

**Making Legal Aid a Justice for Women from investigation to decision  
– a reality through sensitized Judiciary**

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The origin of the English word “Women” indicates that the female’s very right to social existence was determined in the light of her secondary relationship to the male, for the words has originally “wifman”, that is “wife-man”, the wife of the man, in the fourteenth century the “f” was dropped and the word became “wiman” and later on “woman” – published in Women’s Right and the Law by Laura A Otten page 45 Praeger Publishers Edition 1993.

However, as times changed, such perceptions also changed and in keeping with the same, another view is now replacing the earlier opinion on the position of women in society. A simple way to explain this new perspective is by way of the following example:

- The word female, includes the word male;
- The word madam, includes the word adam and;
- The word woman, includes the word man.

Hence, a man is actually carved out of the woman.

Aristotle the great thinker whose words “came to be for European philosophy what the Bible was for theology, an almost infallible text, with solution for every problem”, apart from earning the gratitude of enlightened thinkers, also incurred the odium and wrath of women by pleading for feminine enslavement. Plato was by no means better than him in this respect.

Then, it is said, “Silence is a woman’s glory”. In the mid nineteenth century women’s status was no better than slaves. Even the marriage ceremony vow obligated the wife to obey the Husband. This was finally deleted from the wedding vow in the twentieth century.

The First women to qualify in medicine was Florence Fenwick Miller in 1890. She described the position of women on Legal Slavery. She had been under the arbitrary domination of another’s will and dependant for decent treatment exclusively on the goodness of heart of the individual master.

Jyoti Rao Phule was the first social reformer to establish a school for girls of all castes. Justice Ranade championed the cause of Indian Women and Questioned the injunctions imposed by the orthodoxy. They fought against child marriages, polygamy, compulsory celibacy of widows, untouchability, dowry system, caste restrictions against inter-caste marriages and denial of education to women. Chhatrapati Sahu Ji Maharaj a descendent of Shivaji and ruler of Kolhapur from 1894-1922 introduced far reaching

social reforms in his State. He enacted in 1899 a law legalizing inter-caste marriages and promulgated several laws providing for divorce applicable to all Hindus, prohibition of Devdasi system, and inheritance for illegitimate children and punishment for ill treating women.

Legal aid implies giving free legal services to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a legal proceeding in any court, tribunal or before an authority. The History of the organized efforts on the part of the State to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the State.

Lord Dennings while observing that Legal Aid is a system of government funding for those who cannot afford to pay for advice, assistance and representation said:

*“The greatest revolution in the law since the post-second world has been the evolution of the mechanism of the system for legal aid. It means that in many cases the lawyers fees and expenses are paid for by the state: and not by the party concerned. It is a subject of such importance that I venture to look at the law about costs-as it was –as such it is- and as it should be.”*

Today with the plethora of legislative enactments, statutory rules and regulations, and judicial precedents, Courts are a maze not only to the poor but also to a large number of persons who may not be poor financially but so intellectually on account of the lack of knowledge of the relevant laws and of the procedure for obtaining benefit thereof.

Legal aid to women in that aspect is a legal challenge that we face at this point of time. The rights of women have always been subject to change from time to time and there have always been impediments and barriers with respect to implementation of such rights, even where they are acknowledged. Although attempts at achieving gender equality are now being made, and this has even been achieved to a certain extent, this is only true in certain countries, and largely in the areas of women’s education and employment.

### **Position of Women in Indian Society**

If we look back in time to see what the status of women was, in ancient India, the picture reveals that, their status seemed to be in constant flux.

In the ancient times, Hindus in India were governed either by the Daya Bhaga or the Mitakshara Schools of law. Both of these provided that women have only a right to livelihood and not the right of succession, whether it was with respect to the ancestral property, or the self acquired property of the deceased husband. Women were not treated as coparcenaries.

Man and woman are two pillars of the social structure. Their roles, duties and rights are complementary and supplementary towards each other. If one of the pillars is weak, the other cannot bear the burden of society and whole structure of the society shall demolish. Man should not exploit the woman.

Manu clamped down woman's freedom in certain spheres in order to safeguard their position and to preserve the family structure. He says that women should not be given independence. He equated women with slave and his laws epitomize complete submission of women to man.

