

# **WOMEN LAW AND SOCIETY**

**Dr. Deepak Singal**



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**ACADEMIC**  
**UNIVERSITY PRESS**

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Year of Publication 2024-25

ISBN : 978-93-6284-250-3

Printed and bound by: Global Printing Services, Delhi  
10 9 8 7 6 5 4 3 2 1

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# Preface

Women, Law, and Society is an interdisciplinary field that explores the intersection of gender, law, and social structures. It examines how legal systems shape and are shaped by social norms, cultural values, and power dynamics, with a focus on the rights, experiences, and status of women within society.

The relationship between women, law, and society has evolved over time, reflecting changing attitudes towards gender roles, women's rights movements, and legal reforms. Historical analysis reveals the ways in which laws have been used to perpetuate gender-based discrimination and inequality, as well as the efforts of women's movements to challenge discriminatory practices and advocate for legal reforms.

Women, Law, and Society encompasses various legal frameworks that address issues such as gender-based violence, reproductive rights, employment discrimination, and family law. These legal frameworks include international human rights instruments, national constitutions, statutes, and case law, which provide a foundation for promoting gender equality and protecting women's rights.

Despite legal advancements, women continue to face numerous challenges and barriers to equality in both law and society. These challenges include systemic discrimination, lack of access to justice, gender-based violence, economic inequality, and cultural norms that perpetuate gender stereotypes and inequality. Women from marginalized communities, including women of color, LGBTQ+ women, and women with disabilities, often face intersecting forms of discrimination and marginalization.

An intersectional approach is essential in understanding the complexities of women's experiences and addressing the intersecting forms of discrimination and



oppression they face. Intersectionality recognizes that women's experiences are shaped by multiple intersecting factors, including race, class, sexuality, and disability, and that efforts to promote gender equality must be inclusive and responsive to the diverse needs and experiences of all women.

The field of Women, Law, and Society continues to evolve, with ongoing efforts to advance gender justice, promote women's rights, and create a more equitable and inclusive society for all individuals. Future directions include expanding legal protections for women's rights, addressing intersecting forms of discrimination and marginalization, promoting diversity and inclusion in legal institutions, and strengthening partnerships between governments, civil society organizations, and international agencies to advance gender equality on a global scale.

In this preface, we embark on a journey through the multifaceted interplay of women, law, and society, examining the challenges, progress, and complexities of gender justice and women's rights in contemporary society.

*—Author*

# 1

## **Women, Legal Theory, and Societal Dynamics**

### **CONSTITUTIONAL RIGHTS FOR WOMEN**

The Constitution of India guarantees equality of sexes and in fact grants special favours to women. These can be found in three articles of the Constitution. Article 14 says that the government shall not deny to any person equality before law or the equal protection of the laws. Article 15 declares that government shall not discriminate against any citizen on the ground of sex.

Article 15 (3) makes a special provision enabling the State to make affirmative discriminations in favour of women. Moreover, the government can pass special laws in favour of women.

Article 16 guarantees that no citizen shall be discriminated against in matters of public employment on the grounds of sex. Article 42 directs the State to make provision for ensuring just and humane conditions of work and maternity relief.

The Constitution imposes a fundamental duty on every citizen through Articles 15 (A) (e) to renounce the practices derogatory to the dignity of women.

All these are fundamental rights. Therefore, a woman can go to the court if one is subjected to any discrimination. When we talk about constitutional rights of women in India, we mainly pertain to those areas where discrimination is done against women and special laws formulated to fight those bigotries. The most important issues stand as those pertaining to marriage, children, abortion, crimes against women, and inheritance.

Before modern Hindu laws were passed, child marriages were the norms, inter-caste marriages were banned, the girl became a part of the husband's family, and polygamy was common. In the 19th century, the British rulers passed several laws to protect customs and traditions while abolishing detestable practices like Sati.

Some such revolutionary laws were Hindu Widows Remarriage Act 1865 and the Brahmo Samaj Marriage Act 1872, the forerunner of the present Special Marriage Act. In the beginning, the Act sets four essential conditions for a valid Hindu marriage.

*They are:*

- Monogamy
- Sound mind
- Marriageable age
- The parties should not be too closely related.

Polygamy was permitted among Hindus before the Act was passed in 1955. However, after the act was passed, any man marrying again while his wife is living will be punished with fine and imprisonment up to seven years. Formerly, child marriages were common. The Child Marriage Act of 1929 was not very effective as such marriages were continued to be performed. Now, however, the bridegroom must be 21 years old and the bride 18 years. However, there is a separate Muslim Code of Conduct, which allows polygamy of up to four wives as per Islamic laws. A marriage may be invalid without the boy or the girl realizing it at the time of the wedding. A civil marriage would be void if four essential conditions are not complied with.

*These conditions are listed in the Special Marriage Act as enumerated below:*

- If it is bigamy
- If either party was suffering from mental disorder
- If the boy has not completed 21 years and the girl 18 years
- The boy and the girl are too closely related, or in legal language, are "within degrees of prohibited relationship" unless custom governing at least one party permits the marriage between them. Prohibited relationships are listed in the Special Marriage Act.
- A fifth reason for invalidating a marriage is impotence of either party.

There are some grounds available to the wife only, both in Hindu and civil marriages. One such ground available exclusively to the wife is her husband's commission of rape, sodomy or bestiality. Under the Hindu Adoptions and Maintenance Act 1956, a Hindu wife is entitled to be maintained by her husband.

Section 125 of the Criminal Procedure Code also deals with maintenance of wife and children. If there is a decree of maintenance against the husband and the couple have been living apart for over one year, it would be a ground for the wife to seek dissolution of marriage. Here again the Muslim Personal Law has a different set of conditions for the annulment of an Islamic marriage.

The Dowry Prohibition Act of 1961 says that any person who gives, takes, or abets the giving or taking of dowry shall be punished with imprisonment, which

may extend to six months or with fine up to Rs. 5,000 or with both. Dowry that started off as a practice to give away presents to the departing daughter, usually some resources to begin her new married life, slowly assumed extraordinary proportions and turned into a social evil. Brides were expected to bring the “gifts” regardless of their personal willingness. The bride’s family could no longer have an individual say; lists were prepared and sent to the girl’s house before the final agreement between the two families. The condition being that the boy would marry the girl only if the demands were met. Such a custom is being practiced not only in India but also in other countries like Bangladesh and Nepal. The reason behind this custom is the poor economical condition of the people along with a lack of education; unawareness of legal rights among women and a general bias against the women.

Crimes like rape, kidnapping, eve teasing and indecent exposure can be grouped as crimes against women. Rape is the worst crime against women after murder and the maximum punishment under the Indian Penal Code (IPC) is life imprisonment. An abortion or miscarriage due to natural causes is not an offence. Therefore, the law does not deal with it. However, violent and forceful abortion is a crime. Sections 312 and 316 of the Indian Penal Code deal with abortion as crime. Section 313 deals with abortion without the consent of the woman. The punishment could even be life imprisonment. The Hindu Succession Act gives male and female heirs almost equal right to inheritance. Section 14 says that any property possessed by a female Hindu shall be held by her as full owner and not as a limited owner.

## **SOCIETY AND COOPERATIVE CONFLICTS**

Given the crucial role of social conditions in the genesis of hunger and deprivation, it is important to have some understanding of certain basic feature of social relations in this field. One general characteristic that is, in some sense, quite obvious and that tends nevertheless, to be neglected often enough is the coexistence of conflicts as well as congruence of interests in most forms of human interaction. There are many advantages to be gained by different people from cooperation and collaboration, and yet there are also elements of clash and divergence of interests. Such coexistence of cooperation and conflict is endemic in social relations.

The cooperative elements are often strongly emphasised in the context of describing the social challenge involved in confronting hunger and famines. That can be exactly right, and there are indeed great gains to be made for most people, possibly even all, through such matters as protecting the environment, preventing droughts, or eliminating epidemics. But at the same time, serious mistakes can be made in the analysis of deprivation in general, and of hunger in particular, if we do not pay attention to the pervasive elements of conflict that are among the constitutive features of any society.

Conflicts of class interests have received, rightly, a good deal of attention, partly in connection with Marxian analysis. These conflicts are relevant in an

obvious and elementary way in matters of hunger and famine, and the broad categorisation of classes can be fruitfully extended by seeking further divisions related to occupation groups. Famines are always divisive phenomena. The victims typically come from the bottom layers of society—landless agricultural labourers, poor peasants and share-croppers, pastoralist nomads, urban destitutes, and so on. Contrary to statements that are sometimes made, there does not seem to have been a famine in which victims came from all classes of the society.

Sometimes there is extensive competition and combat between different classes or occupation and combat between different classes or occupation groups in trying to secure a larger share of a given supply of food that is fixed in the short run. For example, in the Bengal famine of 1943, the rural agricultural labourers who had to buy food with their wages were hit by the rise in food prices related, at least partly, to the increase in the purchasing power of the urban population in the war economy of Bengal. When there is a limited amount of food, with the market dividing it among the population according to their respective purchasing powers and market pulls, a worsening of the relative position of some groups in the scale of money incomes can lead to an absolute decline in their ability to command food. In 'food battles,' the Devil takes the hindmost.

There are conflicts of interests of various kinds that operate in the economy, and the importance of cooperative elements in social relations should not make us lose sight of the extensive and vital role that interest conflicts can play in worsening the predicament of some groups as it improves the position of others. Indeed, 'cooperative conflict' *i.e.*, the presence of strong elements of conflict embedded in a situation in which there are mutual gains to be made by cooperation) is a pervasive feature of social living, and to take note of this 'mixed' structure is as important in the analysis of hunger and famines as it is in any other substantive social investigation. The outcomes of cooperative conflicts depends on a variety of factors and can be analysed in different ways. Generally, it seems reasonable to predict that one of the important factors is the 'breakdown position' in case cooperation fails. The more a party has to fear from such a breakdown, the less able it will be to secure a favourable outcome in the choice over alternative cooperative solutions. The workers with no ownership of means of production are, of course, particularly vulnerable to the breakdown of employment arrangements, and this contributes to the bad terms of employment that workers tend to get—an issue that has been extensively discussed by Marx, among others. In the context of hunger analysis it is important to note both (1) the vulnerable 'breakdown position' of those owning few productive assets other than their labour power (they are often the first to starve when the normal operation of the economy is disrupted), and (2) the influence of this vulnerability on the deals that such people tend to get, for instance in exploitative rural employment.

The other side of the same coin can be seen in the enhanced bargaining power of labour in private employment when alternative earning opportunities

improve. For example, there is some evidence that the security provided by the Employment Guarantee Scheme in the state of Maharashtra in India has had a significant impact on the terms of employment in the rural economy, and generally on the economic and social positions of agricultural labourers. The benefits received from the Employment Guarantee Scheme by vulnerable groups in Maharashtra may thus go well beyond the additional earnings from public employment. In assessing various forms of public intervention (*e.g.*, land reforms, literacy campaigns, or employment programmes), importance has to be *inter alia* attached to their impact on the breakdown position of vulnerable groups and through that on the deal that these people receive in the economy and the society.

There are other determinants of outcomes of 'cooperative conflicts' than the breakdown position of the various parties involved, *e.g.*, perceptions of contributions to joint prosperity, threats that the parties can respectively employ. The relevance of different influences will depend crucially on the nature of the congruent interests and the understanding of conflicts faced by the different parties. Here too, public action, *e.g.*, in the form of education and politics, can have a far-reaching impact on the deal that vulnerable groups receive in the society.

Cooperative conflict takes a particularly important but complex form in matters of gender relations, such as the distribution of joint benefits, between men and women in the family. In that context, as we shall argue presently, the nature of the perception of each person's contribution to the joint benefits can play a particularly important part (for example, whether women are seen as 'contributing' much to the family's economic prosperity can become a crucial variable even in the division of food and health care). But the need to take note of the nature of cooperative conflicts in the analysis of hunger and deprivation is a more general requirement that has pervasive relevance because of the extensive coexistence of congruent and conflicting interests in the social relations that govern people's ability to establish entitlement over food and related necessities.

## **FEMALE DEPRIVATION AND GENDER BIAS**

One of the difficult fields of 'food battle' is that of intrafamily divisions. While economic models are often constructed on the assumption that the distribution of commodities among different members of the family is done on the basis of equalising well-being or need-fulfilment, there is considerable evidence that intrafamily divisions often involve very unequal treatments. The systematic deprivation of women *vis-a-vis* men in many societies (particularly that of girls *vis-a-vis* boys) has attracted a good deal of attention recently, and there is a fair amount of evidence in that direction from many parts of the world, including South Asia, West Asia, North Africa, and China.

It is not, of course, easy to observe directly who is eating how much from a shared kitchen. Claims regarding unequal treatment in the division of food are

typically based on indirect information. A natural direction in which to go is that of examining direct evidence of various nutritional and related functionings, such as clinical signs of undernourishment, morbidity rates, or comparative mortality patterns. This also has the merit of establishing comparisons in terms of those things that ultimately matter (what kind of life a person can lead), rather than trying to observe just commodity intakes, which are means to achievements rather than being important in themselves.

Since there can be substantial interpersonal and intrapersonal variations in the relation between nutritional intakes and health achievements or functioning ability, comparisons of inputs can be a defective basis for the assessment of relative treatments. If, on the other hand, it is found that women are more frequently undernourished than men, or that the ratio of female to male mortality rates is higher than what can be expected when there is no serious sex bias in the division of food or health care, there would indeed be a good ground for questioning the thesis of equal treatment.

Such evidence of inequality does exist in many developing economies. Even the elementary statistics of the ratio of female to male population bring out a picture of remarkable variations. The presents values of female-male ratio—FAIR for short—for different regions of the world. For the more developed economies in Europe or North America the FMR tends to average around 1.05, mainly reflecting certain survival advantages that women seem to have over men in the absence of serious anti-female bias in the division of such things as food and health care. In contrast, the FMR in South Asia, China, West Asia, and North Africa averages only around 0.93 or 0.94. In India, not only is the mortality differential remarkably sharp among children (that is, mortality rates are much higher for girls than for boys), the higher mortality rate of females vis-a-vis males applies to all age groups until the late thirties.

However, not all poor regions of the world have very low female-male ratios. In fact, both South-east Asia and sub-Saharan Africa have female-male ratios higher than unity (though not as high as Europe or North America). We shall have to address the question as to why these differences are observed. It is also interesting to probe these differences to throw light on the magnitude of the problem of shortfall of women in the total population—primarily reflecting excess female mortality at present and in the recent past of the concerned region. It may, for example, be asked how many more women there would be in India or China (given the number of men in each) if they had the female-male ratio that obtains in sub-Saharan Africa. The number of ‘missing women,’ calculated in this way, works out as 37 million in India and 44 million in China.

The number of ‘missing women’ reflects an aspect of a complex and terrible problem. The shortfall of women arises from a higher sex differential in mortality rates in India and China than obtains in the sub-Saharan African economies, and reveals in quiet statistics a gruesome story of anti-female bias in social divisions. It is also interesting to note that while sub-Saharan Africa is taken to be, in some respects the ‘problem region’ of the world, when it comes to sex



bias, the more problematic countries are elsewhere. The number of 'missing women' as we have calculated it is highest in China, but proportionate to the population it is even higher in Southern Asia, Pakistan has, in fact, the highest proportion of 'missing women'—as high as 13 per cent. There are significant numbers of 'missing women' also elsewhere, including in West Asia, North Africa, and even Latin America. The numbers would have been larger if we had used, for comparison, not the sub-Saharan African female-male ratio, but that of, say, Europe or North America.

It should be mentioned that the differential mortality rates need not be wholly or even primarily connected with unequal treatments in the division of food as such, and the divergence can arise from other inequalities, such as those of access to health. As was argued earlier, it is a mistake to concentrate exclusively on the delivery of food and to ignore the tremendous interdependence and complementarity that obtain between the use of food and other resources (such as health care). Here as elsewhere, entitlement comparisons have to go beyond the limited focus of food entitlements to the more comprehensive concern for entitlements to the different goods and services which influence our nutritional opportunities and achievements.

The sharp contrast between South Asia and sub-Saharan Africa which emerges from the evidence on female-male ratios is of considerable significance, and has several interesting features. First, many studies of food intake, nutritional status and survival chances confirm the pattern of gender differentials indicated by a demographic examination of female-male ratios. Anti-female discrimination in health and nutrition is endemic in South Asia, but much less noticeable (perhaps even absent) in the case of sub-Saharan Africa. Second, there are many possible reasons for this interregional contrast. A full explanation would have to take into account the profound cultural, economic and social differences between South Asia and sub-Saharan Africa. It is worth noting, however, that the lower incidence of anti-female bias in the latter region fits well with the view that the vulnerability of the respective parties is one important influence on the outcome of cooperative conflicts (including those involved in gender divisions). There is indeed a good deal of anthropological and statistical evidence on the greater autonomy of African women (in terms of land rights, access to gainful employment, control over property, freedom of movement, *etc.*) in comparison with the general position of South Asian women. Third, the extent of sex discrimination in health and nutrition is not an immutable feature of any society, and important changes have taken place over time in both regions. It has been argued that sex differentials in mortality are slowly narrowing in South Asia, while they seem to be widening in at least some countries of sub-Saharan Africa. The latter phenomenon, if confirmed, may relate in part to the decline of agriculture in these countries, and the greater reliance on non-agricultural activities to which men have a privileged access.

Finally, the relative absence of sex discrimination in health and nutrition in sub-Saharan Africa does not imply, by any means, that sex discrimination in



*general* is of little importance in African societies. Indeed, even in the rich countries of West Europe and North America, where nutrition and survival are no longer areas of intense discrimination between the sexes, women remain disadvantaged in numerous ways. Similarly, there is considerable evidence that the general status of women in African societies involves significant and pervasive inequities.

## MATERNAL MORTALITY

India's maternal mortality rates in rural areas are among the highest in the world.

A factor that contributes to India's high maternal mortality rate is the reluctance to seek medical care for pregnancy—it is viewed as a temporary condition that will disappear. The estimates nationwide are that only 40-50 percent of women receive any antenatal care. Evidence from the states of Bihar, Rajasthan, Orissa, Uttar Pradesh, Maharashtra and Gujarat find registration for maternal and child health services to be as low as 5-22 percent in rural areas and 21-51 percent in urban areas.

Even a woman who has had difficulties with previous pregnancies is usually treated with home remedies only for three reasons: the decision that a pregnant woman seek help rests with the mother-in-law and husband; financial considerations; and fear that the treatment may be more harmful than the malady.

It is estimated that pregnancy-related deaths account for one-quarter of all fatalities among women aged 15 to 29, with well over two-thirds of them considered preventable. For every maternal death in India, an estimated 20 more women suffer from impaired health. One village-level study of rural women in Maharashtra determined on the basis of physical examinations that some 92 percent suffered from one or more gynecological disorder.

## THE INVISIBILITY OF WOMEN'S WORK

Women's work is rarely recognized. Many maintain that women's economic dependence on men impacts their power within the family. With increased participation in income-earning activities, not only will there be more income for the family, but gender inequality should be reduced. This issue is particularly salient in India because studies show a very low level of female participation in the labour force. This under-reporting is attributed to the frequently held view that women's work is not economically productive.

In a report of the National Commission on Self-Employed Women and Women in the Informal Sector, the director of social welfare in one state said, "There are no women in any unorganized sector in our state." When the Commission probed and asked, "Are there any women who go to the forest to collect firewood? Do any of the women in rural areas have cattle?" the director responded with, "Of course, there are many women doing that type of work." Working women are invisible to most of the population. If all activities—including

maintenance of kitchen gardens and poultry, grinding food grains, collecting water and firewood, *etc.*-are taken into account, then 88 percent of rural housewives and 66 percent of urban housewives can be considered as economically productive.

Women's employment in family farms or businesses is rarely recognized as economically productive, either by men or women. And, any income generated from this work is generally controlled by the men. Such work is unlikely to increase women's participation in allocating family finances. In a 1992 study of family-based textile workers, male children who helped in a home-based handloom mill were given pocket money, but the adult women and girls were not.

## **THE IMPACT OF TECHNOLOGY ON WOMEN**

The shift from subsistence to a market economy has a dramatic negative impact on women. According to Sandhya Venkateswaran, citing Shiva, the Green Revolution, which focused on increasing yields of rice and wheat, entailed a shift in inputs from human to technical. Women's participation, knowledge and inputs were marginalized, and their role shift from being "primary producers to subsidiary workers."

Where technology has been introduced in areas where women worked, women labourers have often been displaced by men. Threshing of grain was almost exclusively a female task, and with the introduction of automatic grain threshers-which are only operated by men-women have lost an important source of income. Combine harvesters leave virtually no residue. This means that this source of fodder is no longer available to women, which has a dramatic impact on women's workload. So too, as cattle dung is being used as fertilizer, there is less available for fuel for cooking. "Commercialization and the consequent focus on cash crops has led to a situation where food is lifted straight from the farm to the market. The income accrued is controlled by men. Earlier, most of the produce was brought home and stored, and the women exchanged it for other commodities. Such a system vested more control with the women."

## **WOMEN ARE UNSKILLED**

Women have unequal access to resources. Extension services tend to reach only men, which perpetuates the existing division of labour in the agricultural sector, with women continuing to perform unskilled tasks. A World Bank study in 1991 reveals that the assumption made by extension workers is that information within a family will be transmitted to the women by the men, which in actual practice seldom happens. "The male dominated extension system tends to overlook women's role in agriculture and proves ineffective in providing technical information to women farmers."

Mapping Progress, states, "in the farm sector, the process of mechanization of agricultural activities has brought in tendencies for gender discrimination by replacing men for a number of activities performed by women and also by

displacing the labour of women from subsistence and marginal households. Women are employed only when there is absolute shortage of labour and for specific operations like cotton-picking. "To supply food-processing industries being set up with foreign collaboration, there has already been a major shift from subsistence farming method of rice, millet, corn and wheat to cash-crop production of fruit, mushrooms, flowers and vegetables. This shift has led to women being the first to lose jobs."

A number of factors perpetuate women's limited job skills: if training women for economic activities requires them to leave their village, this is usually a problem for them. Unequal access to education restricts women's abilities to learn skills that require even functional levels of literacy. In terms of skill development, women are impeded by their lack of mobility, low literacy levels and prejudiced attitudes towards women. When women negotiate with banks and government officials, they are often ostracized by other men and women in their community for being 'too forward.' Government and bank officials have preconceived ideas of what women are capable of, and stereotypes of what is considered women's work.

## **WOMEN ARE MISTREATED**

Violence against women and girls is the most pervasive human rights violation in the world today. Opening the door on the subject of violence against the world's females is like standing at the threshold of an immense dark chamber vibrating with collective anguish, but with the sounds of protest throttled back to a murmur. Where there should be outrage aimed at an intolerable status quo there is instead denial, and the largely passive acceptance of 'the way things are.'

Male violence against women is a worldwide phenomenon. Although not every woman has experienced it, and many expect not to, fear of violence is an important factor in the lives of most women. It determines what they do, when they do it, where they do it, and with whom. Fear of violence is a cause of women's lack of participation in activities beyond the home, as well as inside it. Within the home, women and girls may be subjected to physical and sexual abuse as punishment or as culturally justified assaults. These acts shape their attitude to life, and their expectations of themselves.

The insecurity outside the household is today the greatest obstacle in the path of women. Conscious that, compared to the atrocities outside the house, atrocities within the house are endurable, women not only continued to accept their inferiority in the house and society, but even called it sweet.

In recent years, there has been an alarming rise in atrocities against women in India. Every 26 minutes a woman is molested. Every 34 minutes a rape takes place. Every 42 minutes a sexual harassment incident occurs. Every 43 minutes a woman is kidnapped. And every 93 minutes a woman is burnt to death over dowry. One-quarter of the reported rapes involve girls under the age of 16 but the vast majority are never reported. Although the penalty is severe, convictions are rare.

## SELECTIVE ABORTIONS

The most extreme expression of the preference for sons is female infanticide and sex-selective abortion. A study of amniocentesis in a Bombay hospital found that 96 percent of female fetuses were aborted, compared with only a small percentage of male fetuses.

"Government officials even suspect that the disproportionate abortion of female fetuses may be a major underlying cause of the recent decline in the nation's sex ratio. In 1971 there were 930 females for every 1,000 males. A decade later this figure had increased to 934, but by 1991, instead of continuing to rise, the ratio dropped to 927, lower than the 1971 figure. This sex ratio is one of the lowest in the world."

Sonalda Desai reports that there are posters in Bombay advertising sex-determination tests that read, "It is better to pay 500 Rs. now than 50,000 Rs. (in dowry) later."

Government has passed legislation to curb the misuse of amniocentesis for sex selection and abortion of female fetuses. Women activists have been critical of this act because of its provision that calls for punishing the women who seek the procedure. These women may be under pressure to bear a male child.

## WOMEN ARE POWERLESS

Legal protection of women's rights have little effect in the face of prevailing patriarchal traditions.

*Marriage:* Women are subordinate in most marriages. Exposure to and interactions with the outside world are instrumental in determining the possibilities available to women in their daily lives. The situation of women is affected by the degree of their autonomy or capacity to make decisions both inside and outside their own household. "The position of women in northern India is notably poor.

Traditional Hindu society in northern rural areas is hierarchical and dominated by men, as evidenced by marriage customs. North Indian Hindus are expected to marry within prescribed boundaries: the bride and groom must not be related, they have no say in the matter, and the man must live outside the woman's natal village."

"Wife givers" are socially and ritually inferior to "wife takers", thus necessitating the provision of a dowry. After marriage, the bride moves in with her husband's family. Such a bride is "a stranger in a strange place." They are controlled by the older females in the household, and their behaviour reflects on the honor of their husbands. Because emotional ties between spouses are considered a potential threat to the solidarity of the patrilineal group, the northern system tends to segregate the sexes and limit communication between spouses—a circumstance that has direct consequences for family planning and similar "modern" behaviors that affect health. A young Indian bride is brought up to believe that her own wishes and interests are subordinate to those of her husband and his family.

The primary duty of a newly married young woman, and virtually her only means of improving her position in the hierarchy of her husband's household, is to bear sons."

Sonalde Desai points out that the perception that sons are the major source of economic security in old age is so strong in the north that "many parents, while visiting their married daughters, do not accept food or other hospitality from them. However, given women's low independent incomes and lack of control over their earnings, few can provide economic support to their parents even if parents were willing to accept it."

In the south, in contrast, a daughter traditionally marries her mother's brother or her mother's brother's son (her first cousin). Such an arrangement has a dramatic impact on women. "In southern India, men are likely to marry women to whom they are related, so that the strict distinction found in the north between patrilineal and marital relatives is absent. Women are likely to be married into family households near their natal homes, and are more likely to retain close relationships with their natal kin."

"Over the past several decades, however, marriage patterns have changed markedly. Social, economic, and demographic developments have made marriages between close relatives less common, and the bride price has given way to a dowry system akin to that in the north. Nevertheless, as long as the underlying ethic of marriage in the south remains the reinforcement of existing kinship ties, the relatively favourable situation of southern Indian women is unlikely to be threatened."

## **RIGHT TO INHERITANCE**

Women's rights to inheritance are limited and frequently violated. In the mid-1950s the Hindu personal laws, which apply to all Hindus, Buddhists, Sikhs and Jains, were overhauled, banning polygamy and giving women rights to inheritance, adoption and divorce.

The Muslim personal laws differ considerably from that of the Hindus, and permit polygamy. Despite various laws protecting women's rights, traditional patriarchal attitudes still prevail and are strengthened and perpetuated in the home. Under Hindu law, sons have an independent share in the ancestral property. However, daughters' shares are based on the share received by their father. Hence, a father can effectively disinherit a daughter by renouncing his share of the ancestral property, but the son will continue to have a share in his own right. Additionally, married daughters, even those facing marital harassment, have no residential rights in the ancestral home.

Even the weak laws protecting women have not been adequately enforced. As a result, in practice, women continue to have little access to land and property, a major source of income and long-term economic security. Under the pretext of preventing fragmentation of agricultural holdings, several states have successfully excluded widows and daughters from inheriting agricultural land.

Women in Public Office (Revised May, 1999)

## PANCHAYAT RAJ INSTITUTIONS

*The highest national priority must be the unleashing of woman power in governance. That is the single most important source of societal energy that we have kept corked for half a century.*

—Mani Shankar Aiyar, *journalist, India Today*

Through the experience of the Indian Panchayat Raj Institutions (PRI) 1 million women have actively entered political life in India. The 73rd and 74th Constitutional Amendment Acts, which guarantee that all local elected bodies reserve one-third of their seats for women, have spearheaded an unprecedented social experiment which is playing itself out in more than 500,000 villages that are home to more than 600 million people.

Since the creation of the quota system, local women—the vast majority of them illiterate and poor—have come to occupy as much as 43% of the seats, spurring the election of increasing numbers of women at the district, provincial and national levels. Since the onset of PRI, the percentages of women in various levels of political activity have risen from 4-5% to 25-40%.

According to Indian writer and activist Devaki Jain, "the positive discrimination of PRI has initiated a momentum of change. Women's entry into local government in such large numbers, often more than the required 33.3 %, and their success in campaigning, including the defeat of male candidates, has shattered the myth that women are not interested in politics, and have no time to go to meetings or to undertake all the other work that is required in political party processes...PRI reminds us of a central truth: power is not something people give away. It has to be negotiated, and sometimes wrested from the powerful."

Contrary to fears that the elected women would be rubber stamp leaders, the success stories that have arisen from PRI are impressive. A government-financed study, based on field work in 180 villages in the states of Uttar Pradesh, Rajasthan and Madhya Pradesh, and coordinated by the Center for Women's Development Studies in New Delhi, has found that a full two-thirds of elected women leaders are actively engaged in learning the ropes and exercising power.

Says Noeleen Heyzer, executive director of UNIFEM, "This is one of the best innovations in grass-roots democracy in the world."

Women leaders in the Panchayati Raj are transforming local governance by sensitizing the State to issues of poverty, inequality and gender injustice. Through the PRI, they are tackling issues that had previously gone virtually unacknowledged, including water, alcohol abuse, education, health and domestic violence. According to Sudha Murali, UNICEF Communications Officer in Andhra Pradesh, women are seeing this power as a chance for a real change for them and for their children and are using it to demand basic facilities like primary schools and health care centres.

The PRI has also brought about significant transformations in the lives of women themselves, who have become empowered, and have gained self-confidence, political awareness and affirmation of their own identity. The



panchayat villages have become political training grounds to women, many of them illiterate, who are now leaders in the village panchayats. Says Sudha Pillai, joint secretary in India's Ministry for Rural Development, "It has given something to people who were absolute nobodies and had no way of making it on their own. Power has become the source of their growth."

By asserting control over resources and officials and by challenging men, women are discovering a personal and collective power that was previously unimaginable. This includes women who are not themselves panchayat leaders, but who have been inspired by the work of their sisters; "We will not bear it," says one woman.

Once we acquire some position and power, we will fight it out...The fact that the Panchayats will have a minimum number of women [will be used] for mobilizing women at large." It is this critical mass of unified and empowered women which will push forward policies that enforce gender equity into the future.

An observation by Deepak Tiwari in *This Week*, India's No.1 Weekly News Magazine, displays the promising future made possible by the PRI. He notes, "'Learning politics' is the latest fad for young village girls, who dream of joining the growing band of women panchayat representatives, 164,060 at last count, in the state."

## **DOWRY HARASSMENT AND WIFE MURDER**

Dowry has always been part of marriage in India, but the dramatic increase in dowry-giving in the post-independence period, reflects the declining value of women in the Indian society. Though the giving and taking of dowry is a legal offense since the passage of a legislation in 1961, the custom has flourished, invading lower castes and working class communities among whom this was not a practice.

Such requested products as videocassette recorders, washing machines, refrigerators, and scooters reflect the higher dowry demands asked from the girl's family. Sudha Tiwari of Shakti Shalini (a women's shelter in Delhi), blames the excessive demands by the boy's family on the western influence of capitalist materialism and the promotion of mindless consumerism by the mass media.

The first protests against dowry in the contemporary Indian women's movement were made by the "Progressive Organization of Women" in the city of Hyderabad in 1975. Though some of their demonstrations numbered as many as 2,000 people, the protests did not grow into a full-fledged campaign. The Mahila Dakshata Samiti was the first women's organization in Delhi to take up the issue of dowry and dowry harassment, but it was Stri Sangharsh whose campaign made "dowry murder" a household term. These organizations use many different methods: investigation and collection of evidence; recording witness accounts; working with specialist lawyers' collectives; using the mass media; mobilizing anti-violence women's networks; organizing local and national marches; lobbying the courts and the Government with high level of publicity; publicizing corrupt police system which colludes with the batterer and his family.

If a girl's parents are not able to meet the demands, even after the marriage the violence may escalate over many years, forcing many woman to either kill themselves to escape daily torture or be killed. Madhu Kishwar and Ruth Vanita, in their book *In Search of Answers: Indian Women's Voices from Manushi*, tells the tragic story of Dr. Shakuntala Arora, who was a lecturer in a women's college and who died of burns. Her family and her colleagues feel that emotional and physical abuse and torture over many years drove her to kill herself.

The harassment of Dr. Shakuntala Arora started at the time of her wedding, when the bridegroom insisted on a scooter as an item in the bride's dowry. Shakuntala's parents had to comply with this demand or else the wedding would have been called off. When Shakuntala moved into her in-laws' house, she was asked to pay off wedding costs of 25,000 rupees, which she was forced to obtain from her parents. Any resistance on Shakuntala's part led to physical and emotional abuse. Shakuntala was allowed a meager pocket money from her salary as a lecturer for food and transport. At the birth of her first child, she received no help from her husband. Her husband became increasingly more violent at her second delivery; he kicked her in the stomach before taking her to the hospital. Only a few weeks after her cesarean section, Shakuntala, badly beaten and in tears, with a small baby in her arms, entered her mother's house to seek temporary respite from the tortures of her husband. She had no money to pay off the taxi. These were some of the economic, physical and emotional tortures that turned Shakuntala's life into a nightmare. Two days before her death, she was beaten up and forbidden to attend her brother's marriage ceremony, because she had failed to get money from her widowed mother.

The term dowry and "dowry deaths" has become synonymous with wife-battering and domestic violence. It has become a key issue and rallying cry in practically all movements in which women are active. However, we need to remember that dowry is only an excuse used by patriarchal families to continue to torture and kill women. The unfortunate consequence of using this term as a rallying cry is that it minimizes the regular abuse and killing of women. The result is that dowry-related wife murders and suicides are criticized, but other domestic violence may not be since it is thought that the wife could have been provoking the abuse.

## **RELIGION AND FAMILY VIOLENCE**

Sati, as the practice of self-immolation, is a long-standing tradition among upper caste Hindus. Although legitimized through myth, it is a violent practice against women. It is complicated by the fact that it is often used against women to take control of land that they might inherit as widows. Widows have very little status in Hindu India and are often seen as bad omens. Therefore, they are treated miserably. Some do commit suicide rather than be subject to daily torture and humiliation and some are killed.

There has been on an average, something like one sati a year, but the death of Roop Kanwar in September 1987 led to a massive agitation both for and



against sati. Sati was most common in the state of Rajasthan, amongst the Hindu Rajput caste. The Indian feminist magazine, *Manushi* and Radha Kumar in her book, *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800-1990*, describe the practice of sati and the movements against it.

The pro-sati organizations invoked a chivalric Rajput (Hindu upper caste identity) tradition in which men defended the Hindu tradition on battlefields by killing and being killed, while women defended it at home by killing themselves. One case of sati was that of Roop Kanwar. Roop Kanwar had brought a large amount of gold in her dowry and had only been married for six months before her husband, who was suffering from mental disorder, died. Roop Kanwar's in-laws decided she would become sati-and did not inform her parents.

The evidence that feminist organizations gathered pointed to murder: some of her neighbours said she had run away and tried to hide before the ceremony, but was dragged out, pumped full of drugs, dressed in bridal finery and put on her husband's funeral pyre. The feminists held counter-demonstrations along the route of the procession and were confronted by groups of hostile women, who had appropriated the language of rights, stating that they should have the right, as Hindus and as women, to commit, worship and practice sati.

The "Joint Action Committee Against Sati" formed and demanded state intervention on three levels: first, Roop Kanwar's in-laws and the doctor who drugged her should be charged with murder; second, that all those who profited financially or politically from her death should be punished; and third, that a law should be passed banning both commission and glorification of crimes against women in the name of religion. Even though the government passed a law under which sati was defined as unlawful, the first person to be punished was the woman herself, for attempting to commit suicide.

In the current fundamentalist climate, sati is seen as a return to old "wonderful" and traditional values with women being the upholders of all moral traditions. In fact, careful scrutiny of the Roop Kanwar case shows that this sati was a complex mixture of misogyny, economics and fundamentalism. Religion is also a significant factor in the multiple oppression faced by Muslim women. The Muslim community is one of the largest minority groups in India.

Muslim women face violence at home and outside the home in the same way as Hindu women. One difference was that Muslim women had the right to divorce, inheritance, and maintenance. However, these rights have been eroded over time. All leaders of the women's movement have urged the restitution of these rights. Due to the passage of the Hindu Code bill in 1956, the inequality between the rights of Hindu men and women was technically eliminated.

But this was not the case with the Muslim Personal Law, which is based on religion. As a result, the inequality between Muslim women and men remained. Women's organizations started examining laws in an attempt to look at women's rights in marriage, divorce, property and maintenance and demanded secular laws which allowed universal rights for all women.

The issue of personal law became extremely controversial in the Shah Bano case between 1986-1987. After she had been thrown out of her home following fifty years of marriage, Shah Bano filed a case under a criminal law (Section 125 of the Criminal Procedure Code), asking that her husband be ordered to pay maintenance. This law granted divorced or deserted women maintenance from their husbands. Muslim feminists, women's groups, liberals and social reformers began campaigns all over India to publicize the upholding of this law and to demand improvements. Many women's organizations like the Janwadi Mahila Samiti, the Mahila Dakshata Samiti, the National Federation of Indian Women and the Dahej Virodhi (Anti-Dowry) Chetna Manch, campaigned for universal legal rights for all women.

The courts granted Shah Bano maintenance from her previous husband. However, fundamentalists on both sides saw this case as a rallying point for their cause. The old scars of partition in India in 1947 were raised again and communalism saw a steep rise with severe oppression of the Muslim community and the destruction of a critical mosque-Babri Masjid. The government caved in to fundamentalist demands eroding the limited rights of Muslim women.

Most women's organizations recognize the issue of communal harmony as vital when doing anti-violence work. AWAG is one such group which not only focuses on issues surrounding violence against women but carries out extensive work around communal harmony in riot-torn areas. Sofia Khan of AWAG explains, "After the bloody riots of 1992 that followed the demolition of Babri Masjid, this issue was so emotionally charged, you could not talk about this within the Muslim communities. Women's groups now talk about equality between Muslim women and men when they campaign for universalizing these laws so that Muslim women would have the same legal rights as Hindu women".

The Indian women's movement has made many creative interventions for social change in mobilizing against violence against women. For example, AWAG, provides training for police and judiciary around gender issues and violence in order to counter their attitudes and implement law more effectively. Shakti Salini is planning a "police sensitization programme," and training on reproductive health, family planning techniques, and mental health awareness.

