Secretary of Ministry of Family Welfare, two members representing the ministries of Women and Child and Law and Justice, Director-General of Health Services, and ten members, two each from amongst eminent medical geneticists, gynaecologists and obstetricians, pediatricians, social scientists and representatives from Women’s Welfare Organistaions. Apart from these, three women members of Parliament and four members are to be appointed by the Central Government.131

(b) Functions of the Board

Section 16 of the Act assigns the following functions to the Board:

a. to advice the Government on policy matters relating to the use of prenatal diagnostic techniques;

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b. to review the implementation of the Act and the rules made thereunder and recommend changes in the said Act and rules to the Central Government;

c. to create public awareness against the practice of prenatal determination of sex and female foeticide;

d. to lay down Code of Conduct to be observed by persons working at Genetic Counseling Centres, Genetic Laboratories and Genetic Clinics.

(viii) Appropriate Authority

The Central Government under Section 17 has been given power to appoint one or more Appropriate Authority for each of the Union territories. The State will appoint such authority for the whole of the State or part of it for fulfilling the purposes of the Act, having regard to the intensity of the problem of prenatal sex determination leading to female foeticide.

The functions assigned to the Appropriate Authority are:

(a) to grant, suspend or cancel registration of a Genetic Counselling Center, Laboratory or Clinic;

(b) to enforce standards prescribed for such Centers, Laboratories and Clinic;

(c) to investigate complaints of breach of the provisions of this Act;

(d) to seek and consider the advice of the Advisory Committee on application for registration and on complaints for suspension or cancellation of registration.
(ix) Advisory Committee

The Central or State Government shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions.

The Advisory Committee, according to Section 17(6), shall consists of:

1. three medical experts who may be gynaecologists, obstetricians, pediatricians and medical geneticists;
2. one legal expert;
3. one officer to represent the department dealing with information and publicity of the State Government/Union Territory;
4. three eminent social workers, and at least one out of these three to be from a women’s organisation.

Application for registration or any complaint for suspension/cancellation of registration shall be considered by the Advisory Committee either on the request of the Appropriate Authority or on its own.

(x) Registration

Under Section 18 of the Act, every Genetic Counselling Centre, Laboratory or Clinic must be registered under the Act before its commencement. The application for registration is made to the Appropriate Authority, who, after holding an inquiry and satisfying itself regarding compliance with the requirements and also having regard to the advise given by the Advisory Committee, may grant a
certificate of registration under Section 19. If after inquiry and
affording opportunity of being heard and for reasons to be recorded,
it is found that the requirements have not been complied with, the
Appropriate Authority may reject the application for registration.

The certificate of registration has to be renewed as per the
manner prescribed and has to be displayed by the Genetic
Counselling Centre, Laboratory or Clinic.

(xi) Cancellation and Appeal

The Appropriate Authority is vested with powers under Section
20 to cancel or suspend a registration if it is found that such a centre
has misused diagnostic techniques.

The Appropriate Authority may issue a show cause notice to a
Centre as to why its registration should not be suspended or
cancelled for reasons mentioned in the notice. The action against the
centre may be on:

(i) a complaint; or

(ii) suo motu;

If after the advice of the Advisory Committee and after giving
the offender a reasonable opportunity of being heard, the
Appropriate Authority is satisfied that there has been violation of the
provisions of the Act, it may suspend or cancel the registration as it
may deem fit. If it is required in public interest the Appropriate
Authority may also suspend the registration without notice.

However, an appeal can be made against the order of
suspension or cancellation under Section 21, within thirty days to:
Central Government, or
State Government
which ever is appropriate.

(xii) Prohibition of Advertisement Relating to Sex Determination

Section 22 of the Act provides that, no person, organisation or Genetic Centre should advertise in any form facilities available for prenatal determination of sex at such centres or laboratories. Therefore, no publicity can be given as to the existence or availability of the facility. Publicity includes publishing or distribution of notices, circulars, labels, wrappers or other documents and includes visible representations made by light, sound, smoke or gas.