In the period of later Smritis, women were declared to be of the same status as that of the Sudras, and so came to be gradually excluded from the study of higher theology and philosophy. There are passages which show that daughters were not desired – “Absurd is the lasting good name of a house in which female children are born”. (Garuda 110) Preeti Mishra, op cit, p.19. The birth of a son is also an absolute necessity for the salvation of both a father and mother, “Without son, there is none other who can be of help in the next world”(Devi Bhagwat, 4.15-23). The prohibition against women's acquisition of knowledge of the sacred scriptures – “Women are by their nature meek and weak, women can not study the Shastras” (Matsya Purana 2.154.156-74)

“.....A husband whether he has any merit or not, is a very deity”, (Ayodhya Kanda, 2.62). The Ramayana re-affirmed the deep seated Hindu conception that husband is a Women's greatest deity. The unsupported suspicions concerning the character of womanhood which were expressed by the revered Rama have not helped forward the ethical progress of womanhood in India.

In the Medieval period, when two major cultures Islam and Hinduism encountered and interacted with each other, violence against woman increased manifold. Even the purdah system, which isolated the women from rest of the world was, after all, violence against women, Girls began to be married off at a tender age and in certain communities the new born baby girls began to be killed by the parents themselves. Immolation of widows and polygamy took strong roots in the society.

### **Sati as Domestic Violence**

It is a manifestation of the barbaric attitude of man in violation of the human rights of a woman. Her touch, her voice, her very appearance was considered unholy, impure and something that was to be shunned and abhorred. A woman was considered pure if they committed Sati. Sati is the violation of the fundamental rights envisaged under Article 21 of the Constitution. Modesty is the biggest asset of womanhood.

A rare instance of women's empowerment in the ancient times is exhibited through an interesting instance. A simple cleaning lady, commonly referred to as 'dasi' in an ashram for Maharishi, named Jabala, took her child Satyakam to the esteemed Gurukul of Maharishi Udyalak for his education, but upon being asked, she was unable to state with surety, the name of the father of her son, as she admitted to being intimately associated with several Maharishies. Maharishi Udyalak, upon recognising the boy's

potential, gave him admission, bestowing upon him the name of “Satyakam Putrasya Jabalika”. He then went on to become a great scholar of the Upanishads, and founded the city of Jabalpur in the name of his mother ‘Jabala’.

In relation to the status of women, and how they were treated, the *Sadar Diwani Adalat*, once faced a rather peculiar problem. In the year 1809, a suit was filed by a woman, by the name of *Musamat Devtaya*, against her son-in-law, *Daya Ram* alleging that the defendant had sold her daughter *Samkuria* for a sum of Rs.15/-. The plaintiff stated that she was willing to pay the said amount to the purchaser of her daughter, and thus, the question of possession of her daughter being vested in her, arose. The English Judge, being unable to understand a problem so alien to his culture, referred the matter to a Committee of Pandits for their considered opinion and the Pandits opined that a husband has the right to give away his wife, if he so desires, provided that the wife also gives her consent. The court accepted such opinion and dismissed the suit. The reasoning was supported perhaps, by stories of how Raja *Harishchandra* gave away his wife, *Taramati*, and also of how *Yudhishtir* lost *Draupadi* after putting her at stake, in the course of gambling, with the *Kauravas*.

Even in other countries, the situation was not much better, though, of course, there were certain instances that showed otherwise. For instance, the ***Code of Hammurabi, Iraq*** (17 Century B.C.)- Para 134 provides that if the husband is not able to maintain his wife, such wife may change her husband. On a general note however, the status of woman even abroad, in the past, has been quite low. Women in fact, at times, had no independent status of their own. If a person lost his city, his wife automatically became the captive of another empire, and if such person regained his city, the woman would be returned to her husband, while the children would follow their father, whatever be his fate. The ‘Bride-price’ in this respect had to be fixed and paid.

The Magna Carta 1215, for the first time recognized the right of widows to re-marriage and inheritance. After the death of her husband, the woman could remain in his house only for a period of 40 days, by way of what was provided herein and such provision speaks volumes, regarding the secondary status of women at the said time, even in a country like the UK. Women further did not enjoy the right to own property. The rule of primogeniture entitled the first born to succeed to all property and only the absence of a son, would allow a daughter to inherit. As a consequence of this, even until, as late as the 19<sup>th</sup> century, women experienced numerous difficulties and their status was barely better than that of slaves. Therefore, as surprising as it may sound, Victorian England was not a desirable place for women. “*Frailty, thy name is woman*”, this is how William Shakespeare starts his great work ‘Hamlet’. As a matter of fact, even in the 20<sup>th</sup> century, as late as the year 1918, the right to vote, was conferred only upon women over the age of 30, while, for women over 21, the same was secured only in 1928.

