A piece of legislation is the reflection of social ideology of a given society. The legislative measure is a potent tool to bring about subtle transition in the attitudes of the people, though gradually and at times with resistance. It depicts the acceptable standards in a society. The government hinges upon the clearly enunciated mandate of the Constitution to take an affirmative action to protect and promote the cause of women, to remove their disabilities, to provide them a place of dignity, equality and opportunity for employment. From time to time, Indian legislatures have passed various laws to combat contemporary problems, have amended the existing laws in response to the egalitarian urges of the Constitution.

A. Child Marriage and the Law

Child marriage, as an institution is legitimised, sanctioned and promoted by the cultural norms, social customs and religious sanctions. It is a deplorable evil the consequences of which are worrisome especially for the girls. Girls and the worst sufferers because of this practice in the patriarchal societies. It is a profoundly entrenched social evil having serious implications on the status of women. Three key concerns are the denial of childhood and adolescence, the curtailment of personal freedom and the lack of opportunity to develop a sense of selfhood as well as the denial of psychological and emotional well-being, reproductive health and educational opportunity. Pre-mature cohabitation, early child bearing, greater maternal mortality are the inevitable effects of child marriage which lead to the vicious circle of persistent poverty, high illiteracy, high incidence

of infectious diseases— including HIV/AIDS, high rate of maternal and child mortality— reinforcing the subordinate status of women. Girls between 15 and 19 years are twice as likely to die of pregnancy-related reasons as girls between 20 and 24. In the child marriage, not only the rights of the individuals involved get violated but their unpreparedness to protect against any violation makes them more vulnerable to further exploitation. Child marriage has bearing on the health and general well being of the children involved and undermines the ‘best interest of the child’.

Article 16(2) of the United Nations Universal Declaration of Human Rights, 1948 recognizes that “marriage shall be entered into only with the free and full consent of the intending spouses.” It recognizes that consent “cannot be free and full” when one of the parties involved is not sufficiently mature to make an informed decision about a life partner. Article 16(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 to which India is a signatory, says that State Parties have to ensure that they take measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular shall ensure, that women have the right “freely to choose a spouse and to enter into marriage only with free and full consent.”

For the protection of the rights of children under International Law, the United Nations Convention on the Rights of the Child (CRC) adopted by General Assembly on November 20, 1989 is the most important legal instrument.

Under Article 27 of CRC, the States Parties are obliged to recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development. Article 19 (1) of CRC requires the States Parties to take all appropriate measures to protect the Child from all forms of physical or mental violence, including

\[2\] Ibid.
sexual abuse. By Article 28 CRC, duty is cast on the State Parties to recognize the right of the child to education and to make primary education compulsory and available free at all.³

The National Family Health Survey 1998-99 found that 65% of girls are married by the time they are 18. The same survey also found that 56% of adolescent girls in India in the age group 15-19 years are anaemic. For girls it often signifies an end to their individual will, aspirations and plunges them into a cycle of early pregnancy, poor health, frequent child bearing and somewhere in between, the possibility of an untimely death.⁴

For obvious reasons child marriage cannot be justified. Its disadvantages outweigh any justification in favour of this practice. Its repercussions are primarily manifested in poor psychological, social and physical health of the minor bride. It is a direct deprivation of the children's human rights to personal freedom and growth and development and also destructive of their happiness.⁵ Over 51 million adolescent girls aged 15-19 years in the world are currently married and bearing the burden of domestic responsibility, early pregnancy, and other risks including HIV/AIDS.⁶

Child marriage is a serious national problem and it is estimated that roughly a half of all marriages taking place in India in a year the girls are under-aged. According to the Rapid Household Survey conducted across the country, 58.9 per cent of women in Bihar were married off before age 18, 55.5 per cent in Rajasthan; 54.9 per cent in West Bengal; 53.8 per cent in UP, 53.2 per cent in Madhya Pradesh, and 39.3 per cent in Karnataka.

³ Right to education has been made a fundamental right by Article 21-A of the Constitution of India.
⁴ Supra note 1.
⁵ Ibid.
Jammu & Kashmir has the lowest percentage of underage marriages with 3.4 per cent followed by Himachal Pradesh with 3.5 per cent and Goa with 4.1 per cent. Despite high literacy, close to one tenth of Kerala women are married off before attaining the legal age of 18 years. The repercussions of early marriage are manifested in poor psychological, social and physical health of the minor bride.

The only existing law in India that specifically deals with the issue of child marriage is the Child Marriage Restraint Act, 1929, which was enacted by the British Government owing to pressure from reformers and women's groups. The Act is popularly known as Sarda Act after the author of the Bill Harbilas Sarda. This piece of legislation prohibited the solemnization of child marriages, but did not declare them invalid or illegal. In words of Harbilas Sarda:

Child marriage is a crime which sometimes results in the death of the victim, the bride and sometimes maiming her for life.... The Act primarily deals with a crime, a grave crime against girls. It is an attempt by indirect means to put a stop to the inhuman acts which go unpunished behind the screen of social religious validity. The Child Marriage Restraint Act is a measure which tackles an evil much more grave than sati, because it is far more devastating in its consequences and more insidious in its working.

Since its enactment the Child Marriage Restraint Act, 1929 has been amended in 1938, 1951, 1968 and 1978 and the age of consent has been raised a number of times. In 1978 the amendment of the Act fixed the age of consent for males to be 21 years and for females to be 18 years.

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7 Soumya Bhaumik, "Compulsory Registration of Marriages" at http://timesfoundation.indiatimes.com/articleshow/64123.CMS.
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The Child Marriage Restraint Act is silent about the effect of child marriages, whether such marriages are “illegal” or “voidable”. This Act aims at the restraint of performance of certain marriages. The question of validity of the marriages is beyond the scope of this Act. The object of the Act is to restrain a marriage but it does not render it illegal or invalid.\(^9\) The Act does not affect the validity of the marriage even though it may be in contravention of the Act. In spite of the marriage being valid, the legislature disapproves of such marriages and makes the performance of such marriage punishable under the law.\(^10\) However, the Act does not address the rights of persons already married.

The Act does not address the implications of the sexual and reproductive aspect of the child bride. The Act does not even apply to situations of trafficking, health hazards and the related problems of the girl child. The Act does not empower the police to stop child marriages if it comes to their knowledge. Mild punishment prescribed for child marriage hardly serves as a deterrent.

Prior to amendment of 1978, the offences under the Child Marriage Restraint Act (CMRA) were not made cognizable. However, the amendment made the offence cognizable only for certain purposes, giving an impression to the enforcing authorities that offences under the Act are of lesser gravity.\(^11\)

Another obstacle is the period of limitation fixed for taking cognisance which prevents any court to take cognisance of any offence

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11. Section 7 of the Child Marriage Restraint Act provides that the Code of Criminal Procedure 1973 (2 of 1974) shall apply to offences under this Act, as if they are cognizable offences – (a) for purpose of investigation of such offences, and (b) for the purpose of matters other than (i) matters referred to in Section 42 of that Code; and (ii) the arrest of the person without warrant or without an order of a magistrate.
under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.\textsuperscript{12}

In \textit{Krishna Pillai v. T.A. Rajendran},\textsuperscript{13} the Court observed that taking cognizance of offence after expiry of one year from commission of offence is barred under Section 4 of the Act. It cannot be justified on the ground that complaint was filed before the Court within one year from the date of commission of offence. Date of filing complaint cannot be treated as date of taking cognizance. Filing of a complaint in a court is not taking cognizance and what exactly constitutes taking cognizance is different from filing a complaint.\textsuperscript{14}

Another minor restraint is the immunity of women from the punishment of imprisonment. There is no provision in law to penalise persons other than parents or priests for abetment of child marriages.

Injunctions for restraining child marriages cannot be issued under the law without notice to the opposite party and hearing of the one against whom complaints are made\textsuperscript{15}. This may not help in preventing such marriages, as the complaints may be made rather late, just before the marriage which could take place even before notice is issued by the Court.

At present, according to the Hindu Marriage Act, a girl can opt out of marriage and get divorce if she was below 15 years of age at the time of marriage and repudiates the marriage between 15 and 18 years. These age limits are arbitrary and are not consistent with the spirit of 1978 Amendment to the CMRA. Despite the permissible age of marriage for girls being stipulated as 18 years, the age for marital consummation under the Indian Penal Code is 15 years, which is a grave contradiction in itself.

\textsuperscript{12} Section 9, \textit{The Child Marriage Restraint Act}, 1929.
\textsuperscript{13} 1990 Supp SCC 121.
\textsuperscript{14} \textit{Id.} at 122.
\textsuperscript{15} Section 12, \textit{The Child Marriage Restraint Act}, 1929.
Very few cases of child marriage come before the courts as complaints are not made; even where complaints are made courts have tended to dismiss them on technical grounds.\textsuperscript{16}

There is as yet no legal stipulation for compulsory registration of marriages which can act as a deterrent in the solemnization of child marriage. The Committee on the Status of Women in India (CSWI) recommended compulsory registration of marriages to check the child marriages, which would also provide reliable proof of marriages\textsuperscript{17}. Non-registration of marriage affects women the most.

Following recommendations by the National Human Rights Commission and the National Commission for Women, the Central Government introduced the Prevention of Child Marriage Bill in the Rajya Sabha in December, 2004. The Bill was referred to a Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice headed by E.M. Sudarsana Natchiappan of the Congress.\textsuperscript{18}

The Bill says that a child marriage is voidable at the option of a contracting party who was a child at the time of marriage. It enables a person who was married as a child to file a petition asking for the marriage to be nullified. But the petition must be filed within two years of attaining majority. If the petitioner is the minor, the petition can be filed through the guardian or next friend along with the Child Marriage Prevention Officer (CMPO).

Under the Bill, a child marriage is void if the child is taken out of the custody of a lawful guardian and made to go through with the marriage, is

\textsuperscript{16} Supra note 13. The case was dismissed as the magistrate had not taken cognizance of the offence in the specified time, even though, the complaint as such was filed within the time limit.


\textsuperscript{18} Siddharth Narain, “Ambivalence in the law”, \textit{Frontline} (July 2-15, 2005) at www.fionnet.com/ff2214/Stories/20050715004802300.htm
sold into marriage or if a minor is married and then trafficked or sold. A petition asking for marriage to be nullified can be filed before a family court or a district court.  

The Bill makes child marriage a cognizable and non-bailable offence. Under the Bill, any male above the age of 18 years marrying a female child will be punished with imprisonment for two years, or a fine of Rs. 1 lakh or both. Parents and guardian and a person who performs, conducts or directs a child marriage can be punished with imprisonment for three months and a fine.

The Bill also covers organizations and associations that promote or permit child marriages as well as a person abetting such a marriage. Both these are punishable with imprisonment for two years and a fine up to Rs. 2 lakh or both. The Bill enables a magistrate to issue an injunction prohibiting a child marriage, and a marriage performed in contravention of an injunction order is void. Contravening an injunction is punishable with imprisonment for two years and a fine of up to Rs. 1 lakh or both.

Though the Child Marriage Prevention Bill is an improvement over the existing Act. According to Colin Gonsalves, Senior Advocate from Human Rights Law Network, instead of plugging the loopholes in the law, what the Bill does is to make sure that the marriage is rendered void only if the children file legal proceedings for this purpose. But given the social pressure surrounding such marriages, it is unlikely that any case will be filed. It has further been pointed out by Deepika Farias from Global Rights: Partners for Justice, an NGO working on this issue in Karnataka and Rajasthan that under the present Act, it is unrealistic to expect a minor between the age of 15 and 18 to repudiate a marriage. The Courts, however, have read these provisions liberally and have annulled marriages, but there is still an anomaly in the law.
There is a provision for granting maintenance to the girl till she remarries, in case a decree of nullity has been made. There is also a provision for granting the girl residence in case an application for nullification is made by her. The Bill also makes provisions for the custody of the child.