If an advertisement is given in contravention of the above provisions, the same is punishable with imprisonment upto 3 years or with fine upto Rs. 1000.

(xiii) Offence Cognizable and Non-Bailable

The seriousness of the offences committed under this Act is reflected by Section 27 which makes every offence under this Act cognizable, non-bailable and non-compoundable. Section 28 of the Act specifies that no Court other than that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act. These Courts shall take cognizance of offences under the Act only on complaint made by:
1. the Appropriate Authority or any officer authorized by the Central or State Government, or

2. a person who has given not less than 30 days notice of offence to the Appropriate Authority and of his intention to make a complaint.

(xiv) Offences and Penalties

Penalties have been provided for the violation of the Act by Genetic Centres or Laboratories and the persons seeking aid of such centres and companies. Notwithstanding anything in the Indian Evidence Act it has been laid down in Section 24 that unless the contrary is proved, the Court shall presume that a pregnant woman was compelled by her husband or relative to undergo prenatal diagnostic tests and such person shall be liable for abetment of the offence. Thus, special protection has been given to a pregnant woman taking into consideration the fact that for a mother her child is important and not its sex.

If the Appropriate Authority has reasons to believe that an offence is being committed under the Act, power to search and seize records at all reasonable times has been conferred. It has also got the power to examine any records, register, document, book, pamphlet, advertisement or any other material object found therein. Such acts have been protected by the Act under Section 31 if taken in good faith.

(xv) Power to Make Rules

The Act confers power on the Central Government to make rules for carrying out the provisions of the Act. The rules may
provide for, inter alia, the minimum qualifications of persons employed at Genetic Counselling Centres or Laboratories, facilities, equipments and other standards to be made available by these centres, the form in which consent of a pregnant woman has to be obtained under Section 5, the form and manner in which application has to be made for registration, manner in which seizure of documents shall be made and the manner in which the seizure list shall be prepared.

The Board has also been granted powers to make regulations with the previous sanction of the Central Government. The Rules and Regulations so made shall be laid before each House of Parliament while it is in session.132

(xvi) Judicial Concern

In Centre for Enquiry into Health and Allied Themes v. Union of India,133 a writ petition was filed against the improper implementation of the Pre-Natal Diagnostic Techniques Act. Though the Pre-Natal Diagnostic Techniques was entered in 1996, femicide continued in many States. A public interest litigation was filed in February 2000 in the Supreme Court of India with two goals. These were to activate the Central and State Governments for rigorous implementation of the Central legislation and to demand amendment to ensure that the techniques being used for sex selection, were brought under the purview of the Act. This petition drew attention to gross misuse of reproductive technology in a society characterized by a strong bias against the female child.

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132 Supra note 28 at 135.
For controlling the situation the Parliament in its wisdom enacted the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The preamble of the Act lays down its objectives, i.e. to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters connected therewith or incidental threats. It is apparent that to a large extent, the Pre-Natal Diagnostic Techniques Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners was the Centre for Enquiry into Health and Allied Themes (CEHAT), a research Centre of Anusandhan Trust based in Pune and Mumbai. The second petitioner was Mahila Sarvangeen Utkarsh Mandal (MASUM) based in Pune and Maharashtra while the third petitioner was Dr. Sabu M. George who had experience and technical knowledge in the field. After the filing of this petition, this Court issued notices to the parties concerned. It took nearly one year for various States to file their affidavits in reply. Prima facie, it appears that despite the Pre-Natal Diagnostic Techniques Act being enacted by parliament five years back, neither the State Governments nor the Central Government have taken appropriate action to ensure its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney-General of India, a Mr. Soli J. Sorabjee, the following directions were issued on the basis of various provisions for the proper implementation of the Pre-Natal Diagnostic Techniques Act.
Directions to the Central Government

1. The Central Government is directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall also be done by the Central Supervisory Board (CSS) provided under Section 16(iii) of the Pre-Natal Diagnostic Techniques Act.

