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*Volume III*

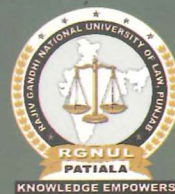
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*Number I*

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# *RGNUL Law Review*



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**Volume II, Number I January-June 2013**

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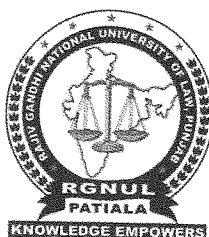
# ***RGNUL Law Review*** ***(RLR)***



**WOMEN LAW AND SOCIETY**

**SPECIAL ISSUE**

**JANUARY-JUNE 2013**



**RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB**  
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# FEMALE FOETICIDE : A SOCIO LEGAL ANALYSIS

Suruchi Kohli\*

## 1. INTRODUCTION

The girl child has often been a victim of the worst forms of discrimination. Gender bias, deep-rooted prejudices, and discrimination against the girl child have led to many cases of female foeticide in the country. Female foeticide is the result of an unholy alliance between the traditional preference for sons and modern medical technology, increasing greed of doctors, rising demand for dowry that makes daughters financial burdens, the ineffectiveness of the relevant legislation, and the lack of any serious involvement of civil society in fighting this social menace.

The situation is so grave that President K.R. Narayan, in his Republic Day address in 2002 referred specifically to female foeticide in the context of the 'deplorable status' of women. He also referred to the increasing incidence of rape, domestic violence, sexual harassment at workplaces and trafficking of women. In the powerful words of the President:

The crime statistics are indicative of women's traumatized existence. No place is safe for them, not even their mother's womb. They are put to death before they are born.<sup>1</sup>

India's legal framework stipulates equal rights for all, regardless of gender. In practice, however, unequal power equations between males and females have led to violations of women's reproductive rights. India's legal framework provides for equal rights for all, regardless of gender. Article 21 of the Indian Constitution boasts of providing the Right to Life to all individuals, besides this there exist a number of rights to promote justice in the society. What to talk of other rights, women are not even given the right to be born today. Owing to technological advancement the females are not even allowed to be conceived.

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\* Assistant Professor, Department of Laws, Guru Nanak Dev University, Regional Campus, Jalandhar.

<sup>1</sup> Ashok K. Jain, *The Saga of Female Foeticide in India, Socio-Legal Offshoots*, Ascent Publications (2006), p. 4.



It is a paradox that on the one hand the Indian culture and tradition consider womanhood as sacred and sacrosanct and on the other hand Indian women are killed in the mother's womb.<sup>2</sup> It is a greivous situation which is staring in the face of Indian society that the sex ratio as per the census of 2011 is as low as 914:1000 in 0-6 years category. It has become clear from the above data that the sex ratio is dipping with every passing day. This problem should not be taken lightly, it has potentiality of an atom bomb. This interference with nature can give rise to many other social evils. Female foeticide is symbolic of a world gone wrong. The figures are not only emotionally disturbing, but also socially alarming. In a scenario where protectors become killers, the very basic family unit is threatened. This is not the legacy we wish the coming generations to inherit.

"Kukha parkhan walion logon / Kudiyan kithon aungian / Ki dharti de mundiyan de naal / Pariyan viyah karwangiyan" "Oh people who scan wombs, where will the girls come from, will you marry your sons on this earth to fairies living in heaven?"

These lines, part of a poem, written by Babu Singh, principal of a school in Khamanon do not belong to a hazy future. Even youngsters like 20 year-old Sharanjeet Kaur in Dera Mir Miran village in Fatehgarh Sahib believes the state would soon establish a "record of unmarried men".<sup>3</sup>

UNICEF, 2007 has warned that the "alarming decline in the child sex ratio is likely to result in more girls being married at a younger age more girls dropping out of education, increased mortality as a result of early child bearing and an associate increase in acts of violence against girls and women such as rape, abduction, trafficking and forced polyandry." Over the next 20 years, in parts of China and India there will be a 12-15 percent excess of young men leading to obvious bride shortage: between 2015-2030 there will be 25 million men in India who have no hope of finding a wife. The decline in the number of females in society will result in increasing sexual and social crimes against women, such as rape, abduction, bride-selling etc.. an increase in prostitution and sexual exploitation and cases of HIV-AIDS. This will lead to physiological and psychological disorders, particularly among women. Individual woman's health

<sup>2</sup> Binayak Patnaik, "Female Foeticide: A Socio- Legal Analysis", *Cri. L.J.* 2006 313 (Jour).

<sup>3</sup> Gayatri Rajwade "A Tribune Special, Killing the Unborn Daughter — IV, Beware, Missing Daughters Means Missing Brides", *The Tribune* (16 September 2006).

will be affected by repeated pregnancies and forced abortions and such a situation will arise where all men of the family share the same wife.<sup>4</sup>

*The Pre-Natal Diagnostic Techniques Act 1994* which was amended in the year 2003 hoped to constrain this crime against humanity. The truth is that the legislation has failed to distract the doctors from performing these tests or the public from getting abortions done. People in their urge to have a male issue and the doctors in their drive to earn more money continue to violate these laws. The legislation has done nothing to check illegal abortions, infact, the legislation has done only one thing and that is that they have made the abortion process and the sex determination tests more expensive and hence promoted corruption. The doctors charge as much as they want from the people who wish to get sex determination tests and abortion done, as they conduct these tests stealthily. The condition that the pre natal diagnostic tests may be performed on patients only if it has been referred by a genetic clinic has done nothing but encouraged malpractice and corruption. Money exchange hands, false ultra sound scan reports are prepared and illegal abortions go and on in the garb of termination for the sake of pregnant woman's health. The mandatory reference letter from genetic clinics is managed and the law is flouted. Thus the regulatory provisions don't have any practical utility, and these laws have proved to be mere paper tigers. Until and unless the doctor realize, that they are not supposed to DESTROY THE CREATORS, the laws will remain on paper.

The census data of 2011 presents a sordid picture of the fact that the preference of Indian parents for a male heir is a centuries old malady which refuses to fade away notwithstanding the stringent laws and the reformation in girl child's status. Leave alone equal economic and social rights, women and girls have not even got a violence free existence to boast of. It is a matter of great shame that in Punjab even after 7 years of the new Act's passage the male- female sex ratio is as low as ever, it is just 798 females per 1000 males as on 20 July, 2009.<sup>5</sup> Also there are 1355 registered ultra sound centres in Punjab out of which 322 centres have indulged in violation of this Act.<sup>6</sup>

<sup>4</sup> Piar Chand and Shashi Poonam, "Declining Child Sex Ratio in Punjab: A Case Study", available at [www.punjab.333.org](http://www.punjab.333.org) (last assessed on 15 May, 2009).

<sup>5</sup> Department of Family Welfare, Chandigarh.

<sup>6</sup> *Ibid.*

District	Sex-ratio 0-6 yrs	No. of Regd. Centers	Action taken for violation of the Act <sup>7</sup>									
			Upto year 2006		Year 2007		Year 2008		Year 2009		Total upto date	
			Court cases	Under sec 20	Court cases	Under sec 20	Court cases	Under Sec 20	Court cases	Under sec 20	Court cases	Under Sec 20
*Amritsar	790	154	10*** ***	21	-	4					6	25
Barnala	786	17	1	4							1	4
Bathinda	785	91	11	27	1	3		2			12	32
Faridkot	812	31	4*	5	1	-		4**			5	9
F.G. Sahib	766	18	5***	3	-	-		1			5	4
Ferozepur	822	74	2	22* *	1	2					3	24
Gurdaspur	789	86	1	11	-	-					1	11
Hoshiarpur	812	68	3	4	-	4		3			3	11
Jalandhar	806	231	7	55	1	-	1		1		10	55
Kapurthala	785	44	5	13*	-	1					5	14
Ludhiana	817	230	8	13*	1	10	1	16	1	5	10	44
Mansa	782	21	2**	4	-	-					2	4
Moga	818	42	2	7	-	-					2	7
Mohali	811	36	5	6	-	-				2	5	8
Muktsar	818	34	2	9*	-	-			1		3	9
N. Shahr	808	29	6	15	-	-			1	1	7	16
Patiala	777	63	9***	12*	-	1		2			9	15
Ropar	794	15	3**	6	1	1*				2	4	9
Sangrur	786	37	6***	13*	-	-	1	2		5	8	20
*T. Taran		34			-	-		1			4	1
State	798	1355	92	250	6	26	3	31	4	13	105	322

<sup>7</sup> Ibid.

It is vivid from the data that has been availed from the Family Welfare Department of Punjab that the sex ratio in Punjab has not improved even after the 2003's amendment. Till August 2009, out of 1355 registered ultrasound centres, just 427 centres have been prosecuted.<sup>8</sup> Only 15 doctors have been convicted so far, rest are pending in the courts, out of these convicted 15 too most of the cases are again in the courts as appeals against the lower court's order.<sup>9</sup>

At the national level too the results of this Act are not encouraging. It is shocking to know that at an all India level just 13 convictions have been reported in this year as far as this Act is concerned. The data released by the government gives a shocking insight into how the country, including rogue states of Haryana, Punjab and Delhi, continue with its lackadaisical approach in the implementation of the 'strengthened' Pre Conception and Pre-Natal Diagnostic Techniques Act. Just 13 cases of conviction under the PNDT Act were reported in 2010 exposing the complete failure of all state governments in effective implementation of the law to prevent the killing of unborn daughters while also bringing related schemes under the scanner.<sup>10</sup> The details of convictions under the Act in the entire country prove that how majority of culprits of the unborn girl child continue to get away scot free.<sup>11</sup> As admitted by the parliament officials it would be absurd to even think that only these many cases of sex determination took place last year, meaning that the majority of culprits got away despite the PNDT Act enacted and further amended in 2003 with the objective of prohibiting sex selection before or after conception, regulation of pre-natal diagnostic techniques and prevention of their misuse for sex determination leading to female foeticide.<sup>12</sup> The government's move to further strengthen the Act<sup>13</sup> will prove to be fruitful or not is yet to be seen.

This alarming situation in the State of Punjab has motivated this researcher to dig out the reasons for this patently deterrent law. For a meaningful study, the law and social realities subjected to it have been critically examined in this paper. The Census Data, demographic data published by the other agencies and the statistics collected from the office of Registrar of Births will also be analysed to

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *The Tribune* (4 August 2011).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *The Tribune* (11 April 2011).

identify the status of women population in the Indian society and more particularly in Punjab State. In addition to this data will be taken from the Family Welfare Department as to the enforcement of the PC and PNDT Act, 1994. In addition to this with the help of a questionnaire views of hundred women are taken about the causes for the continuance this ghastly practice. These women included women of all the strata of the society, rich, poor, rural, urban. Out of 100 respondents however only 94 chose to respond and 6 women who were served the questionnaire did not respond.

The causes of female foeticide and infanticide lie buried deep in the social structure of our society.<sup>14</sup> It has been found that this evil is a result of a number of social ills and the reasons for this practice tend to be so inter mingled that it is hard to determine a single cause for this menace's prevalence.

The questionnaire that was applied on 100 women belonging to different income groups of the society to determine the cause of female foeticide brought these revelations. It was found that out of 94,42 women straight away favoured sex determination tests ,50 women opposed it while 2 respondents were unable to give their opinion.21% of the respondents said they favoured it because of the society's demand for sonship,45% of the respondents said it is essential for a balanced family,26% respondents believed that daughters are financial burden so its better not to have female issues.

In India the religion is the principal magistrate of the society. The Hinduism i.e. the dominant Indian Religion, accords sons with certain unique responsibilities. The son confers the benefit upon the souls of dead ancestors by offering 'PINDA' and 'WATER' to them on the occasion of 'SHRADDHA'. He also conducts funeral rites. According to Vashishtha,"When a father sees the face of his living son on his birth, the debt is transferred, attains immortality and, there are innumerable heaven for a man who has a son and there is no place in heaven for a sonless man. The son keeps the continuity of lineage.<sup>15</sup> Then there is the religious obligation to carry on the VANSHA or lineage and in order to get the boon of a male-a number of females are sacrificed. It was found that out of 94 respondents 75% admitted that a son is essential for the rituals.

Most of the parents who have only daughters feared for their social security in old age. It was found that 55% of respondents wanted a son as the sons could

<sup>14</sup> Avashesh, "Female Infanticide and Foeticide, A Legal Perspective," *NLSUI*, Series 1, No. 1.

<sup>15</sup> *Supra* note 2.

provide them old age support. Though the SC in its epoch judgment has said that the old parents can claim maintenance from their married daughters if they are earning<sup>16</sup>, but the Indian mindset is Indian mindset, the judgment has not been accepted by the society, they would prefer to die than to take even a sip of water from their daughter's house.

Another reason given for the existence of female foeticide is the problem of huge dowries needed to wed daughters. 18% of women opined that a female issue is a potential burden on the family. The dowry or groom price is so staggeringly high, irrespective of the class structure that generation may have to toil to repay the debts incurred during marriage. The Indian society's thinking is quite vivid in the famous Tamil proverb, which proves amply that the Indian society considers women no more than a liability. It says:

## **2. NURTURING A GIRL CHILD IS LIKE WATERING YOUR NEIGHBOUR'S PLANTS.**

In today's material world a woman is fast being relegated to the rank of commodity and marriage has become more of a business alliance than a sacred bond between two people. The Indian society's mental outlook can be traced in a U.P's old folk song:

Prabhuji mein tori binti karon,  
Paiyan padoo baar baar,  
Agle janam mohe Bitiya na dijo,  
Narak chahe dijo dar.....

Translation:

Oh God I beg of you,  
I touch your feet time and again,  
Next birth don't give me a daughter,  
Give me hell instead.....<sup>17</sup>

A study of National Law School of India University, Hyderabad also reveals this bad practice. "We were told in Gohad Block (Behind district, Madhya Pradesh) that when a child is born, the men collect in one room and the women in another. If the child is a male, they bang a thali (metal plate) or fire shots in the air to announce his birth. If a girl is born, an elderly woman of the house goes to the members and asks 'BARAT RAKHNI HAI YA LAUTANI HAI?(SHALL WE

<sup>16</sup> *Vijaya Arbat v. Kashi Rao Sawai*, 1 (1987) 1 SCJ 524.

<sup>17</sup> Zaila Zaidi, available at [www.sikhspectrum.com](http://www.sikhspectrum.com) as on 15 April 2009.



WELCOME THE MARRIAGE PROCESSION OR SHALL WE BID IT TO RETURN?), every woman leaves the room and the mother of the newly born is asked to put tobacco in the girl's mouth. There is no question of resistance as it would mean that the mother herself is at risk of either being killed or thrown out of the house."<sup>18</sup>

An old man in Rajasthan town was known in his neighbourhood for his popular address for new born babies in the locality. Every time he heard of someone having got a son, he said, "Oh so a *Muffatlal* (a free lad) has arrived." If it was a daughter, he would say, "Oh so came the AYEE CHUKI (enough of coming)". He used such a terminology because a son's upbringing and education cost is evened out through the dowry he commands at his wedding<sup>1</sup>. It is said that the day grooms become available without a hefty price tag attached to them; families would stop killing the girl child in the womb.

The social activists point out the nexus between dowry customs and daughter disadvantage, and irrational justification of solving one discrimination (dowry) by resorting to another (foeticide). The Dowry Prohibition Act should so be implemented more rigorously and stringently to ensure the parents that daughters are not considered a liability on the family.

It was felt by 3% of females that crime against women is ever increasing and it is becoming a herculean task to keep their daughters' dignity safe. This is regarded as one of the major causes that people prefer not to have female children. They are responsibilities; their chastity is required to be protected always. Even careerist women who have 9-5 jobs decide to keep a male foetus, because she knows that in her absence from the home, it will be difficult to look after the girls and provide them with a secure environment. What happened in Delhi on 16 December 2012 or more recently on 17 April, 2013 with a girl child of merely five years is a reason enough of the fact that women deem girl children to be social burden. In Ludhiana in the year 2009 a little infant girl of 6 months was raped by a migrant labour<sup>19</sup> and in Surat an old lady of 90 years was made the sacrifice of the lust of a 25 year old man. Age no bar, no female in India is safe. On an average, every single day 42 women are raped and almost 18 cases of dowry deaths occur each passing day. Further, 5 women are estimated to face cruelty every hour, while in similar amount of time, 4 cases of molestation are

<sup>18</sup> *Supra* note 14, p. 18.

<sup>19</sup> *The Ludhiana Tribune* (25 August 2010).

reported.<sup>20</sup> According to the National Crime Records Bureau 2011, a total of 228560 incidents of crime against women (both under Indian Penal Code-IPC and Special and Local Laws-SLL) were reported in the country. 8618 dowry deaths were reported, 24206 cases of rape were 2012<sup>21</sup>.

This is just the tip of the iceberg as these are the reported cases and God knows how many cases go unreported. In such a sorry state of affairs people prefer that the girl child is not born to them.

Because of socio-economic and cultural reasons and also the prevailing security risk, in general couples have to opt for sex selective abortions. In the matter of sex of the child, the inner feelings of the rural Indian women as well as the political figures and urban women dignitaries is similar. Therefore the sex test is the proof that education and material progress alone cannot alter traditional attitudes. Even to counter this, the measures adopted through education, incentives to girls, and their parents or restrictions to sex determination tests have not been effective.<sup>22</sup>

As it is clear from the above data the law against female foeticide is not reaping rich fruits, rather not reaping fruits at all. The law has not been able to bring in the desired changes. It is pertinent to note that in itself the law is sufficiently armed to contain this evil practice. But the problem seems to be what is contained in the Act is not strictly implemented. The law is there but its implementation is not taking place. It need not be made stricter what is essential is that what is already there it should be strictly implemented. It is rightly said that the law if not implemented properly becomes a mere paper tiger. The present law has done this only, law no doubt is there but there are half hearted attempts which are made towards its implementation.

## 2.1 The Cure for this Disease

The law can compel reluctant parents to bring a female child into the world but cannot guarantee her a life of dignity and safety. The law can only facilitate an environment, but it is public awareness which is most important. We need

<sup>20</sup> Jagbir Singh, "Female Foeticide in Punjab", *Army Institute of Law Journal*, Vol-1 (2007), p. 178.

<sup>21</sup> available at [www.ncrb.nic.in](http://www.ncrb.nic.in), last assessed on 16 January 2013.

<sup>22</sup> R. S. Bora and R. P. Tyagi "Socio-economic Explanation for Declining Child Sex Ratio: A Study of North-Western States in India", *Demography India*, Vol. 37, (2008), pp. 47-62.

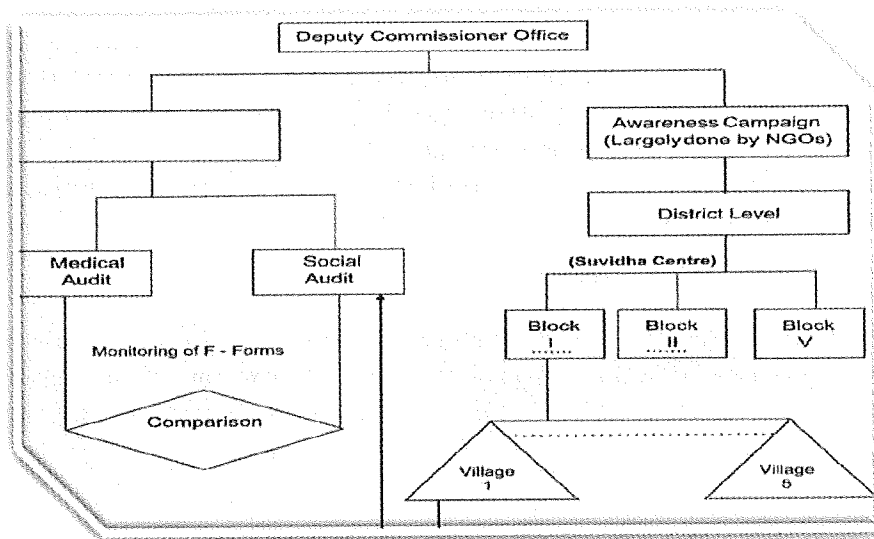
attitudinal change as well as change in laws. What infact is needed in a situation like this is a structural overhaul of society.

The people need to come together in a flock and fight this evil collectively. It has been proved that the model adopted by this small township of Nawanshahr, Punjab is very efficient and deserves to be emulated by all the states grappling with this demon called female foeticide. It is said that law alone cannot bring about social change what is required is the collective fight of law and social groups which brings about change. In the year 2005 when Mr. Krishan Kumar was appointed as the Deputy Commissioner of this town, the sex ratio of 0-1 years was an abysmal 780. It was then that he decided that the law or the social groups in their individual efforts cannot fight this evil, in fact a whole hearted campaign at the administrative level as well as the social action groups level is needed. He divided the entire programme to check this evil into two-one awareness campaign and other enforcement measures by:

- (a) Medical audit      (b) Social audit

A flowchart view of the same would facilitate this way of functioning.<sup>23</sup>

### 2.1.1 Flow Chart for Campaign against Female Foeticide



<sup>23</sup> The report presented by Nawanshahr administration to the then Governor of Punjab in August 2006.

In Nawanshahr the Deputy Commissioner first of all noticed that the efforts of the Child development and Health were not proving fruitful in checking sex determination and the consequent female foeticide. He himself became the steering wheel having in control all the machinery i.e. he brought all the social groups and NGO's together and assigned each of them particular areas and they were asked to set up village level committees and block level committees, for strengthening the grass root of the society. Block level meetings were organized by village lambardars (headmen), sarpanches alongwith ANM's and LHV's of health department participated. Thereafter district level meeting was held by all Municipal Councilors and also the social activists. It came to be seen that the survey of the pregnant ladies was not being done in a fair manner, it is a known fact that the period for sex determination is 3- 5 months of pregnancy where there are maximum chances of their being aborted. Realizing this, a computer software was prepared which carried all the details of the expecting lady i.e. her age, number of the children she already had, her telephone number and in case she does not have a telephonic contact then the sarpanch's number. After this a list was prepared giving details of mothers having pregnancy from 3<sup>rd</sup> to 5<sup>th</sup> month and then a female operating from the deputy commissioner's office telephonically asked these ladies about the well being of their foetus, which leaves an indelible mark on mind of the lady that she is under constant vigil and she should not indulge in the heinous task of sex determination. This computer software also generated a list of those ladies whose date of delivery had passed, and the D.C. office telephonically confirmed it again whether the child born was a male or female and in case no child is born then a proper investigation regarding it was carried out. The minute examination revealed that ANM's and medical practitioners had a link and they were the ones who took the expecting mother to scanning centres and arranged for elimination of the foetus. To break this nexus, all midwives, ANM's and nurses were identified, their telephone numbers were recorded and they were advised strictly to refrain from such activities, or cases would, be registered against them. They were asked further to bring in those couples who wanted to get these tests done. Also it was seen that atleast 65 government departments were free from their own work for most part of the year, their services were also taken and every such officer was allotted 5 villages. Every such officer would monitor sex ratio in these villages. In addition to this the DC indulged the youngsters of the town in this programme, they were invited for meetings with the DC and were told that they would be given a cash prize of Rs.100 if they inform the DC office regarding any expectant mother. Also to generate awareness regarding this menace personal letters to lady

sarpanches are issued, various cycle/scooter rallies are organized. Mourning of baby girls' was done in case an abortion of a foetus took place preceding sex determination. The DC used to send congratulatory messages to the families on birth of females.

So as to intensify the enforcement measures it was felt that all the scanning centers need to be monitored more strictly. All scanning centres are supposed to furnish the details of the scans conducted by them during particular month, but it has been seen that the scanning centres omit providing this information. In order to analyse the data submitted by the scanning centres in a more effective manner, a software was prepared by the district administration and all the data collected from scanning centres on 5<sup>th</sup> of every month was fed in the computer. Subsequently medical audit reports were generated and the scanning centres who indulged in any malpractise was suitably punished.

So it is vivid the campaign from both sides i.e. SOCIAL AUDIT and the MEDICAL AUDIT certainly helps to bring down the cases of female foeticide. The number of children born in Nawanshahr in the last 11 years bears it out that the law has to be armed with societal efforts and vice versa to the top of it the administration should be strong willed to weed out certain evils from the society. Now, Mr. Krishan Kumar though is not in Nawanshahr but his predecessors have emulated him and have been able to keep female foeticide at bay.

*2.1.1.1 No. of Children born in the District Nawanshahr during the last 11 years:-<sup>24</sup>*

Urban				Rural			Overall Child Sex Ratio (0-1) Yr.
Year	Male	Female	Child Sex Ratio (0-1) Yr.	Male	Female	Child Sex Ratio (0-1) Yr.	
2001	1681	1206	717	4543	3355	738	732
2002	1826	1372	751	4365	3370	772	765
2003	2049	1642	801	3780	3109	822	815
2004	2174	1784	820	2677	2073	774	795
2005	2265	1767	780	4712	3922	832	832

<sup>24</sup> Upkar NGO, Nawanshahr, Punjab.

Urban				Rural			Overall Child Sex Ratio (0-1) Yr.
Year	Male	Female	Child Sex Ratio (0-1) Yr.	Male	Female	Child Sex Ratio (0-1) Yr.	
2006	2020	1800	879	5042	4607	913	896
2007	2075	1950	939	5021	4901	976	957
2008	2140	2040	953	5011	4800	957	955
2009	2011	1980	984	4800	4611	960	972
2010	2230	2010	901	3590	3310	922	912
2011	2010	1950	970	5030	4670	928	949
2012 Jan- March	1027	1001	975	-	-	-	975

This model has received appreciation by the Punjab and Haryana High Court. It has been realised that the societal efforts if enforced by the administration bring positive results so it has directed all the “DEPUTY COMMISSIONERS IN THE STATE” to personally monitor the implementation and progress of the Nawanshahr model.<sup>25</sup>

Social awakening, equality, vigorous campaigning against female foeticide, honest and full enforcement of dowry prohibition and sexual harassment laws are the steps towards uprooting the practice of female foeticide of course spearheaded by the administration who is strong enough to fight such demons.

### 3. CONCLUSIONS AND SUGGESTIONS

The urgent necessity therefore is to bring about a radical change in the social attitude towards women along with strict implementation of law. The possible courses of action for the effective implementation of the PC & PNDT Act is to increase sensitization and concern for gender based discrimination and educate the masses about the utility of the girl child. The failure of the PNDT Act to check female foeticide bears that the women still occupy the lower rung in the Indian society. An evil practice can be curbed not by cutting the stems growing on the trunk above the ground, but by eliminating the roots beneath. However

<sup>25</sup> The Tribune 27 September 2012.



the Government and the people on their personal level can take following cures for the disease called female foeticide:

1. Well-designed financial incentives by Government can transform negative perceptions regarding daughters and make people view them as assets. Girl children should be provided free and compulsory education up to higher secondary level. This would decrease the so called 'heavy investment on girl children' made by the parents on their daughters. They would stop thinking their daughters as liability. Government should start various employment schemes for females where 100% reservation could be made for women in different occupations.
2. Religious Gurus can play an important role by spreading awareness about female foeticide. They can create awareness about wrong myths and wrong beliefs mostly spread in each religion about the status of girl child. Religious education can play a role by preaching against female foeticide, dowry and discrimination against the girl children. Jathedars of Takahat Shri Damdama Sahib and Anandpur Sahib have come forward in a big way in lending cooperation and support in improving sex-ratio in the state as their preaching and advocacy has a lot of impact on the mindset of the society. They have issued a Hukamnama from Akal Takht that any Sikh indulging in female foeticide will be excommunicated.<sup>26</sup> Further Radhasoami Dera Beas in Punjab has a large following, they have started showing a documentary before their sermons for saving the unborn daughters and various books have also been published by the Dera favouring women and calling for their rights.
3. Cultural programmes with social messages can do a lot in favour of girl child. In case the same message against female foeticide is repeated by different leading film-stars' and political leaders people will be provoked and they would think twice before indulging in this heinous crime.
4. Seminars, declamations, debates, women awareness camps, wall writings and pamphlets about female foeticide can create awareness. Self dependant groups, Panchayat Pradhans, Zila Parishad members, Block Samiti members, Women Self Dependant groups, Mahila Mandals can do a lot of work against female foeticide.

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<sup>26</sup> *The Tribune* 19 April 2001.

5. Electronic media as well as print media most efficiently can create awareness amongst the people against female foeticide. By giving space in editorials, more news and articles about and against female foeticide, the people and their minds can be awakened against this evil.
6. In Punjab, people often listen to their favourite singers. Singers can make their music in the background of social message against female foeticide. They can come to the aid of unborn daughter by their special songs based on female foeticide. Singers can incorporate social messages in their albums against this evil.
7. Writers and poets can come forward to aware the society about the sin of female foeticide. They can compose poems against female foeticide. A new Punjabi film has been made on this issue *Akheeyan Udeekdiyan*, it is a touching story which gives the social message of saving the females.
8. The trend of giving and taking dowry which takes place mostly in educated and upper class homes cannot be discouraged by laws alone. It is entrenched in the mindset of India's people and no amount of preaching would stop it. However efforts to stop its giving and taking should be made at the individual as well as at the government level. Stringent and effective laws should be supported by speedy trials, dowry giving and taking cases should be tried by special courts and short stay homes should be set up for battered women.
9. Efforts and provisions should be made to provide social security to parents who are above 65 years of age and have only daughters. They should be provided with old age pension if they do not have a son. Because most of the parents who have only daughters feared for their social security in old age. Though The SC in its epoch judgment has said that the old parents can claim maintenance from their married daughters if they are earning<sup>27</sup>, but the Indian mindset is Indian mindset, the judgment has not been accepted by the society.
10. Women's right to own and inherit property and the social obligation of policy intervention to inculcate these new values in households as well as legal support to implement these values should be provided.

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<sup>27</sup> *Vijaya Arbat vs. Kashi Rao Sawai*, 1 (1987) 1 SCJ 524.

The conclusion emerges out that the problem of female foeticide is a great social disease which needs to be cured at the earliest. Society has discriminated a female child in number of ways as regard to her rights are concerned. Women have been subjected to deprivation for centuries. Now this discrimination can be seen, when the female child is still in the womb of her mother. The evil of female foeticide is increasing day by day due to the unchecked commercial sectors in the form of nursing homes and clinics and installation of ultrasonography devices in various towns and localities. What is required is that not only the PC and PNDT Act but the other allied laws are made more meaningful and properly implemented so that the daughters are not considered a burden. There is a need for total revolution of the society, where law will prevail, co-operation of religious leaders and N.G.O.'s will be there and the people will have a progressive and positive attitude towards female children..

# COMMERCIAL SEXUAL EXPLOITATION OF GIRL CHILD IN INDIA

Dr. Anupam Bahri\*

## 1. INTRODUCTION

One of the obverses of child labour in worst condition can be traced in sexual exploitation of children, mostly of girls. This is a billion-dollar trade now prevalent in major parts of the world involving young girls. Young girls are procured and placed in booming sex trade. Many agents and intermediaries are involved including parents and relatives of the victims. Income from the sale of those young girls is distributed as different points of agencies. The *modus operandi* of procuring the young girls is not always same for all places and for all times. The tricksters use different means depending on the ground situation. Fake marriage is one of many means to procure young girls. The procedures for procurement of young girls as an object of sexual pleasure for sale are varied depending on the demand for a particular situation. Vulnerability of young girls to adult's misdeeds is omnipresent. Parents, who are primary care givers for their children, forget their responsibilities. States that are committed to protect children from exploitation and abuse, miserably fail to discharge their duties to their future adults. Millions of young girls all over world thus perish in brothels as a result of neglect from all corners. Sexual abuse differs from commercial sexual exploitation as the latter is characterized by involvement of many actors. Sex trade has now been profit-making venture a billion dollar industry that thrives on poverty and vulnerability of the victims. Present study will throw light on this burning issue.

### 1.1 Contours of the Problem

Commercial sexual exploitation in children is a common concern for many Asian countries. Children are trafficked for the sex industry, for begging and soliciting, for manual labour, and as domestic workers. Around the world, a large number are trafficked to be sold for forced marriage or, children often end up in virtual slavery, with little or no say over their lives and fates. Increasingly, with localized economic development, growing economic disparities, tourism, and improved communications, trafficking in children is becoming a transnational problem.

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Commercial sexual exploitation in children threatens the social stability and development of many rural families and communities, and damages the lives of many people who are its direct or indirect victims. Globally, human trafficking has become the third-largest source of revenue for international criminal gangs, after trafficking of drugs and arms. The annual turnover of the illegal human trafficking industry reaches billions of US dollars.

The nightmare of child abuse takes a more alarming turn when placed in the context of organized exploitation for commercial gain. Sexual exploitation of children involves the use of children for sexual activities for material gains to the children themselves or others. Child prostitution is a term in popular usage but is inaccurate because it implies consent and a child do not consent. Sexual exploitation of a child occurs at an age when consent has no meaning. She is rather victimised into sexual slavery for profit. Child sexual exploitation involves power relations and social structures.

The origin of child sexual exploitation lies only in the circumstances in which a young victim is gainfully subjected to sell her body to satiate the sexual urges of another person. The sexual exploitation of children does not occur in a vacuum but involves a more widespread exploitation, sexual or otherwise. Sexual exploiters include not only users but also suppliers, viz pimps, brothel owners, parents etc. Poverty and ignorance are the underlying causes of this worldwide phenomenon, as families rely on their youngest members to contribute to the household income.

The propelling factor which actualizes commercial sex exploitation of children is the role played by traffickers. The traffickers, through various modus operandi, take the children through unknown and unfamiliar routes to make retracing practically impossible, and they cut off the children from their roots and alienate and isolate them. Trafficking as a phenomenon has been defined by the UN General Assembly in 1994 as: the illicit and clandestine movement of persons across national and international borders, largely from developing countries, with the end goal of forcing women and girl children into economically oppressive and exploitative situations for the profit of recruiters, traffickers, and crime syndicates as well as other illegal activities such as forced domestic labour, false marriage, clandestine employment, and forced adoption. The element of migration, with or without consent, to an alien exploitative environment is an essential component of the concept of trafficking. Globalization, liberalization, and feminization of poverty have only aggravated the situation. Though there are

no comprehensive and absolutely reliable statistics to that effect, it is a known and acknowledged fact that trafficking women and girls for labour and commercial sexual exploitation is on the rise in India.

## 1.2 Forms of Commercial Sexual Exploitation

There are three primary and interrelated forms of commercial sexual exploitation that comprise the sex trade: **prostitution, pornography and trafficking for sexual purposes**. Frequently children in the sex trade participate in all three forms of business simultaneously.

The United Nations defines child prostitution as follows. "Child prostitution is the act of engaging or offering the services of a child to perform sexual acts for money or other consideration with that person or any other person."

The pornography refers to the material representation (media include film, print, photos, audio tape, and digital representations carried via computer) of children engaged in sexual acts, real or simulated, intended for the sexual gratification of the user. The United Nations considers involvement in the production, distribution and/or use of such material to constitute participation in the business of pornography.