Sofia Khan of AWAG remains optimistic about the changes happening at the grass roots level and on the governmental level. She thinks that the system of reserving spots for women on different levels of the governmental power structure will allow women access to resources. In 1990, a National Women's Commission was established to investigate the subordinate position of women in India. There were plans to establish women's commissions on the state level. Recently, due to an amendment, 33 percent of the designated posts have been reserved for women in the Village Panchayat (village council). The Panchayat controls the power structure in the village, in relation to land and access to water, mediates conflicts, and has connection to the State government. More women having access to resources could lead to improvement in the lives of women at this village level.

Like the pioneering work of Jagori, most women's anti-violence organizations work on many levels and use many methods or organizing. But regardless of their methods, their goals are the same: to change the culture of violence against women systemic in Indian society.

## LEGAL THEORY

Legal decisions tend to be multilayered statements that reflect both articulated legal reasoning (reliance on precedent, deference to legislative intent) and unspoken, perhaps even unconscious, assumptions about culture and social roles. Supreme Court decisions have particular power because they can dictate the decision-making rules for all lower courts. Supreme Court decisions also address the most basic legal values of our culture in interpreting the scope of constitutional rights. Legal scholars studying gender-related Court decisions have described recurring themes: Should women be treated the same as men, or differently? If they are to be treated differently, under what conditions? When is differential treatment discrimination, and when is it a means of levelling the playing field so that the result is greater fairness? Where did the standards for treatment develop in the first place, and is there a bias in what is considered “neutral” treatment?

## SAMENESS AND DIFFERENCE

There is a legal assumption that fair, or equal, treatment means treating people the same way. In legal language, the courts refer to “similarly situated” people deserving the same treatment. Many legal scholars argue, however, that men and women are never similarly situated because the social and cultural forces that make meaningful distinctions in the experiences of men and women begin at birth. The courts have traditionally determined “sameness” based on an unspoken male model of “normal” or “neutral,” so that sameness for women has meant how much women are the same as men. The question of how the law should treat pregnancy has challenged legal scholars and courts to review notions of equality. Minow (1988) notes:

The Supreme Court’s treatment of issues concerning pregnancy and the workplace highlights the power of the unstated male norm in analysis of problems of difference. The court considered, both as a statutory and a constitutional question, whether discrimination in health insurance plans on the basis of pregnancy amounted to discrimination on the basis of sex. In both instances, the Court answered negatively because pregnancy marks a division between the groups of pregnant and nonpregnant persons, and women fall into both categories.

Only from a point of view that treats pregnancy as a strange occasion, rather than a present, bodily potential, would its relationship to female experience be made so tenuous; and only from a vantage point that treats men as the norm would the exclusion of pregnancy from health insurance coverage seem unproblematic and free from forbidden gender discrimination.

Espinoza (1997) compares this “sameness equality” in gender-based cases with the idea of colour blindness in race-based cases. In gender-based cases, sameness equality often perpetuates discrimination because the standard by which men and women are to be measured is one de-fined by men and established with men in mind. Espinoza notes that “sameness” equality fails to recognize the lived reality of the disparity of power between men and women and denies the valuable differences women have and wish to retain.

Similarly, “the power of colourblindness is that it makes us feel that we are being fair. It becomes the standard for behaviour. We focus on the process of justice—Blacks and whites took the same test, the voting districts were historically and geographically drawn, and so on. Colourblindness hides the actual exclusion and suppression of outsiders”.

Krieger and Cooney (1983) note that this model of formal equality rests on assumptions that promote the formal appearance of equality over the equality of effect. Problems with the doctrine of formal equality, or treating like cases alike, include its subjectivity, the false promise of neutrality, and the assumption that it is possible to ignore a person’s sex (Weisberg, 1993). It fails to acknowledge the interdependence of men and women and the responsibility for the care of others that tends to fall more heavily on the shoulders of women.

Finley (1986) argues that the special treatment-equal treatment debate is fundamentally flawed. It accepts the culture’s ideal of homogeneity—that men and women are alike—and it relies on a West-ern male ideal of isolated autonomy, self-sufficiency, and individual rights based on noninterference. Finley notes that “the defenders of the American ideal of homogeneous equality wrote in sweeping terms about the commonalities among American citizens, yet their descriptions bore a striking resemblance to the world of the white, Anglo-Saxon Protestant male. The American melting pot has been a cauldron into which we have put black, brown, red, yellow, and white men and women, in the hope that we will come up with white men”.

The analysis of equality (equal treatment for similarly situated people) requires some measure of similarity and difference. These categories can only be measured against some standard: Similar to what? Different from what? The role of men in defining that standard and in assigning significance to ways in which women are different means that the whole premise of equality jurisprudence rests on the idea that whatever is male is the norm (Finley, 1986). Women are equal to the extent that they can act like men.

Finley notes that an equality analysis model that focuses on making comparisons with the male norm makes it well suited for perpetuating existing disparities in power. Because those in power are the ones who make the attribution of difference, they see themselves as normal and everyone else as other. Equality analysis has been used to legitimize discrimination rather than eradicate it. For example, in the guise of equality, it may seem fair to deprive women of health care coverage or employment protections for pregnancy. Withholding bene-fits from all can be justified in the name of equal treatment,

although the impact on male and female employees is far from equal. Federal legislation requiring employers to allow unpaid medical leaves (the Family Medical Leave Act), for example, sounds fair and equal, but it disadvantages women.

Few employees, male or female, can afford to stop working for pay, but women are the ones more likely to be in the position of having to take this time off, without pay.

Women are the ones who have the physical recovery after childbirth, and women typically have the responsibility for the care of children and elders. Even in families where labour is divided equally, women are likely to be the ones to take unpaid leave because their traditionally lower incomes make it a sensible financial decision (thereby perpetuating their lower income as a result of their absence from work).

## **DOMINANCE AND SUBORDINATION**

Catherine MacKinnon argues for an alternative to the formal equality theory and its emphasis on sameness and difference. She notes that the sameness standard's definition of equality as gender neutrality "results in equality only when women are not distinguishable from men. In instances when there is no male standard (*i.e.*, pregnancy), it becomes sex discrimination to give women what only women need; and it is not discrimination to treat women differently by denying to women what only women need. In contrast, men's differences from women are already affirmatively compensated before men even enter the courtroom. Thus... the sameness standard misses the fact of social inequality (*e.g.*, women's poverty, financial dependence, motherhood, and sexual accessibility) imposed by male supremacy".

When courts use a sameness analysis, they are accepting the status quo as the standard against which to judge discriminatory treatment: whether women are being treated differently in comparison to the male norm. MacKinnon argues that no amount of group difference justifies treating women as subordinate. Dominance analysis demands equal power for women in society. Colker (1987) also argues that the special treatment-equal treatment debate focuses on the wrong question. She argues for an "anti-subordination principle" that is similar to the "disparate impact" model of discrimination analysis. The antistubordination perspective views discrimination as the method that results in blacks and women having less power. The analysis focuses on the results, not the intent of the one doing the discriminating. If the result of legislation is to disempower women, then the intent (even if it is well intentioned and "protective") does not matter.

## **ESSENTIALISM**

Sameness-difference approaches focus on whether men and women are treated similarly in similar situations and challenge the courts to define the standards of comparison (Same as what?). Dominance approaches argue that any differential treatment is suspect because the dominant groups (white Anglo-Saxon males)

have historically used the law to maintain their social dominance over women. Both approaches suggest that unequal treatment and the legal decisions that support it must be carefully scrutinized for bias. Essentialism shifts the debate to women's self-definition (Weisberg, 1993). Essentialism suggests that in certain basic, essential ways, women are alike in their experience of the world. It is characterized by two "central assumptions: first, the meaning of gender identity and the experience of sexism are similar for all women; and, second, any differences between women are less significant than the traits they have in common".

According to the work of social science researchers, women are viewed as being essentially different from men in their reasoning about moral and ethical issues, in their relationships, and in their motivations. The essentialist perspective does not attribute these characteristics to biology, as was done a century earlier, but to the effects of growing up female in a sexist Western culture. Antiessentialists argue that essentialism ignores women's diversity and has "taken the experiences of white middle-class women to be representative of all women". Weisberg notes, "In so doing, [essentialists] obscure women's diversity; reinforce the privilege of white middle-class women; result in other women being labeled as 'different,' deviant, and lacking; distort feminism in the same way as masculine privilege has done; contribute to feminism being exclusionary in its concerns; and, ultimately, forestall the possibility of social change". Minow (1988) argues that there is a need for a new language in the discussion of feminism and law: "In critiques of the 'male' point of view and in celebrations of the 'female,' feminists run the risk of treating particular experiences as universal and ignoring differences of racial, class, religious, ethnic, national, and other situated experiences".

## MODES OF APPROACH TO WOMEN'S DEVELOPMENT

At the highest administrative decision-making level as well as at the political level gender awareness needs to get top priority. In formulating policy options, the right selection of the mode of approach is very important. There can be five different modes (a) welfare mode (b) equity mode (c) anti-poverty mode (d) efficiency mode and (e) empowerment mode.

The *welfare mode* is one that benefits the most vulnerable group as passive recipients and is suitable at the initial stage of development where there are wide disparities. The *equity mode* takes special care of gender needs and emphasises redistributing power. The *anti-poverty mode* recognises that a majority of women to be fall in the category of deprivation. It focuses on the productive role of women. It reflects on the necessity of providing women with better access to resources. The *efficiency mode* takes care of practical gender needs and helps in improving the capability and capacity of women by way of imparting education, skill, training, etc. The *empowerment mode* helps women in making their own choices with regard to their lives and makes them more active players in society. These mode need to be selected for different programmes according to what is expected of the programme.



## **EXISTING PROGRAMMES FOR THE DEVELOPMENT OF WOMEN**

Currently, the Government of India has several schemes for women of which some are women specific. These schemes are located in different departments and ministries of the Government of India such as Rural Development, Labour, Education, Health, Science and Technology, Welfare, and Women and Child Development. In 1985 the Government of India constituted a separate department in the Ministry of Human Resource Development for the development of Women and Children.

*During the Sixth and Seventh Plan period, a number of programmes were envisaged:*

- (i) Women's Development Corporation (WDCs)
- (ii) Support to Training and Employment programme (STEP)
- (iii) Training-cum-production Centres for Women
- (iv) Awareness Generation camps for Rural and Poor Women
- (v) Women's Training Centres or Institutes for Rehabilitation of Women in distress
- (vi) Voluntary Action Bureau and Family Counselling Centres
- (vii) Short Stay' Homes for Women and Girls
- (viii) Free legal aid and Para-legal training, and
- (ix) Working Women's Hostels.

The thrust of these programmes was to provide employment and income generation, education training, support services, general awareness and legal support. When we talk about women and development or women's development we have to take an overall view of the development process; but besides this, women's development must be viewed in different sectors such as education, health, family planning, nutrition, employment, training support services, *etc.*

## **WOMEN AND EDUCATION**

Education is perhaps the single most important instrument through which a human resource can be fully developed. It is very well said that knowledge is power. Education enables people acquire basic skills and inculcates abilities which are helpful in raising the social and economic status of the person. Women's education has assumed special significance in the context of planned development because the efforts of planned development are to bring all those in the mainstream who are left outside for some reason or the other. It is true that female education is constrained by socio-economic conditions. As an outcome of the report of the Committee on the Status of Women in India, education was included in the Sixth Plan as a major programme for the development of women. Universalisation of Elementary Education, enrollment and retention of girl in the schools, promotion of balwadis and creches, increasing the number of girls' hostels, women's polytechnics and multi-purpose institutions and adult education programmes were some of the steps taken to boost women

s education. Vocationalisation of education and technical-cum-professional education helps women getting outside the restricted world which they are living in at present.

The National Policy on Education (1986) is a landmark in the approach to women's education. The National Literacy Mission is another step towards eradication of illiteracy in the age group of 15-35 years by the year 1995. Once illiteracy is removed, other venues of development get opened automatically. By educating a women of the house one educates the whole family. Education also helps expand economic opportunities for women. It leads to better health, hygiene, nutrition and also to greater willingness to seek timely medical intervention. All of them together set leads women on the path of development. For ensuring girls access to some education, the strengthening of the Non-formal Education machinery is necessary. By this children, specially girls, who have never been enrolled or who have been dropped out can be easily brought inside the education system and imparted some education.

## **WOMEN HEALTH, NUTRITION AND FAMILY PLANNING**

No one can deny the fact health is wealth. Development and health are intrinsically interrelated. Without a certain level of economic and social development it is difficult to provide basic health care and without basic health care one does not have the adequate energy to contribute positively to society.

The concept of health covers complex human conditions. Prevention is better than cure and, therefore, preventive health care is as important as curative health care. Health is an integral part of development. People are both the means and ends of development. The human energy generated by good health can sustain economic and social development and these in turn can be harnessed to improve the health of the people.

Biological, cultural, economic, social and political factors play an important role in the health status of the community. Gender plays an important role too as health opportunities and health hazards are not be same for men and women. We have very little insight into the effects of gender issues on the status of health. Long distances, poor communication facilities, cost of transportation, shortage of time, inadequacy of supportive services, *etc.*, are some of the factors which have a prohibitive effect on day's wage. They have a damaging effect on children, such as leaving unattended non-school going children at home without any care.

Health is crucial to women's advancement. A comprehensive integrated approach to health issues might have significant impact in improving the female health status. Family planning and nutrition, therefore, play an important role in enhancing the health status of women. Health status of women, in turn affects their productivity. Issues of marriage and fertility are closely related to health and productivity. Education and employment have their effect on marriage and fertility patterns and also on the nutritional pattern of women and their family.



Early motherhood results in inadequate growth, undernourishment, hypertension and anaemia. Women's reproductive roles exercise a disproportionate influence on their health status and on their productivity. Women's health and their control over reproduction are, therefore, intricately linked with their social and economic status. Together, health, nutrition and family planning service can improve the balance between the energy women obtain and the energy women spend in production and reproduction.

## **WOMEN EMPLOYMENT AND TRAINING**

Women in developing countries play a crucial role in almost every economic and social sphere of life. The integration of women in development, therefore, is an issue which relates to every sector of development *e.g.*, agriculture, animal husbandry, fisheries, forestry, industry and trade.

The economic position and social status of women in any society is influenced by the extent of their involvement in income-generating activities outside the household. The role of women in economy is more often linked to services which rarely cater to the market. The child-bearing and child-rearing role besides household maintenance (cooking, cleaning, washing, *etc.*) affect the time and mobility of women to seek employment, education and health care. Increasing women's economic productivity affects their status and survival in the family as well as in society. Raising female earning power, therefore, is crucial in increasing the effective demand for education, health and family planning services, which are necessary for improving women's status. Programmes focusing on women and consisting of skill-building and skill-upgrading can be more fruitful for enhancing the economic status of women and make them have a superior bargaining power as far as employment is concerned.

Women engage in a wider variety of occupations, but usually in the unorganised sector. In India, they are concentrated in occupations which are usually at the lowest rung of the ladder. Lack of organisation and unionisation makes their bargaining position very weak. One of the major hurdles to the development of employment opportunities for women is the lack of adequate training. Women should have access to productive resources such as land, building, credit, housing and skill-training. Supporting service provisions would make women more functional and productive by reducing their drudgery and provide them with more time for employment.

Creches, adequate drinking water supply, fuel fodder, sanitation, energy-saving devices, *etc.*, critically influence the working capacity of women and if taken care of properly, will leave women with more free time to be utilised for employment purposes or for improving skills for employment purpose.

## **RURAL AND URBAN WOMEN**

Women's development has another angle, based on population distribution in the rural and the urban areas. Several regional factors influence the participation of women in the development process, but among them, the placing of a person

in a rural or an urban area cannot be ignored. During the past two decades, women's share of total agricultural employment has increased dramatically. It is the least desirable employment as it is normally taken up by the poorest. Agricultural labourers are among the lowest wage earners and their unemployment rate is the highest. Lack of mobility and marketable skills make them vulnerable to seasonal fluctuations in the labour-demand market.

Agricultural intensification or diversification, labour-saving agricultural technologies, agricultural extension promoting direct-access to land, credit-buildings skill or the co-operatives can be viable propositions in strengthening the process of development.

Although women in urban areas are better off than their rural counterparts in many spheres, their participation in the labour force is much smaller. The service sector is the single most important employer for urban women. In the rapidly growing informal sector, women get employment and a majority of them fall below the poverty line. There is need for more precise understanding of both the formal and the informal sector with a view to keep their relationship healthy and strong.

As poverty is more acutely experienced by women because of gender-based discrimination, the gender-based problems faced by poor women are unequal sharing of food, inadequate or lack of medical care, underpayments, long hours of tedious work and loss of employment due to illness. These problems need to be solved at the earliest so that women can walk on the path of development freely and easily.

# 2

## Women's Rights and Justice

The term women's rights refers to freedoms and entitlements of women and girls of all ages. These rights may or may not be institutionalized, ignored or suppressed by law, local custom, and behaviour in a particular society. These liberties are grouped together and differentiated from broader notions of human rights because they often differ from the freedoms inherently possessed by or recognized for men and boys, and because activists for this issue claim an inherent historical and traditional bias against the exercise of rights by women and girls.

Issues commonly associated with notions of women's rights include, though are not limited to, the right: to bodily integrity and autonomy; to vote (suffrage); to hold public office; to work; to fair wages or equal pay; to own property; to education; to serve in the military or be conscripted; to enter into legal contracts; and to have marital, parental and religious rights. Women and their supporters have campaigned and in some places continue to campaign for the same rights as men.

### HISTORY

According to Dr. Jamal A. Badawin "the status which women reached during the present era was not achieved due to the kindness of men or due to natural progress. It was rather achieved through a long struggle and sacrifice on woman's part and only when society needed her contribution and work, more especial!; during the two world wars, and due to the escalation of technological change."

### ANCIENT CIVILIZATIONS

In ancient India, women are believed to have enjoyed equal status with men in all fields of life. Ancient Hindu scriptures describe a good wife as follows "a

woman whose mind, speech and body are kept in subjection, acquires high renown in this world, and, in the next, the same abode with her husband.” In ancient Athens women were always minors and subject to a male, such as their father, brother or some other male kin. A women’s consent in marriage was not generally thought to be necessary and women were obliged to submit to the wishes of her parents or husband. Ancient Rome subject all legitimate children, regardless of age or sex to the authority of their Pater Familias while he lived, and they would only acquire any legal independence when he died. The Pater Familias could grant any of his children or slaves a Peculium, but that belonged to him and they were merely allowed to use it. All transactions made by a child in power regardless of age or sex had to be directly approved of by their Pater Familias. All children inherited equally from their Pater Familias regardless of age or sex, by the Imperial Period of Roman history even bastards were included as intestate heirs. Early in the Republic women were subject to Manus Marriage, but the custom died out by the Late Republic in favour of marriage without Manus which did not grant the husband any rights over his wife. When married without Manus a woman was not only free of her husbands legal authority, but could divorce him as she pleased without any reason required. Women in Ancient Rome when no longer under the control of their Pater Familias could and did contract, work for wages (usually without many other options), own property, and perform some (but not all) legal functions.

### **EARLY REFORMS UNDER ISLAM**

Efforts to improve the status of women in Islam occurred during the early reforms under Islam between 610 and 661, when Arab women were given greater rights in marriage, divorce and inheritance. In 622 the Constitution of Medina was drafted by the Islamic prophet Muhammad, outlining many of Muhammad’s early reforms under Islam, including an improved legal status for women in Islam, who were generally given greater rights than women in pre-Islamic Arabia and medieval Europe. Women were not accorded with such legal status in other cultures until centuries later. Indeed according to Professor William Montgomery Watt, when seen in such historical context, Muhammad “can be seen as a figure who testified on behalf of women’s rights.”

The general improvement of the status of Arab women included prohibition of female infanticide and recognizing women’s full personhood. “The dowry, previously regarded as a bride-price paid to the father, became a nuptial gift retained by the wife as part of her personal property.” Under Islamic law, marriage was no longer viewed as a “status” but rather as a “contract”, in which the woman’s consent was imperative. “Women were given inheritance rights in a patriarchal society that had previously restricted inheritance to male relatives.” Annemarie Schimmel states that “compared to the pre-Islamic position of women, Islamic legislation meant an enormous progress; the woman has the right, at least according to the letter of the law, to administer the wealth she has brought into the family or has earned by her own work.”

## THE MIDDLE AGES

According to English Common Law, which developed from the 12th Century onward all property which a wife held at the time of a marriage became a possession of her husband. Eventually English courts forbid a husband's transferring property without the consent of his wife, but he still retained the right to manage it and to receive the money which it produced. "French married women suffered from restrictions on their legal capacity which were removed only in 1965." In the 16th century, the Reformation in Europe allowed more women to add their voices, including the English writers Jane Anger, Aemilia Lanyer, and the prophetess Anna Trapnell. Despite relatively greater freedom for Anglo-Saxon women, until the mid-nineteenth century, writers largely assumed that a patriarchal order was a natural order that had existed. This perception was not seriously challenged until the eighteenth century when Jesuit missionaries found matrilineality in native North American peoples.

## THE ENLIGHTENMENT

In the late 18th Century the question of women's rights became central to political debates in both France and Britain. At the time some of the greatest thinkers of the Enlightenment, who defended democratic principles of equality and challenged notions that a privileged few should rule over the vast majority of the population, believed that these principles should be applied only to their own gender and their own race. The philosopher Jean Jacques Rousseau for example thought that it was the order of nature for woman to obey men. He wrote "Women do wrong to complain of the inequality of man-made laws" and claimed that "when she tries to usurp our rights, she is our inferior".

In 1791 the French playwright and political activist Olympe de Gouges published the *Declaration of the Rights of Woman and the Female Citizen*, modelled on the Declaration of the Rights of Man and of the Citizen of 1789. The Declaration is ironic in formulation and exposes the failure of the French Revolution, which had been devoted to equality. It states that: "This revolution will only take effect when all women become fully aware of their deplorable condition, and of the rights they have lost in society". The Declaration of the Rights of Woman and the Female Citizen follows the seventeen articles of the Declaration of the Rights of Man and of the Citizen point for point and has been described by Camille Naish as "almost a parody... of the original document". The first article of the Declaration of the Rights of Man and of the Citizen proclaims that "Men are born and remain free and equal in rights. Social distinctions may be based only on common utility." The first article of Declaration of the Rights of Woman and the Female Citizen replied: "Woman is born free and remains equal to man in rights. Social distinctions may only be based on common utility". De Gouges expands the sixth article of the Declaration of the Rights of Man and of the Citizen, which declared the rights of citizens to take part in the formation of law, to:

*“All citizens including women are equally admissible to all public dignities, offices and employments, according to their capacity, and with no other distinction than that of their virtues and talents”.*

De Gouges also draws attention to the fact that under French law women were fully punishable, yet denied equal rights. Mary Wollstonecraft, a British writer and philosopher, published *A Vindication of the Rights of Woman* in 1792, arguing that it was the education and upbringing of women that created limited expectations. Wollstonecraft attacked gender oppression, pressing for equal educational opportunities, and demanded “justice!” and “rights to humanity” for all.

## THE 19TH CENTURY

*In his 1869 essay The Subjection of Women the English philosopher and political theorist John Stuart Mill described the situation for women in Britain as follows:*

*“We are continually told that civilization and Christianity have restored to the woman her just rights. Meanwhile the wife is the actual bondservant of her husband; no less so, as far as the legal obligation goes, than slaves commonly so called.”*

During the 1800s women in the United States and Britain began to challenge laws that denied them the right to their property once they married. Under the common law doctrine of *coverture* husbands gained control of their wives’ real estate and wages. Beginning in the 1840s, state legislatures in the United States and the British Parliament began passing statutes that protected women’s property from their husbands and their husbands’ creditors. These laws were known as the Married Women’s Property Acts. Courts in the nineteenth-century United States also continued to require privy examinations of married women who sold their property. A privy examination was a practice in which a married woman who wished to sell her property had to be separately examined by a judge or justice of the peace outside of the presence of her husband and asked if her husband was pressuring her into signing the document.

## THE UNITED NATIONS AND WOMENS’ RIGHTS

In 1946 the United Nations established a Commission on the Status of Women. Originally as the Section on the Status of Women, Human Rights Division, Department of Social Affairs, and now part of the Economic and Social Council (ECOSOC). Since 1975 the UN has held a series of world conferences on women’s issues, starting with the World Conference of the International Women’s Year in Mexico City. These conferences created an international forum for women’s rights, but also illustrated divisions between women of different cultures and the difficulties of attempting to apply principles universally

Four World Conferences have been held, the first in Mexico City (International Women’s Year, 1975), the second in Copenhagen (1980) and the third in Nairobi (1985). At the Fourth World Conference on Women in Beijing (1995), *The Platform for Action* was signed. This included a commitment to achieve “gender equality and the empowerment of women”.

## **INTERNATIONAL AND REGIONAL LAW**

### **CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

The Universal Declaration of Human Rights, adopted in 1948, enshrines “the equal rights of men and women”, and addressed both the equality and equity issues. In 1979 the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Described as an international bill of rights for women, it came into force on 3 September 1981. The United States is the only developed nation that has not ratified the CEDAW.

The Convention defines discrimination against women in the following terms:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It also establishes an agenda of action for putting an end to sex-based discrimination for which states ratifying the Convention are required to enshrine gender equality into their domestic legislation, repeal all discriminatory provisions in their laws, and enact new provisions to guard against discrimination against women. They must also establish tribunals and public institutions to guarantee women effective protection against discrimination, and take steps to eliminate all forms of discrimination practiced against women by individuals, organizations, and enterprises.

### **MAPUTO PROTOCOL**

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, better known as the Maputo Protocol, was adopted by the African Union on 11 July 2003 at its second summit in Maputo, Mozambique. On 25 November 2005, having been ratified by the required 15 member nations of the African Union, the protocol entered into force. The protocol guarantees comprehensive rights to women including the right to take part in the political process, to social and political equality with men, and to control of their reproductive health, and an end to female genital mutilation

## **REPRODUCTIVE RIGHTS**

Reproductive Rights are legal rights and freedoms relating to reproduction and reproductive health. The World Health Organisation defines reproductive rights as follows:

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right



to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.

Reproductive rights began to develop a subset of human rights at the United Nation's 1968 International Conference on Human Rights. The resulting non binding Proclamation of Teheran was the first international document to recognize one of these rights when it stated that: "Parents have a basic human right to determine freely and responsibly the number and the spacing of their children." States, though, have been slow in incorporating these rights in internationally legally binding instruments. Thus, while some of these rights have already been recognized in hard law, that is, in legally binding international human rights instruments, others have been mentioned only in non binding recommendations and, therefore, have at best the status of soft law in international law, while a further group is yet to be accepted by the international community and therefore remains at the level of advocacy. According to Knudsen, issues related to reproductive rights are some of the most vigorously contested rights' issues worldwide, regardless of the population's socioeconomic level, religion or culture. Reproductive rights may include some or all of the following: the right to legal or safe abortion, the right to birth control, the right to access quality reproductive health-care, and the right to education and access in order to make reproductive choices free from coercion, discrimination, and violence. Reproductive rights may also include the right to receive education about contraception and sexually transmitted infections, and freedom from coerced sterilization, abortion, and contraception, and protection from gender-based practices such as female genital cutting (FGC) and male genital mutilation (MGM).

### **PROCLAMATION OF TEHERAN**

In 1945, the UN Charter included the obligation "to promote... universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion". However, the Charter did not define these rights. Three years later, the UN adopted the Universal Declaration of Human Rights (UDHR), the first international legal document to delineate human rights; the UDHR does not mention reproductive rights. Reproductive rights began to appear as a subset of human rights in the 1968 Proclamation of Teheran, which states: "Parents have a basic right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect".

This right was affirmed by the UN General Assembly in the 1974 Declaration on Social Progress and Development which states "The family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community. Parents have the exclusive right to determine freely and responsibly the number and spacing of their children." The 1975 UN International Women's Year Conference echoed the Proclamation of Teheran.

## CAIRO PROGRAMME OF ACTION

The twenty year “Cairo Programme of Action” was adopted in 1994 at the International Conference on Population and Development (ICPD) in Cairo. The non binding Programme of Action asserted that governments have a responsibility to meet individuals’ reproductive needs, rather than demographic targets. It recommended that Family planning services be provided in the context of other reproductive health services, including services for healthy and safe childbirth, care for sexually transmitted infections, and post-abortion care. The ICPD also addressed issues such as violence against women, sex trafficking, and adolescent health. The Cairo Programme is the first international policy document to define reproductive health, stating:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed [about] and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant [para. 72].

Unlike previous population conferences, a wide range of interests from grassroots to government level were represented in Cairo. 179 nations attended the ICPD and overall eleven thousand representatives from governments, NGOs, international agencies and citizen activists participated. The ICPD did not address the far-reaching implications of the HIV/AIDS epidemic. In 1999, recommendations at the ICPD+5 were expanded to include commitment to AIDS education, research, and prevention of mother-to-child transmission, as well as to the development of vaccines and microbicides.

The Cairo Programme of Action was adopted by 184 UN member states. Nevertheless, many Latin American and Islamic States made formal reservations to the programme, in particular, to its concept of reproductive rights and sexual freedom, to its treatment of abortion, and to its potential incompatibility with Islamic Law..

## BELJING PLATFORM

The 1995 Fourth World Conference on Women in Beijing, in its non binding Declaration and Platform for Action, supported the Cairo Programme’s definition of reproductive health, but established a broader context of reproductive rights:

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.

Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences [para. 96].

The Beijing Platform demarcated twelve interrelated critical areas of the human rights of women that require advocacy. The Platform framed women's reproductive rights as "indivisible, universal and inalienable human rights."

## **REPRODUCTIVE RIGHTS AND HUMAN RIGHTS**

Since most existing legally binding international human rights instruments do not explicitly mention sexual and reproductive rights, a broad coalition of NGOs, civil servants, and experts working in international organizations has been promoting successfully a reinterpretation of those instruments to link the realization of the already internationally recognized human rights with the realization of reproductive rights. An example of this linkage is provided by the 1994 Cairo Programme of Action:

"Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community."

Similarly, Amnesty International has argued that the realisation of reproductive rights is linked with the realisation of a series of recognised human rights, including the right to health, the right to freedom from discrimination, the right to privacy, and the right not to be subjected to torture or ill-treatment. However, not all states have accepted the inclusion of reproductive rights in the body of internationally recognized human rights. At the Cairo Conference, several states made formal reservations either to the concept of reproductive rights or to its specific content. Ecuador, for instance, stated that:

"With regard to the Programme of Action of the Cairo International Conference on Population and Development and in accordance with the provisions of the Constitution and laws of Ecuador and the norms of international law, the delegation of Ecuador reaffirms, inter alia, the following principles embodied in its Constitution: the inviolability of life, the protection of children from the moment of conception, freedom of conscience and religion, the protection of the family as the fundamental unit of society, responsible paternity, the right of parents to bring up their children and the formulation of population

and development plans by the Government in accordance with the principles of respect for sovereignty. Accordingly, the delegation of Ecuador enters a reservation with respect to all terms such as “regulation of fertility”, “interruption of pregnancy”, “reproductive health”, “reproductive rights” and “unwanted children”, which in one way or another, within the context of the Programme of Action, could involve abortion.”

Similar reservations were made by Argentina, Dominican Republic, El Salvador, Honduras, Malta, Nicaragua, Paraguay, Peru and the Holy See. Islamic Countries, such as Brunei Darussalam, Djibouti, Iran, Jordan, Kuwait, Libya, Syria, United Arab Emirates, and Yemen made broad reservations against any element of the programme that could be interpreted as contrary to the Sharia. Guatemala even questioned whether the conference could legally proclaim new human rights.

### **REPRODUCTIVE RIGHTS AS WOMEN’S RIGHTS**

The United Nations Population Fund (UNFPA) and the World Health Organization (WHO) advocate for reproductive rights with a primary emphasis on women’s rights. In this respect the UN and WHO focus on a range of issues, including access to family planning services, sex education, menopause, and the reduction of obstetric fistula, to the relationship between reproductive health and economic status.

The reproductive rights of women are advanced in the context of the right to freedom from discrimination and the social and economic status of women. The group Development Alternatives with Women for a New Era (DAWN) explained the link in the following statement:

Control over reproduction is a basic need and a basic right for all women. Linked as it is to women’s health and social status, as well as the powerful social structures of religion, state control and administrative inertia, and private profit, it is from the perspective of poor women that this right can best be understood and affirmed. Women know that childbearing is a social, not a purely personal, phenomenon; nor do we deny that world population trends are likely to exert considerable pressure on resources and institutions by the end of this century. But our bodies have become a pawn in the struggles among states, religions, male heads of households, and private corporations. Programmes that do not take the interests of women into account are unlikely to succeed...

Attempts have been made to analyse the socioeconomic conditions that affect the realisation of a woman’s reproductive rights. The term reproductive justice has been used to describe these broader social and economic issues. Proponents of reproductive justice argue that while the right to legalized abortion and contraception applies to everyone, these choices are only meaningful to those with resources, and that there is a growing gap between access and affordability.

### **REPRODUCTIVE RIGHTS AS MEN’S RIGHTS**

Men’s reproductive rights have been claimed by various organizations, both for issues of reproductive health, and other rights related to sexual reproduction.

Three international issues in men's reproductive health are sexually transmitted diseases, cancer and exposure to toxins. Recently men's reproductive right with regards to paternity have become subject of debate in the U.S., The term "male abortion" was coined by Melanie McCulley, a South Carolina attorney, in a 1998 article.

The theory begins with the premise that when a woman becomes pregnant she has the option of abortion, adoption, or parenthood; it argues, in the context of legally recognized gender equality, that in the earliest stages of pregnancy the putative (alleged) father should have the right to relinquish all future parental rights and financial responsibility, leaving the informed mother with the same three options.

In 2006, the National Centre for Men brought a case in the US, *Dubay v. Wells* (dubbed by some "Roe v. Wade for men"), that argued that in the event of an unplanned pregnancy, when an unmarried woman informs a man that she is pregnant by him, he should have an opportunity to give up all paternity rights and responsibilities. Supporters argue that this would allow the woman time to make an informed decision and give men the same reproductive rights as women. In its dismissal of the case, the U.S., Court of Appeals (Sixth Circuit) stated that "the Fourteenth Amendment does not deny to [the] State the power to treat different classes of persons in different ways."

## **REPRODUCTIVE RIGHTS ISSUES**

### **CAIRO PROGRAMME OF ACTION IMPLEMENTATION**

Implementation of the Cairo Programme of Action varies considerably from country to country. In many countries, post-ICPD tensions emerged as the human rights-based approach was implemented. Since the ICPD, many countries have broadened their reproductive health programmes and attempted to integrate maternal and child health services with family planning. More attention is paid to adolescent health and the consequences of unsafe abortion.

Lara Knudsen observes that the ICPD succeeded in getting feminist language into governments' and population agencies' literature, but in many countries the underlying concepts are not widely put into practice. In two preparatory meetings for the ICPD+10 in Asia and Latin America, the United States, under the George W. Bush Administration, was the only nation opposing the ICPD's Programme of Action.

### **ABORTION**

Pro-choice activists argue that "*twenty percent of all pregnancies worldwide end in abortion, and nearly half of those abortions are unsafe and often illegal.*" There are, however, more reliable facts: According to the WHO, more than 45 million (legal and illegal) abortions take place annually. At the same time, approximately 66,500 women die from the complications of unsafe abortion every year (according to data repeatedly published by Ipas).

An article from the World Health Organization calls safe, legal abortion a “fundamental right of women, irrespective of where they live” and unsafe abortion a “silent pandemic”. The article states “ending the silent pandemic of unsafe abortion is an urgent public-health and human-rights imperative.” It also states “access to safe abortion improves women’s health, and vice versa, as documented in Romania during the regime of President Nicolae Ceausescu” and “legalisation of abortion on request is a necessary but insufficient step towards improving women’s health” citing that in some countries, such as India where abortion has been legal for decades, access to competent care remains restricted because of other barriers. WHO’s Global Strategy on Reproductive Health, adopted by the World Health Assembly in May 2004, noted: “As a preventable cause of maternal mortality and morbidity, unsafe abortion must be dealt with as part of the MDG on improving maternal health and other international development goals and targets.” The WHO’s Development and Research Training in Human Reproduction (HRP), who’s research concerns people’s sexual and reproductive health and lives, has an overall strategy to combat unsafe abortion that comprises four inter-related activities:

- To collate, synthesize and generate scientifically sound evidence on unsafe abortion prevalence and practices;
- To develop improved technologies and implement interventions to make abortion safer;
- To translate evidence into norms, tools and guidelines;
- And to assist in the development of programmes and policies that reduce unsafe abortion and improve access to safe abortion and highquality postabortion care.

When negotiating the Cairo Programme of Action at the 1994 International Conference on Population and Development (ICPD), the issue was so contentious that delegates eventually decided to omit any recommendation to legalize abortion, instead advising governments to provide proper post-abortion care and to invest in programmes that will decrease the number of unwanted pregnancies.

On April 18, 2008 the Parliamentary Assembly of the Council of Europe, a group comprising members from 47 European countries, has adopted a resolution calling for the decriminalization of abortion within reasonable gestational limits and guaranteed access to safe abortion procedures. The nonbinding resolution was passed on April 16 by a vote of 102 to 69.

During and after the ICPD, some interested parties attempted to interpret the term ‘reproductive health’ in the sense that it implies abortion as a means of family planning or, indeed, a right to abortion. These interpretations, however, do not reflect the consensus reached at the Conference. For the European Union, where legislation on abortion is certainly less restrictive than elsewhere, the Council Presidency has clearly stated that the Council’s commitment to promote ‘reproductive health’ did not include the promotion of abortion. Likewise, the European Commission, in response to a question from a Member of the European Parliament, clarified:



*“The term ‘reproductive health’ was defined by the United Nations (UN) in 1994 at the Cairo International Conference on Population and Development. All Member States of the Union endorsed the Programme of Action adopted at Cairo. The Union has never adopted an alternative definition of ‘reproductive health’ to that given in the Programme of Action, which makes no reference to abortion.”*

With regard to the US, it should be noted that, only a few days prior to the Cairo Conference, the head of the US delegation, Vice President Al Gore, had stated for the record:

*“Let us get a false issue off the table: the US does not seek to establish a new international right to abortion, and we do not believe that abortion should be encouraged as a method of family planning.”*

Some years later, the position of the US Administration in this debate was reconfirmed by US Ambassador to the UN, Ellen Sauerbrey, when she stated at a meeting of the UN Commission on the Status of Women that: “non-governmental organizations are attempting to assert that Beijing in some way creates or contributes to the creation of an internationally recognized fundamental right to abortion”. She added: “There is no fundamental right to abortion. And yet it keeps coming up largely driven by NGOs trying to hijack the term and trying to make it into a definition”.

Collaborative research from the Institute of Development Studies states that “access to safe abortion is a matter of human rights, democracy and public health, and the denial of such access is a major cause of death and impairment, with significant costs to [international] development”. The research highlights the inequities of access to safe abortion both globally and nationally and emphasises the importance of global and national movements for reform to address this. The shift by campaigners of reproductive rights from an issue-based agenda (the right to abortion), to safe, legal abortion not only as a human right, but bound up with democratic and citizenship rights, has been an important way of reframing the abortion debate and reproductive justice agenda.