The Bill provides for the appointment of Child Marriage Prevention Officer (CMPOs) across the country, whose role is to prevent child marriages, investigate complaints and gather evidence to prosecute any violation of the law. The CMPO is incharge of creating awareness on the issue furnishing statistics on child marriage to the State Government, and petitioning the Court for orders related to maintenance, custody and injunctions. The Bill specifically provides that in order to prevent the solemnization of child marriages on auspicious days like Akshaya Trithiya, the District Magistrate is deemed to be the CMPO and has the power to prevent the solemnisation of mass child marriages during this period. Child rights groups and NGOs have pointed during consultations in Delhi and Bangalore that the Bill is silent on the question of compulsory registration of marriages. There is consensus that for the Bill to be effective it ought to define specifically the role of the police and government officials who may aid and abet child marriages, or elected representatives who solemnize child marriages.  

The Forum of Fact Finding Documentation and Advocacy filed a writ petition in the Supreme Court in 2003. In that petition, “all persons and/or authorities of Government of India including the State Government of Chhattisgarh, Madhya Pradesh, Bihar, Rajasthan, Jharkhand, Orissa, Andhra Pradesh, Maharashtra, Uttar Pradesh, Kerala and Karnataka within the territory of India” were named as the respondents. The petition states that the respondents had been impleaded in the petition on the grounds of

19 Ibid.
inaction on their part to prevent gross violations of children’s rights by failing to ensure the implementation of the Child Marriage Restraint Act, 1929 and in abetting this widespread practice by not taking punitive action against officials responsible at various levels including police personnel. The petition focused on one of the conspicuous facts that the age of children who were married in mass marriages was between 2 to 17 years. In response to this petition the Supreme Court of India, issued an order to all the named states to immediately make submission regarding the status of child marriages in the respective States and to present Action Taken Reports.  

The law and social movement need to move hand in hand to combat the problem of child marriages.

B. Women and Property Rights

A woman occupied a very dependent position in the joint family system and her rights to hold and dispose of property have generally been limited. The joint family system in the Hindu Law traces its origin to the ancient patriarchal system. Even under the early Hindu Law, rights of sons (as junior members of the family) were recognized and they acquired equal interest with the father in the ancestral property as coparceners. However, in the entire history of Hindu Law, right of woman to hold and dispose of property has been recognized, but in respect of a meagre quantum of property. At no time whether as a maiden, wife or widow, has the woman been denied the use of her property as an absolute owner (apart from the husband’s dominant position in respect of certain type of stridhan).  

20 “Petition to the Chief Minister of Karnataka, India” at http://www.workingchild.org/PetitionCM.htm  
22 Id at 281.  
With the passage of time, change in social and economic conditions necessitated equitable distribution between male and female heirs in succession. Since long it has been felt that the laws regulating property rights were discriminating to the females despite constitutional guarantee of equality to women. The Courts have also recognized the importance of equality of woman in matter of property.

In *V. Tulasamma v. Sesha Reddy*, the Supreme Court, cognizant to equality in intestate succession by a Hindu woman, held that after the advent of independence old human values assumed new complex; women need emancipation; a new social order needs to be set up giving women equality and place of honour; abolition of discrimination based on equal right to succession is the prime need of the hour and temper of the time.

Emphasizing on the mandate to the State to eliminate all forms of gender based discrimination, the Supreme Court in *Madhu Kishwar v. State of Bihar*, has observed that property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore the State should create conditions and facilities conducive for women to realize the right to economic development including social and cultural rights.

Some inequitable rules of succession had come into existence due to historical reasons and in certain cases, due to conservatism of judicial interpreters, who at times relied on variant readings of ancient texts. Attempt was made to alter the legal position of women in respect of property by enacting Hindu Women’s Right to Property Act, 1937. This law

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24 AIR 1977 SC 1944.
25 Id. at 1961.
27 Id at 148.
28 Supra note 21 at 282.
introduced significant changes in the law of succession and enlarged the rights of certain category of female, namely widow and what was given to her was the representation of her husband in the family estate in spite of husband’s death.29 While the object of the Act is to confer new rights of succession upon the widows mentioned in it, it not only alters the order of succession, but involves far reaching consequences in many departments of Hindu Law, particularly in relation to Mitakshara coparcenary.30 A Hindu widow by virtue of the rights given to her by Sub-section (2) and (3) of Section 3,31 does not become a coparcener. That right under the Hindu common law could only belong to a male.

A Full Bench judgment of the Bombay Court in Ranu Thaku v. Santu Goga,32 has pointed out that certainly the widow is not raised to the statutory position of a coparcener, though she continues to be a member of the joint Hindu family as she was before the Act. The joint family would continue as before, subject only to her statutory right. The Hindu conception that a widow is the surviving half of the deceased husband was invoked and a fiction was introduced, namely, that she contained the legal persona of the husband till partition. If she divided herself from the other members of the family during her lifetime, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to the other members of the joint family.33 Thus the widow’s

30 Mayne’s Treaties on Hindu Law and Usage at 1012 (2006).
31 The Hindu Women’s Right to Property Act, 1937. Section 3 (2) – When a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by Customary Law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.
32 AIR 1968 Bom 1.
33 Id at 6.
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interest got settled only when a partition was effected. The reference to "a 
male member" was advisedly made not to make her a full-fledged 
coparcener but to give her the same right of partition which the coparcener 
had. The estate taken by the widow, the widowed daughter-in-law, or the 
widowed grand-daughter-in-law, is "the limited interest known as a Hindu 
woman's estate" by virtue of Section 3(3). The widow took a share equal to 
the share of a son and in default of the son took the entire property. If there 
were more than one widow, all of them together took one share.

The Hindu Women's Right to Property Act, 1937 has been repealed 
by the Hindu Succession Act (Act XXX of 1956) which has codified the 
Hindu Law relating to intestate succession. The main scheme of this Act is 
to establish complete equality between male and female with regard to 
property rights, and the rights of the female were declared absolute, 
completely abolishing all notions of a limited estate. The concept of 
"Hindu Woman's Estate", or the "Limited Estate" in the Hindu Law has 
been abrogated under the Hindu Succession Act, 1956 which has given to 
Hindu females full rights of inheritance, completely doing away with the 
limitations on their power of disposition. A Hindu female has been made a 
full owner of the property of which before the enactment of the legislation 
she was merely a limited owner.

Section 14 of the Hindu Succession Act, 1956 provides in explicit 
terms that a female Hindu possessed of property whether acquired before 
or after the commencement of the Act holds it as full owner and not as a 
limited owner. The interest to which a widow became entitled on the death

34 Id at 5.
35 Supra note 23 at 386.
36 Supra note 29 at 81.
37 The Hindu Succession Act, 1956. Section 14 – Property of a female Hindu to be her absolute 
property – (1) Any property possessed by a female Hindu, whether acquired before or after 
the commencement of this Act, shall be held by her as full owner thereof and not as a limited 
owner.
of her husband under Section 3(2) of the Hindu Women's Right to Property Act, 1937, in the property of the joint family is indisputably her "property" within the meaning of Section 14 of the Act 30 of 1956 and when she became "full owner" of that property in duration and unlimited in point of disposition.\textsuperscript{38} The effect of the Section 14 is to transform that statutory interest of the widow of which she was a limited owner into that of a full owner. Now Section 14 confers full heritable capacity on female heir. To put it the other way the effect of the rule laid down in this section is to abrogate the stringent provisions against the proprietary rights of a female which are often regarded as evidence of her perpetual tutelage and to recognize her status as independent and absolute owner of property.\textsuperscript{39} The full ownership conferred upon a Hindu female by Section 14 would have all the attributes of full ownership as is understood normally in law. The first consequence is that there is no question of reversion after the death of the Hindu female and she would constitute a fresh stock. Succession to her property will be governed by the provisions of the Hindu Succession Act and not by the \textit{Shastric Hindu Law}. Being full owner she is entitled to dispose of the property by transfer \textit{inter vivos} or by will. The full ownership conferred on a Hindu female under Section 14(1) of the Hindu Succession Act is not defeasible by the adoption made by her to her deceased husband after the Act came into force.\textsuperscript{40}

Under pure Hindu Law, according to Mitakshara School, the female heirs are not members of coparcenary. Within the larger body of the joint Hindu Family daughters are also members of the joint family until they are married though they are not coparceners. Women introduced in the family by marriage are also members of the joint family though they could not be


\textsuperscript{39} \textit{Supra} note 21 at 378.

\textsuperscript{40} Punithavalli Ammal \textit{v.} Ramalingam, \textit{AIR} 1973 S.C. 1730 at 1731-1732.
coparceners. The Hindu Succession Act, 1956 has brought about changes in the law of succession among Hindus and conferred rights which were till then unknown in relation to women’s property but it did not give the daughter equal rights in the ancestral property.

In order to remove gender discrimination in the Hindu Succession Act, 1956, the Law Commission of India in its 174th Report on “Property Rights of Women: Proposed Reform under the Hindu Law” made certain recommendations. A significant step has been taken towards gender equality with the enactment of Hindu Succession (Amendment) Act, 2005. Now the daughter has been given an entry into the coparcenary of her family who will be counted among those members who are entitled to seek partition and get equal share in the ancestral property.

By amending Section 6 of the Act, now in a joint Hindu Family governed by Mitakshara Law, daughter of a coparcener shall a) also by birth become a coparcener in her own right in the same manner as the son, b) have the same rights in the coparcenary property as she would have had if she had been a son; c) the daughter would however be subjected to the same liabilities in respect of coparcenary property as that of a son. Now a daughter of a coparcener in a joint Hindu Family governed by the Mitakshara Law becomes a coparcener in her own right and thus enjoys rights equal to those hitherto enjoyed by a son of a coparcener. The implications of this fundamental change are quite wide. Now the daughter being at an equal footing with a son of a coparcener, is invested with all the rights, including the right to seek partition of the coparcenary property. Now she can also become karta of the joint Hindu family because of the new provision, whereas under the old law she could not Act as karta.41

Sub-section (2) of Section 6, besides emphasizing the right of a daughter as a coparcener, stipulates the right of any female Hindu over coparcenary

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41 Supra note 21 at 309, 310.
property. In the eventuality of a partition of the property, apart from sons or daughters of a coparcener getting a share in the property of the deceased coparcener, the wife of such coparcener would be entitled to a share as his widow. The entitlement of a wife of a coparcener to claim her right in the property is in no way abrogated.42

The Act deletes Section 23 of the Hindu Succession Act, 1956 giving all daughters, irrespective of their marital status, the same rights as sons to reside in or seek partition of the family dwelling house. Section 23 denied a woman the right to seek partition of an inherited “dwelling” unit or house if other male members were residing in it. It further restricted her right to reside in the inherited residence unless she was separated, deserted by her husband or was a widow. The reason for such deletion is to remove the disability faced by a female heir in claiming her share in the property, as the Section disentitled the female heir from claiming a partition of such property belonging to a joint Hindu family.43

To put it other way, Section 23 of the Act before amendment indicated that the female having share in the property may not be able to seek partition at her own instance.44

The present Act also deletes Section 24 of the Hindu Succession Act, 1956 which barred certain widows, such as those of predeceased sons from inheriting the deceased’s property if they had remarried. Now they can so inherit. Widows will not lose the right of inheritance if they remarry and heirs of pre-deceased daughters will be treated at par with heirs of pre-deceased sons, including agricultural land and ancestral houses.

The Hindu Succession (Amendment) Act, 2005 is a significant achievement in addressing some persisting gender inequalities in the 1956 Hindu Succession Act.