2. The Central Government is directed to implement with all vigour and zeal the Pre-Natal Diagnostic Techniques Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the advisory committees constituted under sub-Section (5) of Section 17 of the Pre-Natal Diagnostic Techniques Act to advise the appropriate authority shall not exceed 60 days. It should be ensured that this Rule is strictly adhered to.\textsuperscript{134}

Directions to the Central Supervisory Board (CSB)

1. Meetings of the Central Supervisory Board will be held at least once in six months.

2. The Central Supervisory Board shall review and monitor the implementation of the Act (re Section 16(ii)).

3. The Central Supervisory Board shall issue directions to all States/UT Appropriate Authorities to furnish quarterly returns to the Central Supervisory Board giving a report on the implementation and working of the Act.

\textsuperscript{134} \textit{Id.} at 578.
These returns should, inter alia, contain specific information about:

(i) Survey of bodies specified in Section 3 of the Act.
(ii) Registration of the bodies specified in Sections.
(iii) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of the records.
(iv) Complaints received by the appropriate authorities under the Act and action taken pursuant thereto.
(v) Number and nature of awareness campaigns conducted and results following there from.

4. The Central Supervisory Board shall examine the necessity to amend the Act, keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government. (re Section 16).

5. The Central Supervisory Board shall lay down a Code of Conduct under Section 16(iv) of the Act to be observed by persons working in bodies specified there in and to ensure its publication so that the public at large can know about it.

6. The Central Supervisory Board will require medical/professional bodies/associations to create awareness against the practice of pre-natal determination of
sex and female foeticide and to ensure implementation of the Act.135

Directions to State Governments/ UT Administrations

1. All State Governments/UT administrations are directed to appoint by notification, fully empowered appropriate authorities at district and sub-district level and also advisory committees to aid and advice the appropriate authority in discharge of its functions (re Section 17(5)).

2. All State Governments/UT administrations are directed to publish the list of the appropriate authorities in the print and electronic media in their respective States/UTs.

3. All State Governments/UT administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisements in the print and electronic media, hoardings and other appropriate means.

4. All State Governments/UT administrations are directed to ensure that all State/UT appropriate authorities furnish quarterly returns to the Central Supervisory Board giving a report on the implementation and working of the Act.136

Directions to Appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body, who issues or causes to be

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135 Id. at 579.
136 Id. at 579-580.
issued any advertisement in violation of Section 22 of the Act.

2. To take prompt action against all bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.

3. To furnish quarterly returns to the Central Supervisory Board, giving a report on the implementation and working of the Act.

4. The Central Supervisory Board and the State Governments/UTs are directed to report to this Court on or before July 30, 2001.137

In the same case, in the order of judgement in para 8 and para 9, it was held by the hon'ble Justice M.B. Shah, Justice Brijeshwar Prasad Singh and Justice Hotoi Khetoho that appropriate action also would be taken for survey and against unregistered and unlicensed clinics as per provisions of Sections 3 and 18 of the Pre-Natal Diagnostic Technique Act, 1994. The State Governments directed to continue further survey so that unregistered clinic do not operate in any part of the country. State Governments also directed to take suitable action for creating awareness in public and sensitize authority charged with implementation of the Act.138

In CEHAT v. Union of India,139 further directions were issued by the Supreme Court. The Center and State Governments were

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137 Id. at 580.
138 Ibid.
directed to issue advertisements to create awareness in the public that there should not be any discrimination between male and female child and to publish annually the reports of appropriate authorities for the information of the public. National Monitoring and Inspection Committee is to continue a function for the effective implementation of the Act. Certain States were directed to appoint State Supervisory Boards and multi-membered appropriate authorities.

