

DOMESTIC VIOLENCE, WOMEN AND THE LAW: AN INDIAN PERSPECTIVE

**A THESIS SUBMITTED TO THE UNIVERSITY OF
NORTH BENGAL FOR THE AWARD OF THE DEGREE
OF DOCTOR OF PHILOSOPHY IN LAW**



Supervisor

Dr. B.P. Dwivedi

Professor of Law
Department of Law

Submitted By

Smt Neelam Rai

**DEPARTMENT OF LAW
UNIVERSITY OF NORTH BENGAL
RAJA RAMMOHANPUR, DARJEELING,
WEST BENGAL, INDIA
PIN – 734013
2009**

DEPARTMENT OF LAW
UNIVERSITY OF NORTH BENGAL
P.O. NORTH BENGAL UNIVERSITY, RAJA RAM MOHANPUR
DISTRICT DARJEELING, WEST BENGAL, INDIA 7340 13.



Dr. B.P. Dwivedi
Professor of Law

Tel: 0353-2776307
Fax: 0353-2699001

Date.....14/07/09.....

CERTIFICATE

This is to certify that Mrs. Neelam Rai has pursued research work under my supervision for more than six years and fulfilled the requirement of the ordinances relating to Doctor of Philosophy of the University. She has completed her work and the thesis is ready for submission. To the best of my knowledge and belief, the thesis contains the original work done by the candidate and it has not been submitted by her or any other candidate to this or any other University for any degree previously. In habit and character, the candidate is a fit and proper person for the Ph.D. Degree.

I recommend submission of her thesis.

Supervisor

A handwritten signature in black ink, appearing to read 'B.P. Dwivedi', with a horizontal line extending to the right.

Dr. B.P. Dwivedi

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**Department of Law
University of North Bengal
Rajarammohanpur, Darjeeling,
West Bengal, India.**


Smt. Neelam Rai

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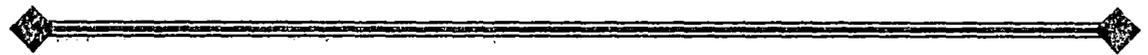
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CHAPTER - I

INTRODUCTION

CHAPTER – I

INTRODUCTION



Our social structure is based upon two pillars i.e. men and women. Their rights and duties must complement and supplement towards each other. If one of the pillars is weak the other cannot bear the burden of society and the whole structure of the society will fall. Hence, to run the society we need both of them, neither is inferior to the other and both of them should be kept in the equal footing. Ironically, out of these two pillars women is the weaker one or in other words, the men exploited women to such an extent that she became weak. Since time immemorial women has been at the receiving end of the men's atrocities. Their rights are frequently violated and crimes against women are on rise. In the name of the religion, custom, and tradition she is subjected to various forms of injustice committed against her such as, polygamy, child-marriage, prostitution, sexual abuse, dowry related crimes, foeticide, rape, etc. All these customs and traditions give unequal status to the women.

Women constitute almost half of the world population, yet she is subjected to various forms of atrocities committed against her in the society. The Supreme Court in *Madhu Kishwar vs. State of Bihar*¹ too has stated that “*Half of the Indian population is women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their mobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.*” Women are

1. (1996) 5 SCC 125.

not secured in the society whether they are outside their home or inside it. In fact, she is subjected to heinous forms of crimes inside her household domain. She is not safe even inside her house. Crimes against her are committed inside her home which is more dangerous in nature. The crime which is committed against her inside the house is known as “domestic violence”. Protective laws have existed in our statute books since a very long period and with the passing time more laws are being added yet there is sudden increase in the violence committed against the women in our society especially at her house whether matrimonial or paternal home. She is subjected to brutal crimes such as financial dependence, marital rape, dowry death, infanticide, foeticide, sexual abuse, wife-beating, bigamy, etc.

Discrimination, oppression, prejudice and violence against women in this male-dominated society can be seen since the dawn of our civilization. The status of women of a nation is the mirror of its civilization. The development of a nation is measured by the status of women held in that nation. Where a woman enjoys a good status it shows that the society has reached a level of maturity and sense of responsibility. However, if she is deprived of a good status, it conjures up the image of a nation. The glimpses of history are evident that the women have contributed tremendously for the development of the society and they enjoyed equal status with men in the society.