In ***Roberts v. Hoppwood***, 1925 Appeal Cases 578, gender bias was reflected even in the outlook of the judiciary. This was with respect to a case involving an increase in the salary of the men and women working in industries, and it came as a shock when, the most celebrated Judge, of his time, Lord Atkinson, used derogatory words in his judgment regarding the said women. He stated that the councilors had acted unlawfully

by becoming such ardent feminists and as a result of the same, the Municipal Council had turned favourable towards the women workers. Across the Atlantic Ocean, in the United States of America, women did not enjoy a status much better than that of their African slaves inside or outside of their homes.

In the State of Chicago for instance, a law was passed, which placed a complete embargo upon a female lawyer's right to practice. Ms. Myra Bradwell challenged the validity of the said law and in the case of **Bradwell v. Illinois**, 83 US (16 Wall) 442 (1873), the Supreme Court rejected her contention that banning her from the practice of law, was in fact, violative of the constitutional mandate of equality, on the ground that she was not fully competent to discharge the duties and trusts that are attached to the office of an attorney. The court then went on to state that, *the paramount destiny and primary mission of a woman's life is to fulfill the noble and benign offices of, a good wife and a good mother.*

Further, on this issue of right to work, in the case of, **Muller v. Oregon**, 28 SC 324 (1908), the Oregon Supreme Court, rejected the equal status of women, on the ground that their physical structure and the obligation upon them to perform their maternal duties, placed them at a considerable disadvantage in the struggle for subsistence.

Meanwhile, times had changed in India and it was now the age of social reform, in the process of which, women were deeply involved.

After the commencement of the Indian Constitution, laws which were not in tune with the ideology of our Social Reform movements of the 20<sup>th</sup> Century and with the concept of equality as enshrined in Our Constitution stood abolished, and a large number of legislations were enforced to uphold and maintain the dignity of women. The constitutional provisions of legal aid are as follows:-

*“Article 14 guarantees equality before law and equal protection of laws. Equality before law necessarily involves the concept that all the parties to a legal proceeding must have an equal opportunity of access to the court and of presenting their cases to the court. Article 38 urges that the State should strive to promote the welfare of the people by securing and protecting as effectively as it may be a social order in which justice: social, economic and political shall inform all the institutions of national life. Article 39A of the Constitution, inserted by 42nd Amendment of the Constitution in 1976, provides for equal justice and free legal aid.”*

**Section 304** of the **Criminal Procedure Code, 1973** (hereinafter referred to as 'Cr.PC.) provides that where in a trial before the Court of Session, the accused is not represented by a pleader and where it appears to the court that the accused has not

sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State; and the section further empowers the State Government to extend the application of the above provision in relation to any class or trials before other courts in the State. Similarly, **Order 33 Civil Procedure Code, 1908** provides for filing of suits by indigent persons. It enables persons who are too poor to pay court-fees and allows them to institute suits without payment of requisite court fees.

The **Universal Declaration of Human Rights, 1948** recognised the inherent dignity and of the equal and inalienable rights of all members of the human family, where all human beings are born free, equal in status, entitled to freedom without any distinction of race or sex. It also recognised the rights of women without any limitation due to race, nationality or religion, to marry and to form a family and entitled to equal rights as to marriage, during marriage and at its dissolution. The Directive Principles under Articles 42 and 39 of our Constitution find resonance with the Convention's declaration of right to work, free choice of employment, equal pay for equal work, protection against unemployment as contained under Articles 23 and 25. Besides, thought process for achieving political equality, led to the passing of the first global **Convention on the Political Rights of Women** 1952, wherein, recognition of the right of, taking part in the Government of the country directly or indirectly through free chosen representatives and to be eligible for election to all publicly elected bodies and to hold public office and to exercise all public functions on equal terms was proclaimed. The provision providing for reservation for women in our Local Self Governing Institutions is a culmination of this Convention.

**The Beijing Declaration which was the first ever declaration to recognise the need of** empowerment and advancement of women, the explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, stated that the same is basic to their empowerment; and aimed to ensure equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education and to ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets, as a means to further the advancement and empowerment of women.