42 Id. at 310.
43 Id. at 449.
Making all daughters including married ones, coparceners in joint family property is of great importance for women, both economically and symbolically. It will provide economic security to women by giving them birth right in property. Even if her marriage breaks down, she can now return to her birth home by right, and would not be at the mercy of relatives for shelter.

Looking at it from other perspective, making daughters coparceners will decrease the shares of other class I female heirs such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit will decline. On the one hand the amendments will reduce inequality between sons and daughters on some counts, on the other hand they will increase inequality between daughters and other women on the same counts.\textsuperscript{45}

Section 30 of the Hindu Succession Act, 2005 retains Section 30 of the old Act of 1956 that allows any Hindu to make unrestricted testamentary disposition of his joint family property. This section can potentially be misused to disinherit women. Restricting testamentary rights to half or two-thirds of the property as found in other jural systems of India and in Europe, would be a step in right direction.\textsuperscript{46}

It is nonetheless too early to assess the implications of these amendments. Undeniably it is a positive approach towards enhancing the status of women by securing their interest in a constructive and realistic manner.

C. Dowry System and Legal Development

With a long historical background based on implied ideologies, the custom of dowry has undergone perceptible transition. In ancient times, \textit{Kanyadaan} was considered to be a pious duty. In order to complete the ritual of \textit{Kanyadaan}, the daughter was gifted away laden with presents and presents and


\textsuperscript{46} Ibid.
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decked up with expensive ornaments. Another justification for giving dowry was that it was a means of giving her share from the parents' wealth.

However, this benevolent practice of giving presents to the daughter at the time of her marriage has assumed abnormal proportions. In the course of time, the term "dowry" has acquired synonymity with Indian women's plight under the patriarchal set up leading to rising number of dowry deaths which is indicative of low value of women and exorbitant cost of their marriage.

Efforts of various social reformers led to the enactment of piecemeal legislations to fight this social evil. The Bihar Government passed the Bihar Dowry Restraint Act in 1950 and Andhra Pradesh enacted the Dowry Prohibition Act, 1958. However, the need was felt to have a Central legislation prohibiting dowry. On December 5, 1958, a Bill entitled Dowry Restraint Bill was introduced in the Rajya Sabha. The Bill received the assent of the President on 20 May 1961 and came to be known as the Dowry Prohibition Act (Act XXXVIII of 1961). It was enforced with effect from July 1961.

The law relating to prohibition of dowry came to be applicable uniformly throughout the country as Section 10 of the Act repealed the earlier State enactments. Section 3 prescribed punishment both for giving and taking of dowry which provided for imprisonment up to six months or a fine of up to Rs. 5,000/- or both. Section 6 laid down that the dowry by way of gifts or presents shall be for the benefit of the wife or her heirs. Section 8 provided that offences under this Act were non-cognizable, bailable and non-compoundable. Section 9 provided the rule making power of the Central government.

The Dowry Prohibition Act, 1961 was amended by Dowry Prohibition (Amendment) Act, 1984 (Act 63 of 1984) which was enforced from 2 October, 1985. Section 3 enhanced punishment from six months to two years and doubled the amount of fine from five thousand to ten thousand rupees, thereby making the punishment more stringent. Section 6 reduced
the time limit from one year to three months within which dowry was to be restored to the bride. Amendments to Section 7 and Section 8 are significant. Amended Section 7 enabled the police and recognized welfare institutions, in addition to parents and relatives of the aggrieved person to report such offences to the Court. Amended Section 8 made the offences to be cognizable for certain purposes.

Despite these amendments there was spurt in the cases of 'dowry deaths' which was a matter of grave concern and sought further amendments keeping in view the spiralling number of callous deaths of the brides. On 22 August 1986, the Dowry Prohibition Amendment Act, 1986 was passed, which brought about sweeping changes. Besides enhancing punishment for taking dowry, it also brought about sweeping changes in the penal statutes. It was for the first time the term 'dowry death' was defined by making it an offence under Indian Penal Code, 1860. Insertion of Section 498-A\textsuperscript{47} in 1983 and Section 304-B\textsuperscript{48} in 1986 in the Indian Penal Code, 1860 and the consequential amendments in the Code of Criminal

\textsuperscript{47} The Indian Penal Code, 1860. Section 498-A. 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.

\textit{Explanation.}—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 commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

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

\textsuperscript{48} Ibid. Section 304-B. Dowry death.—(1) Where the death of a woman is caused by any 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 her death.

\textit{Explanation.}—For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.
Chapter-VI

Procedure, 1973⁴⁹ and the Indian Evidence Act, 1872⁵⁰ sought to strengthen the existing laws to curb the evil of dowry. The amending Act made any offence under the Act to be non-bailable.⁵¹

The Dowry Prohibition Act as it stands today as amended is intended to prohibit giving and taking of dowry. By Section 5 it has been enacted that any agreement for the giving or taking of dowry shall be void. Section 3 makes abetment of the giving or taking of dowry an offence.

The definition of dowry under Section 2 of the Dowry Prohibition Act includes any property or valuable security given or agreed to be given either directly or indirectly:

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

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⁴⁹ The Code of Criminal Procedure, 1973. Section 174 (3) is applicable when –
(i) the case involves suicide by a woman within seven years of her marriage; or
(ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or
(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or
(iv) there is any doubt regarding the case of death; or the police officer for any other reason considers it expedient so to do;
Section 176 deals with inquiry into cause of death, when the case is of the nature referred to in Cl (i) or Cl (ii) of sub section (3) of Section 174.

⁵⁰ The Indian Evidence Act, 1872. Section 113-A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.
Explanation.—For the purposes of this section, “cruelty” shall have the same meaning as in Section 498-A of the Indian Penal Code (45 of 1860); Section 113-B. Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.
Explanation.—For the purposes of this section, “dowry death” shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).

⁵¹ The Dowry Prohibition Act, 1961, Section 8(2), Subs. By Act 43 of 1986, Section 7, for the word “bailable”.

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b) by the parents 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 connections with the marriage of said parties.

This definition as amended by Act 63 of 1984 and Act 43 of 1986 does not leave anything to doubt that demands made after solemnization of marriage would be dowry. The amended definition makes it clear that the property or the valuable security need not be as a consideration for marriage as was required to be under the unamended definition. This apart, the addition of the words "any time" before the expression "after the marriage" would clearly show that even if the demand is made long after the marriage the same could constitute dowry, if other requirements of the section are satisfied. It would appear from Section 2 that consent to comply with the demand for any property as consideration for the marriage would alone make the property or valuable security given or agreed to be given directly or indirectly, "dowry" within the meaning of the Act.

In Madhu Sudan Malhotra v. Kishore Chand Bhandari & Others the Court observed that furnishing of a list of ornaments and other household articles such as refrigerator, furniture, electric appliances etc. at the time of settlement of marriage amounts to demand of dowry within the meaning of Section 2(1) of the Dowry Prohibition Act, 1961.

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52 Pawan Kumar v. State of Haryana, AIR 1998 SC 958, demand of scooter and fridge, when not being met lead to repetitive taunts and maltreatment, just after a few days of marriage. Such demands cannot be said to be not in connection with the marriage. Hence the evidence qualifies to be demand for dowry in connection with the marriage and in circumstances of the case constitutes to be a case falling within the definition of "dowry" under section 2 of the Dowry Prohibition Act, 1961 and section 304-B of the Indian Penal Code.


However, articles received as presents and gifts at the time of marriage cannot be termed as dowry, when given voluntarily. The presents must be listed. Moreover, the giving of such presents should be part of local custom and their value must be proportionate to the financial capacity of the giver.56

The amended Section 3 (2) of the Act does not specify the value of the gifts to be given at the time of marriage. It only states that this value should not be “excessive” in comparison with the financial status of the giver. Such vaguer ess leaves scope for endless disputes and litigation. It is a loophole in the Act that allows dowry by the backdoor.

The amendment of Section 3 by the Act 43 of 1986 makes the person or persons guilty of giving or accepting dowry liable to imprisonment for a minimum period of five years and fine not less than Rs. 15,000/- or the amount of the value of such dowry, whichever is more.

Whereas, any person demanding dowry, directly or indirectly, from the parents or relatives or guardian of a bride or bridegroom 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 the fine which may extend to ten thousand rupees.57 For adequate and special reasons the Court has the power to grant lesser punishment but the reasons must be recorded in writing.

The demand for dowry is prohibited under law. That by itself is bad enough. That amounts to cruelty entitling the wife to get a decree of dissolution of marriage.58 Section 4 of the Dowry Prohibition Act aims at discouraging the very “demand” of “dowry” as a “consideration for marriage” between the parties thereto. It is not necessary that the demand

56 Section 3(2) Inserted by Act 63 of 1984 (w.e.f. October 2, 1985).
57 Section 4, Subs. By Act 63 of 1984, Section 4 (w.e.f. October 2, 1985).
of dowry can only be made being present physically. Such demand can also be made over telephone and threats can also be given for non-fulfilment of dowry over telephone.\(^{59}\)

In *L. V. Jadhav v. Shankarrao Abasaheb Pawar & Others*\(^{60}\), the very demand of property or valuable security as consideration for marriage, even if made prior to the woman or man becoming ‘bride’ or ‘bridegroom’ and even in absence of consent of the other party, would constitute an offence under the Act. The entire definition of the word ‘dowry’ should not be imported into Section 4. The word ‘bride’ or ‘bridegroom’ in Section 4 should not be strictly construed to mean woman or man who has just been married or is about to be married. Having regard to the object of the Act a liberal construction has to be given to the word ‘dowry’ used in Section 4 of the Act to mean that any property or valuable security which if consented to be given on the demand being made becomes dowry within the meaning of Section 2 of the Act. The Court opined that the object of Section 4 of the Act is to discourage the very demand for property or valuable security as consideration for a marriage between the parties to it.\(^{61}\)

Thus, it would be seen that Section 4 makes punishable every demand of property or valuable security as a consideration for marriage, which demand, if satisfied, would constitute the graver offence punishable under Section 3 of the Act. The Supreme Court in *Reema Aggarwal v. Anupam & Others*\(^{62}\) clarified that under Section 4, where demand of ‘dowry’ is sufficient to bring home the offence to an accused, where any such demand is not referable to any legally recognized claim and is

\(^{59}\) *Samir Francis & Others v. State of Orissa and another*, 2003(4) RCR (Criminal) 206 (Orissa) at 208.

\(^{60}\) (1983) 4 SCC 231.

\(^{61}\) Id. at 239.