Sex trafficking is defined as "... a pernicious form of slavery; it is the purchase of a body for sexual gratification and/or financial gain." Children who are the victims of sex trafficking are trans-ported across borders or within countries, across state lines, from city to city, or from rural to urban canters. The use of force is often, but not always, a feature of trafficking.

## 2. INDIAN LAWS DEALING WITH COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

### 2.1 The Constitution of India

According to **Article 23** of the Constitution of India, trafficking in women and children for immoral purposes prohibited.

**Article 34:** States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- a) The inducement or coercion of a child to engage in any unlawful sexual activity;



- b) The exploitative use of children in prostitution or other unlawful sexual practices;
- c) The exploitative use of children in pornographic performances and materials.

**Article 35:** States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form.

**Article 36:** States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

**Article 39 (e) and (f)** of the directive principles of state policy state that it is the duty of the state to secure that the tender age of the children are not abused and forced by economic necessity to enter vocations unsuited to their age and strengthen and direct the state to ensure that children are given opportunity to develop in a healthy manner and in conditions of freedom and dignity.

## **2.2 The Suppression of Immoral Traffic in Women and Girls Act 1956 (SITA)**

Trafficking was first dealt with by SITA which was passed on 31 Dec 1956. The legislation was enacted in pursuance of the UN Convention of 1950. But this act had several loopholes.

## **2.3 The Immoral Traffic Prevention Act 1956 (ITPA or PITA)**

The suppression of immoral traffic in women and girls act 1956, proved to be inadequate to combat the increasing commercialisation of trafficking. Parliament amended the law in 1970 and later in 1986. The purpose of the enactment is to inhibit or abolish commercialized sexual abuse and exploitation and the traffic in person as an organised means of leaving. The object is attempted to be achieved by two major strategies, namely by punishing those who are guilty of such conduct and by rescuing and rehabilitating the victims of such exploitation.

### **2.3.1 *Rescue and Rehabilitation of Children and Minor Under the Act ITPA, 1986***

A minor or a child rescued under this act is treated as a neglected child and placed that child in the safe custody of the child welfare committee as there is a provision for providing for intermediate custody in shelter home or corrective institutions.

## **2.4 Juvenile Justice (Care and Protection of Children) Act, 2000**

Articles impose on the State a primary responsibility of ensuring that all the needs of children are met and that their basic human rights are fully protected.

## **2.5 Young Persons (Harmful Publication) Act 1956**

In this Act [Section 2(c)], young person means a person under the age of twenty years. It is an offence to sell, let, hire, distribute, or publicly exhibit harmful publications [Section 3(1)].

## **2.6 Information Technology Act 2000**

Under Section 67 of the Information Technology Act 2000, publication and transmission of pornography is an offence.

### **2.6.1 Regulation of Cyber Cafes**

Attempts to regulate cyber pornography are being made. For instance, the Government of Maharashtra and the Mumbai police have attempted to bring cyber cages within the purview of the Rules for Licensing and controlling Places of Public Amusement ( Other than Cinemas) and Performances for Public Amusement Including Cabaret Performances, melas and Teammates Rules 1960 (the Amusement Rules) framed under Section 13 of the Mumbai Police Act 1951.

## **3. ORGANISATION WORKING IN THE AREA OF TRAFFICKING**

There are some networks and organizations that work in the areas of trafficking. These include the following:

### **3.1 End child Prostitution in Asian Tourism (ECPAT)**

This has been monitoring and acting against sex tourism in Asia and, in recent times, elsewhere. ECPAT promotes transactional governmental cooperation and extraterritorial legislation, which allows governments to bring their nationals to trial for crimes committed in other countries, and draws public attention to the arrest, detention, and conviction of paedophiles engaged in sex tourism. ECPAT also engages the interest and commitment of world tourism authorities, travel agents, holiday guide publishers, and tour promoters in actively working against sex tourism.

### **3.2 Action against Trafficking and Sexual Exploitation of Children (ATSEC)**

This is a network that deals with cross-border activities between West Bengal and Bangladesh to facilitate advocacy, research, social mobilization, technical assistance, and programme support at the national and regional levels. It also aims to develop capacity of the government and non-government organizations to plan and implement advocacy programmes.

### **3.3 The Network Against Child Sexual Exploitation and Trafficking (NACSET)**

This is a network against commercial sexual exploitation and trafficking, as the prevention of trafficking and CSE is a major orientation and thrust of NACSET, it has given adequate importance to approaching organizations which can play a crucial role on this front. For example, village-based organisations engaged in water conservation, drought relief, soil conservation work in the perennially drought-prone areas along with women's organizations and youth organizations are encouraged to join the network. NACSET believes effective prevention can be achieved primarily by expanding in this manner to all the relevant organizations and social forces.

### **3.4 Action Aid**

Action Aid is working to curb the trafficking of women and children. The Action Aid India campaign, aimed at promoting coordinated action against trafficking, looks closely at interventions at the grass roots and links it to policies and action at state, national, and international levels. Prevention at source is attempted by using strong systems and a community-based approach through exact mapping and tracking of the vulnerable areas from where trafficking takes place. A comprehensive analysis of the situation on the ground with respect to trafficking has been carried out. In the course of conducting sensitization and training exercises, a training manual has been developed for use by those doing prevention work. An assessment tool has been designed to go with the training manual. Rehabilitation and reintegration of trafficked persons is attempted through interventions which are sensitive to the situation of the trafficked persons and in keeping with their aspirations, support has been given to create an organisation of trafficked persons themselves to have self-regulatory boards to prevent children from being trafficked into prostitution.

### **3.5 SOS Movement**

The save Our Sisters (SOS) Movement, recently launched by save the Children India. Mumbai has a major goal to seek out the feasibilities of establishing working partnerships among NGOs working at the city, state, and national levels, corporate sector, media, government, and the judiciary to combat the problem. Its objectives are grouped under advocacy, prevention, rehabilitation, and legislation. It has started holding regional workshops, developing awareness booklets, collecting resource material for a Central Resource and Documentation Centre, conducting a survey of various rehabilitation homes for the reused children in Maharashtra, mapping of the traffic-prone areas, and so on.

### **3.6 Campaign against Child Trafficking (CACT)**

The CACT has initiated by terre des Hommes aiming at developing a national strategy for combating child trafficking using three broad dimensions for addressing the problem: awareness generation, legal interventions, and projects at the grass roots creating and strengthening a region-specific intervention through database and building local strategies; and building partnership with the appropriate groups like decision-makers, media, and citizens to ensure implementation of international conventions, initiating national legislative processes, and aiding its conversion into enforceable law.

### **3.7 Sanlaap**

Sanlaap's activities are centred in and on the reg-light areas of Kolkata and its suburbs. Sanlaap is particularly engaged in lobbying with the government, judiciary, and police to get access to the rescued children of the prostitutes, to support them with necessary counselling and care, an effort is also made to rehabilitate the young girls trafficked from suburban and rural areas of West Bengal, Nepal and Bangladesh.

## **4. CHILD SEX TRAFFICKING IN INDIA: PRESENT SCENARIO**

Approximately 150,000 women and children are trafficked from South Asia every year and most of them from, via and to India. Trafficking in children for commercial sexual exploitation is one of the primary manifestations of commercial sexual exploitation of children in India, which exists on a large scale and in many forms. Trafficking of girls for marriage is prevalent, especially in the States of Punjab and Haryana, as highlighted in a study conducted by local

organisation Sakti Vahini; another study revealed a well-established market in Uttar Pradesh for ‘purchased’ Bangladeshi

### Largest Global Criminal Activities

1. Illegal Arms
2. Drugs
3. Human

Trafficking (7-10 Billion USD Industry) 79% of all global trafficking is for sexual exploitation wives. Although the Indian Child Marriage Restraint Act set the minimum age of marriage for women at 18, the Department of Health Survey (DHS) stated that 33.8 percent of the girls aged between 15 and 19 are currently married. Lack of legal documents/identification makes trafficking victims highly vulnerable to threats of apprehension by authorities, extortion, detention, prosecution and deportation. The specific legislation in India dealing with trafficking is the Immoral Trafficking Prevention Act (1986). However, this Act only refers to trafficking for prostitution and therefore does not provide comprehensive protection for children. The substantive law in India is the Indian Penal Code (IPC) of 1860. The IPC addresses issues of the buying and sale of minors, importation of girls etc. Existing rape, assault and abduction laws can also be used to address the abuse of women and girls in brothels. The Goa Children’s Act (2003) is the only Indian statute that provides a legal definition of trafficking and is child-specific. Initiatives undertaken by the Indian Ministry to improve the protection of children include:

- **Establishing Child Line:** This 24-hour phone service can be accessed by a child in distress or an adult on his/her behalf by dialing the number 1098. Child Line provides emergency assistance to a child and is based upon the child’s need. Through this service, a child is referred to an appropriate organisation for long-term follow-up and care.
- **UJWALA Scheme:** Launched by the Ministry in 2007-08 for the benefit of women and girls in difficult circumstances, with specific focus on the special needs of trafficking victims.
- **Kishori Shakti Yojana:** A holistic initiative supporting the development of adolescent girls (11-18 years) to promote awareness of health, hygiene and nutrition, as well as link girls to opportunities for learning life skills, returning to school and developing a better understanding of their social environment.

- **Scheme for rescuing trafficking victims:** This scheme is to address trafficking in women and children for commercial sexual exploitation through small pilot projects.

## 5 FACTORS AFFECTING COMMERCIAL SEXUAL EXPLOITATION

Despite considerable successes and strict legislation against commercial sexual exploitation, however, the problem continues to grow. This section looks at some of the pull factors that drive the trade in children and allow it to continue, and at some of the push factors that make rural as well as urban children especially girls especially vulnerable.

### 5.1 Pull Factors

**High Profitability:** The profit from trafficking a single person is several times what the average farmer can earn in a year. The huge potential earnings for relatively little input are enough to persuade people to flout the law and risk severe punishment.

**The market:** In many parts of the areas, the human rights awareness is low and few people perceive purchasing a woman or child as criminal or immoral. With the shortage of potential wives and the high cost of marriage ceremonies, there is a large internal market for commercialised children in rural areas. At the same time, there is growing demand for trafficked children in the sex industry.

**Weak Response by Local-Level Authorities:** In areas severely affected by trafficking in children, grassroots authorities have generally failed to take effective action or to establish adequate prevention mechanisms. There have even been reported cases of village leaders aiding and abetting the traffickers, passing them valuable information, warning them of impending police raids, and even encouraging villagers to hinder rescue efforts.

**Insufficient Punishment of Buyers:** Chinese criminal law provides for up to three years imprisonment for people who purchase trafficking victims. However, to date, very few people have been prosecuted for this crime.

**Weaknesses in the Legal Framework:** Two loopholes exist in current legislation that complicates cases of trafficking for forced marriage and adoption. Firstly, even if a marriage is forced, the husband and his family can claim paternity of any child of the marriage. Secondly, if a child victim purchased for adoption stays with the adopting family for a certain length of time, the family can claim



formal adoption rights. Aspects of law also make it difficult for the victims of trafficking or their families to take legal action against traffickers or to claim adequate compensation. While the legal guardians of trafficking victims can sue the traffickers for economic loss, the compensation they can claim is limited to direct economic losses caused by criminal activities, and no claim can be made for emotional distress or indirect losses. Trafficking victims and their families face a long, difficult and potentially expensive ordeal in seeking redress from traffickers. And the reality is that many such cases fail for lack of evidence.

***Lack of Fund, Facilities and Human Resources:*** The efforts of the departments of public security and other agencies to suppress human trafficking have long been hampered by a lack of special funds and qualified, specialist staff. The public security departments also lack necessary equipment and mechanisms to collect, analyse and exchange information on trafficking. Not enough specialist agencies are involved in providing transport, repatriation and housing services to rescued victims, with the result that these services are currently done on an ad hoc basis, with the local Public Security Bureaus and even the police sometimes having to contribute, taking away time and resources from their efforts to crack down on trafficking.

## **5.2 Push Factors**

***Poverty and Lack of Opportunity:*** There is a well-established link between trafficking and underdevelopment. Those areas worst affected by trafficking tend to be poor, rural districts, where a growing number of young people, particularly children, are eager to escape the tough subsistence living of the farmer. They are drawn to the promise of a better life and better work opportunities in more developed, wealthier areas, particularly, towns and cities. Losing young people in this way further exacerbates poverty in the villages.

***Low Level of Education:*** Levels of education tend to be low in these areas. Only a few child victims of trafficking have attended even middle school, and the overwhelming majority are semi-literate or even illiterate, meaning that they cannot read about the changing realities of the world beyond their village. The older generations, among whom illiteracy is much more widespread, have little awareness of dangers that their children might face. Optimistic, naïve and unskilled, young girls continue to walk into the traps laid by the traffickers, despite frequent reports in the news media.

***Low Awareness of Risk and Personal Security:*** The burning desire to get out and seek a better life, coupled with low education and naivety, mean that most young girls and children migrating from their rural villages underestimate the risks they face. The participation of friends and classmates in laying traps for potential victims only increases their tendency to misplace their trust.

***Family Disharmony:*** In rural areas, particularly among minority groups, underage marriage, or at least engagement, of girls continues to be common. Many such marriages are arranged by the parents, and even when they are not, the girls may not have the emotional maturity to make a wise choice.

The propelling factor which actualizes commercial sex exploitation of children is the role played by traffickers. The traffickers, through various modus operandi, take the children through unknown and unfamiliar routes to make retracing practically impossible, and they cut off the children from their roots and alienate and isolate them. Trafficking as a phenomenon has been defined by the UN General Assembly in 1994 as: the illicit and clandestine movement of persons across national and international borders, largely from developing countries, with the end goal of forcing girl children into economically oppressive and exploitative situations for the profit of recruiters, traffickers, and crime syndicates as well as other illegal activities such as forced domestic labour, false marriage, clandestine employment, and forced adoption.

***Recommendations for Action:*** A programme that sets out to reduce trafficking in children must address all of the factors mentioned above. It should include measures in the fields of education, poverty alleviation and law making. It must also build inter-regional and inter-country co-operation.

In recent years, the main response to commercial sexual exploitation has taken the form of legislation and regulations. World countries now has a comprehensive legal framework against trafficking, and yet rather than being brought under control, the problem continues its rapid growth. A new mechanism is needed to deal more effectively with the problem of trafficking of children. Central to this new mechanism should be a new public Security Department trafficking-suppression system capable of mounting quick and effective, with clear definition of roles and duties and appropriate rewards and punishments.

The public should also be encouraged to participate actively in efforts to suppress commercial sexual exploitation, by remaining vigilant, passing on information

about exploitation and exploiter to the relevant authorities, and assisting in the rescue of the victims.

## 5. RECOVERY AND REINTEGRATION

Reintegration of victims of commercial sexual exploitation, especially girls, into their families has proven extremely difficult due to the stigmas attached to any sexual activity, even if involuntary. However, efforts in this direction must be based on individual circumstances, and must be location specific. Counselling of the child and the family, and long term monitoring and support are required.

While community-based rehabilitation is the ideal and more sustainable form of rehabilitation, alternative institutional care is often the only form of recovery available for most victims. Thus, close attention must be paid to ensuring protection and security of children in these institutions, as there have been reports of abuse and torture of children in institutions all across South Asia. Constant vigilance and monitoring of transparency in such institutions must be ensured. Trained and sensitive personnel who can provide appropriate support to victims of commercial sexual exploitation of children and child sexual abuse seem to be lacking in many such institutions. Countries that provide such care must co-operate with NGOs and other professionals to allow regular monitoring of their institutions. Across the region many of the homes providing alternative care need enormous improvement. For instance, transit homes in some countries have neglected juveniles, children who are victims of sexual exploitation and abuse, and children who have committed crimes staying together under one roof. These separate categories of children - victims and child offenders - should not be placed together. At the same time it should be recognised that children held in detention or in prison are often victims themselves. A study in Nepal, for example, showed that many arrested children were not aware of the reasons for their arrest. Commercial Sexual Exploitation of Children and Child Sexual Abuse are the worst forms of child abuse and gross violations of child rights. As outlined in the Stockholm Agenda for Action, measures including prevention, protection, recovery and reintegration, co-operation/co-ordination, and child participation are crucial in addressing the phenomenon of commercial sexual exploitation of children and child sexual abuse. In addition, all actions should be guided by the CRC principles of non-discrimination, the best interest of the child, the child's right to life, survival and development, and respect for the views of the child. While several positive steps have been taken in the region since Stockholm to address the issue, the gravity of the problem of commercial

sexual exploitation of children and child sexual abuse in South Asia suggests that much remains to be done to fulfil the Stockholm commitments.

Applying zero tolerance against commercial sexual exploitation of children and child sexual abuse requires concerted efforts at all levels; local, national and regional. This demands more effective implementation of the CRC and other international instruments, and the enforcement of national laws. The up-coming Second World Congress against Commercial Sexual Exploitation of Children in Yokohama must therefore be followed by effective measures of implementation, establishment of feasible monitoring systems and better research methodologies, facilitating comprehensive data collection.

It must be recognised that combating commercial sexual exploitation of children and child sexual abuse will require addressing the factors perpetuating the root causes and consequences of exploitation and abuse. Factors that generate and contribute to a demand for use of children as sexual objects and as a commodity need specific attention and call for immediate intervention.

For South Asia, complex issues of globalisation and its impact on resource poor households, the feminisation of poverty, all forms of discrimination, migration and poor education must all be addressed. This calls for broad partnerships incorporating all concerned sectors of governments, key actors of civil society, including children and young adults, and the private sector. Implementation measures need to be co-ordinated in effect and complementary in nature with clearly identified impact assessment indicators built into on-going monitoring and evaluation mechanisms. While both girls and boys are sexually exploited and abused, a large majority of exploited children in South Asia are girls. Strategic frameworks and actions to address child sexual exploitation and abuse must be tailored to meet its specific gender dimensions.

## **6. CONCLUSION**

Children have human rights, and they are in a vulnerable stage of development that deserves the protection and concern of adults. Despite their involvement in prostitution, pornography or sex trafficking, children should not be treated as criminals because of what they have done nor because of what is done to them.

It is very tempting to dismiss this ugly problem by simply saying—yes, there ought to be laws against it in every country. Where it is difficult to find consensus for creating local and national legal protections, a new international

treaty could set the standard that criminalizes the sex trade in children. Unfortunately, the problem has not been and cannot be solved by law enforcement alone. Ending the commercial sexual exploitation of children requires wide-spread grassroots action that addresses meeting children's needs and curtailing and correcting the abusive behaviour of adults.

The complexity of commercial sexual exploitation demands dialogue and action on the issues of sexuality, discrimination against women and girls, the role of the family, poverty and child labour, public health, law enforcement and human rights. When community leaders from all of these sectors are working together, children will have real choices about their lives, and adult abusers who sexually exploit children can be brought under the scrutiny and sanction they deserve.

In South Asia, NGOs have for many years been the primary actors involved in recovery and reintegration of child victims of commercial sexual exploitation of children and child sexual abuse. Services provided for recovery includes counselling, non-formal education, vocational training, legal advice, income generation activities and medical care. However, much more attention is required to adequately addressing the mental health impact of sexual abuse and exploitation on children. Many girls rescued from brothels revert to similar situations even after having undergone recovery/reintegration programmes. Loss of an affirmative sense of self is a major factor among several others that lead back to prostitution. Without sensitive attention, reclamation of the affirmative self of the child victim is extremely difficult.

Vocational training with the aim of providing rescued children with alternative means of livelihood is being provided in many South Asian countries. While many children find acquiring a 'marketable skill' that may lead to a good job a dream come true, providing children vocational skills without educating them, especially at young ages, contradicts every child's right to education. Furthermore, vocational training does not always lead to jobs, and the children may then find themselves back on the streets, in the unorganised labour market, in hazardous occupations or even in sexual exploitation. Opportunities for girls and boys also differ. To be effective, rehabilitation must include confidence building in addition to quality vocational and life skill training. This approach will ensure the development of the child's personality as a self-aware individual who can make conscious decisions about life choices. While legal reforms and legislation are a positive first step, effective implementation is crucial to combat child sexual exploitation and abuse. Lack of awareness of legal rights is another

impediment in providing justice to the victims. Furthermore, assessing the impact of the legal reforms undertaken is difficult as data collection and monitoring remains weak. Accurate and consistent data on investigation and prosecution of cases of sexual abuse and exploitation are not always present, so that monitoring of progress remains a challenge. Current laws in South Asia appear to treat the problems of child sexual exploitation and abuse only in terms of punishment, without addressing the situation and the needs of the victims. Inadequate legal aid services and cumbersome legal procedures that further victimise the victims prevent people from using the law as a remedy or for protection.

While legal measures need to be strengthened at national, regional and international levels, it is also imperative to ensure pro-active litigation, invoking whatever legal instruments are available to protect children from being sexually abused and exploited.

The existing legal instruments of international bodies, like Council of Europe Guidelines on the Protection of Victims of Terrorist Acts, 2005, concerning victims of terrorism, are somewhat abstract or include victims of terrorism under the broader heading of victims of crime in general. However, redress and reparation for victims of terrorism is a fundamental demand of justice. From the perspective of victims of terrorism, core values such as protection, remedy and rehabilitation, have to be acknowledged by the states and this duty of protection extends to the courtroom also.

## 2. IS TERRORISM A NEW FORM OF WARFARE?

Terrorism has increasingly become either manifestation of the changing nature of armed conflict or indeed a new form of global warfare and is exemplified by developments in weapons of mass destruction, globalization, the glare of the information era and the positive and negative effects of rapid diffusion of knowledge and technology.<sup>3</sup> Terrorism is no different from war, as terrorism has all the essential characteristics of a war; such as use of force, act of violence, it is an organized attack, causes fear, it is generally constrained by social norms and it has a political objective. Non-territorial terrorism at international level has increasingly become an act of war and the line between domestic and international terrorism is blurred. Now terrorism is not mere criminality as it was initially considered to be. In fact, trends suggest that armed conflict pitting a state against non-state entities, or even pitting one or more non-state entities against each other, will account for the overwhelming majority of wars in coming decades. Non-state entities necessarily fight differently than states. They are less bound by norms, rules, and laws. Robert C. McFarlane, Former Assistant to the President of United States of America for National Security Affairs stated that:

Our problem for the future is that below the threshold where the deterrence works, below the strategic level, we face insidious new threat. This threat is not war as we have known it, not the threat of nuclear attack, but this is a new form of warfare, of terrorism.<sup>4</sup>

It is also to be stressed that terrorism differs from war in certain aspects, i.e., the terrorist attack is a surprise attack, unlike war, which is generally pre-mediated.

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<sup>2</sup> *Rattan Singh v. State of Punjab*, (1979) 4 SCC 719, Para 6.

<sup>3</sup> Brian Jenkins, "International Terrorism: A New Mode of Conflict", Research Paper No. 48, *California Seminar on Arms Control and Foreign Policy*, Crescent Publications (1975), p. 4.

<sup>4</sup> Stephen Sloan, *Beating International Terrorism: An Action Strategy For Preemption And Punishment*, Air University Press, Alabama (2000), p. 15.

Moreover, in terrorism the main target of attack is the civilian population, whereas in war, the army of the enemy State is the target of attack, and finally wars are socially legitimate but not terrorism.

### 3. CONCEPT OF TERRORISM

There is no accepted definition of terrorism or a terrorist. Why is this? It is due to the fact that 'terrorist' is a label. It has never been voluntarily adopted. The only internationally agreed text dates back to the 1937 Convention for the Prevention and Punishment of Terrorism adopted by the League of Nations,<sup>5</sup> which defined terrorism as: Criminal acts directed against the state or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public.

Terrorism is not merely a heinous criminal act; it is more than mere criminality. It has acquired a global dimension. Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are revolt against a civilized society. Terrorism disturbs the harmony of the society or „terrorize people and the society and not only those directly assaulted, with a view to disturb the even tempo, peace and tranquillity of the society and create a sense of fear and insecurity.<sup>6</sup> Terrorism is a premeditated, deliberate systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience.<sup>7</sup> Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted.<sup>8</sup> Terrorist acts are meant to destabilize the nation by challenging its sovereignty and integrity to raze the constitutional principles, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow democratically elected government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so much more. Terrorism cannot be equated with a usual law-and-order problem within a State.<sup>9</sup>

<sup>5</sup> Benjamin Ferencz, "International Criminal Court", Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 2 (1981), p. 1124.

<sup>6</sup> *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra*, (1994) 4 SCC 602, Para 12.

<sup>7</sup> *Nazir Khan v. State of Delhi* (2003) 8 SCC 461, Para 15.

<sup>8</sup> *Devendra Pal Singh v. State of Delhi* (2002) 5 SCC 234, Para 30.

<sup>9</sup> *People's Union for Civil Liberties v. Union of India*, AIR (2004) SC 456 Para 9.



Despite the absence of a definition and the diversity of terrorist acts, it is relevant to further study the various forms of terrorism; such as chemical terrorism, under this type of terrorism chemical agents are used to cause mass destruction, biological terrorism, where biological agents are used, radiological terrorism, in which the terrorist disperse radiological materials to contaminate an area, nuclear terrorism is one which uses nuclear technology, agricultural terrorism, in which terrorists use pathogenic agents to destroy crops and livestock and cyber terrorism is one which terrorists target or use computers as a tool to cause destruction.<sup>10</sup>

#### 4. NOTION OF 'VICTIMS OF TERRORISM'

As it is difficult to agree on a definition of terrorism, it also appears difficult to define the term 'victims' in the context of terrorist attacks. The expression 'victims of terrorism' itself does not appear under any of the International legal instruments or International Humanitarian Law, however victims are also the primary concern of International Humanitarian Law. This does not imply that victims of terrorism are to be left without rights; their ultimate right is the right to protection of life. Mostly, the needs of direct victims of terrorism are similar to those of other victims of war, differing not in kind but rather in degree or in possibilities for implementation. So, by and large, the definition of victims of war also includes victims of terrorism. First of all, it is essential to analyse the definition of victim, both at international and domestic level. The U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, under Principle 8, defines victim as:

A person is 'a victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights.<sup>11</sup>

The expression 'victim' has to be understood in a broad and inclusive sense under international and humanitarian laws, and is not to be construed in a narrow

<sup>10</sup> Gus Martin, *Understanding Terrorism: Challenges, Perspectives and Issues*, SAGE Publications (2009), p 46.

<sup>11</sup> Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 9 (05 August 2004) available at: [www2.ohchr.org/english/events/meetings/docs/versionrev.doc](http://www2.ohchr.org/english/events/meetings/docs/versionrev.doc)

sense of being just an individual victim. It must include a group, a class or community of persons racial, economic, political or religious to whom harm, damage, loss, injury, both physical and psychological, has been caused by an individual wrongdoer or persons in lawful authority by abusing his/their powers.<sup>12</sup> Furthermore, the term victim should also encompass within its fold, not only the immediate victim but also the indirect victims, like the family and the dependents.

#### **4.1 Classification of Victims of Terrorism**

Though terrorist acts affect the society at large but at the same time the impact of these attacks are different on different people and some people might be directly affected but the others may be indirectly affected. So the victims can be broadly classified into primary, secondary and tertiary victims of terrorism. Primary victims are those who directly suffered the harm from the terrorist attack, including those who suffer property damage (economic loss) due to violent acts. Secondary victims consist of relatives, family and dependants of the person who is a primary victim of the acts of terrorism. In any terrorist act, fear is stimulated by threats of indiscriminate and horrifying forms of violence directed against ordinary people everywhere, and these people at large form part of the tertiary victims.

#### **4.2 Definition of 'Victim' in the Indian Scenario**

It is apt to note that for the first time the law makers in India have taken initiative to define victim and it is defined under the Code of Criminal Procedure Act, 1973. It reads as: section 2 (wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.

This definition of victim was recently included by an amendment to the Code of Criminal Procedure, 1973 and under this definition victim does not only mean direct victim but also includes in its fold indirect victims, such as guardian and legal heir. However, again the family as such is not included and hence it cannot be called as an exhaustive definition of victim.

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<sup>12</sup> Report of the Secretary-General, *Guidelines for Measures on Behalf of Victims of Crime and Abuses of Power, Para 9*, delivered to the Economic and Social Council, U.N. Doc. E/AC.57/1984/14 (1984).

### **4.3 Distinction between ‘Victim of War’ and ‘Victim of Terrorism’**

Mostly, the victims of war have similar needs as that of the victims of terrorism, nonetheless, the victim of terrorism differ not in kind but rather in degree. However, the Council of Europe Guidelines on the Protection of Victims of Terrorist Acts 2005, recognises certain specific needs of the victims of terrorism, which are not found in any other legal instrument pertaining to victims of war, such as emergency assistance and provision on the possible negative effects of media exposure.<sup>13</sup>

## **5. WOMEN AS VICTIMS OF TERRORISM**

Wherever terrorism exists, women are often singled out as target. Like men, women are also victims; innocent bystanders. Since men are more likely to be involved in violence as soldiers and militants, women are more often displaced by their absence. Women victims fall under all the three categories of victims such as primary, secondary and tertiary victims. The problems encountered by women victims are far more severe and irreparable.

### **5.1 Why emphasise on women victims of terrorism?**

Considering women as a victim in no way intends to infer that women suffer more than their male counterpart. Indeed, it is not easy to separate the impact of terrorism on women and men but it is an indisputable fact that civilian women are increasingly at risk and terrorist attacks have shown that their safety is not guaranteed by the respect due to their sex and gender.

Further the impact of terrorism on women is not only a result of biological differences, but also of the constraints and opportunities arising from their role in society.

### **5.2 Women as ‘Primary Victims’ of Terrorism**

Women are more physically susceptible to illness than men. Women are endangered by nuclear, biological and chemical weapons, which can kill or maim, leaving survivors with serious damage to their health. As such weapons can also cause genetic damage which can lead to malformations; they affect women’s reproductive system and threaten not only their own health but that of

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<sup>13</sup> Available at [www.euforumrj.org/readingroom/Terrorism/DesVictExec Summary.pdf](http://www.euforumrj.org/readingroom/Terrorism/DesVictExec Summary.pdf)

the future generations. Reproductive health care is a vital need for women.<sup>14</sup> Women who are direct victims of terrorism may suffer different, more severe, social and cultural repercussions than men as a result of injuries. The civilian population is often targeted by terrorists, due to which civilians have been compelled to leave their homes through fear of attacks. In a large number of countries affected by terrorism, like India, the civilian population is highly dependent on its land as a source of livelihood, so displacement of women and loss of this livelihood can have life-threatening implications.

Women make up the majority of the world's refugees.<sup>15</sup> In case of displacement or destruction of property by violent means, women will no longer have the necessary means of production to be self-sufficient. One of the consequences of terrorism is that women lose their homes. Women may be forced to flee, houses may be destroyed or damaged, and there may be serious obstacles to returning because the situation remains dangerous.

### 5.3 Women as 'Secondary Victims' of Terrorism

A woman is the inseparable and intrinsic part of the family, yet is also dependent on the male head of the family in her traditional roles, such as wife, daughter, sister, and mother and in case of terrorist attacks, the family is often separated as the family loses the male bread winning member and as a result of which women have to face widowhood. If a place is frequently affected by terrorism, women may have to move to another place in search of various forms of employment. In the process, the movement of women is greatly restricted and due to security reasons and fear of attacks women cannot perform her roles assigned to her after the death of the male member in the family.

### 5.4 Women as 'Tertiary Victims' of Terrorism

In any terrorist act, fear is stimulated by threats of indiscriminate and horrifying forms of violence directed against ordinary people everywhere. Women who do not fall under the category of primary and secondary victims form part of tertiary victims of terrorism.

<sup>14</sup> Chris Palmer, Jay L. Lush., Anthony Zwi, "The Emerging International Policy Agenda For Reproductive Health Services In Conflict Settings", *Social Science and Medicine*, Issue 40 (1999), pp. 1689 and 1691.

<sup>15</sup> Carolyn McAskie, "Emergencies Impacting Women ~ Women Impacting on Emergencies", A Panel Discussion Organized by OCHA/UNICEF/WFP during the 23rd Special Session of the General Assembly, OCHA News, Issue 51, June 26, 2000 available at [http://www.reliefweb.int/ocha\\_ol/pub/ochanews/on260600.pdf](http://www.reliefweb.int/ocha_ol/pub/ochanews/on260600.pdf)

### 5.5 Women as a Tool and Supporter of Terrorism

Women are not only passive victims of terrorism; some women also participate in terrorism. Women have also committed acts of terrorism, including suicide bombing in India and many other countries like Palestine. Women are just used as a tool but it is men who comprise the overwhelming majority of individuals who practice terrorism and women participate in terrorism mainly because of the existing gender inequalities and patriarchal norms and to protect themselves and their families. Women, who have become terrorists, do so because they see few alternatives for pursuing political change. Some women support men's militancy in their traditional roles as mothers and daughters by nurturing the families committed to terrorist causes and they support mainly because of their husband's and children's wellbeing.

## 6. CONCEPT OF REPARATION AND WOMEN VICTIMS OF TERRORISM

The term 'reparation' has been derived from the word 'repair', and this term is used mainly to describe a range of measures that are aimed to rectify the harm caused and to restore the victim to his/her own position as if they were before the said act was committed, insofar as possible. The rationale for reparation is derived from the violation of the victim's individual rights, which will usually have resulted in a victim suffering some form of material or emotional loss or harm. It should, to some extent, help rehabilitate victims and restore their dignity.<sup>16</sup>

The expression reparation is used interchangeably with terms such as compensation, damages or restoration. Reparation is generally misunderstood to be only financial compensation, but the meaning of reparation is not so narrow, there are some more forms of non-monetary reparation such as rehabilitation and apologies. The forms of reparation are mainly dealt under the Basic Principles of 2005, as material and symbolic forms of redress. The former includes proprietary and pecuniary measures such as compensation and the latter deals with measures such as rehabilitation.<sup>17</sup>

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<sup>16</sup> "The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms", Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62, (18 January 2000).

<sup>17</sup> Jonathan Doak, *Victim's Rights, Human Rights and Criminal Justice*, Hart Publishing (2008), p. 207.

## 6.1 Concept of Victim Reparation under International law

The concept of reparations was originally conceived to be within the framework of the domestic laws of the state and from the beginning of the twentieth century, the principle of tort were recognized under which the perpetrators of illegal or wrongful acts were required to be indemnified by the parties who were injured by their acts. Article 3 of the Hague Convention, 1907, gave full effect to this principle so much so that the treaties following Second World War obligated the defeated powers to pay compensation with respect to war crimes and crimes against humanity, committed by their armed forces on the territories of the allied powers.<sup>18</sup> This view was confirmed in the case of Chorzow factory in 1928.<sup>19</sup> In this case, the Permanent Court of International Justice stated that it was a 'principle of international law, that the breach of an engagement involves an obligation to make reparation in an adequate form',<sup>20</sup> and that:

Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>21</sup>

Human rights law has duly acknowledged the special status of individual victims as those who have primarily suffered the consequences of human rights violations. Its focus is mainly that the individual will be afforded a right to redress directly from the offending state. This position is reflected in various international instruments and the important one amongst them is the Victim's Declaration of 1985. Principle 8 of the said Declaration lays down the basic requirement that: Offenders or the third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants.