Empowerment of women is not complete without recognizing the fetters imposed by customs and the archaic laws that are prevalent in our society. To address this aspect, various laws were brought in, to name a few, The Indian Succession Act, which recognised the right of women to inherit property; the Dowry Prohibition Act, to prohibit the age old custom of dowry demand in marriage; the Protection Of women from Domestic Violence Act, 2005; Indecent Representation of Women (Prohibition) Act, 1996. These Acts were in turn, modelled and influenced by various conventions passed at the international level.

Further more, after the commencement of the Constitution and almost simultaneously, the era of globalization, various archaic customs and traditions in India, which demeaned women, gradually began to be addressed.

Furthermore, the Chota Nagpur Tenancy Act, 1988 which failed to provide to women, the right of succession, was challenged on the ground of being *ultra vires* Articles 14, 15 and 21 of the Constitution, in the case of **Madhu Kishwar v. State of Bihar**, AIR 1996 SC 1864. The majority decision of the Supreme Court regarding the same, was that, as the Act protects the right to livelihood, the Act would also of course protect the immediate female relatives, of the last male tenant, and allow them to continue holding the said land, so long as they are dependant upon it for earning their livelihood and are saved; by the proceeds from such land from being rendered destitute. This decision therefore, did not confer the right of succession upon women and the said Act, was held not to be violative of the equality clause, in the Constitution or, for that matter, of any other constitutional provisions.

Another very important aspect, that must be considered particularly as regards women, although essential to the life of every citizen and even non citizen of India, is in the context of the protection of a woman's privacy, for she too, has the right to privacy, just as her male counterparts do.

In **Alika Khosla v. Thomas Mathew & Anr.**, (2002) 62 DRJ 851, the husband asked his wife to carry out paternity test on her aborted fetus. He had accused her of an illicit relationship. The High Court of Delhi held that since the fetus was no longer a part of her body, she could not claim a right to privacy.

The case of **Neera Mathur v. LIC of India**, AIR 1992 SC 392, was more supportive of a woman's right to privacy, as here it was held that, the questioning of a woman, by any employer, or prospective employer, as regards her personal matters, was held to be not only embarrassing and humiliating, but also against her modesty, dignity and self respect.

In **Yusuf Abdul Aziz v. State of Bombay**, AIR 1954 SC 321, the Supreme Court held that the provision of Section 497 IPC is not unconstitutional, though the man only is punishable for adultery under this section. The woman is exempted, though she is an abettor.

The Supreme Court in **Govt. of A.P. v. P.B. Vijayakumar**, AIR 1995 SC 1648, while dealing with the issue of women reservation in the state services, declared that the power conferred upon the state by Article 15(3) covers the entire range of state activities including employment under the state and education.

Pro-active approach of the judiciary could be clearly seen in **V.D. Bhanot v. Savita Bhanot**, AIR 2012 SC 965, where the Apex court has made the retrospective application of the Domestic Violence Act, 2005 to protect the right of the wife.

The Supreme Court in **Ganduri Kotes Waramma & Anr. v. Chakiri Yandi & Anr.**, AIR 2012 SC 169, explaining the objectives of the Hindu Succession (Amendment) Act, 2005 observed, “the legislature has now conferred substantive right in favour of the daughter in order to uphold the gender equality”

In **C.B. Mutthamma v. Union of India**, AIR 1979 SC 1868, when the constitutional validity of Rules 8(2) and 18(4) of the Indian Foreign Service Rules was challenged, the Supreme Court held that these rules are violative of Article 14, 16 and 21 of the Constitution as these rules are prohibiting married women to enter services and continue in service. Similarly, in **T. Sudhakar Reddy v. Govt. of A.P.**, AIR 1994 SC 544, when the validity of certain provisions of co-operative society act and rules, which benefit the women members, was challenged the court dismissed the petition and upheld provisions in the interest of women.

Again in **Air India Cabin Crew Association v. Yeshaswinee Merchant & Ors.**, AIR 2004 SC 187, the apex court held that **Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women**, which is a positive measure in their favour. Therefore, it is clear that the discrimination against women is withheld, whereas discrimination in their favour is upheld by the apex court.

In **Gautam Kundu v. State of W.B.**, AIR 1993 SC 2295, the Supreme Court dealt with Section 112 r/w Section 4 of the Indian Evidence Act, 1872. It was held that blood test, generally should not be allowed. However, a person can give blood for testing when he/she wants to give evidence himself.