\(^{62}\) 2004(1) RCR (Criminal) (SC) 776 at 780, 781.
relatable to the consideration of marriage, would fall within the mischief of 'dowry'. Marriage in this context would include a proposed marriage also, more particularly where the non-fulfilment of the “demand of dowry” leads to the ugly consequence of the marriage not taking place at all. The Supreme Court further said that the expression “dowry” under the Dowry Prohibition Act has to be interpreted in the sense which the statute wishes to attribute to it. The definition given in the statute is the determinative factor.63

Section 5 makes agreement for giving or taking dowry to be void. Section 6 is another provision which reflects statutory concern for prevention of dowry, be it taking or giving. The Section makes it clear that pending transfer of the dowry, the person who received the dowry holds it in trust for the benefit of woman. The Section further provides that where the woman entitled to any property, as dowry, dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being. Where such woman dies, not due to natural causes, within seven years of her marriage, and is survived with no issue, such property be transferred to her parents, and if she had children, then the same be transferred to such children.64

Another important provision for the appointment of Dowry Prohibition Officers prescribing duties to ensure the compliance of the Act has been made by inserting Section 8-B.65

In Enforcement And Implementation of Dowry Prohibition Act, 1961, IN RE,66 the Supreme Court directed the Union of India and the State Government to consider whether appropriate rules cannot be framed for compelling males, seeking government employment, to furnish in prevention on whether they had taken dowry, and if taken, whether the

63 Id. at 781.
64 Section 6, The Dowry Prohibition Act, 1961.
65 Section 8B inserted by Act 43 of 1986.
same has been made over to the wife as contemplated by Section 6 of the Act, calling for such information also from those already in employment. Lamenting the manner in which government machinery had functioned in the implementation of the Dowry Prohibition Act and lack of zeal in doing the same, the Supreme Court made various directions to the Union of India, the Central Government and the State Governments for its rigorous and effective implementation, and for framing rules under the relevant provisions of the Act.67

Besides the ineffective implementation of the Act, another problem that has emerged in dowry cases is pertaining to the overlapping of the terms dowry and stridhan, which are often confused. Stridhan traditionally means woman’s absolute property, which passes on to the woman’s heirs after her death, whereas dowry goes to her in-laws. Dowry now represents the distorted version of stridhan which is to be transmitted to the bridegroom and his family in this consumerist Indian culture. This traditional notion of stridhan has been reiterated by the Supreme Court in Pratibha Rani v. Suraj Kumar68, wherein it was held that a Hindu married woman is the absolute owner of the stridhan property and can deal with it in any manner she likes. She may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilize it but he is morally bound to restore it or its value when he is able to do so.69 By overruling a Full Bench decision of the Punjab and Haryana High Court in Vinod Kumar Sethi v. State of Punjab,70 the Supreme Court clarified that Section 27 of the Hindu Marriage Act, and

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67 Id. at 571.
68 (1985) 2 SCC 370.
69 Id. at 377.
70 AIR 1982 P & H 372. The High Court opined that the stridhan property of a married woman becomes a joint property as soon as she enters her matrimonial home.
Section 14 of the Hindu Succession Act can be interpreted to provide that if the husband refuses to return the stridhan property of his wife, it will be open to recover the same by a properly constituted suit. It cannot be spelt out from any textbook or the sastric law of the Hindus that the two Acts take away the strichan right of a woman; at the most these Acts merely modify the concept of stridhan.71

Marriage gifts including ornaments received from wife’s parents must be restored to the wife while driving her out of matrimonial home. Failure to do so would constitute offence punishable under Section 406 IPC read with Sections 4 and 6 of the Dowry Prohibition Act.72

The greed for dowry, and the dowry system as per institution, calls for the severest condemnation.73 The conscience of the society needs to be fully awakened to the evils of dowry system so that the demand for dowry itself should lead to loss of face in the society for those who demand it. The establishment of a committed and sincere machinery to implement the Act and the rules can hasten the eradication of the evil.74 Legislation cannot by itself normally solve deep-rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give push and have that educative factor as well as the legal sanctions behind it which help public opinion to be given a certain shape.75

In order to arouse the conscience of the people against the demand and acceptance of dowry, effective spreading up of anti-dowry literacy among the people through Lok Adalats, radio broadcasts, television and newspapers is the need of the hour. The practice of dowry has worsened

71 Supra note 68 at 380.
74 Supra note 66 at 571.
75 Quoted in id. at 569.
over the years, exacerbated by a new consumerist culture fostered by India’s rapid globalisation. It is a bitter fact that the giving and taking of dowry is a crime that enjoys wide social sanction among both victims and perpetrators giving it a reason to flourish. A grave fallout of the practice of dowry is female foeticide. Possibly, a social revolution is needed to put an end to the menace. Refusal by bride's father to pay dowry, refusal of the girls to get married if dowry is insisted upon and the attaching of a social stigma to those who demand dowry, can alone ultimately put an end to this system or at least reduce its prevalence. However, the Committee on the Status of Women in India has pointed out, that the educated youth is grossly insensitive to the evil of dowry and unashamedly contributes to its perpetuation.76

According to the official figures there has been a 4 per cent increase in dowry deaths in the 21st Century.77 The reason is that there is no social delegitimisation of dowry and there is hardly any evidence of social conscience. The Dowry Prohibition (Amendment) Act, enacted in 1984 did not place any ceiling on the number of gifts that could be presented. The giving of dowry continues to be viewed as much of an offence as the receiving of it, ensuring that any chance of prosecution were virtually nullified.

D. Protection of Women from Prostitution.

Trafficking is a modern form of slavery that violates human dignity & worth. Trafficking is an issue of high complexity, interwoven with sex tourism, labour migration, forced marriages, bonded labour and other similar practices. A complex and multifaceted phenomena; trafficking does

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76 Referred in id. at 567.
77 Quoted in Pamela Philipose, ‘Women in a broken mirror’, The Indian Express, Chandigarh at 8 (May 25, 2003).
not lead itself to any uniform definition. Sex trafficking is an almost inevitable death sentence for a variety of reasons.\(^7\)\(^8\)

A study conducted by the United Nations Population Fund says that there are an estimated 4 million women and girls who are trafficked.\(^7\)\(^9\)

Sexual exploitation and trafficking is an alarming global problem. According to the report on the State of World Population, 1997, commercial sex is increasing in third world countries of Africa, Asia and Latin America, and in Eastern Europe because of high unemployment, rural poverty, growing inequalities in wealth and increased demand. It further pointed out that this problem also exists in the rich countries of North America, Great Britain and other European Countries.\(^8\)\(^0\)

The increasing magnitude and global reach of trafficking, with women as well as children being the majority of those trafficked, has been referred to as the dark side of globalisation.\(^8\)\(^1\) Today trafficking has become an international industry where traffickers resort to newer methods to circumvent law. End Child Prostitution (ECPAT), set up in 1991 to fight child sex workers trade, estimates prostitution to be a $ 5 billion industry.\(^8\)\(^2\)

Encyclopedia Britanica, 1987 defines prostitution as the practice of engaging in relatively indiscriminate sexual activity in general with individuals other than a spouse or friend, in exchange of immediate payment in money or other valuables.\(^8\)\(^3\) Trafficking is considered as the second largest illegal trade after arms sale. It is a complex and

\(^7\)\(^8\) Trafficking of Women and Children for Sexual Exploitation - Briefing kit at http://www.wiseindia.org/briefingkit.htm
\(^8\)\(^0\) See The Lost Childhood, The first survey study of child prostitution in Delhi, commissioned by National Commission for Women, New Delhi at 1(1997).
\(^8\)\(^1\) Supra note 78.
\(^8\)\(^2\) Supra note 80 at 1.
\(^8\)\(^3\) Ibid.
multifaceted phenomena. Trafficking in women and girls is one of the most corrosive forms of violation of human rights. It results in gradual total destruction of a woman’s personal identity and her right to live as a free human being in a civilized society. The victim is subjected to violence, total humiliation and violation of personal integrity. The victim of such devastating violence may also end up with life threatening HIV/AIDS/STD or a lifetime of trauma, drug addiction or personality disintegration. It is a denial of the right to liberty and security of person, the right to freedom from torture, violence, cruelty or degrading treatment, the right to home and a family, the right to education and employment, the right to health care – everything that makes for a life with dignity. Trafficking has been rightly referred to as a modern form of slavery.84

Article 6 of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 obliges State Parties to take all measures including legislation to suppress all forms of traffic in women. Articles 34 and 35 of the UN Convention on the Rights of the Child (CRC), 1989 enjoin State Parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction, sale or traffic of children for any purpose or form. Article 39 ensures that the State takes all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim from any of the neglect. The International Labour Organization Convention on Worst Forms of Child Labour 1999 has identified commercial sexual exploitation as a worst form of child labour and it obligates members to eliminate as a priority such worst form of child labour.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children\textsuperscript{85} supplementing The United Nations Convention Against Transnational Organised Crime\textsuperscript{86}, also called the Palermo Protocol, has been agreed upon by the international community.

The SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution, 2002\textsuperscript{87} gives a narrower definition of trafficking focusing on trafficking for prostitution. Under Article 1(3) trafficking means moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking. Sub-clause (5) defines "persons subjected to trafficking" to mean women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage or any other unlawful means. The Convention in itself is an important step as it recognizes the need for extraterritorial application of jurisdiction and extradition laws.

The only central legislation dealing with trafficking in India, confined to trafficking for prostitution, is the Immoral Traffic (Prevention) Act, 1956 or ITPA. ITPA was originally known as the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). SITA was originally passed as a result of the United Nations International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women, New York, 1950 to


\textsuperscript{86} The Convention was adopted by the General Assembly at its Millennium meeting in November 2000. It is the first legally binding instrument in the field of crime at http://www.unodc.org/palermo/convmain.html

\textsuperscript{87} The Convention was adopted on January 5, 2002 at the Eleventh SAARC Summit held at Kathmandu, Nepal at http://www.december18.net/traffickingconventionsSAARC2002.pdf
which India is a signatory. The Act was amended twice. It was first amended in 1978, and then amended and renamed as ITPA in 1986.

In the Suppression of Immoral Traffic in Women and Girls (Prevention) Act, 1956 (SITA) prostitution was defined as “act of a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind.” However, under the amended Act prostitution means the sexual exploitation or abuse of persons for commercial purposes. In the new definition, the emphasis shifted from a mere act which goes against societal norms to a more serious criminal offence of sexual exploitation and sexual abuse.

Prostitution is not prohibited under the amended Immoral Traffic (Prevention) Act, 1956. A commercial sex worker as long as she is above 18 years of age and solicits peacefully and voluntarily and keeps her activity outside the vicinity of public places is not punishable under the law. The Act aims at prohibiting prostitution in public places with a view to safeguarding public morals and society.

A brothel has been defined as any house, room, conveyance or place or any portion of any house, room or place which is used for the purposes of sexual exploitation or abuse for the gain of another persons or for the mutual gain of two or more prostitutes. The phrase “for the purposes of sexual exploitation” postulates plurality of instances of prostitution. A solitary instance of prostitution does not make the place a ‘brothel’. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was so keeping it.

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89 Ibid. Section 2(h), “Public place” means any place intended for use by, or accessible to, the public and includes any public conveyance.
90 Ibid. Section 2(a).
91 Sushila v. State of Tamil Nadu, 1982 Cri. LJ 702 (Mad.)
92 In re Dhanalakshmi, 1974 Cr. L.J. 61 (Mad.) at 65.
Punishment for procuring, inducing or taking away persons for prostitution has been enhanced to a minimum of three years up to a maximum of seven years of rigorous imprisonment and in case it involves a minor girl or child, it can extend to life imprisonment. Forcible detention for prostitution can also be punished with imprisonment for seven years up to a life term. Running a brothel is punishable with imprisonment for a minimum of one year to three years and a fine up to Rs. 2000. Any person who carries on prostitution and the person with whom such prostitution is carried on in any premises which are within 200 meters of a place of religious worship, educational institution, hostel, hospital, nursing home or such other public place or notified area is liable for punishment with imprisonment up to three months but in respect of an offence involving a child or a minor, the offence shall be punishable with imprisonment of not less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable for fine. Besides special police officers, the law provides for non-official advisory bodies to be appointed by the State Government and trafficking police officers to be appointed by the Central Government to deal with cases under the Act. It also provides for corrective institution for rescued girls who can stay there for a maximum period of five years.

One essential ingredient of the offence is promiscuous sexual intercourse, that is to say, that it should be proved that the person concerned indulges in indiscriminate sexual intercourse with several

93 The Immoral Traffic Prevention Act, 1956, Section 5.
94 Ibid. Section 6.
95 Ibid. Section 3.
96 Ibid. Section 7(1).
97 Ibid. Section 7 (1-A).
99 Ibid. Section 10-A.
persons. This has reference to some kind of commercialised nature of the activity taking place in a brothel. Prostitution in itself is not an offence under the Act except in the manner given in Section 7 and Section 8.