Also the Basic Principles and the Guidelines in the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law were adopted by the Commission on Human Rights in April 2005 and by the General Assembly in December 2005.<sup>22</sup>

<sup>18</sup> *Supra* note 11, p. 5.

<sup>19</sup> *Factory at Chorzow* (Jurisdiction), Series A. No 17 (1927) PCIJ No.8.

<sup>20</sup> *Ibid.*, 21.

<sup>21</sup> *Ibid.*, 47.

<sup>22</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

## 6.2 Limitations of Victim Reparation under International Law

The concept of victim reparation is recognised by International Law but it does not deal with the victims of terrorism and there is a need for a specific international convention to deal with victims of terrorism and their right of reparation. Furthermore, under the International Law there is *a priori* requirement that victims are represented or even supported by a state body, so the individual victims cannot get reparation under international law directly. The International Human Rights Law has substantially recognised the rights of the individual victims even in case of war, but again this recognition is not extended to the victims of terrorism and their right to reparation.

## 6.3 Victim Reparation at the Regional Level

It is a very significant development at the regional level that the rights of victims of terrorism are duly acknowledged by the Council of Europe and the important legal instrument in this regard is the Council of Europe Guidelines on the Protection of Victims of Terrorist Acts, 2005. This guideline on the protection of victims of terrorist acts recognizes the suffering endured by the victims, and considers that they must be shown national and international solidarity and support. States are encouraged by these guidelines to provide to victims and, in appropriate circumstances, to their close family, an emergency and continuing assistance. In addition, the guidelines deal with key issues, such as the need for granting a fair and appropriate compensation to victims, facilitating their access to the law and to justice, as well as protecting their private and family life, their dignity and security.

## 6.4 Victim Compensation in Indian Scenario

Under the provisions of Code of Criminal Procedure, 1973 the power to award compensation is vested under Section 357. However, the power to award compensation is provided under the Indian Constitution. Sub-section (1) and (3) vests power on the trial court to award compensation and sub-section (4) gives power at the appellate stage. Also, it is to be noted that for the victim to claim compensation before the court, the following are to be satisfied:

- There should be a loss or injury suffered by the victim
- Loss or injury must be caused by the commission of the offence

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Humanitarian Law, G.A. Res. 60/147, Annex, U.N. Doc A/RES/60/147/Annex (Mar. 21, 2006).

- Victim can recover compensation in the appropriate forum

In *Sarwan Singh v. State of Punjab*<sup>23</sup> it was held that the object of the section is to provide compensation payable to the persons who are entitled to recover damage from the person sentenced even though fine does not form part of the sentence. The Supreme Court further held that it is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation.

## **7. FORMS OF REPARATION AND WOMEN VICTIMS OF TERRORISM**

Generally, victim reparation is known only in terms of monetary compensation. Basically the primary women victims of terrorism may be in need of immediate medical assistance, financial support and rehabilitation. Secondary women victims of terrorism generally need financial assistance and rehabilitation and the women who are tertiary victims of terrorism generally do not require any financial assistance or rehabilitation but demand a strong assurance from the state that such acts would not occur in future.

## **8. CAN VICTIMS OF TERRORISM CLAIM COMPENSATION IN INDIA?**

In India there are no legislations that deal with the victims of terrorism but this does not mean that their rights can be ignored by the state and there are various arguments that justify as to why the state should compensate the victims of terrorism and the primary argument is that:

- The state has to compensate because it has failed to prevent the crime by means of effective criminal policy.
- Secondly, state intervention is justified on grounds of solidarity and equity.

Under Article 32, the power has been conferred upon the Supreme Court to issue appropriate directions, orders of writs in the nature of habeas corpus, quo warranto, mandamus, prohibition and certiorari, for the enforcement of the fundamental rights. Similarly, Article 226 empowers the High Court to issue orders, directions and writs etc. for the enforcement of fundamental rights or any

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<sup>23</sup> AIR 1978 SC 1525.



other purpose. The expression „any other purpose makes it clear that the High Courts can use writ jurisdiction not only for enforcing fundamental rights but also for enforcing any other legal right. The writ jurisdiction has provided to the judiciary a valuable tool in protecting the life and liberty of citizens.

In *C. Ramakonda Reddy v. State of Andhra Pradesh*,<sup>24</sup> it was pointed out that the immunity of the state function is not an exception to Article 21, which guarantees the fundamental right of life and liberty. Thus, it was ruled that where an act or omission of state infringes the right of life and personal liberty of a citizen, a suit for compensation on behalf of victim is maintainable and cannot be barred by pleading sovereign immunity.

Further, the practice of payment of compensation to victims under writ jurisdiction has been further facilitated by several developments. First significant development was that the rule of *locus standi* was widened. After the decision in the *SP Gupta v. Union of India*,<sup>25</sup> popularly known as the Judges Transfer case, the concept of Public Interest Litigation evolved. According to this concept any member of the public who has sufficient interest in the matter can bring a suit for the enforcement of fundamental rights on behalf of the person whose rights have been violated. In *M. C. Mehta v. Union of India*,<sup>26</sup> compensation was paid to victims of gas leakage under the head of Public Interest Litigation. The second significant development is widening the ambit of the word ‘state’ as defined in Article 12. In the decision of *R. D. Shetty v. International Airport Authority*,<sup>27</sup> the word ‘state’ as used in Article 12 of the Constitution has been held to include any agency or instrumentality of the State. Thirdly, in *Maneka Gandhi v. Union of India*,<sup>28</sup> the Supreme Court held that:

The expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of men and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

The Right to life under Article 21 is not confined merely to physical existence or animal existence, but it includes within its ambit the ‘right to live with human dignity’. Further, Maneka Gandhi’s case also imposed a limitation on the law

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<sup>24</sup> AIR 1989 A.P. 235.

<sup>25</sup> AIR 1982 SC 149.

<sup>26</sup> AIR 1987 SC 1087.

<sup>27</sup> AIR 1979 SC 1628.

<sup>28</sup> AIR 1978 SC 597.

making as well, that while prescribing a procedure for depriving a person of his life or personal liberty; it must prescribe a procedure which is reasonable, fair and just and not arbitrary, whimsical and fanciful.

In the case of *Harikishan Singh v. Sukhbir Singh*,<sup>29</sup> the Apex Court held that victim compensation is an important provision but courts have seldom invoked it, perhaps due to ignorance of the object that it aims at. It empowers the court to award compensation to victims while passing the judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences, but it is in addition thereto. This power was intended to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is indeed a step forward in the Indian criminal justice system. The Supreme Court in *Maneka Gandhi's* case has held that right to life includes right to life with human dignity and the victims of terrorism especially women are shattered by the terrorist attacks both physically and psychologically and they are in immediate need of financial assistance to restore their position back in the society to the extent possible and it is the duty of the state to compensate these victims of terrorism and if the state fails to do so then the victims can claim their remedy under the constitution.

## 9. CONCLUSION

Globally terrorism is a major threat to the civilian population and every terrorist attack leaves behind innocent and hapless victims, especially women. Women become victims not just because they form part of the civilian population, but also because of their extreme vulnerability. The primary aim of this essay was to demonstrate the growing importance attached to the rights of the victims of terrorism and reparation in International and Human Rights discourse and assess the corresponding degree to which it is reflected in the domestic laws. It is necessary to acknowledge the harm suffered by the women victims of terrorism and also various different ways in which such harm might be rectified. Although reparation is viewed as being backward looking on grounds of corrective justice if broadly construed to encompass ideas such as rehabilitation and other gestures of remorse, it may be conceived as being progressive and capable of re-

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<sup>29</sup> AIR 1988 SC 2127.

equipping the women victims of terrorism. However, a study of the contemporary practices, national and international, have thus proved that these rights do not seem justiciable and can thus only with difficulty, give place to a remedy.

## THE INDIAN WOMEN AND LAW

Manish Kumar\*  
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### 1. INTRODUCTION

The pain of the Delhi gang rape victim and other victims in the other horrible incidents in India has been felt by the nation. The Aam Admi has been shaken out of inertia and is demanding safety and security for women in his family, locality and city etc and stricter punishment for the criminals. In this hour of crisis the reaction of some political and religious leaders has shown a disturbing mindset deeply embedded in the psychology of Indian men towards rape that desperately needs to change and a thinking has come in their mind that the women should not cross the Laxman Rekha. But there is no suggestion available to trap the Ravana.

The main reasons if there are found behind the various crimes against the women are westernization of India and denial of real culture of Bharat. The mindset has been disturbed due to various sources of society one of which is television, internet etc. The same has increased the crime in society. What will happen if a daughter is not safe from her father? if a sister is not safe from her brother? How would godmen explain the rape of 3 years old girl? If the girl is subjected to abuse even in safe four walls of house<sup>1</sup>.

It is relevant to mention here that reacting to the rise in rape crimes, the statements given by various religious leaders of society exhorting women to wear traditional and culturally acceptable or decent clothes. They do not realize that sexual harassment of young girls is happening right in the religious places when there is huge rush of devotees and young women wearing traditional clothes with their head covered stand in queues for darshan, a stray hand touches or snakes up to pinch the body, or someone will make body touch under the guise of the crowd pushing. While going to school or college it is common place to have stalkers following school or college girls, sometimes to their homes.

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<sup>1</sup> *The Tribune*, 23 January, 2013, p. 9.

Now the stalkers or bad boys are more aggressive and violent to the point of criminality. A 'no' by a girl invites the acid attack or kidnapping or rape<sup>2</sup>.

The private world is also not safe for the women these days. Now it is not the outside world that needs to be made safe for women but their private world also needs to be taken care of. Most of the cases that has come to the Punjab State Women Commission seeking divorce had a common refrain. They can not take any physical assault any more.

## **2. POSITION OF INDIAN WOMEN IN INDIAN SOCIETY**

In our society, which is a patriarchal society, the worth of women is centered around her sexuality. In Indian society the virginity of a woman is her biggest asset and loss of the virginity is a reason to kill her. Throughout the history the victor army raped the women of the defeated nation to demoralize it further.

Women are always subjugated to sexual violence. However they become victims and culprits at the same time. Innumerable girl children, young girls and women, even the old aged women are raped everyday and the news is tucked away in the next morning news paper in one or two columns. This depends upon the sensation which it can create. There is generally no public reaction. But the brutal and savage gang- rape in Delhi bus has brought the issue to the country's focus. It has given the wide attention to the nation. Now the time has come that a strong and actionable law in this regard is required.

The issue needs more discussion not only about the weakness of legal and executive system handling the molestation cases in India but also on role of institutions such as National Commission for Women (NCW). Before we go for suggestion for stronger and effective legal system/ laws we must have a look at the prevailing laws in this regards.

## **3. WOMEN PROTECTIVE LAWS AND CONSTITUTIONAL PROVISIONS IN INDIA<sup>3</sup>**

There are many provisions given in the enacted laws relating to benefits to Indian women. Some of these are discussed here below:-

<sup>2</sup> *The Tribune*, 23 January, 2013, p. 9.

<sup>3</sup> [http://www.google.co.in/#hl=en&tbo=d&output=search&client=psy-ab&q=Women+Protective+Laws+and+Constitutional+Provisions+in+India&oq=Women+Protective+Laws+and+Constitutional+Provisions+in+India&gs\\_l=hp.3...1862.1862.0.3276.1](http://www.google.co.in/#hl=en&tbo=d&output=search&client=psy-ab&q=Women+Protective+Laws+and+Constitutional+Provisions+in+India&oq=Women+Protective+Laws+and+Constitutional+Provisions+in+India&gs_l=hp.3...1862.1862.0.3276.1) retrieved on 03-02-2013.

S.No	Description	Source	Provision
1	Political Rights of Women	Constitution of India	Equality before law and equal protection of law (A.14).
2	Right to vote	Constitution of India	Every person who is citizen of India and who is not less than 18 yrs. of age and is not otherwise disqualified, shall be entitled to be registered as a voter at any election (A.326). And No person to be ineligible for inclusion in, or to claim to be included in a special electoral roll on grounds of race, religion, caste or sex (A.325).
3	Right to vote	Representation of People Act, of 1951	Every person who has completed his or her age of 18 years is eligible for registration of his/her name in the electoral roll (S.19).
4	Right of women to contest elections	Representation of People Act, of 1951	basic qualification for a candidate to LS/RS or State legislatures are as follows: - he/she a citizen of India- have completed 25/30 yrs - have sound mind - not be a undischarged insolvent - Not hold nay office of profit- not be convicted of criminal offence of moral turpitude. There is no bar for women to stand for election/s provided she is elector in the same constituency. Not less than one-third (including the no. of seats reserved for women belonging to the SC and the ST) of the total no. of seats to be filled by direct election in every Panchayat/s shall be reserved for women (Chapter II)

S.No	Description	Source	Provision
5	Right of women to contest elections	Constitution of India	Not less than one-third (including the no. of seats reserved for women belonging to the SC and the ST) of the total no. of seats to be filled by direct election in every Municipality shall be reserved for women (A.243 D).
6	Right of women to hold public office	Constitution of India	Equality of opportunity in matters of public employment. No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State (A.16).
7	Right to association	Constitution of India	All citizens both men & women shall have the right to form association or union (A.19 cl.1 (c)).
8	Appropriate measures for women	Constitution of India	<p>Equality before law and equal protection of law (A.14).</p> <p>Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth (Art 15)</p> <p>No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them be ineligible for or discriminated against in respect of any employment or office under the State (Art.16(2))</p>

S.No	Description	Source	Provision
9	Education for achieving the crimation of the prejudices	Constitution of India	It shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women (Art.51A(e)).
10	Protection against all forms traffic in women & exploitation of prostitution of women	Constitution of India	Prohibition of traffic in human beings and forced labour (A.23).
11	Protection against all forms traffic in women & exploitation of prostitution of women	Indian Penal Code, 1860	Procreation of minor girls for illegal and improper purposes (Sec.366A). And Importation of minor girls i.e. girls below 21 years of age, from foreign country including Jammu and Kashmir for illegal and improper purposes (Sec. 366B). And Buying or disposing any person as a slave (Sec.370). And Habitual dealings in slaves (Sec. 371).
12	Protection of Women	Indian Penal Code, 1860	Selling minors, i.e. below 18 years of age for the purposes of prostitution is penalized (Sec.372). Buying minors i.e. below 18 years of age for the purposes of prostitution is penalized (Sec.373).



S.No	Description	Source	Provision
13	Protection of Women	Immoral Traffic (Protection) Act, 1934	Procuring, indulging or taking a person for the sake of prostitution is an offence (S.5).
14	Protection of Women	Bombay Devdasis (Protection) Act, 1934	Dedication of girls & women to Gods & Goddess is penalized (S.3).
15	Representation by women at international level And Rights to the Nationality	Constitution of India	Right to equality (A.14).
16	Rights to the Nationality	Citizenship Act, 1951	Citizenship by birth for both men and women (S.3).
17	Education	Constitution of India	State shall within the limits of its economic capacity and development make the effective provision for securing the right to education (A.41).  State shall make provisions for the free and compulsory education for children until they complete the age of 14 years (A.43).
18	Equality in the matters of employment	Constitution of India	Right to equality (A.14).
19	Right to work	Constitution of India	Policy of the state shall be towards securing citizens men and women equally have right to an adequate means to livelihood (A.39 cl.(a)).

S.No	Description	Source	Provision
20	Right to non-discrimination	Constitution of India	State shall make effective provisions for securing the right to work (A.41).  And Equality of opportunity in matters of public employment (A.16).
21	Right to non-discrimination	Equal Remuneration Act, 1976	No employer can discriminate against men or women in the matters of the same or similar nature, except where employment of the in such work is prohibited or restricted by law (S.5).
22	Equal pay for equal work	Equal Remuneration Act, 1976	A worker working in any establishment shall not get a wage lower than what the worker of opposite sex get for doing the same or similar type of work (S.4).
23	Right to the social security	The Workman's Compensation Act of 1923 (applicable for both men and women)	It provides compensation to be paid by the employer for any injury or any accident suffered by the worker at the time of and/or during his/her employment.
24	Maternity benefits	The Maternity Benefit Act, 1973 (applicable to women working in the organized sector)	It prohibits employment of the pregnant women during certain period (usually for three months) (S.5).  Absence during the maternity period is paid with full wages (S.7).  Women are entitled to get the medical bonus in addition to her paid leave (S.8).  The Act also provides for the nursing breaks to mothers for feeding their infants (S. 11).

S.No	Description	Source	Provision
25	Health	Constitution of India	State shall direct its policy towards securing health and strength of workers men, women (A.39 cl(e)). And State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner (A.39 cl(f)).

Apart from various enactments of parliament there are **Law relating to Sexual Violence**

At present only two provisions of the Indian Penal Code, 1860 primarily deal with the issue of sexual violence against women.

Section-376 Indian Penal Code punishes rape. And Section-354 Indian Penal code punishes outraging the 'modesty' of a woman. Sec-354 of IPC applies to routine incidents of molestation and certainly does not respond to aggravated sexual assault by mob, accompanied by public striping and parading naked. There is no provision of law to redress the harm, injury, humiliation and trauma suffered by the victim. Sec-354 IPC offers no commensurate penalty nor is a deterrent. In fact, molestation is a bailable offence and allows the court to award a maximum of two years of imprisonment or at its discretion, a mere fine as a minimum sentence.<sup>4</sup>

### 3.1 New Amendments to Law relating to Women

The Criminal Law (Amendment) Bill, 2013 is an Indian legislation passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013, which provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences. The Bill received Presidential assent on 2 April 2013 and deemed to come into force from 3 February 2013. It was originally an Ordinance promulgated by the President of India, Pranab Mukherjee, on 3 February 2013, in light of the protests in the 2012 Delhi gang rape case.

<sup>4</sup> *The Tribune*, Chandigarh, 23 August, 2012, p. 9.

### 3.2 New offences<sup>5</sup>

This new Act has expressly recognised certain acts as offences which were dealt under related laws. These new offences like, acid attack, sexual harassment, voyeurism, stalking have been incorporated into the Indian Penal Code. These are discussed below:

#### 3.2.1 Section-326 A-Offence-Acid Attack

Punishment-Imprisonment not less than ten years but which may extend to imprisonment for life and with fine which shall be just and reasonable to meet the medical expenses and it shall be paid to the victim. It's a gender neutral offence.

#### 3.2.2 Section- 326 B-Offence-Attempt to Acid attack

Punishment- Imprisonment not less than five years but which may extend to seven years, and shall also be liable to fine. It's a gender neutral offence.

#### 3.2.3 Section- 354 A-Offence-Sexual Harassment

Punishment- Rigorous imprisonment up to five years, or with fine, or with both in case of offence described in clauses (i) & (ii). Imprisonment up to one year, or with fine, or with both in other cases.

Its a Gender neutral offence

- i. physical contact and advances involving unwelcome and explicit sexual overtures; or
- ii. a demand or request for sexual favours; or
- iii. making sexually coloured remarks; or
- iv. forcibly showing pornography; or
- v. any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

#### 3.2.4 Section-354 B-Offence-Public Disrobing of Woman

Punishment- Imprisonment not less than three years but which may extend to seven years and with fine. Assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked in any public place.

<sup>5</sup> [http://en.wikipedia.org/wiki/Criminal\\_Law\\_%28Amendment%29\\_Act,\\_2013](http://en.wikipedia.org/wiki/Criminal_Law_%28Amendment%29_Act,_2013) retrieved on 15-05-2013

Offence	Changes
Acid attack	Fine shall be just and reasonable to meet medical expenses for treatment of victim, while in the Ordinance it was fine up to Rupees 10 lakhs.
Sexual harassment	"Clause (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature" has been removed. Punishment for offence under clause (i) and (ii) has been reduced from five years of imprisonment to three years. The offence is no longer gender-neutral, only a man can commit the offence on a woman.
Voyeurism	The offence is no longer gender-neutral, only a man can commit the offence on a woman.
Stalking	The offence is no longer gender-neutral, only a man can commit the offence on a woman. The definition has been reworded and broken down into clauses, The exclusion clause and the following sentence has been removed "or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking". Punishment for the offence has been changed; A man committing the offence of stalking would be liable for imprisonment up to three years for the first offence, and shall also be liable to fine and for any subsequent conviction would be liable for imprisonment up to five years and with fine.
Trafficking of person	"Prostitution" has been removed from the explanation clause
Rape	The word <i>sexual assault</i> has been replaced back to <i>rape</i> . The offence is no longer gender-neutral, only a man can commit the offence on a woman. The clause related to touching of private parts has been removed.

#### **4. MAJOR CRIMES AGAINST WOMEN**

- i. Rape
- ii. Eve-teasing
- iii. Misogyny
- iv. Acid violence
- v. Molestation
- vi. Cyber crimes against women
- vii. Sexual harassment
- viii. Domestic Violence or Assault

##### **4.1 Inadequacy of Laws**

###### **4.1.1 *Eve teasing***

At this movement there is no law for protection from eve-teasing. These are perceived as minor offences and not taken seriously. It is taken almost as normal part of being a woman. When normal offences are left unaddressed then they grow to bigger crimes. Delhi and Tamil Nadu have taken a lead in passing a prohibition of Eve-teasing Act 1988 and 1998 respectively. In Tamil Nadu it is a non-bailable offence with the maximum punishment being rigorous imprisonment up to 10 years and a fine up to Rs. 50,000/- . Maharashtra is deliberating on it. But no other state has introduced this required law. In Delhi while in traveling in Metro rail if the male passenger enters in the women apartment then he would be fined Rs.200/-

###### **4.1.2 *Sexual Harassment at Work Places***

Sexual harassment is bullying or coercion of a sexual nature, or unwelcome or inappropriate promise of rewards in exchange for sexual favors. In most modern legal contexts, sexual harassment is illegal. As defined by the US EEOC, "It is unlawful to harass a person (an applicant or employee) because of that person's sex." Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Where laws surrounding sexual harassment exist, they typically don't prohibit simple teasing, offhand comments, or minor isolated incidents. In the workplace, harassment may be considered illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted, or when the victim decides to quit the job). The harasser can be the victim's

supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer. It includes a wide range of behavior from mild transgressions to sexual abuse or sexual assault. Sexual harassment is a form of illegal employment discrimination in many countries, and is a form of abuse (sexual and psychological) and bullying. For many businesses and other organizations, preventing sexual harassment, and defending employees from sexual harassment charges, have become key goals of legal decision-making.<sup>12</sup>

#### ***4.1.3 In India-Vishaka Guidelines against Sexual Harassment at Workplace***<sup>13</sup>

In a famous case Guidelines and norms are laid down by the Hon'ble Supreme Court in Vishaka and Others Vs. State of Rajasthan and Others. The honorable Apex court of India gave the guidelines against Sexual Harassment at Workplace. Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time. It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.

##### ***4.1.3.1 Duty of the Employer or other Responsible Persons in Work Places and other Institutions***

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts, of sexual harassment by taking all steps required.

##### ***4.1.3.2 Definition of Sexual Harassment***

For this purpose, sexual harassment includes such unwelcome sexually Determined behavior (whether directly or by implication) as:

- i. Physical contact and advances;
- ii. A demand or request for sexual favors;
- iii. Sexually coloured remarks;
- iv. Showing pornography;

<sup>12</sup> [http://en.wikipedia.org/wiki/Sexual\\_harassment](http://en.wikipedia.org/wiki/Sexual_harassment) retrieved on 20-02-2013

<sup>13</sup> <http://www.iitb.ac.in/WomensCell/data/Vishaka-Guidelines.pdf> retrieved on 20-02-2013

- v. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature

Where any of these acts is committed in circumstances where-under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

#### ***4.1.3.3 Preventive Steps Taken***

- a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
- c) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
- d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

#### ***4.1.3.4 Criminal Proceedings***

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

But still a proper law is being waited by the society.



#### ***4.1.4 Cyber-crimes against Women including making Videos Without Knowledge<sup>14</sup>***

Amongst the various cyber-crimes committed against individuals and society at large the crimes which can be mentioned as specially targeting women are as follows: –

##### ***4.1.4.1 Harassment via E-Mails.***

Harassment through e-mails is not a new concept. It is very similar to harassing through letters. Harassment includes blackmailing, threatening, bullying, and even cheating via email. E-harassments are similar to the letter harassment but creates problem quite often when posted from fake ids.

##### ***4.1.4.2 Cyber-Stalking.***

Cyber stalking is one of the most talked about net crimes in the modern world. The Oxford dictionary defines stalking as "pursuing stealthily". Cyber stalking involves following a person's movements across the Internet by posting messages (sometimes threatening) on the bulletin boards frequented by the victim, entering the chat-rooms frequented by the victim, constantly bombarding the victim with emails etc. Cyber Stalking usually occurs with women, who are stalked by men, or children who are stalked by adult predators or paedophiles. Typically, the cyber stalker's victim is new on the web, and inexperienced with the rules of netiquette & Internet safety. Their main targets are the mostly females, children, emotionally weak or unstable, etc. It is believed that Over 75% of the victims are female. The motives behind cyber stalking have been divided in to four reasons, namely, for sexual harassment, for obsession for love, for revenge and hate and for ego and power trips. Cyber stalkers target and harass their victims via websites, chat rooms, discussion forums, open publishing websites (e.g. blogs and Indy media) and email. The availability of free email and website space, as well as the anonymity provided by these chat rooms and forums, has contributed to the increase of cyber stalking as a form of harassment. There are a couple of reported cases, which speak of the position of the cyber stalking in India. The recent being the case of Manish Kathuria who was recently arrested by the New Delhi Police. He was stalking an Indian lady, Ms Ritu Kohli by illegally chatting on the Web site MIRC using her name. He

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<sup>14</sup> R. Nagalakshmi, Article – "Cyber Crime Against Women", available on [http://tnfwl.com/pdf/news\\_letter/CYBER\\_CRIME\\_AGAINST\\_WOMEN.pdf](http://tnfwl.com/pdf/news_letter/CYBER_CRIME_AGAINST_WOMEN.pdf) retrieved on 20-02-2013.

used obscene and obnoxious language, and distributed her residence telephone number, inviting people to chat with her on the phone. As a result of which, Ritu kept getting obscene calls from everywhere, and people promptly talked dirty with her. In a state of shock, she called the Delhi police and reported the matter. For once, the police department did not waste time swinging into action, traced the culprit and slammed a case under Section 509 of the Indian Penal Code for outraging the modesty of Ritu Kohli (Indian Child, 2005). In another case, an engineering and management graduate, facing prosecution in a dowry harassment case, was arrested by Delhi police for sending obscene e-mails in his wife's name to several persons. In June 2000, a man was arrested by the Delhi police for assuming the identity of his ex-employer's wife in a chat channel encouraging others to telephone net. The victim who was getting obscene telephone calls at night from stranger made a complaint to the police. The accused was then located "on line" in the chat room under the identity of the victim and later traced through the telephone number used by him to access the internet (Mishra, 2001).

#### 4.1.4.3 *Cyber pornography*<sup>15</sup>.

Cyber pornography is the other threat to the female netizens. This would include pornographic websites; pornographic magazines produced using computers (to publish and print the material) and the Internet (to download and transmit pornographic pictures, photos, writings etc). Internet has provided a medium for the facilitation of crimes like pornography. Cyber porn as it is popularly called is widespread. Almost 50% of the web sites exhibit pornographic material on the Internet today. Pornographic materials can be reproduced more quickly and cheaply on new media like hard disks, floppy discs and CD-Roms. The new technology is not merely an extension of the existing forms like text, photographs and images. Apart from still pictures and images, full motion video clips and complete movies are also available. Another great disadvantage with a media like this is its easy availability and accessibility to children who can now log on to pornographic web-sites from their own houses in relative anonymity and the social and legal deterrents associated with physically purchasing an adult magazine from the stand are no longer present. Furthermore, there are more serious offences which have universal disapproval like child pornography and far easier for offenders to hide and propagate through the medium of the internet.

<sup>15</sup> <http://www.cyberlaw.in/db.com/main/india/cyber-crime-law/70-cyber-pornography> retrieved on 20-02-2013.

Recent Indian incidents revolving around cyber pornography include the Air Force Balbharati School case. A student of the Air Force Balbharati School, Delhi, was teased by all his classmates for having a pockmarked face. Tired of the cruel jokes, he decided to get back at his tormentors. He scanned photographs of his classmates and teachers, morphed them with nude photographs and put them up on a website that he uploaded on to a free web hosting service. It was only after the father of one of the class girls featured on the website objected and lodged a complaint with the police that any action was taken.

In another incident, in Mumbai a Swiss couple would gather slum children and then would force them to appear for obscene photographs. They would then upload these photographs to websites specially designed for paedophiles. The Mumbai police arrested the couple for pornography.

#### *4.1.4.4 Defamation.*

Cyber tort including libel and defamation is another common crime against women in the net. This occurs when defamation takes place with the help of computers and / or the Internet. E.g. someone publishes defamatory matter about someone on a website or sends e-mails containing defamatory information to all of that person's friends

#### *4.1.4.5 Morphing.*

Morphing is editing the original picture by unauthorised user or fake identity. It was identified that female's pictures are downloaded by fake users and again re-posted/uploaded on different websites by creating fake profiles after editing it. This amounts to violation of I.T. Act, 2000 and attracts sec. 43 & 66 of the said Act. The violator can also be booked under IPC also. The Times of India reported that in October, a Delhi-based beautician told the police that her photograph was flashed on a porno portal along with her mobile number.

#### *4.1.4.6 Email spoofing.*

A spoofed e-mail may be said to be one, which misrepresents its origin. It shows its origin to be different from which actually it originates. A review in the CyberlawTimes.com shows that India has crossed the danger mark in cyber crime targeting women and children. Statistics show, and law enforcers confirm, that the maximum number of cyber crimes related to obscenity occurred in Mumbai last year. There were at least 40 cases in 2006 (of which only ten were registered), a steep rise from only five cases in 2005. Delhi was close behind,

with 30 obscenity-related cases (nine registered), but topped in cases of hacking. Bangalore, Chennai, Hyderabad and Pune reported only a handful of obscene crimes but saw a greater incidence of hacking.

The more common method used by men is to email vulgar photographs of themselves to women, praising their beauty, and asking them for a date or inquiring how much they charge for 'services'. Besides sending explicit messages via e-mail, SMS and chat, many also morph photographs - placing the victim's face on another, usually nude, body. In another instance, a couple entered an internet chat room agreeing to strip for each other using a web camera." The guy stripped, but the person at the other end was actually another man and his friends, who obviously didn't. They recorded it and uploaded the clip on a porno website," said Duggal. "These things happen in every city but only one in every 500 cases is reported," added Duggal. According to Borwankar, most cases go unreported because people are "petrified of adverse publicity". While Mumbai is battling obscenity, other cities are concerned about hacking. While Delhi reported 67 cases and 30 in Bangalore in year 2012.

The need of hour is that the solid law for the prevention of cyber crimes against the women should be made by the legislature.

#### ***4.1.5 Offences under Information Technology Act<sup>16</sup>***

The Information Technology Act was enacted in the year 2000 with a view to give a fillip to the growth of electronic based transactions, to provide legal recognition for e-commerce and e-transactions, to facilitate e-governance, to prevent computer based crimes and ensure security practices and procedures in the context of widest possible use of information technology worldwide. With proliferation of information technology enabled services such as e-governance, e-commerce and e-transactions, protection of personal data and information and implementation of security practices and procedures relating to these applications of electronic communications have assumed greater importance and they require harmonisation with the provisions of the Information Technology Act. A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by

<sup>16</sup> <http://nlrd.org/childs-rights-initiative/legislations-laws-related-to-women-child-rights-initiative/offences-under-information-technology-act-2006-related-to-circulation-of-obscene-materials-and-cyber-crime-against-children> retrieved on 22-05-2013.

intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. The Information Technologies Act has provisions of combating the treat of cyber crime and lists out various offences and punishment under this Act. Some of the Provisions are discussed below:

#### *4.1.5.1 Section 66 A*

##### **Punishment for sending offensive messages through communication service, etc. (Introduced vide ITAA 2008)**

Any person who sends, by means of a computer resource or a communication device,-

- a) any **information** that is grossly offensive or has menacing character; or
- b) any **information** which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes **by making** use of such computer resource or a communication device,
- c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages (Inserted vide ITAA 2008) shall be punishable with imprisonment for a term which may extend to two **three** years and with fine.

#### *4.1.5.2 Section 66E*

##### **Punishment for violation of privacy. (Inserted Vide ITA 2008)**

Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both

#### *4.1.5.3 Section 67*

##### **Punishment for publishing or transmitting obscene material in electronic form (Amended vide ITAA 2008)**

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either

description for a term which may extend to *two three* years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to *five* years and also with fine which may extend to ten lakh rupees.

#### 4.1.5.4 Section 67 A

#### **Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form (Inserted vide ITAA 2008)**

Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to *five* years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to *seven years* and also with fine which may extend to ten lakh rupees.

#### 4.1.5.5 Section- 67 B

#### **Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.**

Whoever,-

- (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or
- (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or
- (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or
- (d) facilitates abusing children online or
- (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

- (i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or
- (ii) which is kept or used for bonafide heritage or religious purposes

**Explanation:** For the purposes of this section, “children” means a person who has not completed the age of 18 years.

#### ***4.1.6 Acid Violence***

Acid violence involves intentional acts of violence in which perpetrators throw, spray, or pour acid onto victims’ faces and bodies. Report by the Avon Global Center for Women and Justice examines acid violence in Bangladesh, India, and Cambodia from an international human rights perspective. Using this framework, it identifies the causes of acid violence and suggests practical solutions to address them. Acid violence is prevalent in these countries because of three related factors: gender inequality and discrimination, the easy availability of acid, and impunity for acid attack perpetrators. Acid violence is gender-based violence that reflects and perpetuates the inequality of women in society and as such is prohibited by international law. To eradicate acid violence, governments must address its root causes—inequality and discrimination against women. In the short-term, governments should take the following actions to address acid violence: (1) enact laws that adequately punish perpetrators of attacks and limit the easy availability of acid, (2) enforce and implement those laws, and (3) provide redress to victims, including compensation for healthcare costs. Bangladesh is the only country among the three countries studied to adopt specific criminal laws and procedures relating to acid attacks and to enact particular laws to curb the easy availability of acid. Neither Cambodia nor India has adopted such legislation. Since Bangladesh adopted those laws in 2002, the rate of acid violence has decreased by 15% to 20% each year, while acid attacks continue to rise in Cambodia and India. Acid attacks occur at higher rates in locations where factories use acid in their manufacturing processes. Together with governments, businesses and other industrial users of acid can play an important role in curbing the criminal use of acid. Businesses that produce, distribute, or otherwise use acid must ensure that their activities do not have

negative human rights impacts. Companies can contribute to combating acid violence by, among other things, adopting procedures to ensure the proper safekeeping and labeling of acid containers and supporting government and industry efforts to regulate its transfer and proper disposal.<sup>17</sup>

#### 4.1.6.1 *A Statistical Overview*

While very little data is available on acid attacks in India some studies have reported an increasing trend in cases relating to acid attack. According to a study<sup>18</sup> 174 cases of acid attack were reported in India in 2000. This was a per capita incidence of about 1/15 of that of Bangladesh, which has the highest incidence rate as well as the highest number of acid attack cases in the world. However, the absolute number of cases was approaching those of Bangladesh. 35 cases of acid attacks were reported in Karnataka between 1999 and 2004. This figure does not include victims that do not report their case because they fear further violence or being socially stigmatized. In this regard, the Campaign and Struggle Against Acid Attacks on Women (CSAAAW) noted one incidence in Bangalore in July 2004 that was not included as part of the reported cases partly because the victim and her family have opted not to go public with their trauma. The number of cases added up to 53 by 2006 in Karnataka and, as reported by the CSAAAW, verdicts were given in only 9 of these 53 cases. A newspaper report put the total number of acid attacks as 60 by 2007 in Karnataka alone adding 8 more cases till February 2007. In most of these cases Hydrochloric and Sulphuric acids were used and all the victims were women. The victims in Karnataka were very young women between 16 and 25 years of age, and were attacked by men known to them. Most attacks took place in public places or at home.<sup>19</sup>

<sup>17</sup> A Report by the Avon Global Center for Women and Justice at Cornell Law School, the Committee on International Human Rights of the New York City Bar Association, the Cornell Law School International Human Rights Clinic, and the Virtue Foundation- available on- [http://www2.ohchr.org/english/bodies/cedaw/docs/cedaw\\_crc\\_contributions/AvonGlobalCenterforWomenandJustice.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/cedaw_crc_contributions/AvonGlobalCenterforWomenandJustice.pdf) retrieved on 20-02-2013.