The present work studies the status and position of women in the Indian society which has undergone various changes. The status and position of women in the Indian society is studied under the four heads viz. ancient India, medieval India, pre-independent India, and post-independent India. The present study dwell the status and position of women in Indian society which has suffered gradual deterioration and has gone from bad to worse. It discusses the historical retrospect of the status and position of women in the Indian society i.e. from ancient India till today. The present work also discusses the position and status of women in the Hindu society and their status in other religions such as Jainism,

Buddhism, Sikhism, etc. It also studies the impact of invasions of the Muslim rulers and British rulers on the status and position of women in Indian society. Various social evils existed in the Indian society at the beginning of the 19th Century which still hold place in our society. The women during pre-independent period actively participated in the freedom struggle which to some extent changed their position in the society for better. After the independence the Government passed certain enactments to curb the existing social evil in the society. Thus, the historical retrospect of the status and position of women in Indian society, thus, helps us to understand the origination of such social evils which causes the discrimination of women in the society.

The violence against women is not a new phenomenon. It is as old as our civilization. It is not confined to a particular class or to a particular country. It is a global problem. Women are placed at various disadvantageous positions due to gender differences and biasness. Gender discrimination represents the ugly face of the society which is not only offensive to human dignity and human rights but has also emerged as a fundamental crisis all over the world. The question of gender justice and gender equality is a very old and burning problem because contribution of both the sex is essential in order to attain a developed nation. It is important to recognize the inherent dignity, equality and inalienable rights of all the members of the society which will lay the foundation of freedom, justice and peace in the world. Despite playing major roles during various stages of her life as a daughter, wife, mother, sister etc and in spite of her contribution to the society she is still suffering from discrimination, exploitation and victimization.

The present work discusses the history of women empowerment which was started with the Declaration of Sentiments. The idea of protecting the rights of women started with a small tea talk which resulted in the Declaration of Sentiments which was the seed for the women empowerment all

over the world. Frequent commission of crimes in different shape and size violating the basic rights of the women gave rise to various international instruments which dealt with the protection of right to life, liberty and security of a person; protection against gender discrimination; right to education; political rights of women; protection of women against discriminatory customs, laws, regulations and practices etc; elimination of all forms of discrimination and violence against women etc. In the national front the Constitution of India provides certain provision, which protect women from gender discrimination and exploitation and other forms of atrocities committed against them. The present work also discusses various other enactments which have been made to promote gender equality and protect women from exploitation and fight against the atrocities committed against them. The prime question which is raised in the present study is: How far the International instruments have changed the perspective of the society towards women? Whether these instruments have curbed the inequality in the society towards women? To what extent the Indian Constitution provides the concept of equality irrespective of one's sex? And How far the legislative enactments support the cause of equality to women? Are they sufficient to curb the unequal status of women in the society?

In the Indian society marriage has always been considered as a sacramental union since the ancient period. Still the institution of marriage was held in great esteem. It is known as one of the "*sanskars*" which every Hindu must perform. Marriage is the institution wherein the woman has to leave her paternal home and enter her matrimonial home. However, in her matrimonial home another social evil awaits her in the form of Dowry which has many facets i.e. dowry demand, dowry deaths, torture, cruelty etc which are related to the dowry. In India dowry has been identified as one of the most killing problems of women. The dowry system in India prevailed since the *Vedic* periods. However, the concept of dowry at that period was different from what it is now. At that period the dowry

was not based on avarice and extortion but was a token of love to the bridegroom from the bride's parents. It was in fact a religious ritual. The present work discusses the evolution of dowry system in India, the changes in the concept of dowry, the effects of dowry system in the society, and the legislative enactments in India against the evils of dowry system.

The present work discusses the definition of dowry under a special legislative enactment with the help of various judicial decisions. This special legislative enactment also deals with certain provisions wherein taking, giving, and demanding dowry is prohibited and is punishable under the law. This present work also studies the provisions against dowry system under the Indian Penal Code, 1860. The relevant question to be investigated in respect of problem relating to dowry and evils of dowry system is: Whether the dowry system and problems relating to dowry system existed since the ancient period? What are the factors which gave rise to the system of dowry? Whether the legislations are sufficient to curb the evils of dowry system in India? The enforcement machinery, its efficacy and to what extent all these provisions are helpful in curbing the evils of dowry system from our society are some of the matters which find a place in this study. Another important aspect is about the limitation of these provisions.