Under Section 8 of the Act only a woman or a girl soliciting for the purpose of prostitution is made punishable. What is made punishable is not the actual sexual act between the man and the woman or the girl. It is only where a woman or a girl solicits for the purpose of prostitution she is made punishable.

Despite the amendments, the legislation falls short of its objectives and has failed to be an effective measure to check commercialised flesh trade. It rather acts more as a supplement to the provisions of the Indian Penal Code concerning kidnapping, sale, abduction, seduction or wrongful restraint of women and children, emphasizing only the punitive aspects of the problem. Despite the punitive provisions, the law has several loopholes and inadequacies.

The Act does not even define trafficking. It recognizes prostitution as the only form of trafficking. It criminalizes children of prostitutes.\(^{100}\) It does not punish the client who is contributing to the vice of prostitution. Further the Act does not make any provision for the rehabilitation of women and children who are rescued from the brothel. There is no single body which can oversee the implementation of this Act. The definition of prostitution is vague.\(^{101}\) The Act criminalizes such victims also who are forced or cheated into prostitution. Sub-Section (3) of Section 10-A provides for issuance of licence to the female offender who is found guilty of an offence

\(^{100}\) *Ibid.* Section 4 (1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees or with both...

\(^{101}\) *Ibid.* Section 2(f) "prostitution" means the sexual exploitation or abuse of persons for commercial purposes.
under Section 7 or Section 8 if the court is satisfied that such female offender will lead industrious life. It seeks to regulate the victim’s life although it does not provide any rehabilitative assistance.

Section 15 gives wide powers to the police. The manner in which the Act has so far been used has evidently shown the need for reconsideration of the provisions. Police bereft of decency and humane approach and inevitable police corruption and complicity, is in fact being directly responsible for its perpetuation. They extort money from traffickers; kotha malkins or they are themselves involved in trafficking.102

The Parliamentary Committee has been set up by the human resource development ministry to make recommendations on the Immoral Traffic (Prevention) Amendment Bill 2006. The Proposed amendments to ITPA, 1956 are aimed at widening the Immoral Traffic Prevention Act so as to make it more effective. The focus is on treating women as victims and not culprits.103

The proposed amendments to ITPA, 1956 seek to remove those sections from the Act that criminalize prostitutes while protecting their rights as victims. Proposed amendments to the Act insert the definition of trafficking as clause 2(k) as per the Palermo Protocol. For the purposes of the Protocol as in Article 3

(a) ”Trafficking in persons“ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion or abduction or fraud or deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of

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102 "PIL on flesh trade: HC notice to Haryana", The Hindustan Times, at 5 (November 28, 2003) reported a case filed before Punjab & Haryana High Court against an ASI for providing protection to a woman running prostitution business from Kurukshetra (Haryana). The woman was booked under Sections 3, 4, 5 and 7 of ITPA 1986 and disclosed that she enjoyed the protection of the said ASI for a monthly fee of Rs. 10,000/-. 

103 http://www.wcd.nic.in/ITPABill.htm
exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in sub paragraph (a) are used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article.¹⁰⁴

In the aforementioned definition, the consent of the victim of trafficking is immaterial. Trafficking is in itself a human rights violation, irrespective of the end purpose, and involves a number of issues including mobility, migration within and across borders, and volition or consent. This definition intends to include a range of cases where human beings are exploited by organized crime groups.

• The amendment to Section 3(1) of ITPA increases the fine and punishment for keeping a brothel or allowing one's premises to be used as a brothel. Unfortunately, the amendments do not contain similar provisions for increasing the penalties attached to living on the earnings of a prostitute (under Section 4) and procuring for prostitution (under Section 5).

• Section 7 of the ITPA criminalizes prostitution in the vicinity of public places and Section 7(1A) imposes a higher penalty if a minor is involved. The amendment to the Act increases both the term of imprisonment as well as the amount of the fine attached to an offence with respect to a person below the age of 18 years, which is a welcome step. The failure of the amendment to provide any specific provision for the protection of children trafficked for prostitution is a glaring lapse.

¹⁰⁴ http://www.ohchr.org/english/law/protocoltraffic.htm
The amendment to ITPA has deleted Section 8 that makes outward manifestations of sex work such as ‘soliciting’ and ‘public disturbance’ illegal. The deletion of Section 8, is a step in the right direction, protecting the interests of prostitutes or sex workers instead of treating them as criminals.

Under the amendment to Section 21 (a) of the ITPA, additional provisions for setting a time limit for speedy record of evidence has been made. The amendments should also contain safeguards to ensure that proper procedures are followed and the human rights are not violated.

For the first time the clients of the prostitutes have also been sought to be punished by insertion of Section 5C. It penalizes those persons ‘who visit or are found in a brothel for the purpose of sexual exploitation of any victim of trafficking’ with a term of imprisonment and/or fine. Justification for inserting this provision is that it will provide a penal remedy against clients who stimulate the demand for trafficking for commercial sexual exploitation yet remain untouched by existing law. The term ‘sexual exploitation’ has nowhere been defined in the amendment bill. This provision is likely to hurt the interests of those workers who have willingly entered the profession by punishing clients, on whom they are dependant for their livelihood.105

The parliamentary committee noted that ITPA could only be considered a “half-hearted” attempt, as the cross-border dimensions of trafficking had not been tackled.106

Reflecting the global trend, there are reports of large scale trafficking of children and young women mainly for flesh trade from various countries. Traffickers having cross border connections entrap minor girls and women with a promise of better living. This is often organized by kidnapping minor girls and women. Sometime the *dalals* lure innocent girls with fake marriages. Approximately 4.25 percent girls between the age group 8 and 15 are trafficked from Bangladesh and Nepal form an important component of child prostitutes in Delhi's red light area.\textsuperscript{107} It is estimated that there are nearly 2,70,000 to four lakh children below 14 years in commercial prostitution in the country.\textsuperscript{108}

According to a Central Welfare Board Study, 15 per cent of the Commercial sex workers are below the age of 15 years and 25 per cent are below the age of consent.\textsuperscript{109} A survey by National Commission For Women revealed that more than 200 girls and women enter into prostitution racket each day.\textsuperscript{110} The incidents of child prostitution through abduction is 40 per cent. Percentage of those forced into the *devdasi* system is between 15 and 20 in Mumbai Brothels, 10 per cent in Nagpur, Delhi, Hyderabad, 50 per cent in Pune and up to 80 per cent in urban centres around Belgaum in Karnataka. About five per cent of children get into prostitution after getting raped, while 8 per cent are in it due to incestuous attention. Ten per cent are the children of sex workers and five per cent are children of dalit and tribal families. Between five and ten per cent girls are married and sold to brothels, five per cent come from broken homes, who have been abandoned by their husbands or families and two

\textsuperscript{107} Supra note 80 at 27.
\textsuperscript{108} NHRC calls for end to child prostitution at http://www.expressindia.com/ie/daily/19981110/31450084.html
\textsuperscript{109} Ranjita Biswas, “Exploitation & Violence, where have the daughters gone?”, Documentations on Women, Children and Human Rights, Library And Documentation Centre, All India Association for Christian Higher Education, New Delhi at 33 (July-September – 2001).
\textsuperscript{110} Aggressive advertising drives more girls to sex trade in Documentations on Women, Children and Human Rights, Library And Documentation Centre, All India Association for Christian Higher Education, New Delhi at 37 (July-September – 2001).
per cent take to the profession after natural disasters. Every day, about 200 girls and women become prostitutes, some eighty per cent of them against their will.\footnote{111}

In a writ petition\footnote{112} filed in the High Court of Gujarat at Ahmedabad challenging the provisions of Sections 7(1) (b), 14 and 15 of the Immoral Traffic (Prevention) Act, 1956 on the ground that they violate the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India, the Hon'ble Court while rejecting the contention pointed out that a multitude of research around the world has established that all prostitution causes harm to women. Approval to prostitution would tend to institutionalise, promote and teach the abuse of women and create an ever-expanding industry which normalizes that abuse. It is never right for a man to be able to buy a woman and recognition of prostitution would be an undesirable phenomenon in a civilized modern society. Prostitution becomes an activity that is degrading to individual dignity of the prostitute and it is a vehicle for pimps and customers to exploit the disadvantaged position of women in our society. The need to outlaw organized prostitution and brothels, target the demand that drives the industry and to ensure a range of programmes to assist women out of prostitution, can be effectively met by a proper implementation of the provisions of the Act.

Though all offences are cognizable under the Act, they rarely result in convictions. Prosecution is extremely superficial, as it is only the victim and the women who run the brothel who are usually prosecuted, whereas the pimps, touts, procurers and the primary traffickers who are important elements in this illegal network, go scot-free and manage to secure bail and continue running their business.

\footnote{111} "The Devdasi Tradition and Prostitution" in http://www.mtholyoke.edu/courses/igroisho/archieves/devdasis.html

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Another practical problem emerges from the manipulations of the brothel owners. As a matter of practice when a young girl is rescued from a brothel or from any form of prostitution, she has to be treated as a 'victim' of the crime and if she is a child as defined under Juvenile Justice Care and Protection Act, 2000, she has to be produced before the Child Welfare Committee as a 'child in need of care and protection' and has to be properly rehabilitated under statutory obligations. However, the brothel owners are strongly lobbying to convert this into a crime and then to treat the girls as 'children in conflict with law'. Then such girls are to be dealt with by the Juvenile Justice Board. The format of the Juvenile Justice Care and Protection Act, 2000 entitles them to a bail as a matter of right. In a day or two the girls are back into trade thereby defeating the whole purpose of rescue.113

The relevant provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 make it evident that both a juvenile in conflict with law or a child in need of care and protection have to be dealt with keeping in mind the possibility of their reformation and rehabilitation. The JJA provides for Protective Homes or Special Homes where such girls have to be kept for safe custody, because the fear is that they may be driven back to the brothels. There is no provision under the JJA where under the Board can release the minor girls because they desired to be released without giving a thought to their rehabilitation and the frightening possibility of their re-entry into brothels.114

A study revealed another aspect of the problem that the police are involved in registering the victims. After a minor girl is brought in a brothel, the brothel owner requests and pays Rs. 10,000/- to the police to make a

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new entry of a newly purchased minor girl. Fake case is registered against these girls showing that they were trying to solicit clients in a public place. They are arrested, kept in the lock up and then police prepares *challan* where minor girl's age is written as 21 years. The brothel owners get an agreement signed by the newly purchased girls on old stamp paper (back dated) that this girl will work as her domestic servant willingly and simultaneously by other promissory note that a girl has taken a loan of 40,000 from brothel owner so as minor girl turns captive into conditions of servitude.\textsuperscript{115} Child sex workers who are nabbed by the police are freed only when their relatives come. Victims are routinely handed over to anybody who claims to be the parent of the victim. Usually the relatives' intention behind coming to houses are a part of the game plan for pushing the child prostitutes again to flesh trade. Someone from the brothel itself turns up masquerading as the minor girl's mother, aunt or grandmother.\textsuperscript{116}

Another malaise that has merged into illegal traffic in girls and women is the distorted system of *devdasi*, a practice that was most common in Southern India, whereby a family donated a daughter to the temple, who, in effect, became sexual slave to the priest.