<sup>18</sup> Report BY Law Commission of India submitted to the Hon'ble Supreme Court of India for its consideration in the pending proceedings filed by one Laxmi in W.P. (Crl.) No. 129 of 2006.

<sup>19</sup> Report by Law Commission of India submitted to the Hon'ble Supreme Court of India for its consideration in the pending proceedings filed by one Laxmi in W.P. (Crl.) No. 129 of 2006 On "The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime" on July, 2008 Available at- <http://lawcommissionofindia.nic.in/reports/report226.pdf> retrieved on 20-02-2013.



## 5. CONCLUSION

To make the society safe for women, mainly three pronged approaches should be followed. First, the amendment to the existing laws and making of new strong laws in place of the old one. Secondly strong mechanism should be created to ensure implementation of the gender laws and thirdly the environment to deter crime. The Indian parliament should pass more strong Acts to prohibit the offences against women like eve teasing, sexual harassment at work places, acid violence etc. and also should make it non-bailable offence with different intensity of punishment for various types of molestation. It is important to recognize a woman as person with basic right to privacy and safety from unwanted advances. Citizens also need to be responsive and responsible in bringing the culprit to justice. The Delhi victim lay on the road naked and bleeding on a cold winter night and passers by were just spectators. Nobody wanted to get involved in trouble which is commonly called as “court kachehri ka chakkar”. There should be a law that the statement of eye-witness be recorded in not more than two hearings. The common man should not feel harassed in helping the victim. Moreover the persons giving false evidence to weaken the case and help culprits should be given harsh punishment so that the practice of professional witnesses giving false evidence for pecuniary benefits should be put to an end.

Several suggestions are put forward to Justice Verma Committee in this regard for instance, to strengthen the legal system, to have strict law for eve-teasing and sexual offenses in the form of an explicit law defining it, to increase police patrolling and training and sensitizing the police about handling these cases to increase the safety of women on the streets etc. It is relevant to note here another important question that is being raised is to examine the reasons behind a differential treatment of women in the society and ways to bring about a change in the collective mind set streamlining it. There are two streams, sometimes interlocking within the feminist debates. One is the exploration of the roles that traditions, especially the way patriarchal pressure within which society are framed work. The other is, looking at political economy and the exchanges between political economy and women. Violence against women and patriarchal attitudes that generate it is a large and fairly well discussed debate. Political economy theories practice and initiatives, both global and national are not yet

pulled in while looking at for example the Gowahati case of mob molestation of a minor girl at Gowahati.<sup>20</sup>

This is a country where our brave heroes snatched back cartloads of young girls from invaders and escorted them safely home. Let us restore India back to its glory as the land of Indian heroes. It should be moral, legal, religious and ethical duty of every citizen to make every possible effort to protect women folk and restore the traditional glory of India where our ancestors always held women in high esteem.

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<sup>20</sup> *The Tribune*, dated-23-Aug-2012, P. 9.

well as female circumcision.<sup>2</sup> All these are committed by the dominating class of men who violate the fundamental human rights of the women.

## 2.1 Kinds of Violence against Women

Women become prey to violence even before their birth where the parents abort their unborn child only because it's a female in the hope of giving birth to male child. Female foeticide is on the rise in the world, especially in the developing countries such as India. It is evident from the male : female sex ratio derived from the Census since its beginning in 1901. Sex ratio is described as the number of females per 1000 of males. It is an important source in finding out the population of females during the census. In the 2011 Census conducted by the Government of India, it was found that the sex ratio was 940 females per 1000 males. Though the figures depict an increase in the number of females as compared to the census of 2001 where the ratio was 933 females per 1000 males, but in majority of the states and Union territories, there has been a decrease in the number of females. It has been observed since last few decades.<sup>3</sup> There are some states where female foeticide is still occurring due to which the sex ratio has become a major area of concern. Causes of such decrease in the number of females are due to the violence and ill treatment towards women in the society. Such states are north Indian states of Haryana, Rajasthan and adjoining areas. When compared to the census of 1901 before independence of India, the male : female sex ratio was normal but later declined.

Violence against women is severe in many parts of the country. It is seen in orthodox and traditional societies of the country that if born, young girls are subjected to various forms of discrimination in their society. In some cases they are subjected to traumatic traditional practices such as circumcision; they are also often forced to marry in a very young and tender age even before they are mature enough to understand the institution of marriage. Thus they are subjected to more abusive circumstances. At the domestic level, the women are often victims of domestic violence, rape and sexual abuses which lead to

<sup>2</sup> United Nations Department of Public Information "Women and Violence" DPI/1772/HR--February 1996, available at <http://www.un.org/rights/dpi1772e.htm>, accessed on 28 February 2013.

<sup>3</sup> Provisional Population Totals Paper 1 of 2011 India Series 1, Statement-13, Sex Ratio of Total population and child population in the age group 0-6 and 7+ years : 2001 and 2011 Office of the Registrar General & Census Commissioner, India, available at [http://www.censusindia.gov.in/2011-prov-results/prov\\_results\\_paper1\\_india.html](http://www.censusindia.gov.in/2011-prov-results/prov_results_paper1_india.html), accessed on 29 May 2013.

traumatized condition – mentally, physically and emotionally and / or in some cases lead to death. The following are some of the different kinds of violence against women:

### *2.1.1 Domestic Violence*

Violence against women in the domestic sphere is of grave magnitude. It occurs in both developed as well as developing countries. Earlier it was considered by the neighbours, community and even the government, as a private issues which remained inside the home, family but later on it was noticed that these thought to be private issues often turned into public tragedies. Often, it has been noticed that the husbands exert unreasonable force and dominance on their wives to suppress their voice and rights and take to method of violence. They beat - up their wives, abuse them, torture them physically, mentally and emotionally and violate all kinds of human rights and lower their dignity of a human being. Often such violence is a consequence of dowry related matters and frequent quarrels and fights due to petty reasons and ego problems. The United Nations has reported that in the United States, which is a developed nation, that a woman is beaten every eighteen minutes. In Pakistan, around 400 cases of domestic violence were reported in 1993 where almost half of the cases ended with the death of the wife.<sup>4</sup>

### *2.1.2 Female Foeticide and Infanticide*

Female foeticide is a serious issue in our society, especially in developing countries. The preference for a son in the family is one of the major reasons for violence against women. Such violence is evident mostly in the Asian countries. This has given rise to female foeticide and infanticide. The discrimination and neglect of a girl child in the family by her own parents compared to the sons has lead to severe discrimination in terms of health care, educational facilities, nutrition and other vital needs of the child. Many women abort their child when they come to know that the foetus is a female. In India and other Asian countries, the sex determination and sex selection of a child is turning into a profitable business due to the help and support from the patriarchal societies prevalent in these countries.<sup>5</sup> This female foeticide and infanticide has reduced the male : female sex ratio in many countries such as Japan, China, Cuba. It is evident from the report of the US Department of

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *Ibid.*

Health and Human Services which shows that the sex ratio of female to male is similar to that of India as per the statistics of the census 2011.<sup>6</sup>

### 2.1.3 Child Marriage

Child marriage is another offence and a kind of violence against women which fully violates the human rights and poses a risk to the health and life of the young girl child. In many countries, especially in the developing nations, girls below the age of 18 are married to men who are often double their age or are even older. These girls are often married without their consent, forcefully and are not mature enough physically, mentally and emotionally to handle the stress and consequences of such marriages.<sup>7</sup> Major reason of child marriages has been noticed to be the poverty which plays a pivotal role in early marriages. Many families residing in countries facing with poverty have very limited resources to have access to health care, education and other economic facilities; hence they prefer child marriages thinking that their daughters would not face the poverty after marriage. But in reality, the situation does not change and their daughters remain poor and also face very severe health consequences which are often lifelong.<sup>8</sup> These young girls hamper their physical and mental growth and development and face various health risks due to early pregnancy and giving birth to child under the age of 15.

### 2.1.4 Rape

Rape is another severe form of violence against women. It can take place anywhere in the world, at work place, at home, in the family, outside the home, in fact anywhere. In the family, it generally takes place in the form of marital rape mainly. It even occurs in the community where women fall prey to the perpetrator or abuser; it takes place even in refugee camps and during armed conflicts. In many places during war, rape is used as a weapon to destroy ethnic groups and community or race<sup>9</sup> which has been discussed in Article 7 of the Rome Statute as Crimes against humanity. Rape has become the fastest growing crime in the world which reflects the law and order situation of the

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<sup>6</sup> T. J. Mathews, M. S., and Brady E. Hamilton, Ph. D., "Division of Vital Statistics", *Trend Analysis of the Sex ratio at birth in the United States*, US Department of Health and Human Services, National Centre of Health Statistics, National Vital Statistics Report, Vol. 53, No. 20, (20 June 2005), p. 5.

<sup>7</sup> *Supra* note 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

countries across the world and the lack of proper understanding and enforcement of laws to prevent such violence against women.

In India, the crime against women has increased manifold. As per the report of the National Crime Records Bureau, India, a total of 2,28,650 crimes against women has been reported in the country in 2011, whereas in the year 2010, the number of crimes occurred against women was 2,13,585 which shows an increase in the rate of crimes against women. This increase has been reported as 7.1% in the year 2011.<sup>10</sup>

#### *2.1.5 Sexual Harassment at work place*

Sexual harassment at workplace is an area of great concern. It is taking place across the world. It has been reported by the United Nations that in many places, Employers abuse the female employees and use their authority and seek sexual favours in return of promotion and career advancement. Often, it is seen that women who protest and refuse are faced with consequences such as termination from the job and demotion.<sup>11</sup> But, in recent times, women have come forward and protested such violence and many laws have been enforced to prevent such kind of violence against women. Sexual harassment is considered to be a form of sex discrimination which degrades the woman and is often regarded as having lesser ability to perform well at work in comparison to the male employees.<sup>12</sup>

#### *2.1.6 Trafficking and Prostitution*

Trafficking of women has been the gravest form of violence against women. It is considered to be the third largest trade in the world committed by the organized crime syndicate across the borders and is spread all over the world. Many young girls and women are trafficked from their community and country of origin to the country of destination where they are exploited through sexual abuse and forced prostitution. The women are forced into this trade with the help of other women, friends and family and are often found to be coming from the economically and educationally disadvantaged section of the society. The women and young girls are also trapped through fake employment offers and marriages and are sent to foreign countries where their identity documents

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<sup>10</sup> National Crime Records Bureau, India (2011), Crime Against Women, Chapter 5, available at <http://ncrb.nic.in/CD-CII2011/cii-2011/Chapter%205.pdf>, accessed on 29 May 2013.

<sup>11</sup> *Supra* note 2.

<sup>12</sup> *Ibid.*

are seized by the traffickers and are forced into prostitution trade. They are left fully at the mercy of the traffickers and brothel owners.<sup>13</sup> Trafficking and forced prostitutions are increasing at an alarming rate and are majorly taking place in the South Asian countries, Middle East, Central Asia and African region. The victims are often found to be deprived of their basic rights and are found to be facing various problems in getting proper protection and refugee status at the destination country due to their mistaken identity as illegal immigrants.

### **3. CAUSES OF VIOLENCE AGAINST WOMEN**

Violence and Crimes against women are increasing day by day despite the development of economic and social conditions of the people in the society and the women empowerment in modern times. It has been observed that most of the violence and crimes takes place among the poorer section of the society and are also caused by the men of this section of the society. Some of the major causes of violence against women have been identified as lack of educational facilities, poor economic conditions, economic dependence of women on the male member of the family, lack of leadership qualities and lack of awareness of their rights.

#### **3.1 Lack of Educational Facilities and Illiteracy**

Women have always been subjected to discrimination in the society and in the family. They have been always looked down upon as inferior in the society and the male dominating society laid down some rules for the women to suppress them and their voices. Due to such attitude of men towards the women in the society, the women have never been given any opportunity to educate themselves and hence are devoid of education facilities. The parents, mostly due to poor economic conditions, and also because of their preference and love for the male child, have always restricted the girl child at home and did not give access to any kind of educational facilities. This poor literacy rate of women and also in some cases among men has resulted in the increase of various forms of violence and crimes against women.<sup>14</sup> The men are not apprised of the benefits of education and thus indulge into different kinds of unsocial activities and crimes which lead to such violence against women.

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<sup>13</sup> Louise Shelley, *Human Trafficking: A Global Perspective*, Cambridge University Press, 1<sup>st</sup> Edition, 2010.

<sup>14</sup> *Supra* note 2.

Women are also deprived of proper education facilities because of the conservative attitude of the society and hence it has been seen that they are not allowed to raise their voices and fight for their right to education. The consequence of such attitude has mainly resulted in the increase in the crime rate and violence against women.

### **3.2 Poor Economic Conditions and Economic Dependence**

Violence against women also is a consequence of the poor economic conditions prevailing in many countries, mostly in the Asian region. Lack of education leads to lack of proper employment facilities which thereby hamper the development of the socio-economic condition of the people in the country. The condition of women in the society is worst, mostly among the poorer section where women are not even allowed to go out of their house, get employed and work due to certain traditional and cultural restrictions in the society prevalent in such patriarchal system existing in the society and thus the women are economically dependent on their father during childhood, on husband after marriage and on son in old age.<sup>15</sup> This poor economic condition and economic dependence of women on male members of the family is majorly due to inequality status prevailing in the society, lack of education and prevalent traditional practices and rituals. This condition has, in various instances, caused violence against women inside the house and in the society by the dominating male members.<sup>16</sup>

### **3.3 Lack of leadership Qualities**

Since the women are fully dependent on the male members of their family and are suppressed in the society, they are often seen to lack leadership qualities. The patriarchal system of the society has led to the suppression of women and their rights and voices in the society. The voices of women are often unheard and their problems are neglected. They are not given any kind of facilities and opportunities for development through education, awareness of rights etc. This is mainly because of the inequality status prevailing among men and women in the society and thus their leadership qualities are not developed. This is one of the causes which have helped in the increase in the violence against women.

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<sup>15</sup> *Ibid.*

<sup>16</sup> UN Report, "Ending Violence Against Women and Girls: Programming Essentials", *United Nations Entity for Gender Equality and the Empowerment of Women*, January 2013, available at <http://www.eenawnow.org/uploads/modules/pdf/1360104822.pdf>, (last accessed 28 February 2013).



### 3.4 Lack of Awareness of Rights

Women in the society are often suppressed. They are not given any access to education and other development facilities in the society by the dominating men and hence the women remain unaware of their rights. In case of India, it is seen that state of women in the rural part of the country is very pathetic. The Indian Constitution has provided every citizen, irrespective of caste, creed, religion, the basic fundamental rights. But due to the lack of freedom of women and restriction of the society on women, quite a large number of women in the rural section have been deprived of their rights. These women are often unaware of their rights. Similarly, in many developing nations, women are deprived of their rights due to their unawareness and ignorance of the rights, lack of education etc. and hence their voices are suppressed. This prevailing condition of women further gives rise to crimes and violence against women.

## 4. VARIOUS LEGISLATIONS FOR THE PROTECTION OF WOMEN

It is a grave truth that women across the world are beaten up, raped, trafficked and also killed irrespective of their status and countries – rich or poor. Such abuses and violations of human rights not only impose a threat to the existence and status of women in the society but also tear apart the entire society. But now there is a growing concern for the women and to protect the women against such violence across the world. Thus the international community has come forward with comprehensive legislation for effective response to violence against women. Various countries of the world have obligations under the International Law to enact, implement and enforce various legislations which address all kinds of violence against women. Many countries have adopted and revised legislations to prevent violence against women but they still face difficulties in proper enforcement of legislations and protect women from such violence.

In the society, women are subject to protection and dependence on their father in their childhood, after marriage on their husband and in old age on their sons. The patriarchal system of the society has given men to exercise unlimited power on women in the society.<sup>17</sup> Hence, in order to protect the women from violence and ensure the fundamental human rights and specific rights of women, various legislations have been enforced at the international level as well as at the

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<sup>17</sup> *Supra* note 2.

domestic level. These international conventions and treaties and other legislations are as follows:

#### **4.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

The CEDAW or the Convention on the Elimination of All Forms of Discriminations Against Women was adopted on 18 December 1979 by the United Nations General Assembly and was entered into force on 3 September 1981 as an international treaty.<sup>18</sup> It was enforced in order to monitor and scrutinize the condition and the position of women and to promote the rights of the women. CEDAW has been involved ensuring equality of women with men and denied all such areas which denied equality with men. The Article 11 states that "[State] takes all appropriate measures to eliminate discrimination against women in the field of employment"<sup>19</sup> and Article 24 states that "[State shall] undertake to adopt all necessary measures at the national level aimed at achieving the full realization"<sup>20</sup>

#### **4.2 International Convention on Elimination of all Forms of Racial Discrimination against Women**

This convention was adopted on 21 December 1965 by the UN General Assembly to deal with the racial discrimination against women. Its monitoring body, the committee on the Elimination of Racial Discrimination made reference to trafficking in persons in some recommendations and observations to the state parties on the basis of Article 5.

Article 5 expands upon on the general obligation of Article 2 and creates a specific obligation to guarantee the right of everyone to equality before the law regardless of "race, colour, or national or ethnic origin".<sup>21</sup> It further lists specific rights this equality must apply to: equal treatment by courts and tribunals,<sup>22</sup> security of the person and freedom from violence,<sup>23</sup> the civil and political rights affirmed in the ICCPR,<sup>24</sup> the economic, social and cultural rights affirmed in the

<sup>18</sup> The Convention on the Elimination of All Forms of Discrimination Against Women, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>, accessed on 12<sup>th</sup> August 2012.

<sup>19</sup> CEDAW (adopted 18 December 1979, entered into force 3 September 1981), Article 11.

<sup>20</sup> *Id.*, Article 24.

<sup>21</sup> ICERD (adopted 21 December 1965), Article 5.

<sup>22</sup> *Id.*, Article 5(a).

<sup>23</sup> *Id.*, Article 5(b).

<sup>24</sup> *Id.*, Article 5(c) and (d).

ICESCR,<sup>25</sup> and the right of access to any place or service used by the general public, "such as transport hotels, restaurants, cafes, theatres and parks."<sup>26</sup>

In addition, other international instruments which create obligations for State parties to enact and enforce legislation for addressing violence against women are Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol), and the Rome Statute of the International Criminal Court (The Rome Statute).

### 4.3 Declaration on the Elimination of Violence Against Women, 1993

Besides the above mentioned legislations, Article 4 of the 1993 Declaration on the Elimination of Violence against Women, which has been adopted by the General Assembly, requires Member States to:<sup>27</sup>

- (i) Condemn violence against women and not invoke custom, tradition or religion to avoid their obligations to eliminate such violence;
- (ii) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to victims;
- (iii) Provide access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies; and
- (iv) Ensure that the secondary victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions

### 4.4 Other Regional Legislations

Various other regional legislations to prevent violence against women have been enacted and enforced in many countries across the world. The following are some of the important regional legislations.

#### *1.4.4.1 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*

It is also known as the Convention of Belém do Pará. It is the only Convention directed solely at eliminating violence against women. It requires that States

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<sup>25</sup> *Id.*, Article 5(e).

<sup>26</sup> *Id.*, Article 5(f).

<sup>27</sup> Department of Economic and Social Affairs, Division for the Advancement of Women, 'Handbook for Legislations on Violence against Women', United Nations Publications, New York (2010).

parties apply due diligence to prevent, investigate and impose penalties for violence against women and contains detailed International and regional legal and policy framework provisions regarding the obligations of States to enact legislation. Under article 7, States parties are obligated to:<sup>28</sup>

- (i) Adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman;
- (ii) Take all appropriate measures, including legislative measures, to amend existing laws or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- (iii) Establish fair and effective legal procedures for victims; and
- (iv) Establish the necessary legal and administrative mechanisms to ensure that victims have effective access to just and effective remedies.

#### **4.4.1 *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa***

It also addresses violence against women within its provisions, and establishes obligations related to legal reform. Under the Protocol wherein States parties are required to:<sup>29</sup>

- (i) Enact and enforce laws to prohibit all forms of violence against women (article 4(2));
- (ii) Adopt legislative, administrative, social and economic measures to ensure the prevention, punishment and eradication of all forms of violence against women (article 4(2));
- (iii) Take all necessary legislative and other measures to eliminate harmful practices (article 5); and
- (iv) Enact national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties and that the minimum age of marriage for women is 18 years (article 6).

#### **4.4.2 *Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution***

In South Asian region, the South Asian Association for Regional Cooperation (SAARC) has adopted the Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution which obligates States parties, under article III, to take effective measures to ensure that trafficking is

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

an offence under their respective criminal laws and punishable by appropriate penalties.<sup>30</sup>

#### ***4.4.3 The Council of Europe Convention on Action against Trafficking in Human Beings***

It came into force in February 2008. The Convention obligates State parties to criminalize trafficking in human beings and related offences. Legislation must ensure that the offences are punishable by “effective, proportionate, and dissuasive sanctions”. The Convention also obligates States parties to adopt legislative or other measures to assist victims in their recovery, and provide compensation for them. Action has also been mandated by the Council of Europe in its Recommendation (2002)5 of the Committee of Ministers to member States on the protection of women against violence. The recommendation urges member States to ensure that:<sup>31</sup>

- (i) All acts of violence are punishable;
- (ii) Swift and effective action is taken against perpetrators; and
- (iii) Redress, compensation and protection and support is provided for victims.

#### **4.5 Legislations in India**

In India, various legislations have been enacted towards providing the rights of women. The Constitution of India, in its Article 14, states the Right to Equality, Article 15 states the right to non-discrimination, Article 19(1)(g) states the right to practice one’s profession and Article 21 states the right to life. Besides these rights provided by the Constitution of India, various other specific legislations have also been enacted and enforced to prevent violence against women and protect women’s rights. These are enumerated as follows:

- (i) Abolition of Sati in 1829;
- (ii) Hindu Widow’s Remarriage Act 1856;
- (iii) Special Marriage Act 1954 to promote inter caste, intercommunity marriages;
- (iv) The Child Marriage Restraint Act 1929;
- (v) The Prohibition of Child Marriage Act, 2006;
- (vi) Hindu Women’s Right to Property Act 1937;
- (vii) Suppression of Immoral Traffic in Women and Girls Act 1956;

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

- (viii) Dowry Prohibition Act 1961;
- (ix) The Indecent Representation of Women (Prohibition) Act 1986;
- (x) Commission of Sati (Prevention) Act 1987;
- (xi) Pre conception and Pre Natal Diagnostic Techniques (Prohibition of Sex selection) (PCPNDT) Act, 1994;
- (xii) Protection of Women from Domestic Violence Act, 2005

Apart from the above mentioned legislations, there are some other enactments pertaining to industry containing special provisions for women such as, The Workmen's Compensation Act, 1921; Payment of Wages Act, 1936; Factories Act, 1948; Maternity Benefit Act, 1961; Minimum Wages Act, 1948, Employees State Insurance Act 1948 and Pensions Act, 1987 etc.

All the above mentioned international and regional legislations have been enacted and enforced with a common goal of protecting women, their fundamental rights and to prevent violence against women across the world. Apart from these legislations which are being implemented in various countries across the world by the governments, it is also very important for the government machinery to conduct various awareness programmes and provide educational and all other facilities to the women in that country so as to develop skills, build confidence, develop leadership qualities and apprise them about their rights. The states and governments need to work towards bringing equality among men and women in their regions so as to uplift the conditions of the society and reduce violence and crimes taking place against women.

## **5 CONCLUSION**

Women and the growing violence against them have become pervasive in the society. The patriarchal system of the society and the approach and attitude of men towards women as downtrodden has fuelled and developed violence and various crimes against women. Despite having so many enactments and legislations at the international and regional level which deal with women, the oppressed and poor conditions of women have not been improved and they are still facing all types of atrocities, violence and abuses. This proves the failure of the legislative, executive and judicial machinery in the country to protect the women from the hands of perpetrators and also fails to provide respect to women in the patriarchal form of society. The inequality status prevalent between the men and women cannot be bridged by just enacting and enforcing legislations unless public support is sought for. It has also been clear from the situation that century old practice existing in the society cannot be eliminated in few days. It

will take a lot of time to make people understand and realize their rights, equality and humanity and make them aware of their development through education, awareness programmes etc. These legislations enacted are not supported by the will of the people. They public is not aware of such steps which have been taken for the upliftment of women in the society and hence it faces great resistance and opposition from the conservative thought of the society. To improve the status of the women in the society, prevent the violence against women and protect them is the need of the hour. Since the conservative social thinking is deeply rooted in the society, there is a need that such legislations should to be enacted with the support and strong public willingness and opinion.

# DEVELOPMENTS AND POLICY RESPONSES TO VIOLENCE AGAINST WOMEN

Rangaswamy D\*

## 1. INTRODUCTION

The women population constitute significant human resource of the global economy. In the wake of unemployment, global competition and deregulation more and more women are joining an unforgiving job market.<sup>1</sup> In line with this, various international declarations, conventions and national policies have brought to forefront the role of women in the development process. Furthermore, the fundamental principal of human right law is that every society, no matter its cultural, economic or social background, should provide equal protection for men and women. Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. In the past few decades, there have been potential efforts from civil society activists and the international community to protect these human rights and uphold their rights across the globe in accordance with various international, multilateral and bilateral treaties and forums.

The Universal Declaration on Human Rights stipulates that “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.”<sup>2</sup>

In addition, the international community has adopted numerous policy documents, strategies and legislation and established bodies to tackle foregoing issues including poverty, social exclusion, improvement of the position of socially excluded. These create basis for identifying and implementing measures

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<sup>1</sup> Narasaiah, M.L. *Women and Development*, Discovery Publishing House, New Delhi, 2006, at p. 5.

<sup>2</sup> The Universal Declaration of Human Rights, ‘The Preamble’ GA res. 217A (III), UN Doc A/810 at 71 (1948).



for affirmative action in different fields, including civil registration, personal documents, registration of residence, education, health care, social welfare, employment, gender equality and prohibition of discrimination.

Although efforts have been taken to improve the status of women, there are huge challenges for women engaged in the defence of human rights. Despite considerable progress achieved in recent decades in the process of empowerment of women, their conditions are not up to mark and their participation in the mainstream of the society remains limited. They are facing wide range of biases in society such as unequal opportunities in education, employment and assets ownership.<sup>3</sup> According to estimates by the United Nations, up to 200 million women and girls are demographically 'missing'. The number of women forced or sold into prostitution is estimated at anywhere between 700,000 and 4 million per year. Between 120,000 and 500,000 of them are sold to pimps and brothels in Europe alone. Profits from the sex slavery market are estimated at US\$7-12 billion per year. Over 60 per cent of HIV positive youth between the ages of 15 and 24 around the world are women.<sup>4</sup>

Among the most extreme issues associated with the women in recent days, violence against women is unspeakable and painful which posed serious threat to the transformation of the society. Gender-based violence is a greatest challenge and block to development worldwide. Violence against women in the form of physical, sexual, psychological and economic within the family, community and the State, is such a serious and key challenge for policy makers, legislators, social activists and human rights activists in recent days. The present profile of women situation created a critical juncture in our collective efforts to address the issue of violence against women, and the need for progress.

It is one of the most pervasive of human rights violations, denying women and girls' equality, security, dignity, self-worth, and their right to enjoy fundamental freedoms.<sup>5</sup> Gender-based violence, can impairs or nullifies the enjoyment by women of human rights and fundamental freedoms such as the right to life; The right not to be subject to torture or to cruel, inhuman or degrading treatment or

<sup>3</sup> Chirstabell, P. J., *Women Empowerment Through Capacity Building*, Concept Publishing Company, New Delhi, 2009, at p.24.

<sup>4</sup> Marie Vlachovd and Lea Biason, *Women in an Unsecured World*, Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2005, at pp.1-2.

<sup>5</sup> UNICEF, Report on *Domestic Violence-against Women and Girls* (2000), available at <http://unesdoc.unesco.org/images/0009/000966/096629eo.pdf>. (Last accessed 29 February 2012).

punishment; The right to equal protection according to humanitarian norms in time of international or internal armed conflict; The right to liberty and security of person; The right to equal protection under the law; The right to equality in the family; The right to the highest standard attainable of physical and mental health; The right to just and favourable conditions of work.<sup>6</sup>

Besides, the various international documents created and adopted by the international community have generated widespread commitment to address this issue at priority. Violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men; the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life.<sup>7</sup>

## 2. CONCEPTUAL ANALYSIS

Violence in its general sense is an act carried out with the intention or perceived intention of physically hurting another person. It is an act involving use of force or coercion with intent of perpetuating promoting hierarchical gender relations. It is a multidimensional and multifaceted act of the individual which can take place within different settings such as schools, families, working places, alternative care institutions. It is a heinous act of the individual or group influenced by wide range of factors such as the personal characteristics of the offender and preparatory to their cultural and physical environments.

The United Nations Declaration on the Elimination of Violence against Women (1993) defines violence against women as “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.”<sup>8</sup>

CEDAW General Recommendation 19 on Violence against Women (VAW) views gender-based violence as a form of discrimination that constitutes a serious obstacle in the enjoyment of human rights and fundamental freedoms by women, and addresses intersections of gender-based violence with the different

<sup>6</sup> See UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendations No. 19, adopted at the Eleventh Session, 1992, A/47/38.

<sup>7</sup> See preamble of UN Declaration on the Elimination of Violence against Women, ‘the Preamble’ (DEVAW), GA Res.A/RES/48/104, 20 December 1993.

<sup>8</sup> *Ibid.*, Article 1.

substantive areas covered by the articles of CEDAW.<sup>9</sup> It defines gender-based violence as 'violence directed against a woman because she is a woman or which affects a woman disproportionately. It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.'<sup>10</sup>

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women defined as 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.'<sup>11</sup> According to the Convention, violence against women shall be understood to include physical, sexual and psychological violence;

- I. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
- II. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and
- III. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

By looking into forgoing provision it can be concluded that violence against women is referred to abuse of the women by a husband, intimate partner (whether male or female) ex-husband or ex-partner against a women resulting in a loss of dignity, control and safety as well as feeling powerlessness and entrapment experienced by the women who is direct victim of ongoing or respected physical, economic, sexual, verbal and spiritual abuse. Women abuse also includes persistent threats or forcing women to witness violence against their children or other relatives, friends, pet or cherished possessions by their husband, partners, ex-husband or ex-partners.

<sup>9</sup> CEDAW 1992, See *Supra* note 7, at para.1.

<sup>10</sup> *Ibid* at para.6.

<sup>11</sup> See Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (IA-VAW), 1994, 33ILM 1534, 6 September 1994; entered into force 3 May 1995, Article 1.

### 3 FORM IF VIOLENCE AGAINST WOMEN

Violence in general is a coercive mechanism to assert one's will over another, in order to prove or feel a sense of power. It can be perpetrated by those in power against the powerless, or by the powerless in retaliation which attempts to deny their powerlessness.<sup>12</sup> According United Nations Declaration on the Elimination of Violence against Women Violence against women shall be understood to encompass, but not be limited to, the following:<sup>13</sup>

- I. Physical, sexual and psychological violence occurring 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;
- II. Physical, sexual and psychological violence occurring 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;
- III. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

According to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Violence against women shall be understood to include physical, sexual and psychological violence.<sup>14</sup>

- I. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
- II. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and
- III. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

Violence against women manifests in multiple behaviours including rape, sexual coercion, incest, honour killings, female genital mutilation, acid burnings,

<sup>12</sup> UNESCO, *Report on Violence against Women Reports from India and the Republic of Korea, Bangkok* (1993), available at <http://unesdoc.unesco.org/images/0009/000966/096629eo.pdf>. (last accessed 29 February 2012).

<sup>13</sup> DEVAW 1993, Article 2. See *Supra* note 8.

<sup>14</sup> IA-VAW 1994, Article 2. See *Supra* note 12.

stalking and trafficking. Perpetrators of violence against women can be intimate partners, family members, members of the community or strangers. Across cultures, the most common experience for women is violence by intimate partners.

#### 4. VIOLENCE AGAINST WOMEN: EVIDENCES

Millions of women and girls around the world are victims or survivors of violence and the number is moving up steadily. The cases of violence against women are invisible in nature and remain hidden for many reasons. Social stigma associated with the reporting of violence is a formidable obstacle to have accurate data on violence against women. However, the various initiative ranging from international institutions to local level research have made us to have an appropriate picture of the magnitude and pervasive nature of the problem.

Women and girls have been unacceptably subjected to violence in such a way that both private and public places are not any safer. Statistics on the frequency and severity of the issues are certainly scanty and artificially hide the scale of the problem. The following statement has been issued by the UN High Commissioner for Human Rights Navi Pillay on the occasion of International Day for the Elimination of Violence Against Women, on 25 November 2010 that ‘Although precise statistics are not available, since violence against women – especially domestic violence is a hidden crime, recent figures released by the United Nations suggest that in some countries close to 60 percent of women may be subjected to physical violence at least once in their lifetime. They also make clear that no country, whether rich or poor, dictatorship or democracy, has come close to eliminating violence against women.’<sup>15</sup>

It is further stated that “A life free from violence is an obligation of States and a responsibility of us all. In Africa and elsewhere in the world, eliminating violence against women must be our common effort and can be our common achievement. Violence against women must be recognized as a threat to democracy, peace and security; an obstacle to sustainable development; and an appalling human rights violation.”<sup>16</sup> It is further remarked that “Violence against

<sup>15</sup> The above statement has been issued by the UN High Commissioner for Human Rights Navi Pillay on the occasion of International Day for the Elimination of Violence against Women, which is commemorated on 25 November 2010 in UN Headquarters, New York.