## **POPULATION CONTROL**

Compulsory or forced sterilizations and abortions may also occur in the context of population control policies. From the 1970s to 1980s, tension grew between women’s health activists who advance women’s reproductive rights as part of a human rights-based approach and population control advocates. At the 1984 UN World Population Conference in Mexico City population control policies came under attack from women’s health advocates who argued that the policies’ narrow focus led to coercion and decreased quality of care and that these policies ignored the varied social and cultural contexts in which family planning was provided in developing countries. In the 1980s the HIV/AIDS epidemic forced a broader discussion of sex into the public discourse in many countries, leading to more emphasis on reproductive health issues beyond reducing fertility. The growing opposition to the narrow population control focus led to a significant departure in the early 1990s from past population control policies.



## GLOBAL CONCERN

The rise in inequality in the distribution of income among people is well-documented and displays the characteristics of a trend, having affected large numbers of countries, from the poorest to the most affluent, during the past two decades. Up to the 1980s, at least since the Second World War and in some cases since the beginning of the twentieth century, there had been a general narrowing of differences in the income available to individuals and families. Income-related inequalities, notably in the ownership of capital and other assets, in access to a variety of services and benefits, and in the personal security that money can buy, are growing. There is also greater inequality in the distribution of opportunities for remunerated employment, with worsening unemployment and underemployment in various parts of the world affecting a disproportionate number of people at the lower end of the socio-economic scale. The inequality gap between the richest and poorest countries, measured in terms of national per capita income, is growing as well.

The popular contention that the rich get richer and the poor get poorer appears to be largely based on fact, particularly within the present global context. Moreover, extreme or absolute poverty, experienced by those whose income is barely sufficient for survival, remains widespread. Indigence levels have risen in the most affluent countries, in countries once part of the Soviet bloc and in various parts of Africa, but have remained stable in Latin America and have declined in Asia. Extreme poverty and the suffering it entails affect a large proportion of humankind, and major efforts by Governments and international organizations to reduce or eradicate poverty have thus far failed to produce the desired results.

The persistence, aggravation and very existence of extreme poverty constitute an injustice. Those experiencing dire poverty are deprived of a number of the fundamental rights invoked in the Charter and enumerated in the Universal Declaration. Individuals affected by internal conflicts and wars are also robbed of many of their basic freedoms and are thus victims of injustice as well. Hunger is but one face of poverty; discrimination, poor health, vulnerability, insecurity, and a lack of personal and professional development opportunities are among the many other challenges faced by the poor. The rise in poverty in all its manifestations, along with the increase in the numbers of refugees, displaced persons and other victims of circumstance and abuse, represents sufficient evidence for a judgment of persistent, if not growing, injustice in the world.

Some proponents of social justice—though significantly fewer since the collapse of State communism—dream of total income equality. Most, however, hold the view that when people engage in economic activity for survival, personal and professional growth, and the collective welfare of society, inequality is inevitable but should remain within acceptable limits that may vary according to the particular circumstances. In the modern context, those concerned with social justice see the general increase in income inequality as unjust, deplorable and alarming. It is argued that poverty reduction and overall improvements in

the standard of living are attainable goals that would bring the world closer to social justice. However, there is little indication of any real ongoing commitment to address existing inequalities.

In today's world, the enormous gap in the distribution of wealth, income and public benefits is growing ever wider, reflecting a general trend that is morally unfair, politically unwise and economically unsound. Injustices at the international level have produced a parallel increase in inequality between affluent and poor countries.

These are political judgments deriving from the application of political concepts. Inequalities in income and in living conditions within and between countries are not defined as just or unjust in international texts or national constitutions. Some economists argue that a more equal distribution of income facilitates economic growth, given the involvement of more people with energy and diverse skills in the economy and the increased demand for goods and services, while others retort that savings and capital accumulation are strengthened by the concentration of income at the top of the socio-economic scale. Similarly, the call for greater equality in the distribution of world income at the international level is weakened by the observation that technological and other innovations vital to the health of the world economy originate in the most affluent countries. Sociologists may contend that excessive income inequality restricts social mobility and leads to social segmentation and eventually social breakdown, but other social scientists counter this argument with examples of economically successful authoritarian or elitist societies. Arguments founded on moral fairness are easily disposed of in an atmosphere of moral relativism and cultural pluralism. Present-day believers in an absolute truth identified with virtue and justice are neither willing nor desirable companions for the defenders of social justice.

Aware of the difficulties inherent in the defence of their support for greater equality in the distribution of income, the proponents of social justice are cognizant of the fact that trends relating to the fundamental question of equality of rights are not as clear as those associated with income and income-related inequalities.

During the past several decades, people have achieved freedom from authoritarian and totalitarian regimes on a massive scale. Furthermore, despite various setbacks and some alarming signs of regression, the trend towards the treatment of all human beings as members of the same global family, set in motion after the Second World War, has continued virtually uninterrupted owing to concerted efforts to reduce and ultimately eliminate all forms of discrimination. Particularly noteworthy is the steady progress made in achieving equality between women and men in spite of numerous cultural and religious obstacles. Greater equality of rights is also apparent for specific groups such as indigenous peoples and disabled persons. The equality gap remains somewhat wider for migrant workers and refugees, though there is an increasing global awareness of their predicament. The issue of equality of opportunities further complicates

efforts to determine whether ground has been lost or gained in the realm of social justice. Apart from the issue of unemployment, an area in which social justice appears to have suffered setbacks in recent years, there is the crucial question of whether societies offer their people sufficient opportunities to engage in productive activities of their choice wherever they wish, whether at home or abroad, and to receive benefits and personal and social rewards commensurate with their initiative, talents and efforts. This might be termed economic justice; for many it represents justice or fairness in the broadest sense. It has traditionally been perceived as the basis for social justice in the United States of America, the economically dominant country today.

Within the context of the present analysis, economic justice is considered an element of social justice, a choice justified by the desire to convey the idea that all developments relating to justice occur in society, whether at the local, national, or global level, and by the related desire to restore the comprehensive, overarching concept of the term “social”, which in recent times has been relegated to the status of an appendix of the economic sphere. Economic justice has unquestionably grown as the basic principles and practices of the market economy have become more prevalent and pervasive, as more people with valuable skills have been given greater freedom of movement regionally and internationally, and as barriers to cross-border economic and financial transactions have progressively been lowered.

The multifaceted nature of the concept of justice and the ambiguousness of relevant trends should not be used as an excuse for moral laxity and political indifference, however. Progress in one part of the world does not offset regression in another. The enjoyment of rights by some people does not compensate for violations of the same rights among others. Morally, all injustices are unacceptable.

The risk of laxity and indifference is even higher when history is viewed as a succession of cycles. From this perspective, the current emphasis on economic freedom and economic justice would likely be interpreted as a corrective or compensatory trend counterbalancing the excessive past preoccupation with redistributive social justice, and the presumption is that “reverse” corrections would occur when the limits of present views and policies have been reached or surpassed.

The validity of such cyclical movement might be confirmed in subsequent analysis, but institutions with public responsibilities cannot operate on the assumption that corrections occur automatically or providentially. Correctives occur as a result of changes in ideas, power structures, political processes and policies, and moral outrage and public protest certainly guide such changes in the direction of greater justice and fairness.

The promotion of social justice through public institutions is a deeply rooted tradition. Throughout history, the advances made by humankind have been conceived by great individuals—including philosophers, scientists, political leaders, prophets, and even ordinary inspired and courageous citizens—and

implemented by institutions. However, positive trends and advances are reversible. Individuals, institutions and forces driven by power and greed can undo what are clearly political and social gains. Social justice and international justice, at least from the distributive or redistributive perspective, do not appear to constitute a high priority in this modern age.

Advancements in social justice, except in extraordinary situations and circumstances such as the gaining of political independence, the aftermath of a long war or the depths of an economic depression, require pressure from organized political forces. Brief and sporadic protests against injustices, even if vehement, usually have a limited effect. The problem is that few political regimes have institutions or processes to promote the orderly and effective expression of grievances and demands by those who are not benefiting or are hurt by existing economic and social arrangements. Political parties are often reduced to administrative machines focused on winning elections. Trade unions are declining in both number and influence.

Democracy is seemingly gaining ground but is being vitiated by the “moneytization” of social relations and social institutions at many levels. The concept of reform, so often invoked in recent years to facilitate economic deregulation and privatization, could be constructively applied by liberal democracies and other regimes inspired by liberal principles to identify the requirements of social justice and implement appropriate policies.

Social justice is not possible without strong and coherent redistributive policies conceived and implemented by public agencies. A fair, efficient and progressive taxation system, alluded to in Commitment 9 of the Copenhagen Declaration on Social Development, allows a State to perform its duties, including providing national security, financing infrastructure and public services such as education, health care and social security, and offering protection and support to those who are temporarily or permanently in need. While the scale of taxation and public obligations varies widely according to the wealth and capacity of each country, it is generally accepted that greater financial participation is required from those with more resources at their disposal. This constitutes a sacrifice that in well-functioning liberal and social democratic societies is accepted as part of the social contract binding citizens together. Official development assistance (ODA) to poor and developing countries is a manifestation of redistributive justice at the international level, and various proposals for taxes on global transactions derive from the same objective of promoting fairness and solidarity. Redistributive ideas and practices are currently under attack.

Governments and international organizations vacillate between the adjustment, neglect and abandonment of redistributive policies, but there is no evidence yet of any socially, politically or economically viable alternative strategies.

Social justice requires strong and coherent policies in a multitude of areas. Fiscal, monetary and other economic policies, as well as social policies,

incorporate specific objectives but must all be geared towards the overall social goal of promoting the welfare of a country's citizens and increasingly, in this age of global interdependence, the citizens of the world. The well-being of citizens requires broad-based and sustainable economic growth, economic justice, the provision of employment opportunities, and more generally the existence of conditions for the optimal development of people as individuals and social beings. Macroeconomic policies may be presented in all their complexity by experts or justified by politicians with self-serving arguments, but they can essentially be divided into two groups: those favouring a few and those offering a chance to the many. The same is true for trade policies. The difficulties encountered in elaborating and implementing such policies in a way that balances different interests and ensures progress towards social justice are enormous, especially for countries still in the process of establishing their economic, institutional and political foundations. What is critical in this context is the belief that the goal is worth pursuing and that shared efforts are necessary.

Social justice may be broadly understood as the fair and compassionate distribution of the fruits of economic growth; however, it is necessary to attach some important qualifiers to this statement. Currently, maximizing growth appears to be the primary objective, but it is also essential to ensure that growth is sustainable, that the integrity of the natural environment is respected, that the use of non-renewable resources is rationalized, and that future generations are able to enjoy a beautiful and hospitable earth. The conception of social justice must integrate these dimensions, starting with the right of all human beings to benefit from a safe and pleasant environment; this entails the fair distribution among countries and social groups of the cost of protecting the environment and of developing safe technologies for production and safe products for consumption. Two of the greatest indicators of progress during the past century are the increased equality of men and women and the growing recognition that human beings are both guests and custodians of the planet earth. Unfortunately, little has been done to apply this enhanced environmental consciousness on the ground. Environmental concerns were largely ignored by communist regimes, and are not typically integrated into socialist approaches to the management of human affairs. Capitalist systems tend to "deify" production and consumption at the expense of balanced, long-term growth. Social justice will only flourish if environmental preservation and sustainable development constitute an integral part of growth strategies now and in the future.

When income and income-related inequalities reach a certain level, those at the bottom of the socio-economic ladder are no longer in a position to enjoy many of their basic rights. Inequalities tend to intensify and accumulate. The human suffering in such circumstances is sufficient reason for public action—even without taking into consideration the real danger of social breakdown. The parallel in terms of international justice relates to the likelihood that efforts to build a global community will break down as the gap separating the poorest from the most affluent countries widens.

The use of wealth is arguably more important than its distribution. For reasons that are understandable in the light of the blatant exploitation associated with the industrial revolution, early proponents of the concept of social justice directed their anger and criticism more at wealth itself, at its concentration among a privileged few, than at the manner in which it was used. This attitude led to excessive reliance on public ownership and public intervention in the economy and was partly responsible for the neglect of economic justice by regimes focused on the pursuit of social justice. John Rawls wrote in *A Theory of Justice* that “there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved”. It is not yet clear whether the enormous resources and benefits in the hands of today’s few—individuals, corporations and nations—are “trickling down” to benefit the rest of humanity.

There may be a link between the rise in various types of inequality; the division of individuals, communities and countries into two distinct groups comprising those who succeed and win and those who do not; and the excessively simplistic and vulgar modern interpretation of utilitarianism as it applies to life and society in modern times, whereby each looks only to his own advantage. A personal and social price is paid when success is defined in terms of defeating competitors and is seen to represent an opportunity for further expansion and the consolidation of power.

It is perhaps the fault of certain misguided and overly sentimental proponents of social justice that generosity, compassion, solidarity, and ultimately justice itself have come to be perceived in the dominant world culture as “soft” (and therefore insignificant and dispensable) qualities or concepts. The idea of social justice has too often been associated with an excessively benevolent perception of human nature and a naively optimistic belief in the capacity of good ideas and institutions to transform the world into a secure and agreeable place. The capacity to judge and sanction is an indispensable quality at all levels of society. However, exclusive reliance on simple, straightforward instincts will only lead to injustice and violence. It makes more sense to periodically revisit and “update” the concept of social justice than to act as if it is obsolete.

It is important to reflect more deeply on the nature and use of power within both the human and institutional contexts. Individuals who hold power must be willing to submit to certain laws and regulations that limit their freedom to use their authority as they see fit. Those who are privileged to hold political and administrative power must understand that their legitimacy derives entirely from their capacity to serve the community.

Social justice is impossible unless it is fully understood that power comes with the obligation of service. In reflecting on the nature, legitimacy and use of power, consideration must be given to self-interest, enlightened self-interest, general interest and the common good. The essence of democracy resides in a shared understanding of these concepts. Along similar lines, there seems to be a need to revive the notion of a social contract both within communities and for



the world as a whole. Neither positivism nor utilitarianism is likely to yield very promising fruit for the future of humankind. In the final analysis, with the opportunity having been taken to reflect upon the developments and concepts surrounding social justice and the plight of the innumerable victims of injustice, it appears that the key to the successful pursuit of justice may lie in moderation—in the use of power, in production and consumption, in the expression of one's interests, views and beliefs, and in the conception and manifestation of self-interest and national interest. Even in the pursuit of equality, justice and freedom—often characterized by intense passion—moderation and reason should prevail. Justice and freedom share an uneasy relationship. In philosophy, political theory, individual experience and collective endeavours, these critical human objectives are often incompatible; in the pursuit and protection of justice and freedom there is more typically an occasional and fragile reconciliation than a natural harmony.

Nonetheless, all through human history, those facing extreme political oppression have revolted in the name of both freedom and justice, and great strides have been made through innumerable acts of heroism. At the very least, the idea that all individuals share a common humanity and possess fundamental rights simply because they are human, and that oppression and misery are not necessarily part of the human condition, has started to permeate the collective consciousness. However, setbacks and regressions occur more regularly than advances; in this fast-moving world, the majority of societies and political regimes, including those founded on democratic principles and ideals, have problems achieving and maintaining a balance between individual freedom and social justice. The myriad difficulties and uneven progress notwithstanding, continued pursuit of these ideals is essential; even if Sisyphus is unhappy, he must fulfil his duty.

## **SIX IMPORTANT AREAS OF INEQUALITY IN THE DISTRIBUTION OF GOODS, OPPORTUNITIES AND RIGHTS**

Going a step further in endeavouring to define the more concrete elements requiring consideration in relation to the idea of social justice, the Forum identified six areas of distributive inequality corresponding to situations that, from the perspective of those directly concerned and of the “impartial observer”, require correction.

Listed roughly in descending order in terms of their relative importance and in ascending order in terms of how difficult they are to measure, the highlighted areas of inequality are as follows:

- *Inequalities in the distribution of income:* The distribution of income among individuals or households at the local or national level, based on classifications such as socio-economic status, profession, gender, location, and income percentiles, is the most widely used measure of the degree of equality or inequality existing in a society. Though the statistical difficulties, particularly with regard to crosscountry



comparisons, cannot be overemphasized, the distribution of income is relatively amenable to measurement, and if the resulting data are interpreted correctly and sufficient prudence is exercised, any problems that may arise are generally surmountable. With the availability of an income, individuals and households acquire the capacity to make choices and gain immediate access to a number of amenities. For most contemporary societies, income distribution remains the most legitimate indicator of the overall levels of equality and inequality.

- *Inequalities in the distribution of assets*, including not only capital but also physical assets such as land and buildings. There is normally a strong positive correlation between the distribution of income and the distribution of assets. Data from a variety of sources are generally available to Governments or independent statistical offices wishing to document what has traditionally been both a determinant of social status and political power and a source of political upheaval and revolution. As stated in article 17 of the Universal Declaration of Human Rights, “everyone has the right to own property alone as well as in association with others”, and “no one shall be arbitrarily deprived of his property”.
- *Inequalities in the distribution of opportunities for work and remunerated employment*: In both developed and developing countries today, the distribution of work and employment opportunities is the main determinant of income distribution and a key to economic and social justice. The distinction between work and employment is important; “work” encompasses all independent economic activities and what is called the spirit of entrepreneurship (an element of which is the creation of small and medium-sized enterprises), and more generally the economic opportunities offered by society to all those who wish to seize them. Statistics on the distribution of employment opportunities and unemployment are more readily available than data on, for instance, the proportions of young people from different socio-economic backgrounds who have managed to secure bank loans to start their own enterprises. As economies continue to diversify and become more and more service oriented, this sort of information will be increasingly useful. At the same time, the United Nations and its agencies, in particular the International Labour Organization (ILO), cannot ignore the fact that the vast majority of people in the world work in order to survive. Discrepancies in working conditions among those in different professions and social groups, including immigrants, constitute part of this item.
- *Inequalities in the distribution of access to knowledge*: Considered in this context are issues relating to levels of enrolment in schools and universities among children from different socio-economic groups, as well as issues linked to the quality of educational delivery in various

institutions and regions. Education, including technical training and adult education, is critical for ensuring access to decent work and for social mobility, and in most societies is a strong determinant of social status and an important source of self-respect. Because schools and universities are no longer the only dispensers of knowledge, and in the light of the emergence of new learning modes and tools such as the Internet, access to various technologies is also considered in assessing education-related inequalities. Although the distinction between information and knowledge remains valid and relevant, a number of statistical publications now present certain types of data together, including, for example, gender-disaggregated statistics on the ownership of television sets, book acquisitions, and primary and secondary enrolment ratios.

- *Inequalities in the distribution of health services, social security and the provision of a safe environment:* Traditional indicators of well-being such as life expectancy and child mortality rates, broken down by gender, socio-economic status and area of residence, are typically used along with other data to identify and measure inequalities in the distribution of amenities all societies endeavour to provide for their members. As is the case with education, issues relating to the availability, quality and accessibility of health and social services and facilities are critical but are difficult to analyse and measure. As stated in article 22 of the Universal Declaration of Human Rights, “everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. Social security, now often limited to social protection and safety nets, was a core component of the welfare state model adopted by countries around the globe after the Second World War. The sources of financing for social security benefits and the distribution of such benefits within a community remain pressing issues. Moving on to the last item, the right to a healthy and pleasant environment, not polluted by uncontrolled or predatory human activities, is considered by its proponents to constitute part of the third generation of human rights (the first generation having comprised civil and political rights and the second generation economic, social and cultural rights). Pollution, generated continuously by unregulated commercial activities and more dramatically and catastrophically through incidents such as the Chernobyl and Bhopal disasters, does not choose its victims. It is nevertheless true that rich and poor people have an unequal capacity to ensure a safe environment. Differentials in personal security and safety could also logically be placed under the heading of inequalities in the provision of a safe environment. Crime, in its many forms, is growing in most societies, and groups at

the lower end of the socio-economic scale continue to be disproportionately affected. The suffering and losses associated with internal conflicts and wars are also very unevenly distributed; it should be noted that the Forum hesitated on whether to place this increasingly critical issue here or in the next and last category.

- *Inequalities in the distribution of opportunities for civic and political participation:* This form of inequality is rarely discussed in international circles, perhaps because of its inherent complexity and sensitivity, and perhaps also because the practice of democracy is usually limited to the holding of elections; those who vote in presidential and parliamentary elections are implicitly considered participants in political life. Involvement in the electoral process notwithstanding, the Forum asserted that inequalities and inequities associated with political institutions and processes were key factors contributing to inequalities and inequities in society more generally. The way power is organized and distributed among society's various institutions and the manner in which political processes are carried out have a profound influence on how citizens see and find their place on the social ladder and within in the social fabric. This does not mean that the unequal distribution of political power is always the direct cause of other forms of inequality. Simple cause-effect relationships do not explain this highly complex phenomenon in which personal and social factors are intertwined. It is generally acknowledged, however, that the distribution of power and how it is exercised by those who have it are at the core of the different forms and manifestations of inequality and inequity.

## **ISSUES RELATING TO THE RELIABILITY AND DIVERSITY OF SOURCES OF INFORMATION**

It is necessary to outline the difficulties and considerations associated with conducting an analytical appraisal of the immensely complicated issue of equality and justice from a distributional perspective. First, there is the vastness of the issue, which in itself challenges the research capacity and analytical ability of an institution or group of people meeting periodically to share their knowledge and views, and a second important limiting factor is the paucity and poor quality of data. Justice, equity and equality can legitimately be explored from a philosophical, moral or political perspective, even by those who can only aspire to the breadth and depth of perspicacity shown by a John Rawls, John Stuart Mill or Jean-Jacques Rousseau. One could argue that in the United Nations itself more discussion and debate should be devoted to the philosophical, moral and religious foundations of the idea of justice and to the current understanding of the notion of universal human rights. In a limited exercise such as that undertaken by this Forum, however, theoretical reflections had to be supported by facts and data.

There are some significant problems relating to the availability, consistency and quality of data. For many developing countries, basic demographic, social

and economic statistics do not come from national sources but are compiled by international organizations, with relevant data obtained through sample surveys, at best, but more often through comparisons, projections and extrapolations. These statistics often convey a partial and very superficial picture of living conditions among the people concerned. One unfortunate aspect of the bureaucratic or technocratic culture of international organizations is the general reluctance to complement and enrich limited statistical data with direct impressions, personal testimonies, anecdotal material, travelogues or works of fiction. A better balance will have to be sought at some point in the United Nations between different sources and forms of knowledge. In particular, empirical data will have to be complemented by the less measurable but richer knowledge of the human condition gained through real-world experience.

Even when reliable statistics are available from national sources and the muchused (and indeed indispensable) aggregates and averages for indicators such as per capita income and enrolment ratios are provided, data are generally not broken down enough to capture critical details relating the situation of specific population groups. In the present context, data on individuals in the top 5 per cent or 1 per cent in terms of income or assets could be further disaggregated in some countries to allow an examination of the situation of the very rich. Those at the other end of the socio-economic scale would also benefit from a closer look; the extremely poor are rarely the focus of regular detailed analysis.

Data on social and economic conditions are often expressed in absolute numbers, percentages or ratios; indicators relying on other forms of measurement offer an added dimension to the analytical process. This complex and somewhat ambiguous title effectively represents an invitation to those interested in pursuing this line of inquiry rather than a set of informed conclusions reached by the Forum. Clearly, segments of the population that previously had little or no access to information now find it far more readily available. Radio, television and newspapers have touched the lives of people all along the socio-economic spectrum in virtually every corner of every nation.

Wired and wireless technologies have revolutionized the exchange and dissemination of information; Internet use has been characterized by exponential growth in every region of the world. The ICT revolution is often considered one of the defining features of globalization; its social, economic, cultural and political implications are enormous but have yet to be fully understood. Knowledge is also transferred through these new technologies; distance learning and other non-traditional options have made education more accessible to many. In a more traditional context, there has been consistent improvement in school and university enrolment ratios. Even in Africa, which continues to face serious challenges in many areas of development, estimates indicate that between the early 1980s and 2000, primary enrolment ratios increased from 78 to 89 per cent for girls and from 85 to 95 per cent for boys, and rates of illiteracy declined from 61 to 46 per cent for women and from 40 to 29 per cent for men. In China, primary enrolment reached 98.6 per cent in 2000, and 97 per cent of those

completing primary school were continuing on to the secondary level. Latin America is believed to have achieved full primary enrolment. In India, overall literacy rose from 52 per cent in 1991 to 65 per cent in 2000.

Globally, a higher proportion of young people from poor and modest households now have the opportunity to acquire knowledge. The quality and depth of educational provision has been the subject of intense controversy, however. Mention is often made of the poor quality of education provided in primary schools in both developed and developing countries, and at the tertiary level gaps in educational quality appear to be widening. Children of wealthy and well-connected families have a much better chance of attending prestigious (or simply good) universities either at home or abroad than do children of families with limited means. The intergenerational transfer of inequalities in education remains a persistent problem. In Latin America, for example, around 75 per cent of young people in urban areas are from households in which the parents received less than 10 years of education, and on average, more than 45 per cent of them fail to complete the 12 years of schooling considered necessary to secure a decent and stable job and income. Just over 30 per cent of young people whose parents did not complete their primary education manage to finish the secondary cycle, compared with 75 per cent of those whose parents had at least 10 years of schooling.

There appears to be a strong link between rising inequalities in the distribution of opportunities for a quality education and the recent tendency to commercialize education and treat it as a commodity subject to the rules of an open and competitive market economy. For years, international financial institutions overseeing the implementation of structural adjustment programmes encouraged the Governments of developing countries to charge fees for the delivery of primary education. This reform component was discarded following widespread protests, but there are many other indications that, within the general context of the weakened commitment to public service and reduced support for universal social programmes, education is increasingly being treated as merchandise and pupils as customers. If nothing is done to address this issue, schools and universities of quality will be accessible only to the privileged classes, while the masses will have to be satisfied with lower-priced and often mediocre institutions.

## **UNIVERSAL GROUNDS FOR THE DETERMINATION OF WHAT IS JUST AND WHAT IS UNJUST**

Individuals, institutions, Governments and international organizations make judgments about what is just and what is unjust based on complex and generally unformulated frameworks of moral and political values. Such frameworks vary considerably across cultures and over time, but through the centuries prophets, philosophers and other intellectuals have repeatedly attempted to identify common ground that would allow all human beings in their own and in successive generations to agree on definitions of right and wrong, good and bad, just and

unjust. It is often said that all great religions and philosophies embody the same core principles and values, and beyond the different metaphysics and institutional settings, reflect the same belief in the capacity of human beings to make moral judgments and to seek perfection in some form. Progress was originally a spiritual concept and was only later applied to the fruits of human technical ingenuity, and the same is true for the notion of justice, which has retained much of the timeless immanence deriving from its religious roots.

### THREE CRITICAL DOMAINS OF EQUALITY AND EQUITY

There are three areas of priority with regard to equality and equity highlighted in the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenants on Human Rights, and in subsequent texts adopted by the General Assembly, notably the Copenhagen Declaration and Programme of Action and the United Nations Millennium Declaration. They include the following:

*Equality of rights*, primarily implying the elimination of all forms of discrimination and respect for the fundamental freedoms and civil and political rights of all individuals. This represents the most fundamental form of equality. As stated in article 1 of the Universal Declaration, “all human beings are born free and equal in dignity and rights”, and article 2 is even more specific: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

*Equality of opportunities*, which requires stable social, economic, cultural and political conditions that enable all individuals to fulfil their potential and contribute to the economy and to society. Interpreted restrictively, this form of equality is akin to equality of rights and means “simply” that societies and Governments refrain from discrimination and allow individuals to freely pursue their aspirations and develop and apply their talents within the moral and legal limits imposed by respect for the freedom of others. Thus defined, it is often identified with justice and, in the sense described above, more precisely with economic justice. Support for this objective has been linked to the emergence of the laissez-faire doctrine, and from a philosophical perspective this aspect of equality is very close to liberalism and utilitarianism. Interpreted more broadly, equality of opportunities is linked to deliberate action, in particular the application of public policies, to correct and offset the many “unnatural” inequalities that separate individuals from different sociocultural backgrounds and milieus. With this levelling of the playing field, the financial and social success of individuals is largely determined by their natural talent, character, effort, and level of ambition, along with a certain measure of chance or fate. Meritocracy is the logical outcome. Policies focusing on health, education and housing are traditionally seen as particularly important for ensuring equality of opportunities, or *egalite des chances*. In political philosophy, this approach relates to the tradition of the social contract and is a critical aspect of social justice, as understood within socialist and social democratic conventions.



*Equity in living conditions* for all individuals and households. This concept is understood to reflect a contextually determined “acceptable” range of inequalities in income, wealth and other aspects of life in society, with the presumption of general agreement with regard to what is just or fair (or “equitable”) at any given time in any particular community, or in the world as a whole if universal norms are applied. This shift in terms, from equality to equity, derives from the fact that equality in living conditions has never been achieved in practice (except on a very limited scale by small religious or secular communities), has never been seriously envisaged by political theorists or moralists (except in the context of describing attractive—or more often repulsive—utopias), and is today commonly perceived as incompatible with freedom.

The pre-Marxist ideal—“from each according to his ability, to each according to his works”—would need to be applied, and for a very long time, within post-revolutionary societies. The truly egalitarian Marxist principle—“from each according to his capacities, to each according to his needs”—would only prevail (with any success) in the distant and quasi-utopian “end of history” referred to in communist theory. In short, equity is the most logical reference point in determining what is just and what is unjust with regard to living conditions and related matters within society. The lack of objective indicators makes this a daunting task, however. What constitutes the equitable distribution of income among social classes, occupations and age groups? From which perspective and on which basis are various manifestations of equity and inequity being assessed? What are the universal norms that allow the United Nations and other international organizations to make judgments and offer advice on the equitability of living conditions around the world? Equity is an inherently vague and controversial notion. Nonetheless, it is a pervasive preoccupation in all societies, both affluent and poor. Every society, even the laissez-faire variety, has engaged in the distribution and redistribution of income and wealth in some form, with policies generally favouring the poorest but sometimes benefiting the richest, and it is for this reason that issues of equity in living conditions remain central to the dialogue and debate on social justice.

## **SOCIAL JUSTICE FROM RELIGIOUS TRADITIONS**

### **METHODISTS**

From their founding Methodism was a Christian social justice movement. Under John Wesley’s direction, Methodists became leaders in many social justice issues of the day, including the prison reform and abolitionism movements. Wesley himself was among the first to preach for slaves rights attracting significant opposition., Today social justice plays a major role in the United Methodist Church.



## JEWISH SOCIAL TEACHING

In *To Heal a Fractured World: The Ethics of Responsibility*, Rabbi Jonathan Sacks claims that social justice has a central place in Judaism. One of Judaism's most distinctive and challenging ideas is its ethics of responsibility reflected in the concepts of simcha ("gladness" or "joy"), tzedakah ("the religious obligation to perform charity and philanthropic acts"), chesed ("deeds of kindness"), and tikkun olam ("repairing the world").

## CATHOLIC SOCIAL PRINCIPLES

Catholic social principles comprise those aspects of Roman Catholic doctrine which relate to matters dealing with the collective aspect of humanity. A distinctive feature of the Catholic social doctrine is their concern for the poorest members of society.

*Two of the seven key areas of "Catholic social teaching" are pertinent to social justice:*

- Life and dignity of the human person: The foundational principle of all "Catholic Social Teaching" is the sanctity of all human life and the inherent dignity of every human person. Human life must be valued above all material possessions.
- Preferential option for the poor and vulnerable: Catholics believe Jesus taught that on the Day of Judgement God will ask what each person did to help the poor and needy: "Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me." The Catholic Church believes that through words, prayers and deeds one must show solidarity with, and compassion for, the poor. The moral test of any society is "how it treats its most vulnerable members. The poor have the most urgent moral claim on the conscience of the nation. People are called to look at public policy decisions in terms of how they affect the poor."

*Even before it was propounded in the Catholic social doctrine, social justice appeared regularly in the history of the Catholic Church:*

- The term "social justice" was adopted by the Jesuit Luigi Taparelli in the 1840s, based on the work of Thomas Aquinas. He wrote extensively in his journal *Civiltà Cattolica*, engaging both capitalist and socialist theories from a natural law viewpoint. His basic premise was that the rival economic theories, based on subjective Cartesian thinking, undermined the unity of society present in Thomistic metaphysics; neither the liberal capitalists nor the communists concerned themselves with public moral philosophy.
- Pope Leo XIII, who studied under Taparelli, published in 1891 the encyclical *Rerum Novarum* (On the Condition of the Working Classes), rejecting both socialism and capitalism, while defending labour unions and private property. He stated that society should be based on cooperation and not class conflict and competition. In this document,

Leo set out the Catholic Church's response to the social instability and labour conflict that had arisen in the wake of industrialization and had led to the rise of socialism. The Pope advocated that the role of the State was to promote social justice through the protection of rights, while the Church must speak out on social issues in order to teach correct social principles and ensure class harmony.

- The encyclical *Quadragesimo Anno* (On Reconstruction of the Social Order, literally "in the fortieth year") of 1931 by Pope Pius XI, encourages a living wage, subsidiarity, and advocates that social justice is a personal virtue as well as an attribute of the social order, saying that society can be just only if individuals and institutions are just.
- Pope Benedict XVI's encyclical *Deus Caritas Est* ("God is Love") of 2006 claims that justice is the defining concern of the state and the central concern of politics, and not of the church, which has charity as its central social concern. It said that the laity has the specific responsibility of pursuing social justice in civil society and that the church's active role in social justice should be to inform the debate, using reason and natural law, and also by providing moral and spiritual formation for those involved in politics.
- The official Catholic doctrine on social justice can be found in the book *Compendium of the Social Doctrine of the Church*, published in 2004 and updated in 2006, by the Pontifical Council *Iustitia et Pax*.

## SOCIAL JUSTICE MOVEMENTS

Social justice is also a concept that is used to describe the movement towards a socially just world, *i.e.*, the Global Justice Movement. In this context, social justice is based on the concepts of human rights and equality, and can be defined as "*the way in which human rights are manifested in the everyday lives of people at every level of society*".

There are a number of movements that are working to achieve social justice in society. These movements are working towards the realization of a world where all members of a society, regardless of background or procedural justice, have basic human rights and equal access to the benefits of their society.

## THE GREEN PARTY

Social Justice (sometimes "Social Equality and Global Equality and Economic Justice") is one of the Four Pillars of the Green Party and is sometimes referred to as "Social and Global Equality" or "Economic Justice". The Canadian party defines the principle as the "equitable distribution of resources to ensure that all have full opportunities for personal and social development". As one of the 10 key values of the party in the United States, social justice is described as the right and opportunity of all people "to benefit equally from the resources afforded us by society and the environment."

## **SOCIAL JUSTICE IN HEALTH-CARE**

Social justice has more recently made its way into the field of bioethics. Discussion involves topics such as affordable access to health care, especially for low income households and family. The discussion also raises questions such as whether society should bear health-care costs for low income families, and whether the global marketplace is a good thing to deal with health-care. Ruth Faden and Madison Powers of the Johns Hopkins Berman Institute of Bioethics focus their analysis of social justice on which inequalities matter the most. They develop a social justice theory that answers some of these questions in concrete settings.

## **SUFFRAGE, THE RIGHT TO VOTE**

During the 19th Century women began to agitate for the right to vote and participate in government and law making. The ideals of women's suffrage developed alongside that of universal suffrage and today women's suffrage is considered a right (under the Convention on the Elimination of All Forms of Discrimination Against Women). During the 19th Century the right to vote was gradually extended in many countries and women started to campaign for their right to vote. In 1893 New Zealand became the first country to give women the right to vote on a national level. Australia gave women the right to vote in 1902, while the USA, Britain and Canada gave women the vote after the First World War. Sweden would also be a contestant as the first independent nation to grant women the right to vote. Conditional female suffrage was granted in Sweden during the age of liberty (1718–1771)

In Britain women's suffrage gained attention when John Stuart Mill called for the inclusion of women's suffrage in the Reform Act of 1867 in a petition that he presented to Parliament. Initially only one of several women's rights campaign, suffrage became the primary cause of the British women's movement at the beginning of the 20th Century. At the time the ability to vote was restricted to wealthy property owners within British jurisdictions. This arrangement implicitly excluded women as property law and marriage law gave men ownership rights at marriage or inheritance until the 19th century. Although male suffrage broadened during the century, women were explicitly prohibited from voting nationally and locally in the 1830s by a Reform Act and the Municipal Corporations Act. Throughout the 19th century women had organised through various groups until, by 1903, the National Union of Women's Suffrage Societies and the Women's Social and Political Union had emerged. Leaders in the struggle were Millicent Fawcett and Emmeline Pankhurst with her daughter Christabel. In 1918 the British Parliament passed a bill allowing women over the age of 30 to vote, and the voting age for women was lowered to 21 in 1928.

The Seneca Falls Convention of 1848 formulated the demand for women's suffrage in the United States of America and after the American Civil War (1861–1865) agitation for the cause became more prominent. In 1869 the proposed

Fourteenth Amendment to the United States Constitution, which gave the vote to black men, caused controversy as women's suffrage campaigners such as Susan B. Anthony and Elizabeth Cady Stanton refused to endorse the amendment, as it did not give the vote to women. Others, such as Lucy Stone and Julia Ward Howe however argued that black men were enfranchised, women would achieve their goal. The conflict caused two organisations to emerge, the National Woman Suffrage Association, which campaigned for women's suffrage at a federal level as well as for married women to be given property rights, and the American Woman Suffrage Association, which aimed to secure women's suffrage through state legislation. In 1920 the Nineteenth Amendment to the United States Constitution gave women the right to vote.

Nordic countries gave women the right to vote in the early 20th Century – Finland (1906), Norway (1913), Denmark and Iceland (1915). With the end of the First World War many other countries followed- the Union of Soviet Socialist Republics and the Netherlands (1917), Austria, Czechoslovakia, Poland and Sweden (1918), Germany and Lunenburg (1919). Spain gave women the right to vote in 1931, France in 1944, Belgium, Italy, Romania and Yugoslavia in 1946. Switzerland gave women the right to vote in 1971, and Liechtenstein in 1984.

In Canada women's suffrage was achieved first on a provincial level in Alberta, Manitoba and Saskatchewan on 1916, with federal suffrage being granted in 1918. In Latin America some countries gave women the right to vote in the first half of the 20th Century – Ecuador (1929), Brazil (1932), El Salvador (1939), Dominican Republic (1942), Guatemala (1956) and Argentina (1946). In India, under colonial rule, universal suffrage was granted in 1935. Other Asian countries gave women the right to vote in mid of the Century – Japan (1945), China (1947) and Indonesia (1955). In Africa women generally got the right to vote along with men through universal suffrage – Liberia (1947), Uganda (1958) and Nigeria (1960). In many countries in the Middle East universal suffrage was acquired after the Second World War, although in others, such as Kuwait, suffrage is very limited. On 16 May 2005, the Parliament of Kuwait extended suffrage to women by a 35-23 vote, and women have been elected to Parliament.