A study revealed, in the State of Karnataka that the girls were attached to the temples in the name of religion, but soon they disappeared even from the State; and were sent away to various parts of the country for flesh trade.\textsuperscript{117} There are around 30,000 *devdasis* in the State of Andhra Pradesh alone. The most traditional systematic role the religion plays in prostitution is through the *devdasi* system. The religious aspects of the commercial sex trade frequently overlap with the basic survival needs created by poverty and its constraints, but it is in this dimension that Indian

\textsuperscript{115} *Supra* note 80 at 9.
\textsuperscript{116} *Id.* at 11.
\textsuperscript{117} *Supra* note 109 at 34.
prostitution is distinctly different from prostitution in the West. Poverty is not the only cause of prostitution, at least in India, where custom and tradition often contribute substantially to the thriving traffic. However, it is the sole most important factor in persistent trafficking.

The first legal initiative taken for stopping the Devdasi system dates back to 1934 when Bombay Devdasi Protection Act was passed by British Government. The Act declared dedication of a woman as illegal act, irrespective of the fact whether the dedication was made with her consent or not. The Act of 1934 had provided rules, which were aimed at protecting the interests of the devdasis. Concurrently with the Bombay Devdasi Protection Act, the Madras Devdasi (Prevention of Dedication) Act 1947 was also in operation in the Mysore State which was renamed as Karnataka in 1972. The two Acts then existing were replaced by the Karnataka Devdasis (Prohibition of Dedication) Act which was adopted by the State Legislature in 1982 and was notified by the Government through its Gazette in 1984. The new Act declared dedication as devdasi to be an unlawful practice. The 1982 Act strengthens the penal provisions that were hitherto available under the 1934 Act. The maximum punishment was increased to 3 years imprisonment and maximum fine was increased to Rs. 2000/-. If the guilty was found to be a parent or guardian or relative of the dedicated woman, the penal provisions are even stronger. Imprisonment in such a case can extend up to 5 years with a minimum term of 2 years and the fine can be up to Rs. 5,000/- with the minimum fine being Rs. 2000/-.118

The Andhra Pradesh Devdasis (Prohibition of Dedication) Act, 1988 renders the dedication of a woman as devdasi to be unlawful and void.

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Section 4 of the Act gives validity to the marriage contracted by a devdasi in accordance with any law, custom or usage and further clarifies that a child born out of such marriage shall be considered to be a legitimate one.

Every offence under this Act shall be cognizable and non-bailable. Punishment for a person performing, providing, participating or abetting the performance of any ceremony or act connected with it shall be imprisonment for maximum three years and minimum two years with fine upto three thousand rupees. But in case of a parent or a relative of the woman so dedicated, imprisonment extends to five years with time of not less than five thousand rupees.\(^{119}\)

Despite legal measures devdasi system continues even today in parts of Tamil Nadu, Mysore, Andhra Pradesh and Orissa practiced by some castes. There is lack of national legislation to outlaw the practice of devdasi. In contemporary India, the effectiveness of the Immoral Traffic Prevention Act, 1956 and the Devdasi Act, 1986 has been negated by the ever-increasing incidences of prostitution and trafficking in minor girls and women.

It is cardinal that the practical aspects of the problem are looked into and the loopholes be filled so as to ensure the protection of the victim and eradication of commercial sexual exploitation. A multi pronged approach aimed at combating pimps and traffickers and curtailling the demand for prostitution, while providing protection and meaningful alternatives to sex workers and their children is the need of the hour.

E. Practice of Sati and the Law

Sati\(^{120}\) tantamounts to widow murder and is indicative of low status of women in the patriarchal society where her identity comes to an end


\(^{120}\) For historical details see supra Chapter II.
with that of her husband. In the name of tradition she is burnt alive on the pyre of her husband. Some arguments were based on female sexual vulnerability, some on Shastric sanction that woman became ardhangini (half-body) of her husband, or an essential part of him. Primarily widow murder (sati) settled any questions of inheritance or shares in property which may have occurred from her husband.121 This way sati has served as a double-edged weapon.

Despite the legal ban on sati system with the enactment of Sati Regulation Act, XVII, 1829, it is a dismaying scenario on the social set-up of independent India that the custom of sati has not remained the thing of yore but sadly this gruesome and savage custom has persisted till date. A recent case of Sati that hogged the limelight and created much hullabaloo was that of Roop Kanwar, a young and educated girl of Deorala in Sikar District, Rajasthan at 65 km away from Jaipur, who was said to have burnt herself on the pyre of her husband. After her death she was projected as the ‘epitome of Indian womanhood, of pure feminity i.e., the faithful and devoted wife, the potential mother of sons, self-sacrificing to the end’.122 Judgment given by the Special Sati Court in Roop Kanwar case evoked sharp criticism. Despite hue and cry all the thirty-two accused persons responsible for abetting suicide by Roop Kanwar were acquitted due to “lack of evidence” and various chauvinistic acts of the Government of Rajasthan.123 It has been alleged that in the judgment glorification practice was inaccurately interpreted by the judge. It was further alleged that the contradictory nature and the predetermined mind of the judge could be

122 Mala Sen, Death by Fire: Sati, Dowry Death and female Infanticide in Modern India at x (2001).
gathered from the definition of sati given by him as – all those women who spend their lives with one man are pure and of character.\textsuperscript{124} This sati incident demonstrated the overpowering hold of those orthodox sections of society that supported this inhuman custom in the name of religion.\textsuperscript{125}

Sections 306 and 309 of the Indian Penal Code, 1960 provide punishment for abetment to commit suicide and attempt to commit suicide respectively, including commission of sati. In a case of sati, the ingredients of offence of committing murder under section 302 Indian Penal Code were lacking, thereby this lacuna necessitated the enactment of a Central legislation to punish sati cases with great severity.\textsuperscript{126} Thus to overcome such incidents, the Parliament enacted a new legislation called the Commission of Sati (Prevention) Act, 1987.

Prior to this Act, there were a few State legislations to combat this barbaric practice. These were Rajasthan Sati Prevention Act, 1987, Bengal Sati Prevention Act, 1829 and Tamil Nadu Sati Prevention Act, 1830.

Under Commission of Sati (Prevention) Act, 1987 the definition of sati includes not only the burning or burying alive of any widow along with the body of the deceased husband but also includes such burning or burying of any woman with any other relative or with any article, object or thing associated with the husband or such relative even if the act is claimed to be voluntary.\textsuperscript{127}

Definition of glorification\textsuperscript{128} includes the observances of any ceremony, participating in any procession connected with the Commission of sati or of any function to eulogise the person who had committed sati. It

\textsuperscript{125} Neera Desai and Usha Thakkar, Women in Indian Society at 164 (2003).
\textsuperscript{126} Dr. Devinder Singh, Human Rights: Women And Law at 121 (2005).
\textsuperscript{127} Section 2(c), The Commission of Sati (Prevention) Act, 1987.
\textsuperscript{128} Section 2(d), ibid.
also includes the construction or any temple or the performance or carrying on of any form of worship for the performance of ceremony thereat. Glorification of Sati is punishable with a minimum imprisonment of one year which may extend to seven years and with a minimum fine of five thousand rupees which may extend to thirty thousand rupees.\textsuperscript{129}

The offence of attempt to commit sati is punishable with imprisonment up to one year or fine which is same for the offence of attempt to commit suicide under Section 309 of the Indian Penal Code.\textsuperscript{130} This is because in most cases the widow or the woman is compelled to commit sati and invariably she is not in a fit state of mind or is intoxicated or is in a state of stupefaction or other cause that impedes the exercise of her free will. Thus for conviction for this offence the state of mind of the person charged of the offence, at the time of the commission of the Act and all relevant factors have to be taken into consideration.

Abetment of sati has been made punishable with death or imprisonment for life and the abettor is also liable to fine while the abetment of any attempt to commit sati has been made punishable with imprisonment for life and fine.\textsuperscript{131} In an old case \textit{Sahebloll Reetloll v. State},\textsuperscript{132} the deceased wanted to become sati and proceeded to the pyre. The accused caused a pile to be lighted, and persuaded a sati to re-ascend it, after she had once left it and she was immolated. The accused were convicted of abetting culpable homicide not amounting to murder.

Giving any kind of inducement to the widow or woman or making her believe that commission of sati would result in some spiritual benefit or would lead to general welfare of the family; or encouraging to remain fixed

\textsuperscript{129} Section 5, \textit{ibid.}
\textsuperscript{130} Section 3, \textit{ibid.}
\textsuperscript{131} Section 4, \textit{ibid.}
\textsuperscript{132} (1863)1 R.J.P.J. 174 as quoted in Rattanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, \textit{The Indian Penal Code} at 501 (2006).
in her resolve thereby instigating her to commit sati; or aiding or participating in connection with commission to any ceremony connected with it, preventing or obstructing the widow or woman from saving herself from being burnt or buried alive and also obstructing, or interfering with the police in discharge of its duties to prevent commission of Sati would be deemed to be an abetment of sati.\textsuperscript{133} In \textit{Tej Singh v. State of Rajasthan},\textsuperscript{134} the accused were members of the crowd who had joined the funeral procession from the house of the deceased who was leading the procession with an intention to commit sati among the shouts "Sati Mata ki jai". About 100 to 150 members of the crowd surrounded the police to obstruct them to prevent commission of sati. Ultimately, the widow succeeded in committing sati as funeral pyre was lit with the widow sitting on it. It was held that all those persons who joined the procession were aiding the widow in committing sati and were guilty of the offence. The accused were sentenced to five years rigorous imprisonment.\textsuperscript{135} The Supreme Court in \textit{All India Democratic Women's Association and Janwadi Samiti v. Union of India},\textsuperscript{136} held that chunri ceremony in Rajasthan is associated with glorifying sati and is a part of traditional process of religious offering in sati temples. Thus the restraint on performing chunri ceremony within the temple should continue.

A person who is convicted of an offence of abetment of commission of sati or attempt to commit sati shall be 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

\textsuperscript{133} Section 4, Explanation, ibid.
\textsuperscript{134} AIR 1958 Raj. 169.
\textsuperscript{135} Id. at 171-172.
\textsuperscript{136} AIR 1989 SC 1280
committed. Abetment of Sati with the motive of inheritance to certain properties has been discouraged by introducing such a disqualification.

It is of grave concern that a practice as retrogressive as sati is still prevalent and is acceptable by the so-called civilized society. Depriving a person of his right to life is undeniably violative of Article 21 of the Constitution and is an antithesis of a civilized society. Any custom or usage, if inconsistent with fundamental rights, shall to the extent of inconsistency be void and if the custom is recognized by law, custom must yield to the fundamental rights.

F. Domestic Violence and the Law

Domestic violence exists in a "culture of silence" and denial, and of denial of the seriousness of the health consequences of abuse at every level of society. Although woman is usually the primary target of violence, it is sometimes directed towards children. Domestic violence can be described as such a relationship in which there is misuse of power to control another. It is the establishment of control and fear in a relationship through violence and other forms of abuse. The abuser tortures and controls the victim by calculated threats, intimidation, and physical violence. Gender-based violence is universal, differing only in scope from one society to the other. Domestic violence is a violation of women's human rights. The conduct that falls within the definition of violence against women in the family includes physical battering, sexual battering, psychological battering and social and financial abuse. At its most basic level, domestic violence consists of physical violence or aggressive behaviour towards the victim's body. Violence in its subtle form may make

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139 Violence Against Girls and Women at http://www.unfpa.org/intercenter/violence/intro.htm
140 Domestic Violence in India at http://www.indianchild.com/domestic_violence_in-india.htm
someone feel worthless; or isolate a person socially by not allowing to leave home or meet someone.