In **‘X’ v. Hospital ‘Z’**, AIR 1999 SC 495, it was held that, privacy right is not absolute when a person seeks information about another, with whom the marriage of such person is likely to take place. This is because there might have relevant interests in such disclosures.

In **Pratibha Rani v. Suraj Kumar**, AIR 1985 SC 628, the Supreme Court ruled that ‘Stridhan’ refers to property which must always remain with the wife and that her husband or other family members have no concern with the same.

On the issue of protecting the dignity of a woman, the Apex Court in the case of **State of Maharashtra v. Christian Community Welfare, Council of India**, AIR 2004 SC 7, held that, whenever a woman is required to be arrested it is desirable that a female constable be present and as a consequence thereof, the Cr.PC. was amended in the year 2005. This means no women can be arrested after sunset and before sunrise apart from in exceptional cases.

In keeping with this, in **Sheela Barse v. State of Maharashtra**, AIR 1983 SC 378, the Supreme Court issued directions to ensure that female prisoners are kept in police lock ups in a manner protecting their dignity. The court issued the direction that the police must inform the nearest Legal Aid Committee about the arrest of a person immediately after such arrest.



Further, in **Dr. Upendra Baxi (I) v. Uttar Pradesh & Anr.**, 1983 (2) SCC 308, two distinguished law Professors of the Delhi University addressed a letter to this Court regarding inhuman conditions which were prevalent in Agra Protective Home for women. The court heard the petition on a number of days and gave important directions by which the living conditions of the inmates were significantly improved in the Agra Protective Home for women.

In **Nandini Satpathy v. P.L. Dani & Anr.**, AIR 1978 SC 1025, the Supreme Court issued direction to enforce the provisions of Section 160(1) Cr.PC., which prevents a police officer from calling a woman to attend at any place, other than the place in which such woman normally resides. The court directed to answer all police interrogations relevant but not self-incriminatory. The police officer shall not summon her to the police station but examine her in terms of the proviso to Section 160(1) Cr.PC.

The Supreme Court in various cases tried to reflect upon the dehumanizing act of physical violence on women escalating in the society and the approach to be adopted while dealing with these.

In **State of H.P. v. Shree Kant Shekari**, AIR 2004 SC 4404, the Supreme Court has viewed rape as not only a crime against the person of a woman, but a crime against the entire society. It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. (See also: **Bodhisattwa Gautam v. Subhra Chakraborty**, AIR 1996 SC 922).

Further, in **Satya Narain Tiwari @ Jolly & Anr. v. State of U.P.**, (2010) 13 SCC 689, the Apex Court held that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment. (See also: **Mehboob Batcha & Ors. v. State rep. by Supdt. of Police**, (2011) 7 SCC 45).

In **Chandrika Prasad Yadav v. State of Bihar & Ors**, AIR 2009 SC 1719, the Apex Court given directives to State for providing proper safety and security to girls and women. It was observed :

*“If the inmates of the protection home could flee away from the control of authority managing the home or if persons could enter the said home at the dead of night without detection or permission and could take away girls under the nose of the people protecting the home, lot of explanation would have to be given by the appropriate Government and the competent authority regarding their capabilities of offering proper care and protection to such girls and women.”*

Furthermore, in the case of **Priya Patil v. State of Madhya Pradesh**, AIR 2006 SC 2639, the Supreme Court ruled that a woman cannot possess the intention to commit rape.

In **Every v. Miles**, 1964 AC 261, the moral responsibility of the offender was emphasised so as to provide such compensation to the girl whose life prospects are ruined as the accused people can afford to pay was to be paid and in addition to the sentence.

In **State of Punjab v. Gurmit Singh**, AIR 1996 SC 1393, the Supreme Court observed :

*“Of late crime against women in general and rape in particular is on the increase..... Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murder destroys the physical body of the victim; a rapist degrades the very soul of the helpless female. The court, therefore, shoulder a greater responsibility while trying an accused on charges of rape”.*

Further, it was also held that the trial of rape cases must be done invariably in-camera rather than in open court as envisaged in **Section 327(2) Cr.PC.** The Supreme Court also pointed out that it would be unlawful for any person to print or publish any matter in relation to the proceedings of such cases except with the previous permission of the judge of the court as per provisions of Section 327(3) Cr.PC. The further dictum of the Apex Court was that wherever possible, it would be desirable that sexual assault cases on women are tried by lady judges so that the victim can make her statement with greater ease and assist the courts to properly discharge their duty without allowing the truth to be sacrificed at the altar of rigid technicality while appreciating evidence in such cases.