Son preference is deep-rooted in Indian society, for both cultural and economic reasons. Daughters are seen as a liability. Older parents typically rely on sons, and their wives, for support. And sons may be needed to perform last rites or ancestor worship. Female foeticide is rising because of the availability of technologies such as ultrasonography and amniocentesis to determine the gender of foetuses at the request of parents. If the foetus is found to be a girl, it is aborted. As a result their parents have killed around 10 million girls either before or immediately after the birth over the past 20 years. Fewer women will spark a demographic crisis in many parts of the country. Health workers and saviors of human life are the ones who have bent their skills to act as agents of death for unborn children. Such doctors and their assistants are not less than mass murderers and serial killers and deserve the highest punishment. Parents are defiant and defensive. They do not want to pay dowry so they feel nothing is wrong in getting rid of their girls. Even affluent families are getting rid of their girls- in fact they find it easier as they have the money to scan and pay for abortions. People don’t seem to get it that the girls should live and fight for their rights. In many areas, among the prosperous, dowry is viewed
as a status symbol. Business families also feel the need for having a male heir. And with the trend of smaller families slowly creeping in, the girl child gets chucked out. This trend of sex selection is extremely unhealthy can have disastrous consequences for society. Moreover, a society which denies the girl child even basic right to existence, can not claim to be civilized. It is time loopholes in the law should be corrected. Strict implementation of the law can be the only deterrent to this practice.

5.13 The Commission of Sati (Prevention) Act, 1987

(i) Introduction

Though we hope to forget a form of domestic violence which rampant in our past but ebbed in the last country, mention must be made of the practice of sati. The practice of sati is an act of violence against a woman, it is a violation of basic human rights and if the woman is forced to join her dead husband’s body in the flames is murder.140 A woman sitting on the pyre of her dead husband with his head on her lap waiting to go up in flames with him, joining him in his final journey. This is the manner in which the practice of sati has been eulogized, romanticized, worshipped and has achieved divine status in parts of northern India. Temples have been built in reverence.141

(ii) Origin of Sati

Hindu custom in India in which the widow was burnt to death on her husband’s pyre. A widow’s status was looked upon as an unwanted burden that prevented her from participating in the

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household work. Her touch, her voice, her very appearance was considered unholy, impure and something that was to be stunned and abhorred. A woman was considered pure if she committed sati. Sati, the wife of Daksha, was so overcome at the demise of her husband that she immolated herself on his funeral pyre. Sati was the consent of lord Shiva. She burnt herself in fire as protest against her father. Daksha did not give her consort Shiva the respect she thought he deserved. Even though sati is considered an Indian custom or a Hindu custom it was not practiced all over India by all Hindus but only among certain communities of India. Sacrificing the widow in her dead husband’s funeral or pyre was not unique only to India. This custom was prevalent among Egyptian, Greek, Goths, and others. In Ramayana Sita walks through fire to prove her purity. In Mahabharata Madri throws herself on her husband, pându’s fire. The practice of sati was mainly a medieval development and began to have appreciable effect on society after 1300 A.D. sanctified by long tradition and encouraged by Brahmins, the practice was firmly established as an integral part of Hindu social system in the Medieval period. Amongst the Rajput families the custom became firmly established. Muslim administrators did not like the custom. Sati continued to be practiced through Akbar, Jahanír and Aurangzeb banned this custom. It can be presumed that sati existed in some form in the pre-Vedic period. However, the evidence from the scriptures does not support the prevalence of the custom. The writers of early, Smritis like Manu and Yajnavalkya (100 A.D. to 300 A.D.), the greatest scriptural authorities, have laid down

specific rules on the duties of widow.\textsuperscript{145} The practice, however, was so shocking and revolting that the great social reformist Raja Rammohan Roy started the movement against the practice of sati. It was Lord Bentick who introduced the Regulation of 1812 which prohibited the commission of sati. When the said Regulation came into force, one Radhakanta Deb sent a petition against the said enactment to the Privy Council which, however, refused to block Lord Bentick’s legislation against sati.