<sup>16</sup> Opening remarks of Ms. Lakshmi Puri, UN Assistant Secretary-General and UN Women Deputy Executive Director, on 14 January 2013 in *African Ministerial Preparatory Meeting for the 57th Session of the Commission on the Status of Women (CSW)* ‘Elimination and

women and girls is an outrage and a gross violation of human rights. It must be stopped through the implementation of existing international treaties, standards and agreements. This requires decisive and courageous leaders to translate these international promises into tangible national actions and to make a true difference in the lives of the women and girls we just heard in the video earlier.”<sup>17</sup>

The proportion of ever-partnered women who had ever suffered physical violence by a male intimate partner ranged from 13% in Japan city to 61% in Peru province, with most sites falling between 23% and 49%. The prevalence of severe physical violence (a woman being hit with a fist, kicked, dragged, choked, burnt on purpose, threatened with a weapon, or having a weapon used against her) ranged from 4% in Japan city to 49% in Peru province. The vast majority of women physically abused by partners experienced acts of violence more than once.<sup>18</sup>

The range of lifetime prevalence of sexual violence by an intimate partner was between 6% (Japan city and Serbia and Montenegro city) and 59% (Ethiopia province), with most sites falling between 10% and 50%. While in most settings sexual violence was considerably less frequent than physical violence, sexual violence was more frequent in Bangladesh province, Ethiopia, province and Thailand city.<sup>19</sup>

The victims of honour killings are almost always women or adolescent girls, and the perpetrators are normally male family members, including the father or elder brother.<sup>20</sup> According to UNFPA, 5,000 girls and women are killed by family members in the name of honour every year. However, the full extent is unknown.<sup>21</sup>

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Prevention of all forms of Violence against Women and Girls,’ to be held in March 2013 in New York.

<sup>17</sup> Remarks by UN Michelle Bachelet, UN Executive Director, in the occasion of the Official Commemoration of the International Day to Eliminate Violence against Women, a Promise is a Promise, held on 28 November 2012 at New York.

<sup>18</sup> WHO, *Multi-country Study on Women’s Health and Domestic Violence against Women*, WHO, PATH, Washington DC, 2005, at p.6.

<sup>19</sup> *ibid* at p.7.

<sup>20</sup> United Nations Children’s Fund Innocenti Research Centre, *Law Reform and Implementation of the Convention on the Rights of the Child*, UNICEF IRC, Florence, 2007, at p.70. Quoted in; UNICEF, *A Study on Violence against Girls*, Report on Interantional Girl Child Conference, held on 9-10 March 2009 at Hague, Natherland. Florence: UNICEF Innocenti Research Centre, June 2009, at p.20.

<sup>21</sup> United Nations Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women, E/CN.4/2002/83, Office of the United Nations High

According to United Nations general secretary Ban Ki-moon ‘one out of every three females in the world will be beaten, will be forced into having sex or will be otherwise abused in her life time.’ Based on projected data for 2010, secretary general Ban Ki-moon’s estimation mean that 52.7 million girls and women in the United States and 1.2 billion worldwide may eventually be victims of violence if something is not done to stop it.<sup>22</sup>

The Female Genital Mutilation/Cutting (FGM/C) is another growing violence against women in recent days. There are an estimated 130 million girls and women alive today whose human rights have been violated by Female Genital Mutilation/Cutting (FGM/C).<sup>23</sup> This harmful practice not only affects girls and women in Africa and the Middle East, where it has been traditionally carried out, but also touches the lives of girls and women living in migrant communities in industrialized countries. Although concerted advocacy work over recent decades has generated widespread commitment to end this practice, success in eliminating FGM/C has been limited – with some significant exceptions.<sup>24</sup>

According to a WHO estimate, between 100 and 140 million women and girls in the world have undergone some form of FGM/C.<sup>25</sup> Although overall figures are difficult to estimate, they do indicate the massive scale of this human rights violation. FGM/C affects far more women than previously thought. Recent analysis reveals that some three million girls and women are cut each year on the African continent (Sub-Saharan Africa, Egypt and Sudan).<sup>26</sup> Of these, nearly

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Commissioner for Human Rights, Geneva, 31 January 2002, p.12. Quoted in; UNICEF (2009), op cit., at p.20.

<sup>22</sup> Bickerstaff, Linda, *Voilence against Women- Public Health and Human Rights*, Rosen Publishing Groups, New York, 2010, at p. 8.

<sup>23</sup> *Female Genital Mutilation/Cutting* (FGM/C) refers to “a range of practices involving the complete or partial removal or alteration of the external genitalia for nonmedical reasons.” Shell-Duncan, Bettina and YlvaHernlund (eds.), *Female Circumcision in Africa: Culture, Controversy and Change*, Lynne Rienner Publisher, London, Quoted in; UNICEF (2009), *Supra note 22* at p. 1.

<sup>24</sup> UNICEF, *Changing A Harmful Social Convention: Female Genital Mutilation/Cutting*, Innocenti Research Centre, Florence Italy, 2008, at p. 1.

<sup>25</sup> WHO, *Female Genital Mutilation*, Fact sheet no. 241, World Health Organization, Geneva, 2000 at p. 2.

<sup>26</sup> It has been calculated that in 2000, approximately, 3,050,000 were girls cut on the African continent. Figure courtesy of Stan Yoder, Measure DHS, ORC Macro. This figure is derived by taking the number of females born in 2000 in these countries, calculating a loss due to infant mortality, and multiplying the resulting figure by the prevalence of FGM/C among the 15-24 year old cohort in each of the countries where FGM/C is performed. The resulting figure is approximate, in part because there are no figures for prevalence among girls of less than 15 years of age, and in part because there is uncertainty over FGM/C prevalence in a number of countries (DRC, The Gambia, Liberia, Senegal, Sierra Leone and southern Sudan). Quoted in; UNICEF (2008), *Supra note 25*, at p. 9.

half are from two countries; Egypt and Ethiopia. Although this figure is significantly higher than the previous estimate of two million, this new figure does not reflect increased incidence, but is a more accurate estimate drawn from a greater availability of data. Effective efforts to end this practice require a more detailed picture of this situation.

In India, more than a 34 percent of women, between the ages 15-49 have experienced physical violence, and 9 percent have experienced sexual violence. In all, 45 percent of women, between the ages 15-49 in India have experienced physical or sexual violence. By state, women's experience of physical or sexual violence ranges from a low of 6 percent in Himachal Pradesh to 40 percent or more in Rajasthan, Madhya Pradesh, and Tripura, and to a high of 56 percent in Bihar.

Among all ever-married women who reported ever experiencing physical or sexual violence, 36 percent report cuts, bruises, or aches, 9 percent report eye injuries, sprains, dislocations or burns, 7 percent report deep wounds, broken bones, broken teeth, or other serious injury, and 2 percent report severe burns. All of these percentages are higher for women who report violence in the 12 months preceding the survey. Notably, 38 percent of women experiencing physical or sexual violence report having experienced at least one of these groups of injuries.<sup>27</sup>

## 5 VIOLENCE AGAINST WOMEN- INTERNATIONAL LAW APPROACH

The International law, in that too international human right law plays a massive and decisive role in protection and promotion of the basic rights of the individuals. In order to prevent violations there need to be norms that separate what is permissible from what is forbidden. There are many human rights treaties adopted under the aegis of the United Nations that codify the substance of human right law.<sup>28</sup> International Human Right law is like domestic law in that it is based on the texts of legal instruments and the decisions of judicial or other authoritative decisions makers.<sup>29</sup>

<sup>27</sup> International Institute for Popular Sciences (IIPS) and Macro International, *National Family Health Survey (NFHS-3)-2005-2006: India*, VOL.1, IIPS, Mumbai, 2006, at p. 16.

<sup>28</sup> David Weissbrodt and Connie De La Vega, *Interantional Human Right Law- An Introduction*. University of Pennsylvania Press, Pennsylvenia, 2007, at p. 29.

<sup>29</sup> Curtis F.J Doebe ., *Introduction to Interantional Human Right law*, CD Publications, Washigton D C, 2007, at p. 7.



The World Conference on Human Rights in Vienna (1993) accepted that the rights of women and girls are 'an inalienable, integral and indivisible part of universal human rights.' The 1993 Declaration on the Elimination of Violence against Women, adopted by the General Assembly, is the first international human rights instrument to deal exclusively with violence against women, a ground-breaking document that became the basis for many other parallel processes. The declaration calls upon States to 'consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with the issue of violence against women.'<sup>30</sup>

While gender-based violence is not specifically mentioned in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1992 the Committee overseeing CEDAW implementation adopted General Recommendation 19, which states that it is a form of discrimination that inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men. It asks that governments take this into consideration when reviewing their laws and policies. The Beijing Platform for Action, adopted by the Fourth World Conference on Women in 1995, urges Governments to formulate and implement, at all appropriate levels, plans of action to eliminate violence against women.

In 2002, the United Nations International Research and Training Institute for the Advancement of Women (UN INSTRAW) developed an e-mail based seminar discussion series called "Ending Male Violence -Net" to provide a forum for United Nations bodies, practitioners, NGO representatives, activists and university professionals to discuss men's roles and responsibilities in ending gender-based violence.

Expressing its appreciation for the high number of activities undertaken by the United Nations bodies, entities, funds and programmes and the specialized agencies, including by the Special Rapporteur of the Human Rights Council on violence against women, its causes and consequences, to eliminate all forms of violence against women, and welcoming the recent appointment of the Special Representative of the Secretary-General on violence against children, on 11<sup>th</sup>

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<sup>30</sup> CEDAW, Article 4(e), See United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, GA Res.34/180 (adopted on 8 December 1979, entered into force September 1981) 1249 UNTS 13.

February 2010, General Assembly in its resolution 64/137, call upon the international community, including the United Nations system and, as appropriate, regional and sub-regional organizations, to support national efforts to promote the empowerment of women and gender equality in order to enhance national efforts to eliminate violence against women and girls, including, upon request, in the development and implementation of national action plans on the elimination of violence against women and girls, though, inter alia, official development assistance and other appropriate assistance, such as facilitating the sharing of guidelines, methodologies and best practices, and taking into account national priorities.

According to the resolution, as of 27 May 2010, 54 Member States had responded to the Secretary-General's request for information relating to the implementation of General Assembly resolution 63/155. Information was provided on a range of measures taken to address violence against women, including strengthening legal frameworks, adopting dedicated policies, reinforcing prevention action and efforts to prosecute perpetrators and protect and support victims.

On 2 August 2010, in resolution 63/155 on intensification of efforts to eliminate all forms of violence against women, the General Assembly reaffirmed the obligation of all States to promote and protect all human rights and fundamental freedoms, and recognized that violence against women was rooted in unequal power relations between men and women and that all forms of violence against women constituted a major impediment to the ability of women to make use of their capabilities.

## **6 VIOLENCE AGAINST WOMEN- INDIAN CONTEXT**

Comprehensive legal frameworks provide the foundation for effective action against violence against women at the national level. Progress in strengthening such frameworks and bringing them into line with international and regional standards is therefore essential for combating violence against women. The absence of specific legislation on violence against, or delays in adopting related laws, constitutes an obstacle to an effective response to the problem.

### **6.1 Constitution of India**

Gender equality is the primary and prominent step to address the problem of violence against women and to enhance their position in the power structure of society. The principle of gender equality is enshrined in the Indian Constitution in

its preamble, fundamental rights and directive principles of State policy.<sup>31</sup> Violence against women, either Physical, sexual and psychological violence occurring in the family or outside infringes the right to equality and right to life. Gender equality<sup>32</sup> and right to life and live with dignity<sup>33</sup> has cemented under Indian Constitution.

The State is directed by the Constitution 'to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.'<sup>34</sup> An amendment in 1976 states 'The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.'<sup>35</sup>

## 6.2 The Protection of Women from Domestic Violence Act, 2005<sup>36</sup>

This is the Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The Act provides conceptual framework for the terms domestic violence, physical abuse, sexual abuse and verbal and emotional abuse.<sup>37</sup> The Act has provided civil remedies in the nature of protection orders, residence orders, maintenance, compensation and temporary custody orders to women facing domestic violence within the home. The Act Establishes a coordinated implementation mechanism to ensure women have access to and enjoy support services such as shelter, medical relief and legal assistance through Appointment

<sup>31</sup> Dasarathi Bhuyan, "Empowerment of Indian Women- A Challenge for 21st Century". Bhuyan, R C Panigrahy and Dr.Dasarathi (Ed.), *Women Empowerment*, Discovery Publishing House, New Delhi (2006), pp.18-23, at p. 18.

<sup>32</sup> Constitution of India, Articles 14, 15, and 16.

<sup>33</sup> *Id.*, Article 21.

<sup>34</sup> *Id.*, Article 38(1).

<sup>35</sup> *Id.*, Article 38(2).

<sup>36</sup> No. 43 of 2005.

<sup>37</sup> Section 3 of the Act which define domestic violence runs as follows; For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it -

- 1 harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
- 2 harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- 3 has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
- 4 Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

of Protection Officers, who are to act as the link between women and the courts on the one hand, and women and support services on the other; Registration of Service Providers and notification of medical facilities and shelter homes.<sup>38</sup>

### **6.3 The Prohibition of Sexual Harassment of Women at Workplace Bill, 2010<sup>39</sup>**

The Bill passed in Lok Sabha on 3 September, 2012. It seeks to provide every woman, irrespective of her age or employment status (excluding domestic workers) a safe and secure environment free from sexual harassment by fixing responsibility on the employer and laying down a redressal mechanism. The Bill conferring upon women the right to protection against sexual harassment and towards that end for the prevention and redressal of sexual harassment of women in;<sup>40</sup>

- I. any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a cooperative society
- II. any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, nongovernmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial or financial activities including production, supply, sale, distribution or service;
- III. hospitals or nursing homes;
- IV. any place, vehicle either by air, land, rail or sea visited by the employee arising out of, or during and in the course of, employment

### **6.4 The National Policy for Empowerment of Women, 2001 (NPEW)<sup>41</sup>**

The National Policy for Empowerment of Women, 2001 (NPEW) was formulated as the blueprint for the future, with the express goal of addressing women's felt needs and bringing about their advancement, development and

<sup>38</sup> See *The Protection of Women from Domestic Violence Act*, 2005, Ss. 8, 9 & 10.

<sup>39</sup> Bill No. 144 of 2012, the preamble of the Bill asserts that 'sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment'.

<sup>40</sup> The Prohibition of Sexual Harassment of Women at Workplace Bill, 2010, S.2 (n).

<sup>41</sup> The goal of this Policy is to bring about the advancement, development and empowerment of women. The Policy will be widely disseminated so as to encourage active participation of all stakeholders for achieving its goals. Particularly principle 1.11 (viii) speaks about Elimination of discrimination and all forms of violence against women and the girl child.

empowerment. The NPEW laid down detailed prescriptions to, inter alia, address discrimination against women, strengthen existing institutions which includes the legal system, provide better access to healthcare and other services, equal opportunities for women's participation in decision-making and mainstreaming gender concerns in the development process. The NPEW was envisaged as a comprehensive framework which is progressive and forward looking in nature.

### **6.5 National Mission for Empowerment of Women**

The objective of the Mission is to empower women socially economically and educationally by securing convergence of scheme/programmes of different Ministries / Departments of Government of India as well as State Governments. The National Mission Authority (NMA) is headed by the Hon'ble Prime Minister and has Chief Ministers of two States of Andhra Pradesh & Bihar and five Civil Society Organisations as Members. The NMA is assisted by Central Monitoring Committee headed by Minister of Women and Child Development and Inter-Ministerial Coordination Committee (IMCC) under Cabinet Secretary. To assist NMA and IMCC, there would be Mission Directorate and National Resource Centre for Women (NRCW). Similarly, at the State level, there would be a State Mission Authority (SMA) and State Resource Centre for Women (SRCW).

The Government of India instituted the "Performance Monitoring and Evaluation System (PMES) for Government Departments" under the guidance of the Cabinet Secretariat and with the approval of the Prime Minister. As part of this framework, Ministry of Women and Child Development has developed a Results Framework Document (RFD) for the last quarter of 2009-2010 and for 2010-2011. The Ministry's overarching goal of promoting the survival, protection, development and participation of both women and children is reflected in the priorities delineated in the RFD. The development of the annual RFD constitutes a concrete exercise towards aligning people, systems, programmes and processes towards the fulfilment of the Ministry's vision and mission for women and children.

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

The constitution of Justice Verma Committee is in response to the country-wide peaceful public outcry of civil society, led by the youth, against the failure of governance to provide a safe and dignified environment for the women of India,

who are constantly exposed to sexual violence.<sup>42</sup> The immediate cause was the brutal gang rape of a young woman in the heart of the nation's capital in a public transport vehicle in the late evening of 16 December 2012. As the both houses of the Parliament were not in session, the President of India had promulgated the ordinance by using its Constitutional power under Article 123 of the Indian Constitution. Subsequently, it came into force as Criminal Law (amendment) Act, 2013.<sup>43</sup> The major object of this Act is to amend the Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872.

Through the Act the Government of India has made substantial changes in Substantive as well as procedural criminal law to properly shape the Indian criminal jurisprudence. The Criminal Law (amendment) Act, 2013 intent to bring following changes to the Indian Penal Code, 1860 in order to address the violence against women with committed and consistent way.

#### **6.6.1 Acid attack**

The menace of acid attack has strictly been addressed by the legislation by supplementing Section 326A and 326B to Section 326 of the Indian Penal Code, 1860.<sup>44</sup> Though the majority victims of the acid attackers are women, the law has not discriminated statutory protection on gender and both men and women have equal protection against this heinous crime.

Section 326A of the Indian Penal Code demonstrates that whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may

<sup>42</sup> The committee was constituted by GOI Notification NO.SO (3003) E, dated 23 December 2012 to find out challenges associated with criminal justice system to tackle sexual assault cases and to suggest possible solutions to the problem of sexual violence against women in India. The Committee consist Hon'ble Justice (Retd.) J.S Verma (Chairman), Hon'ble Justice (Retired) Leila Seth (Member) and Shri Gopal Subramanian, former Solicitor General of India (Member). See Gazette Extraordinary, Part-II, Section (3), Sub-section (ii), 24 December 2012.

<sup>43</sup> Received the assent of the President of India on the 2 April 2013 and came in to force with effect from 3 February 2013. See Gazette of India, Extraordinary part.1, New Delhi Tuesday 2 April 2013.

<sup>44</sup> See *Criminal Law (Amendment) Act, 2013*, S 5.

extend to imprisonment for life and with fine which may extend to ten lakh rupees. Another, glaring feature of this Section is its attempt to compensate victim of the acid attack. The contentious issue of compensation for victims under criminal law has potentially been addressed by the legislative provision under Section 326A of the Indian Penal Code, 1860.<sup>45</sup>

Section 326A of the Indian Penal Code intent to punish the voluntarily causing grievous hurt by use of acid, etc. On the other hand Section 326B of the Indian Penal Code, 1860 has taken care of voluntarily throwing or attempting to throw acid. It says that whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.<sup>46</sup>

#### **6.6.2 Sexual Harassment**

Through the Criminal Law (amendment) Act, 2013, Section 354A has been added to the Indian Penal Code, 1860 and clarity has been maintained in defining the Sexual harassment. Under Section 354A (1) of the Indian Penal Code, 1860 the following acts constitute sexual harassment;

- I. Physical contact and advances involving unwelcome and explicit sexual overtures; or
- II. A demand or request for sexual favours; or
- III. Showing pornography against the will of women; or
- IV. Making sexually coloured remarks

Any person who commits the offence specified in clause (i) or clause (ii) of sub-section (1) of 354A shall be punished with rigorous imprisonment which may

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<sup>45</sup> The second part of Section 326 A of the Act stipulate that any fine imposed under this section shall be given to the person on whom acid was thrown or to whom acid was administered.

<sup>46</sup> The explanation added to 326 A and 326 B of the Indian Penal Code has outlined conceptual analysis of Acid and Permanent or Partial Damage used under Section these Sections. According to Explanation 1 of Section 326 A "For the purposes of section 326 A and this section, 'acid' includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability." Further, Explanation 2 of the Section says that 'Permanent or partial damage' includes deformity, or maiming, or burning, or disfiguring, or disabling any part or parts of the body of a person.

extend to three years, or with fine, or with both. Further, Section 354A (2) mandates that any person who commits the offence specified in clause (iii) or clause (iv) or of sub-section (1) shall be punishable with imprisonment of either description that may extend to one year, or with fine, or with both.

### **6.6.3 Assault or use of Criminal Force to Woman with Intent to Disrobe**

Assault or use of criminal force to disrobe women is fundamental issue of violence against women in recent days. The Act has intellectual intension to capture this situation by providing conceptual framework and appropriate criminal sanction to these kinds of unnatural activities of the human being. The Act further stipulate that whoever assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked in any public place, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years and with fine.<sup>47</sup>

### **6.6.4 Voyeurism**

Whoever watches, or captures the image of, a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminate such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.<sup>48</sup> Where the victim consents to the capture of images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.<sup>49</sup>

<sup>47</sup> *Indian Penal Code*, 1860, S.354 B of Criminal Law (Amendment) Act, 2013, S.7.

<sup>48</sup> For the purposes of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy, and where the victim's genitals, buttocks or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the person is doing a sexual act that is not of a kind ordinarily done in public. See (Explanation 1 of Indian Penal Code, 1860, S. 354 C of Criminal Law (Amendment) Act, 2013, S. 7.

<sup>49</sup> Explanation 2 of *Indian Penal Code*, 1860, S. 354 C as amended by Criminal Law (Amendment) Act, 2013, S. 7.



### **6.6.5 Stalking**

Following a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly, despite a clear indication of disinterest by such woman, or whoever monitors the use by a woman of the internet, email or any other form of electronic communication constitute stalking under Section 354D of the Indian Penal Code, 1860.<sup>50</sup> Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.<sup>51</sup>

### **6.6.6 Trafficking for Exploitation**

The exploitation of the human being has strictly been addressed with stringent punishment under the new provision. The exploitation for prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the forced removal of organs. The amendment provision mandate that whoever recruits, transports, transfers, harbours, or receives a person or persons for the purpose of exploitation by means of using threats or use of force or any other form of coercion, abduction, practising fraud, deception or by abuse of power or by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.<sup>52</sup>

### **6.6.7 Sexual Assault**

The concept of rape in the contemporary world constitute pervasive and persistent element of women lives. This heinous crime has significant impact on charity and quality life of women. The old Indian Penal Code, 1860 concept of rape was intended to replace with 'Sexual Assault' under Criminal Law (amendment) Ordinance, 2013. The Group of Ministers (GoM) was set up by the Prime Minister to resolve difference met on 13 March 2013 and the cabinet on 14 March 2013 agreed to clear the Bill by agreeing to replace the word 'Sexual Assault' with 'rape' and reducing the age of consent from 18 to 16

<sup>50</sup> However, the following exceptions have been provided to the stalker under Section 354D: Stalking by a person entrusted with the responsibility of prevention and detection of crime by the state; or that it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or that in the particular circumstances the pursuit of the course of conduct was reasonable.

<sup>51</sup> *Supra* note 47, S. 354 D (2) as amended by 7Criminal Law (amendment) Act, 2013, s. 7.

<sup>52</sup> *Id.*, S. 370 as amended by Criminal Law (Amendment) Act, 2013, S. 8.

years. Finally, it was decided to retain the term rape instead of Sexual Assault through the Act. The old Sections 375, 376, 376A, 376B, 376C and 376D of the Penal Code have been replaced with new provisions and the subject matter of the provision also got considerably changed by the amendment as follows;

- I. penetrates his penis, to any extent, into the vagina, mouth urethra or anus of woman or makes her to do so with him or any other person; or
- II. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- III. manipulates any part of the body of woman so as to cause penetration into the vagina, urethra, anus or any part of body of such person or makes the person to do so with him or any other person; or
- IV. applies his mouth to the penis, vagina, anus, urethra of another person or makes such person to do so with him or any other person;

Furthermore, the aforementioned penetration or touching is punishable if it is carried out for proper hygienic or medical purposes under the circumstances falling under any of the following seven descriptions:—

- I. Against her will.
- II. Without her consent.
- III. With her consent when her consent has been obtained by putting her or any person in whom such she is interested, in fear of death or of hurt.
- IV. with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- V. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that action to which she gives consent.
- VI. With or without her consent, when she is under eighteen years of age.
- VII. When she is unable to communicate consent.

#### ***6.6.8 Punishment for Rape***

The punishment for rape is substantially changed under new Act. Whoever commits rape shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to

imprisonment for life, and shall also be liable to fine. The new amendment provisions have maintained the *status quo* in respect to the imposition of the punishment on public servant for their rapist attitude. However, the proportion of the punishment has been revised under the amendment provisions. Section 376 of the newly inserted provision says that whoever;

- a) Being a police officer, commits sexual rape–
  - i. within the limits of the police station to which such police officer is appointed; or
  - ii. in the premises of any station house; or
  - iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
- b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
- c) being a member of the armed forces deployed in an area by the Central or a State Government, commits sexual rape; or
- d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or
- e) being on the management or on the staff of a hospital, commits sexual assault on a woman in that hospital; or
- f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
- g) commits rape during communal or sectarian violence; or
- h) commits rape on a woman knowing her to be pregnant; or
- i) commits rape on a person when such person is under eighteen years of age; or
- j) commits rape, where the person assaulted is incapable of giving consent; or
- k) being in a position of control of or dominance over a woman, commits rape on such woman ; or
- l) commits rape on a woman suffering from mental or physical disability; or
- m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
- n) commits rape repeatedly on same woman,

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, which shall mean

imprisonment for the remainder of that person's natural life, and shall also be liable to fine. The amendment provision further mandates that in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death.<sup>53</sup>

The Act has recognised the Sexual intercourse by husband upon his wife during separation and imposes appropriate punishment for such sexual attack on women. The Act says that whoever has sexual intercourse with his own wife, who is living separately whether under a decree of separation or otherwise without her consent, shall be punished with imprisonment of either description, for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.<sup>54</sup>

The Act is further concentrate on Sexual intercourse by a person in authority by misusing his authority or influencing position. The Act mandates<sup>55</sup> that whoever,—

- I. in a position of authority or in a fiduciary relationship; or
- II. a public servant; or
- III. superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
- IV. on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years but which may extend to ten years, and shall also be liable to fine.

The Criminal Law (amendment) Act, 2013 has taken serious course of action gang rapes as they are seriously increasing. The Act mandates that where a women is raped by one or more persons constituting a group or acting in

<sup>53</sup> *Id.*, S. 376 A as amended by *Criminal Law (Amendment) Act*, 2013, S. 9.

<sup>54</sup> *Id.*, S. 376 B as amended by *Criminal Law (Amendment) Act*, 2013, S. 9.

<sup>55</sup> *Id.*, S. 376 C as amended by *Criminal Law (Amendment) Act*, 2013, S. 9.

furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape, and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life and fine.<sup>56</sup> The section further says that compensation is to be paid to the victim to reasonably meet the medical expenses and rehabilitation of the victim. If the offences punishable under section 376 or section 376A or section 376C or section 376D are repeatedly committed by a person and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life, which shall mean the remainder of that person's natural life or with death.<sup>57</sup>

The criminal justice system of the nation in recent days is open to severe criticism on a number of counts. There is often a say about the Indian Penal Code, 1860 that it is a colonial law, out dated and a urgent need of fresh look at the provision of the Code. In the light of apparent desire, the Criminal Law (amendment) Act, 2013 is a timely and welcoming step by the Government of India. As Kennedy, J. observed: - "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule....."<sup>58</sup> On the other hand International Covenant on Civil and Political Rights, 1966 stipulates that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment in particular, no one shall be subjected without his free consent to medical or scientific experimentation."<sup>59</sup> In line with above statement the new Criminal Law (amendment) Act, 2013 has expressed a commendable concern by balancing the punishment of criminals and avoid of inhuman punishment for criminals.

In addition, India is a signatory to the UN Convention against Transnational Organized Crime with its Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children and is in the process of ratifying

<sup>56</sup> Explanation to *Indian Penal Code*, 1860, S. 376 D of *Criminal Law (Amendment) Act*, 2013, S. 9, stipulates that 'for the purposes of this section, imprisonment for life shall mean imprisonment for the remainder of that person's natural life'.

<sup>57</sup> *Supra* note 47, S. 376 E of *Criminal Law (Amendment) Act*, 2013, S. 9.

<sup>58</sup> Justice Verma Report at p.250. J.S Verma, Leila Seth and Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law, Ministry of Home affairs (GOI), New Delhi, January 2013, at p.250.

<sup>59</sup> ICCPR, 1966 para.3 of Article.7, See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

them. India has ratified: The SAARC Convention on Preventing and Combating Trafficking of Women and Children in Prostitution; Convention on the Elimination of All Forms of Discrimination against Women; and Convention on the Rights of the Child.

## **7 CONCLUSIONS AND RECOMMENDATION**

Violence is a problem that calls for a multi-sectoral response. Violence against women is being addressed by an increasing range of actors across various sectors of society. The work being done by various International and national institutions, Non-Governmental Organisations, Women Organisations, Community based Organisations to address the gravity of the issue. Even where the struggle has engaged a wide variety of people, it is not enough. Each and every one of us has it in us to become a human rights defender, acting to prevent or diminish discrimination.

The international legal and policy framework for eliminating discrimination against women is well-developed, but there is a wide gulf between the standards set, and actual practice at the national and local level. States have the primary responsibility to protect their women, and in most cases are clearly not doing enough. Improvement in laws and institutions is necessary for ending violence, but at the same time positive societal change is also needed in the ways that individual's perception, beliefs and behaviour towards women.

Educational curricula and institutions provide an important opportunity and forum within which attitudes that perpetuate violence against women can be addressed and women's rights might be promoted. The media is an important conduit of public opinion and can influence societal attitudes. Training journalists to report on violence against women in a gender sensitive manner can help to dispel myths and create awareness of the issue among the general public.

The Efforts to improve collection of data on violence against women, including a growing number of population-based surveys to assess the prevalence of violence against women and the creation of national databases should be improved. The availability of more and better quality information, including statistical data, is crucial. Such information allows policymakers to undertake effective legislative and policy reforms, ensure adequate provision of targeted and effective services, monitor trends and progress in addressing and eliminating violence against women, and assess the impact of measures taken.

A stronger focus must be placed on prevention, to complement more effectively the improved laws, policies and programmes and their implementation, monitoring and evaluation. These efforts should be rigorously evaluated to gain a better understanding of their impact and effectiveness, including when they form part of a comprehensive approach to addressing violence against women.

# **RE-VERSING THE SOCIAL GAZE : SEXUAL VIOLENCE, LAW AND GENDER**

Manasi Sinha\*

## **1. INTRODUCTION**

The formation of gender identity and consequent gender differences is instilled in the social fabric, reinforced in daily life and is practiced and perpetuated through the process of socialization. This leads to asymmetry and consequent inequality which in a way sanctions male hegemony over gender hierarchy and allows for a male gaze through which women are viewed as an object of gratification; a vulnerable group; a voice less gender; and traditional care-givers. This narrow gaze vis a vis women consequently put the lives of women in jeopardy and expose them to various sexual violence and discrimination in private and public domain.

However, enforcement of law has not sufficiently reduced the crisis of sexual violence. The reason behind this being legal consciousness having a narrow value laden gaze in which sexual violence is defined through the same larger framework of patriarchal discourse which considers it to as crime only. This escapes the root cause of sexual violence and intensifies the problem of gender inequality and gender violence in society.

This paper therefore, attempts to analyze the ways through which women are viewed through a social gaze which objectify them as modest, tender, and weak and thus justifies their vulnerability in public spaces. It also analyses how the legal consciousness has been influenced by the patriarchal gender discourse and reinforces this social gaze.

Therefore, this paper seeks to investigate into new ways which helps in reversing this social gaze by triggering a change in the social mindset at larger level so as to delimit the scope of this social gaze on women. This, the paper holds that the solution lies in reversing and widening the social gaze with respect to gendered space, gender role performance, and conceptual domain of sexual violence so that a woman could receive her freedom, liberty and rights not being a woman only but as an equal gender.

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## 2. GENDERING SEXUAL IDENTITY

*Gender* has been a significant term for examining the status of women. It is a learned behaviour which is socially and culturally constructed. Gender been usually seen a 'psychological, social and cultural aspects of maleness and femaleness'<sup>1</sup>-which represented the characteristics taken on by males and females as they encountered social life and culture through socialization. However, the problem arises when this social construction boosts up a 'hierarchical relationship' within patriarchal set up where men and women are produced and live with different realities according to time and space, with male domination and female subordination in most spheres of life.

V. Geetha (2002), points out that *gender is everywhere*, and when we allocate to the male and female sexes, specific and distinctive attributes and roles, we are 'doing' gender. She talks about different spaces meant for both the sexes. Thus men are being taken as more outdoor going whereas women are seen as bearer of indoor responsibility. Female identity is linked to her role as mothers, wives and daughters while male identity is linked to the productive work. This mindset is surrounded by a particular historical and sociological identity to the female sex and thus makes it appear natural. However, 'Power' plays a very dominant role in defining these roles and statuses. The theory of power has been connected to 'authority', 'domination', and/or exploitation and it is an entity that an individual or groups can possess. However, whichever group has power can define roles, can access to all the economic and political resources and can eventually shape the social structure as per its own interests. In *Sexual Politics*, Kate Millet (1972)<sup>2</sup> defined politics as a 'Power Structured Relationships', arrangements whereby one group of persons is controlled by another'. What made her argument debatable was that she applied this definition to the relation between Women and Men. Thus *Power* is manifests into the creation of gender inequality which exist across a range of resources, from income and wealth to social honour, cultural authority etc. She argues that those benefiting from inequalities have an interest in defending them and those who bear the costs have an interest in ending them.

The 'male female' hierarchy may be linked to the historical development of the relation between the 'colony' and the 'colonizer'. Edward Said's (1979)

<sup>1</sup> Edward Stein, *The Mismeasure of Desire: The Science, Theory and Ethics of Sexual Orientation*, Oxford University Press, New York (1999).