Women are perceived as the weaker class who is subjugated to the heinous crimes. Various forms of atrocities are committed against women all over the world whether it is a developed nation or developing country or even in the third world countries. The society always focused on eradicating the violence against women outside their homes by the strangers, but it is also a known fact that the cruelest and heinous crimes are committed against women inside her home at the hands of those she trusts and loves. The present work discusses the various forms of domestic violence which a woman has to undergo before her marriage or after it, its prevention and punishments. These crimes are bigamy by the husband, cheating and fraud in marriage, and Sati system. The

present work also dwells upon such crimes which women are subjected to in their matrimonial as well as paternal house. These crimes are not covered under any legislation yet the women are subjected to it and often the abuser gets away without being punished. Such crimes are marital rape, sexual abuse by the relatives i.e. child sexual abuse or sexual abuse by the relatives of the husband etc, and wife-battering. The kinds of trauma which a women has to go through under these circumstances, the effects or consequences of such incidence and the necessity to have legislations covering these crimes, providing provisions relating to its prevention and punishment for committing it find a place in this study.

One of the issue which deals with the deprivation of rights of a women is female infanticide and foeticide. The practice of female infanticide and foeticide is a gross violation of human rights as it not only depicts the low status of women in a society and reflects the issue of gender discrimination which begins from the womb but also hits at women's right over her motherhood. Female infanticide and foeticide is the beginning of the suffering of a woman in the course of her life. The sudden decline in the sex ratio of our country is evident that the ratio of women in comparison to men are decreasing every year i.e. 927 females per 1000 males as per the latest census.

The present work discusses the background of female infanticide in India since the ancient period which reflects the influence of religious practices in our society; causes of female infanticide in India where apart from other causes one of the main causes of female infanticide which has now changed its face into foeticide is the advanced technology which can determine the sex of the foetus; methods of killing infants in India in ancient period and some of the places wherein still the technology of determining sex of the foetus has not reached; effects of declining female sex ratio; the international instruments against the practice of female infanticide and foeticide; the national enactments against the female infanticide and foeticide such as the Constitution of India, the Indian Penal

Code, The Medical Termination of Pregnancy Act, 1971, and the Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act, 1994. The implementation of these enactments, whether they provide effective machinery to fulfill the ideals of the legislations i.e. are they effective in preventing the female infanticide and foeticide? What are the measures they are taking to prevent it? And the punishments provided under these Acts are sufficient to curb this societal evil is the matter of concern of this study.

Women play diverse roles of a mother, daughter, friend, wife, guide, companion, and nurse through out her life, yet she suffers all forms of violence and atrocities of all kind are instituted against her. Marriage is seen as the social security of a woman but the same becomes the source of various forms of discrimination at the hands of those whom she trust and love. She is often beaten up by her husband, abused by her in-laws, sexually abused by the husband and often denied the minimum bare necessities for her existence. The issue relating to domestic violence has become a major issue all over the world. Despite the laws regarding the protection of women, violence against women has increased substantially. Due to the vast expansion of electronic media large number of cases started to come into light and the existing law was not sufficient to include the expanding horizons of the domestic violence as they were inadequate to deal the domestic relationship. Ultimately, the Parliament passed the Protection of Women from Domestic Violence Act, 2005 to address the problems of domestic violence faced by women in India. The said Act defines the “domestic violence” and provides effective measures through which it can be prevented or punishments can be awarded. The present work also discusses the forms of domestic violence; theories of domestic violence; causes of domestic violence; effects of domestic violence; and domestic violence as a human right issue which will be helpful in determining the scope of domestic violence and through which measures we can take to prevent it and punish the abuser. These will also help us to understand that

why we need a new and separate legislation for the protection of women against the domestic violence.

The present work along with the study of the legislations and policies taken by the Government to curb all forms of domestic violence also critically analyze the said legislations and policies. The reasons for the failure of the legislations to curb the said violence against the women or shortcomings in the legislations and the policies or non-implementation of the said legislation properly are all the subject matter which is the matter discussed in this study. After analyzing the shortcomings and reasons for not its effective implementation the present work also tend to provide some suggestions which can help in making the laws more effective in curbing the domestic violence.