In **Chairman, Railway Board v. Chandrima Das**, AIR 2000 SC 988, the Supreme Court held that a victim of rape can claim compensation, even if she is a foreign national, based on the Universal Declaration of Human Rights, 1948, which has been widely accepted as the *“Moral Code of Conduct”*.

The Supreme Court in **Delhi Domestic Working Women’s Forum v. Union of India & Ors.** 1995 (1) SCC 14, has found that in the cases of rape, the investigating agency as well as the Subordinate courts sometimes adopt totally an indifferent attitude towards the prosecutrix and therefore, this Court issued directions in order to render assistance to the victims of rape.

In **Gaurav Jain v. Union of India & Ors.**, AIR 1997 SC 3021, the Supreme Court dealt with a petition seeking improvement of plight of prostitutes and their progeny and the Court issued directions for preventing of induction of women in various forms into prostitution; their rescue from the flesh trade; and rehabilitation and restoration of dignity through various welfare measures.

A woman of easy virtue also has the right to protect her dignity and not be raped. (Vide: **Narender Kumar v. State** (NCT Delhi), AIR 2012 SC 2281).

In **Begum Subanu @ Saira Banu & Anr. v. A.M. Abdul Gafoor**, AIR 1987 SC 1103, the Supreme Court held that a right has been conferred upon the wife under Section 125 Cr.PC., to allow her to claim maintenance from her husband if living separately and that such law applies uniformly, irrespective of the personal laws of the parties as per Section 125 Cr.PC.

Further, in this context, in **Lata Singh v. State of U.P. & Anr.**, AIR 2006 SC 2522, a woman's right to marry a person, or to live with anyone she likes was upheld.

In **S. Khushboo v. Kanniammal & Anr.**, AIR 2010 SC 3196, the Supreme Court held that morality and criminality are not co-extensive. If two persons of different gender, of their own free will choose to live together, the same is not an offence under any penal statute.

Finally, a landmark decision on a woman's right over her own body and her right to reproduction, was delivered in the case of **Suchita Srivastava v. Chandigarh Administration**, AIR 2010 SC 235, a question arose regarding the termination of pregnancy of a mentally challenged woman, living in a shelter in Chandigarh. The Supreme Court interpreted the provisions of Article 21 and held that the right to privacy of a woman, her dignity and bodily integrity must be respected. Consequently, reproductive rights must include the woman's right to carry her pregnancy to its full term, to give birth and to subsequently raise children.

It would be incorrect to state that the Judiciary alone is responsible for the evolving status of women and for their empowerment. Tremendous effort is being made by all three organs of the State. An example of such efforts is illustrated below:

### **Compulsory Registration of Marriages**

In a bid to prevent child marriages, polygamy and desertions, the Supreme Court declared in 2006 that it is compulsory for all marriages to be registered. However, only a few States framed necessary rules to implement the declaration and these rules, were made in respect of Hindus only.

### **Restrict the Freedom to Bequeath One's Property**

In an attempt to protect the interests of female legal heirs, it is being suggested by experts that a Hindu should have the discretion to bequeath by will, only upto 2/3's of his property and the remaining 1/3<sup>rd</sup> of his estate, should be governed by the laws of succession, which now include daughters in the list of legal heirs.

### **Allowing Women to Complain against their Adulterous Husband**

Section 497 IPC, defines adultery, as an offence actionable only between the adulterer and the aggrieved husband. No relief is thus given to a woman in the event that her husband commits adultery. The Law Commission of India and the Malimath

Committee on criminal reforms proposed to make the provision dealing with adultery, in the Code, gender neutral.

### **Widening the Scope of Rape**

Section 375 IPC is too weak to deal with an offence as serious as rape, leaving a lot of scope for the perpetrators of sexual assault and harassment, to escape completely free.

In Nepal, the law exempted men from being prosecuted for the rape of their wives. In 2002, in a case taken by the Forum for Women, Law and Development, the Nepal's Supreme Court ordered Parliament to amend the rape law. Till date, 52 countries worldwide have explicitly criminalized marital rape in their penal codes.

This is because Section 375 is too narrow. While "sexual intercourse" is the necessary condition for rape, "penetration" is stipulated as the sufficient condition; meaning thereby, that despite the fact that the man might have sexually assaulted the victim in various ways, the offence of rape cannot be made out against him, unless the crime involves "penile-vaginal penetration".