Even after the aforesaid regulation of 1812, the practice of sati did not come to an end, though of course such incidents decreased immensely.\textsuperscript{146}

A few rulers of India tried to ban this custom. The Mughals tried to ban it. The British, due to the effects of Hindu reformers like Raja Ram Mohan Roy outlawed this custom in 1829. There are not exact figures about the number of sati incidences. In general, before this custom was outlawed in 1829, there were a few hundred officially recorded incidences each year. Even after the custom was outlawed, this custom did not vanish completely. It took few decades before this custom almost vanished. But still there are rare incidences in which the widow demands to voluntary commit sati. In 1987 an eighteen years old widow committed sati in a village of Rajasthan with the blessing of her family members. In this incidence the villagers took part in the ceremony, praising and supporting the widow for her act. In October 1999 a woman hysterically jumped on her husband’s pyre surprising everyone. But this incidence was

\textsuperscript{145} D.N. Datta, \textit{A Historical, Social and Philosophical Enquiry in Hindu Rite of Widow Burning}, 3 (1988).

declared suicide and not sati, because this woman was not compelled, forced or praised to commit this act. In response to this incident Roop Kanwar, some more recent legislation against the practice was passed, first by the State Government of Rajasthan, then by the Central Government of India. The Rajasthan Government enacted the Rajasthan Sati (Prevention) Ordinance, 1987 on October 1, 1987 and later passed the Commission of Sati (Prevention) Act, 1987 by the Centre.

In different communities of India, sati was performed for different reasons and different manners. In communities where the man was married to one wife, the wife put an end to her life on the pyer. But even in these communities not all widows committed sati. These women who committed sati were highly honoured and their families were given lot of respect. It was believed that the woman who committed sati blessed her family for seven generations after her. Temples or other religious shrines were built to honour the sati.147 On 18 May, 2006, Vidyawati, a 35 year old woman allegedly committed sati by jumping into the blazing funeral pyer of her husband in Rari-Bujurg Village, Fatehpur district in the State of Uttar Pradesh.148

On 21 August, 2006, Janakrani, a 40 year old woman, burnt to death on the funeral pyre of her husband Prem Narayan in Sagar district.149

(iii) Meaning of Sati

Sati (Devanagari: the feminine of Sat ‘true’) (also suttee) is a funereal practice among some Hindu communities in which a

147 http://adaniel.tripod.com/sati.htm-13k accessed on 06.08.2008
148 The Times of India, May 19, 2006 at 7.
recently-widowed woman would immolate herself on her husband’s funeral pyre. The term derived from the original name of the goddess Sati also knows as Dakshayani, who immolated herself, unable to bear her father Daksha’s humiliation of her (living) husband shiva. The term may also be used to refer to the widow herself. The term sati is now sometimes interpreted as ‘chaste woman’.  

(iv) Definitions

The act of sati basically involves three stages – the act itself, i.e. burning or sati, its glorification and the culmination with the establishment of a temple dedicated to the sati. The Act tries to define these three important concepts irrespective of the fact whether the act of sati was committed or not. According to Section 2(1)(c).

(a) Sati means burning or burying alive of:

(i) Any widow along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative; or

(ii) Any woman along with the body of any of her relatives, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the woman or otherwise.

(b) The term glorifications of sati like the term sati has been defined very broadly. Section 2(1)(b) states:

Glorification in relation to sati, whether such sati was committed before or after the commencement of this Act, includes, among other things:-

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(iii) The observance of any ceremony or the taking out of a procession in connection with the commission of sati; or

(iv) The supporting, justifying or propagating the practice of sati in any manner; or

(v) The arranging of any function to eulogise the person who has committed sati; or

(vi) The creation of a trust or the collection of funds or the construction of a temple or other structure or the carrying on of any form of worship or the performance of any ceremony with a view to perpetuate the honour of or to preserve the memory of a person who has committed sati.

(c) Temple is defined under Section 2(1)(e), other Commission of Sati (Prevention) Act, 1987

   Temple includes any building or the structure whether roofed or not, constructed or made to preserve the memory of a person in respect of whom sati has been committed or used or intended to be used for the carrying on of any form of worship or for the observance of any ceremony in connection with such commission.