Coming to the framework of the present study, it has been divided into eight chapters. Chapter One introduces the subject matter, the object of the study, and research areas of the present study. Chapter Two deals with the historical perspective, the status and position of women in the Indian society in ancient India which can be studied under the head of primitive period, *Vedic* period and post *Vedic* period. In the ancient India there were other religions which emerged due to social changes, such as Buddhism and Jainism. The said chapter deals with the views regarding the status of women under these religions. In the *Vedic* period the status and position of women in the society was neither too good nor too bad. It was combination of the two as with some restrictions the women had certain freedoms. In the post-*Vedic* period when the Muslims invaded India the status and position of women became worse as in order to protect themselves from the Muslim men the society imposed strict rules upon her and she was denied her basic rights. Similarly, the Muslim women too faced the same fate as men of their society imposed strict rules upon them to follow as they have come to a foreign land wherein she has to save herself from the prying eyes of the foreigners. Hence, the situation became from bad to worse. During this period the Sikhism

was born wherein women were more liberated than their counter parts in the Hindu and Muslim religion. During the pre-independent period i.e. during the reign of British rulers the society in India consisted mainly of two religions i.e. Hindu and Muslim. It also deals with the role of women in Pre-independent India during the freedom struggle along with their status and position.

Chapter Three deals with the efforts made in the international as well as the national front for eliminating domestic violence. In the international front by providing gender friendly Conventions, Declarations and Treaties which binds the member or signatory States to implement the said provisions in their national legislations the world wanted to curb the violence faced by women at homes through gender equality and justice. The Government in India has enacted many legislations and made many policies for curbing violence against women in the domestic front on the guidelines of the international Conventions, Declarations and Treaties. Chapter Four deals with the Dowry System in the Indian society specifically. In this chapter the causes of the system, the effects of this practice in the Indian society and the legislation enacted by the Government to eliminate this social evil from our society is discussed.

Chapter Five include the study of other forms of domestic violence which a woman faces in the household such as bigamy by the husband, cheating and fraud in the marriage, sati system, marital rape, wife battering and child sexual abuse. The present work under this chapter studies the various aspect of the rise of the said violence's and the laws which are present in India against it. Chapter Six consists of the subject of female infanticide and foeticide. Under this chapter various causes for such practices are studied and how this practice effect's our society. The present work under this chapter also studies the legislations for preventing and punishing such offence. Another thing which is dealt in this chapter is the right to life of the foetus vis-à-vis right of the mother to abort the foetus. Chapter Seven discusses why we need a separate law for Domestic

Violence. It studies in detail the provisions of the Protection of Women from Domestic Violence Act, 2005, and how far it is effective in preventing the incidences of the domestic violence. It also deals with the various shortcomings of the existing legislation. Chapter Eight is the Epilogue, the last chapter of the present work, wherein the outcome of the present study and possible suggestion has been summarized.

CHAPTER - II

HISTORICAL PERSPECTIVE

CHAPTER – II

HISTORICAL RETROSPECT

Almost half of the world's population consists of women yet she is subjected to various kinds of discrimination, oppression and prejudice in the male- dominated society. It is said by Swami Vivekananda that *"there is no chance for welfare of the world unless the condition of women is improved. It is not possible for a bird to fly on only one wing."*¹ By quoting this he wants to lay emphasis upon the fact that one-half of the mankind is suffering from prejudice, discrimination and oppression in a male dominated society, and unless their position and status in the society is improved we cannot move towards a better world.

The status of women of a nation is the mirror of its civilization. The development of a nation is measured by the status of women held in that nation. Where a woman enjoys a good status it shows that the society has reached a level of maturity and sense of responsibility. However, if she is deprived of a good status, it conjures up the image of a nation. Hence, it has been aptly marked by the first Prime Minister of India, Pt, Jawaharlal Nehru, *"You can tell the condition of a nation by looking at the status of women"*. Swami Vivekananda too had observed *"That country and that nation which do not respect women have never become great nor will ever be in future. The principal reason why your race is so much degraded is that you have no respect for these living images of 'shakti'. If you do not raise the women who are living embodiments of the Divine Mother,*

1. D.C. Bhattacharya, *Sociology*, Vijaya Publishing House, Kolkata, 2002, P.498.

don't think you have any other way raise."² Thus, it is clear that the status and position of women and the respect given to her actually derives the kind of a society.