The Law Commission has suggested a fresh definition for rape, making it clear that penetration could be of the vagina, anus or the urethra, either with any part of the body of another person, or by way of an object manipulated by another person. It also seeks to include oral sex and the manipulation of any other part of the body with sexual intent.

### **Criminalising Marital Rape**

The sole instance where marital rape is not condoned by the Indian law is when the wife is below the age of 15 years. Even so, she must lodge a complaint within one year of the said incident, and despite this, even upon conviction, her husband will have to serve a maximum sentence of only 2 years, which is very mild, in comparison to the regular minimum punishment for rape being, a sentence of 7 years. And there still remains no remedy for wives who are above the age of 15.

In this context, the Domestic Violence Act, 2005 has created a civil remedy for victims of such an offence, even though, it too, has refrained from criminalising marital rape.

However, a progressive decision in this regard was given in the case of **In R v. R**, (1992) 1 AC 599, where the House of Lords examined the provisions of Section 1(1) of Sexual Offences (Amendment) Act, 1976, where the accused admitted to having forcible sexual intercourse with his wife. He was charged for rape and assault. The Court came to the conclusion that the supposed marital exemption in rape formed no part of the law of England. Therefore, there was no law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband and, "therefore, a husband could be convicted of rape, or attempted rape of his wife, where she had withdrawn her consent to sexual intercourse."

### **Enactment of a Law on Sexual Harassment**

In **Vishaka & Ors. v. State of Rajasthan & Ors.**, AIR 1997 SC 3011, the Supreme Court defined the term 'sexual harassment' and issued guidelines to prevent the same at all workplace, and further provided for a mode of domestic enquiry in the event of such violation.

The provisions dealing with, "outraging the modesty" of a woman (Section 354 IPC), and "insulting the modesty" of a woman (Section 509 IPC), are outdated. The Law Commission in the year 2000 recommended replacing of the 'outraging the modesty' clause, with one, that deals with "unlawful sexual conduct", which would cover touching of the body of any person, other than one's own spouse "with sexual intent and, without the consent" of such person.

Recently, the Lok Sabha on 3<sup>rd</sup> September, 2012 passed the, Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Bill, 2010. As per the act, sexual harassment includes any one or more of unwelcome acts or behavior like physical contact and advances, a demand or request for sexual favours or making sexually coloured remarks or showing pornography.

Clause(2) talks about the status of domestic workers, Clause (4) talks about the Constitution of an Internal Committee for scrutinizing the complaints. Clause (6) talks about the Constitution of Local Complaint Committee which would address complaints where the complainant does not have the resources to an Internal Committee or where the complaint is against the employer. Clause(11) talks about the inquiry into a complaint by the committee.

Non-compliance with the provisions of the Act shall be punishable with a fine of up to Rs 50,000/-. It has also provisions for safeguard against false or malicious charges.

### **Higher Penalty for Molestation of Children**

There are separate provisions under Section 376 IPC for dealing with minor victims of rape, where the minimum punishment cannot be less than 10 years imprisonment, however, Section 354 IPC, which covers all other forms of non-consensual sexual contact, makes no such distinction between child and adult victims of such offences.

Hence, the "unlawful sexual contact" provision as suggested by the Law Commission, is designed to enhance the penalty for those who abuse children, to a total of 7 years, from the present penalty of just 2 years.

Section 3(4) of the Medical Termination of Pregnancy Act, 1971 make it evident that the termination of pregnancy with respect to a minor girl can be only carried out with the consent of her guardian. A question may therefore arise regarding a situation where, when the wife is a minor, whether she, even for reasons permissible in law, can terminate her pregnancy without the consent of her guardian.

A similar issue arose in the case of, **U.K. Gillick v. West Norfolk and Wisbech Area Health Authority**, (1985) 3 All E.R. 402, where the Court addressed questions regarding the validity of a Circular issued by the National Health Service-Family Planning Clinics of United Kingdom containing guidelines for the area health authorities, with respect to giving advice regarding contraception, even to girls under the age of 16. Ms. Gillick sought a declaration from the Court, against the health authorities regarding the issuance of the said Circular.

Ultimately, the House of Lords by a majority of 3:2 rejected her claim, as the House held that having regard to the reality that a child becomes increasingly independent as he/she grows older, and that parental authority dwindles correspondingly, the law did not recognize any rule regarding absolute parental authority, until a fixed age. Accordingly, it was held that a doctor, who in the exercise of his clinical judgment gave contraceptive related advice and treatment to a girl under the age of 16, without her parental consent, did not commit any offence under Section 6(1) or Section 28(1) of the Sexual Offences Act, 1956.