(v) Punishments for Offences

   The Commission of Sati (Prevention) Act, 1987 provides punishment for three types of offences relating to sati:

   (a) Attempt to commit sati;

   (b) Abetment of sati; and

   (c) For glorification of sati
(a) **Attempt to commit Sati**

Attempt to commit Sati is made punishable in Section 3, that notwithstanding anything contained in the Indian Penal Code, 1860, wherever any person attempts to commit sati and does any act towards the commission of sati shall be punishable with imprisonment for a term which may extend to one year or with fine or with both. But the Special Court trying an offence under Section 3 shall, before convicting any person, take into consideration the circumstances leading to the commission of the offence, the act committed and the state of mind of the person charged with the offence at the time of the commission of the act and all other relevant factors.\(^\text{151}\)

(b) **Abetment of Sati**

Section 4 provides that-

(i) Notwithstanding anything contained in the Indian Penal Code, 1860, if any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable to fine.

(ii) If any person attempts to commit sati, whoever abets such attempt; either directly or indirectly, shall be punishable with imprisonment for life and shall also be liable to fine

Any of the following acts or the like shall be deemed to be an abetment, namely:

(i) Any inducement to a widow or woman to get her burnt or buried alive along with the body of her deceased husband or with any other relative or with any other article, object or thing associated with the husband or such relative irrespective of whether she is in a fit state of mind or is labouring under a state of intoxication or stupefaction or other cause impeding the exercise of her free will.

(ii) Making a widow or woman believe that the commission of sati would result in some spiritual benefit to her or her deceased husband or relative or the general well-being of the family;

(iii) Encouraging a widow or woman to remain fixed in her resolve to commit sati and thus instigating her to commit sati;

(iv) Participating in any procession in connection with the commission of sati or aiding the widow or woman in her decision to commit sati by taking her along with the body of her deceased husband or relative to the cremation or burial ground;

(v) Being present at the place where sati is committed as an active participant to such commission or to any ceremony connected with it;
(vi) Preventing or obstructing the widow or woman from saving herself from being burnt or buried alive; and

(vii) Obstructing or interfering with the police in the discharge of its duties of taking any steps to prevent the commission of sati.\(^{152}\)

(c) **Glorification of Sati**

Glorification is the intentional colouring of the act of sati with religion which is dangerous to the social order. An assault on the dignity of a woman cannot be allowed to be glorified. Hence, Section 5, provides punishment for glorification of sati. It provides that, whoever does any act for glorification of sati shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

(vi) **Power of Collector or District Magistrate to Prevent Offences Relating to Sati**

(a) **Power to Prohibit Certain Acts under Section 6 of the Commission of Sati (Prevention) Act, 1987**

1. Where the Collector or the District Magistrate is of the opinion that sati or any abetment thereof is being, or is about to be committed, he may, by order prohibit the doing of any act towards the commission of sati by any person in any area or areas specified in the order.

2. The Collector or the District Magistrate may also, by order, prohibit the glorification in any manner of sati by any person in any area or areas specified in the order.

3. Whoever contravenes any order made under sub-Section (1) or sub-Section (2) shall if such contravention is not punishable under any other provision of this Act, be punishable, with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

(b) Power to Remove Certain Temples or other Structures under Section 7 of the Commission of Sati (Prevention) Act, 1987

1. The State Government may, if it is satisfied that in any temple or other structure which has been in existence for not less than twenty years, any form of worship or the performance of any ceremony is carried on with a view to perpetuate the honour of or to preserve the memory of any person in respect of whom sati has been committed, by order, direct the removal of such temple or other structure.

2. The Collector or the District Magistrate may, if he is satisfied that in any temple or other structure, other than that referred to in sub-Section (1), any form of worship or the performance of any ceremony is carried on with a view to perpetuate the honour of, or to preserve the
memory of, any person in respect of whom sati has been committed, by order, direct the removal of such temple or other structure.