## MODERN MOVEMENT

In the subsequent decades women's rights again became an important issue in the English speaking world. By the 1960s the movement was called "feminism" or "women's liberation." Reformers wanted the same pay as men, equal rights in law, and the freedom to plan their families or not have children at all. Their efforts were met with mixed results.

In the UK, a public grounds well of opinion in favour of legal equality had gained pace, partly through the extensive employment of women in what were traditional male roles during both world wars. By the 1960s the legislative process was being readied, tracing through MP Willie Hamilton's select committee report, his Equal Pay For Equal Work Bill, the creation of a Sex

Discrimination Board, Lady Sear's draft sex anti-discrimination bill, a government Green Paper of 1973, until 1975 when the first British Sex Discrimination Act, an Equal Pay Act, and an Equal Opportunities Commission came into force. With encouragement from the UK government, the other countries of the EEC soon followed suit with an agreement to ensure that discrimination laws would be phased out across the European Community.

In the USA, the National Organization for Women (NOW) was created in 1966 with the purpose of bringing about equality for all women. NOW was one important group that fought for the Equal Rights Amendment (ERA).

This amendment stated that "equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex." But there was disagreement on how the proposed amendment would be understood. Supporters believed it would guarantee women equal treatment. But critics feared it might deny women the right be financially supported by their husbands. The amendment died in 1982 because not enough states had ratified it. ERAs have been included in subsequent Congresses, but have still failed to be ratified.

In the last three decades of the 20th century, Western women knew a new freedom through birth control, which enabled women to plan their adult lives, often making way for both career and family. The movement had been started in the 1910s by US pioneering social reformer Margaret Sanger and in the UK and internationally by Marie Stopes.

Over the course of the 20th century women took on greater roles in society such as serving in government. In the United States some served as U.S., Senators and others as members of the U.S., Cabinet. Many women took advantage of opportunities in higher education. In the United States at the beginning of the 20th century less than 20% of all college degrees were earned by women. By the end of the century this figure had risen to about 50%.

Progress was made in professional opportunities. Fields such as medicine, law, and science opened to include more women. At the beginning of the 20th century about 5% of the doctors in the United States were women.

As of 2006, over 38% of all doctors in the United States were women, and today, women make almost 50% of the medical student population. While the numbers of women in these fields increased, many women still continued to hold clerical, factory, retail, or service jobs. For example, they worked as office assistants, on assembly lines, or as cooks.

## **RAPE AND SEXUAL VIOLENCE**

Rape, sometimes called sexual assault, is an assault by a person involving sexual intercourse with or sexual penetration of another person without that person's consent. Rape is generally considered a serious sex crime as well as a civil assault. When part of a widespread and systematic practice rape and sexual slavery are now recognised as crime against humanity and war crime. Rape is also now recognised as an element of the crime of genocide when committed with the intent to destroy, in whole or in part, a targeted group.

## **RAPE AS AN ELEMENT OF THE CRIME OF GENOCIDE**

In 1998, the International Criminal Tribunal for Rwanda established by the United Nations made landmark decisions that rape is a crime of genocide under international law. The trial of Jean-Paul Akayesu, the mayor of Taba Commune in Rwanda, established precedents that rape is an element of the crime of genocide. The Akayesu judgement includes the first interpretation and application by an international court of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

The Trial Chamber held that rape, which it defined as “a physical invasion of a sexual nature committed on a person under circumstances which are coercive”, and sexual assault constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group, as such.

It found that sexual assault formed an integral part of the process of destroying the Tutsi ethnic group and that the rape was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide.

Judge Navanethem Pillay said in a statement after the verdict: “From time immemorial, rape has been regarded as spoils of war. Now it will be considered a war crime. We want to send out a strong message that rape is no longer a trophy of war.” An estimated 500,000 women were raped during the 1994 Rwandan Genocide.

## **RAPE AND SEXUAL ENSLAVEMENT AS CRIME AGAINST HUMANITY**

The Rome Statute Explanatory Memorandum, which defines the jurisdiction of the International Criminal Court, recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, “or any other form of sexual violence of comparable gravity” as crime against humanity if the action is part of a widespread or systematic practice.

Rape was first recognised as crime against humanity when the International Criminal Tribunal for the former Yugoslavia issued arrest warrants based on the Geneva Conventions and Violations of the Laws or Customs of War. Specifically, it was recognised that Muslim women in Foca (southeastern Bosnia and Herzegovina) were subjected to systematic and widespread gang rape, torture and sexual enslavement by Bosnian Serb soldiers, policemen, and members of paramilitary groups after the takeover of the city in April 1992. The indictment was of major legal significance and was the first time that sexual assaults were investigated for the purpose of prosecution under the rubric of torture and enslavement as a crime against humanity. The indictment was confirmed by a 2001 verdict by the International Criminal Tribunal for the former Yugoslavia that rape and sexual enslavement are crimes against humanity. This ruling challenged the widespread acceptance of rape and sexual enslavement of women as intrinsic part of war. The International Criminal Tribunal for the former



Yugoslavia found three Bosnian Serb men guilty of rape of Bosniac (Bosnian Muslim) women and girls (some as young as 12 and 15 years of age), in Foca, eastern Bosnia-Herzegovina. Furthermore two of the men were found guilty of the crime against humanity of sexual enslavement for holding women and girls captive in a number of de facto detention centres. Many of the women subsequently disappeared.

## **DALIT WOMEN**

There are about 250 million Dalits in India. There is meagre improvement in the socio-economic condition of dalits in the past 50 years. Which that is not enough when compared to non-dalits. Of course, much more needs to be done. The urgent need is to have a national sample survey on dalits. Every fourth Indian is a dalit. There is no proper survey to give the correct number of dalit women in India. They are generally scattered in villages and they are not a monogamous group. About 75% of dalits live below poverty line. Economic backwardness of dalits is mostly due to injustice done to them by the high castes and also due to exploitation. From the time immemorial they worked like slaves, sold as commodities resulting in their social discrimination, economic deprivation and educational backwardness. To assess the position of dalit women in India this chapter is divided into various heads.

### **EDUCATION**

Till some years ago, many dalit women were ill treated and educationally backward inspite of the facilities for free education. The reasons for the high rate of illiteracy among dalit women are many.

*The following are the main reasons:*

1. Resistance from the family to send girls to schools.
2. Fear of insecurity in villages.
3. Lack of physical facilities like accommodation, school, transport and medical facilities.
4. The girls were forced to take care of the siblings when the parents are away at work.
5. Girls were forced to do domestic chores which prevent them from attending school.
6. Working to earn for the family prevent the girls from attending school.
7. Working with parents to earn their livelihood in beedi factories or other unorganized sector made them illiterate.
8. Because of the sick and unemployed parents girls were forced to work.
9. Many were forced to get married at young age, which stop schooling.
10. Social restriction is that the girls should stop education after marriage.
11. In some areas there are complaints from dalit women teachers of misbehaviors, blackmail and exploitation by the male staff of other high caste people.
12. Distance of schools from home.



13. Irrelevant content of the education system.
14. Fear of alienation of girls from their environment as a result of education are some of the other factors for low literacy level among SC girls. Even if the education improved the marriage prospects of the girls, the minus point is the increase in dowry. Therefore many parents wish to withdraw the girls from schools.

The present positions seems to be better with reference to the rate of literacy among dalits. The literacy rate is 31.48% for boys and 10.93% for girls. Dalits women belonging to the creamy layer of the society are better with good education and socially and economically they are well off like other high castes. They are fully aware of the welfare schemes provided by the Government and their percentage is very low when compared with the total dalit population. In rural areas, the first generation girls from SC needs the attention of Government and other organization. Mostly the teachers of the locality provide information to them about the welfare schemes. In many Dalit association executive position are occupied by male members whereas very poor representation is made by women in their pasts. The women are not properly informed about the Government schemes and there is an urgent need to get a feedback about the welfare schemes where lot of money is spent for the development of Dalits. The funds are not utilized properly for their upliftment. Many of the schemes go unnoticed because they are not popularized properly.

The coaching programmes conducted by the Government for dalit women are beneficial in training many women to compete in the competitive exam. These programmes also do not reach the needy dalit women because they are cornered by the very few creamy dalit women. This should be monitored properly and the schemes should be reached by the most deprived and constantly struggling dalit women. Because these dalit women are neglected by socially advanced communities and also by the better off among the dalits, which leads to an unhealthy socio-economic condition. There should be some scientific basis to pick up the poorest and they should be equipped with facilities.

There are some pre-examination coaching centres giving trainings for dalits which are doing very good service to train them in vocational line, for competitive exam, in medical and engineering field, railway recruitment boards, bank recruitment, etc.

*Here are some suggestions for the better implementation of the schemes to dalit women:*

1. Competitive spirit should be instilled in the girls.
2. Selection and identification of the talented girls should be done correctly.
3. Identify the candidate at college level for coaching.
4. Result oriented teaching is necessary.
5. Group discussions, quiz, and seminars to instill confidence.
6. Teacher: Student ratio 1:20 or below.
7. Monitoring by the teacher after class hours.
8. Loan facility.

Financial aid for uniform for girls, maps, charts, examination grant, laboratory facilities, library facilities should be provided for them special coaching should be given for meritorious dalit girls to compete for IAS and IPS. Hostel facilities for dalit girls at all levels of education starting from primary school up to higher education should be provided reservation policy especially for girls should be allotted in both admission and employment.

There is an increased awareness in recent years among dalit women about their rights and about the Government welfare schemes about higher education. This should be augmented by information technology, which should reach even to the remote rural citizen.

### **HIGHER EDUCATION**

The UGC has given reservation for seats in colleges for SC students 25%, ST 7.5%, which is highly beneficial. Also relaxation in marks for 5% is given to all dalit students in admission. Financial assistance in the form of fellowships is given to dalits. Rs. 3,600/- is given per JRF to continue research studies at the University level. There are special SC/ST cells at the University for effective implementation of the Government orders and to improve the condition of University level dalit students.

There are some of the suggestions for effective implementation of the various welfare schemes for the dalit students.

1. The communication gap between the educational institution and the social welfare department should be reduced.
2. District wise computer database of the male and female dalit students is very essential to provide necessary facilities to them.
3. Pamphlets with details about the welfare schemes should be distributed to the students.
4. Supply of books to the dalit students.
5. Incentive scholarship should be given to deserving and meritorious girls to encourage them for higher education.

### **GENDER EQUALITY**

Female infanticide is more prevalent among the uneducated dalit families. Educational development among SC women is very marginal because only girls were not sent to school because of the responsibilities at home.

Therefore the gender discrimination starts at the very early stage in the life of a dalit girl. Normally girl children are retained at home to look after the siblings. Another thing is the compulsory marriage of the girls at very early age after which the education is stopped. Generally in the male-dominated society, polygamy is allowed and more so in many dalit families. Because of this the position of the women deteriorated. Joint family system, polygamy, property structure, early marriage, and permanent widowhood were hurdles for the development of all women in early period. But in the twentieth century, after the Mahatma Gandhien movement to educate women, slowly changes occurred

in the position of women. But here, rural women were more blessed than urban women because divorce and remarriage were allowed for them. Mainly Sudras (*i.e.*, low caste people) allowed divorce and remarriage for their women.

## OCCUPATION

*The occupation of many SC women can be divided in the following heads:*

1. Agriculture labourer.
2. Marginal Cultivators.
3. Fisherwomen.
4. Traditional artisans.
5. Leather Workers.
6. Weavers.
7. Scavengers and sweepers.
8. Midwifery.
9. Beedi factories and unorganised sectors.

The Work Participation Rate (WPR) of SC population is said to be for males 22.25% and for females 25.98%.

The contribution of SC women to the economic development of our country is significant especially in the agricultural sector. They are exploited by the higher caste landlords. They are paid very marginal salary for the hard work in the field for the whole day. In leather industries the tanning process is considered to be an unclean job which is done only by socially backward class. Traditional artistes get very more benefit because the middleman exploits them. The condition of scavenger and sweepers is very deplorable and they the most vulnerable sectors among SC. The working condition is very poor and the remuneration is also very poor.

## FAMILY ROLE

Because of the girls remain uneducated, they got married very early. Marriage in the high reproductive stage with high fertility rate, children care more. Because of the unlimited family, the burden fell on the young girls which affected their health. They were not able to assist in family matters to their husbands. But now the situation is different. The girls manage to plan their family, educate the children, assist the husbands in family matters and office going and professional girls improve the economic conditions. On the whole the family becomes socially developed because of the education of the girls.

Education among women increased intercaste marriages, which is definitely a sign of development. Government also encourages intercaste marriages among dalits and highcaste by incentives.

## PROTECTION FROM ILLTREATMENT

Most women are illtreated even today among tribals. Ministry of welfare GI (1993 –94) Annual report had recorded 18,014 crimes against SCs (murder, rape, *etc.*).

Disputes on land, minimum wage for SC workers bonded labourers, in debatedness – problem.

SC/ST under privileged, regarded less than human beings assigned lowest of the low status in society.

Scavenging: is no other country scavenging is amalgamated with the evil structure of caste.

### **UNTOUCHABILITY AND ILLTREATMENT**

1. Non-access to temples, places of worship.
2. Non-access to hotels and eating-places.
3. Not available – barber services for SC/ST Tamil Nadu.
4. Not allowed in gramsabha sittings – Tamil Nadu.
5. Discrimination in educational institution, public health services.
6. Not allowed to participate in social ceremonies – Tamil Nadu.
7. General untouchability – Tamil Nadu.
8. Enforcement of removal of carcasses – Tamil Nadu.
9. Not access to public cremation/burial ground/public pathways/roads.
10. Not allowed in residential premises of high caste.
11. Access to Dharmasalas – denied.

Untouchability is acute in villages. There is a gradual change in rural areas because they have become aware of their rights. Spread of education, improvement in economic conditions, welfare measures.

## **MEASURES TO BE TAKEN FOR UPLIFTMENT**

### **BASIC COMMON NEEDS**

*The following facilities should be provided:*

- *Nutrition:* Malnutrition in female children high infant mortality should be corrected.
- *Health:* Unclean surroundings – proper accommodation should be provided.
- *Family welfare:* SC – women get married very soon high fertility – affect health.
- Safe drinking water.
- Electricity in village.
- Essential goods and medicines.
- Retail outlets not available.
- Fair price shops – necessary.

### **SLUM IMPROVEMENT AT THE GOVERNMENT BASE**

1. Conservation of assets of SC.
2. Provide land to SC women.
3. Train them in new fields for employment.
4. Ensure minimum wages.

5. Compulsory education up to 35 years.
6. Introduce new employment facilities.
7. Self-employment programme for women.
8. Modernizing existing traditional activities.
9. Liberate the women from scavenging work – alternative arrangement for dignified work.
10. Eradicate social untouchability.
11. Provide minimum basic facilities.
12. Positive discrimination. *i.e.*, policy of reservation should be continued both in Government and public sector.
13. Fee exemption, age relaxation for direct recruitment – separate interview.
14. Atrocity control room:  
Close watch, monitoring of atrocities against dalit women.

### **PRESENT POSITION**

The present position is better because of education, literacy rate for boys 31.48%, girls 10.93%.

Now they have lot of self respect, aware of their rights, organisations to voice their feelings. The creamy layer is well aware of the Government welfare schemes. Among SC dalits executive positions in associations are occupied only by men, very poor representation by women. Feedback about the welfare programme is very essential.

## **SOCIAL JUSTICE**

Social justice is the application of the concept of justice on a social scale. The term appeared before the 1800s, including in the *Federalist Papers* and Edward Gibbon's *The History of the Decline and Fall of the Roman Empire*.

The idea was elaborated by the moral theologian John A. Ryan, who initiated the concept of a living wage. Father Coughlin also used the term in his publications in the 1930s and the 1940s. The concept was further expanded upon by John Rawls beginning in the 1960s. It is a part of Catholic social teaching and is one of the Four Pillars of the Green Party upheld by green parties worldwide. Some tenets of social justice have been adopted by those on the left of the political spectrum.

Social justice is also a concept that some use to describe the movement towards a socially just world. In this context, social justice is based on the concepts of human rights and equality and involves a greater degree of economic egalitarianism through progressive taxation, income redistribution, or even property redistribution. These policies aim to achieve what developmental economists refer to as more equality of opportunity than may currently exist in some societies, and to manufacture equality of outcome in cases where incidental inequalities appear in a procedurally just system.

## THEORIES OF SOCIAL JUSTICE

### RAWLS

The liberal political philosopher John Rawls draws on the utilitarian insights of Bentham and Mill, the social contract ideas of John Locke, and the categorical imperative ideas of Kant. His first statement of principle was made in *A Theory of Justice* (1971) where he proposed that, “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others.” A deontological proposition that echoes Kant in framing the moral good of justice in absolutist terms. His views are definitively restated in *Political Liberalism* (1993), where society is seen, “as a fair system of co-operation over time, from one generation to the next.”

All societies have a basic structure of social, economic, and political institutions, both formal and informal. In testing how well these elements fit and work together, Rawls based a key test of legitimacy on the theories of social contract. To determine whether any particular system of collectively enforced social arrangements is legitimate, he argued that one must look for agreement by the people who are subject to it, but not necessarily to an objective notion of justice based on coherent ideological grounding. Obviously, not every citizen can be asked to participate in a poll to determine his or her consent to every proposal in which some degree of coercion is involved, so one has to assume that all citizens are reasonable.

*Rawls constructed an argument for a two-stage process to determine a citizen's hypothetical agreement:*

- The citizen agrees to be represented by X for certain purposes; to that extent, X holds these powers as a trustee for the citizen;
- X agrees that a use of enforcement in a particular social context is legitimate; the citizen, therefore, is bound by this decision because it is the function of the trustee to represent the citizen in this way.

This applies to one person representing a small group (*e.g.*, to the organiser of a social event setting a dress code) as equally as it does to national governments which are the ultimate trustees, holding representative powers for the benefit of all citizens within their territorial boundaries, and if those governments fail to provide for the welfare of their citizens according to the principles of justice, they are not legitimate.

To emphasise the general principle that justice should rise from the people and not be dictated by the law-making powers of governments, Rawls asserted that, “There is... a general presumption against imposing legal and other restrictions on conduct without sufficient reason. But this presumption creates no special priority for any particular liberty.” This is support for an unranked set of liberties that reasonable citizens in all states should respect and uphold — to some extent, the list proposed by Rawls matches the normative human rights that have international recognition and direct enforcement in some nation states where the citizens need encouragement to act in a way that fixes a greater degree of equality of outcome.

## THE BASIC LIBERTIES ACCORDING TO RAWLS

- Freedom of thought;
- Liberty of conscience as it affects social relationships on the grounds of religion, philosophy, and morality;
- Political liberties (*e.g.*, representative democratic institutions, freedom of speech and the press, and freedom of assembly);
- Freedom of association;
- Freedoms necessary for the liberty and integrity of the person (*viz.*: freedom from slavery, freedom of movement and a reasonable degree of freedom to choose one's occupation); and
- Rights and liberties covered by the rule of law.

## CRITICISM

Many authors criticize the idea that there exists an objective standard of social justice. Moral relativists deny that there is any kind of objective standard for justice in general. Non-cognitivists, moral skeptics, moral nihilists, and most logical positivists deny the epistemic possibility of objective notions of justice. Cynics (such as Niccolo Machiavelli) believe that any ideal of social justice is ultimately a mere justification for the status quo. Supporters of social darwinism believe that social justice assists the least fit to reproduce, sometimes labelled as dysgenics, and hence should be opposed. Many other people accept some of the basic principles of social justice, such as the idea that all human beings have a basic level of value, but disagree with the elaborate conclusions that may or may not follow from this. One example is the statement by H. G. Wells that all people are "equally entitled to the respect of their fellow-men."

On the other hand, some scholars reject the very idea of social justice as meaningless, religious, self-contradictory, and ideological, believing that to realize any degree of social justice is unfeasible, and that the attempt to do so must destroy all liberty. The most complete rejection of the concept of social justice comes from Friedrich Hayek of the Austrian School of economics:

There can be no test by which we can discover what is 'socially unjust' because there is no subject by which such an injustice can be committed, and there are no rules of individual conduct the observance of which in the market order would secure to the individuals and groups the position which as such (as distinguished from the procedure by which it is determined) would appear just to us. [Social justice] does not belong to the category of error but to that of nonsense, like the term 'a moral stone'.



# 3

## Social Change and Law

### **THE CHALLENGE OF SOCIAL CHANGE: FROM A COLONIAL SOCIETY TO AN INDEPENDENT STATE**

Our current history begins with the emergence of independent states in societies which till then, had been under colonial rule. Independence promised to usher in social change. Colonial societies were marked by feudal hierarchies, patron-client relationships, and disparities of wealth, class and caste.

Equal opportunities for self realisation were a far cry as access to education and access to health for all was a distant goal. A classic work by an anthropologist on post-colonial Africa bears the title 'From Subject to Citizen'. In a colonial society, a person was the subject of an imperial ruler, whose viceroys exercised executive authority without constitutional limits.

They were thus under no constitutional obligation to respect the fundamental rights neither of their subjects, nor in these societies could the subjects seek judicial protection of their rights. Upon independence, subjects emerged as citizens whose fundamental rights were recognised. In the realisation of these rights, the judiciary was to make a significant contribution.

A Constitution has been described as "the autobiography of a nation". It reflects its history and many of its provisions can best be understood as responses to the historical experience of the nation and as providing guide-posts to a future which is free from the negative features of the past.

A Constitution is thus both a document that a generation drafts in the light of its experience and the prevailing currents of thought and a document which seeks to anticipate the future and to provide a framework for orderly change.

Constitutions which mark freedom from colonial or authoritarian rule must necessarily promise change to correct the disparities and inequalities inherited from the old order.

The fundamental rights clauses and the directive or fundamental principles of state policy provide a reservoir of legal resources which can be drawn upon to bring about such change. They provide the mandate for innovative laws, innovative institutions and remedies and for affirmative action designed to give substance to the constitutional pledges of freedom, equality and justice.

### **PROCEDURE TO CHANGE THE LAW**

The Constitution of India provided chances to change the law by amending it. You have asked the law of government, for that it is to change the law by an amendment as said earlier.

*Constitution has provided to change law with:*

- Simple majority and
- Special majority

As a person, if you want to change the law, it is not possible as a person. *E.g.:* Sharmila Chanu of North-eastern India has been fasting for 10 years to change a law. But it is not changed until now. The government of India is providing nutrition to her through veins and does the same for another 10 years if she can live. Reason is that you cannot change a law as a single person.

Another example is that how we can change the law is public support. BT brinjal is banished in India due to mass support against it. Even you go to courts, courts cannot change law, but they can suggest government. Even their criminal procedures, they cannot change, it is government should change keeping it in Parliament.

Actually the Constitution of India provided a chance for us to change a law depending upon the majority in the Parliament. As a simple being we are unable to change a law but there is a process to change a law by filing a case before the Court of law by explaining discrepancies existed in the present law. When we need to change a Bill, after completion of the drafting of a Bill before its enactment the Government voluntarily invites suggestions from the public to explain about the amendments need by them then it is possible to participate each and every citizen to give suggestions for the better utilisation of law.

### **LAW IS SOCIAL ENGINEERING**

There is underlying principle or myth associated with all schools of jurisprudence and the myth of sociological jurisprudence is that of recognising, reconciling and striking a balance between the competing social and individual interest in the society. But the problem is that there is no yardstick as to how one interest could be decided over the other.

At the same time there is no other school of jurisprudence that could be used to explain and hasten the inevitable change process. Indian society has transformed over the period of time from a society governed by Smrithi, Sruti,

Dharma and other customary law, to western conceptions of law and authority during the colonial period. Further with the rights-based Constitution and progressive law-making which includes the codification of religious laws and affirmative action during the post-colonial period, the Indian society has undergone transition. The contribution of sociological jurisprudence to the social transformation in India, could be well assessed as understood by perceiving the law as a tool of social engineering.

Professor Upendra Baxi has emphasised the importance of study of sociology of law in Indian context. Importance assigned to sociological school of jurisprudence, is due to the fact that by looking through the lens of this particular school of thought, the response of human behaviour in a society to law and how law has crafted and moulded itself to suit the way the society responds to it could be understood.

There also could be instances we could observe, by which we could see even the society at times demands for laws. This interplay of law and society contributes and leads to development of each other. Pluralism existing in the Indian society and entry of modernism into the various aspects of public and personal life makes the task of law-monitored and law linked social changes in a developing multicultural society like India a complex and difficult task.

Since this study would involve concepts like law, legal system, social justice, morality and development, an analysis from sociological jurisprudence perspective, a jurisprudential school which stands most close to these concepts, would be the most suited one. Law has always been looked at as one of the important instruments that could bring about social change.

Many academicians have supported the view that law enjoys and uses unifying power to contribute towards better social cohesion, as a tool for bringing about homogeneity in the hetero-geneous population having socio-cultural diversities. Though there are several devices to bring about a change and reformation in society, but reformation through law is perhaps one of the most effective and safest methods to achieve this end.

A functional definition of social transformation needs to be arrived at before we proceed into the detailed analysis. For this purpose, social change needs to be distinguished from social transformation. Social change is understood as and “non-repetitive alteration in the established modes of behaviour in society.”

Further to establish social change, there would be ideally a change in the established social norms, social roles and patterns of social relations. But only a “massive, structural or far-reaching social change would be termed as a social transformation.” For example from Indian perspective, the effect of the affirmative action or reservation and codification of the Hindu law in India could be very well be understood to as a social transformation, but the effect of a legislation such as the Right to Information Act, 2005, could be assessed from the current scenario only to constitute a social change. Understanding Sociological Jurisprudential thought Socio-logical jurisprudence

was first introduced by Roscoe Pound in a law-review article. He challenged the formal jurisprudence by introducing the concept of using social sciences to develop legal rules. The just claims and desires to be satisfied the law as a form of social control needs to be adequately employed and reliance upon the social science is necessary for the understanding of law in society.

Sociological jurisprudence was more concerned about the effects the law has upon the society and only to very less extent on the social determination of law, which led to a functional approach to law. This is where we also need to look at sociological jurisprudence from the perspective of model for responsive law. Sociological jurisprudence is aimed at enabling the legal institution to make more complete and intelligent amount of the sound facts upon which law must proceed and to which it is to be applied.

Sociological jurisprudence, only through the social norms of “living law” we could understand the concept of “positive law”, which clearly shows us that law intended for the society will have to be evolved and also ingrained within a legal system that would keep close touch regarding the development happening in the society and acts in accordance towards the change.

The shift in jurisprudential thinking from that of human will to human want and in turn the focus on purpose of law rather than on the nature of law is a characteristic of the early twentieth century thinking. Social engineering is aimed at building a society as efficient as possible in which wants of maximum are satisfied with minimum of friction and waste. Consensus and Conflict Model The sociological jurisprudence started with a consensus model of society in which the conflicting interests are adjusted and reconciled by law.

But today no society, including Indian society, does exist as a static, cohesive and homogenous in nature. The present day societies are existing in conflict paradigm, with the various interest-groups trying to mould the legal system just as to their needs and so as to protect their interests. In a conflict model law is a social product while in the consensus model law is more of a social force.

The role of sociological jurisprudence in a conflict model is to understand and conceptualise the various group conflict, with different power arrangement, resulting in a pluralistic conflict. Recent Developments in Sociological Jurisprudence Sociology of law is a new dimension that has emerged within the sociological jurisprudence in the recent times. Sociology of law does not advocate for the use of any new methods, theories or outlook from the discipline of sociology, but emphasises upon the aspect of trans-disciplinary understanding.

Further sociology of law, drives home the point of having to re-look at the law on a consistent basis to understand law systematically and empirically as a social phenomenon. Maurice Hauriou, a great French sociologist and jurist has aptly put “A little sociology leads away from law but much sociology leads back to it” and Georges Gurvitch has quite correctly mentioned in his writing that “little law leads away from sociology but much law leads back to it”. Law and society or rather socio-legal studies,

also falls within the broad ambit of sociological jurisprudence. Law and society tried to trace the relationship and site the law in the theoretical tradition of sociology and further enquiring into what the theoretical tradition could offer for the study of law. For example, with the post-modernism which reject the grand narratives and advocates the individualistic perspective, a view point is mooted that population is becoming a silent spectator devoid of political energy and just a mere recipient of government action.

An after effect of this would be that law as tool for social engineering cannot look at society for legitimisation or course that it should take. Analysing Social Transformation in India from the Perspective of Sociological Jurisprudence In an attempt to analyse the social transformation in India from the sociological jurisprudential perspective, we look at the way the interaction between law and society have led to social change and modernisation and in the process, the way judicial process is affected by law and society interaction.

M.N. Srinivas, the great Indian sociologist, had observed that sanskritisation, westernisation, caste mobility, secularisation, the alteration in value arrangement that India has witnessed, could be seen as examples of social change. Another Indian sociologist, Yogendra Singh, has mentioned that abolishment of untouchability, other discriminatory practices such as child marriage and sati and in modern India, the reaffirmation of importance of Panchayati Raj System through constitutional amendment could be very well perceived as instances of law induced social transformation.

Colonial Period. Indian society had the Anglo-Saxon laws being imposed upon them during the colonial time. This had led to the erosion of by smriti, sruti, dharma and other customary law. Though the recognition of personal laws was the policy adopted by the colonial administration, as a matter of respect to the culture and tradition of India and conflict avoidance mechanism, due to the sudden application of an alien law.

But still the British law had a backdoor entry into the Indian legal system, with the use of “justice, equity and good conscience” as a residuary source of law. Further, due to the strict standard of proof enforced by the colonial court, many customary practices cannot be proved and was not enforced. Even other factor such as the colonial courts consultation with pundits and maulavis and strict enforcement of the stare decisis also are indicated as a reason for the influx of the British law into India. The colonial administration had also imposed codification of laws in criminal as well as civil side based on the Anglo-Saxon model into India.

This includes laws such as the Penal Code, the Criminal Procedure Code, the Code of Civil Procedure and Evidence Act. An important point to be noted here is that, all these legislations had brought into India the English concepts of law. Looking from the sociological school of jurisprudence during the time of colonial administration in India, social change had obviously taken place, but the situation that existed in which the laws were imposed by the colonial administration, gives a perception of a situation for the positivist jurisprudence to exist.

British administration cannot be said to have perceived law as social engineering tool for the Indian society. Further, largely there was no reference to the want of the people in the law-making during colonial times. The colonial system of law-making cannot be demarcated into consensus or conflict model, as the people and participation, perceptive or want was not of much concern for the law-making at that time.

But ruling out all the law made during colonial administration out of ambit of sociological jurisprudence is also not possible. British administration was more interested in forming laws that will help in forming a pan-India level framework for the governance of the country. But due to the public opinion also certain laws were enacted. This includes matters such as sati and child marriage abolishment legislations.

This indicates that the need of people, reflected in the public opinion also had an impact on the legislations even during the colonial period. Upendra Baxi also points out to Lalitha Panigrahi's study on the implementation of the Infanticide Act and demonstrates that this particular legislation was a purposive legislation which has positive and negative sanctions, along with the effective administrative mechanism, which had led to substantial decrease in the female infanticide practice.

This could be very well being understood as a use of law as an instrument for social control by the colonial administration. Post-Colonial Period Post-colonial period witnessed significant amount of law-making that effected much of social transformation in India. This started with the framing of Indian Constitution, a document which could be referred to as socio-political and right-based in approach. The Constitution has actually sown the seeds of a slow social revolution that had triggered many progressive and purposive law-making.

The Constitution by incorporating provisions that brings in affirmative action, promotes multiculturalism and measures of an obligation upon the State leading to a welfare mechanism is an epitome of a law made within the framework of sociological jurisprudence. Even though the Constituent Assembly was not an elected body, the views and issues that were discussed and further got reflected in the Constitution, had definitely the aspirations of the people and considered the various aspects of interest of the Indian society.

Further, we could very well derive that the Constitution of India, is a purposive law-making for leading India into a slow social revolution, and over the period of time Constitution has moulded its shape with the changing need of the nation. An attempt has been made to look into certain instances by which the law as a tool for social control and purposive policy making has been used so as to transform the society. Affirmative Action Affirmative action in India could be traced to the Constitution.

The provisions relating to affirmative action are Article 46 in Part IV of the Constitution, which deals with directive principles of State policy and also in Part III dealing with fundamental rights by way of Article 15(4) and Article 16(4) for education and government jobs. Article 15(4) and Article 16(4) are



brought about by the first amendment to the Constitution, so as to balance the original provisions, prohibiting any discrimination on the basis of caste, class, and sex.

Marc Galanter identifies that policy choice to provide affirmative action mentioned in the Constitution andldquo; proceeded from an awareness of the entrenched and cumulative nature of group inequalities. Galanter further states that affirmative action, as many of the fundamental rights and directive principles provisions were brought in with the idea of greater social equality.

This clearly shows that the affirmative action in India was incorporated in the Constitution of India, which is the basic policy document, as a reconciliation of individual and societal interest and to emphasising on purposive law making method under the sociological jurisprudence, to address the need of Indian society at large, by removing the caste-based discrimination and inaccessibility to opportunities.

So in turn the affirmative action would lead to removal of caste-based demarcation and lead to social transformation. But many academic works have pointed out to the fact that making caste as major criteria for reservation in public jobs and education had led to a situation of multiplicity and re-enforcement of caste system.

Hindu Law Codification Hindu law codification, was one the steps taken by the Indian Government during mid-1950 as to carry forward the notion of womenandrsquo;s equality and legitimising it in Indian society. Hindu law reform was seen as the first step towards this. Commonly referred to as the Hindu code, the codified laws include the Hindu Marriage Act, 1955, the Hindu Minority and Guardianship Act, 1956, the Hindu Succession Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956.

The Hindu Marriage Act, 1955 brought about major changes such as removing the necessity of being in the same caste for both husband and wife which was previously a precondition. Further, important concept of monogamy and uniform provision for dissolution of marriage was brought in. Academic writings have criticised the Hindu law reform on grounds of not bringing in uniform practices, which is in certain manner more procedural and inflexible than the existing practices in certain parts of India, but have accepted largely that Hindu law codification had led to the gradual reform and brought about social transformation in Indian society.

In Mulla Principles of Hindu Law; The outstanding feature of the changes made in the law is that all disparity in the rights of men and women and disabilities based on sex are eliminated in matters of marriage, succession and adoption. This also leads to a situation where the female and male heirs would be seen at par when it comes to succession.

From the perspective of sociological jurisprudence, the need of society is not clearly reflected in the Hindu law reform, as it is the leaders who were involved in the nationalist movement and later governed the country, who thought of need for such a codification and uniform law being applied to Hindu



community. Academic writings have referred to the aspect of the Indian people not very aware or even interested in the codification and coming under the procedural rigour of a Hindu law.

But this could be well viewed as a conflict approach to law-making, with certain progressive thinkers and women organisations supporting and lobbying for the law, while at large people were unaware or not interested in the law. Panchayati Raj Institutions (PRI) Though Mahatma Gandhi, had advocated for a village model of development, with self-dependent villages having resources and even the dispute resolution being done at the village level, the constitutional framers were not very much in favour of such a model.

The model that finally got implanted in India is a top-down approach model, with a partial mention to the need for village level administration in Article 40 of Constitution of India. Works of Upendra Baxi and Marc Galanter points towards the Nyaya Panchayat role in the process of informal, effective, faster and economical access to justice for the people in the rural areas. But at the same time, Panchayati Raj Institutions (PRI) as a method of decentralised mechanism of administration, with participatory method got constitutional recognition in the real sense, quite late with the Seventy Third Amendment to the Constitution of India.

An attempt to scrutinise whether PRI have contributed to the social transformation, with the people plan and participatory governance prioritising the agenda for their own development, would lead us to the answer that the PRI is not given enough funds and powers in effect, thus leading to an overcrowded regime of paper laws for panchayats. This depicts the sad state of no effective social change being through PRI mode of administration. From the sociological jurisprudence aspect, the importance of giving the want of people is totally not taken into account here.

Also decentralised PRI is the real manner in which want of the people and responsive laws at the lowest level could be framed. Hence, there is need for giving more emphasis on the PRI system of administration. The Nyaya Panchayat Act, 2009 was passed but no effective implementation in this regard has been initiated. Access to justice and PIL The greatest contribution the Indian judiciary has provided regarding access to justice for the people of India, could very well be identified as the concept of public interest litigation (PIL).

Prof. Upendra Baxi has referred this judicial activism trend by the nomenclature of Social Action Litigation (SAL) as this is an Indian brand of class action suits and noted that the Supreme Court of India is “taking suffering seriously. The most important aspect regarding PIL is that of relaxing the locus standi concept, any “public-spirited person; can approach the constitutional courts and could bring into the courts notice the blatant violations of fundamental rights of people who are not capable of being approaching the courts themselves.

PIL is a concept aimed at increasing the accessibility to justice and forms a part of constitutional jurisprudence in India. An academic article has mentioned that “the need was more pressing in a country like India where a

great majority of people were either ignorant of their rights or were too poor to approach the court and hellip; especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stake.

The PIL which started around 1970 had cases related to the rights of disadvantaged sections of society such as child labourers, bonded labourers, prisoners, mentally challenged, pavement dwellers, and women as the subject-matter of the case. But this trend underwent a change and the subjects of PIL got shifted to matters of collective concern such as environment and policy matters in the 1980 and early-1990.

PIL have contributed to the social change in the sense that without such a mechanism many of the problems that had been faced by the poor and those inaccessible people would have never come before the court. Another important aspect that has also contributed to the development of the Supreme Court as an important institution in social change is the liberal and pro-active interpretation of the Constitutional provisions by the Supreme Court of India.

This judicial activism was mainly carried forward by the way of making Article 21 of the Constitution of India an umbrella provision by stretching the ambit of the provision. Judge-jurist Cardozo has clearly shown the importance of judiciary for social progress. He had emphasised the judges should ensure that the social progress and desired change is being carried on without hindrance.

From the sociological jurisprudential perspective, the Supreme Court of India has played an important role in the social trans-formation with providing access to justice being made available for all through PIL and taking up important issues leading to the policy moulding with the purpose of striking balance between interest claims of society and individuals.

Post-Liberalisation and Globalisation Post-liberalisation has made the governmental and law-making processes a method of negotiation in which the demands of various forces in the society for transfer of resources do take place. Forces and groups claiming for the various resources would include corporate conglomerates to poor and marginalised people.

Here an important factor of democracy in India is that the electoral vote bank politics does play a role in providing the poor and marginalised people, even after the time of liberalisation, for laying claims in the allocation of resources of the State. Viewing from the lens of sociological jurisprudence, we could say that conflict model which exist in India, still provide the poor and marginalised people a say in the government policy and law-making and still purposive and responsive law is made with striking the balance of need of society and individuals.

Legislations such the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 and the pending Food Security Bill are examples of the same. Khap Panchayat Recent issue of Khap Panchayat, which are tribal councils formed for their intra and inter-conflict resolution, giving rulings for honour killing have shown the importance of sociology of law based study under the sociological jurisprudence.

Aspect of how law as a tool for social engineering could affect the issues of social ostracism and peer pressure on the basis of caste has now come to the forefront. Even though the marriages in the same gothra are valid as the Hindu Marriage Act, the peer pressure and fear of social ostracism have made the families to follow the rulings of Khap Panchayat and even led to killing of their own relatives.