<sup>2</sup> Kate Millet, *Sexual Politics*, Doubleday, New York (1970).

concept of *Orientalism* strengthens the perception of this gender hierarchy. He describes that:

An entire corpus of writing and other material--literature, poetry, philosophical tracts, government reports, religious commentary, etc.—represented the Orient in specific ways. 'Orientalism' refers to the processes and sites of 'producing' a space called the Orient for western consumption, such that the West and the 'Orient' come to be in a relation of superiority-inferiority. Western religious, aesthetic, philosophical, kinship, literary, scientific and ontological traditions come to be established as superior to their Oriental counterparts. And, hence, colonialism becomes justifiable as the 'civilizing mission' of a superior 'race'. Most significantly for our purposes, 'Orientalism' also established the dominant meanings of masculinity through 'feminizing' entire populations who came to be represented as unfit for self-rule. So, the 'cunning Arab', the 'inscrutable Chinese', and the 'effeminate Bengali' were simultaneously stereotypes of gendered behaviour: they were, compared to western men, 'womanly'. This way of thinking proceeds, of course, from the premise that women are inferior to men. Hence, the idea that western men were superior to non-western men was based on the notion that 'masculine traits' were superior to 'feminine' ones.<sup>3</sup>

The theoretical variation on gender discourse still follows a continuum in its direction. The existing inequality in both the gender has been advocated by early thinkers as 'natural' and consequence of 'biological differences'. They found significance in a relative universality of physical characteristics among humans and of a gender division of labor that assigned men to certain tasks and women to others, a division that sometimes characterized the public sphere as a male domain and private sphere as a female domain. This view of biological determinant in deciding gender stereotypes was however, replaced and questioned later on by feminist scholars who hold the view that though there are basic differences between the sexes which are biologically determined, the differences in gendered role are the product of 'social conditioning' (typically set early in life).

To be a feminist is to understand that different identities located hierarchically as *dominant* or *subordinate*—are produced at different times and in different spaces, but also to be aware particularly of the processes of gendering. By 'gendering', I mean the ways in which people are produced as 'proper' men and 'women' through rules and

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<sup>3</sup> Edward Said, *Orientalism*, Vintage Books, New York, 1979.

regulations of different sorts; some of which we internalize, some of which have to be violently enforced.<sup>4</sup>

Ann Oakley, a British sociologist disagreed on the notion of 'sexual division of labor or gendered role' as something universal and rejected it as a myth that women are biologically incapable to carry out heavy and demanding work.

For Oakley, sex is a word that refers to the biological differences between male and female: the visible difference in genitalia, the related difference in procreative function and gender is however a matter of culture, it refers to the social classification into masculine and feminine.<sup>5</sup>

Simone de Beauvoir similarly questioned the assumptions behind such biological formulations in her feminist classic *The Second Sex* and said that "anatomy is not destiny and that one is not born, but rather becomes a woman".<sup>6</sup>

## 2.1 Conceptualizing 'Social Gaze', Gender Identity and Male Hegemony

*Gaze* is a psychoanalytical term brought into popular usage by Jacques Lacan to describe the anxious state that comes with the awareness that one can be viewed. In her essay *Visual Pleasure and Narrative Cinema* (1975), Laura Mulvey introduced the second-wave feminist concept of 'male gaze' as a feature of gender power asymmetry in film. Mulvey stated that women were objectified in film because heterosexual men were in control of the camera and women are represented for male gaze.<sup>7</sup>

The *social gaze* with respect of viewing women is rather like that. It occurs when the society projects the 'woman' through the perspective of a man. The patriarchal society narrates the lifestyle, code of conduct in which women are usually represented the manner men want. Thus a female objectification is sanctioned and reinforced through a socially created gender discourse and create an environment in which male body perpetrate sexual violence on 'women', thinking her being an *object of sexual gratification*.

The male gaze may be seen by a feminist either as a manifestation of unequal power between gazer and gazed, or as a conscious or

<sup>4</sup> Nivedita Menon, *Seeing Like a Feminist*, Penguin Publication, New Delhi (2012).

<sup>5</sup> A. Oakley, *Sex, Gender and Society*, Gower Publishing Company, Hants (1985).

<sup>6</sup> Simone de Beauvoir, *The Second Sex*, London (1988).

<sup>7</sup> Laura Mulvey, "Visual Pleasure and Narrative Cinema", Constance Penley (Ed.), *Feminism and Film Theory*, Routledge Publication, UK (1988), pp. 57-68.

subconscious attempt to develop that inequality. From this perspective, a woman who welcomes an objectifying gaze may be simply conforming to norms established to benefit men, thereby reinforcing the power of the gaze to reduce a recipient to an object.<sup>8</sup>

Maintaining an existing social prevalence is like reiterating it through its performance over and over again. When a woman 'sees' the world through a feminist gaze, she reveals the hidden *social gaze* through which she has been projected as an 'objectified manner' at all levels of society, that goes on below the surface of apparent 'equal world'.

The projection of women in their various gender roles and responsibilities is constructed and maintained through a larger social-cultural framework in which a gendered subject acquires a gendered identity in the way society gaze at it, or projects it. Thus the gendered identity which women emulate as reflection of their 'own self' is actually the reflection of the essence of that social mindset in which they live in. They start therefore perform their corresponding gender role designed by the society. This gender identity further reinforced by the process of dialogism through which the female gender involves in interaction with various agents of society and acquires meanings for itself.

The concept of identity cannot mean simply 'to be something' or to be 'identical with oneself'...rather, the principle of identity coincides with the principle of otherness or to use Bakhtin's terminology with the 'principle of dialogism': The self is the gift of other...Bakhtin argues..."I realize myself initially through others, from them I receive words, forms and tonalities for the formation of my initial idea about myself".<sup>9</sup>

Consequently a matrix of culture and religion along with other social agents intertwined together to construct a multiple identity for women according to its own preferred discourse. In a patriarchal set up, the male hegemony creates norms, code of conduct and divides spaces for the female gender. Men therefore held claim in everything which is resourceful and productive ice the *public sphere* and pushed women to the unproductive and unrecognized domain i.e., the 'private sphere'. However, both the spheres continuously being

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<sup>8</sup> <http://en.wikipedia.org/wiki/Gaze>, Last accessed on 1 March 2013.

<sup>9</sup> Jola Skulj, "Comparative Literature and Cultural Identity", *Comparative Literature and Culture*, Vol. 2, No.4 (2000), pp.1-8.

the noxious domain for women exposing them to extreme form of violence perpetrated by men so to retain their authority.

For decades women looked at themselves through the prism of this social gaze, succumbing to the male sexual violence and consider it a part of their fate-“Men look at women. Women watch themselves being looked at”.<sup>10</sup>

## 2.2 Normalizing Gendered Desk

For decades the gender structure, the unequal gender relations and particularly the narrow *social gaze* through which women have been seen like a ‘reproductive object’, ‘the dweller of private domain’ and ‘the different others’ have been maintained through a male hegemony and acquired a commonsensical understanding of the society. Gramsci’s pivotal concept of *hegemony* has been relevant in this regard:

For Gramsci, hegemony involves two elements through which it maintains its power: the first element of hegemony is that it produces consent among people to accept the group in power and live within existing structures. Second, this hegemony involves the production of what Gramsci (1971) calls “historically organic ideologies...[that] ‘organize’ human masses,...[and] form the terrain on which men [sic] move, acquire consciousness of their position, struggle, etc.”<sup>11</sup> “As ideologies permeate both culture (Gramsci’s ‘civil society’) and politics, they settle into people’s unconsciousness to generate “sedimentation of common sense”, a shared understanding that the workings of society have a natural logic and are meant to be the way they are.”<sup>12</sup>

In the same manner, the *social gaze* of projecting women through the prism of male hegemony has been maintained as a cultured ideology and strive to normalize ‘male gazing’ of female gender and tries to gain consent from women in the process.

The normalized gender structure then diffused through influential agents like: priests, journalists, advertisers, politicians, psychiatrists, designers, playwrights, film makers, actors, novelists, musicians, activists, academicians, coaches, and sportsmen- who are the “weavers of the fabric of hegemony” as Gramsci put it, its “organizing intellectuals”- these people regulate and manage the gender regimes: articulate

<sup>10</sup> John Berger, *Ways of Seeing*, Penguin Group, 1972. pp. 45-47.

<sup>11</sup> Kaela Jubas, “Theorizing Gender in Contemporary Canadian Citizenship: Lessons from the CBC’s Greatest Canadian Contest”, *Canadian Journal of Education*, Vol. 29, No.2, 2006, pp. 376-77.

<sup>12</sup> *Ibid.*

experiences, fantasies, and perspectives; reflect on and interpret gender relations.<sup>13</sup>

### 3. GENDERED SPACE, MODERNITY AND SEXUAL VIOLENCE

#### 3.1 Modernity and Gendered Space

A significant way to perceive the intricate gender relations is through exploring their relationship with respect to their social identity and space they share, as part of their everyday lives- as it unfolds their relative rights, freedom and constraints. Public sphere has been historically the domain of men and that of private sphere is being made the territory of women. However, instead of being complementary to each other two spheres reflect their hostility to each other like their dwellers of the corresponding domain.

If the public is presented as the domain of action, 'rationality', 'educated opinion', and a realm where important matters of social life can be discussed among the rightful claims to the public sphere—men—then the private is imagined as that sphere where men can find relief from the 'difficult' tasks of engaging and forming the public sphere. The private is represented as the 'soft' sphere where other kinds of—'feminine'—sensibilities come into play. Here, women rule as they are supposedly endowed with those qualities that are best suited to the domestic sphere: capacity for maternal care and emotional response, lack of ability for 'rational' and 'scientific' thinking and capacity for thinking about concrete matters such as the state, and abstract matters such as philosophy. However, according to this line of thought, the private sphere is a necessary complement to the public....without the notion of the private, the public would not carry the connotations of a superior realm that it does. It is in this sense that the two are complementary. It is also here that we can understand the hostility that women face should they choose to place themselves in the imagined public sphere: masculine anxiety and hostility guards the public as a realm of men. What we have, in effect, are masculinized public spheres.<sup>14</sup>

In all cultures, the binary domain of both the spheres existed in more or less as a common reality. But with the beginning of modern era, things started changing. While the modern society opens up new avenues for women; and offers economic opportunities in the public space, and women are trying to shade off

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<sup>13</sup> M. Donaldson, "What is Hegemonic Masculinity", *Theory and Society, Special Issue: Masculinities*, Vol. 22, No. 5, (October 1993), pp. 643-57.

<sup>14</sup> Sanjay Srivastava, "Masculinity and Its Role in Gender-Based Violence in Public Spaces", (2010), Cequin, available at [https://docs.google.com/viewer?a=v&q=cache:SUyFkSUABEkJ:cequinindia.org/pdf/Special\\_Reports](https://docs.google.com/viewer?a=v&q=cache:SUyFkSUABEkJ:cequinindia.org/pdf/Special_Reports), (last accessed on 10 March 2013).

their traditional role in which they have been represented so far, there develops a tension between both the genders as they try to reclaim over the spaces. In such a situation entering women into public sphere becomes a threat to the male hegemony. However, men in turn involved in carrying out of violence against women in order to retain their authority and thus attempt to push them back to their traditional private sphere. Moreover, men also create a *fear psychosis* of sexual violence in the minds of women in the form of rape, molestation and sexual abuse and thus control their mobility by restricting them not to go beyond the *lakhman rekha* (the private sphere).

### 3.2 Ethics of Public Space, Sexual Violence and Culture: An Indian Experience

Although women face sexual violence in both private and public sphere, sexual violence in the public sphere has been an alarming phenomenon in the recent past in India. There is popular belief that public spaces have certain ethics under which men and women may access it, failing to conform to such *ethics of space* may invite inevitable consequences particularly for women. Therefore, men's accessing into the public spaces may not require a *purpose* (i.e. carrying out specific tasks); the idea of women loitering in public spaces without purpose becomes both incomprehensible and condemnable. One such popular mindset highlighted by a study carried out by Ranade (2007: 1521) runs as follows:

...it is always men who are found occupying public space at rest.... women, on the other hand are rarely found standing or waiting in public spaces—they move across space from one point to another in a purposeful movement....women occupy public space essentially as a transit between one private space and another.<sup>15</sup>

This way different kinds of social attributes, rules, popular beliefs come into play in forming a wider *social gaze* through which the mobility and sexuality of women is restricted in gendered spaces. The gendered ideology is also being strengthened usually through the interplay of this social gaze. A recent study by the School of Women's Study at Jadavpur University points out:

...while there exist different restrictions on women's mobility outside the home among various caste and class groups, 'restrictions over time are completely absent in case of upper-caste men. The only condition for men is that they should inform a family member in case of

<sup>15</sup> Shilpa Ranade, "The Way She Moves: Mapping the Everyday Production of Gender-Space", *Economic and Political Weekly*, Vol. Xiii, No.17, (April 2007), pp. 1519-26.

delay...women and their purpose is reinforced by a complimentary formulation that refers to the 'balance', a working woman must achieve between her paid work and household responsibilities. So, a woman's 'paid work' was not objectionable, provided she took good care of her 'household responsibilities'....in order to achieve this 'balance', however, it becomes imperative that women spend only that time in the public sphere that serves the purpose of carrying out the responsibilities of paid work, there after retreating to the home for other duties.<sup>16</sup>

So, women wearing 'revealing' western clothing, or dancing in pub at night, or loiter in public spaces without purpose are often regarded as having forfeited the right to (male) protection and regard. This aspect is further backed up by the logic that "to deliberately titillate men is a fault in a woman and the responsibility for its consequences ought not to be placed upon men"<sup>17</sup>

The recent molestation case<sup>18</sup> in Guwahati committed by a perverted mob to the hapless girl and its post effects exhibited us this terrible misogynistic culture of Indian society: on 9 July 2012, a young student left a bar and was set upon by a gang of at least 18 men. They dragged her into the road by her hair, tried to rip off her clothes and smiled at the cameras that filmed it all. The woman was abused for 45 minutes and still no one called the police. When the police eventually turned up, they took away the woman but no attempt was made to arrest the men whose faces could clearly visible on camera. What more shocking were the post effects of the incidents where various comments and statements were put forward by leaders of society towards the victim for a prescribed lifestyle, and dress code so as to avoid such crimes. Therefore, women being subjected to sexual violence by not following the masculine rules of modesty in public space may not be portrayed as victims, rather their 'worldliness' was to be blamed for the crimes they suffered.

The chairperson of Karnataka State human Rights Commission said in a public meeting: "Yes, men are bad....But who asked them (women) to venture out in the night..women should not have gone out in the night and when they do, there is no point in complaining that men touched them and hit them."<sup>19</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> Auke Smit, "Resisting Modernity?: The Performance of Gender Based Violence in Contemporary India", 2012, available at [http://www.academia.edu/1983974/Resisting\\_Modernity\\_The\\_Performance\\_of\\_Gender\\_Based\\_Violence\\_in\\_Contemporary\\_India](http://www.academia.edu/1983974/Resisting_Modernity_The_Performance_of_Gender_Based_Violence_in_Contemporary_India), (last accessed on 10 March 2013).

<sup>18</sup> Sushanta Talukdar and Bindu S. Perappadan, "Guwahati Molestation: 8 persons still at large", *The Hindu*, 13 July 2012, available at <http://www.thehindu.com/news/national/article3634606.ece?homepage=true>, last accessed 19 September 2012.

<sup>19</sup> *Supra* note 4, at 114.



#### 4 RAPE: THE HEINOUS ACT

Among various kinds of sexual violence rape could be the most dangerous one which takes place in both the spheres when female is supposedly enraged the male ego. While rape is usually seen an individual or a collective crime inflicted upon a woman, it is important to see how and to what extent the state and society could be held accountable for controlling such mindset of men who rape. Because, when any such activity takes place within the periphery of society, not only the accused (may it be individual or the collective group) who arrests our attention but also the society and its value system which faces outrage.

Various theories posit different reasons behind 'rape mindset'. Early theories emphasized on two factors: uncontrollable internal and external factors. While the former is supposedly driven by an overpowering sexual impulse ( Glueck, 1925; Karpman 1951) or because of an underdeveloped ego (Cohen et al, 1971) or as a result of unresolved sexual childhood desires ( Freud (1905); the latter however shifts the blame on the behaviour of the victim (Amir, 1967, 1971). All these earlier thoughts described rape as a matter of individual pathology and not as a socio-structural problem.

However, this perspective came under severe criticism by feminist discourse which place the reason onto the power-structure vis a vis men and women which is consequently driven by a hierarchy that enhances masculinity or support male power over the female ones. Here rape is being seen as a tool in order to 'control' over the weak group (women), and thus refutes the previous supposition of 'lack of control' due to some internal flow of fluids. This approach is best described by Brown Miller (1975) who considers rape as "...nothing more or less than a conscious process of intimidation by which all men keep women in a state of fear" (pg.15). By this she meant that rape is not about individual men 'losing control' as the earlier theories suggested, but is actually the conscious upholding of the oppressive patriarchal structures in society. Another thinker Russell considered 'rape' as the way some men express their hostility to women. More threatened egos may mean more rape. "In the short run, the more women who break out of the traditional female role and assert themselves in new ways, the more threatened male egos there are" (Russell, 1975, pg.14). Rape, therefore is being extensively used as a political tool to represent coercion of male hegemony over the other bodies i.e. female.

However, although different motivations and reasons are put forward while theorizing the mindset behind rape, we still need to consider another aspect i, e the 'social space' that allows these motivations to take place. Therefore, the underlying inquiry goes like if men are perceiving rape as a low risk, high reward crime (Scully, 1990), it is necessary to consider this wider structure within which the individual/collective motivations take place.

#### 4.1 Rape Culture in India

Many researchers considered rape being functionally normative and essentially a condoned behaviour because of the socio-cultural consensus which is integrated into social fabric as a common reality.

In a rape culture the socio-cultural supports for rape are structurally integrated in all levels of society. This includes the institutionalizing of patriarchal values; socialization practices that teach non-overlapping notions of masculinity and femininity with men viewed as tough, competitive and aggressive and woman as tender, nurturant, and weak; social, familial, political, legal, media, education, religious, and economic systems that favour men; and criminal justice and legal systems that fail to protect women.<sup>20</sup>

Culture provides a strong influence on perceptions, behaviours and attitudes of people. These perceptions affect the way how people look into matters. As cultural values are unique to group, it guides their actions and decisions.

The importance of culture to rape and sexual assault is affected then by the cultural values and norms related to sexual behavior and the social organization determining roles and responsibilities of men and women....the way a cultural or ethnic group defines gender roles and the woman's place in society impacts how rape will be perceived.<sup>21</sup>

Rape culture is prevalent in India since ages. It has been used primarily as a tool of dominance to exert caste supremacy or class supremacy or has been used many times strategically in a war torn areas (partition) so as to trigger terror onto the minds of opponents and weaken them. For many thinkers rape is primarily an effective means of subjugation where some 'honour' of a caste, a class, a social group, or a family is violated through a narrowly defined 'chastity/ purity' of a woman by making her 'impure'- this is very much related to Indian scenario.

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<sup>20</sup> Patricia D. Rozee, and Mary P. Koss, "Rape: A Century of Resistance", *Psychology of Women Quarterly*, Vol. 25, 2001, pp. 295-311.

<sup>21</sup> Robert R. Hazelwood and Ann Wolbert Burgess, *Practical Aspects of Rape Investigation: A Multidisciplinary Approach*, Taylor & Francis Group, New York (2009).

India has been typically configured with such violent incidents right from feudal society, to partitioned India to the modern time as well. Also in India multiple examples of male superiority and female subjugation exists in its religious texts, literature, and in other discourses. This perhaps provides a ground for an Indian society that sends a message that a women's value is related to her sexuality and that rape decreases that value. Such is that in a culture that values patriarchy and diminishes social status and rights of women, the forcible rape of women may not be a crime of major importance. Therefore, forcible rape may it be individual or gang rapes that are occurring with alarming regularity in India mark a trend of acceptance or of such crimes giving a boost to patriarchal values at all levels in society.

Besides, the more alarming is the way 'rape survivor' is being treated by the society and in the manner solutions/compensations are prescribed for the rape survivor. In India, a woman victim of rape is often treated as 'polluted' by her own near and dear ones. When strong cultural stigmas are attached to rape, women can experience incredibly severe secondary victimization, including rejection by their communities and families thereby re-victimizing the rape survivor again and again. Therefore, in India rape has been always linked with chastity, dignity and honour of women which they are prescribed to hold throughout their lives and which get violated once they are being raped.

This restricted definition of rape further forms the larger *social gaze* in which it remains a crime defined by law, therefore even legal measures unable to hit at the root cause and thus fails to arrest such power relations and dominance which create this mindset and play havoc around.

#### 4.2 The Geography of Fear<sup>22</sup>

The violence against women is mostly discussed exclusively in terms of public-male world of dominance/torture versus the private, female world of violence in the home. Some argue that this threat leads to the creation of geography of fear among women. A wide range of statistics reveals that most violence against women occurs within the private realm (inside the home) than outside; and it is men who face more actual violent behavior from their male counterpart. Despite this, women are taught to avoid the sphere of public space but men usually are not restricted in any manner. Thus "fear of violence in public spaces literally

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<sup>22</sup> The term taken from Gill Valentine's, "The Geography of Women's Fear", *Area*, Vol. 21, No.4, 1989, pp. 385-390.

becomes a means of keeping women 'in their place', that place being the home and the private sphere".<sup>23</sup>

However, there are two underlying assumption run through this argument: one is that women might face sexual violence only from strangers outside the home; and that sexual violence is an inimitable and irreparable form of violence. However, Feminists dislike this framework altogether. It is in this context that the idea of *risk-taking subject* has emerged within the feminist discourse in opposition to the *vulnerable subject* (Agnes 2006; Phadke 2007).

In the context of sexual violence, Shilpa Phadke suggests that a feminist demand for equal access to public space must be based not on a demand for safety and protection, but on the basis of 'equality of risk'-the recognition that both men and women risk dangers of various kinds. So the feminist project should not be to protect women from attack, which is bound to feed into a narrative enforcing 'safe' behavior on the part of women themselves. Rather, the goal should be the certainty that if they are attacked, they would receive prompt redress, thus establishing the unequivocal rights of women to be in public spaces at all times of the day and night.<sup>24</sup>

Therefore the idea of 'risk' challenges the wider *social gaze* boost up by patriarchal values, in which women are being seen as vulnerable objects and make them believe to live in a pervasive culture of fear.

From this perspective, feminist politics must emphasize the agency of women, and demystify sexual violence as merely one of the many risks faced by people. This attempt to legitimize risk-taking must, of course says Phadke, be accompanied by putting pressure on the State to provide infrastructure so that women have the option to choose risk-taking behavior rather than having risk forced on them at every step-for instance, safe public transport at all hours....<sup>25</sup>

The recent outrage over the Delhi gang rape of a 23 year old girl and the subsequent movements has equivocally demanded for this 'risk-taking' attitude and *Bekhauf Azadi* (complete freedom without fear) for all women across society.

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<sup>23</sup> Robyn Ryle, *Questioning Gender: A Sociological Exploration*, Sage Publication, New Delhi (2012).

<sup>24</sup> Shilpa Phadke, "Dangerous Liaisons: Women and Men, Risk and Reputation in Mumbai", *Economic and Political Weekly*, Vol. Xlii, No.17, 2007, pp. 1510-18.

<sup>25</sup> *Supra* note 4, at p. 143.

## 5. LEGAL CONSCIOUSNESS AND SEXUAL VIOLENCE

### 5.1 Narrow Gaze

In India 'sexual violence' has often been addressed in a problematic framework of morality, public decency and honour and as a crime against the family or society, rather than a violation of an individual's bodily integrity. Under the Indian Penal Code, crime against women include rape, kidnapping, abduction, molestation, sexual harassment, torture, homicide for dowry and the importation of girls. But critics have voiced concern over the vagueness of their definitions, particularly that of rape:

The existing law on rape, section 375 of the Indian Penal Code, recognizes only the penetration of the vagina by the penis as rape. All other forms of sexual assault are considered as lesser crimes, deserving of a smaller quantum of punishment. Thus, penetration by objects or, in the case of very young girls, by a finger, does not constitute rape. Flavia Agnes argues that this is because rape laws are based on 'the same old notions of chastity, virginity, premium on marriage and fear of female sexuality'. As penis penetration may lead to pregnancies by other men and thus is a greater threat to property rights and the patriarchal power structure, than other kinds of sexual and non-sexual assaults on women. In its in keeping with this understanding of rape, she points out, that in all other criminal offences, injury and hurt caused by weapons is considered more grievous, deserving of greater punishment than that caused by limbs; but in case of sexual assault, injury caused by iron rods, bottles or sticks is considered to be lesser crime (1992).<sup>26</sup>

However, these definitions do not account for the full range of sexual violations experienced by women. Rape is not the only sexual violence which is perpetrated on women, but they face many other forms of sexual assaults in the everyday life, but due to weak prosecution of such assaults women continue to get harassed by men.

### 5.2 Social Norms, Values and Law

Many researchers have established the mutually constitutive relationship between law and social world. Legal consciousness acquires meanings through everyday practice, norms, and beliefs of ordinary citizens and thus emerges from people's experiences. It further indicates the unconscious toleration of ideological or structural factors in society while following legal procedures.

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<sup>26</sup> *Id.*, at pp.116.

The study of legal consciousness “traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings.” .... The study of legal consciousness in this more specific sense carries with it a program of analyzing and potentially unmasking hegemonic ideologies or structures that prevents a liberating consciousness of law’s effects to emerge.<sup>27</sup>

Law and society scholars have long emphasized the ‘legal ignorance’ of ordinary citizens (Suchman and Edelman 1996). As the vast majority of people have never read legal doctrine, they define and understand the law as being mediated by how they learn about it. People therefore, learn about the law through media, professional, personal experience etc.

Darley, Robinson and Carlsmith (2001) found that when people do not know their own state criminal law codes they make guesses based on their own personal opinions about what the law should be. It is this taken for granted quality of people’s interpretations that allows for law to be shaped by ordinary citizens’ beliefs and actions.<sup>28</sup>

Thus the power of law usually is contingent on people’s beliefs and behaviours. Hence, on proceedings on gender related crimes, legal consciousness gets influenced by the wider social mindset in which women are being represented. Nivedita Menon unveils this trajectory of judicial bias on rape in her latest book on *Seeing like a Feminist* (2012):

The patriarchal understanding of rape confines it to the narrow domain of crime against the honour of the family. “In patriarchal perspective, rape is a fate worse than death; there is no normal life possible for the raped women; the way to avoid rape is to lock them up at home, within the family, under patriarchal controls. In this understanding, raped woman is responsible for the crime against her because either she crossed the *lakshman rekha* of time (by going out after dark) or the *lakshman rekha* of respectability (by dressing in unconventional ways or by leaving the four walls of her home at all). This patriarchal understanding is pervasive in the judiciary as well. “In 2008, the Chief justice of Karnataka, Cyriac Joseph, stated that immodest dressing was the cause of the increasing crimes against women: ‘nowadays women wear such kind of dresses in temples and

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<sup>27</sup> John Nemec and Donald R. Davis, Jr. “Legal Consciousness in Medieval Indian Narratives”, *Law, Culture and the Humanities*, (2012), pp.1-26.

<sup>28</sup> Justine E. Tinkler, “People Are Too Quick to Take Offense”, The Effects of Legal Information and Beliefs on Definitions of Sexual Harassment”, *Law and Social Inquiry*, Vol. 33, No. 2, 2008, pp. 417-445.

churches that when we go to places of worship, instead of meditating God, we end up meditating on the person before us".<sup>29</sup>

#### ***1.4.3 Challenges before Law***

In spite of many well-framed laws framed in the protection for women against sexual violence, justice does not reach to the victim of sexual violence because of procedural and structural flaws in the judicial process. India's slow, overburdened criminal justice system exacerbates the plight of rape and sexual assault victims. Moreover, because of cultural stigma associated with rape survivors and their families, most rapes cases gone unreported. And those who do report often faces dehumanizing experience either from the supporters of perpetrators or from the police also who in most cases decline to lodge FIRs for rape cases and aggravate the crisis. The lack of specialized training for police moreover makes them insensitive towards rape survivors, and most often police themselves involve in dehumanizing the person:

In the case of seventeen-year old village girl who was drugged and gang raped in northern Punjab committed suicide in December, 2012 after a police officer pressed her to drop the case and marry one of her attackers. Reports surfaced that officers not only harassed the victim, but failed to register her case and attempted to broker an out-of-court settlement between her family and the families of her alleged attackers- a practice known locally as 'compromise'.<sup>30</sup>

Furthermore, rape laws are usually enacted mostly around procedural evidences which show a women's history of sexual relations thereby denies the idea of standards of consent and thus make the rape survivor guilty.

The deep seated culture of victim-blaming and misogyny makes it more difficult to bring justice in the hands of the person who is being sexually abused or fall prey to sexual violence. In 2011 the Director General of Health Services (DGHS) discontinued the practice of the 'two-finger' test but it is still being practiced to determine if the rape survivor is 'habituated to sex'- In an October 2012 verdict, a Madhya Pradesh court held that a rape complainant was "a consenting party" because "Looking to her physical examination, she was habitual to do the intercourse and therefore,

<sup>29</sup> *Supra* note 4, at p. 113.

<sup>30</sup> Beina Xu, "Governance in India: Women's Rights", 2013, *Council on Foreign Relations*, available at: <http://www.cfr.org/india/governance-india-womens-rights/p30041>, (last accessed on 10 March 2013).

she knew about that act but, she did not complain to anybody, till she reached to her house”.<sup>31</sup>

Despite the public outcry for reform in rape and related sexual assault laws, the Indian government has not banned yet this colonial, misogynist, and degrading medico-legal practice of inserting two fingers in the vagina for proving rape. The Human Rights Watch report, *Dignity on Trial* (2010), documented the widespread practice of this degrading test, which claims to document the size of the hymenal orifice, ‘laxity’ of the vagina, or ‘old tears’ in the hymen- all these reflect a traumatic experience which a rape survivor undergoes while proceeding for rape cases. This sometimes discourages their moral as they find such invasive tests as ‘re-rape’. Hence, many of rape survivors most of the time undermine the potential for successful prosecution.

The lack of uniform national standards for treatment and examination of sexual assault survivors undermines the potential for a successful prosecution. Only around 26 percent of rape cases tried in court in 2011 resulted in convictions, and only four out of ten cases were reported, according to the National Crime Records Bureau.<sup>32</sup>

This trend perhaps indicates for the continuous decrease in conviction rate over the years in rape cases. Since 1971 the conviction rate in rape cases in India which was 46% has been drastically reduced down to a mere 26%. This percent of conviction rate against the number of rape charges however is very less. According to some government data majority of rape cases in the country end up without conviction, which perhaps emboldens sick minds to fearlessly indulge in such acts. Data submitted by the Home ministry shows that while rape cases have increased steadily year after year, the conviction rate has remained constant.

For example, the country as a whole saw registration of 21,397 rape cases in 2009, which went up to 22,172 in 2010 and 24,206 in 2011. But the convictions in the past three years could not cross the 6000-mark. It was 5,316 in 2009, 5,632 in 2010 and 5,724 in 2011, remaining constant at just about one conviction in every four registered cases. Figures also showed a rapid frequency in rape related crimes in India as per which a woman is raped every 22 minutes in India; that between 1971 and 2011 the registered rape cases

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<sup>31</sup> Kavita Krishnan, “Sushil Kumar Shinde, Home Minister of India: Prohibit the “Two Finger-Test” in Rape Cases”, 2013, Chane.org, available at. <http://www.change.org/petitions/sushil-kumar-shinde-ho.-to-prohibit-the-two-finger-test-in-rape-cases-2>, (last accessed on 10 March 2013).

<sup>32</sup> *Supra* note 30.



saw a jump of more than 800 per cent, possibly the largest among all categories of crime.<sup>33</sup> National crime records show that 228,650 of the total 256,329 violent crimes recorded last year targeted women, with conviction rates for rape cases at 26 percent.<sup>34</sup>

## 6. VERMA COMMITTEE ON SEXUAL VIOLENCE: A NEW HOPE

The recent Delhi gang rape and subsequent death of the girl which sparked nationwide furor over Indian authorities' sloppy treatment of sexual violence prompted the govt. to set up Verma Panel to find out gaps in existing laws and frame recommendations accordingly in order to fight the menace of sexual violence.

While considering the myriad socio-cultural challenges which a woman face in India, Verma committee's recommendations hailed as signs of paradigm shift in understanding violence against women and strongly aspired for a socio-political change to end sexual violence against women.

The report includes measures like a CAG-like body to look after the interests of women and children, an immediate review of the Armed Forces Special Powers Act that has been blamed for crimes against civilians by armed forces, including assaults on women, in areas like Kashmir and the north-east and to improving street lighting. Clearly, beyond policing and effective justice delivery mechanisms, a wider sociopolitical change is needed to end all forms of crimes and discrimination against women.<sup>35</sup>

Unlike various preventive measures expressed by social groups, students, civil societies, NGOs and other bodies who insisted on 'death penalty' or 'chemical castration' for perpetrators, Verma committee does not find solution in this. As it believes that while rape as a concept opens up a whole pandora's box of a conceptual web of power, domination and control exerted by the masculinity over the feminine gender, the reductionist approach towards rape to define it within the framework of 'crime' only constricts the real gender issue, and therefore evades the real cause of rape and effects upon society- therefore, offering any such punishment might create short term deterrence for criminals

<sup>33</sup> Vibha Sharma, "Nation's Shame: Most Rape Cases End Without Conviction", *The Tribune*, 19 December 2012, available at <http://www.tribuneindia.com/2012/20121219/main4.htm>, (last accessed 10 March 2013).

<sup>34</sup> Available at. <http://www.france24.com/en/20121220-rape-outcry-shines-light-indias-misogyny>, (last accessed on 10 March 2013).

<sup>35</sup> Available at. [http://articles.economictimes.indiatimes.com/2013-01-25/news/36548132\\_1\\_justice-verma-committee-offences-report-dot](http://articles.economictimes.indiatimes.com/2013-01-25/news/36548132_1_justice-verma-committee-offences-report-dot), (last accessed on 10 March 2013).

but also may be dangerous for women: since the risk of hanging for murder and rape are the same, it is likely to become an incentive for the rapist to make sure to kill the victim so that she cannot testify against him.

However, parallel to Verma Committee Report, Indian Government also issued an Ordinance which is pending before parliament to get passed. However, many civil society groups and organizations have protested against this ordinance for its narrow definition towards sexual violence including its provision for 'death penalty'

The ordinance rejects the Verma Committee's recommendations on issues like making rape a gender-specific crime...increasing the punishment to public servants for dereliction of duty and increasing the punishment for acid attacks and...compensation for victims, and is highly selective about the other recommendations. The ordinance has thus done injustice to the Verma Committee's report and appears to be a diversion from the serious issues... of state culpability [and] inclusion of armed forces in the ambit of the criminal law with an amendment suggested to it.<sup>36</sup>

The following is an analytical comparison between Verma committee and Ordinance on their specific focus on sexual violence:

The JVC Report	The Govt's Ordinance
For the first time in India, spelt out a constitutional Bill of Rights for women, and the means to ensure those fundamental rights to equality, freedom, and autonomy	Ignores the Bill of Rights
Recognised that sexual violence is not an act of sex or lust: it is an act of patriarchal power. Therefore, to reduce sexual violence, we must safeguard women's freedom and rights; and to ensure that perpetrators are punished, we must undo the impunity and protection for such offences that is built into the laws and into our system	Maintains the inbuilt ways in which laws protect powerful perpetrators

<sup>36</sup> Aarti Dhar, "Verma Panel Recommendations Negated: CPI (M)", *The Hindu*, 2nd February 2013, available at <http://www.thehindu.com/news/national/verma-panel-recommendations-negated-cpi/article4372637.ece>, (last accessed 10 March 2013).