Girls and women face systematic discrimination from entrenched power relations that perpetuate the almost universal subordination of females. This leaves them highly vulnerable to being harmed sexually, physically or psychologically by the men in their families and communities.141

The extent of violence against women in the home has been largely hidden and widely denied by communities because of fear that an admission of its incidence will be an assault on the integrity of the family.142 The current perception of violence against women in the family as a “private” affair is a serious barrier. It has largely remained invisible in the public domain because of various factors like family honour, fear of breaking up of marriage, humiliation, no support system, lack of knowledge about legal rights, genuine fear of being victimized again etc. The values attached to the family system are enough to justify domestic violence and because of the fear of further condemnation the victims do not retaliate against the violence. But such private matters have a tendency to become public tragedies.143

In 1993, the World Development Report of the World Bank estimated that “women ages 15 to 44 lose more Discounted Health Years of Life (DHYL) to rape and domestic violence than to breast cancer, cervical cancer, obstructed labour, heart disease, AIDS, respiratory infections, motor vehicle accidents or war.”144

Today gender-based violence is recognized as a major issue on the international human rights agenda. Several international treaties explicitly include mention of human right to protect from violent family members.

141 Supra note 139.
144 Supra note 139.
Important progress has been made in establishing gender-based violence as a human rights concern since the Convention on the Elimination of All Forms of Discrimination was adopted by the United Nations General Assembly in 1979. Article 19 of the United Nations Convention on the Rights of the Child, 1989 declares that all children should be protected from "physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the case of parent(s), legal guardian(s) or any other person who has the care of the child."

In 1992, the Committee on the Elimination of Discrimination against Women, in its General Recommendation 19 viewed "gender based violence" as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. General Recommendation no. 19 specifies the nature of governments' obligation to take comprehensive action to combat violence against women.

The Vienna Declaration, adopted at the World Conference on Human Rights, 1993 asserted for the first time that women's human rights must be protected not only in public life but also in home.

The United Nation Declaration on the Elimination of Violence Against Women adopted in December 1993 for the first time provided a definition of violence, and included psychological violence in the definition. The Declaration provides a basis for defining gender-based violence. According to Article 1 of the Declaration, violence against women is to be understood as any act of gender-based violence that results in, or is likely to result in physical, sexual, psychological harm or suffering to women,

including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life.

The Declaration also recognized that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanism by which women are forced into a subordinate position compared with men.\footnote{Declaration on the Elimination of Violence against Women, G.A. res.48/104 at \url{http://www1.umn.edu/humanrts/instree/e4devw.htm}}

The International Conference on Population and Development (ICPD), Cairo, 1994 recommended actions for governments to promote discussion of the need to protect women from violence through education and establish preventive measures and rehabilitation programmes for victims of violence.\footnote{Supra note 139.}

The United Nation Fourth World Conference on Women, held in Beijing in 1995 in its Platform for Action recognized that all governments are responsible for the promotion and protection of women’s human rights. This document specifically declared that violence against women is one of the 12 critical areas of concern and is an obstacle to the achievement of women’s human rights.\footnote{Ibid.}

In recent years some countries have taken significant steps towards improving laws relating to violence against women. Combating and eradicating this scourge of domestic violence requires enhanced and concerted efforts to protect women at the local, national and international levels. Passing laws to criminalize violence against women is an important way to redefine the limits of acceptable behaviour. State responsibility is
clearly underlined in Article 4 of the Declaration on the Elimination of Violence Against Women, which stipulates that, "States should exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."

Any approach designed to combat violence must be twofold, addressing the root causes of the problem and treating its manifestations. Combating violence against women requires challenging the way that gender roles and power relations are articulated in society. In many countries women have a low status. Raising awareness of the issue of violence against women, and educating boys and men to view women as valuable partners in life, in the development of a society and in the attainment of peace are just as important as taking legal steps to protect women's human rights.\(^\text{150}\)

Insertion of Section 498-A in 1983, Section 304-B in 1986 in the Indian Penal Code, 1860 and corresponding provisions in the Indian Evidence Act, 1872 has been a significant step in the criminalisation of domestic violence in India. These provisions for the first time made it possible to identify the instances of domestic or family violence with the public domain. However, the ambit of these provisions is limited and is not sufficient to address this phenomenon in its entirety. Vacuum in the civil law necessitated an exhaustive legislation to address this largely invisible phenomenon in public sphere.

The Protection of Women from Domestic Violence Act, 2005, as a civil remedy is a milestone in the quest of women's rights in India. As civil remedy it assures the victims of domestic violence freedom from fear of eviction or physical harm in their family home and to have access to family resources for adequate maintenance.

\(^{150}\) United Nations Women and Violence at \url{http://www.eurowrc.org/13.institutions/5.un/un-en/02.un_en.htm}
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The Act recognizes different forms of violence and relies on UN Framework for Model Legislation on Domestic Violence\textsuperscript{151} which mandates a broad and inclusive definition of domestic violence.

The Domestic Violence Act makes provisions for protective injunctions against violence, dispossession from matrimonial home and alternate residence. The new statute while acknowledging the pervasiveness of domestic violence as problem of power relationships provides recognition to the problem faced by millions of women in our country.

Section 3 of the Act gives a very wide definition to the term “domestic violence” so as to cover all forms of physical, sexual, verbal, emotional and economic abuse that can harm, cause injury to endanger the health, safety, life, limb or well being, either mental or physical of the aggrieved person. Harassment by way of unlawful dowry demands to the woman or her relatives is also covered under this definition.

“3. Definition of domestic violence.- For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it--.

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

\textsuperscript{151} Article 11. All acts of gender-based physical, psychological and sexual abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation coercion, stalking, humiliating verbal abuse, forceful or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts shall be termed domestic violence in A Framework for Model Legislation on Domestic Violence a report of Special Rapporteur on Violence against women. Its causes and consequences Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution, 1995/85E/CN4/1996/53/Add2.
(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section,—

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes—

   (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

   (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes—

   (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

   (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be
reasonably required by the aggrieved person or her children or her _stridhan_ or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence” under this section, the overall facts and circumstances of the case shall be taken into consideration.”

This comprehensive definition genuinely covers every eventuality thus embracing the invisible violence suffered by a large section of women.

Benefit of this law is not confined to a wife but has also been made available to women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage, through a relationship in the nature of marriage or adoption. According to Section 2(a)

“aggrieved person” means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection as an “aggrieved person”. The scope of law is to address all women. A woman in live-in relationship is equally susceptible to violence like a wife specially where she had been lured into a live-in relation with a promise for marriage.

Under the Domestic Violence Act complaint can be filed against any adult male or female relative of the husband or male partner so as to ensure that the female relatives do not go scot-free.152 Another unique

152 Section 2(q). _The Protection of Women from Domestic Violence Act, 2005._
feature of the Act is that it makes provision that any person, be it a neighbour, social worker, relative etc., who has reason to believe that an act of domestic violence has been or is being committed, can take the initiative on behalf of the victim to lodge a complaint regarding an act or acts of domestic violence and does not make it necessary for the aggrieved woman to do it.\textsuperscript{153}

Making provision for the security of house, the Act gives right to the aggrieved woman to reside in the shared household who cannot be evicted by the respondent in retaliation, even if she has no legal claim or share in the property.\textsuperscript{154}

On the satisfaction of the Magistrate that domestic violence has taken place, he may pass a residence order restraining the respondent from dispossessing or disturbing the possession of the aggrieved person from the shared household, directing the respondent to remove himself from the shared household, restraining the respondent or his relatives from entering the shared household, restraining the respondent from alienating, or disposing off or encumbering the shared household or directing the respondent to secure alternate accommodation for the aggrieved person or to pay rent for the same.\textsuperscript{155}

The Magistrate has been empowered, after being satisfied that domestic violence has taken place, to pass protection orders in favour of the aggrieved person prohibiting respondent from aiding or committing an act of domestic violence or any other specified act, entering a work place or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the partners and causing violence to the aggrieved person, her relatives or others who

\textsuperscript{153} Section 4, \textit{ibid.}

\textsuperscript{154} Section 17, \textit{ibid.}

\textsuperscript{155} Section 19, \textit{ibid.}
provide her assistance from domestic violence. The Magistrate can call concerned members of the household to be heard. He can counsel, direct and punish as the case may be.

Further the Act allows the Magistrate to provide monetary relief and monthly payments or maintenance. The respondent can also be made to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence and can also cover the maintenance of the victim and her children including maintenance under Section 125 of Code of Criminal Procedure, 1973 or any other law for the time being in force. In case of failure on the part of respondent to make such payments, the Magistrate may direct the employer or a debtor of the respondent to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries or debt due to or accused to the respondent. The Magistrate is further empowered to make the respondent pay compensation or damages or both for injuries including mental torture and emotional distress caused by acts of domestic violence.

Some activists and social organizations are looking askance at the actual benefit and workability of Section 16 which allows the Magistrate to hold proceedings in camera “if either party to the proceedings so desires”. It has been pointed out on the basis of experience that many a times camera proceedings only intimidate the aggrieved in favour of the respondent especially when the aggrieved is the only female in the Court. It has been urged to change this section to allow camera proceedings only if the ‘aggrieved party so desires’.

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156 Section 18, ibid.
157 Section 20, ibid.
158 Section 22, ibid.
The Act also provides for registration of certain entities with the State Government as service providers for the purpose of the Act.\textsuperscript{160}

The most significant achievement of the statute lies in the widening of scope of protection against violence beyond the category of ‘wives’ and extending it not only to mothers, daughters and sisters but also to women in informal relationships. There’s however an apprehension that the problem will arise when the right of residence of a legally married wife clashes with the right of a so-called ‘immoral and promiscuous’ one.\textsuperscript{161}

A law is an instrument of social change. However, as law is only as good as its implementability, despite the lofty aspirations.\textsuperscript{162} Awareness about law certainly gives an idea that what is wrong can be challenged. The success and failure of a legislation further depends upon the public response as well as the efficacy of implementing machinery. Knowledge of law is a very powerful tool. Awareness of law is like a shelter against dangers.\textsuperscript{163}

A strategy to deal with domestic violence must go beyond legal interventions and look at the special needs of the victims of violence, and understanding the reasons of their being in situations of abuse. Backing of law has the potential to challenge dominant notions of gender, tradition and culture. This new legislation appears to be a radical approach to combat and confront politics of rights in the house. This Act puts forth a novel conception about gendered violence in relation to women.

Referring to the Act, the Union Woman and Child Welfare Minister Renuka Chowdhary commented that it is the answer to the unvoiced

\textsuperscript{160} Section 10. \emph{The Protection of Women from Domestic Violence Act}, 2005.
\textsuperscript{162} Ibid.
anguish of people. She further said that the law has been presented in a manner that the people should try to use it in its real matrix and not as an isolated instrument for misuse. There would have been no need for this Act if other laws had not been abused. A word of caution in this regard has been given by Kiran Bedi that the Act is for women who genuinely need help. At no stage should this be used falsely by them. Magistrates, Protection Officers are for justice and not pro-women and anti-men.

Being a summary remedy the Act provides tangible relief to the aggrieved, which is in fact supplementary to the criminal law remedies of arrest so as to make complete protection and safety meaningful.

G. Sexual Harassment of Women at the Workplace and Legislative Move

Sexual harassment at workplace is an occupational hazard, a violation of human rights and a succinct manifestation of gender discrimination that undermines equality of opportunity. Sexual harassment depicts the unequal power relations between men and women. The gendered roles assigned to men and women in social and economic life are based on the conditioned perceptions about male and female sensuality which form the basis of commonly held beliefs or myths about sexual harassment. Stigmatisation and blame shifting on grounds of ‘provocation’ locates responsibility away from the harasser.

Sexual harassment means unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work. A sexually harassed person commonly suffers a range of emotional and physical disturbances.

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167 Ibid.
The United Nations Committee on the Elimination of All Forms of Discrimination Against Women has dealt with the issue under the application of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979. The CEDAW Committee adopted General Recommendation no. 19 in 1992 on "Violence Against Women and called on States to take measures to protect women from sexual harassment, which was recognized as a form of violence. In the General Recommendation, it defined sexual harassment as such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions".