Demand of society for moulding criminal laws so as to make the people who issue such illegal rulings for honour killing is an example of demand of people for change in the law from sociological jurisprudential perspective. Conclusion The socio-logical jurisprudence based analysis has helped us to understand the way law and society had interacted with each other during the colonial and post-colonial times.

It has also shown us that sociological jurisprudence has contributed much to the social transformation and judicial process in India. Law in India, we could see that during the colonial time, was not used generally as an instrument for bringing about social change and the need of people except for certain instances such as sati abolishment law, child marriage abolishment law.

But with advent of the Constitution of India, a slow social transformation was attempted to be initiated. From analysing the issues such as affirmative action, Hindu law codification, Panchayati Raj Institutions from the perspective of sociological jurisprudence, we could see that though social change have taken place, we cannot claim that there were social transformation in a developmental sense. While looking at the Indian Supreme Court, it has played an important role in policy control in important matters which have helped in furthering social change.

The post liberalisation situation in India helps us to understand the existence of a conflict model in India and the Khap Panchayat situation throws light to the understanding of importance of the sociology of law perspective even in modern India. Moreover, as Robert Stern has pointed out, while looking at the developmental terms, we talk about per capita development, in the actual sense, it is not happening that way.

Most of the benefits are being bagged by the middle class in India and they are the directors of change in India. From sociological jurisprudential perspective this clearly shows a conflict model of society existing in India. For a real social transformation to take place inclusive development need to be adopted, in which poor and marginalised also become part of the process.

## **SOCIAL CONTROL AS SOCIAL ORDER OF CRIME**

Among the oldest concepts in sociology, social control has historically undergone important transformations in terms of the concept's understanding within different theoretical frameworks (Cohen 1985; Coser 1982; Scull 1988). From the late nineteenth century onwards, social control was used primarily in American sociology to refer to a society's capacity to regulate itself without

resource to force. This broad concept of social control was understood in a benign sense of self-governance that emphasized a society's continued need for social integration through socialization into common value systems despite trends of increasing individualism. Social control thus characterizes societal integration to the extent that a society does not need to rely on coercion to command conformity. This concept of social control, implying harmony and progressivism, remained en vogue until World War II, especially in US sociology.

The broad consensual notion of social control finds its sharpest expression in the works of George Herbert Mead (1934) and Edward Alsworth Ross (1901). Mead conceived of social control in voluntaristic terms as the ability of individuals to modify their behavior by taking into account others' expectations, thus harmonizing one's self control and the social control exerted by others. Social control depends on the ability of individuals "to assume the attitudes of the others who are involved with them in common endeavour" (Mead 1925:275). The implied consensual perspective of the relation between the individual and society is most clearly phrased by Mead by arguing that social control overlaps with self control: "self-criticism is essentially social criticism, and behavior controlled by self-criticism is essentially behavior controlled socially. Hence social control, so far from tending to crush out the human individual or to obliterate his self-conscious individuality, is, on the contrary, actually constitutive of and inextricably associated with that individuality" (Mead 1934:255).

The most important representative of the consensual understanding of social control as social order, Edward Ross articulated the role played by society's institutions in fostering social control and identified law as one dimension of social control, next to other institutions such as education, public opinion, and religion. As a constant function in society, this conception of social control Ross understood to apply to all the members of a society, not just to those who violate normative expectations. Consensus, Ross argued, is the very foundation of social order. Social control is thus opposed to coercive control. The association of people with one another through various mechanisms of social control applies especially to organic societies, *i.e.*, societies in which (as Durkheim formulated) people are essentially different from one another, perform different functions (division of labour), and have different belief systems. It is especially under these conditions of increased individualism that societies have to take special efforts to ensure their members to become social beings. Social control also transcends mere social influence. Whereas social influence refers to the ascendancy over individuals by the group to which they belong as a mere effect, social control ensures such ascendancy on behalf of the group in a directed and purposeful manner oriented at harmonizing clashing interests and activities.

The study of social control, Ross further maintained, is part of static sociology because social control is always needed in society, not just at certain times. All possible social institutions, such as art, law, beliefs, public opinion, religion, education, and custom, serve social control functions. Therefore, based on Ross's work, it is not possible to categorize institutions in order to study their social

control functions (*e.g.*, a study of education as an institution of social control). Instead, with Ross, attention turns to the study of social control as a societal foundation which is secured through multiple institutions of social control (*e.g.*, education is an institution of social control).

While clearly conservative in its bias towards assumptions on the consensual nature of modern society, Ross's work was developed in the background of an attention for social problems, such as urbanization, poverty, alcoholism, and prostitution. The solution the early American sociologists typically favoured towards these problems were liberal (in the traditional sense). As Spierenburg (2004) argues, social control was conceived of as a contribution to the creation of a social order that is based on peaceful social relations and collective harmony. Ross's concept of social control also implied a plea for state intervention, especially of uncontrolled capitalism, a notion that was much admired by US President Theodore Roosevelt.

An important theoretical shift in the sociology of social control came about in the period following World War II, when the model of a consensual society could no longer be easily accepted, especially in the wake of the rise of fascism and Nazism, the atrocities of the war, and the build-up towards the cold war and the nuclear arms race. The concept of social control was now employed to refer to the more repressive and coercive forms of control that are instituted, not by socialization into norms, but on the basis of power and force. The emphasis in this concept of social control is thus on control.

Importantly, from the viewpoint of the coercive conception of social control, attention also goes to social institutions that are not traditionally understood in terms of coercion and power. From this perspective, for instance, sociologists Frances Fox Piven and Richard Cloward investigated the social control functions of welfare in their landmark study, *Regulating the Poor: The Functions of Public Welfare* (Piven and Cloward 1971). In this work, welfare is conceived as an effort to exert control over certain classes of people, such as the poor and the unemployed, in order to pacify the economically deprived classes and prevent social rebellion. Conversely, poor relief is constrained with the workforce needs to be expanded. As van Krieken (1991) argues, this use of the social control concept in historical-sociological studies of social welfare owes much to the Marxian instrumentalist theories of ideology and the state. By extension, this perspective of social control can also be applied to various special categories of people, such as the physically and mentally ill, the young and the old, and the deviant and the criminal. With this conception of social control, then, not all members of society, but only certain special and often suspect categories are subject to social control.

## **THE CONTROL OF CRIME AND DEVIANCE**

Extending from the concept of social control focused on certain classes, social control has from the 1950s onwards been conceived more narrowly in relation to deviance and/or crime. Social control now refers to those institutions

and mechanisms that define and respond to crime and/or deviance. Corresponding to the dominant theory groups in criminological sociology (the perspectives of crime causation, crime construction, and critical sociology), social control is now conceptualized as a functional response to crime, the societal reaction to deviance, or the reproduction of a social order beyond a mere focus on crime. First, from the perspective of crime causation theories, such as Edwin Sutherland's (1973) theory of differential association, social control is conceived as a dependent variable which functions, in response to crime, as a mechanism of redress. Crime takes center stage in such a perspective as criminal behavior, which needs to be causally explained, is observed to be sanctioned by the forces of social control in order to prevent the disintegration of society. This perspective of social control can theoretically rely on the functionalist sociology of Talcott Parsons (1951), who developed a perspective of social control as a corollary to a theory of deviance and crime. Whereas crime is seen as creating a tension in an otherwise stable system, social control is understood as a re-integrative attempt to stabilize the functioning of a society. The mechanisms of social control thus function to fulfill society's integrative needs in the societal community. It is to be noted that this conception of social control is not to be confused with the so-called social control theory of crime, which was developed by Travis Hirschi (1969). In Hirschi's theory, which is mostly an extension to Durkheim's theory of a society's need for integration and regulation (and what happens in the absence thereof), criminal behavior is accounted for as the result of a weakening of the bonds with society. As a function of social control, conversely, society offers restraints on people's drives and desires.

Second, from the viewpoint of labeling or societal reaction theories, popularized by Howard S. Becker (1963) and Edwin Schur (1965), crime is viewed as a societal construction on the basis of a process of the criminalization of deviance. Whereas an act of deviance is seen as motivated by an actor, its subsequent criminalization is conceived as a function of the societal conditions that define and respond to deviance. Social control is thus constructive of crime through a process of labeling.

From the perspective of crime construction theories, social control mechanisms are not a functional response to crime, but instead determine crime. This occurs through two processes of criminalization: through primary criminalization, some acts are defined as criminal; and through secondary criminalization, this definition is applied to specific acts. The formal treatment of crime through the processes of social control, furthermore, is typically observed to not take into account the needs and motives of the deviant actor, but instead imposes a system of control that serves societal goals of retribution and punishment.

Third and finally, from the viewpoint of sociological conflict theory, the interactionist focus of labeling theory is transcended with a structural perspective that situates the labeling processes of social control within the broader society



in which they take place (*e.g.*, Quinney 1973). Instead of analyzing the interactionist order of rule-violator and rule-enforcer, a critical sociology focuses on social control in terms of the historically grown socio-economic conditions of society and its mechanisms and institutions that are mobilized to maintain order. Marxist perspectives, for instance, focus on the norms of enforcement as representing the interests of a class, the elite, which try to have their interests accepted as general norms. Non-Marxist critical perspectives more broadly focus on a variety of groups and inequalities (classism, racism, sexism, ageism).

To end this review of the concept of social control in relation to crime and deviance, it is to be noted that there have been continued attempts in modern sociology to redefine social control broadly, specifically in the works of Morris Janowitz and Jack Gibbs. Morris Janowitz (1975, 1978) uses the concept of social control to denote a society's capacity to regulate itself within a moral framework that transcends self-interest. He argues that social control has been drastically weakened in advanced industrial societies, and wonders why this is the case and how social control can be re-strengthened. Jack Gibbs (1989, 1994) has developed a scientific theory with a high degree of predictive power (accuracy, testability, scope, range, intensity, discriminatory power, and parsimony). He defines (attempted) control as "overt behavior by a human in the belief that (1) the behavior increases or decreases the probability of some subsequent condition and (2) the increase or decrease is desirable" (Gibbs 1994:27). Distinguished on the basis of the target of control are inanimate, biotic, and human control, pertaining to control over objects, nonhuman organisms, and humans, respectively. Control over human behavior comprises self-control, proximate, sequential, and social control, relative to how many and how other humans are involved.

Turning to contemporary theories of social control in relation to deviance, at least two very different strands of theorizing can be highlighted: the general theory of social control developed by Donald Black; and the revisionist perspective of social control that builds on the work of Foucault.

## **A GENERAL THEORY OF SOCIAL CONTROL**

Originally conceived by Donald Black, the general theory of social control aims to provide a scientific theory of social control that is based on the principles of natural science (Black 1976, 1997). Black is interested in formulating a general theory of law and social control that can account for empirical variation irrespective of any value judgments or policy claims. Conceiving of law as governmental social control, Black's pure sociology is oriented at a general theory of all forms of social control, defined as the handling of right and wrong by defining and responding to deviant behavior. The epistemological orientation that underlies Black's pure sociology is scientific in its ambition to formulate a general theory, whereby the ordering of variation in empirical reality is seen as the goal of theory. The paradigmatic framework in which Black's theory is situated is distinctly sociological. Rejecting teleological and anthropocentric



premises that take into account, respectively, normative and subjective dimensions, Black's approach is radically anti psychological in developing a multi dimensional perspective of social life, including law, as a function of structural characteristics of social space.

On the basis of this paradigm, Black has developed a number of propositions on the behavior of law and other forms of social control. Social control is generally conceived of as a reality that appears in variable forms of quantity and style. The quantity of social control refers to the amount of social control that is available, for instance whether or not a particular kind of human conduct is regulated by law and whether or not a legal sanction is applied. The styles of social control can be of various kinds, such as penal, compensatory, therapeutic, or conciliatory. In seeking to account for variations in social control in terms of quantity and style, Black studies the geometry of social control on the basis of variations in social space in terms of such characteristics as stratification, differentiation, integration, and culture. For instance, stratification refers to the vertical structure of society in terms of the inequality of wealth. Vertical space can be high or low in terms of position or downward or upward in direction. Morphology refers to the horizontal aspect of society, including the division of labour (differentiation) and the relative degrees of intimacy and distance (integration). Culture is the symbolic dimension of social life, including expressed ideas about truth, beauty, and ethics, such as in science, art, and religion. Culturally, societies and social groups can vary from being closely related to extremely distant.

On the basis of the suggested model, Black develops various testable propositions. Among them is the thesis that social control varies directly with stratification: societies with higher degrees of stratification have more social control. Law and social control also vary directly with culture: simpler societies have less law and social control than more differentiated societies. On the basis of such propositions, pure sociology seeks to explain and predict the behaviour of social life in terms of social space in value-neutral terms. Irrespective of the intrinsic merits of Black's approach, it is striking that the sharpness of his formulations has enabled much theoretical debate and empirical research.

## **WOMEN RIGHTS AND CITIZENSHIP**

In this section the meaning of citizenship and rights and their relevance to the pursuit of gender justice, are analysed in the context of South Asia.

### **RIGHTS**

Feminist legal studies and practices have begun to explore the question of the role of law in feminist struggles from a multiplicity of perspectives, many of which defy simple classification. A new perspective on the role of law and rights in the context of South Asia is emerging, one based on post-colonialism. I now review some of the recent literature in this area, which exemplifies the emergence of this approach. It is important to pursuing a gender justice project

specifically in the context of South Asia, although it has ramifications well outside of this region. Postcolonial approaches to rights and law are varied and defy any simple classification. One common position, however, is that they do critique the basic philosophical tenets of the enlightenment—rationality, objectivity and subjectivity. Postcolonialism rejects the concepts of objectivity and neutrality that are ostensibly the central characteristics of law, insisting the law is always based on biases and a point of view. Quite specifically, that law is based on inclusions and exclusions that are determined invariably from a majoritarian perspective (Kapur 2005). This view is based partly on the historical experiences with law, where the sovereignty of the Asian subcontinent was denied in the name of the imperial project and justified on the grounds that the colonial subject was so culturally and socially different, that he or she was not entitled to sovereignty or rights. Difference was a ground for denying rights, and was not an argument posited in opposition to the notion of universal rights, but inherent in the universal project. Rights could only be conferred on those who had reached a certain stage of civilizational maturity and the colonial ruler was best situated to determine when that stage had been reached (Sinha 2000; Mehta 1999).

Feminist legal studies have begun to develop increasingly complex and nuanced analyses of law's role in women's oppression, and its potential role in challenging that oppression. Interestingly, some of the most insightful work that has initially been written comes from disciplines other than law. Feminist historians have played a leading role in the articulation of a more complex understanding of the role of law in social change. Lata Mani, Radhika Singha and Tanika Sarkar are among the feminist historians who have critically examined the complex relationship between law in colonial India and women's subordination (Mani 1998 Singha 2000 Sarkar 2001). Singha, for example, considers the ways in which law-making was a cultural enterprise, where the colonial state could draw upon differences such as rank, status and gender. She explains how the state re-ordered these identities in ways that produced an exclusive definition of its sovereign rights, so as to define who was or was not entitled to benefits conferred. In addition to feminist historians, feminist work on law has begun to emerge within the social sciences and humanities more generally. In their ground-breaking discursive analysis of the Shah Bano case, Zakia Pathak and Rajeswari Sunder Rajan have examined law as discourse, and the way in which this discourse constitutes subjects (Pathak and Sunder Rajan 1989). More recently, Rajeswari Sunder Rajan has examined the relationship between the postcolonial, Indian nation-state, law and Indian women's actual needs and the contradictions produced through this relationship. She argues that law and citizenship define not only the scope of political rights for women, but also their cultural identity and everyday life (Sunder Rajan 2000).

Postcolonial legal scholarship has only recently begun to develop these feminist perspectives. Archana Parashar, in her study of family law reform,

examines and evaluates some of the insights of debates within feminist legal studies (Parashar 1992; Parashar 2000:140-178). She uses the insights of these debates to further her understanding of the role of law in social change, while rejecting those aspects of the debates that do not fit the Indian context. In developing her analysis of the role of legislation and the promotion of gender justice, Parashar argues for the importance of law reform in women's struggles. However, her view of the nature of the role of law reform is informed by a consideration of the limits of law. She argues, for example, that 'instead of dismissing law reform as a means of achieving equality for women, it is more productive to realize the limitations of law and have appropriate expectations that law reform by itself will be insufficient to change society and end women's oppression.' (Parashar 1992:30) She argues that law can serve an important symbolic value: 'Symbolic legislation can be of liberating value as it can provide a focus around which forces of change can mobilize.' (Ibid 1992: 33) In this respect, Parashar's work marks an important shift in feminist legal analysis, in its integration of rigorous and detailed legal analysis with a feminist perspective attentive to both the limitations and possibilities of law.

Other scholars have similarly begun to complicate feminist understandings of law. Nivedita Menon has explored questions of the conceptualization of rights within the context of women's struggles around abortion, sexual violence and reservations (Menon 2004). Menon's work can be seen as a discursive analysis of the women's movement's engagement with law. In the context of abortion, for example, she argues that the women's movement has demanded that women have a right to choose and have control over their bodies. Yet, within the context of sex selection, the same groups have argued for a limitation on the same right. Menon attempts to illustrate the contradictions within the liberal discourse of rights for feminism. She argues that rights are discursively constituted—that rights only acquire meaning within specific contexts and specific discourses. In other words, rights may have a radical potential within feminist frameworks, but once they are put into the context of the broader political economy, their meanings may change and their contradictory character exposed.

Flavia Agnes' work has also been an important contribution to the development of more complex and nuanced analyses of feminist engagement with law (Agnes 2004). Throughout her work, Agnes interrogates the effect of law reforms on women and questions whether laws intended for women's benefit have lived up to their promise. Her work on violence against women, for example, addressed the failure of law to adequately address the reality of violence (Agnes 1992). Through a detailed examination of laws addressing rape, dowry, domestic violence, prostitution, indecent representation of women, sati (the practice which relates to the immolation of widow on her husband's funeral pyre) and sex discrimination tests, Agnes explores the broader questions of why law has had so little effect in women's lives, and whether law can bring about social change. In her analysis of rape laws, for example, Agnes reveals the ultimate failure of the campaign for reform in the early 1980s to bring about

a transformation in the definition of rape. She illustrates the extent to which 'the same old notions of chastity, virginity, premium on marriage and fear of female sexuality are reflected in the judgements of the post-amendment law.' (Agnes 1992:21)

Agnes' analysis of the other legislative provisions intended to protect women against violence similarly attempts to reveal the extent to which the reforms did not fundamentally challenge and transform the underlying assumptions about women's identities. She exposes how law is susceptible to being appropriated by a reactionary politics, illustrated in her analysis of the debates on the Uniform Civil Code in India, and how these are located in a highly charged communal context. She reveals how communalism seeps into some recent judicial decisions, exposing the contested nature of law and rights (Agnes 2001; Agnes 2004). Agnes is also critical of both the women's movement's failure to develop an explicitly secular agenda, and the resulting—though unstated—Hindu norm that has come to characterize the movement.

The postcolonial literature that is emerging in the context of South Asia reveals that law is no longer viewed in terms of an either/or dichotomy. It is neither a mere instrument of social change nor of patriarchy (Mukhopadhyay 1998). What is emerging is a much more complex analysis born from postcolonial location and experience (Kapur 2005).

Law was received in the Asian subcontinent as already exclusive and subordinating. It was introduced into the subcontinent as a mechanism for denying the colonial subject rights and freedoms that could only be acquired through civilizational maturity and the development of the capacity to reason (Kapur 2005). During the freedom struggle, it is clear that rights also served a progressive end, because the freedom fighters invoked civil and political rights in order to acquire independence.

Yet the struggle itself speaks to the contradictory nature of law and rights, and how it is a contested terrain. In the context of women, there is evidence that law has been used as both a subordinating tool as well as a liberating one. Women have won the right to vote, to education and also have succeeded in law reform in the area of sexual violence.

But as the literature indicates, such achievements cannot be read as clear victories. They have at times been achieved by reinforcing gender difference. In the case of rape for instance, a woman may succeed in her claims if she is willing to present herself as chaste, pure, virginal and modest. This representation is deeply entwined with the demands of nationalism and for feminism to position itself at times as anti-Western, so that they do not compromise their nationalist credentials. The new literature is exposing how certain assumptions about women are embedded in legal discourse and how gender and the constitution of women's subjectivities need to be understood against the backdrop of the colonial encounter.

At one level, it would seem that rights discourse is ultimately unable to represent the interests of marginalized and disadvantaged groups. However,

this position would be met with considerable resistance from women, *dalits* (lower castes), Muslims and other disadvantaged communities who have used rights in their struggles for social change. Rights remain important to people who have never had them, and a perspective that argues against rights can only come from a privileged position, from those whose rights are already secure. At the same time, there is a need to move beyond the limitations of what I have described above as 'a rights-based approach.' Remaining confined to a universal understanding of rights, does not attend to its potential to be exclusive (as demonstrated by the history of colonialism) and also to be appropriated by more reactionary agendas (as demonstrated by the use of rights discourse by right wing nationalist entities, such as the Hindu Right in India). The rights based agenda can be used in pursuit of gender justice, only so long as it remains attentive to historical antecedents and fact that rights can be appropriated by the more powerful and can entrench notions of gender difference in ways that are not necessarily liberating for women.

## CITIZENSHIP

The conception of gender justice affects the ways in which claims to citizenship and entitlement are pursued. (Shamim and Sever 2004) Citizenship has been traditionally understood in a formal sense, that is, it is based on equal and formal citizenship for all adults born within the territory of a state. With the ending of colonialism in the context of South Asia, all adults were to be included in suffrage, and political inequality thus eliminated. However, feminists have challenged these formal understandings of citizenship, asserting that women still have a secondary status in political and public life (Singha 1999; Menon 2004). Women are also paid less than men and seem to be less respected than men in public life. They are often characterized as 'second-rate citizens'.

The analysis of gender justice suggests that citizenship is intimately connected to understandings of gender difference and whether women are included on the same terms as men, are treated as naturally weak and inferior, or as sometimes requiring different treatment and sometimes similar treatment in order to enjoy full access to their rights as citizens. If a woman, for example, is merely considered as naturally and inherently different from a man, then as evidenced in South Asia and elsewhere, difference in treatment in terms of the rights and privileges accorded through citizenship and the claims to entitlements will be justified merely on the basis of that difference.

If however, women are considered to be the same, and gender difference largely ignored, then citizenship will be understood in terms of formal equal treatment and similar treatment. This will not enable women to claim special rights, an entitlement to special treatment in order to accommodate the differences between men and women that do exist.

For example, pregnancy or childcare is largely ignored in the sameness approach. Women are treated the same as men and any special treatment based on women's role in child bearing and rearing is regarded as a violation of the

equality clause or as an exception to the principle of equality rather than integral to it. Finally, if gender justice is viewed from the perspective of patriarchy, any claims to citizenship always will be exposed as deeply flawed, as inherently based on oppressing women through their sexuality and holding some undefined, omnipresent system of patriarchy responsible for women's oppression. Thus, citizenship is not just about membership and the rights and responsibilities that membership bestows. It is also connected to the way in which women are included or excluded based on the assumptions about gender difference on which citizenship is based.

In the legal arena, the literature reflects very different understandings of citizenship, and influences the ways in which gender justice is pursued. In the context of South Asia, the definition of citizenship was heavily influenced by the legacy of the colonial encounter (Nair 1996). Citizenship was something that the 'white man' invented and was focused on the idea of the citizen as someone who was virtuous and rational, who had no kinship ties (Weber 1927). In contrast, the colonial subject was viewed as lacking citizenship, as chaotic, different and incapable of taking on the responsibilities demanded of citizenship (Mehta 1999). This conception of citizenship, as linked to notions of reason, capacity to choose, as well as civilizational development was quite prevalent. It was reminiscent of the attitude towards women, both in the subcontinent as well as in the west, who were regarded as infantile, incapable of decision-making and in need of protection. The law was employed as a means for defining citizenship in terms of an unstated Eurocentric norm. It was, at its core, a definition based on racial distinctions, on exclusions and the techniques of 'othering'. At the same time, the colonial power desired to redefine the colonial subject through a move to universalize and rationalize laws as well as to create a native population through Western education and create elites that mimicked the West.

Thus the disciplining of sexuality in the colonial context which was perceived as corrupting and excessive (Stoler 1995), as well as the representation of the Western citizen to the colonial subject as good, decent, enlightened and civilized through the technologies of law and education (Viswanathan 1989; Van der Veer 2001). were integral to the definitions of citizenship and of who could be incorporated into such definition and in what ways. A uniform criminal legislation was enacted in 1833, which inaugurated the process of 'disarming' Indian society (Singha 1998:ix) and moving towards the creation of a universal legal subject. The moral compass of the colonial power was inserted into the legal agenda, and used to justify the banning of a litany of practices—infanticide, sati, child marriages—in the name of rational law and civilizing the native into a recognizable and more familiar subject of liberal rights discourse.

The image of citizenship as pure, virtuous and rational has been challenged in the feminist and postcolonial scholarship. It has also been contested on the ground, in the context of the early struggles for freedom and rights fought by anti-colonial movements, the struggle for rights and equality by women and



other disadvantaged groups, and the contemporary conditions of globalization. Anti-colonial struggles opened up new definitions of citizenship, as an identity that enables rights claims. Women have claimed rights to citizenship in Pakistan, India and Nepal; along with freedom from non-discrimination and freedom from violence. Religious minorities have claimed rights to retain special temporary measures as well as the right to be governed by their personal laws, in order to retain their integrity and freedom from majoritarianism. These claims have challenged the West's notions of universality and exposed the notion that the universal subject, or idea of the pure citizen, had built into it an exclusionary potential (Kabeer 2002).

In the contemporary period, citizenship has been subjected to new concerns and challenges (Purvis and Hunt 1999; Isin and Wood 1999; Fraser 1997 Young 1990). The conflicts between different religious and ethnic groups, as in India, Bangladesh and Sri Lanka, have resulted in an increased strain in the boundaries of citizenship, where different groups are pitted against one another in their claims for recognition. Challenges have been made by religious and conservative forces against claims to citizenship by minorities in their own countries. Some examples include the claims of Ahmadiyas in Pakistan, the Nepali refugees in Bhutan, or the Muslims in India (Amnesty International 1991; Amnesty International 2000; Amnesty International 2003).

Citizenship is increasingly being informed by xenophobia, exclusions and other forms of alienation, that treat 'the other' as a threat to national and social cohesion and national identity (and security). It is for this reason that a review and understanding of the colonial constructions of citizenship are critical in order to appreciate the current shifts and contemporary constructions of citizenship. In the contemporary period, citizenship is increasingly essentializing identities, contingent on static definitions of caste, religion, age as well as class, as more groups compete for access to the scarce state resources and benefits. In other words, citizenship is being used as a tool for inclusion as well as exclusion, and cannot be understood in purely universalistic terms or as having equal applicability to all.

In the context of women, claims to citizenship have at times been based on the recognition of their gender difference. Historically, women have been denied rights to citizenship in their individual capacities and their citizenship determined by a male member such as a father or husband.

Such exclusions were based on essentialist assumptions about women. They were not deemed capable of exercising rights to self-determination or engaging the public democratic or political process by virtue of their inferiority to men. This, in turn, has tended to essentialize gender identities: women are cast primarily as caretakers, mothers and wives in need of protection.

Such an assumption has led to law-reform proposals that actually curtail rather than advance women's rights to gender justice. An example is the previous Indian government's law reform proposal on domestic violence that was more concerned with the protection of the institution of the family and marriage, and women's roles within this institution. It sanctioned the right of men to beat



their wives with reasonable cause, which included instances where a wife made a grab for her husband's property. A second example includes the recent interest in sexual harassment in Nepal and India, which has come to be informed by moralistic assumptions about women's sexual conduct and the need to sexually sanitize the workplace (Kapur 2001). At the same time, ignoring these differences does not address how difference has been used to discriminate against and subordinate women. The critical point is that the ways in which differences are understood and defined have a considerable influence on the way in which citizenship comes to be understood and defined.

The contemporary conditions of globalization have further altered understandings of citizenship. Since the 1980s, the processes of globalization have resulted in increased economic privatization and deregulation. Simultaneously, we have witnessed the emergence of new non-state actors, groups and communities who are migrating and no longer identified exclusively within one nation (Sassen 2004). There is an increased dependence on the market to provide essential services such as health or childcare. The unequal distribution of wealth leaves some citizens with less purchasing power to access these services and contributes to the impoverishment of marginalized groups such as women. Feminist academics, advocates and women's organizations argue that unless development planning and practice take into account unequal power relations on the basis of gender, women's position—as well as that of other marginalized groups—will remain unchanged and might even worsen (Kabeer 1994; Sen and Grown 1985). Finally, undocumented migrants, of which women constitute at least fifty percent, are crossing borders and gravitating towards the large metropolitan centres, setting up a new strata of informal citizenship that destabilizes further 'pure forms' linked exclusively to one nation.

## **FAMILY LAW**

One of the first things for you to think about is the broad range of areas that are covered under the general term, "family law." Family law includes marriage, divorce, custody, visitation, family support (spousal support, child support, domestic partners), child abuse and neglect, delinquency, adoption, estate planning, elder law, new reproductive technologies and a number of other areas.

There are rewarding jobs in private practice and with public and private agencies and law reform organizations. When you are deciding what courses to take and whether you want to practice in this exciting, changing and challenging area of law, keep in mind that you may need to draw on a broad range of experiences and courses when you are developing your specialty area.

### **WHAT IS FAMILY LAW?**

*Family law is a practice area that encompasses the legal issues that face families. These issues include:*

- Divorce
- Spousal support

- Child support
- Custody
- Division of assets and liabilities due to divorce
- Adoption
- Termination of parental rights
- Paternity
- Dependency and child neglect
- Protection from abuse.

## **SOCIAL CHANGE IN FAMILY LAW**

At the conference, it was mentioned that in a contemporary Chinese university a faculty member's divorce might well come under discussion at a faculty meeting. In India, by way of contrast, a faculty promotion may very possibly be disputed in the courts. Any Indian university, especially in the north, is likely to have several lawsuits going among members of the faculty. The readiness of Indians to take their disputes to governmental tribunals suggests that they have become, in Professor Rheinstein's term, "juridicalized" to a high degree—much more so, it appears, than is the case in China.

Indians seem to have more need or willingness to resort to courts to intervene in disputes and forward their interests. In the absence of comparative data on litigation, we may take as a rough measure of this propensity the lawyer/population ratio which is much higher than is found in Southeast and Eastern Asia. A comparison of India's 183 lawyers per million population with 70 in Japan, 58 in Taiwan, 35 in Malaysia/Singapore, and 17 in Indonesia provides some idea of the prevalence of lawyers in India. With few exceptions, they all function as "barristers" (even though there is no formal distinction of solicitors and barristers). Lawyers and clients concur in visualizing the lawyer as a man whose principal function is to argue in court. The Indian lawyer is literally to be found at the court and, typically, it is only when the client is ready to litigate that he goes to the court to engage a lawyer. In Myron Cohen's description of the ad hoc Ch'ing councils, I was struck by the definiteness of their mandate and by the clarity and thrust of their work. Indians, too, traditionally took (and take) matters to nongovernmental tribunals—they might be caste or village tribunals or other kinds—but it is my impression that the outcome was typically much more ambiguous. It was very difficult to obtain a decision that had any finality and, if you got it, the tribunal would not necessarily exert itself to enforce its decision.

Why the outcome of Indian tribunals, as compared to the Chinese, has this diffuse character can only be conjectured. I suspect it has something to do with the extreme fragmentation of Indian society, the breakdown into many, many small caste groups, cross-cut by village, sect, guild, and other groupings, each of which constitutes its own tribunals. This fragmentation is given ideological support by the traditional Indian notion that every group—caste, village, guild, or whatever—should be relatively autonomous, both in making its own rules

and in applying these rules to itself. What happened, I conjecture, is that the groups became so small that they became unable in many cases to control powerful persons and factions within themselves. They were unable to invoke fixed legal principles, apply them to the case, and make their decision stick.

The decisions that they were capable of making were often little more than reflections of the current power position of the parties. When the British administration provided an opportunity to take disputes to the Government's courts, this diffuseness and indefiniteness of the unofficial tribunals led Indians to use the courts to a much greater extent than in other Asian areas where the British provided similar judicial institutions. The courts offered "more bang for your buck": a clear "all or none" decision; the matter settled with finality; and, best of all enforcement by outside authority. It was possible to have an outcome with real impact and independent of local opinion and local configurations of power. In resorting to the courts, Indians subjected themselves to the rules that prevailed in these courts, and these rules typically were at some variance with the attitudes and understandings of the locality. This gap between the norms of the courts and those of the population occurred, not only in the general criminal, civil and commercial law, where indigenous law was replaced by that of British origin or inspiration, but also in the area of family law and religious endowments where the British attempted to administer Hindu and Muslim law.

The British retained the system of personal law in matters of family law (marriage, divorce, adoption, guardianship, and so on), inheritance and succession, caste, and religious endowments. In these fields, each community had its own laws, but they were applied in the government's courts (unlike, *e.g.*, the Ottoman millet system)-and in a spirit far removed from that in indigenous tribunals. It was an established rule that custom-it could be the custom of a locality, caste, or even of a family-overrode the written law. However, custom was difficult to prove, and the attempt of the courts to deal with all Indians as if their affairs were habitually regulated by the texts undoubtedly had the result of imposing on many Hindus rules which were at variance with their customary law.

Again, the administration of Hindu law by a hierarchy of courts staffed by judges trained in the common law and interpreting the texts according to common law techniques introduced considerable changes in Hindu law. But such inadvertent change aside, the British were reluctant to institute any large scale innovations in the personal law of the Hindus. Legislative innovation during the British period can roughly be divided into three stages.

First, the British somewhat hesitantly introduced some reforms that seemed demanded by basic humanitarianism; female infanticide, immolation of widows, and slavery were all abolished in the first half of the nineteenth century. Second, there was occasional legislation protecting converts and regarding wills, remarriage of widows, and civil marriage. These measures were only permissive, designed to provide an escape for those who wished to avoid the stringencies of Hindu law; they did not alter the law for those who were prepared to adhere to

it. Only in the last few decades of British rule did the legislature undertake to alter Hindu law as it applied to everyone. This third stage saw restraints on child marriage, slight changes in the rules of inheritance to favour women, the improvement of the position of widows, and the Gains of Learning Act—which provided that the fruits of an education financed by joint family funds accrued to the individual and not to the family.

These pre-independence reforms marked the successful assertion of legislative power over the Hindu law and modified it in important respects, but they left its basic structure unchanged. Until nearly the end of British rule proposals that the legislature codify and reform the entire system of Hindu law, which was conceded to be a most confusing and uncertain body of law, were rejected on the ground that the legislature had no mandate to undertake such drastic changes.

By the time the Constitution was drafted the idea of a complete overhaul of Hindu law was accepted by a large section of “advanced” opinion and was on the agenda for legislative attention. One of the Constitution’s Directive Principles of State Policy was that the legislature enact “a uniform civil code,” thereby abolishing the system of separate personal laws. There has not been any serious effort in this direction, and it is unlikely that there will be in the near future since a uniform code could be adopted only by abolishing the separate Muslim law, a move that would be fiercely resented by many Indian Muslims. Until now the Indian legislatures have steered clear of tampering with Muslim law, and it seems likely that they will continue to pursue the course of prudence. In spite of the infeasibility of a uniform civil code—or as a step towards it—Parliament has felt free to introduce wholesale changes in Hindu law.

The earliest proposals for a Hindu code were merely to record and systematize the existing law, incorporating some needed amendments. But by the time the matter came before the Parliament of independent India, it was clear that the code would not merely declare the law but would radically alter it. The early proposals had sought to justify themselves as incorporating the best or earliest of sastric law and as purging Hindu law of impurities introduced by British administration.

But after independence the sponsors of Hindu law reform clearly abandoned sastra as their standard in favour of modernity, equality, and freedom. The revamping of Hindu personal law was regarded, not as an exercise in restoration, but, in Dr. Ambedkar’s phrase, as a piece of legal “slum-clearance.” ) In 1955-56 the long heralded reforms became law in a series of enactments known collectively as the Hindu Code. The institution of marriage was radically altered: polygamy was abolished; caste and gotra restrictions on partners were abolished; divorce was introduced (for the higher castes—the lower always had customary nonjudicial divorces). The position of women was vastly improved by giving them equal rights of succession and increased control over property, thus eliminating their economic dependence within the family.

The preference for males was eliminated; male and female lines were equated. The Mitakshara joint family was curtailed by treating interests in it as separate

for purposes of inheritance. Adoption was liberalized: the adoption of and by females was introduced. Rights of guardianship (and liability for maintenance) were extended to women. Before discussing the impact of these changes, let me make a few general observations about the implications of this large-scale reform.

First, for the first time the classical texts and commentaries have been entirely supplanted as the source of Hindu family law. Hindu social arrangements are for the first time moved entirely within the ambit of legislative regulation.

Previous enactments introduced specific modifications into the framework of sastric law. But now the whole field is pre-empted by the legislature, and there is every indication that it will remain there. For purposes of Hindu law, appeal to the whole sastric tradition has been dispensed with. Second, the passage of the Code marks the acceptance of the Indian Parliament as a kind of central legislative body to the Hindus in matters of family and social life. The older notion that government had no mandate or competence to redesign Hindu society has been discarded. For the first time the bulk of the world's Hindus live under a single central authority with both the desire and the techniques to enforce changes in their social arrangements. Throughout the history of Hinduism, no across the board reform was possible because of the absence of centralized governmental or ecclesiastical institutions. Reformers might gain acceptance as a sect, but there was no way for them to win the power to enforce changes for others. Now it is possible to have changes enforced among all Hindus by a powerful central authority.

Third, the Code subjects the Hindus to a degree of uniformity unprecedented in Hindu legal history. Regional differences, the schools of commentators, differences according to varna, customs of locality, caste, and family, distinctions of sex—all have fallen by the wayside. Some narrow scope is allowed for custom, but for the first time a single set of rules is applicable to Hindus of every caste, sect, and region. This both reflects and presages an unprecedented degree of unification and integration of the Hindus. It marks an important step in the consolidation of a single Hindu community. Fourth, it may fairly be said that the Code represents a kind of “Westernization” and secularization. Sastric notions of varna, indissoluble marriage, preference for males, inheritance by those who can confer spiritual benefit, *etc.* are discarded and replaced by emphases on individual rights, equality of women, the nuclear family, and so forth. Considerations of unseen benefit are replaced by notions of worldly welfare.

Very few rules remain with a specifically religious foundation. Finally, the Code represents the use of law by an elite to procure a legal regime congenial to its interests and sentiments. As in other areas of law, the family law reforms are not a response to the felt needs of the generality of the law's clientele nor an accommodation of conflicting interests. Rather they are an expression of the aspirations of those ‘advanced’ power holders who hope to use the educational and coercive powers of the law to improve the unenlightened. In this area of the law, as in many others, the Indian legal system is vastly overcommitted. There

is a great disparity between the new regulations on the one hand and the resources (including the will) for inducing compliance on the other. In a multi-level system where commitments outrun resources, a gap between theory and practice is a normal and typical condition. As in other areas, a high value is put on the symbolic outputs of the law, and there is a broad tolerance of the discrepancy between the law on the books and social practice.