The JVC Report	The Govt's Ordinance
<p>Recognised women's rights to autonomy: including her sexual autonomy and her right to choose her partners, friends, and spouses. Recommended changing the archaic and anti-women vocabulary of laws. Understood sexual violence as a violation of a woman's bodily integrity and her dignity, rather than as 'outraging modesty', 'robbing honour' or bringing 'shame'.</p>	<p>Has many clauses that go AGAINST women's autonomy and freedom, and retains the anti-women wording of 'outraging modesty' instead of molestation or sexual violence</p>
<p>Expanded the meaning of sexual assault to cover a range of forms of sexual violence: from sexual harassment to stalking to voyeurism (making MMS etc) to acid-throwing to rape by insertion of an object or a male body part. Recommended higher and more severe punishment for various forms of sexual violence.</p>	<p>Accepted expanded definition and scope of sexual assault, and more severe punishment</p>
<p>Recognised that the <i>victim</i> of sexual violence could be 'gender-neutral' (i.e. could be female/male/transgender/hijra etc), but that the <i>perpetrator</i> is male.</p>	<p>Makes the <i>perpetrator/accused</i> in the rape law gender-neutral – i.e. both men and women can be accused of rape. This will mean that if a woman files a rape complaint against a man, he can file a counter-complaint of rape against her.</p>
<p>Recognises that rape happens even within marriage. Asserted that sexual contact, even within a marriage, must be with a woman's consent; a wife is not her husband's property, and cannot be 'expected' to have sex with her</p>	<p>Legitimises marital rape – i.e. forced sexual contact by husband against wife's consent. Therefore strengthens the idea of the wife as the 'sexual property' of the husband. Retains the provision of</p>

The JVC Report	The Govt's Ordinance
<p>husband, against her will. Therefore, recommended removal of the existing exemption of 'marital rape' from the rape law. Upheld the principle that in the case of rape and sexual assault, the relationship of the accused with the complainant will not be the basis for denying her claim of rape; neither can it be the basis for a more lenient sentence. Therefore recommended deletion of the provision of lenient sentence in case of rape of a legally separated wife by a husband.</p>	<p>lesser sentence (minimum sentence of 2 years) for a husband who rapes a legally separated wife. Therefore, even if a wife has taken the pains to separate herself from an abusive husband, the law will make excuses for him if he rapes her, on the grounds that she was once his wife, and so he can be excused for thinking of her as his property. Not only that, according to the ordinance, wives cannot accuse husbands of sexual assault – but because of the 'gender-neutral' provision, husbands can accuse wives of sexual assault. Not only that, husbands cannot get life sentence or death sentence for sexual assault even of a separated wife, but a wife accused by a husband of sexual assault, can under the ordinance get life sentence and even death sentence.</p>
<p>Recommended changes in the existing medical investigation protocol for rape survivor. Recommended prohibition of the demeaning two-finger test and other forms of medical examination that investigate women's past sexual history. Also recommended a protocol to ensure sensitive medical care of a rape survivor.</p>	<p>Does not prohibit 'two-finger test,' whereby a doctor puts two fingers into a rape survivor's body to check if she is 'habituated to sex.' In fact, the ordinance's definition of 'rape' (Section 375) legitimises this test, by stating that penetration or touching of private parts 'for medical purposes' (without specifying the need to obtain prior consent of the patient) will not be considered rape. The rape definition in the ordinance also,</p>

The JVC Report	The Govt's Ordinance
	strangely, justifies penetration of the body for 'hygienic' purposes – so now, many rapists can try and explain away rape as a lesson in hygiene.
Did not recommend death sentence.	Includes death sentence for rapes that result in death or permanent vegetative state of the victim. In the case of death of the victim, the provision of death sentence already exists and is nothing new. Death sentence for causing permanent vegetative state is dangerous for women: since the risk of hanging for murder and rape are the same, it is likely to become an incentive for the rapist to make sure to kill the victim so that she cannot testify against him.

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### 6.1 Beyond Law and Women: Deconstructing Gender

While considering the menace of sexual violence and its befitting mechanism, the legal consciousness should go beyond the purview of law to understand the wider social-structural domain in which the mindset for such crime is born, cherished and grow as an accepted norm. While traditional Law has its own limitations in terms of its scope of definition with respect to sexual violence, its circumstantial evidence, and the trial process, it is the larger socio-political discourse or the *social gaze* which defines 'women' as vulnerable and makes them learn to be vulnerable. It is not law but society at large which epitomizes women as beholder of chastity, purity and modesty and affixes these attributes with the honour of the family, the community, or the society at large and held

<sup>37</sup> Available at, <http://bekhaufazadi.blogspot.in/2013/02/comparison-ordinance-vs-jvc.html>, (last accessed on 10 March 2013).

sexual violence the violating point of this purity. This perspective needs to be overhauled. Because it is this perspective which legitimizes the existence of rape which is presumably occur when a woman do not conform to these prescribed requirements.

In the patriarchal perspective, rape is a fate worse than death; there in no normal life possible for the raped woman; the way to avoid rape is to lock women up at home, within the family, under patriarchal controls. In this understanding, the raped woman is responsible for the crime against her because either she crossed the *lakshman rekha* of time (by going out after dark) or the *lakshman rekha* of respectability (by dressing in unconventional ways or by leaving the four walls of her home at all).<sup>38</sup>

Hence, in order to root out the genesis of sexual violence, the rooted gender hierarchy has to be deconstructed in order to create a gender just society based on equal rights and freedoms for both the gender. The gendered identity which enforces women to perform various gender roles also need to be overhauled. The changes in gender role reversal within family and beyond, the equal gender wages, gender budgeting, equal division of labour work etc. could be promising ways to deal with this crisis in the long run. New social values should also be ingrained into the minds of people through a social re-engineering process. The very idea of allocating gendered space also should be made gender neutral so that all spaces are accessible and safe for women. The very idea of rape as a *violation* which is located within the patriarchal and patrilineal discourse needs to be erased as the most deadly form of violence, to build up immunity to this virus-the fear of potential rape.<sup>39</sup>

An approach of gender-mainstreaming could be a new pathway for resolving this massive chaos in the long run. The term emerged within the gender and development discourse during Beijing conference 1995 and since then it has been incorporated into mainstream development policies by most of the international players. Gender-mainstreaming has remarkably shaped the gender discourse in a new fashioned way by replacing earlier women centric development approach with a genuine gender centric development approach.

Therefore, gender mainstreaming starts with an analysis of the everyday life and situation of women and men. It makes their differing needs and problems visible and ensures that policies and practices are

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<sup>38</sup> *Supra* note 4, at 113.

<sup>39</sup> *Id.*, at pp. 141.

not based on incorrect assumptions and stereotypes. It further goes into the root cause of the problem which lies in the social structures, institutions, values and beliefs which create and perpetuate the imbalance between women and men. It focuses not on how to add women to various processes but to reshape these processes to create the space for women's and men's involvement.<sup>40</sup>

Theoretically gender-mainstreaming is based on a feminist critique of liberal democracy and is considered one of the most potential strategies for achieving gender equality in society. The underlying core principle here is to deconstruct the 'gender hierarchy'. "It starts with doing *gender* in political and economic institutions and thus questions the *construction of gender roles and hierarchies* and the consequential discrimination of women."<sup>41</sup> It might be useful to think of gender mainstreaming not merely as a strategy to push for a gender aspect into policy or project, but to recognize that it is a response to the inadequacies of the existing system which fails to take into account the concerns, interests and well being of women as well as men.

Gender mainstreaming gives *due attention* to this *diversity* through policy instruments and target the *particular situation of different groups* of women where specific equality policies have so far not been successful, because it leaves no room for diversity. From a gender mainstreaming perspective, the problem is not the fact that there are differences but that they are connected to a hierarchical ranking and that there is a danger of measuring of all citizens to a male norm. In this sense gender mainstreaming goes a step further than merely working towards gender equality. It leaves room for *non-hierarchical diversity* in general, be it in terms of sex, race, class or a combination of factors. The side effect of mainstreaming as a strategy to promote gender equality is a positive one for the whole society.<sup>42</sup>

## 7. CONCLUSION

The sexual violence inflicted upon women in private or public spaces is rooted in the existing structures of gender power and is instilled into the social fabric as a common reality. As it involves a larger society, its people and their mindset, reducing it to a level of crime intensifies the problem. The

<sup>40</sup> European Commission, 'Equal Guide on Gender Mainstreaming, Employment and Social Affairs (2004)', available at [http://ec.europa.eu/employment\\_social/equal/data/document/gendermain\\_en.pdf](http://ec.europa.eu/employment_social/equal/data/document/gendermain_en.pdf). Emphasis added).

<sup>41</sup> Stefanie Ehemann, *Gender Mainstreaming in the European Union*, GRIN Publishing GmbH, Munich, 2007, (Emphasis added).

<sup>42</sup> Council of Europe, 'Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices (2004)', available at [http://www.coe.int/t/dghl/standard\\_setting/equality/03themes/gender-mainstreaming/eg\\_s\\_ms\\_98\\_2\\_rev\\_en.pdf](http://www.coe.int/t/dghl/standard_setting/equality/03themes/gender-mainstreaming/eg_s_ms_98_2_rev_en.pdf). (Emphasis added).

stigma attached with the concept of rape and its survivor; projection of rape as more of an individual crime rather than a crime resulted from a deeply rooted patriarchal values exerted through a defined means of control/domination/ protection over women; the passive reaction of society towards control mechanism; and the lacking pace between traditional and modern value system- all these have been largely responsible for such rapid incidents in India. Therefore, unless we deal with these structural and cultural inequalities and recognize male violence as political rather than psychological, criminalizing sexual violence will not significantly alter gender relations or eliminate male violence.

Therefore, legal consciousness should not be confused with addressing act of sexual violence as a crime only rather this narrow outlook has to be widened so to look beyond, into the gender hierarchy and power relations which create and maintain this fear of sexual violence.

Efforts also should be there to formulate new laws that aim at situating sexual assault within the constitutional right to life, dignity and bodily integrity along with evolving international jurisprudence that sees rape as a form of torture when committed in custody or in situations of occupation/conflict. It also attempts to set out the social contexts within which such violence occurs, underlining the fact that it is always an exercise of power that is used to target women, children and persons who are socially vulnerable.

It is judiciary which is authorized to delimit and redefine the space, freedom, rights and locations for women. Therefore, Law being an impartial one, should not discriminate women and their due rights on the basis of how they are being perceived by society, rather it should bring women at par with men at all levels through its land marking steps. This in a way would create a new value system which would unfasten all barriers for women in a legal manner. Laws also should inform a concerted effort that includes education, awareness raising and community mobilization. It should also contribute to tackling discriminatory stereotypes and attitudes, and mandate research and knowledge-building that is necessary to support policy development.

Besides legal measures, gender mainstreaming could be path breaking strategy in order to deal with sexual violence in the long run. As it that strives to question the underlying social structure and its various agencies



and institutions that together influence in shaping the mindset of structure for gender relations, it deconstruct gender identities and gender role at the structural level. While addressing the gender bias and consequent gender inequality prevalent within family and beyond, it formulates programmes accordingly keeping in mind the interests of both the gender in order to undo with this gender bias. This results into an overall transformation of the structures and system which construct this gender bias.

As such gender mainstreaming strategy should be adopted at all levels: in family, schools, institutions, law enforcing agencies and in the policy making process through which the values of gender equality could be permeated and a culture of gender sensitization and training on gender issues could be encouraged. Reformulations of the school curriculum by incorporating gender aspects are also desired as it influences most of our minds. Policies should not limit gender as women's issue only rather should concern and fully engage men as well as women in the transformation of society.

All these would help in re-constructing the *social gaze* that legitimizes misogynist culture and project women through the patriarchal discourse. The transformation so happened will also help in delimiting the freedom of women and will decisively put an end to the old markers of femininity which always taught them to learn to be 'others' and live with fear so to save their chastity, modesty and purity. This paper thus concludes with the remark that:

the social-context approach gives us external factors about the way people behave; but what we need to understand is the ideas and the reasons for the behavior....what we need to understand is neither law in books nor law in action, but law in minds.<sup>43</sup>

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<sup>43</sup> *Supra* note 27, at p. 1-26.

# WOMEN LIBERATION : A MYTH OR REALITY

Ruchi Sapahia\*

## 1. INTRODUCTION

India's first Prime Minister *Pandit Jawaharlal Nehru*, once said that, "*you can tell the condition of a nation by looking at the status of its women.*"

'Woman' is a symbol of love, care and eternity. Women are born free and remain equal in rights to men. This country has a mixed history of glory and shame. In earlier times, women were highly regarded. They knew shastras, sat in yajna, fought in battles and did many other things. Scholars believe that in ancient India, the women enjoyed equal status with men in all fields of life. But, there are contrasting views also. Women were educated in the early *Vedic* period as suggested by *Patanjali* and *Katyayana*. Rig Vedic verses suggests that the women married at a mature age and were probably free to select their husbands. Scriptures such as Rig Veda and Upanishads mentioned several women sages and seers, notably *Gargi* and *Maitreyi*. Some kingdom in the ancient India had traditions such as Nagar Vadhu (Bride of the City). Women used to compete with each other to win the coveted title of the Nagar Vadhu. *Amrapali* is the most famous example of a Nagar Vadhu. Women enjoyed equal status and rights during the early Vedic period. However, later (approximately in 500B.C) the status of women began to decline with the Smritis and Manusmritis and with the Islamic invasion of Babur and the Mughal Empire. Later on Christianity also curtailed women's freedom and rights. The reformatory moment such as Jainism allowed women to be admitted to the religious order, but by and large the women faced confinement and restrictions. The malpractices of child marriage, sati pratha, ban on widow remarriage, parda system, devdasi of the temple started in the medieval period.

But gradually the position of women started deteriorating day by day. They were now regarded just like any other piece of furniture which could be handled rather mis-handled in any way that one pleased. She was forced to remain inside the house, cut from others, asked to lower herself from top to bottom and was deprived of the right to inheritance. She was subject to continuous humiliation, indignation and her human rights were violated.

But in the modern century women are trying to liberate themselves from such fetters. Even after celebrating more than sixty anniversaries of its independence,

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India is still struggling to realize the potential of what it means to be the world's largest democracy. India's economy is growing steadily and opening up new economic opportunities for women. Women are making gains in government, civil service, business and culture.

At the same time, many women are struggling to hold the tiger by the ear. More than 200 million women in India are illiterate. A population chasm is opening up as gender selective abortions have resulted in the disappearance of millions of baby girls. Thousands of women have been murdered in dowry disputes and domestic violence is so common in India. Many women, from toddlers to young to old have fallen prey to the lust of the opposite gender. Crimes like eve-teasing, molestation, sexual assault and rape have become the shock reality of today's life. Poor health and diseases have a devastating effect on their productivity and life expectancy.

## **2. THE PROBATION AND GENESIS**

A lot of steps are needed to be taken. The best strategy would be to mobilize people at grass root level, to build self reliance, to empower women, to forge effective partnerships of people with the local, state and central governments. Most importantly we have to respect and value our women and let them live with dignity.

According to India's constitution, women are legal citizens of the country and have equal rights to men. Because of lack of acceptance from the male dominant society, Indian women suffer immensely. Women are responsible for bearing children, yet they are malnourished and suffer with poor health. Women also overwork in the fields along with doing domestic work. Most Indian women are uneducated. Although the country's constitution says women have equal status to men, women are powerless and are mistreated inside and outside the home.

India is a society where male is greatly revered. Therefore women, especially the young girls, get very little respect and standing in this country. The women of the household are required to prepare meals for the men, who eat most of the food. Only after the males are finished with eating, can the females eat. Typically the leftover food is meager, considering the families are poor and have little to begin with. This creates a major problem with malnutrition, especially for pregnant or nursing women. Very few women seek medical care while pregnant because it is thought of as a temporary condition. This is one of the main reasons why India's maternal and infant mortality rate is so high. Starting from birth, girls do not receive as much care and commitment from their parents and society as a boy gets. For example a new baby girl would only be breast fed for a short period of time, barely supplying her with the nutrients she needs. This

is, so that the mother can get pregnant as soon as possible in the hope of a son the next time.

Even though the constitution guarantees free primary schooling to everyone up to 14 years of age, very few females attend school. Only about 39 percent of all women in India actually attend primary schools. There are several reasons why families choose not to educate their daughters. One reason is that parents get nothing in return for educating their daughters. Another reason is that all the females in a household have the responsibility of the housework. So even though education does not financially burden the family, it costs them the time she spends at school when she could be doing household chores. In addition, even if a woman is educated, especially in the poorer regions, there is no hope for a job. Most jobs women perform are agricultural or domestic which do not require a formal education. Another reason girls are not educated is because families are required to supply a chaste daughter to the family of her future husband. With over two-thirds of teachers in India being men and students predominately male, putting daughters in school, where males surround them all day could pose a possible threat to their virginity.

Because women are not educated and cannot hold a prestigious job, they take on the most physically difficult and undesirable jobs. A typical day for a woman in an agricultural position lasts from 4am to 8pm with only an hour break in the middle. Compared to a man's day, which is from 5am to 10am and then from 3pm to 5pm. Most women are overworked with no maternity leave or special breaks for those who are pregnant. Plus women do the majority of the manual labor that uses a lot of energy compared to the men who do mostly machine operating. Even though women work twice as many hours as men, the men say that "women eat food and do nothing." This is mainly because the work the women perform does not require a lot of skill and are smaller tasks which men don't value.

The reality of women's lives remains invisible to men and women alike and this invisibility persists at all levels beginning with the family to the nation. Although geographically men and women share the same space, they live in different worlds. The mere fact that "Women hold up half the sky"- does not appear to give them a position of dignity and equality. True, that over the years women have made great strides in many areas with notable progress in reducing some gender gaps. Yet, 'the afflicted world in which we live is characterized by deeply unequal sharing of the burden of adversities between women and men'. Sprawling inequalities persists in their access to education, health care, physical and financial resources and opportunities in the political, economic, social and cultural spheres.

‘Gender inequality holds back the growth of individuals, the development of nations and the evolution of societies to the disadvantage of both men and women’. Gender issues are not simply talking about women’s issues. Understanding gender means understanding opportunities, constraints and the impact of change as they affect both men and women.

The impact of inequality is reflected in the status of women worldwide and in India.

The term "gender" is used to describe a set of qualities and behaviours expected from men and women by their societies. A person's social identity is formed by these expectations. These expectations stem from the idea that certain qualities, behaviour, characteristics, needs and roles are ‘natural’ for men, while certain other qualities and roles are ‘natural’ for women. Gender is not biological – girls and boys are not born knowing how they should look, dress, speak, behave, think or react. Their "gendered" masculine and feminine identities are constructed through the process of socialization, which prepares them for the social roles they are expected to play. These social roles and expectations differ from culture to culture and at different periods in history.

As said by Henry Frederic Amiel- ‘The only true principle for humanity is justice; and justice to the feeble is protection and kindness’.

If you educate a man you educate a person, but if you educate a woman you educate a family. With little education and few job skills, women often face a lot of pressure both direct and indirect. As said by Ban Ki Moon, United Nations Secretary General - ‘Investing in girls and women is likely to prevent inter-generational cycle of poverty and yield high economic and societal returns’.

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women.

### **3. LEGAL STUDIES AND NATIONAL AND INTERNATIONAL LEVEL**

Within the framework of a democratic polity, our laws, development policies, Plans and programs have aimed at women’s advancement in different spheres. From the Fifth Five Year Plan (1974-78) onwards there has been a marked shift in the approach to women’s issues from welfare to development. In recent years, the empowerment of women has been recognized as the central issue in determining the status of women. The National Commission for Women was set

up by an Act of Parliament in 1990 to safeguard the rights and legal entitlements of women. The 73<sup>rd</sup> and 74<sup>th</sup> Amendments (1993) to the Constitution of India have provided for reservation of seats in the local bodies of Panchayats and Municipalities for women, laying a strong foundation for their participation in decision making at the local levels.

India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. Key among them is the ratification of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1993. The women's movement and a wide-spread network of non-Government Organizations which have strong grass-roots presence and deep insight into women's concerns have contributed in inspiring initiatives for the empowerment of women. However, there still exists a wide gap between the goals enunciated in the Constitution, legislation, policies, plans, programmes, and related mechanisms on the one hand and the situational reality of the status of women in India, on the other.

The status of women in India varies considerably across various classes, regions, religions and the rural, urban divide due to uneven socio-economic development and impact of divergent social ethos and values. The women of modern India today enjoy a better status than its past as compared to the women of other nations. But, when we give a closer look, we find that the reality is however different. The women's situation vis-à-vis men is one of systematic gender subordination although there have been attempts by the government and the enlightened groups to elevate the status of women in our society.

We are proud and can boast of the fact that the highest position as laid down in the constitution was once held by a woman i.e. the President ship was with *Ms. Pratibha Patil* recently. The speaker, *Ms. Mira Nair*, of the Lok Sabha is a female. There are and were women Chief Ministers of distinct states ruling over four hundred million people, namely, *Ms. Mayawati* in Uttar Pradesh, *Ms. Mamta Banerjee* in West Bengal, *Ms. Jaya Lalitha* in Tamil Nadu and *Ms. Shiela Dixit* in Delhi. There are female governors also present in India. One of our Prime Ministers in the past was a woman who got the opportunity to lead India more than once namely *Ms. Indira Gandhi* in her lifetime. The leader of main opposition party is a female namely *Ms. Sushma Sawraj*.

Women bear almost all responsibilities for meeting basic needs of the family yet are systematically denied the resources, information and freedom of action. If women are supported and empowered, all of the society will benefit. Their families would be healthier, more children would go to school thereby, and the literacy rate would increase. The agricultural productivity will also improve thereby increasing the family income. The communities would become more

resilient. We need to build and pool our efforts and resources to support women in any and every way and in building their capacity to the optimum.

#### **4. SOCIO-ECONOMIC STATUS**

The social and economic status of women directly impinges on their freedom in real terms. Their status is therefore of great relevance in cases of substance abuse by women themselves and even more so where women suffer the consequences of such abuse by members of their family.

Women have always been looked upon and considered weak by the societies of all times and all places. In India, there is a strong mentality to give education to boys only and not to girls. Boys are considered to be the bread earners of the family and are pampered since childhood. Girls are not given any education due to the mentality that they would get ahead of the boys and also the money and efforts would go waste on sending them to schools. She is made to sit home and do household chores. If some families send their girl children to school for getting education, their motive is generally to get them a good match according to their family status and her education. There are very few people who believe in making their daughters self-dependent.

The women suffer from health problems but they either themselves don't put forward their woes or the family doesn't take interest in their health and dismiss the idea that a little problem can lead to a serious consequence. But the boys health is always monitored. He is given proper nutrition and timely medicine.

The ratio of women is very low in politics also as in any other field. Women are crying for thirty three percent reservation in all fields like other reservations being given to the scheduled castes, scheduled tribes, other backward class and handicapped. She is aware of the fact that her representation is very low at public front.

Today's woman is not sexually liberal. Her parents look for a suitable match for her without taking her will into consideration. The 'virginity' issue is closely watched. Losing virginity is not appreciated and is looked upon as if some crime has happened.

The women work equally and many would say, more than the men. But they are not paid equal to men as envisaged by our constitution. They are considered feeble and weak and hence, paid less than the opposite sex. The employer doesn't take interest in making efforts to keep the work place healthy and hygienic. Maternity benefits are also not provided to her.

The picture looks very gloomy. But women are trying to liberate themselves. Today many women have marked a difference and carved a niche for

themselves. They are trying hard to enter every field occupied and dominated by men. Today's woman is capable of becoming Prime Minister or President or Chief Minister or Governor or any leader or pilot or army personnel or of becoming hot and sizzling actor etc.

Today women are trying hard to prove to themselves that they are not less than their male counterparts. Women Empowerment refers to increasing the spiritual, political, social or economic strength of Women. It often involves the empowered developing confidence in their own capacities. Empowerment is probably the totality of certain capabilities such as, having decision-making power of their own, having access to information and resources for taking proper decision, having a range of options from which you can make choices (not just yes/no, either/or.), ability to exercise assertiveness in collective decision making, having positive thinking on the ability to make change, ability to learn skills for improving one's personal or group power, ability to change others' perceptions by democratic means, involving in the growth process and changes that is never ending and self-initiated, increasing one's positive self-image and overcoming stigma.

#### **5. SUGGESTIONS TO IMPROVE THE POSITION OF WOMEN IN INDIA**

1. We need to respect and value women and womanhood and realise their worth.
2. There is a need to generate opportunities for girl education by providing free education and means in the school, free supply of books and uniforms.
3. Need to give more and more employment to them in different fields according to their calibre and to their optimum potential.
4. The right in property should be made a reality and should not remain confined to law books only.
5. More representations in public forums and governmental positions is required so that they can have a say in the decision making process.
6. Formulation of effective and non-discriminatory governmental policies for their welfare and upliftment is the need of the hour.
7. State should cover all its women under health insurance schemes as women of all age have health related issues of which they are generally not vocal.
8. Allocation of special budgets for their welfare by the respective governments is a must.
9. Encouraging women to speak and stand for themselves should be promoted.
10. Concern about women need to be reflected upon at international, national, state and grass root level.



11. Empowering women at all levels and in all fields whether social, economic, political or otherwise should be priority.
12. General awareness should be generated and conscious efforts by men and women should be taken in understanding their role in each others lives, their influence and effect on each other. The woman is the nurturer of her family but the man has to understand and think seriously about why and how that woman can be nurtured in the society, in his family and his life.
13. Strong laws should be made and implemented absolutely relating to female foeticide, female abuse, exploitation, dowry deaths etc.

Women liberation can turn into a reality as envisaged by our constitution framers only when social justice to a woman creates an atmosphere which enables her to get out of the sense of human wronged, a situation where her dignity, self-worth and human rights could be asserted with a belief of self-preservation. Women liberation or gender equality will help her to overcome the feeling of powerlessness, so that she emerges from the comforts of dependency and faces the challenges of autonomy by enjoying her human rights in the true sense of the words.

# CYBER OBSCENITY OF WOMEN AND PROTECTION UNDER IN IT ACT, 2000

Dr. Kamaljit Kaur\*  
Tuhina Shrivastava\*\*

...That is the Law. How could there be a mistake in that?’

I don’t know this Law,’ said K.

‘All the worse for you,’ replied the warder.

The Trial, Franz Kafka<sup>1</sup>

## 1. INTRODUCTION

In the digital age of today, Information and Communication Technology is benefitting billions across the world by bridging gaps and multiplying human potential in every walk of life.<sup>2</sup> Due to the immense dependency of individuals in every field on Cyberspace, a number of cybercrimes have evolved.<sup>3</sup> Cyber victimisation of women in particular is on a rise, posing as a major threat to their security as a whole.<sup>4</sup> Cyber-stalking, e-mail harassment, morphing, using internet to publish obscene information etc to exploit and embarrass women is particularly taking alarming proportions.<sup>5</sup>

Cyber pornography is a rising threat to the female netizens.<sup>6</sup> There is no doubt that sex sells and sells extremely well.<sup>7</sup> It is evident from the fact that pornography industry is larger than the revenues of top technology companies combined: Microsoft, Google, Amazon, eBay, Yahoo!, Apple and Netflix and the likes.<sup>8</sup> A

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<sup>1</sup> Clive Gringras, *The Laws of The Internet* (2<sup>nd</sup> ed.)

<sup>2</sup> Shobhna Jeet, *Cyber Crimes against Women in India: Information Technology Act, 2000*, Elixir Criminal Law 47, 8891-8895 (2012) [http://www.elixirpublishers.com/articles/1351168842\\_47%20\(2012\)%208891-8895.pdf](http://www.elixirpublishers.com/articles/1351168842_47%20(2012)%208891-8895.pdf) (last accessed: 17 August 2013)

<sup>3</sup> Rohit K. Gupta, *An Overview of Cyber Laws V. Cyber Crimes: In Indian Perspective* <http://www.mondaq.com/india/x/257328/Data+Protection+Privacy/An+Overview+Of+Cyber+Laws+vs+Cyber+Crimes+In+Indian+Perspective> (last updated: 12 August 2013; last accessed 17 August 2013)

<sup>4</sup> R. Nagalaxmi, *Cyber Crime Against Women* [http://tnfwl.com/pdf/news\\_letter/CYBER\\_CRIME\\_AGAINST\\_WOMEN.pdf](http://tnfwl.com/pdf/news_letter/CYBER_CRIME_AGAINST_WOMEN.pdf) (last accessed: 17 August 2013)

<sup>5</sup> *Ibid.*

<sup>6</sup> Debarati Halder, *Cyber Crimes Against Women in India* <http://www.cyberlawtimes.com/articles/103.html> (last accessed: 17 August 2013)

<sup>7</sup> Dr. R. K. Chaubey, *An Introduction to Cyber Crime and Cyber Law* 383 (2008)

<sup>8</sup> *Facts About Pornography* [http://www.cwfa.org/brochures/CWA\\_FactsAboutPornography.pdf](http://www.cwfa.org/brochures/CWA_FactsAboutPornography.pdf) (last accessed: 17 August 2013); Jerry Ropelato, *Internet Pornography Statistics* <http://internet-filter-review.toptenreview.com/internet-pornography-statistics.html> last accessed: 17 August 2013)

total of 4.2 million websites contain pornography, i.e. 12 % of the total number of websites. There are 420 million pornographic webpages, and 68 million pornographic search engine requests (25% of the total).<sup>9</sup>

## 2. THE CLASH BETWEEN FREEDOM OF SPEECH AND EXPRESSION AND PORNOGRAPHY

The whole world in Cyber Space is a place under one roof.<sup>10</sup> Hence, the ideas, thoughts, expressions, views, culture, traditions and customs flow from one corner to the other, of the globe at the click of a mouse.<sup>11</sup> With the outflow of these, the inevitable hardship i.e. the adaptability, amenability and intermingling of one culture with the other has been realised-the clash between the spiritualistic east and materialistic west. Every society has imposed some sort of limitation in form of morality, indecency and other similar standard.<sup>12</sup> The controversy between freedom of speech and expression, and pornography is one such area of major conflict which from the very inception has been hotly debated.<sup>13</sup>

In the Indian context, Article 19 (1) of the Constitution of India guarantees complete freedom of speech and expression.<sup>14</sup> At the same time, clause (2) of that Article makes an exception which imposes restrictions on the exercise of the right in the interest of public decency and morality.<sup>15</sup> The freedom of speech and expression must be exercised within limitations. Stepping over the ethical lines attracts obscenity clauses so far as the expression is concerned.<sup>16</sup>

<sup>9</sup> *Ibid.*

<sup>10</sup> Ashish Pandey, *Cyber Crime-Detection And Prevention* (1<sup>st</sup> ed. 2006); Daljeet Singh Bawa, Aparna Marwah, *Cyber Ethics-A New Evolving Era*, VSRD-IJCSIT, Vol. 1 (6), 369-381 (2011) [http://www.vsrjournals.com/CSIT/Issue/2011\\_8\\_August/5\\_Daljeet\\_Singh\\_Bawa\\_Research\\_Communication\\_Aug\\_2011.pdf](http://www.vsrjournals.com/CSIT/Issue/2011_8_August/5_Daljeet_Singh_Bawa_Research_Communication_Aug_2011.pdf) (last accessed: 17 August 2013); P.A.S Pati, *Pornography and Obscenity: An Analysis* <http://www.naavi.org/pati/cyberobscenity.html> (last accessed 17 August 2013)

<sup>11</sup> *Ibid.*

<sup>12</sup> Yogesh Barua, P. Denzyl Dayal, *Cyber Crimes-Notorious Aspects Of The Humans And The Net* (2001); P. A. S Pati, *Supra* note 9

<sup>13</sup> Ashish Pandey, *Supra* note 10; P.A.S Pati, *Supra* note 9; See also Jocelyn Holloway, *Pornography*, in *Current Issues On The Internet*, McMaster University-Sociology 4JJ3-Sociology of the Internet-PBL 4 [http://socserv2.mcmaster.ca/soc/courses/soc4jj3/stuweb/pbl\\_4/pbl4.htm#PORNOGRAPHY](http://socserv2.mcmaster.ca/soc/courses/soc4jj3/stuweb/pbl_4/pbl4.htm#PORNOGRAPHY) (last accessed: 17 August 2013)

<sup>14</sup> Constitution of India 1950 Art. 19 (1) (a) - "Protection of certain rights regarding freedom of speech etc.-All citizens shall have the right to freedom of speech and expression."

<sup>15</sup> Constitution of India 1950 Article 19 (2) "Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

<sup>16</sup> Sarla Gupta, Beniprasad Agarwal, *Cyber Laws* (1<sup>st</sup> ed., 2008)

### 3. PORNOGRAPHY: PROPAGANDA AGAINST WOMEN

The particular problem of the way in which women are portrayed in pornography is recognised in the following passage from Sopinka J's judgement<sup>17</sup>:

[I] true equality between male and female persons are to be achieved, we cannot ignore the threat to equality resulting from the exposure of audiences to certain types of violent and degrading material. Materials portraying women as a class of objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self-worth and acceptance.'

Clearly, pornography is propaganda against women. It is a practice which perpetuates sexism, sex discrimination and sexual violence.<sup>18</sup> It is therefore one of the basic means of maintaining the sexual status quo. Sexual equality depends on the elimination of pornography as part of the elimination of sex discrimination.<sup>19</sup> Moreover, the distribution of pornography has caused an increase in sexual assault or rape, widespread acceptance of lower moral standards in sexual matters and a reinforcement of undesirable attitudes towards one section of society, i.e. women.<sup>20</sup>

### 4. OBSCENITY AND PORNOGRAPHY: A BROAD COMPARISON

Obscenity is the characteristic or state of being morally abhorrent or socially taboo, especially as a result of referring to or depicting sexual or excretory functions.<sup>21</sup> In 1868, the test of obscenity was laid down in the case of *Regina v. Hicklin*<sup>22</sup> by Cockburn C J in these words:- "*The test of obscenity in this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall.*"

Pornography, on the other hand consists of material (such as writings, photographs, or movies) depicting sexual activity or erotic behaviour in a way that is designed to arouse sexual excitement.<sup>23</sup> Technically, 'pornography' has come to

<sup>17</sup> Sopinka's J., 479

<sup>18</sup> Catherine Itzin, *Pornography: Women, Violence And Civil Liberties* 70 (1992); View of Campaign Against Pornography and Censorship (CPC), *Porn the theory rape the practice* <http://www.permanentrevolution.net/entry/1893> (last accessed: 17 August 2013)

<sup>19</sup> Catherine Itzin, *Supra* note 17.