Moving forward to the recommendations given by **J.S. Verma Committee on amendments to the Criminal Law system** in our country. To name a few recommendations, amongst many others:-

- 1) In respect of certain categories of cases, such as those where the victim is in custody of persons in authority including police and armed personnel, certain statutory presumptions must apply under Section 114-A of the Indian Evidence Act, 1872. Every complaint of rape must be registered by the police and civil society should perform its duty to report any case of rape coming to its knowledge.
- 2) Any officer, who fails to register a case of rape reported to him, or attempts to abort its investigation, commits an offence which shall be punishable as prescribed. We have also taken into account offences of eve teasing, voyeurism, stalking as well as sexual assault and unsolicited sexual contact.
- 3) The protocols for medical examination of victims of sexual assault have also been suggested, which we have prepared on the basis of the best practices as advised by global experts in the fields of gynecology and psychology. Such protocol based professional medical examination is imperative for uniform practice and implementation. The nature of forensic evidence collected will be determined by three main factors - nature of assault, time lapsed between assault and examination and whether the survivor has bathed/washed herself since the assault. If a woman reports within 96 hours (4 days) of the assault, all evidence including swabs must be collected without fail, in keeping with the history of assault. The likelihood of finding evidence after 72 hours (3 days) is greatly reduced, however it is better to collect evidence upto 96 hours in

case the survivor may be unsure of the number of hours lapsed since the assault.

4) The judiciary has the primary responsibility of enforcing fundamental rights, through constitutional remedies. The judiciary can take *suo motu* cognizance of such issues being deeply concerned with them both in the Supreme Court and the High Court. An all India strategy to deal with this issue would be advisable. The Chief Justice of India could be approached to commence appropriate proceedings on the judicial side.

5) To augment the police force, there is a need to develop community policing by involving the local gentry, which would also motivate them to perform their duty as citizens. Respectable persons in each locality could also be appointed, Special Executive Magistrates under Section 21 Cr.PC. and invested with powers to deal with the traffic offences and other minor offences. In addition, to assisting the maintenance of law and order in the locality, their presence would inspire greater confidence of safety in the locality.

### **Criminal Law (Amendment) Act, 2013**

The Criminal Law (Amendment) Bill, 2013 was passed by the Lok Sabha and the Rajya Sabha and received the assent of President of India. Now it will be called the Criminal Law (Amendment) Act, 2013.

The new laws have provisions for increased sentence for rape convicts, including life-term and death sentence, besides providing for stringent punishment for offences such as acid attacks, stalking and voyeurism. Through the revised Bill, the government has amended various sections of the Indian Penal Code, the Code of Criminal Procedure, the Indian Evidence Act and the Protection of Children from Sexual Offences Act. Certain changes have been introduced in the Cr.PC. and Evidence Act, like the recording of statement of the victim, more friendly and easy, character of the victim is irrelevant, presumption of no consent where sexual intercourse is proved and the victim states in the court that there has been no consent, etc.

As per the amended law, a rape convict can be sentenced to rigorous imprisonment for a term not less than 20 years, which may extend to remainder of the convict's natural life and compensation to the victim which shall be reasonable to meet the medical expenses and rehabilitation of the victim. It also provides for the death sentence to repeat offenders. And for the first time, stalking and voyeurism have been defined as non-bailable offences if repeated for a second time, while acid attack convicts can get a 10-year jail sentence. The law has fixed age for consensual sex at 18 years.

### **What this leads me to conclude is that:**

We can find a paradigm shift in the approach of the Supreme Court towards the concept of legal aid from a 'duty of the accused to ask for a lawyer' to a 'fundamental right of an accused to seek free legal aid'. But in spite of the fact that free legal aid has

been held to be necessary adjunct of the rule of law. The legal aid movement has not achieved its goal. There is a wide gap between the goals set and the goals met. The major obstacle to the legal aid movement in India is the lack of legal awareness. People are still not aware of their basic rights due to which the legal aid movement has not achieved its goal yet. It is the absence of legal awareness which leads to the exploitation and deprivation of rights and benefits of the poor. Thus, it is the need of the hour that the women of the society should be imparted with legal knowledge and should be educated on their basic rights which should be done from the grass root level of the country.

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