The educated urban elite have their desired uniformity, modernity, and individualism, while the rural and traditional populace are left to accommodate themselves to the new dispensation. It is difficult as yet to discern just what the impact of the Code on prevailing social patterns will be.

For example, in the exogamous villages of the Gangetic plain, the Code's provision for equal inheritance by daughters might mean that over time the village property would be owned largely by women residing outside the village. And the brother-sister relationship, in many places the closest and most unshakable of family bonds, would be exposed to rivalry and conflict now that sisters inherit equally with their brothers. It is too early to discern the patterns of accommodation, but there is no reason to expect that social relations will automatically align themselves to correspond to the law's dispensation.

The sheer lack of penetration of the law in a diverse, stratified society limits its impact. One very early study reported that immediate impact to be very small: changes had not been communicated to potential beneficiaries, "benefits" were not perceived as such, and the resources needed to pursue them were not available.

Where the changes are known, I gather that a variety of arrangements (deeds of gift, testamentary provisions) are devised to make property arrangements that are regarded as suitable. We may anticipate then that ignorance, indifference, and avoidance will cushion any drastic effects. Rather than expecting that the population will passively conform to this new dispensation, we may expect that they will actively manipulate it to serve their own ambitions and concerns. The new law and its procedures will be used to carry on disputes and to pattern relationships in ways that depart from the intention of the law makers. The active use of government law by Indians need not be thought of as an abandonment of "tradition," for this "modern" law may be used to pursue traditional ambitions and uphold traditional values. The official law becomes entwined with indigenous norms at the same time that it modifies present social practice. For example, the criminal law has been thoroughly domesticated and has become very much a part of the life and lore of the village. The emerging patterns of accommodation in the family law area are not yet clear and badly need to be researched.

## **LAW AS AN INSTRUMENT OF SOCIAL CHANGE**

Legal reforms have been at the centre of the agenda for strategising gender justice in India. This has been so, right from the time of 19th century social reforms movements, through the period of nationalist struggles, down to the



contemporary women's movement. In more recent times, this reliance on the efficacy of law and legal reforms to initiate changes in the social order towards a gender just and egalitarian society gets voiced in what might be termed the first comprehensive document marking the contemporary feminist movement in India, *i.e.*, the Report of the Committee on the Status of Women in India. The committee viewed legislation as one of the major instruments for ushering in changes in the social order in the post-colonial state.

Legislation, it was felt, can 'act directly as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable'. Building a gender-just society was perceived as part of the task of nation building, of development and social reconstruction. The role of law in the whole process is perceived as non-ambivalent, well-defined and positive.

Two decades and many struggles later, the answers are no longer so clear-cut, in spite of the fact that the contemporary women's movement in India had in fact coalesced into a movement by mobilising public opinion around the need for legal reforms for redressing individual cases of atrocities against women. The Mathura rape case of 1979, the Shah Bano case on divorce under the Muslim personal law in 1985 or the Bhanwari rape case in 1994 are landmarks that in many ways determined the course and content of the contemporary feminist movement in India.

The Mathura rape case had ushered in a wave of public outcry and was instrumental in bringing about wide-ranging changes in rape laws in the country. However, even under the changed legal regime, hardly any substantive improvements seem to have taken place in the ground conditions. Although punishments have become more stringent, the rate of conviction has dropped significantly in the post-reform years.

The insensitivity of the justice delivery mechanism and the trauma of the rape victim under an unsympathetic system continues unabated. The Shah Bano case typifies an attempt at societal change aborted at the altar of political exigency. In this case, the Supreme Court had held that a divorced Muslim woman, like divorced Indian women from other religions, has the right to receive a regular maintenance allowance from her husband under Section 125 of the Criminal Procedure Code of India. This judgement had provoked strong reactions from conservative Muslim segments of the country as it was perceived as an encroachment by the state into the arena of Islamic law. The Indian government subsequently buckled under the pressure and passed a new law negating the Supreme Court judgement.

The Shah Bano case not merely exposed the importance of the state in bringing about societal reforms in the face of fundamentalist opposition, it also brought out the multifarious ways in which such situations can be usurped by divisive forces to press for various sectarian goals. In this case, conservative right-wing Hindutva forces started pressing for a Uniform Civil Code, ostensibly to further the rights of Muslim women, although it was clear that a Uniform Civil Code by itself is unlikely to better women's position, unless such a code is

also actually empowering for women. It is well known that as personal laws under all religions stand today, they are stacked up against women. As has been argued by some progressive Islamic scholars, Muslim personal laws can be reformed for greater gender justice even without recourse to a uniform civil code. This is exemplified by a recent judgement delivered by the Bangladesh High Court, which calls for a progressive reinterpretation of Muslim personal law in line with modern social values.

In the Bhanwari Devi case an enlightened 'Sathin' under the Women's Development Programme of the Rajasthan Government was subjected to mass rape for opposing the practice of child marriage in the community. The culprits are yet to be brought to book. This case continues to typify the near-impossibility under certain circumstances of successfully challenging deeply entrenched patriarchal power structures through legal channels alone. The contemporary women's movement is at the crossroads now.

In the light of the experience of the last twenty years, the question that keeps recurring is whether legal reforms are capable of bringing about gender justice in society.

Has law been instrumental in ushering in any change in the gender balance? Can legal reforms or litigation indeed ever deliver the goods? Law has in fact been often used to reinforce the social subjugation of women.

Some believe that given the patriarchal nature of the state, and given the reflection of such bias in the framing and dispensation of justice by the judiciary and its functionaries, it is not sensible to expect that law can ever be a potent force for change in the existing social structure: that the hope of ensuring gender justice using law as an instrument of social engineering is an altogether impossible dream.

In a way this ambivalence about law and legal reforms in matters of securing gender justice is nothing new in the history of women's movement in India.

Back in the nineteenth century, when social reformers like Raja Rammohun Roy and nationalists like Bal Gangadhar Tilak were concerned with oppressive social practices like 'sati' or child marriage, the tensions between the indigenous scriptural dicta and the colonial heritage of the British legal system always lurked in the background.

While Rammohun's denunciation of the practice of sati had been based primarily on his reading of the scriptural text, Tilak's refusal to address social issues through legal instruments laid down by the foreign rulers was based on the perceived illegitimacy of the colonial hegemony in all its ramifications.

The social history of the period is replete with the tensions between the liberalist strain of thinking of the pre-independence era which was geared to adopt and adapt from Western liberalist traditions on the one hand and the nationalist revivalist movements which aimed at social reforms working from within indigenous traditions on the other.

Much of this tension can be attributed to the dominant political climate of the era. In the context of the contemporary women's movement, the ambivalence

that marks feminist engagements with law as an instrument of ensuring gender justice has a somewhat different character. While demand for legal reforms has been one of the major foci for mobilising popular support, and specific cases of atrocities on women have been used to further the aims of the movement, the disenchantment with the potential of law as an instrument of social transformation has been triggered by two simultaneous developments. On the one hand, last twenty years' experience of the effect of legal reforms has been perceived to be not altogether positive.

The meticulously researched documentation by Flavia Agnes in this volume on the effects of legal reforms in the area of violence against women covering rape and domestic violence as well as dowry-related violence, suggests that laws, old and new, are structured to operate against the larger interests of women. The treatment of women under institutionalisation as argued by Usha Ramanathan. Neither litigation, nor legal reforms have, in the opinion of the authors been able to deliver gender justice.

The dominant social culture within which such justice is sought to be mediated have proved to be much too strong for legislation or judicial activism alone.

The second development can be traced to the growing engagement of feminist research with the post-modernist wave in Western academic thinking and its deconstructionist implications for a monolithic, linear strategy for women's empowerment, Nivedita Menon's reflects some of the analytical complexities that arise in the context of cross cutting discourses in the field of law for gender justice.

Menon's exhibits the undercurrent of tension between conflicting compulsions of contemporary research in feminist jurisprudence and feminist practice and activism in the legal arena. However, recent thinking in the area has made considerable progress in addressing such tensions squarely by laying bare the complex and contradictory nature of law, and the need for such understanding for successful accessing of law as an instrument of social change.

The arena of law is seen as a site for discursive struggles, where the dominant notions of gender, tradition and culture are challenged from a multiplicity of perspectives, including the feminist perspective. The extent to which law is made to serve as an instrument of gender justice depends to, a large extent on an informed understanding of the strength, and the potential weaknesses of the dominant ideology of gender and the ability to engage with tenacity and wisdom, to explore the moral and substantive weaknesses of the familial ideology in the legal arena.

A relatively new area of legal discourse in the context of gender is social rights—of women, such as the right to health. Usha Ramanathan's included in this volume recounts the current status of law on women's health. What it does not explore in depth is the whole range of issues that are linked with women's reproductive rights and their legal ramifications.

The Indian Penal Code does not admit of the notion of marital rape, thereby signifying a negation of a major dimension of such rights to women. The link between this negation and the role of the dominant familial ideology that

shapes the contours of women's substantive legal rights in the country is fairly obvious. The rights discourse does open up new dimensions of analysis and investigation.

Social movements which aim at fighting exploitative practices may utilise the moral strength of individual dignity to strategise the fight for justice. However, in order to invest such strategisation with some substantive content, it has to be properly contextualised.

For instance, the whole issue of reproductive health rights for women in India needs to be seen in the perspective of the dismal status of primary health care in the country, as also the rampant poverty of the masses that negates access to basic needs irrespective of gender.

The brought together in one platform a wide range of people—from sitting judges to senior practising lawyers and legal experts, people from civil rights and human rights backgrounds, as well as feminist scholars and activists—to deliberate on the potential of law as an instrument of gender justice. A second major achievement of the seminar was in the area of opening up of new dimensions in the legal discourse on gender issues, such as women's health and law, and institutionalisation of women under the law.

## DEFINITION OF LAW

- In general, a rule of being or of conduct, established by an authority able to enforce its will; a controlling regulation; the mode or order according to which an agent or a power acts.
- *In Morals*: The will of God as the rule for the disposition and conduct of all responsible beings towards him and towards each other; a rule of living, conformable to righteousness; the rule of action as obligatory on the conscience or moral nature.
- The Jewish or Mosaic code, and that part of Scripture where it is written, in distinction from the gospel; hence, also, the Old Testament.
- An organic rule, as a constitution or charter, establishing and defining the conditions of the existence of a state or other organised community.
- Any edict, decree, order, ordinance, statute, resolution, judicial, decision, usage, *etc.*, or recognised, and enforced, by the controlling authority.
- *In Philosophy and Physics*: A rule of being, operation, or change, so certain and constant that it is conceived of as imposed by the will of God or by some controlling authority; as, the law of gravitation; the laws of motion; the law heredity; the laws of thought; the laws of cause and effect; law of self-preservation.
- *In Mathematics*: The rule according to which anything, as the change of value of a variable, or the value of the terms of a series, proceeds; mode or order of sequence.
- *In Arts, Works, Games, etc.*: The rules of construction, or of procedure, conforming to the conditions of success; a principle, maxim; or usage; as, the laws of poetry, of architecture, of courtesy, or of whist.

- Collectively, the whole body of rules relating to one subject, or emanating from one source;—including usually the writings pertaining to them, and judicial proceedings under them; as, divine law; English law; Roman law; the law of real property; insurance law.
- Legal science; jurisprudence; the principles of equity; applied justice.
- Trial by the laws of the land; judicial remedy; litigation; as, to go law.
- An oath, as in the presence of a court.

# 4

## **The Victim of Violence against Women in Worldwide**

Violence affects the lives of millions of women worldwide, in all socio-economic and educational classes. It cuts across cultural and religious barriers, impeding the right of women to participate fully in society. Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female circumcision. All are violations of the most fundamental human rights.

In a statement to the Fourth World Conference on Women in Beijing in September 1995, the United Nations Secretary-General, Boutros Boutros-Ghali, said that violence against women is a universal problem that must be universally condemned. But he said that the problem continues to grow. The Secretary-General noted that domestic violence alone is on the increase. Studies in 10 countries, he said, have found that between 17 per cent and 38 per cent of women have suffered physical assaults by a partner.

In the Platform for Action, the core document of the Beijing Conference, Governments declared that "violence against women constitutes a violation of basic human rights and is an obstacle to the achievement of the objectives of equality, development and peace". The issue of the advancement of women's rights has concerned the United Nations since the Organization's founding. Yet the alarming global dimensions of female-targeted violence were not explicitly acknowledged by the international community until December 1993, when the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women.



Until that point, most Governments tended to regard violence against women largely as a private matter between individuals, and not as a pervasive human rights problem requiring State intervention. In view of the alarming growth in the number of cases of violence against women throughout the world, the Commission on Human Rights adopted resolution 1994/45 of 4 March 1994, in which it decided to appoint the Special Rapporteur on violence against women, including its causes and consequences.

As a result of these steps, the problem of violence against women has been drawing increasing political attention.

The Special Rapporteur has a mandate to collect and analyse comprehensive data and to recommend measures aimed at eliminating violence at the international, national and regional levels. The mandate is threefold:

- To collect information on violence against women and its causes and consequences from sources such as Governments, treaty bodies, specialized agencies and intergovernmental and non-governmental organizations, and to respond effectively to such information;
- To recommend measures and ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences;
- To work closely with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights.

## **VIOLENCE AGAINST THE OLD**

Singh (1998) defines elder abuse as 'harm to an elder person caused by someone in a position of trust, who may have control over the victim. This includes material abuse such as financial exploitation, physical abuse, such as pushing, physical assault, psychological abuse, such as chronically threatening, swearing at or insulting the older person, and neglect or failing to provide necessary help such as meal preparation, housework or personal care. In the past few years, the aged have frequently been the target of gang robberies or brutal killing by servants or outsiders (Mitu; 1998). Old are attacked frequently due to their inability to put up a fight. Elders normally have to face up to the facts that, their energy and authority is eroding. To add to their woe is the death of any one of the spouse. Widows have to be dealt with specifically, as the death of a spouse for a woman in any age is a tragedy in itself, because of the norms and tradition and the manner in which she is treated after the death of her husband.

## **INCEST, RAPE AND DOMESTIC VIOLENCE**

Some females fall prey to violence before they are born, when expectant parents abort their unborn daughters, hoping for sons instead. In other societies, girls are subjected to such traditional practices as circumcision, which leave them maimed and traumatized. In others, they are compelled to marry at an early age, before they are physically, mentally or emotionally mature. Women

are victims of incest, rape and domestic violence that often lead to trauma, physical handicap or death. And rape is still being used as a weapon of war, a strategy used to subjugate and terrify entire communities. Soldiers deliberately impregnate women of different ethnic groups and abandon them when it is too late to get an abortion.

The Platform for Action adopted at the Fourth World Conference on Women declared that rape in armed conflict is a war crime -- and could, under certain circumstances, be considered genocide. Secretary-General Boutros-Ghali told the Beijing Conference that more women today were suffering directly from the effects of war and conflict than ever before in history.

*"There is a deplorable trend towards the organized humiliation of women, including the crime of mass rape", the Secretary-General said.*

*"We will press for international legal action against those who perpetrate organized violence against women in time of conflict."*

A preliminary report in 1994 by the Special Rapporteur, Ms. Radhika Coomaraswamy, focused on three areas of concern where women are particularly vulnerable: in the family (including domestic violence, traditional practices, infanticide); in the community (including rape, sexual assault, commercialized violence such as trafficking in women, labour exploitation, female migrant workers, *etc.*); and by the State (including violence against women in detention as well as violence against women in situations of armed conflict and against refugee women).

In the Platform for Action adopted at the Beijing Conference, violence against women and the human rights of women are 2 of the 12 critical areas of concern identified as the main obstacles to the advancement of women.

## **WARTIME VIOLENCE AND POST-CONFLICT ABUSE**

Historically, women have been targeted for sexual violence during times of conflict--both civil and international. Soldiers raped and otherwise sexually abused women from the opposing side as a method of war; in this sense rape functioned to demoralize and punish the enemy. Another contributing factor to women's being targeted for sexual violence during times of conflict was the socialized attitudes that men held about women: women (like other objects) were spoils of war and therefore sexually available to them in times of conflict. Moreover, soldiers did not fear being punished for engaging in sexual violence towards a part of the civilian population that, even in times of peace, held an unequal or diminished status vis-à-vis men. For example, women in Sierra Leone were victims of sexual violence during the armed conflict which intensified between February and June 1998 when the Armed Forces Revolutionary Council (AFRC) and the United Revolutionary Front (RUF), an armed rebel coalition that was opposed to President Ahmed Tejan Kabbah's government, increased attacks against civilians. The attacks included rape and enslavement of women and girls for sex and labour by the AFRC/RUF rebels.

In Algeria, armed Islamist factions, nominally headed by the Armed Islamic Group, a secretive coalition of Islamist militants and armed groups known as the GIA, have made attacks against women an integral part of a campaign against a secularist government that canceled legislative elections in 1992. In 1998, the GIA continued to engage in a punitive campaign against those whom they perceived as having turned their back on Islam by failing to join in the holy war against the Algerian state. Within this context, the GIA abducted and sexually assaulted women, considering them spoils of war. The GIA intimidated, raped, mutilated, and killed women for opposing their views, for defying their rules (regarding dress, work, and education), and for being married to "infidels" (members of government security forces).

In conflict situations women are among the first to become internal or international refugees. With refugee families living under debilitating financial and social stress, the incidence of domestic violence risks escalation. Moreover, female refugees face an increased risk of sexual violence by other refugees, because of close living quarters, poor security, or the existence of combatants among the civilians.

Ethnic conflict in Africa's Great Lakes Region precipitated massive internal and external displacement of people during 1998. Conflict in Burundi, Rwanda, and the Democratic Republic of the Congo (formerly Zaire) precipitated a massive exodus of people into Tanzanian refugee camps, where women refugees faced domestic violence in their homes and sexual violence in the camps and in areas around the camps. Burundian women, for example, were raped by other refugees, Tanzanians from nearby communities, and police officers. Additionally, according to refugee women representatives in the camps, almost every married Burundian refugee woman had experienced domestic violence since becoming a refugee.

Often the host countries for refugee women and the agencies that operated refugees camps were wholly ill-equipped to investigate and respond to incidents of domestic and sexual violence against refugee women. Our research found that the Tanzanian government's and international humanitarian agencies' representatives, in responding to the refugee crisis in Tanzania, failed to investigate and punish instances of sexual and domestic violence, creating an atmosphere of impunity. The office of the United Nations High Commissioner for Refugees (UNHCR) failed to implement existing policy guidelines on preventing sexual violence against refugee women. UNHCR field staff in Tanzania did not follow up to ensure that cases were properly tried in court and that women had access to legal redress. Moreover, some UNHCR staff did not view domestic violence as a crime. Consequently, they referred victims of domestic violence and their batterers to counseling rather than to the judicial system. At the time of this writing, UNHCR had no policy guidelines on responding to and preventing domestic violence against refugee women.

Lack of justice for victims of sexual and domestic violence in Tanzanian camps was further compounded by deficiencies in a dual legal system operating in the

camps: the traditional Burundian and the Tanzanian criminal justice systems. The Burundian system was composed of male refugee leaders, who had no legal training and limited enforcement powers. Even for serious assault cases, they could impose only a minuscule fine. Many Tanzanian government officials did not view domestic violence as a crime and were reluctant to refer cases to court. They often offered counseling services that focused on reconciling the two parties, ignoring the victims' need for justice. Resolution of conflict did not always bring an end to violence against women. Women in Bosnia, for example, reported that demobilized soldiers manifested their frustration with reintegration into civilian life through domestic violence. Because post-conflict societies such as Bosnia and Rwanda were rebuilding their countries in almost every way, including the economic and judicial systems, often violence against women was either ignored or relegated to low-priority status compared with other pressing problems. Thus in Bosnia, human rights reports from the Organization for Security and Cooperation in Europe (OSCE) all year contained cases of violence committed against female returnees throughout the country. Women were targeted for evictions, physical assault, and rape throughout the Federation of Bosnia-Herzegovina and Republika Srpska. One officer of the International Police Task Force observed to Human Rights Watch that women were disproportionately targeted for ethnic violence because they were considered "softer targets," that is, much less likely to fight or be able to defend themselves.

As in the refugee camps in Tanzania, domestic violence in Bosnia increased dramatically after the war. According to experts participating in an OSCE conference on women's rights in Bosnia, police still treated domestic violence as "a private family matter" and refused to intervene. Although reforms proposed to the Bosnian criminal code and criminal procedure code explicitly criminalized domestic violence, local activists feared that the law would not effectively protect women without extensive training for police and law enforcement officials.

## **CUSTODIAL VIOLENCE AGAINST SUFFERED SEXUAL WOMEN**

Women who suffered sexual and other physical abuse in custody at the hands of government agents were perhaps the most invisible and the most vulnerable, as their abusers held positions of authority and public trust. Governments as diverse as the United States and India repeatedly turned a blind eye to the abuses that those acting under cover of authority were committing. In India, attacks on Dalit women during massacres, police raids, and caste clashes were on the rise in 1998. As untouchables, Dalit women constituted the majority of prostitutes and landless workers and thus came into frequent contact with law enforcement officials. In Tamil Nadu, for example, women were the primary targets during a February 26 police raid on Dalit villages in the aftermath of clashes between Dalit and middle-caste communities. Police also engaged in instances of "hostage-taking" wherein women were arrested and tortured as a means of punishing their absconding male relatives and forcing them to surrender.

In the United States, sexual and other abuse of women in custody continued to be a serious problem for women incarcerated in local jails, state and federal prisons, and immigration detention centers. Moreover, in many instances, no adequate and transparent mechanisms existed through which victims of assault could safely and confidentially report abuse and seek an investigation without fear of significant retaliation. A January 1998 Department of Justice's Bureau of Justice Statistics report showed that more than 78,000 women were incarcerated in federal and state prisons, an increase of 6.1 percent over the previous year, compared with an increase of 4.7 percent for men. Women in custody faced abuse at the hands of prison guards, most of whom were men, who subjected the women to verbal harassment, unwarranted visual surveillance, abusive pat frisks, and sexual assault. Fifteen U.S. states do not have criminal laws prohibiting sexual abuse of women in prison. Moreover, Human Rights Watch found that in most states, guards were not trained about their duty to refrain from sexual contact with prisoners.

The vulnerability of women prisoners to sexual abuse and the failure of prison officials to intervene effectively was demonstrated in a civil suit filed by three women incarcerated in the Federal Corrections Institution in Dublin, California, which was settled in March 1998. The women plaintiffs had been placed in punitive segregation in the men's detention center, where guards allegedly allowed male inmates into their cells at night to assault them sexually. When the women filed complaints, all three were beaten and raped, allegedly by guards, in apparent retaliation. As part of a landmark settlement, the Federal Bureau of Prisons agreed to refrain from housing any women inmates in the men's detention center, to create a confidential mechanism for reporting sexual assault, and to review the staff training programme for prison guards.

In Michigan state, women incarcerated in state prisons continued to report sexual abuse and retaliatory behavior by guards against women who reported the abuse. In particular, women who were plaintiffs in the civil rights suit jointly litigated by private lawyers and the Department of Justice reported severe retaliation by prison guards. Despite the litigation and reports of sexual abuse and retaliation, Michigan claimed that it had a "zero tolerance" policy towards sexual abuse and denied that the women had suffered retaliation because of their participation in the suit.

In direct contravention of international prohibitions against detention of asylum seekers absent compelling circumstances, the U.S., continued routinely to detain asylum seekers in Immigration and Naturalization Service detention facilities, prisons, and local jails pending the outcome of their asylum proceedings.

Non-criminal asylum seekers detained in local jails and prisons were placed with the general inmate population, a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners. In this context, women asylum seekers were subjected to the same abuses that Human Rights Watch documented in state prisons, including privacy violations, abusive pat frisks, and sexual assaults.

## **DISCRIMINATION PRACTICE**

In 1998 discriminatory practices, tolerated and even encouraged by states, continued unabated around the globe. Despite commitments made under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and "national platforms for action" to implement the 1995 Fourth World Conference on Women Platform for Action adopted in Beijing, many states continued to enforce discriminatory laws and to tolerate discriminatory practices under customary law.

Although international attention focused largely on the repressive policies enforced by Afghanistan's Taliban, serious and systematic discrimination persisted in many regions. For example, Guatemala's civil code denied women the right to administer marital property, allowed husbands to prevent their wives from working outside the home, and limited women's exercise of guardianship over children. A 1994 challenge to these laws by María Eugenia Morales de Sierra, represented by the Center for Justice and International Law, was finally accepted for review on March 6, 1998 by the Inter-American Commission on Human Rights. At the time of this writing, the commission had yet to issue a decision on the merits of the case.

In Pakistan, concern about escalating discrimination against women increased with the election of Muhammad Rafiq Tarar as president in January 1998. While serving as a judge, President Tarar called a rape victim a liar and openly opposed laws giving women the right to divorce and seek custody of their children. Women's rights activists feared that Tarar's election was indicative of a more conservative mood in the country, likely to have negative consequences for women's rights in Pakistan. In a move that seemed to confirm these fears, the prime minister introduced a constitutional amendment in August that would replace British common law with religious laws based on the Koran and Sunnat. Local activists feared that absent a specific guarantee of women's equality, the amendment would be used to justify a rollback in women's rights. As of this writing, the amendment was still being debated.

On a more positive note, a new Ugandan law passed in July granted women equal say in decisions about family property. The new land law recognizes women's right to own property and forbids one spouse from dispensing of property unilaterally. And, in India, the Mumbai (Bombay) high court in August 1998 recognized women's equal right to the marital home when it restrained a man from entering or claiming his family home after he was found guilty of abusing his wife and children. Women activists hailed the ruling as a significant departure from past practice in which women separated from husbands were expelled from the marital home, regardless of circumstances.

## **STATE-TOLERATED DISCRIMINATION AND TOLARATE**

Elsewhere, states continued to tolerate discrimination against women by private actors, failing to live up to the commitment to "end all forms of



discrimination" mandated in CEDAW. Instead, states turned a blind eye to evidence of discrimination or actively encouraged such discrimination.

Sex discrimination had a particularly egregious impact on women displaced by war. Bosnian women, for example, faced discrimination in the reconstruction period. Micro-credit programmes aimed at women provided significantly smaller loan amounts, in some cases only one-third of the amount, offered to male entrepreneurs under similar programmes. Women found themselves ghettoized in training programmes developed to prepare them for gender-stereotyped, low-paying occupations, including secretarial positions and hairdressing. According to a World Bank official in Republika Srpska, public works jobs went solely to male applicants. The World Bank and USAID insisted that their programmes included women as beneficiaries, but in general, these and other aid agencies failed to maintain reliable statistics on women's participation in employment, training, and loan programmes. Women remained the vast majority of the displaced, eking out an existence and served by disproportionately limited programmes. Many displaced women found themselves stuck in collective centers where deplorable conditions, poverty, hopelessness, and health concerns plagued all of the occupants. Many hoped to return home but feared reprisals.

In other instances, employers' discrimination against women based on their reproductive capacity-practices tolerated by many governments-undermined women's attempts to participate fully in the labour market. The assumption that women would become pregnant, and therefore were a "bad investment," perpetuated de facto discrimination. The Mexican government, for example, continued to allow transnational corporations to discriminate against women in the export processing (*maquiladora*) sector there. Human Rights Watch research in 1997 and 1998 found that women applying for work as assemblers were required to reveal their pregnancy status as a condition for employment. Women were required to undergo pregnancy testing through analysis of urine samples, revelation of birth control use, the provision of information regarding sexual activity, and by submitting to abdominal examinations. Those found to be pregnant were not hired.

Factories also discriminated against women after they were hired. Some *maquiladoras* required women workers to submit urine samples for pregnancy analysis after they had been hired as a condition for maintaining their employment. Moreover, factories practiced more invasive types of pregnancy checks, such as requiring women workers to prove that they were still menstruating, and therefore not pregnant, by showing factory medical personnel their used sanitary napkins. The government of Mexico did nothing to remedy hiring-process sex discrimination and made only token gestures to condemn and investigate on-the-job pregnancy discrimination, failures that violated Mexico's domestic labour law and its international human rights obligations. In fact, the government argued that pregnancy testing in the hiring process was permissible under Mexican law. With regard to on-the-job pregnancy discrimination, the government's sole remedial effort was to reiterate that such practices are illegal in Mexico.

In the face of Mexican refusal to enforce its own domestic laws, human rights organizations sought redress through the North American Agreement on Labour Cooperation, commonly referred to as the labour rights side agreement of the North American Free Trade Agreement, (NAFTA). Human Rights Watch, the International Labour Rights Fund, and the National Association of Democratic Lawyers (Asociación Nacional de Abogados Democráticos) submitted a petition against Mexico to the United States National Administrative Office (U.S., NAO, the body charged with hearing cases of alleged violations by Canada or Mexico of the labour rights side agreement) that charged unremedied sex discrimination.

In January 1998 the U.S., NAO found that Mexico's constitution and labour code prohibit discrimination based on sex; pre-employment pregnancy testing did occur in Mexico; there were contradictory interpretations of Mexico's law regarding the illegality of this practice; and while on-the-job pregnancy-based sex discrimination was clearly illegal under Mexican labour law, greater efforts needed to be made towards awareness programmes for women workers. This was the first case heard by the U.S., NAO that dealt explicitly with the right to gender equality in the workforce.

Discrimination against women in labour markets in their own countries only increased the likelihood that women and girls would be trafficked into forced labour abroad. Unable to find work at home, women from virtually every region of the globe accepted seemingly lucrative opportunities to work as domestic servants, dancers, waitresses, or sex workers abroad. Others accepted apparently legitimate offers of marriage, only to find themselves caught in situations of battery and extreme cruelty, forced labour, and sexual abuse. Young girls tricked into migrating or sold by their families to traffickers found themselves trapped in brothels or sweatshops, unable to return home. The United States government estimated that one to two million women and girls were being trafficked annually around the world for the purposes of forced labour, forced prostitution, servile domestic labour, or involuntary marriage.

Women trafficked into forced labour experienced human rights abuses such as debt bondage, slave-like conditions, illegal confinement, enforced isolation, wage withholding, deprivation of identity documents, rape, and sexual and other physical abuse. Trafficked women's status as illegal migrants and their complete isolation left them at risk for exploitation by traffickers. Women interviewed by Human Rights Watch in several countries expressed reluctance to approach police or state officials, fearing traffickers' reprisals against themselves or their families, imprisonment and prosecution for illegal entry or employment by the state, and deportation.

In many countries, women forced into prostitution feared even greater penalties for engaging in an illegal occupation. While many officials in countries such as Thailand, India and Israel considered the arrest and deportation of the women and girls a form of "rescue," this impression did not reflect the reality of the experience. For trafficked Burmese women detained in Thai prisons, for

example, "rescue" meant potential rape by police and the possibility of sale back to the same or another brothel owner. Traffickers worldwide operated with near-impunity, as corrupt officials, economic crisis, and states' failure to prosecute this modern form of slavery coalesced to guarantee high profits and low risk. In Cambodia, economic and political crisis led to a surge in domestic trafficking of women and girls, as families desperate for money sold their children into the sex trade. With the spread of HIV and AIDS, the demand for younger and younger girls increased. According to local press reports, traffickers in Phnom Penh commanded prices of up to U.S., \$1,000 for a virgin. Thai NGOs reported that corrupt police officers received bribes from brothel owners and free sexual services from the trafficked women as pay-offs to guarantee their turning a blind eye. Such extortion on the part of officials was not uncommon. In Macau, local press reported that police arrested a police constable for allegedly leading a racket which blackmailed women overstaying their visas.

In policy terms, states focused on trafficking as an issue of illegal migration and prostitution, but crackdowns and criminalization of prostitution often led to incarceration and further abuse of the trafficked women. Due to corruption among officials and police, enhanced enforcement measures led to higher bribes by traffickers resulting in higher debts for the women and girls. When arrests were made, it was the women, not the traffickers, who were detained. In Israel, for example, the government arrested and deported over 1,000 women back to Eastern Europe and the former Soviet Union from 1994 through 1998, according to an Israeli women's NGO. Law enforcement officials blamed the women themselves for the lack of prosecutions of traffickers, despite the complete absence of witness protection for the women.

Across the globe, women victims of trafficking were by and large unable to bring civil cases for lost wages, violations of civil rights, and violations of labour codes against traffickers and others engaged in the buying and selling of human beings. Few states offered support services such as safe shelter, legal aid, psychological assistance, and medical aid. The Netherlands and Belgium continued to provide funding to women's organizations offering some of these services. Dutch, Italian, and Belgian legislation provided for stays of deportation while women decided whether or not to participate as witnesses in criminal proceedings. During that period, women received temporary work permits, psychological counseling, shelter, social security benefits, and medical care.

In an effort to set standards for the protection of the human rights of trafficked women, the Global Alliance Against Trafficking in Women drafted a set of standard minimum rules concerning the treatment of trafficked persons. These draft rules included the right to freedom from persecution or harassment from authorities, access to competent translators during legal proceedings, access to free legal assistance and representation, access to legal possibilities of compensation and redress, legal permission to stay in the country of destination if unsafe to return home, and protection against reprisals from authorities or perpetrators.

## **TYPES OF VIOLENCE**

### **Domestic Violence**

Women are more likely to be victimized by someone that they are intimate with, commonly called "Intimate Partner Violence" or (IPV). The impact of domestic violence in the sphere of total violence against women can be understood through the example that 40-70% of murders of women are committed by their husband or boyfriend. Studies have shown that violence is not always perpetrated as a form of physical violence but can also be psychological and verbal. In unmarried relationships this is commonly called dating violence, whereas in the context of marriage it is called domestic violence. Instances of IPV tend not to be reported to police and thus many experts believe that the true magnitude of the problem is hard to estimate. Though this form of violence is often portrayed as an issue within the context of heterosexual relationships, it also occurs in lesbian relationships, daughter-mother relationships, roommate relationships and other domestic relationships involving two women. Violence against women in lesbian relationships is about as common as violence against women in heterosexual relationships. Violence against women by women also exists outside the sphere of relationship violence, probably even less research has been done on this subject.

### **KINDS OF VIOLENCE AGAINST DOMESTIC WOMEN**

Violence against women in the family occurs in developed and developing countries alike. It has long been considered a private matter by bystanders -- including neighbours, the community and government. But such private matters have a tendency to become public tragedies. In the United States, a woman is beaten every 18 minutes. Indeed, domestic violence is the leading cause of injury among women of reproductive age in the United States. Between 22 and 35 per cent of women who visit emergency rooms are there for that reason.

The highly publicized trial of O. J. Simpson, the retired United States football player acquitted of the murder of his former wife and a male friend of hers, helped focus international media attention on the issue of domestic violence and spousal abuse. In Peru, 70 per cent of all crimes reported to the police involve women beaten by their husbands.

In Pakistan, Prime Minister Benazir Bhutto strongly defended a 35-year-old mother of two who was severely burned by her husband in a domestic dispute. "There is no excuse for such a behaviour", the Prime Minister declared after visiting the hospitalized victim. "My presence here is to send a message to all those who violate Islamic teachings and defy laws of the land with their inhuman treatment of women. This will not be tolerated."

According to the Human Rights Commission of Pakistan, in the 400 cases of domestic violence reported in 1993 in the province of Punjab, nearly half ended

with the death of the wife. According to the Special Rapporteur's report, many Governments now recognize the importance of protecting victims of domestic abuse and taking action to punish perpetrators. The establishment of structures allowing officials to deal with cases of domestic violence and its consequences is a significant step towards the elimination of violence against women in the family. The Special Rapporteur's report highlights the importance of adopting legislation that provides for prosecution of the offender. It also stresses the importance of specialized training for law enforcement authorities as well as medical and legal professionals, and of the establishment of community support services for victims, including access to information and shelters.

### **Traditional Practices**

In many countries, women fall victim to traditional practices that violate their human rights. The persistence of the problem has much to do with the fact that most of these physically and psychologically harmful customs are deeply rooted in the tradition and culture of society.

### **Female Genital Mutilation**

According to the World Health Organization, 85 million to 115 million girls and women in the population have undergone some form of female genital mutilation and suffer from its adverse health effects. Every year an estimated 2 million young girls undergo this procedure. Most live in Africa and Asia -- but an increasing number can be found among immigrant and refugee families in Western Europe and North America. Indeed, the practice has been outlawed in some European countries. In France, a Malian was convicted in a criminal court after his baby girl died of a female circumcision-related infection. The procedure had been performed on the infant at home.

In Canada, fear of being forced to undergo circumcision can be grounds for asylum. A Nigerian woman was granted refugee status since she felt that she might be persecuted in her home country because of her refusal to inflict genital mutilation on her baby daughter. There is a growing consensus that the best way to eliminate these practices is through educational campaigns that emphasize their dangerous health consequences. Several Governments have been actively promoting such campaigns in their countries.

### **Son Preference**

Son preference affects women in many countries, particularly in Asia. Its consequences can be anything from foetal or female infanticide to neglect of the girl child over her brother in terms of such essential needs as nutrition, basic health care and education. In China and India, some women choose to terminate their pregnancies when expecting daughters but carry their pregnancies to term when expecting sons.

According to reports from India, genetic testing for sex selection has become a booming business, especially in the country's northern regions. Indian gender-

detection clinics drew protests from women's groups after the appearance of advertisements suggesting that it was better to spend \$38 now to terminate a female foetus than \$3,800 later on her dowry.

A study of amniocentesis procedures conducted in a large Bombay hospital found that 95.5 per cent of foetuses identified as female were aborted, compared with a far smaller percentage of male foetuses. The problem of son preference is present in many other countries as well. Asked how many children he had fathered, the former United States boxing champion Muhammad Ali told an interviewer: "One boy and seven mistakes."

## **DOWRY-RELATED VIOLENCE AND EARLY MARRIAGE**

In some countries, weddings are preceded by the payment of an agreed-upon dowry by the bride's family. Failure to pay the dowry can lead to violence. In Bangladesh, a bride whose dowry was deemed too small was disfigured after her husband threw acid on her face. In India, an average of five women a day are burned in dowry-related disputes -- and many more cases are never reported. Early marriage, especially without the consent of the girl, is another form of human rights violation. Early marriage followed by multiple pregnancies can affect the health of women for life.

The report of the Special Rapporteur has documented the destructive effects of marriage of female children under 18 and has urged Governments to adopt relevant legislation.

## **VIOLENCE IN THE COMMUNITY**

### **Rape**

Rape can occur anywhere, even in the family, where it can take the form of marital rape or incest. It occurs in the community, where a woman can fall prey to any abuser. It also occurs in situations of armed conflict and in refugee camps. In the United States, national statistics indicate that a woman is raped every six minutes.

In 1995, the case of a Brazilian jogger raped and murdered in New York City's Central Park drew international attention once again to the problem. The incident occurred only a few years after an earlier sensational jogger-assault case in which the victim -- an American assaulted in the same general area of the park -- barely survived after her assailants left her for dead.

Relations between residents of the Japanese island of Okinawa and American GIs were thrown into turmoil in 1995 after two marines and a sailor allegedly kidnapped and raped a 12-year-old girl.

The Special Rapporteur's report underlines the importance of education to sensitize the public about the special horrors of rape, and of sensitivity training for the police and hospital staff who work with victims.