3. Where any order under sub-Section (1) or sub-Section (2) is not complied with, the State Government or the Collector or the District Magistrate, as the case may be, shall cause the temple or other structure to be removed through a police officer not below the rank of the sub-inspector at the cost of the defaulter.

(c) Power to Seize

The Collector or the District Magistrate has been given the power of seizure of certain properties. It has been provided that where the Collector or the District Magistrate has reason to believe that any funds or property have been collected or acquired for the purpose of glorification of the commission of any sati or which may be found under circumstances which create suspicion of the commission of any offence under this Act, he may seize such funds or property and shall report the seizure to the Special Court.153

(vii) Special Courts and Special Public Prosecutors

The Act prescribes constitution of Special Courts to try all offences under the Act. The State Government shall constitute one or more Special Courts for the trial of offences and the powers to be exercised will be as specified in the notification. The Special Court shall be presided over by a Judge who has been a Sessions Judge or Additional Sessions Judge immediately before such appointment,

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153 Section 8(1) and (2), The Commission of Sati (Prevention) Act, 1987.
appointed by the State Government with the concurrence of the Chief Justice of the High Court.\footnote{154}

For every Special Court, under Section 10 of the Act, it has been provided that there shall be an appointment of a Special Public Prosecutor who had been an advocate for not less than seven years under the State requiring special knowledge of law. The Special Public Prosecutor shall be deemed to be a Public Prosecutor within the meaning of Clause (4) of Section 2 of the Indian Penal Code.

(viii) Procedure and Powers of Special Courts

A Special Court has all the powers of a Court of Session and shall try such offence as if it were a Court of Session, in accordance with the procedure prescribed in the Code for trial before a Session Court.\footnote{155} It may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts.\footnote{156}

A Special Court when trying any offence under this Act may also try any other offence with which the accused may, under the Code, be charged at the same trial of the offence is connected with such other offence.\footnote{157}

If in the course of any trial of any offence under this Act it is found that the accused person has committed any offence under this Act or under any other law, a Special Court may convict such person...
also of such other offence, and pass any sentence authorized under this Act or under such other law for the punishment thereof.\textsuperscript{158}

In every inquiry or trial the proceedings shall be held as expeditiously as possible and, in particular, where the examination of witnesses has begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, and if any Special Court finds the adjournment of the same beyond the following date to be necessary, it shall record its reasons for doing so.\textsuperscript{159}

The Special Court under Section 13 has got power to declare that any article or property seized by the Collector or District Magistrate shall stand forfeited to the State.

(ix) Appeal

Section 14 of the Act provides for appeal from the order of a Special Court. It says notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgement, sentence, or order not being an interlocutory order of a Special Court to the High Court both on facts and on laws. Every appeal preferred shall be filed within a period of thirty days from the date of judgement, sentence or order appealed from provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring an appeal within the said period.

\begin{footnotesize}
\textsuperscript{159} Section 12(3), The Commission of Sati (Prevention) Act, 1987.
\end{footnotesize}
(x) **Burden of Proof**

Section 16 of the Act reverses the burden of proof on to the accused. Under the Act, it is the accused who has to prove that he has not committed the offence.

(xi) **Obligation to Report**

Section 17 of the Act imposes an obligation on certain public servants to assist the police in the apprehension of culprits. It is laid down that all officers of Government are required and empowered to assist the police in the execution of the provisions of this Act or any rule or order made thereunder and the village officers and such other officers as may be specified by the Collector or District Magistrate in relation to any area and the inhabitants of such area shall if they have reason to believe or have knowledge that sati is about to be or has been committed in the area, forthwith report of such fact to the nearest police station. Contravention of these obligations may result in a punishment of imprisonment for a term which may extend to two years as well as fine. The imprisonment may be simple or rigorous.

(xii) **Disqualification of Convicts**

Section 18 provides that a person who has been convicted for the offence of abetment of sati is disqualified from inheriting the property of the person in respect of whom such sati has been committed or the property of any other person which he would have been entitled to inherit on the death of the person in respect of whom such sati has been committed.