<sup>20</sup> *Supra* note 16 at p. 300; See also Sommer EK, Check JV, *An empirical investigation of the role of pornography in the verbal and physical abuse of women*, *Violence Vict.* 2 (3) 189-209 (1987 Fall) <http://www.ncbi.nlm.nih.gov/pubmed/3154165> (last accessed: 17 August 2013); Cramer E, McFarlane J, *Pornography and abuse of women*, *Public Health Nurs* 11(4) 268-72 (1994 Aug) <http://www.ncbi.nlm.nih.gov/pubmed/7937500> (last accessed: 17 August 2013)

<sup>21</sup> Bryan A. Garner, *Black's Law Dictionary* 1107 (8<sup>th</sup> ed.)

<sup>22</sup> 1868 L. R. 3 Q. B. 360.

<sup>23</sup> Bryan A. Garner, *Supra* note 21 at p. 1199

the English language from the Greek language 'Pornographos' (porne prostitute+ graphein write).<sup>24</sup> It begins with 'porne or porno' which means 'prostitution', implying that the subject is not mutual love or love at all, but domination and violence against women. It ends with a root 'graphos', which further means 'writing about' or 'description of which puts still more distance between the subject and the object.' Thus it induces a spontaneous deep desire for closeness with object and voyeur, a dangerous situation rendering a person to become a covert, passive powerless observer of the pornographic activities written or otherwise available in cyberspace.<sup>25</sup>

In Ranjit D Udeshi<sup>26</sup>, the Supreme Court stated: "The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive<sup>27</sup>. It cannot be denied that it is an important interest of the society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form."

In *Samaresh Bose v. Amal Mitra*<sup>28</sup>, it was observed by the Supreme Court as under:-

The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries- In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in

<sup>24</sup> Oxford Talking Dictionary (1998); See also Merriam Webster, <http://www.merriam-webster.com/dictionary/pornography> (last accessed: 17 August 2013)

<sup>25</sup> Amita Verma, *Cyber Crimes & Law* (1<sup>st</sup> ed., 2009); See also Mohit Mittal, *Issue of Jurisdiction in Combating Cyber Crimes: Issue and Challenges Pornography and Indian Jurisdiction* [http://www.legalservicesindia.com/article/print.php?art\\_id=1386](http://www.legalservicesindia.com/article/print.php?art_id=1386) (last accessed: 17 August 2013).

<sup>26</sup> AIR 1965 SC 881; 1965 SCR (1) 65.

<sup>27</sup> See also *Public Prosecutor v. A.D. Sabapathy* AIR 1958 Mad 210.

<sup>28</sup> AIR 1986 SC 967; 1985 SCR Supl. (3) 17.

question can be said to be obscene within the meaning of S. 292 I.P.C. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment.

#### 4.1 Pornography in Historical and Religious Context

As far as history goes, pornography has been there in one form or the other since time immemorial.<sup>29</sup> 'Kamasutra' was the first manual on love written somewhere in 300 AD and contained explicit description of lovemaking and related subject. So if we go by definition this can be called a pornographic work but till date this book is considered to be an authority on the subject with numerous translations in various languages and by no stretch of imagination can anyone call this as obscene or vulgar rather it is called a masterpiece on this sensitive subject.<sup>30</sup>

In religious context also, the escapades of Lord Krishna with Gopis in 'Raaslila' are revered in Hindu mythology. In Hindi literature these escapades have been the subject matter of a number of books and such literature is on course book as well. The statutes in famous temples of Khujraho depict the lovemaking scenes in explicit details and are places of not only art and culture but of worship also. These are few examples, which go on to prove that love in its pure form has not been taboo in India. The paintings on the walls by the tribal societies hardly show the titillation caused by nudity, for nudity was natural to them. The statutes of the 'Yakshi' in National Museum, the carved copulatory postures on the walls of Temples, presently preserved in Konark of Orissa State and Khajuraho in Central India are celebration of creation, or so the intelligentsia seem to say. Though, the probability of them being temples accessible only to the aristocracy for their titillation cannot be ruled out.

From the aforementioned judicial decisions and context, it is evident that something could be regarded as "pornographic" but still not be considered obscene, such as an explicit sex film produced and used to teach medical students about human sexuality, or a film or book with serious artistic and/or literary value which has some explicit sexual content.<sup>31</sup>

<sup>29</sup> Amita Verma, *Supra* note 25 at p. 121.

<sup>30</sup> *Ibid*; See also *The Art of Love: Kamasutra* <http://www.spaceandmotion.com/kamasutra.htm> (last accessed: 17 August 2013).

<sup>31</sup> *R.D. Udeshi v. State of Maharashtra* AIR 1965 SC 881; 1965 SCR (1) 65.

## 4.2 Regulation of Obscenity-The Core Issue of Conflict

Thus, in the light of the definitions of obscenity and pornography stated above and the comparison between the two, it can be said that the acid test is not 'Pornography' but 'Obscenity'. This is a sad state of affair that majority of us bear/carry a misconception that pornography should be regulated, but on the contrary what is obscene or detrimental to public decency should be checked not pornography *in toto*.<sup>32</sup>

## 5. CYBER PORNOGRAPHY

Cyber pornography is pornography that is distributed *via* the internet, primarily *via* websites, peer-to-peer file sharing, or Usenet newsgroups<sup>33</sup>. While pornography had been traded over the Internet since the 1980s, it was the invention of the World Wide Web in 1991 as well as the opening of the Internet to the general public around the same time that led to an explosion in online pornography.<sup>34</sup>

Like videotapes and DVDs, the Internet has proven popular for distributing pornography because it allows people to view pornography anonymously in the comfort and privacy of their homes-without having to walk into a seedy bookstore or movie house.<sup>35</sup> It has decreased the hurdle of shame that comes with purchasing pornographic materials, public ridicule or the embarrassment of being caught with it.<sup>36</sup> Moreover, one can download only those things that excite him, rather than buying an entire magazine or video.<sup>37</sup>

## 6. CYBER OBSCENITY-THE INDIAN SCENARIO

The dusk of the 20<sup>th</sup> century witnessed the emergence of most high-tech medium, which completely transformed the conception of Information Technology. With the growth of IT, it was strongly felt by the world community to bring in some legislation to regulate this high tech medium<sup>38</sup>. In India, the constitutional

<sup>32</sup> P. A. S. Pati, *Supra* note 9.

<sup>33</sup> R. K. Chaubey, *An Introduction To Cyber Crime And Cyber Law* 384 (2008) See also J. Lillie, *Cyberporn, Sexuality and the Net Apparatus*, *Convergence*, (vol.10, issue 1) 43-61 (2004).

<sup>34</sup> Lynn Hunt, *The Invention of Pornography: Obscenity and the Origins of Modernity 1500-1800* (2000); See also *Cyber Pornography in India*, All India Reporter Journal <http://airwebworld.com/articles/index.php?article=1260> (last accessed: 17 August 2013).

<sup>35</sup> J. Buskin, *The Web's Dirty Little Secret*, Wall Street Journal (Online) Proquest: ABI/Inform Global (2000); Philip Elmer-DeWitt, *Online Erotica: On a Screen Near You* Time Magazine, 03 July <http://www.time.com/time/magazine/article/0,9171,983116-1,00.html> (last accessed: 17 August 2013).

<sup>36</sup> J. Buskin, *Supra* note 34.

<sup>37</sup> Philip Elmer-DeWitt, *Supra* note 34.

<sup>38</sup> Amita Verma, *Supra* note 25 at p. 133.

protection available to citizens, in respect of their speech and expression is enshrined in Article 19 (1) (a) of the Constitution of India:

Protection of certain rights regarding freedom of speech etc All citizens shall have the right to freedom of speech and expression.

The absolute nature of this freedom has been later curtailed in Art. 19(2):

Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

### 7.1 Section 67 Information Technology Act 2000

In the year 2000, India enacted its first law on Information Technology namely, the Information Technology Act, 2000.<sup>39</sup> The IT Act, 2000 is based on the Model law of e-commerce adopted by UNCITRAL<sup>40</sup> in 1996.<sup>41</sup> Section 81 of the Information Technology Act, 2000 specifically states, "*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*"<sup>42</sup> Hence, this legislation has an overriding effect.

Section 292 of the Indian Penal Code 1860 and Indecent Representation of Women (Prohibition) Act, 1986<sup>43</sup> could not suitably curb the selling, hiring, distribution, public exhibition or circulation etc of obscene material pertaining to women on the Internet. Thus, the IT Act 2000 also incorporated the offence of 'publishing of information which is obscene in electronic form' within its ambit, as given under Section 67 of the IT Act. Section 67 is modelled on the basis of Section 292 Indian Penal Code, and is the most serious legislative measure against pornography.

In the last week of December 2008 as a knee-jerk reaction to the November 2008 terror attacks in Mumbai, India, the Information Technology (Amendments) Act,

<sup>39</sup> Act No. 21 of 2000, enacted on June 9<sup>th</sup>, 2000.

<sup>40</sup> United Nations Commission on International Trade Law (UNCITRAL).

<sup>41</sup> Karnika Seth, *IT Act 2000 vs 2008- Implementation, Challenges, and the Role of Adjudicating Officers* National Seminar on Enforcement of Cyber laws, New Delhi, May 8<sup>th</sup>, 2008 <http://www.sethasociates.com/wp-content/uploads/IT-Act-2000-vs-20083.pdf> (last accessed: 17 August 2013).

<sup>42</sup> Amita Verma, *Supra* note 25 at p. 141.

<sup>43</sup> Act No. 60 of 1986, dated December 23<sup>rd</sup>, 1986.



2008<sup>44</sup> was hastily tabled before the Parliament and was passed in a hurry, without any debate whatsoever.<sup>45</sup> It came into effect from October 27<sup>th</sup>, 2009<sup>46</sup> the date notified by the Government of India<sup>47</sup> The IT Amendment Act 2008 brought about various sweeping changes in the existing Cyber law.<sup>48</sup> It amended Section 67 and incorporated Section 67 A, 67 B, 67 C in the Act. They are as follows:

67. Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.”<sup>49</sup>

67A. Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

67C (1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine.

In India, during the year 2003, 60 cases were registered under IT Act as compared to 70 cases during the previous year thereby reporting a decline of 14.3 percent in 2003 over 2002. Of the total 60 cases registered under IT Act 2000, around 33

<sup>44</sup> Bill No. 96 – C of 2008 passed by the Lok Sabha on December 22, 2008 and to which the President’s assent was given on February 5, 2009.

<sup>45</sup> N.S Nappinai, *Cyber Crime Law in India: Has Law Kept Pace with Emerging Trends? An Empirical Study*, Journal Of Int’l Comm. Law & Tech. (vol. 5, issue 1) 22 (2010).  
<sup>46</sup> Act No. 10 of 2009.

<sup>47</sup> Nappinai, *Supra* note 45 at 20.

<sup>48</sup> Pavan Duggal, *Your Cybercrime-Friendly Legislation* <http://www.cyberlaws.net/itamendments/bs1.html> (last accessed: 17 August 2013).

<sup>49</sup> *Information Technology (Amendment) Act 2008*.

percent (20 cases) relate to obscene publication / transmission in electronic form. 17 persons were arrested for committing such offences during 2003.<sup>50</sup> In its report, the National Crime Records Bureau of the home ministry said 88 of the total 179 cyber cases registered in 2005 related to cyber pornography. Incidentally, 50% of the 88 cases were related to transmission of abusive images and videos of children through the internet.<sup>51</sup> A recent survey indicates that for every 500 cybercrime incidents that take place, only 50 are reported to the police and out of that only one is actually registered. These figures indicate how difficult it is to convince the police to register a cybercrime.<sup>52</sup>

## 8. ESSENTIALS OF SECTION 67

### 8.1. Acts those are punishable in respect of obscenity:<sup>53</sup>

The important ingredients of the offence under section 67 are:

- Publishing, or
- Transmitting,<sup>54</sup> or
- Causing to be published obscene material in electronic form.<sup>55</sup>

#### 8.1.1 Publishing

The Oxford dictionary defines 'publish' as "make generally known; announce formally, promulgate, issue copies for sale to public."<sup>56</sup> It means to distribute copies (of a work) to the public.<sup>57</sup> It is essential that at least one natural person (man, woman or child) becomes aware or understands the information that is published. Simply putting up a website that is never visited by any person does not amount to publishing.<sup>58</sup> Applying this definition, it is apparent that if a website is disseminating obscene material, then the domain name owner, the technical and administrative contacts of the domain name and the creator of pornographic material that is being disseminated will be liable under section 67.<sup>59</sup>

<sup>50</sup> Talwant Singh, *Cyber Law & Information Technology* <http://www.delhidistrictcourts.nic.in/CYBER%20LAW.pdf> (last accessed: 17 August 2013); P.A.S Pati, *Cyber Crime* [http://www.naavi.org/pati/pati\\_cybercrimes\\_dec03.htm](http://www.naavi.org/pati/pati_cybercrimes_dec03.htm) (last accessed 17 August 2013)

<sup>51</sup> Vishwa Mohan, *Cyber Porn on the Rise*, The Times of India, October 16, 2006 [http://articles.timesofindia.indiatimes.com/2006-10-16/india/27787098\\_1\\_cyber-pornography-online-paedophiles-home-ministry](http://articles.timesofindia.indiatimes.com/2006-10-16/india/27787098_1_cyber-pornography-online-paedophiles-home-ministry) (last accessed: 17 August 2013)

<sup>52</sup> *Supra* note 50

<sup>53</sup> Rohas Nagpal, *Cyber Crime And Digital Evidence-Indian Perspective* 35

<sup>54</sup> Dr. Amita Verma, *Supra* note 24 at 134.

<sup>55</sup> *Id.*, at p. 135.

<sup>56</sup> *Id.*, at p. 134.

<sup>57</sup> Bryan A. Garner, *Supra* note 20 at 1268.

<sup>58</sup> Rohas Nagpal, *Supra* note 53 at 36.

<sup>59</sup> Dr. Amita Verma, *Supra* note 24 at 135.

### 8.1.2 Transmit

To transmit means to send or transfer (a thing) from one person to another.<sup>60</sup> The Oxford dictionary defines 'transmit' as "*pass on, hand on, transfer, communicate, allow to pass through, be a medium for, serve to communicate (signal etc.)*." This definition adequately covers the role of internet service providers.<sup>61</sup> It is not necessary that the "transmitter" actually understands the information being transmitted.<sup>62</sup> Transmission may be addressed to an intended recipient for his personal use, but that is not relevant. The act of 'transmission' is sufficient to constitute an offence under section 67 of the IT Act.<sup>63</sup>

### 8.1.3 Causing to be Published

'Cause' means to produce an effect.<sup>64</sup> 'To cause to be published' means to produce the effect of publishing. It is apparent that the term 'cause to be published' would cover the job performed by the web server. A web server causes material to be published over the internet.<sup>65</sup>

It is clear that the provisions of section 67 are wide enough to cover all perpetrators of 'Cyber-obscenity', be it the Internet Service Providers, web hosting entities or the persons behind the actual web site.<sup>66</sup>

## 8.2 Constitution of Obscenity in Electronic Form

An analysis of the relevant terms used in Section 67 will provide an understanding as to what constitutes obscenity in the electronic form:

- **Any material** in the context of this section would include video files, audio files, text files, images, animations etc. These may be stored on CDs, websites, computers, cell phones etc.<sup>67</sup>
- **Lascivious** is something that tends to excite lust<sup>68</sup>; lewd; indecent; obscene.<sup>69</sup>
- **Appeals to**, in this context, means "arouses interest".

<sup>60</sup> Bryan A. Garner, *Supra* note 20 at 1537.

<sup>61</sup> Dr. Amita Verma, *Supra* note 24 at 135.

<sup>62</sup> Rohas Nagpal, *Supra* note 53 at 36.

<sup>63</sup> Lekhesh Dholakia, 'Opinion The Law on Pornography in India and implication on Cyber Cafe operators', December 3, 2005, <http://apiap.org/opinions/legal/opinion-the-law-on-pornography-in-india-and-implication-on-cyber-cafe-operators> (last accessed: August 17, 2013)

<sup>64</sup> Dr. Amita Verma, *Supra* note 24 at 135.

<sup>65</sup> Rohas Nagpal *Supra* note 53 at 36.

<sup>66</sup> *Id.*, at p. 36.

<sup>67</sup> *Id.*, at p. 34.

<sup>68</sup> *Id.*, at p. 35.

<sup>69</sup> Bryan A. Garner, *Supra* note 21 at p. 897.

- **Prurient interest** is characterized by lustful thoughts<sup>70</sup>; arousing inordinate or unusual sexual desire.<sup>71</sup>
- **Effect** means to produce or cause<sup>72</sup>; to bring about; to make happen.<sup>73</sup>
- **Tend to deprave and corrupt** 'Deprave' refers to being horrendous and morally horrendous.<sup>74</sup> Corrupt refers to change (a person's morals or principles) from good to bad.<sup>75</sup> 'Tend to deprave and corrupt' in the context of this section means "to lead someone to become morally bad".
- **Persons** here refers to natural persons (men, women, children) and not artificial persons (such as companies, societies etc).<sup>76</sup>

The Indian test of obscenity, which may be called as "target standard", takes into account the persons who are likely to read, see or hear the matter. This is as against the American test of obscenity, more commonly called "Community Standard"<sup>77</sup> as laid in the *James Joyce's Ulysses case* in 1933.<sup>78</sup> The test is whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interest.<sup>79</sup>

## 9. DETERMINATION OF THE TERMS 'LASCIVIOUS' OR 'PRURIENT' UNDER SECTION 67

Neither the IT Act, 2000 nor the Indian Penal Code, 1860 give any definitions of the term "lascivious" or "prurient".<sup>80</sup> By its very inherent nature, lust, as a feeling, differs from person to person and from situation to situation. The concept of obscenity has varied from age to age, region to region and even from person to person, depending upon the particular social conditions and the standards of contemporary society. Further, the standards of moral values are subject to mutation.

Hence, the challenge that arises is: what would be the standards that are likely to be kept in mind by the authorities in determining whether any information or

<sup>70</sup> Rohas Nagpal, *Supra note 53* at p. 35.

<sup>71</sup> Bryan A. Garner, *Supra note 21* at p. 1263.

<sup>72</sup> Rohas Nagpal, *Supra note 53* at p. 35.

<sup>73</sup> Bryan A. Garner, *Supra note 20* at p. 554.

<sup>74</sup> *Id* at 473.

<sup>75</sup> *Id* at 371.

<sup>76</sup> Rohas Nagpal, *Supra note 53* at p. 35.

<sup>77</sup> Farooq Ahmad, *Cyber Law In India* (Law On Internet) 327 (3<sup>rd</sup> ed., 2008).

<sup>78</sup> 72 F.2d 705.

<sup>79</sup> Amita Verma, *Supra note 25* at p. 140; See also *Memoirs v. Massachusetts* 383 U. S. 413; *Obscenity*, Legal Information Institute, Cornell University Law School, (August 19, 2010) <http://www.law.cornell.edu/wex/obscenity> (last accessed: August 17, 2013).

<sup>80</sup> *Id.*, at p. 136.

material in the electronic form is lascivious or appeals to the prurient interest.<sup>81</sup> For this, the trends of judicial pronouncements made by the Supreme Court and various High Courts on various occasions must be considered. In the landmark judgement of *R.D. Udeshi v. State of Maharashtra*<sup>82</sup> the Supreme Court held as under:

Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely "poor value in the propagation of ideas, opinions and information's of public interest or profit." When there is propagation of ideas, opinions and information's of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Art. 19.

In this case, Justice M Hidayatullah held that in order to determine whether any material is obscene or not, the test laid down in *Regina v. Hicklin*<sup>83</sup> should not be discarded.<sup>84</sup> The Apex Court further held that what is obscene would always remain a question to be decided in each case. The Court advocated that it was the duty of the Court to consider the alleged obscene matter by taking an overall view of the obscene matter. Taking an overall view of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity is so decided, that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In doing so, one must not overlook the influence of the book on the social morality of our contemporary society.

Further, in the case entitled *C. K. Karodkar v. State of Maharashtra*<sup>85</sup> the Supreme Court held that "*What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country.*" It was further held that, "*what we have to see is whether a class, and not an isolate case, into whose hands, the book, article or story falls suffers in their moral outlook or become depraved*

<sup>81</sup> See also *Roth v. U. S.* 354 U. S. 476 (1957).

<sup>82</sup> AIR 1965 SC 881.

<sup>83</sup> 3 LR-QB 360 (1868).

<sup>84</sup> Amita Verma, *Supra* note 25 at p. 13.

<sup>85</sup> (1969) 2 SCC 687.

*by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect."*

## 10. CRITICISM OF SECTION 67 OF INFORMATION TECHNOLOGY ACT, 2000 AND THE AMENDMENTS

### 10.1 Section 67 of the Information Technology Act

Section 67 of the Information Technology Act has created a bit of confusion by merely copying the material phrases from Section 292 IPC and by not taking into consideration the changed standards of the society and human behaviour in modern India. The Indian Penal Code was enacted in 1860, at a time when India was under the colonial rule of the British and the Indian society was highly conservative. It would have been better if the legislature had taken the changed societal standards in consideration while enacting Section 67 of the Information Technology Act.<sup>86</sup>

The Act has not really defined standards to ascertain what is obscene, lascivious or prurient in the context of the electronic medium at a time when internet is flooded with pornography. It has been left to the subjective interpretation of the relevant law enforcement agency. No doubt, the pronouncements made under Section 292 IPC would act, as guiding principles for the courts but they would be required to act proactively and interpret Section 67 in the context of cyberspace.<sup>87</sup>

On a plain reading of Section 67, it appears as if it seeks to assume the role of a global supervisor and regulator. It gives the impression that any person who puts up a sex web site in a foreign land showing obscenity, would also be liable there under. However, this is not so because Section 75<sup>88</sup> provides that the IT Act shall apply to an offence or contravention outside India by any person if the act or conduct constituting the offence involves a computer, computer system or computer network located in India. Therefore, if an Indian surfer visits a pornographic website based in a foreign land, the site would not be liable under section 67 because it is the visitor's act which gives him access to the website whereas the website does not commit any offence.<sup>89</sup>

<sup>86</sup> Amita Verma, *Supra* note 25 at p. 139.

<sup>87</sup> Amita Verma, *Supra* note 25 at p. 139.

<sup>88</sup> Information Technology Act, 2000, s.75- "*Act to apply for offence or contravention committed outside India. (1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.*

*(2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India."*

<sup>89</sup> Vivek Sood, *Cyber Law Simplified* (2001).

This gives rise to another concern-As to how the law enforcement agencies in India check the offence of online pornography emanating outside the country? A majority of the pornographic content of the internet has been hosted on websites, which are in turn hosted on web servers, which are located outside the territorial jurisdiction of India, though available here. Technically speaking, the Information Technology Act, 2000 states in Section 1(2)<sup>90</sup> and Section 75 that it shall be applicable not only to the whole of India but also to any offence or violation of the provisions of this Act done by any person of any nationality anywhere in the world. This approach is clearly not practical under the norms of existing international law. No country can assume jurisdiction over the citizens of other countries.

The quantum of punishment in Section 67 is much higher as compared to Section 292 IPC. The only material difference that Section 67 makes to the offence defined under Section 292 IPC is that it has extended<sup>91</sup> the same offence to electronic format. Thus, a peculiar situation is likely to emerge in the practical working and implementation of the IT Act. For example, a person may publish a pornographic book and he is liable to be punished with imprisonment up to two years under Section 292 IPC. But at the same time, if the same person publishes the pornographic book in electronic form, then he becomes entitled to a much higher imprisonment of five years and fine up to one lakh rupees on first conviction under Section 67, IT Act, 2000.

Mere possession of the obscene material for one's own personal use may not be construed as an offence.<sup>92</sup> It has been observed in the case of *C.K. Karodkar v. State of Maharashtra*<sup>93</sup> the state cannot tell a man sitting in the privacy of his house as to what books he may read or what films he may watch. Similarly, the State cannot with its unfettered power enforce upon its citizens a morality in which it believes. No harm is caused by an individual watching what he likes.<sup>94</sup> However, it would be advisable to be cognizant of the fact that the prosecution can take a plea of abetment in a case of mere possession.<sup>95</sup>

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<sup>90</sup> Information Technology Act, 2000, s.1(2)- "*It shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention there under committed outside India by any person.*"

<sup>91</sup> Amita Verma, *Supra* note 25 at p. 141.

<sup>92</sup> Lekhesh Dholakia, *Supra* note 63.

<sup>93</sup> (1969) 2 SCC 687.

<sup>94</sup> Sakshi Sawhney, *The Information Technology (Amendment) Act, 2008: The Provenance of E-Policing*, Nalsar Student Law Review <http://www.nalsarstudentlawreview.com/files/10The%20Information%20Technology%20%28Amendment%29%20Act,%202008-The%20Provenance%20of%20E-Policing.pdf> (last accessed August 17, 2013)

<sup>95</sup> Lekhesh Dholakia, *Supra* note 63

In the case of *Jagdish Chavla and others v/s the State of Rajasthan*<sup>96</sup>, the accused was caught viewing an obscene film on the television with the help of a VCR which along with the cassette was seized and a case under section 292 of the IPC was registered. The accused filed a petition in the High Court for quashing of the proceedings and it was held that simply being in possession of a blue film could not make a person guilty under section 292 unless it was further proved that the purpose of keeping the same was selling or letting it on hire. Therefore without proving the purpose of keeping the same no offence mentioned in section 292 was made out and the proceedings were quashed. The law therefore excludes from liability (under section 292) the mere possession of obscene material for one's own personal use without any intention to perform any of the purposes specified in section 292.

The Act of 2000 does not make private viewing of Pornographic sites illegal therefore no offence is committed by surfing through Pornographic sites. This exemption is certainly exercising an adverse impact on the mental fabric of growing children who are knocking at the door of adolescence or have crossed that State.<sup>97</sup> Therefore some restriction on the private viewing at least in the form of pecuniary penalty may be imposed. The extent of fine may be between two hundred to one thousand rupees, depending on the frequency of surfing and visiting such sites.

The section begins with 'whoever'. This word can include a wide array of people like internet service providers (ISPs), telecom network service providers (NSPs), cyber cafe owners, investigating officers and even a layperson. Further, the section makes transmission of pornographic materials an offence, thus making intermediaries such as ISPs, cyber cafe owners liable. The section also has a phrase 'whoever causes to be published' which has a very wide purview of application. In its strict sense, it can make even search engines like Google, Rediff, Yahoo and email service providers like Hotmail, Yahoo and Gmail liable although they may not be actively involved in the pornographic transaction.<sup>98</sup>

Explanatory clause to section 79 states that "network service provider" is an intermediary. Section 2(W) of this Act defines an intermediary as any person who on behalf of another person receives stores or transmits that message or provides any 'service' with respect to that message. Here for the purpose of the Act the word service<sup>99</sup> should be construed in the same sense as defined in the Consumer

<sup>96</sup> 1999 CR LJ 2562 (Raj); 1999 (2) Raj. L. W. 803, 1999 (1) Raj. L. R. 665

<sup>97</sup> Amita Verma, *Supra* note 25 at p. 151.

<sup>98</sup> Quoted by Shreyas Adyanthaya, *Fine-tune law on pornography*, The Times Of India, February 12, 2005, [http://articles.timesofindia.indiatimes.com/2005-02-12/pune/27860656\\_1\\_cyber-cafe-owners-cyb Pornography-service-providers](http://articles.timesofindia.indiatimes.com/2005-02-12/pune/27860656_1_cyber-cafe-owners-cyb Pornography-service-providers).

<sup>99</sup> Consumer Protection Act, 1986, S. 2(o)-"service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in



Protection Act, 1986.<sup>100</sup> And while Section 79 of the IT Act protects the NSPs, it is not an adequate relief because it does not prevent the arrest of the person in charge of the network service (as in the case of the CEO of Bazeed.com). This section places the burden of proof of innocence on the NSP, which goes against the principle of natural justice that says 'a person is innocent until proved otherwise'.<sup>101</sup>

The biggest question that arises is how would the present provision of Section 67, IT Act 2000 be implemented? The Information Technology Act, 2000 does not specify the *lex fori*, or the forum for trying the offence under Section 67. In which area would a case of online pornography be registered? Which court would assume territorial jurisdiction on the same? These issues have yet not been sorted out.

All in all, given the glaring loopholes as detailed above, the new IT Act Amendments are likely to adversely impact corporate India and all users of computers, computer systems and computer networks, as also data and information in the electronic form.<sup>102</sup> With the passage of time, it is hoped that the various issues raised by Section 67 of the IT Act, 2000 would be properly resolved.<sup>103</sup>

## 10.2 Criticism of the Amendments to Section 67 of Information Technology Act, 2000

The most bizarre and startling aspect of the new amendments is that these amendments seek to make the Indian Cyber law a cyber crime friendly legislation. A legislation that goes extremely soft on cyber criminals, with a soft heart; a legislation that chooses to encourage cyber criminals by lessening the quantum of punishment accorded to them under the existing law; a legislation that chooses to give far more freedom to cyber criminals than the existing legislation envisages; a legislation which actually paves the way for cyber criminals to wipe out the electronic trails and electronic evidence by granting them bail as a matter of right; a legislation which makes a majority of cybercrimes stipulated under the IT Act as bailable offences; a legislation that is likely to pave way for India to become the potential cyber crime capital of the world. A perusal of the said legislation shows that there is hardly any logical or rational reason for adopting such an approach.

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*connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service".*

<sup>100</sup> P. A. S Pati, *Applicability of I. P. C to Cases of Cyber Crime*, <http://www.naavi.org/pati/cybercrime2.html> (last accessed 17 August 2013).

<sup>101</sup> *Fine-tune law on pornography*, The Times Of India, February 12, 2005, [http://articles.timesofindia.indiatimes.com/2005-02-12/pune/27860656\\_1\\_cyber-cafe-owners-cyber-pornography-service-providers](http://articles.timesofindia.indiatimes.com/2005-02-12/pune/27860656_1_cyber-cafe-owners-cyber-pornography-service-providers).

<sup>102</sup> Pavan Duggal, *Supra* note 48.

<sup>103</sup> Amita Verma, *Supra* note 25 at p. 151

The amendments to the IT Act have gone ahead and reduced the quantum of punishment. Section 67 has reduced the quantum of punishment on first conviction for publishing, transmitting or causing to be published any information in the electronic form, which is lascivious, from the existing five years to three years.<sup>104</sup>

At that time when the entire world is going hammer and tongs against cyber crimes and cyber criminals, here comes a contrary trend from the Indian legislature. Cyber criminals of the world targeting India or operating in India need not despair. The legislation has now stipulated that cyber crimes punishable with imprisonment of three years shall be bailable offences. Since the offence of cyber pornography is punishable with three years, the crime shall be bailable, which in common language, means that the moment the cyber criminal will be arrested by the police, he shall be released on bail as a matter of right, by the police, there and then.<sup>105</sup>

Keeping in account human behaviour and psychology, it will be but natural to expect that the concerned cyber criminal, once released on bail, will immediately go and evaporate, destroy or delete all electronic traces and trails of his having committed any cyber crime, thus making the job of law enforcement agencies to have cyber crime convictions, a near impossibility.<sup>106</sup>

Section 67 C has only empowered the Government to further its intrusive agenda while using the 'intermediaries' to carry out the same. Section 67C allows intermediaries to retain information in a manner and for a time-frame to be determined by Central Government which is a direct violation of the right to privacy.

Here again reference can be made to the case of *People's Union for Civil Liberties v Union of India*<sup>107</sup> where it was held that the right to privacy included the right to hold a telephone conversation in the privacy of one's own home and that telephone, a form of "technological eavesdropping" infringed the right to privacy. A parallel can be drawn with Section 67C which allows third parties in the form of "intermediaries" store and retain information which individuals are surfing on the net in the privacy of their homes and offices, as violative of the right to privacy. Even the Act of 2000 did not provide any protection or adequate safeguards against obtaining illegal and unauthorized access to such information.

## 11. CONCLUSION

After the advent of the internet which has no jurisdictional or physical boundaries, pornography has been made available in every nook and corner of the world.

<sup>104</sup> Pavan Duggal, *Supra note* p. 48.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> (1997) 1 SCC 301 : AIR 1997 SC 568 : JT 1997 (1) SC 288.

Further, it would be impossible to find a settled definition of pornography or obscenity simply because where there exists no uniform standards of moral culture and ethics, there cannot exist any fixed and uniform standards of law. Its concept is moulded to a very great extent by the social outlook of the people subject to it and the standards of morality of contemporary society in different countries.

In India, while Article 19(1) of the Constitution of India guarantees complete freedom of speech and expression, clause (2) puts restrictions on the exercise of public decency and morality. Section 67, 67-A, 67-B and 67-C of the Information Technology Act, 2000 makes the publishing and transmitting information, which is obscene in the electronic form an offence. However, mere possession of obscene material for one's own personal use is not.

While these clauses should be complemented for their appreciable work in being a supervisor and a regulator of public decency and morality, yet there has been a major mismatch between the expectations of the nation and the resultant effect of the legislation. As pointed out earlier in the article, there are various areas where these penal provisions relating to cyber obscenity fall short of an answer and become vague and uncertain. It is high time that the lacunae therein are plugged and the arbitrariness be clarified through suitable amendments before they surface when the law is rigorously tested on the anvil of time and advancing technologies. The government, through these measures should ensure women rights, especially their protection online, as is done in physical space. The legal system and the regulatory agencies should ensure that these newer technologies do not become tools of women harassment and exploitation. Cyber obscenity pertaining to women should be brought down by making the penal provisions as air tight as possible.

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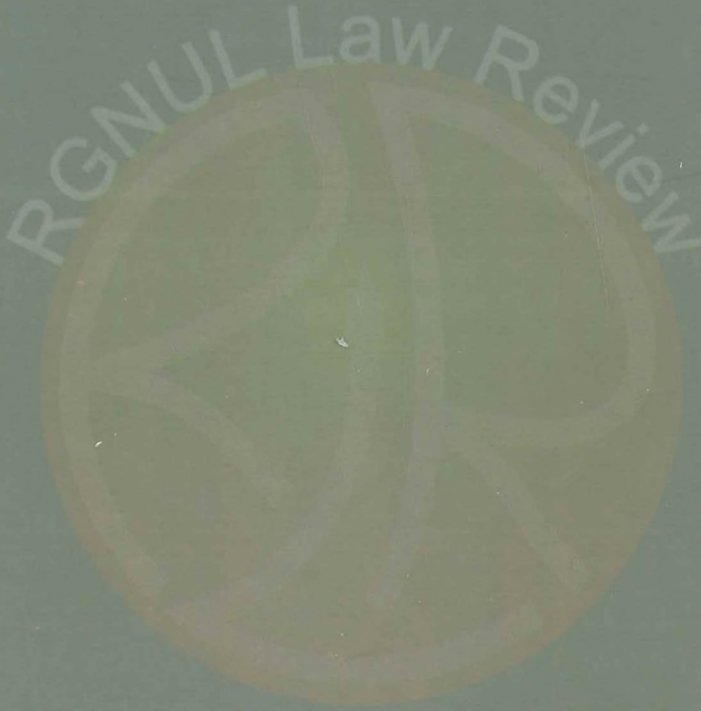
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