### **Sexual Assault within Marriage**

In many countries sexual assault by a husband on his wife is not considered to be a crime: a wife is expected to submit. It is thus very difficult in practice for a woman to prove that sexual assault has occurred unless she can demonstrate serious injury. The report of the Special Rapporteur noted that light sentences in sexual assault cases send the wrong message to perpetrators and to the public at large: that female sexual victimization is unimportant.

### **Sexual Harassment**

Sexual harassment in the workplace is a growing concern for women. Employers abuse their authority to seek sexual favours from their female co-workers or subordinates, sometimes promising promotions or other forms of career advancement or simply creating an untenable and hostile work environment. Women who refuse to give in to such unwanted sexual advances often run the risk of anything from demotion to dismissal. But in recent years more women have been coming forward to report such practices -- some taking their cases to court. In her report, the Special Rapporteur stressed that sexual harassment constitutes a form of sex discrimination. "It not only degrades the woman", the report noted, "but reinforces and reflects the idea of non-professionalism on the part of women workers, who are consequently regarded as less able to perform their duties than their male colleagues."

### **PROSTITUTION AND TRAFFICKING**

Many women are forced into prostitution either by their parents, husbands or boyfriends -- or as a result of the difficult economic and social conditions in which they find themselves. They are also lured into prostitution, sometimes by "mail-order bride" agencies that promise to find them a husband or a job in a foreign country. As a result, they very often find themselves illegally confined in brothels in slavery-like conditions where they are physically abused and their passports withheld. Most women initially victimized by sexual traffickers have little inkling of what awaits them. They generally get a very small percentage of what the customer pays to the pimp or the brothel owner. Once they are caught up in the system there is practically no way out, and they find themselves in a very vulnerable situation.

Since prostitution is illegal in many countries, it is difficult for prostitutes to come forward and ask for protection if they become victims of rape or want to escape from brothels. Customers, on the other hand, are rarely the object of penal laws. In Thailand, prostitutes who complain to the police are often arrested and sent back to the brothels upon payment of a fine. The extent of trafficking in women and girl children has reached alarming proportions, especially in Asian countries. Many women and girl children are trafficked across borders, often with the complicity of border guards. In one incident, five young prostitutes burned to death in a brothel fire because they had been chained to their beds. At

the same time, sex tours of developing countries are a well-organized industry in several European and other industrialized countries. The Special Rapporteur has called on Governments to take action to protect young girls from being recruited as prostitutes and to closely monitor recruiting agencies.

## **VIOLENCE AGAINST WOMEN MIGRANT WORKERS**

Female migrant workers typically leave their countries for better living conditions and better pay -- but the real benefits accrue to both the host countries and the countries of origin. For home countries, money sent home by migrant workers is an important source of hard currency, while receiving countries are able to find workers for low-paying jobs that might otherwise go unfilled.

But migrant workers themselves fare badly, and sometimes tragically. Many become virtual slaves, subject to abuse and rape by their employers. In the Middle East and Persian Gulf region, there are an estimated 1.2 million women, mainly Asians, who are employed as domestic servants. According to the independent human rights group Middle East Watch, female migrant workers in Kuwait often suffer beatings and sexual assaults at the hands of their employers.

The police are often of little help. In many cases, women who report being raped by their employers are sent back to the employer -- or are even assaulted at the police station. Working conditions are often appalling, and employers prevent women from escaping by seizing their passports or identity papers.

The report of the Special Rapporteur draws attention to the fact that there are many international instruments that can be used to prevent abuse against migrant women and suggests some measures to protect the human rights of migrant women.

## **PORNOGRAPHY**

Another concern highlighted in the Special Rapporteur's report is pornography, which represents a form of violence against women that "glamorizes the degradation and maltreatment of women and asserts their subordinate function as mere receptacles for male lust".

## **ENSURING THAT LAWS ARE OBEYED**

These examples illustrate some steps taken at the national level towards the eradication of violence against women. Combating and eradicating this scourge require enhanced and concerted efforts to protect women at the local, national and international levels. States have tended to adopt a passive attitude when confronted by cases of violations of women's rights by private actors. Most laws fail to protect victims or to punish perpetrators. Passing laws to criminalize violence against women is an important way to redefine the limits of acceptable behaviour.

States should ensure that national legislation, once adopted, does not go unenforced. 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. Society at large, including judges and police officers, must be educated to change the social attitudes and beliefs that encourage male violence.

## **CHALLENGING TRADITIONAL ATTITUDES**

The meaning of gender and sexuality and the balance of power between women and men at all levels of society must be reviewed. 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. They are considered as inferior and there is a strong belief that men are superior to them and even own them. Changing people's attitude and mentality towards women will take a long time -- at least a generation, many believe, and perhaps longer. Nevertheless, 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.

It is also important in order to prevent violence that non-violent means be used to resolve conflict between all members of society. Breaking the cycle of abuse will require concerted collaboration and action between governmental and non-governmental actors, including educators, health-care authorities, legislators, the judiciary and the mass media.

In 1998 violence against women remained one of the most intractable violations of women's human rights. In various forms it persisted in times of peace as well as in times of conflict. The perpetrators were as likely to be private actors as public officials. Women were beaten in their homes by intimate partners; raped and otherwise sexually assaulted during times of internal conflict by soldiers; sexually assaulted by law enforcement personnel while in their custody; raped in refugee camps by other refugees, local police, or the military; and targeted for sexual violence based on their low social status.

Several years of work by women's human rights movements produced gains in government actions to deter violence against women in a handful of countries in 1998. For example, Taiwan's legislature considered a bill that would fully criminalize rape and sexual abuse. Currently, rape is not automatically considered a criminal offense, and the state does not bring criminal charges in every rape case.

Although the criminal code makes rape illegal, the state will not proceed with the investigation of a rape case without the consent of the victim, many of

whom settle for monetary compensation out of court rather than press criminal charges. The bill would remove the option of an out-of-court settlement and would require the police automatically to file criminal charges in any rape or sexual abuse case that comes to their attention. In another step forward, Egypt's Supreme Administration Court upheld a governmental ban on the genital cutting of girls and women in late December 1997. The 1996 governmental ban had been challenged by conservatives who claimed that genital cutting was a legitimate religious and cultural practice with which the state should not interfere. The government began public education programmes in early 1998 about the health risks of genital cutting and announced its intent to impose penalties on doctors, midwives, and barbers who violated the ban.

Nevertheless, many government actions in response to violence against women were inadequate. Human Rights Watch investigations revealed that, while some governments focused legislative attention on domestic and sexual violence, such reform was undermined by structural barriers to women's meaningful access to legal redress and protection from further violence. Domestic violence victims faced nearly insurmountable obstacles when attempting to report assault. In countries from Bosnia to Peru, South Africa to Russia, authorities treated domestic violence as a lesser offense because it took place between intimate partners, and discouraged women from reporting assaults. Women in different countries told Human Rights Watch that, instead of helping victims to file complaints, police routinely accused them of being bad spouses, implying that their behavior somehow warranted the abuse.

In Peru, for example, domestic violence victims reported that police peppered them with questions about what they "had done" to their husbands to provoke a physical attack. In post-conflict Bosnia, we found that, routinely, police flatly refused to intervene in domestic violence disputes.

Sexual violence victims faced some of the same obstacles, including acute bias in the legal system. Human Rights Watch monitored four countries-Peru, Russia, South Africa, and Pakistan-where women victims of sexual violence undergo a forensic exam in order to gather evidence supporting their rape claims. These exams are essential to the case's proceeding successfully through the legal system. However, these forensic exams, while required by law, were rarely conducted in a way to gather complete and compelling evidence of sexual assault. In Pakistan, for example, the forensic exam concentrated almost exclusively on determining the state of the victim's hymen-a trend reported in other countries as well. Elsewhere, as in South Africa, forensic doctors were poorly trained and did not complete exams that were consistent with victims' injuries.

Governments were also remiss in preventing and condemning other forms of violence against women, such as violence in conflict and post-conflict situations and violence in state custody. Internal civil strife often provided the context in which women were targeted for sexual assault, as well as one of the reasons they fled their homelands for refugees camps, where they again were targets of sexual violence.

In 1998 Human Rights Watch investigated private actor violence against women in India and Indonesia; wartime violence and post-conflict abuse in Algeria, Bosnia, Sierra Leone, and Tanzania; and custodial abuse in the United States.

## **VIOLENCE BY PRIVATE ACTORS**

De jure discrimination, as well as customary practices, often kept women in a subordinate status in their communities. This unequal status made them targets for sexual and domestic violence. The failure of judicial systems to investigate thoroughly and condemn acts of domestic and sexual violence against women further diminished and entrenched women's second-class status through impunity. In 1997 Human Rights Watch conducted a series of investigations into the state's response to violence against women in Pakistan, Peru, Russia, and South Africa, where we found that women's complaints of domestic and sexual violence were often met with legal indifference and procedural and attitudinal obstacles. A year later, little had changed.

More often than not, it was government agents, in the form of local police, who were the first and most persistent obstacle to justice for rape and domestic violence complaints. Our work in different countries showed that police exercised undue and arbitrary authority regarding the types of complaints they accepted, and actively discouraged women from filing complaints—a pattern reported by women's advocates in other countries. For example, in Peru police routinely refused to process victims' complaints, conducted shoddy investigations, failed to offer victims protective orders, failed to remove violent men from the home, and blamed victims for the violence.

On International Women's Day, March 8, Pakistan's Prime Minister Nawaz Sharif reaffirmed his government's commitment to women's human rights yet failed to back this up with progress towards preventing widespread violence against women. Pakistani police still failed to investigate an alarming and fatal form of violence against women: bride burning. An August 1998 report on bride burning by the nongovernmental Progressive Women's Association (PWA) found that the government's response to this common type of violence against women remained negligent. PWA found that Pakistani women, particularly young brides, were still being burned in "accidental fires," usually from stoves and most often set by their husbands or in-laws. The Human Rights Commission of Pakistan (HRCP) reported that in 1997 in the Lahore newspapers alone, reports of stove burnings averaged more than four a week; three of every four (75 percent) women victims of stove burnings died.

The pattern of bias against domestic violence victims extended to the judiciary in the countries we researched. Women victims of domestic violence who were able to persuade the police to accept their cases for investigation were later hampered by judicial systems that valued family unity over the safety of women victims of domestic violence. For example, in Peru judges often referred married domestic violence victims and their batterers to counseling before charges could

be laid against the accused, with the alleged batterer remaining in the home. Rape victims in these countries fared just as poorly. They faced many of the same obstacles as victims of domestic violence. Police acted as gatekeepers and allowed their own stereotypes and biases about women's behavior or dress to jeopardize the investigation of cases. Often, women's complaints were met by disbelief and disregard for their privacy and security. Police skepticism towards rape cases compromised official investigations, effectively denying women's equality under the law. In one rape case documented by Human Rights Watch in Russia, police gave the defendant the victim's address and notified him that she had reported a rape. In Russia, in the rare instances when police did register reports, victims were subject to intrusions into their privacy during the course of the investigation, including psychological exams and interviews with the victims' friends and family.

Forensic doctors were another obstacle to justice for sexual violence in countries including Peru, South Africa, and Pakistan. According to the South African Department of Justice, the country has one of the highest rates of reported rape in the world. There was a rise from 105.3 per 100,000 in 1994 to 119.5 per 100,000 in 1996. District surgeons, those responsible for performing forensic exams on sexual assault victims, were often poorly trained in the collection of evidence in rape cases, reluctant to appear in court to affirm their findings, or unavailable for the timely examination of rape victims, and they unfairly vetted and prejudged victims, choosing to do thorough examinations only on those whom they deemed likely to be persuasive in court. In fact, a parliamentary subcommittee identified district surgeons as being among the biggest stumbling blocks to the successful prosecution and conviction of rapists. The South African government did begin to address this problem and released procedural guidelines for the treatment of sexual violence victims in 1998-guidelines aimed at health care professionals, prosecutors of rape, social welfare agencies, and others. Activists expressed hope that government officials would ensure that these far-reaching guidelines would be widely distributed and implemented.

Women's second-class status rendered them vulnerable to rape by intimate partners at home and by strangers on the street. In many countries, sexual violence against women carried no real probability of punishment or penalty, sending the message that these types of crimes were of no importance to the state. This acceptance of sexual violence against women was reflected and magnified elsewhere in times of national or regional unrest or civil strife, when women were targeted for rape as a continuation of the impunity for rape and sexual violence during times of peace. Sexual violence was perpetrated against women in times of conflict as a deliberate political policy of warring factions.

Whether civil unrest was directed at those groups believed to be financially better off or not a trusted part of the social fabric-as was the case of the violence directed at Indonesia's ethnic Chinese-or at those perceived as vastly inferior and challenging the social hierarchy-as was the case of violence directed at lower castes in India-the women of these distinct groups suffered the same fate: sexual assault.



In Indonesia, frustration about the economic crisis and political authoritarianism devolved into widespread civil unrest that ultimately removed President Soeharto from power. Just as much of the violence and looting were directed at the ethnic Chinese population, so were ethnic Chinese women reportedly singled out for rape and sexual assault.

The allegations of rape were turned into a political football rather than investigated seriously. Indonesian authorities used the rape allegations to further impugn the reputation of ethnic Chinese. Then they used the allegations to call into question the credibility of nongovernmental organizations. The Indonesian government's skepticism was based in part on the fact that no victims had come forward to the police. However, nongovernmental organizations working with rape victims noted that many were too ashamed to come forward, had fled the country, or were afraid of reporting the rape as police were widely believed to have been involved in the riots and the rapes themselves.

As of this writing and largely thanks to the efforts of Indonesian women's advocates, President Habibie had appointed a fact-finding commission to investigate the violence. Meanwhile, women's rights advocates continued to work with rape survivors, providing counseling, monitoring the government's response, and gathering evidence on the rape charges.

In some instances, socially determined characteristics such as caste affiliation rendered women more vulnerable to rape. In India, despite protective legislation, attacks against members of the lower castes continued to go unpunished. Sexual abuse and other forms of violence by high-caste men against lower-caste women have historically been a means of maintaining socio-economic divisions in India.

Upper-caste men, landlords, and the police have physically and sexually abused Dalit ("untouchable") women to suppress movements to demand payment of minimum wages, settle sharecropping disputes, or reclaim lost land. Cases of such abuse were documented by Human Rights Watch in 1998. Dalit women were targeted on the basis of both their sex and their caste. They are thought to be available for sexual abuse, and their occupations in agriculture or as prostitutes put them in frequent contact with men who can rape them with impunity. While women all over India found the criminal justice system unsympathetic to sexual assault, Dalit women also confronted officials who were hostile to their low caste status.

# 5

## **Women's Legal Protection: Legislative Safeguards**

The history of mankind is a history of repeated injuries and usurpations on the part of man towards women, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

He had never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners.

Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

He has made her, if married, in the eye of the law, civilly dead.

He has taken from her all right in property, even to the wages she earns.

He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.

He has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be

given, as to be wholly regardless of the happiness of women—the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands.

After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration.

He closes against her all the avenues to wealth and distinction, which he considers most honourable to himself. As a teacher of theology, medicine, or law, she is not known.

He has denied her the facilities for obtaining a thorough education— all colleges being closed against her.

He allows her in church, as well as State, but a subordinate position, claiming Apostolic authority for her exclusion from the ministry, and with some exceptions, from any public participation in the affairs of the Church.

He has created a false public sentiment by giving to the world a different code of morals for men and women, by which moral delinquencies which exclude women from society, are not only tolerated but deemed of little account in man.

He has usurped the prerogative of Jehovah himself, claiming it his right to assign for her a sphere of action, when that belongs to her conscience and her God.

He has endeavoured, in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.

Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.

In entering upon the great work before us, we anticipate no small amount of misconception, misrepresentation, and ridicule; but we shall use every instrumentality within our power to effect our object. We shall employ agents, circulate tracts, petition the State and national Legislatures, and endeavour to enlist the pulpit and the press in our be-half. We hope this Convention will be followed by a series of Conventions, embracing every part of the country.

Firmly relying upon the final triumph of the Right and the True, we do this day affix our signatures to this declaration.

During the convention, the participants also adopted the following resolutions:

Whereas, The great precept of nature is conceded to be, “that man shall pursue his own true and substantial happiness.” Blackstone, in his Commentaries, remarks that this law of Nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over

all the globe, in all countries and at all times; no human laws are of any validity if contrary to this, and such of them as are valid, derive all their force, and all their validity, and all their authority, mediately and immediately, from this original; therefore,

Resolved, That such laws as conflict, in any way, with the true and substantial happiness of woman, are contrary to the great precept of nature and of no validity, for this is “superior in obligation to any other.”

Resolved, That all laws which prevent women from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority.

Resolved, That woman is man’s equal—was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such. Resolved, That the women of this country ought to be enlightened in regard to the laws under which they live, that they may no longer publish their degradation, by declaring themselves satisfied with their present position, nor their ignorance, by asserting they have all the rights they want.

Resolved, That inasmuch as man, while claiming for himself intellectual superiority, does accord to woman moral superiority, it is pre-eminently his duty to encourage her to speak, and teach as she has an opportunity, in all religious assemblies.

Resolved, That the same amount of virtue, delicacy, and refinement of behaviour that is required of woman in the social state, should also be required of man, and the same transgressions should be visited with equal severity on both man and woman.

Resolved, That the objection of indelicacy and impropriety, which is so often brought against woman when she addresses a public audience, comes with a very ill grace from those who encourage, by their attendance, her appearance on the stage, the concert, or in feats of the circus.

Resolved, That woman has too long rested satisfied in the circumscribed limits which corrupt customs and a perverted application of the Scriptures have marked out for her, and that it is time she should move in the enlarged sphere which her great Creator has assigned her.

Resolved, That it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise.

Resolved, That the equality of human rights results necessarily from the fact of the identity of the race in capabilities and responsibilities.

Resolved, therefore, That, being invested by the Creator with the same capabilities, and the same consciousness of responsibility for their exercise, it is demonstrably the right and duty of woman, equally with man, to promote every righteous cause by every righteous means; and especially in regard to the great subjects of morals and religion, it is self-evidently her right to participate with her brother in teaching them, both in private and in public, by writing and by speaking, by any instrumentalities proper to be used, and in any assemblies

proper to be held; and this being a self-evident truth, growing out of the divinely implanted principles of human nature, any custom or authority adverse to it, whether modern or wearing the hoary sanction of antiquity, is to be regarded as a self-evident falsehood, and at war with mankind.

Resolved, That the speedy success of our cause depends upon the zealous and untiring efforts of both men and women, for the over-throw of the monopoly of the pulpit, and for the securing to woman an equal participation with men in the various trades, professions, and commerce [Bartlett and Harris, 1998].

The Declaration of Sentiments shows that, from the start, a belief in sex equality drove the feminist campaign to win the vote. To feminist minds, women's inability to vote was a central feature of their oppression by men: "Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides".

Women's advocates pressed for the vote not only as a means to improve women's lives, but also because it would symbolize recognition of women's "equal personal rights and equal political privileges with all other citizens". As the first right of a citizen, suffrage means citizenship; it is the very substance of self-government.

On November 1, 1872, while "reading her morning paper," the *Rochester Democrat and Chronicle*, Susan B. Anthony noticed an editorial urging readers to register to vote. She and her sister immediately marched down to the Board of Registry, housed in a local barbershop, and demanded that the inspectors permit them to register. Anthony responded to the inspectors' initial refusal with an aggressive verbal assault, launching into a thorough argument as to why the U.S., Constitution guaranteed women suffrage. Unable to defend their position against Anthony and under the strong advice of the U.S., supervisor present that day, the young inspectors allowed Anthony to register. The evening newspapers covered the story extensively, and within days, fifty Rochester women had registered, fourteen in Anthony's ward alone (Winkler, 2001).

The Grant administration, having won reelection, informed Anthony three weeks later, on Thanksgiving Day, that it was bringing criminal charges against her. She was charged with fraudulent voting in violation of the Civil Rights Act of 1870, a federal law passed to prevent the Ku Klux Klan and other southern whites from casting multiple ballots to dilute the effect of freedmen's votes (Winkler, 2001).

The logic was based on the view that women were not individual citizens but extensions of their husbands and fathers. Thus, a vote by a woman was viewed by the legal system as a second vote by the man she was most closely related to. Ironically, Anthony herself was not allowed to speak during her trial. As a woman, she was declared by Judge Hunt to be incompetent to testify on her own behalf. Unlike *United States v. Anthony* (1873), the case of *Minor v. Happersett* (1874) was at least allowed to reach the U.S., Supreme Court.

The Supreme Court rejected Virginia Minor's assertion that the right to vote was one of the privileges and immunities of citizenship under the Fourteenth

Amendment to the Constitution. The Court unanimously held that although women were citizens, the framers had never intended to enfranchise them.

After these failures, the suffrage movement essentially gave up on the courts and turned to the political arena, pursuing constitutional change.

## **DOWRY LAW IN INDIA**

Payment of a dowry, gift—often financial, has a long history in many parts of the world.

In India, the payment of a dowry was prohibited in 1961 under Indian civil law and subsequently by Sections 304B and 498a of the Indian Penal Code were enacted to make it easier for the wife to seek redress from potential harassment by the husband's family.

Dowry laws have come under criticism as they have been misused by women and their families.

### **DOWRIES**

Gifts given by the parents of the bride are considered “stridhan”, *i.e.*, property of the woman, traditionally representing her share of her parent's wealth.

### **THE 1961 DOWRY PROHIBITION ACT**

Introduced and taken up by then Indian law minister Ashoke Kumar Sen, this historical act prohibits the request, payment or acceptance of a dowry, “as consideration for the marriage”, where “dowry” is defined as a gift demanded or given as a precondition for a marriage. Gifts given without a precondition are not considered dowry, and are legal. Asking or giving of dowry can be punished by an imprisonment of up to six months, or a fine of up to Rs. 15000 or the amount of dowry whichever is higher and imprisonment up to 5 years. It replaced several pieces of anti-dowry legislation that had been enacted by various Indian states.

### **IPC SECTION 304B**

This Section of the Indian Penal Code was inserted by a 1986 amendment. The Dowry deaths law defines a ‘dowry death’ as the death of a woman caused by any burns or bodily injury or which does not occur under normal circumstances within seven years of her marriage.

For a woman's death to be a dowry death, it must also be 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.

If this is proved, the woman's husband or relative is required to be deemed to have caused her death. Whoever commits dowry death is required to be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.



## IPC SECTION 498A

*Section 498A was inserted into the penal code in 1983 it reads:*

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.

In practice, cruelty is taken to include the demanding of a dowry. This section is non-bailable, non-compoundable (*i.e.*, it cannot be privately resolved between the parties concerned) and cognizable (*i.e.*, the police can arrest the accused without investigation or warrants) on a report from a woman or close relative. Another examples of a cognizable law in India was the Prevention of Terrorist Activities Act. Police often file charges against the husband, his parents and other relatives (whoever being named on the complaint by the wife or her close relatives) and put them in jail. There is no penalty (even a fine) for filing a false case. Many individuals have claimed this is being abused by the wife or her close relatives.

In urban India, the majority of families have inadequate knowledge regarding section 498A of the Indian Penal Code, 1860. The Malimath committee in 2003 proposed making amendments to this section although such amendments have been opposed by women's groups and radical feminists.

The Centre for Social Research India has released a research report opposing amendments to section 498A. According to this report, in the studied cases there were no convictions based solely on section 498A. Although the report states that 60.5 percent of the studied cases were falsified. They also state that many people believe the law has been abused by "educated and independent minded women." A police official asserted that in his district one-third of dowry murder cases were found totally false by the police..

However, on December 17, 2003, the then Minister of State for Home Affairs, I.D. Swami said: "There is no information available with the Government to come to the conclusion that many families in India are suffering due to exaggerated allegations of harassment and dowry cases made by women against their husbands and other family members involving them in criminal misappropriation and cruelty." On 20 July 2005, Justices Arijit Pasayat and H.K. Seema of the Indian Supreme Court declared Section 498A to be constitutional." The object is to strike at the root of dowry menace. But by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used as a shield and not an assassin's weapon. If [the] cry of "wolf" is made too often as a prank, assistance and protection may not be available when the actual wolf appears," the Bench said.. Several reports of the abuse of Section 498A have involved couples based outside India especially in the US & Canada. The United States Department of State has published the following travel warning: A number of US men who have come to India to marry Indian nationals have been arrested and charged with crimes related to dowry extraction. Many of the charges stem from the US citizen's inability to provide an immigrant visa for his prospective spouse to travel immediately to

the United States. The courts sometimes order the US citizen to pay large sums of money to his spouse in exchange for the dismissal of charges. The courts normally confiscate the American's passport, and he must remain in India until the case has been settled.

It is stated in Travel Advisory by US, since the police may arrest anyone who is accused of committing a crime (even if the allegation is frivolous in nature), the Indian criminal justice system is often used to escalate personal disagreements into criminal charges.

This practice has been increasingly exploited by dissatisfied business partners, contractors, estranged spouses, or other persons with whom the US citizen has a disagreement, occasionally resulting in the jailing of US citizens pending resolution of their disputes. At the very least, such circumstances can delay the US citizen's timely departure from India, and may result in an unintended long-term stay in the country.

Corruption in India, especially at local levels, is a concern, as evidenced by Transparency International's Corruption Perception Index of 3.5, ranking India in 72nd place of the world's countries.

In a well publicized case, Dr. Balamurali Ambati, who earned his MD at age 17, and his family were detained in India for over three years in a suit related to alleged dowry demands by the family for his brother's wife Archana, which delayed Dr. Ambati's entry to the ophthalmology programme for two years, leaving him to begin his residency in 1998. All charges against him were dismissed in October 1996 and all his family members were acquitted in June 1999. During the course of the trial the Ambatis produced a tape in which the father of Archana demanded US \$500,000 to drop all the charges although the details of this particular case are still debated in India.

## **OPPRESSION OF WIDOWS**

"In every fourth household there is a widow. And with few exceptions, she is under tremendous economic, social and psychological pressure.

The problem of India's widows is not confined to Vrindavan, Mathura, Tirupathi and the other holy towns where widows have traditionally congregated. According to the 1991 census, there are 33 million widows in India, 50 percent of whom are over the age of 50. Only a very small minority of widows could claim to be comfortable, secure and well-looked-after.

So many are the deprivations that a widow faces, that the mortality rate for widows is a shocking 85 percent higher than it is for married women. India has amongst the highest prevalence of widowhood in the world. The incidence of widowhood rises sharply with age: 64 percent among women aged 60 and above, and 80 percent among women aged 70.

An Indian woman who survives to old age is therefore almost certain to become a widow. In contrast, only 2.5 percent of Indian men are widowers...

A sample survey revealed that though 88 percent of widows remain in their deceased husband's village, less than 3 percent are allowed to stay in the

same house. The others are either abandoned, often by their own sons to appropriate the father's property, or sent back to their parents' houses.

Widow remarriage is prohibited only in the upper castes. In most other cases, widows are allowed to remarry- including levirate marriages to their brothers-in-law- but often don't choose to, either because of their children, or because a man agreeing to marry a widow is generally impoverished.

An extensive survey of widows conducted recently across seven states reveals the immense psychological and social pressures that widows are under even today: they are accused of being 'responsible' for their husband's death. They are pressurised to observe restrictive codes of dress and behaviour. They are excluded from religious and social life. They are physically and sexually abused. And they are deprived of their property.

## **DOWRY DEATHS AND DOWRY LAW IN INDIA**

Dowry deaths are the deaths of young women who are murdered or driven to suicide by continuous harassment and torture by husbands and in-laws in an effort to extort an increased dowry. Dowry deaths are reported in various South Asian countries such as India, Pakistan, and Bangladesh. Dowry death is considered one of the many categories of violence against women in South Asia. Most dowry deaths occur when the young woman, unable to bear the harassment and torture, commits suicide. Most of these suicides are by hanging, poisoning or by fire. Sometimes the woman is killed by setting her on fire; this is known as "bride burning", and sometimes disguised as suicide or accident. According to Indian police, every year it receives over 2,500 reports of bride-burning, while human rights organisations in Pakistan report over 300 deaths per year. The Indian National Crime Records Bureau (NCRB) reports that there were about 6787 dowry death cases registered in India in 2005. Incidents of dowry deaths during the year 2005 (6,787) have increased significantly by 46.0 per cent over 1995 level (4,648).

'The 1961 Dowry Prohibition Act' prohibits the request, payment or acceptance of a dowry, "as consideration for the marriage". where "dowry" is defined as a gift demanded or given as a precondition for a marriage. Gifts given without a precondition are not considered dowry, and are legal. Asking or giving of dowry can be punished by an imprisonment of up to six months, or a fine of up to Rs. 5000. It replaced several pieces of anti-dowry legislation that had been enacted by various Indian states. Indian women's rights activists campaigned for more than 40 years to contain dowry deaths without much success. The Dowry Prohibition Act 1961 and the more stringent Section 498a of IPC (enacted in 1983) did not achieve the desired result. Using the Protection of Women from Domestic Violence Act 2005 (PWDVA) implemented in 2006, a woman can put a stop to the dowry harassment by approaching a domestic violence protection officer. Due to demands by women's rights activists, the Indian government has modified property inheritance laws and permitted daughters to claim equal rights to their parental property. Some religious groups

have urged the people to curb the extravagant spendings during the marriages. Bride-burning is the practice of dousing a new bride with kerosene and setting her ablaze to die. It is considered the most common form of dowry deaths. It is also known as a bride's suicide, or a bride's murder at the hands of her husband and/or in-laws soon after the marriage since they are dissatisfied with the amount of the dowry and, in most cases, could not extort additional dowry. Dowry is defined as "movable or immovable property that the bride's father or guardian gives to the bridegroom, his parents, or his relatives as a condition to the marriage, and often under duress, coercion, or pressure." In addition, the dowry paid is usually commensurate with and proportional to the bridegroom's class, socioeconomic status, physical appearance, and education.

There are at least four prevailing views on the origins and persistence of the contemporary practice of dowry that leads to bride-burning. These views are important in setting the foundation for subsequent discussions on conflict analysis and future resolution of this human rights crime. These views also shed light on why bride-burning continues today despite varied enacted domestic legislation, international law protocols, and grass-roots movements to halt the practice of dowry. The most prevailing view relates to the perception and socialization of women in a highly patriarchal society, such as India. Even before she is born, Indian mythology has already defined a woman's role in society. The myths consistently portray women as economically and emotionally dependent on men as "mothers, wives, sisters, and daughters." From the moment she is born, a woman in India "is considered a burden," an extra mouth to feed. Because of the caste system and the very narrowly defined roles of men and women, women are considered an economic liability. Men are considered an asset to the family because they can perform manual labour, carry on the family line, and are expected to care for their aging parents, thus providing economic security to the family. On the other hand, women are conditioned from birth to be subservient to their husbands. The girl's family sees her as "economic bondage" for whom they will have to give up their tremendous resources and material wealth as dowry. This scenario is further complicated by the fact that once a woman is married, society mandates obedience to her husband. Therefore, any disobedience is quickly silenced because it brings disgrace to both the bride and her family. Divorce is highly discouraged and women do not accuse their husband of violence, even in the most dire circumstances. They will suffer in silence instead. Consequently, because of societal pressures, relatives, friends, or neighbours will not come to the aid of an Indian bride if she claims domestic abuse. Once she leaves her birth family's home, she is alone, considered an outsider even in her new family, and a virtual slave.

A second predominant reason cited by scholars is the new-found consumerism that has caused countries, such as India, to become greedy. This greed results in using dowry as a means to climb the social ladder, achieve economic security, accumulate material wealth, and "keep up with the Jonasas [sic]." Because of consumer greed, the practice of dowry has spread to those communities and

classes who traditionally do not practice dowry. Today, dowry has spread to all religious communities, including the Christian and Muslim communities in India, as a means to attain material wealth.

Furthermore, the insidious nature of consumer greed perpetuates the need to demand more dowry since the financial value of the dowry represents the social and economic status of both families and the extent to which either family can co-exist in the same social circle within India's caste system. Unfortunately, because of patriarchal attitudes, the bridegroom and his family have greater bargaining power and usually set the dowry rates. Furthermore, the economic model used to calculate the dowry takes into account the bridegroom's education and future earning potential while the bride's education and earning potential are only relevant to her societal role of being a better wife and mother.

Consequently, the bridegroom's demand for a dowry will normally exceed the annual salary of a typical Indian family man. The taste of wealth only wets the appetite for more, leading to a continuous cycle of extortion for more dowry at the expense of the hostage bride. A third, primarily historical reason was to prevent the spread of the Muslim religion and to fight off Muslim invasions. During the thirteenth and fourteenth centuries, Hindu culture and religion came under the attack of Muslim invasions. To protect Hindu culture and religious customs, Hindus held steadfast to their castes and agreed to inter-marry only "within their castes and sub-castes."

However, due to poor economic conditions, parents of daughters began to bid for bridegrooms in an effort to find a husband of sufficient economic and social standing. This gave way to the practice of dowry being a form of settlement in marriage rather than a gift. The practice of dowry spread further to the lower castes and marriage became a commercial, contractual arrangement as "Hindu traditions suffered a period of at least 333 years of continuous anarchy during which survival was top priority...."<sup>44</sup> The practice of dowry resulted in the degeneration of old Vedic traditions and scriptures, which held men and women as equal in status, and today thrives on the insatiable perception of material wealth as the means to survive.

Finally, scholars argue that the practice of dowry remains as a remnant of British rule and India's experiences as a British colony. Before India was a British colony, there were "different forms of marriage." While the high castes (*e.g.*, Brahmins) engaged in the practice of dowry, other castes recognized marriages with varied rituals, including one in which the groom gave gifts to the bride and her family (bride price).

Under British rule, the government reinforced the dowry form of marriage by discouraging other forms of marriage and considered non-dowry marriages to be invalid. By the mid-twentieth century, the various forms of Hindu marriage that existed were discredited, leaving only the Brahmin form of marriage consisting of a dowry. Therefore, historically, Indian women and particularly Indian brides have been slaves to an ancient system of survival since 300 B.C., for over 2,300 years. Now, it is a matter of life or death *only* for these brides as

they are held hostage to acts of torture, degradation, humiliation, and extortion. If this does not shame the international consciousness of humanity, nothing will. While it is likely that each of these theories have contributed to the existing practice of dowry, thus resulting in the continuation of bride-burning, none of these explanations excuse the continued practice of bride-burning in violation of domestic and international laws.

Statistically, bride burning is on the rise. Convictions of perpetrators are nearly non-existent, and the international community closes its eyes while there is a slow, statistical genocide of women, specifically Indian women, who are burned alive or tortured to death, everywhere, every single day at the rate of seventeen (17) women per day. Over the course of a 365-day per year calendar, the result is intentional, pre-meditated murder of approximately 6,200 women per year on average!

## **WOMEN AND CRIME**

Over 32000 murders, 19,000 rapes, 7500 dowry deaths and 36500 molestation cases are the violent crimes reported in India in 2006 against women. There are many instances of crime especially against women go unreported in India.

These are figures released by the National Crime Records Bureau recently. While Madhya Pradesh is worst off among the states, the national capital New Delhi continues to hold on to its reputation of being the most unsafe city in India. Delhi takes the top slot for crimes ranging from murders and rapes to dowry deaths and abductions.

It reflects country's law and order situation when its capital is a cauldron of crime. Instead of leading the way in tackling crime, Delhi only seems to do worse year after year. For instance while the national crime rate declined negligibly by .02 % in 2006; Delhi's rate grew to 357.2 more than double the national average of 167.7. Rape is the fastest growing crime in the country today and as many as 18 women are assaulted in some form or the other every hour across India. Over the last few months cases of rapes and assault have made it to the headlines with alarming frequency. Mumbai watched with shame as an ugly mob attacked women on New Year's Eve.

In Latur a 14 year old was raped and killed by four young men. In Konark four men were charged with dragging a woman out of a bus and gang raping her. It is an ordeal simply to file a police report and the investigations thereafter have been stories of apathy and down right humiliation meted out to the victims. Where convicted, punishments have ranged from capital punishments to a day in jail.

Equally horrific are news reports of foreign tourists being sexually assaulted. Recently an American was molested in Pushkar, a British journalist raped in Goa, Canadian girls attacked in Kumarakom to list the few instances.

It looks like that India as a nation has ceased to know how to treat women as human beings who have a right to dignity and safety. The crime against tourists



is against our culture of ‘atithi devo bhava’ Government has decided to meet and discuss with the state government the safety of women tourists as a reaction from the fear that such incidents will impact India’s image.

Despite the trauma women across all classes are reporting crimes such as rape and assault and do not feel helpless or abandoned by family or society as was the prevalent case before. Society is changing and government is forced to take action as it has run out of excuses such as society’s mindset or class divide.

## **THE SOFT TARGETS**

Violence affects the lives of millions of women worldwide, in all socio-economic and educational classes. It cuts across cultural and religious barriers, impeding the right of women to participate fully in society.

Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female circumcision. All are violations of the most fundamental human rights.

In a statement to the Fourth World Conference on Women in Beijing in September 1995, the United Nations Secretary-General, Boutros Boutros-Ghali, said that violence against women is a universal problem that must be universally condemned. But he said that the problem continues to grow.

The Secretary-General noted that domestic violence alone is on the increase. Studies in 10 countries, he said, have found that between 17 per cent and 38 per cent of women have suffered physical assaults by a partner.

In the Platform for Action, the core document of the Beijing Conference, Governments declared that “violence against women constitutes a violation of basic human rights and is an obstacle to the achievement of the objectives of equality, development and peace”.

## **COMMITMENTS BY GOVERNMENTS**

Governments agreed to adopt and implement national legislation to end violence against women and to work actively to ratify all international agreements that relate to violence against women. They agreed that there should be shelters, legal aid and other services for girls and women at risk, and counselling and rehabilitation for perpetrators.

Governments also pledged to adopt appropriate measures in the field of education to modify the social and cultural patterns of conduct of men and women. And the Platform called on media professionals to develop self-regulatory guidelines to address violent, degrading and pornographic materials while encouraging non-stereotyped, balanced and diverse images of women.

## **DEFINING GENDER-BASED ABUSE**

The Declaration on the Elimination of Violence against Women is the first international human rights instrument to exclusively and explicitly address the issue of violence against women. It affirms that the phenomenon violates, impairs or nullifies women’s human rights and their exercise of fundamental freedoms.

The Declaration provides a definition of gender-based abuse, calling it “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

*The definition is amplified in article 2 of the Declaration, which identifies three areas in which violence commonly takes place:*

- Physical, sexual and psychological violence that occurs in the family, including battering; sexual abuse of female children in the household; dowry-related violence; marital rape; female genital mutilation and other traditional practices harmful to women; non-spousal violence; and violence related to exploitation;
- Physical, sexual and psychological violence that occurs within the general community, including rape; sexual abuse; sexual harassment and intimidation at work, in educational institutions and elsewhere; trafficking in women; and forced prostitution;
- Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

## **GROUNDWORK IS LAID IN VIENNA**

The importance of the question of violence against women was emphasized over the last decade through the holding of several expert group meetings sponsored by the United Nations to draw attention to the extent and severity of the problem. In September 1992, the United Nations Commission on the Status of Women established a special Working Group and gave it a mandate to draw up a draft declaration on violence against women. The following year, the United Nations Commission for Human Rights, in resolution 1993/46 of 3 March, condemned all forms of violence and violations of human rights directed specifically against women.