A person who is convicted of any offence under the Act incurs the disqualification for contesting any election for a period of five years.
years from the date of conviction. The Act has inserted a new clause in the Representation of the People Act. The newly inserted clause says:

“The propagation of the practice or commission of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.”

(xiii) Provisions for Sati under Indian Penal Code

The 1833 Charter to the East India Company empowered the Government to make laws for British India with due respect for native custom and usage. T.B. Macaulay, brilliant academician and lawyer was given the brief of formulating a comprehensive criminal code of universal application through the entire sub continent. He had no doubt in his mind that sati was a barbarous practice which could brook no justification. But the administration of 1860 and the Law Commissioners who revised the first draft, were unnecessarily alive to the sensitivities of high caste brahmanical feeling and watered down the murder provisions in their relation to sati by enacting exception 5 of Section 300. Under this, a mitigation was provided for murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent. Despite this concession under the Indian Penal Code, taking of life is absolutely prohibited to everyone in every circumstances. But punishment varies depending on the nature and circumstances of the offence.  

160 www.pucl.org/from-archives/Gender/Sati accessed on 08.08.2008.
If on the fact, the ritualistic public burning or burying alive of a woman is shown to be involuntary, it is murder plain and simple.\textsuperscript{161} In the unlikely even that the woman was a willing participant, her death still amounts to culpable homicide\textsuperscript{162} or at the very least to abetment to suicide.\textsuperscript{163} Even where a sati is deemed to be a suicide i.e. voluntary self-killing, the presence of any intoxicant or anything which in fact inhibits free will makes the better as culpable as if he had helped murder the victim.\textsuperscript{164} The punishment for this is exactly the same as for murder.

Where the sati is incomplete, a person helping to achieve it is caught by the attempt Section of the Indian Penal Code. Depending again on the circumstances, the crime may be attempt to murder,\textsuperscript{165} attempt to culpable homicide not amounting to murder,\textsuperscript{166} or abetment to suicide punishable with one year's imprisonment and attempt to commit suicide which is an offence for the woman as well.

Under the present Indian Penal Code no one who abets a sati should escape the consequences of his acts. Abetment can take the form of instigation, conspiracy to do an act or make an illegal omission, intentional aiding, or willful misrepresentation or willful concealment.\textsuperscript{167} Again depending on the facts, the aider could be abetting murder, culpable homicide. From all the above it is clear that there are enough and more laws on the statute books to punish

\begin{footnotesize}
\begin{enumerate}
\item Section 300, the Indian Penal Code, 1860.
\item Section 299, the Indian Penal Code, 1860.
\item Section 306, the Indian Penal Code, 1860.
\item Section 305, the Indian Penal Code, 1860.
\item Section 307, the Indian Penal Code, 1860.
\item Section 308, the Indian Penal Code, 1860.
\item Section 107, the Indian Penal Code, 1860.
\end{enumerate}
\end{footnotesize}
those guilty of making any human sacrifice including widow burning.

The glaring and obvious infirmity in the Act is its acceptance of the act of sati as suicide and under Section 3 of the Act, attempt to commit sati is punishable with imprisonment of one year or with fine or with both. It shows as if the woman commits sati voluntarily whereas it is an established fact that she is always forced to commit sati by the relatives of the husband to fulfil their ulterior motives. Further, sati can never be suicide because the woman does not light her own funeral pyre. Someone else set it a light and she is either psychologically forced to or physically pushed onto it. Those who are guilty of burning a woman alive with her husband’s pyre must be punished for committing the offence of murder. The law would prove much stronger deterrent, if Section in the aforesaid Act on the commission of sati had charged the perpetrators of the crime with the offence of murder. Because they are bringing about the killing of the widow to devour the property of which she is the absolute owner under Hindu Succession Act, 1956. While the Section 5 on the glorification of sati in any form is fairly comprehensive it would have been more strengthened if, as suggested by many woman’s groups that those who give donations for temples glorifying sati are made liable to prosecution under the law.