The United Nations Declaration on Violence Against Women, 1993, acknowledges under Article 2 that violence against women –

[E]ncompasses (but is not limited to) physical, sexual and psychological violence...including...sexual harassment, and intimidation at work and in educational institutions....

In 1993, at the International Labour Organisation (ILO) Seminar held at Manila, it was recognized that sexual harassment of women at the workplace was a form of "gender discrimination against women".

Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes women's right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate the working environment.

Article 15 of the Constitution of India prohibits discrimination on grounds of sex. Realizing inferior status accorded to women, the Constitution not only grants equality to women, but also empowers the state to adopt measures of affirmative discrimination in favour of women under Article 15(3) by enacting laws and provisions so as to ameliorate their social, economic and political condition and to accord them parity.

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166 Supra note 166 at 144-145.
170 For details see supra Chapter V.
The word "sexual harassment" has neither been defined in the Indian Penal Code, 1860 nor is there any legislation to curb sexual harassment at the workplace. However, Criminal Law is applicable in case of sexual harassment but the same is obsolete in definition and scope and is difficult to implement.\footnote{The Indian Penal Code. 1860 Section 292 - (1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it; Ibid. Section 354 – Assault of criminal force to woman with intent to outrage her modesty – Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; Ibid. Section 509 – Word, gesture or act intended to insult the modesty of a woman – whosoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending with such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.}

Besides the provisions of Criminal Law, the Indecent Representation of Women (Prohibition) Act, 1987 also has the potential to be used in cases of sexual harassment but within the restricted ambit. Firstly, if the individual harasses another with books, photographs, paintings, films, pamphlets, packages etc. containing indecent representation of woman; he is liable for a minimum sentence of two years.\footnote{Section 4 and Section 6, Indecent Representation of Women (Prohibition) Act, 1987.} Secondly, a company can be held guilty of offences under this Act, where there has been indecent representation of women on the premises, thereby creating a hostile working environment for the females.\footnote{Ibid. Section 7.}

Cognizant to the growing social menace of sexual harassment of women at the workplace, three judge Bench of the Supreme Court, by an innovative judicial process, using its extraordinary power to make law and
enforce fundamental rights, issued exhaustive guidelines in Vishaka v. State of Rajasthan,\textsuperscript{174} after taking note of the fact that the present civil and penal laws in the country do not adequately provide for specific protection of women from sexual harassment at places of work and that enactment of such legislation would take considerable time.

Since the domestic law was silent on this issue, the Court formulated the measures to prevent sexual harassment, relying on international conventions and norms, including the Convention on the Elimination of All Forms of Discrimination Against Women, 1979. The Supreme Court laid down guidelines to prevent sexual harassment of women at workplace. The guidelines are as follows:

- All employers or persons in charge of work place whether in the public or private sector, should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation, they should take the following steps:

  (a) Express prohibition of sexual harassment which include physical contact and advances; a demand or request for sexual favours; sexually coloured remarks; showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature; should be noticed, published and circulated in appropriate ways.

\textsuperscript{174} (1997) 6 SCC 241. The SC guidelines came about due to gang rape of Bhanwari Devi (Saathin's case) by a group of Thakurs, as punishment for having stopped a child marriage in their family. (Bhanwari Devi was a village-level social worker (Sathin) of a development programme run by the State Government of Rajasthan, fighting against child and multiple marriages in villages.) The trial court acquitted the accused. In December 1993 the High Court ruled it out to be a case of gang rape committed out of vengeance. Various women groups and NGO's, joined Bhanwari in her fight to get justice and filed a petition in the Supreme Court of India, under the name Vishaka asking the Court to give directions regarding sexual harassment that women face at the workplace, as cited in Combat Law, Vol. 3, Issue-5 at 4 (January, 2005).
(b) The rule or regulation of Government and Public Sector bodies relating to conduct and discipline should include rules prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards to private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work place and no woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

• Where such conduct amounts to specific offences under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

• The victims of sexual harassment should have the option to seek transfer of the perpetrator, or their own transfer.

While implementing Vishaka guidelines the Supreme Court in Apparel Export Promotion Council v. A.K. Chopra,175 observed that any lenient action in such case is bound to have a demoralizing effect on working women. Sympathy in such cases is uncalled for and mercy is misplaced.176 It was further clarified by the Court that:

[E]ach incident of sexual harassment at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty – the two most precious fundamental rights guaranteed by the Constitution of India ... [T]he contents of the fundamental rights... are

175 (1999)1 SCC 759.
176 Id. at 777.
of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse... That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. 177

The Supreme Court noted that any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment. In any case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or the dictionary meaning of the expression 'molestation'. The Court further said that the statement of the victim must be appreciated in the background of the entire case. 178

A significant judgment that galvanized the monitoring of the implementation of Vishaka Guidelines across the country was Medha Kotwal Lele & Others v. Union of India. 179 Notices were issued to the Central Government and the Union Territories asking them to report to the Supreme Court the measures taken by them for complying with the Vishaka Guidelines.

A draft Bill on sexual harassment was prepared by the National Commission for Women (NCW) in August 2001 and was widely circulated and discussed and national meetings were conducted at Delhi to discuss the bill. As a result the bill moved from being a criminal bill to the current form of bill with civil remedies. 180

177 Id. at 776.
178 Id. at 774, 777.
Chapter VI

A survey conducted by the National Human Rights Commission found that till 2003, that the Supreme Court guidelines to prevent sexual harassment continued to be ignored by many Governments. The survey undertaken in Uttar Pradesh, Bihar, Orissa, Tamil Nadu, West Bengal and Madhya Pradesh found that majority of departments had not even received an order or notification about the guidelines. It found that more than 75 percent of departments had not set up complaint committees. And nearly all of them had failed to put anti-sexual harassment policy in place. Tamil Nadu was the only exception with 2 percent of the departments reporting that they had such a policy.181

A number of organizations working on the issue of sexual harassment met in Mumbai in November, 04 to discuss and suggest amendments to this bill. The major changes suggested in the alternate Bill are as follows:

• Some of the major victims of sexual harassment are service beneficiaries, who are not employees, as students in educational institutions, patients in hospitals, customers in banks, etc. It was noted that such beneficiaries have been sidelined by the Government Bill. The alternate Bill covers service beneficiaries in a new Chapter.

• The proposed Government Bill does not cover places where intra professional or inter professional relationship exists i.e. sexual harassment indulged in by professional such as doctors, lawyers and others. The alternate Bill embodies such relationships with a view that at least statutory Bodies like Medical Council, Bar Council, etc. start treating such actions as professional misconduct.

181 Rashtra Mahila, Published by the National Commission for Women at 4 (June 2003).
• Another drawback of the proposed Government Bill is relating to unorganised sector. The Bill provides for setting up of Local Committees to deal with those employers having less than 50 employees, no details are provided about the function and jurisdiction of these committees. The alternate Bill provides detailed mechanism for dealing with complaints of sexual harassment within the unorganised sector.

• The Government Bill has not dealt extensively with protection of the victim within the domestic enquiry in terms of the manner and type of questions which would be asked, etc. the alternate Bill tries to rectify the same by giving ample protection to women who are under cross-examination.

• Many cases where complaint of sexual harassment has been made, women may not want a full-fledged enquiry to follow; rather only want counselling services. Some cases may even be sorted out by mediation. Government Bill does talk about mediation, but no framework for counselling is provided. The alternate Bill takes this into account.

• The alternate bill also focuses on providing compensation to the victim.182

A National Consultation on the Sexual Harassment Bill was held on the 23rd and 24th of October, 2004 involving organizations from across the country working on this issue. It was felt that rather than confining the offence to the ‘workplace’ sexual harassment can be interpreted in the context of work environment, thus covering the exploitation of power, manifesting in the form of harassment in non-working hours and spaces. This will also provide for broader grounds for accountability.183

182 Supra note 180 at 4-6.

Chapter-VI

Since the Bill has attracted national attention and is being widely discussed and circulated for eliciting views and suggestions, the Government Bill has already emerged in a new form rectifying the loopholes in the earlier proposed Bills. The Protection Against Sexual Harassment of Women Bill, 2005\textsuperscript{184} recognizes ‘sexual harassment’ as the infringement of fundamental right of woman to gender equality under Article 14 and her right to life and live with dignity under Article 21 of the Constitution which includes a right to safe environment free from sexual harassment.

The proposed Bill gives a comprehensive connotation to ‘sexual harassment’

Section 2(aj) “Sexual Harassment” includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Explanation: It is clarified that it is the reasonable perception of the woman that would be relevant in determining whether such conduct was unwelcome or not.

The definition of ‘defendant’ has been widened by including even any such person who according to the complainant has either aided or abetted such sexual harassment. The Bill casts duty on the employer to take all necessary steps to prevent and ensure that no woman employed in

\textsuperscript{184} Government of India, in http://www.wcd.nic.in/draftsexharassment.htm

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the establishment is subject to sexual harassment by any third party during the course of employment.

Taking note of the vulnerability of women placed in various situations (besides employer-employee relationship) the Bill ensures protection from sexual harassment to

- an outsider who visits the public establishment for legitimate purpose;
- a person seeking admission to an educational institution, a student of that establishment or a member of teaching staff;
- receiver of the services of an advocate, doctor, architect and chartered accountants;
- a person in custody of juvenile home, prison or Mental Health Care Centre, or an outsider or a visitor who visits the premises for lawful purpose;
- employee of the Orphanage or Charitable home (by the inmates of the said institutions);
- any member of staff or any Member of Parliament, a State Legislative Assembly or Council or any other person in the course of carrying out their duties;
- any non-judicial officer, a member of the staff of a court, any person who visits the court premises for legitimate reason from the judicial offices, or any staff employed by such court;
- a woman in the course of seeking to enter into a contract for service or during the period of service from any person.

The bill gives the right to claim compensation from the defendant for any sexual harassment to which she may have been subjected to in an appropriate court of law. While awarding compensation, the court shall take into account –
(1) the mental trauma, pain, suffering and emotional distress caused to the person aggrieved;

(2) the loss in career opportunities due to this particular incident;

(3) medical expenses incurred by the victim for physical or psychiatric help;

(4) the income and financial status of the defendant.

In India there is a dire need for a civil statute on sexual harassment in the workplace. So far, IRWA has not been used to penalize behaviour constituting sexual harassment whereby women are involuntarily forced to view such materials at the workplace. The need has been felt that specific legislation must be enacted to deal with this kind of sexual harassment at workplace. The Court directives coupled with employer commitment are not sufficient to combat the serious problem of sexual harassment at workplace. Specific legislation against sexual harassment at the workplace will enhance the constitutional prohibition against the same as laid down in Vishaka case. Only law can make such a declaration meaningful that sexual harassment is a violation of rights and make people sensitive to such conduct.

In tune with Constitutional mandate of equality and non-discrimination wide range of progressive legislations have contributed towards the realization of equal status of women with men. From time to time new legislations have been enacted to fight the contemporary social evils. Law is a living organism and its utility depends on its validity and ability to serve as a sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. Law as a cornerstone of the edifice of “order” should meet the

\[185\] Indira Jai Singh(ed), Law Relating to sexual harassment at the workplace at 95 (2004).

\[190\] Supra note 26 at 152.
challenges confronting the society. To quote Sujata Manohar, "Unless laws create equality and fairness, there is no way of getting rid of discrimination. If discrimination is permitted or sanctioned by law, social attitudes will not change, and if they do, there will not be a law to give effect to the new aspirations." The women-specific and women-related legislative framework in India has been and will always remain a vital measure for improvement in the status of women. More importantly the success and failure of a law depends upon its implementation.

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