The World Conference on Human Rights, held in Vienna in June 1993, laid extensive groundwork for eliminating violence against women. In the Vienna Declaration and Programme of Action, Governments declared that the United Nations system and Member States should work towards the elimination of violence against women in public and private life; of all forms of sexual harassment, exploitation and trafficking in women; of gender bias in the administration of justice; and of any conflicts arising between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. The document also declared that “violations of the human rights of women in situations of armed conflicts are violations of the fundamental principles of international human rights and humanitarian law”, and that all violations of this kind — including murder, systematic rape, sexual slavery and forced pregnancy — “require a particularly effective response”.

## WOMEN AND THE LAW

Until relatively recently, women were legally in-visible. Inheritance laws passed property from fathers to sons, and marriage laws passed women from fathers to husbands as if they were property. Children were the property of their father and belonged to their father in the case of divorce. Even the money or property that women owned independently before marriage became the property of the husband on marriage.

These legal patterns have existed in both Western and Eastern cultures. While it is beyond the scope of this chapter to examine the anthropological aspects of why this pattern emerged, it is not difficult to see how it was maintained: by preventing women access to a legal voice, through either standing in court or the vote, and by preventing women from accumulating their own wealth, there have been few means of enforcing a more equitable status for women. Ultimately, change began through the efforts of women to organize themselves—to gain power in numbers where it was not available any other way. In the United States, the first Women's Rights Convention in Seneca Falls, New York, on July 19 and 20, 1848, represents a starting point for organized action to change the legal status of women. The convention produced the Declaration of Sentiments and Resolutions, modeled after the Declaration of Independence. The list of grievances in the declaration, which follows, not only contained an attack on specific discriminatory statutes but also provided a statement of fundamental feminist principles, attacking the "supremacy of man," the unequal allocation of power in family, state, and church, and the different moral codes applied to men and women (Becker, Bowman, & Torrey, 1994).

## WOMEN RAPE LAWS IN INDIA

"The law of rape is not just a few sentences. It is a whole book, which has clearly demarcated chapters and cannot be read selectively. We cannot read the preamble and suddenly reach the last chapter and claim to have understood and applied it."

Kiran Bedi., Joint Commissioner, Special Branch.

In the Mathura rape case, wherein Mathura- a sixteen year old tribal girl was raped by two policemen in the compound of Desai Ganj Police station in Chandrapur district of Maharashtra.

Her relatives, who had come to register a complaint, were patiently waiting outside even as the heinous act was being committed in the police station. When her relatives and the assembled crowd threatened to burn down the police chowky, the two guilty policemen, Ganpat and Tukaram, reluctantly agreed to file a panchnama. The case came for hearing on 1<sup>st</sup> June, 1974 in the sessions court. The judgment however turned out to be in favour of the accused. Mathura was accused of being a liar. It was stated that since she was 'habituated to sexual intercourse' her consent was voluntary; under the circumstances only sexual intercourse could be proved and not rape.

On appeal the Nagpur bench of the Bombay High Court set aside the judgment of the Sessions Court, and sentenced the accused namely Tukaram and Ganpat to one and five years of rigorous imprisonment respectively. The Court held that passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse.

However, the Supreme Court again acquitted the accused policemen. The Supreme Court held that Mathura had raised no alarm; and also that there were no visible marks of injury on her person thereby negating the struggle by her.

The Court in this case failed to comprehend that a helpless resignation in the face of inevitable compulsion or the passive giving in is no consent. However, the Criminal Law Amendment Act, 1983 has made a statutory provision in the face of Section.114 (A) of the Evidence Act, which states that if the victim girl says that she did no consent to the sexual intercourse, the Court shall presume that she did not consent.

In Mohd.Habib Vs State, the Delhi High Court allowed a rapist to go scot-free merely because there were no marks of injury on his penis- which the High Court presumed was a indication of no resistance. The most important facts such as the age of the victim (being seven years) and that she had suffered a ruptured hymen and the bite marks on her body were not considered by the High Court. Even the eye- witnesses who witnessed this ghastly act, could not sway the High Court's judgment.

Another classic example of the judicial pronouncements in rape cases is the case of Bhanwari Devi, wherein a judge remarked that the victim could not have been raped since she was a dalit while the accused hailed from an upper caste- who would not stoop to sexual relations with a dalit. In another instance of conscience stirring cases, Sakina- a poor sixteen year old girl from Kerala, who was lured to Ernakulam with the promise of finding her a good job, where she was sold and forced into prostitution. There for eighteen long months she was held captive and raped by clients. Finally she was rescued by the police- acting on a complaint filed by her neighbour.

With the help of her parents and an Advocate, Sakina filed a suit in the High Court- giving the names of the upper echelons of the bureaucracy and society of Kerala.

The suit was squashed by the High Court, while observing that ' it is improbable to believe that a man who desired sex on payment would go to a reluctant woman; and that the version of the victim was not so sacrosanct as to be taken for granted.'

Whereas, in State of Punjab Vs. Gurmit Singh, the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of loose character.

The Supreme Court has in the case of State of Maharashtra Vs. Madhukar N. Gardikar, held that "the unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes. She is

entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard.”

Also the Bandit Queen case, which depicts the tragic story of a village girl. Phoolan Devi- who was exposed from an early age to the lust and brutality of some men. She was married to a man old enough to be her father. She was beaten and raped by him. She was later thrown out of the village- accused of luring boys of the upper caste. She was arrested by the police and subjected to indignation and humiliation. Was also kidnapped and raped by the leader of dacoits and later by the leader of a gang of Thakurs- who striped her naked and paraded her in front of the entire village. This is truly one story that shows the apathy of the existing society. In *Chairman, Railway Board Vs. Chandrima Das*, a practicing Advocate of the Calcutta High Court filed a petition under Article.226 of the Constitution of India against the various railway authorities of the eastern railway claiming compensation for the victim (Smt. Hanufa Khatoon)- a Bangladesh national- who was raped at the Howrah Station, by the railway security men. The High Court awarded Rs.10 lacs as compensation.

*An appeal was preferred and it was contended by the state that:*

- (a) The railway was not liable to pay the compensation to the victim for she was a foreigner.
- (b) That the remedy for compensation lies in the domain of private law and not public law. *i.e.*, that the victim should have approached the Civil Court for seeking damages; and should have not come to the High Court under Article.226.

*Considering the above said contentions, the Supreme Court observed:*

*“Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would be avoidable under public law. It was more so, when it was not a mere violation of any ordinary right, but the violation of fundamental rights was involved- as the petitioner was a victim of rape, which a violation of fundamental right of every person guaranteed under Article.21 of the Constitution.”*

The Supreme Court also held that the relief can be granted to the victim for two reasons- firstly, on the ground of domestic jurisprudence based on the Constitutional provisions; and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948 which has international recognition as the ‘Moral Code of Conduct’- adopted by the General Assembly of the United Nation.

After having studied the case laws, it is necessary to also study the definition of Rape as given in the Indian Penal Code, 1860.

*As per Section.375 of IPC a man is said to commit the offence of rape with a woman under the following six circumstances:*

1. Sexual intercourse against the victims will,
2. Without the victims consent,

3. With her consent, when her consent has been obtained by putting her or any person that she may be interested in fear of death or hurt,
4. With her consent, when the man knows that he is not her husband,
5. With her consent, when at the time of giving such consent she was intoxicated, or is suffering from unsoundness of mind and does not understand the nature and consequences of that to which she gives consent,
6. With or without her consent when she is under sixteen years of age.

Further explanation provided to the section states that penetration is sufficient to constitute the sexual intercourse necessary to constitute the offence of rape, whereas the exception leaves out marital rape altogether if the wife is not under fifteen years of age.

### **MARITAL EXCEPTION**

In *R Vs. R*<sup>12</sup>, the House of Lords widened the scope of criminal liability by declaring that the husband could be charged as a principal offender in the rape of his wife. This decision seems to have obliterated the protection of the husband from such prosecution under the doctrine of marital exemption. This exemption was based upon the belief under which the wife was regarded as the husband's chattel. She was supposed to have given a general consent to her husband as a natural implication of the marriage.

This has now become an outdated view of marriage in England. However, the above decision of the House of Lords has not been followed in India- where marital exemption to the husband 'still exists'.

*Section. 375 therefore requires:*

- (a) Sexual intercourse by a man with a woman;
- (b) The sexual intercourse must be under any of the six circumstances given in the section.

### **CRIMINAL LAW AMENDMENT ACT, 1983**

The Criminal Law Amendment Act has substantially changed Sections 375 and 376 of the IPC. Several new sections have been introduced therein- viz. Sections 376(A), 376(B), 376(C) & 376(D) of the IPC.

Section 376(A) punishes sexual intercourse with wife without her consent by a judicially separated husband.

Section 376(B) punishes for sexual intercourse by a public servant with a woman in custody.

Section 376(C) punishes sexual intercourse by superintendent of jail, remand house, etc., whereas,

Section 376(D) punishes sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital.

These new sections have been introduced with a view to stop sexual abuse of women in custody, care and control by various persons- which though not amounting to rape were nevertheless considered highly reprehensible.



## ATTEMPT TO RAPE

In cases where an indecent assault is made upon the person of a woman, but where rape is not committed- the culprit is charged with Section.354 of IPC, because unless the Court is satisfied that there was determination in the accused to gratify his passion at any cost, and inspite of all resistance, such person is not charged with rape.

Section.354 of the IPC prescribes punishment for anyone who assaults or uses criminal force to any woman with an intent to outrage her modesty.

An indecent assault upon a woman is punishable under this section. Rape is punished under Section.376; but the offence under this Section is of less gravity than rape. And also because a person who is guilty of attempting rape cannot be allowed to escape with the lesser penalty of this section.

An indecent assault, *i.e.*, an assault which right minded persons would consider as indecent- accordingly any evidence explaining the defendants conduct, or whether any admission by him or otherwise is admissible to establish whether he intended to commit an indecent assault, as is stated under Section.21 sub clause (2) of the Evidence Act, which reads:

Section.21 (2): An admission may be proved by or on behalf of the person making it, when it consists of statements of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

## IMPEDIMENTS TO JUSTICE

In the present circumstances when offences against women are on the rise- when young girls are raped by their doctors, by presidential guards in broad daylight, the definition of rape to be of any deterrence- falls extremely inadequate. It does not address forced penetration of objects and parts of the body into the vagina and anus; and forced oral or anal intercourse.

It also does not recognize other forms of sexual assaults- like protracted sexual assault by relatives, marital rape, *etc.*, as aggravated forms of rape. This causes grave injustice to many victims. In many cases of child rape, the child has been penetrated through fingers or by objects or been force to perform oral or anal sex; yet this is not considered rape by the Courts.

Adding to this is Section. 155(4) of the Evidence Act, which allows the victim to be questioned of her past sexual history- which the defence uses to humiliate the victim in the Courtroom.

One of the major obstacles in delivering justice in rape cases is the poor quality of investigations. The reason behind this ranges from gender bias and corruption to the general inefficiency of the police. In many cases the police have even refused to lodge the FIR or have lodged incomplete FIR.

The victims are not taken for prompt medical examination, because in cases of rape, or attempt to rape- medical examination of the victim and of

the accused soon after the incident often yields a wealth of corroborative evidence. Therefore, such an opportunity should not be lost by the police.

The manner in which some courts have interpreted the law or assessed the evidence has often proved to be an obstacle also. In spite of Supreme Court judgments to the contrary, lower court judges often insist on evidence of physical resistance or marks of injuries to hold that a woman has not consented. A woman's evidence without corroboration is not considered sufficient. The long time that is taken to complete a rape trial often by allowing senseless adjournments; and the giving of evidence by the victim in the presence of the accused and the harsh cross examination in the Court are some other major obstacles.

As observed by Krishna Iyer, J. in Rafique's case,

*"When a woman is ravished, what is inflicted is not mere physical injury but the deep sense of some deathless shame... judicial response to Human Rights cannot be blunted by legal bigotry."*

Therefore rape laws in order to be of great deterrence, must have a cooperative victim, professional investigation, diligent prosecution; and an expeditious trial. For otherwise it shall not be the law, that fails, but the applicants, the process and application.

Failure of law reflects the failure of the society to protect and serve humanity. In view of the above, the Supreme Court has laid down the following guidelines for the trial of rape cases:

1. The complaints of sexual assault cases should be provided with legal representation. Such a person should be well acquainted. The Advocates role should not merely be of explaining to the victim the nature of the proceedings, to prepare for the case and assist her, but to provide her with guidance as to how she might obtain help of a different nature from other agencies- for e.g., psychiatric consultation or medical assistance.
2. Legal assistance should be provided at the police Station, since the victim may be in a distressed state. Guidance and support of a lawyer at this stage would be of great help.
3. The police should be under a duty to inform the victim of her right to a counsel before being interrogated.
4. A list of lawyers willing to act in these cases should be kept at the police station.
5. Advocates shall be appointed by the Court on an application by the police at the earliest, but in order that the victim is not questioned without one, the Advocate shall be authorized to act at the police Station before leave of the Court is sought or obtained.
6. In all rape trials, anonymity of the victim must be maintained
7. It is necessary to setup Criminal Injuries Compensation Board with regard to the Directive Principles contained under Article. 38(1) of the Constitution of India. As some victims also incur Substantial losses.

8. Compensation for the victims shall be awarded by the Court on the conviction of the offender and by the Criminal Injuries Compensation Board- whether or not a conviction has taken place. The Board will take into account pain, suffering, shock as well as loss of earnings due to pregnancy and child birth if this accrued as a result of rape.

The National Commission for Women be asked to frame schemes for compensation and rehabilitation to ensure justice to the victims of such crimes.

As observed by Justice Saghir Ahmad, “Unfortunately a woman in our country belongs to a class or group of society who are in an disadvantaged position on account of several social barriers and impediments and have therefore, been victims of tyranny at the hands of men with whom they, unfortunately, under the Constitution enjoy equal status.”

## **MOST UNWANTED ACT**

### **HUMAN TRAFFICKING IN INDIA**

India is a source, destination, and transit country for men, women, and children trafficked for the purposes of forced labour and commercial sexual exploitation. Internal forced labour may constitute India’s largest trafficking problem; men, women, and children are held in debt bondage and face forced labour working in brick kilns, rice mills, agriculture, and embroidery factories. While no comprehensive study of forced and bonded labour has been completed, NGOs estimate this problem affects 20 to 65 million Indians.

Women and girls are trafficked within the country for the purposes of commercial sexual exploitation and forced marriage especially in those areas where the sex ratio is highly skewed in favour of men. Children are subjected to forced labour as factory workers, domestic servants, beggars, and agriculture workers, and have been used as armed combatants by some terrorist and insurgent groups.

India is also a destination for women and girls from Nepal and Bangladesh trafficked for the purpose of commercial sexual exploitation. Nepali children are also trafficked to India for forced labour in circus shows. Indian women are trafficked to the Middle East for commercial sexual exploitation. There are also victims of labour trafficking among the thousands of Indians who migrate willingly every year to the Middle East, Europe, and the United States for work as domestic servants and low-skilled labourers. In some cases, such workers are the victims of fraudulent recruitment practices that lead them directly into situations of forced labour, including debt bondage; in other cases, high debts incurred to pay recruitment fees leave them vulnerable to exploitation by unscrupulous employers in the destination countries, where some are subjected to conditions of involuntary servitude, including non-payment of wages, restrictions on movement, unlawful withholding of passports, and physical or sexual abuse.

## PROSECUTION

The Government of India prohibits some forms of trafficking for commercial sexual exploitation through the Immoral Trafficking Prevention Act (ITPA). Prescribed penalties under the ITPA — ranging from seven years' to life imprisonment — are sufficiently stringent and commensurate with those for other grave crimes. India also prohibits bonded and forced labour through the Bonded Labour Abolition Act, the Child Labour Act, and the Juvenile Justice Act.

These laws are ineffectually enforced, however, and their prescribed penalties — a maximum of three years in prison — are not sufficiently stringent. Indian authorities also use Sections 366 (A) and 372 of the Indian Penal Code, prohibiting kidnapping and selling minors into prostitution respectively, to arrest traffickers. Penalties under these provisions are a maximum of ten years' imprisonment and a fine. In addition to this, bonded labour and movement of sex trafficking victims, is facilitated by corrupt officials and people having a stake in this lucrative business. They protect brothels that exploit victims, and protect traffickers and brothel keepers from arrest and other threats of enforcement.

Usually, there are no efforts made to tackle the problem of government officials' complicity in trafficking workers for overseas employment. Bulk of bonded labour heads for Middle East to emerging economies and there are several media reports which testify the plight of Indian workers.

State governments regularly conduct campaigns through their welfare departments along with police raids. However, sustained efforts in combating trafficking for commercial sexual exploitation usually come to a naught because of ineffectual laws as well as delays in prosecution. India's Central Bureau of Investigation incorporated anti-trafficking training into its standard curriculum. In November, the State of Maharashtra developed an action plan to combat trafficking; it did not, however, allocate appropriate funding to accomplish the objectives of this plan.

The government does not break down these statistics by sections of the law, meaning that law enforcement data regarding trafficking offences may be conflated with data regarding arrests of women in prostitution pursuant to Section 8 of the ITPA.

## PROTECTION

India's efforts to protect victims of trafficking varies from state to state, but remains inadequate in many places. Victims of bonded labour are entitled to 10,000 rupees (\$225) from the central government for rehabilitation, but this programme is unevenly executed across the country. Government authorities do not proactively identify and rescue bonded labourers, so few victims receive this assistance. Although children trafficked for forced labour may be housed in government shelters and are entitled to 20,000 rupees (\$450), the quality of many of these homes remains poor and the disbursement of rehabilitation funds is sporadic.

Some states provide services to victims of bonded labour, but Non Governmental Organisations provide the majority of protection services to these victims. The central government does not provide protection services to Indian victims trafficked abroad for forced labour or commercial sexual exploitation. Indian diplomatic missions in destination countries may offer temporary shelter to nationals who have been trafficked; once repatriated, however, neither the central government nor most state governments offer any medical, psychological, legal, or reintegration assistance for these victims. Section 8 of the ITPA permits the arrest of women in prostitution. Although statistics on arrests under Section 8 are not kept, the government and some NGOs report that, through sensitization and training, police officers no longer use this provision of the law; it is unclear whether arrests of women in prostitution under Section 8 have actually decreased. Because most law enforcement authorities lack formal procedures to identify trafficking victims among women arrested for prostitution; some victims may be arrested and punished for acts committed as a result of being trafficked.

Some foreign victims trafficked to India are not subject to removal. Those who are subject to removal are not offered legal alternatives to removal to countries in which they may face hardship or retribution. NGOs report that some Bangladeshi victims of commercial sexual exploitation are pushed back across the border without protection services. The government also does not repatriate Nepali victims; NGOs primarily perform this function. Many victims decline to testify against their traffickers due to the length of proceedings and fear of retribution by traffickers.

The central government continued to give grants to NGOs for the provision of services to sex trafficking victims with funding available through its Swadhar Scheme and the recently developed Ujjawala Scheme.

## PREVENTION

Ministry of Labour and Employment displays full-page advertisements against child labour in national newspapers at periodic intervals. The government has also instituted pre-departure information sessions for domestic workers migrating abroad on the risks of exploitation. Most of the Indian workers pay huge sums of money to agents who facilitate their emigration outside the official channels and willingly emigrate despite being aware of the conditions prevailing in those destinations. This is because of the fact that most of the destinations abroad pay better sums of money. Therefore, a dream of better future ahead often lures the people abroad and hence trafficking cannot entirely be prevented. India has not ratified the 2000 UN TIP Protocol.

The commonplace understanding of trafficking as akin to ‘prostitution’ was one of the major reasons why the human rights violations inherent in trafficking were never understood. This called for demystification of the term. The complexity of the phenomenon, its multidimensional nature, its rapid spread and the confusion surrounding the concept made the need for a deeper comprehension of trafficking a top priority. The reasons for its persistence and rapid proliferation were not very

clear. Thus, there was an urgent need for a greater understanding of the various aspects of the phenomenon. There was a strong indication from the available information that women and children were becoming vulnerable to trafficking as they were unable to survive with dignity because of lack of livelihood options. In the absence of awareness of human rights, the economically and socially deprived people at the grassroots have become easy prey to the trafficking trade. Migrating populations have become most vulnerable to exploitation by traffickers. The fact that notwithstanding this stark reality, such gross violations of human rights continued to be a low priority area with law enforcement agencies, made it imperative that this area be investigated.

The Indian Constitution prohibits all forms of trafficking under Article 23. The Suppression of the Immoral Traffic Act, 1956 (amended to the Immoral Traffic Prevention Act) was in response to the ratification of the International Convention on Suppression of Immoral Traffic and Exploitation of Prostitution of Others in 1950 by India. Trafficking has been an area of concern since the early 20th century. It especially attracted attention during the 1980s. More recently, there has been a widening of its focus. However, this was not accompanied by an independent and sustained mass movement, against trafficking in the country (D'Cunha 1998).

## **PROCESS/ORGANISATION OF TRAFFICKING**

Central to the organisation of trafficking are the people who become “highly profitably, low risk, expendable, reusable and resellable commodities” (Richard 1999). This trade in human beings as chattels and treatment of their bodies as commodities becomes possible because of the incremental link between body and money, the end objective of this process always being instrumentalisation for gains. According to Truong (2001) this is a reflection of the ‘ongoing, cultural decomposition of the human being through gradual removal of its spirit, personhood, vitality down to bare body parts.’ Notwithstanding the problems of conceptual clarity in the definitions of trafficking, there is broad agreement on the stages involved throughout the literature surveyed. They are listed as recruitment of people from a village or city; transportation to a designated location/transit point; possible shift to a central location; before the move to their ultimate destination. Sometimes the trafficked persons are shifted several times before they arrive at their final destination, where the ‘sale’ takes place. The different elements involved in this process seem to create an impossible number of permutations and combinations. Thus, most of the research on trafficking resorts to case studies in an attempt to reflect its variations. However, at the regional level, some patterns in these processes can be discerned (ILO 2002a: 14–15).

## **RECRUITMENT**

*Place:* People are reportedly recruited at places like cinema halls, bus stops, railway stations, airports, streets and their homes. Other places mentioned are cafes, restaurants, beauty contests and beauty parlours. State and national



highways, quarry and construction work sites, and areas where locals are displaced without proper rehabilitation may also be sites for potential victims.

*Time:* Some studies report that traffickers choose special times for recruitment. They take advantage of difficult periods, either before the harvesting season or during a drought, when many locals look elsewhere for income to survive (HRW 1995). Traffickers also keep themselves informed about severely impoverished areas or those which have suffered climatic, economic or political disasters. They also reportedly recruit people during festivals (ISS 2003a, and 2003c).

*Methods:* The range of the tactics or strategies reportedly used vary from the extremely violent (drugging, kidnapping and abduction) to persuasion, material inducements, befriending and deception.

People are lured with fake job offers or false marriages. In the South Asian region, offers of marriage without dowries are welcomed; thus, it is easy to arrange fake marriages. In the CSWB study, 11.90 per cent of the respondents listed deception by someone as a cause for entry into prostitution. The percentages were 23.15 and 27.2. According to another study, 11 per cent of the women were lured, 11 per cent were abducted, and 9.2 per cent were sold and resold.

Traffickers approach women and girls in groups as it helps them to win their trust (Sangroula 2001). In India, recent news stories have shown a trend of traffickers using marriage bureaus and placement and tutorial agencies as a front for luring people.

*Recruiters/Procurers:* Recruiters can be neighbours, friends of families, relatives of friends, acquaintances returned from abroad; women who have migrated or who have been trafficked, women friends returned from abroad; husbands, fathers, boyfriends or lovers. Some recruiters were gay men who were trusted by women because of their sex orientation (Raymond 2002). They can be drug peddlers, head masons at construction sites, even band leaders in dancing/live bars (ISS 2003a), motorcycle pilots as in Goa (CRG 2003) or labour contractors (ISS 2003c). They either use friends and acquaintances to recruit or rely on word of mouth. Terms like *dalal* or *dalali* are used, to refer to traffickers.

*Characteristics of traffickers:* Traffickers are usually young men and middle-aged women who are significantly older than the young women/children they recruit. They are natives and agents who travel back and forth from home countries/regions to receiving regions and generally have links with the villages to which the victims belong. Procurers are reportedly substance abusers or gamblers. Many of the traffickers are older women, who are either former prostitutes or are themselves in forced prostitution, trying to escape abuse and bondage by providing a substitute.

Often, these agents speak several languages. They may have multiple roles. For instance, those who fuel migration, with its outcome in trafficking, may often also be the people who facilitate other, less exploitative, forms of migration, as in the case of refugees (Tumlin 2000). The 'use of words like "mafia" or the depiction of traffickers as villain outsiders do not correspond to the actual garb taken by most traffickers' (Blanchet 2002).

*Players:* Trafficking is said to involve a range of players ‘along the road from acquisition to exploitation’ (ILO 2002a: 13). They are generally found in the context of organised trafficking.

Networks may involve the police, visa/passport officials, railway/bus authorities and employees, taxi/autorickshaw drivers or rickshaw pullers (DWCD 1996). The various roles have been classified as financiers or investors; procurers or recruiters; organisers; document forgers; corrupt public officials or protectors; brothel operators and the owners and managers of sex establishments; escorts, guides or travel companions and crew members. There is also the category of an initial spotter, which is called *choghat/arkathi* in Bengali.

Some additional categories are smuggling and trafficking, especially cross-border operations. These are informers, enforcers, supporting personnel and specialists, debt-collectors, money-movers and transporters who gather information on matters such as border surveillance, immigration and transit procedures, asylum systems, and law enforcement activities. There are also agents, who pay the recruiter, arrange for travel documents, hold the women until they are ready to leave; and brokers who meet the women on arrival and pay the agent for delivering them.

DWCD (1996) has identified two types of traffickers: primary and secondary. The latter are said to operate behind the scenes with connections in government circles, which are used to provide themselves with protection. Pimps and procurers are the primary traffickers.

*Types of operations:* People can be trafficked via organised international networks, through local trafficking rings or by occasional traffickers. Thus, traffickers may operate alone, in small gangs or as part of organised crime groups. The last two are reportedly the dominant modes of trafficking in South Asia. However, a Joint Women’s Programme (JWP) study indicates the presence of systematic organised trafficking of girls for profit, for the greatest number of girls brought, transported and sold within and outside India. When part of an organised network, traffickers have less freedom and make smaller profits compared to a scenario where they operate on a more independent basis.

*Trafficking and organised crime:* An organised crime group is defined by the United Nations Convention on Organised Crime as a structured group of three or more, existing for a period of time and ‘acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention in order to obtain directly or indirectly a financial or other material benefit’.

Richard (1999) draws a vivid picture of the involvement of organised crime groups in trafficking in the international context. She notes that in most cases, the operations are sophisticated and global in scale (facilitated by modern technology) with a few exceptions, where trafficking is localised cottage industry.

The information that is available on the involvement of organised crime groups, in the literature on trafficking in India, amounts to unsubstantiated references. The involvement is indicated by case studies covered by news reports. Traffickers operate within zones which are marked and do not usually violate

the zone norms. Consequently, when moving from one zone to another, entirely different sets of people take over the activities (ISS 2003a). They also frequently change their area of residence to not only avoid the police but also to widen their field of operation (ibid.)

## MOVEMENT/TRANSPORTATION

Trafficking 'patterns and routes are often highly complex, ranging from trafficking within one country and cross-border flows between neighbouring countries to inter-continental and globalised trade' (Tumlin 2000).

The general movement of trafficked people is from less developed areas to more developed regions. Thus, the flow of trafficked women and children moves from South to North or East to West, with the former being characterised by poverty and the latter by relative affluence; or from countries in economic, social and political crises to more socially and politically stable countries; or from rural to urban areas. People have been trafficked from South-East Asia and South America to the United Kingdom, Italy, US, *etc.* They are also being moved towards the Middle East. Some cases of trafficking from India to South-East Asia have been reported. Delhi and Mumbai are said to be the main transit zones for international movement (Haq 2001).

Routes are usually divided into origin, transit and destination points; some reports also mention collection and dispersal points. Correspondingly, countries are categorised as sending, transit or destination countries.

They may belong to more than one category as in the case of India, which is destination as well as a source, a transit point. Studies identify routes and districts and discuss the problems faced in finding effective solutions to cross-border trafficking. In the Indian context, Nepal and Bangladesh are the two main suppliers. There have been news reports that after the disintegration of USSR, girls from Russia and other CIS countries, like Uzbekistan, were trafficked into India.

*Bangladesh:* Bangladesh shares a 4,156 km border with 30 districts on the Indian side. India has 20 official checkpoints manned by the Border Security Force (BSF). Being few and widely dispersed, they are ineffective in maintaining strict vigilance over movements across the border. Crossing the border between Bangladesh and West Bengal is a daily routine for many. Thus, keeping track of the movement of people is very difficult. Illegal entries by traffickers are a matter of common knowledge, and there is a perception that they are protected. A number of businesses have developed to facilitate these cross-border movements; each trip may cost no more than Rs. 50 per person (ADB 2002: 16,23). A well-organised bribe system also helps people to cross over the flat terrain

(BNWLA 1998). Further, a multiple passports system 'facilitates easy entry of Bangladesh; girls into Kolkata brothels and a close nexus exists between traffickers and border village communities' (DWCD 1996).

Once the women enter India, they are kept in West Bengal and Orissa. After being 'sorted and graded', they may be sold to pimps or sent to the Middle East,

Kolkata, Bashirghat, Delhi, Mumbai or Agra. Studies conducted by ADB (2002), BNWLA (1998) and Shamim (2001) list detailed trafficking routes in this area.

*Nepal:* The Indo-Nepal border is a long and porous one with 14 legal entry points along the entire stretch (ADB 2002: 24), which facilitate illegal cross-border movements. 'Under the 1950 Treaty with India, citizens of each country are guaranteed equal treatment, including the same privileges in the matter of residence, participation in trade and commerce.

This means in practice that there is no immigration control for Nepalese travelling or migrating to India, and hence no records are maintained' (ibid.:18). The ADB study on Nepal lists the districts through which this movement takes place and identifies the entry and exit points as well as the major border regions used by traffickers between Nepal and India.

*Internal:* Trafficking from neighbouring countries accounts for only 10 per cent of the coerced migration, with approximately 2.17 per cent from Bangladesh and 2.6 per cent from Nepal. The share of interstate trafficking is estimated to be around 89 per cent (ADB 2002: 8).

Studies by Rozario (1988), Gathia (1999), Mukherjee (1997), CSWB (1991), SAP (2001) and Haq (2000) provide details of the internal trafficking routes in India, where centres of commercial sexual exploitation are located and the interstate flesh trade triangles. These studies also identify geographical belts of exploitation; for instance, the pink triangle between Agra, Jaipur and Delhi.

Andhra Pradesh, Bihar, Karnataka, Madhya Pradesh, Rajasthan, West Bengal, Uttar Pradesh and Maharashtra appear to be the main states from where trafficked persons are sourced. The metro cities are the most frequent destination points. Rozario et al. (1988) also trace various sellers and market centres. Interstate movement for prostitution was found to be high between Mumbai and Karnataka. Women from Karnataka constitute 45.6 per cent of the prostitutes in Mumbai. Interstate movement in case of women in Bangalore was as high as 72.11 per cent, and 93.60 per cent of the prostitutes in Hyderabad were from within Andhra Pradesh.

## DESTINATIONS

Once they are brought to their destinations, the women maybe 'sold' or 'transferred'. Rozario et al. (1988) have identified the market areas in various states and describe the characteristics of the girls being 'sold'. In some places, they are 'resold'. The 'rates' for women range from Rs. 400 to Rs. 70,000 based on criteria such as looks, age, etc.

*Mechanisms of control:* The aim of trafficking is to transfer a person to another place for purposes of exploitation. Thus, various control mechanisms are used to ensure compliance with the exploiters' demands.

Trafficked persons maybe subjected to three forms of control: physical confinement; monetary control; and all kinds of violence and threats. In fact, violence is an integral part of this process and is used as a means of initiation, intimidation, punishment and control. It 'is the tool by which slavery is achieved,

the aim of slavery is profit' (Bales 1999: 246). Thus, situations and circumstances are created where trafficked people have little or no control over their bodies and lives.

Rozario reports up to 18 forms of violence faced by women trafficked for prostitution. They may be starved, locked up in a dark room, beaten, burnt with cigarette butts, bound, forced to drink, strangled, stabbed or killed or not trading their bodies.

The women face threats of torture and physical abuse (even their families are not spared), and they may be murdered if they do not cooperate. Attempts are made to create dependency on drugs and alcohol among the victims. Most 'children relent within 7 to 10 days under psychological pressure' and the other tactics used by their exploiters.

The women are often in debt bondage because money is withheld as payback for the purchase price. Bales (1999: 18) refers to this as 'contract' slavery and it is considered extremely profitable. They have little money for sustenance and most report living off tips received. This leads to dependence on traffickers for money, food, clothes and other necessities. The resulting emotional and physical manipulation ensures that the traffickers' activities are kept secret and allows them to maintain control over the victim. Rescued trafficked women fear reprisals by traffickers to whom they are indebted.

*Bonded labour:* Extraction of labour on the basis of debt bondage is widely prevalent in the sectors served by trafficking. This is especially true of India. In his work on slavery, Bales (1999: 8-9) estimates that the number of slaves in the world is around 27 million, of which 15 to 20 million constitute bonded labour in India, Pakistan, Nepal and Bangladesh.

Bonded labour is said to be prevalent in over 20 states of India. Migrant workers have been found to be working under conditions similar to the bonded labour system in fish processing units of Gujarat, stone quarries of Haryana and brick kilns of Punjab (ILO 2001c).

According to Human Rights Watch, at least 15 million children are working as virtual slaves (HRW 1996). Agriculture accounts for 52 to 87 per cent of the population of bonded child labourers.

They can also be in bondage working as domestic help; in the domestic, export industries (silk and silk saris, beedi, silver jewellery, synthetic and precious gemstones, footwear and sporting goods, and handwoven wool carpets); and in services like small restaurants, truck stops and tea shops.

Other instances of children in forced labour are found in prostitution, begging, drug selling and petty crime. Trafficking of children is specifically reported from the carpet industry.

## DESTINATION SECTORS

The demand for trafficked persons comes from various sectors. The broad divisions given below have been borrowed from the Haq study on child trafficking.



## COMMERCIAL SEXUAL EXPLOITATION

Trafficking for purposes of commercial sexual exploitation has been widely reported and studied. The relationship between these two processes is a matter of some major confusion and contention, resulting in diverse perspectives and opinions. The different forms that commercial sexual exploitation takes are prostitution, pornography, cybersex and sex tourism.

*Prostitution:* Prostitution is mainly an economic phenomenon that is grounded in deeply patriarchal values. It involves moral, religious, health and human rights issues. The sector is characterised by economic exploitation, corruption, links with crime and is one which governments find difficult to deal with (Lim 1998). The 'large-scale accumulation of capital takes place through a progressive appropriation and decimation of women's and children's bodies, sexuality and entire beings' (Raymond et. al. 2002). The majority of the victims are women and young children, mainly girls.

In India, the most quoted figures to depict the magnitude of prostitution are from the CSWB survey of six metropolitan cities conducted in 1990. According to the study, the total population of prostitutes in all the cities put together is between 70,000 and 100,000 (Mukherjee and Das, 1996). Another report estimates the number of prostitutes to be 900,000 (Gathia 1999). According to the 1992 estimates of the Indian Association for the Rescue of Fallen Women, there are 8 million brothel workers in India and another 7.5 million call girls.

Prostitution is currently a contentious issue in India. In 2007, the Ministry of Women and Child Development reported the presence of 2.8 million sex workers in India, with 35.47 percent of them entering the trade before the age of 18 years.. The number of prostitutes has also doubled in the last decade. According to a Human Rights Watch report, Indian anti-trafficking laws are designed to combat commercialized vice; prostitution, as such, is not illegal. A sex worker can be punished for soliciting or seducing in public, while clients can be punished for sexual activity in proximity to a public place, and the organization puts the figure of sex workers in India at around 15 million, with Mumbai alone being home to one hundred thousand sex workers, the largest sex industry centre in Asia. Over the years, India has seen a growing mandate to legalize prostitution, to avoid exploitation of sex workers and their children by middlemen and in the wake of growing HIV/AIDS menace. Normally, girl prostitutes are categorised as common prostitutes, singers and dancers, call girls, religious prostitutes (or devdasi), and caged brothel prostitutes.

Districts bordering Maharashtra and Karnataka, known as the 'Devadasi belt', have trafficking structures operating at various levels. Brothels are illegal *de jure* but in practice are restricted in location to certain areas of any given town. Though the profession does not have official sanction, little effort is made to eradicate or impede it. Sonagachi in Kolkata, Kamathipura in Mumbai, G. B. Road in New Delhi, Reshampura in Gwalior and Budhwar Peth in Pune host thousands of sex workers. They are famous red light centres in India. Earlier, there were other centres such as Dal Mandi in Varanasi, Naqqasa Bazaar in Saharanpur, Mali Sahi in Bhubaneswar, Chaturbhuj Sthan in Muzaffarpur, Peddapuram and Gudivada in Andhra Pradesh.



# WOMEN LAW AND SOCIETY

"Women Law and Society" offers a comprehensive examination of the intersection between law, gender, and society, providing valuable insights into the legal rights, challenges, and experiences of women around the world. This groundbreaking text explores the multifaceted ways in which law shapes and is shaped by societal attitudes towards gender, offering critical perspectives for scholars, policymakers, activists, and students alike. The book begins by examining historical and cultural perspectives on women's rights, tracing the evolution of legal frameworks addressing issues such as marriage, property rights, reproductive rights, and violence against women. It then delves into contemporary debates and challenges facing women in various legal contexts, including employment discrimination, access to justice, and the impact of globalization on women's rights. Through interdisciplinary analysis and case studies from diverse cultural and legal contexts, "Women Law and Society" sheds light on the complex interplay between law, gender norms, and social institutions. It critically evaluates the effectiveness of legal strategies and advocacy efforts aimed at promoting gender equality and advancing women's rights in different spheres of life. With its intersectional approach, the book also examines how factors such as race, class, sexuality, and disability intersect with gender to shape women's experiences within the legal system. It highlights the importance of incorporating diverse perspectives and experiences into legal discourse and policymaking to ensure justice and equality for all women. Whether used as a textbook in gender studies courses or as a reference guide for practitioners and policymakers, "Women Law and Society" provides a comprehensive and insightful exploration of the complex dynamics of law, gender, and society, empowering readers to engage critically with issues of gender justice and equality.



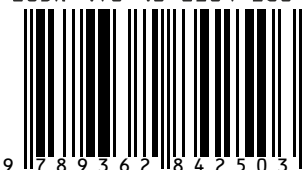
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4378/4-B, Murarilal Street, Ansari Road, Daryaganj, New Delhi-110002  
Phone : +91-11-23281685, 41043100, Fax: +91-11-23270680  
E-Mail: [academicuniversitypress@gmail.com](mailto:academicuniversitypress@gmail.com)

ISBN-978-93-6284-250-3



9 789362 842503