The glimpses of history are evident that women have contributed tremendously for the development of a society and they have enjoyed if not greater but then not less than men, a good status in the society. Similarly, in the Indian society the status and position of women didn't remain static. With time her position and status in a society too has undergone various changes. From the very ancient Indian society till now her status and position in a society has suffered gradual deterioration which has gone from bad to worse. Hence, it is important for us to study the history of the status and position of women in an Indian society which is not only interesting and instructive but also provides us with the society's high sense of justice and fair play or lack of it. Though the Constitution of the Republic India ensures equality for women and men in every sphere of life and activity, be it in the matters relating to education, employment and legal status. The women have been legally and constitutionally access to as well as right to venture in every walk of life, it is not an unknown fact that still a majority of women in India are illiterate and uneducated. This is a paradoxical situation which must be understood and seen in its historical perspective. This chapter, thus, focuses on the vicissitudes in status and position of women in the Indian society. The study of the status and position of women in the Indian society can be divided under the following heads:-

1. Ancient India,
2. Medieval India
3. Pre-Independent India,
4. Post-Independent India.

2. H.V.Sreenivasa Murthy, *History of India – Part I*, Eastern Book Co, Lucknow, 1993, P.112

1. ANCIENT INDIA: - The study of women in the ancient India can again be divided into the following heads:-

(A) PRIMITIVE PERIOD: -

The status of women in ancient period can be traced back from the primitive period. Still a stimulating debate exists regarding the status of women in primitive communities. It has been brought forward by various scholars that basically there was no civilization in the primitive period, hence, for their livelihood humans used to depend upon hunting since agriculture was not known to them. It is a known fact that men are physically stronger than women. At that period the humans were of barbaric nature so the men's physical prowess, bodily vigor and muscular strength established them naturally as well as permanently superior than the women. Due to the indispensable element of muscle, in a family the role of man and a woman were assigned accordingly. The men were provided with the job of "economic-provider" role and the women, the "child bearing role". Hence, women were made subordinate to male authority and they were largely excluded from the position of prestige and power. However, as per Altekar the role of woman as the gatherer has been grossly underestimated owing to the male bias in anthropology and while some anthropologists emphatically maintain that early societies were sexually egalitarian having relations of reciprocity rather than subordination.....in the hunting societies too, which according to them subordinated women to men in certain respects, men did not exercise the amount of control over women as they did in the class societies.³

3. H.V. Sreenivasa Murthy, *History of India – Part I*, Eastern Book Co., Lucknow, 1993, P.113.

(B) VEDIC PERIOD: -

The status and position of women in Vedic period was better than the primitive community as gradually the state of food gathering and hunting, which was the prime means of livelihood during that period, was being replaced by agriculture and civilization. In other words, we can say that the society was moving towards settlement rather than leading the life as nomadic. During this period India saw the invasions of Aryans who became the main habitants of India. These people were mainly Brahmins and they used to give the status of goddess to the women. A famous Sanskrit Shloka signifies the status of women in that era – “*Yatra naryastu pujayante, ramante tatra devta*”⁴ which means that the place where women are worshipped, god themselves inhabit that place.

The status and position of women under the vedic period can be studies under the following heads: -

- (i) Educational Rights.
- (ii) Marriage System.
- (iii) Religious Rights.
- (iv) Property Rights.

(i) Educational Right: - During the Vedic period women enjoyed a fair amount of freedom and equality with men specifically in the fields of education and religion. Women used to take part in the intellectual life of the society during the Vedic period. They were required to undergo ‘*upanayana*’ ceremonies in Vedic studies. The women too used to devote their time, till their marriage, to specialize in Vedic theology and philosophy like the boys. Proper training in the sacred lore was considered essential for a maiden to succeed in her married life as both husband and wife used to take equal part in the sacrificial rites. The education of women

4. *Manusmriti*.

was given importance in the *ATHARVAVEDA* by stating: - “the success of women in her married life depends upon her proper training during the *Brahmacharya*. ”⁵

The *Upanishads* carry various references of women having high intellectual attainments such as Gargi Vacknavi (who was one of the interlocutors of Janaka Yajnavalkya) who possessed the highest spiritual knowledge. Another example is that of Maitreye (the wife of Yajnavalkya) who held a philosophical discussion on the relationship of the universal soul (*paramatma*) to the individual soul (*jivatma*). These are the instances which demonstrate the height of intellectual and spiritual attainments to which a woman could rise. The available resource provides that there are instances which proves that education to the women was considered a must and the areas wherein women excelled in the education. The Vedas provides us with various instances which also give us a clear picture that women were not confined to domestic life only; she also excelled and held the position of teachers. There were two classes of girls – (a) the *Brahamavadini* students, who donned the sacred thread, constant reminder of the holy vows, tend the fire and study the Vedas, but, in distinction from the boy students, do the begging for alms within their own parental homes, and (b) the *Sadyovadhey*, who are given only symbolically and formally, immediately before marriage.⁶ It means that *Sadyovadhey* were those women who used to prosecute their studies till their marriage. The women used to take teaching as their profession and such women were known as *Upadhyayas* or *Upadhyasis*. The sacred books of Hindus provides us with names of women such as Sita, two daughters of Dakshyana, Damayanti, Draupadi and three of the Panchkanyas:

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5. Lila Samatani, *Status of women in vedic times-A Revealing Monograph*, Maharshi Academy of Vedic Science-88. Quoted in Baidyanath Choudhury, *Human Rights and Women in India*, IX CILQ 374 (1996).
 6. V.K. Dewan, *Law Relating to Offences Against Women*, Orient Law House, New Delhi, 1996, P.32.

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Ahilya, Tara, and Mandodari, who are still remembered with great reverence in Indian society.⁷

(ii) Marriage System: - Marriage has often been defined as joining of man and woman in body and soul. It has often been denoted as a social institution which is complete in itself. Marriage was looked upon as a religious and social duty. Several Hindu writers attach great importance to the marriage of a woman. A man is deemed to be incomplete if he does not get married. Wife is the source of the “*purusharthas*”, not only of *dharma*, *artha* and *kama*, but even of *moksa*. It was a social and religious duty and necessity and it was obligatory for girls as there will be more pitfalls in the path of an unmarried women.⁸ However, it was not looked upon as compulsory for every girl. There was also no limitation on the age of marriage. The women who remained unmarried and grew old in the house of her parents were called ‘*Amajur*’, a girl who grew old in her father’s house. The Vedic women being grown up and educated had a voice in the selection of their husbands.⁹ The sacred books of Hindus provide us with various instances wherein the Vedic women had the right to choose their own life partner. The process of choosing one’s own life partner was known as ‘*Swayamvar*’ in which the men interested in the lady holding it assemble at the house of the bride and she choose one whom she likes as her groom. The known and famous example is that which is described in Maharishi Ved Vyas in his *Mahabharata* wherein Draupadi’s father arranged for her ‘*swayamvar*’ and Arjuna was chosen by her after he successfully managed to fulfill the conditions and became eligible to marry her. Even Maharishi Valmiki’s *Ramayana* bear testimonial to this wherein Lord Rama won

7. Vijender Kumar, *Law Relating to Domestic Violence*, S. Gogia and Company, Hyderabad, 2007, P.19.

8. H.V. Sreenivasa Murthy, *History of India – Part I*, Eastern Book Company, Lucknow, 1993, P.121.

9. Baidyanath Choudhury, *Human Rights and Women in India*, IX CILQ 374 (1996), P.375.

Sita by breaking the '*shiv dhanusha*'. This system for choosing a husband was followed not just by princely women but the common women were also given the same right. In fact women were so important that many of the major battles of ancient India was fought for them, i.e., Mahabharata which was the fiercest battle of ancient India which was fought for the honour of Draupadi. Even Ramayana is evident of the cause of death of most learned man of his time – *Ravana* who was killed by Lord Rama for abducting Sita in order to marry her forcibly.

The Hindus used to consider marriage as a sacramental union- i.e. a sacrosanct (inviolable), permanent, indissoluble and eternal union. However, there are various instances in the sacred texts where woman was allowed to abandon her husband and take another. '*Narada*' and '*Parasara*' mention five cases in which a woman may abandon her husband and take another. They are:-

- (a) when the husband is missing,
- (b) when he is dead,
- (c) when he becomes an ascetic,
- (d) when he is impotent,
- (e) when he is an out-caste.¹⁰

They also laid down two circumstances wherein remarriage of women was permissible –

- (a) when the damsel was abducted and not married according to sacred rites, and
- (b) if the husband died before consummation of marriage.

Kautilya too gave detailed rules of divorce in his Arthashastra. He too laid down grounds under which woman may abandon her husband. The grounds are mentioned as under:-

- (a) if he is of bad character,

10. Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency, Faridabad, 1998, P. 59.

- (b) if he is absent for a long time,
- (c) if he becomes traitor,
- (d) he is likely to endanger her life,
- (e) he is an outcaste,
- (f) has lost his manhood virility or is impotent.¹¹

The plight of women after the death of husband can be presumed the Vedic period as the evidence in the *Rig Veda* regarding the widow is too meager to form any idea of her position. In other words, we can say that *Rig Veda* never mentioned anywhere the practice of the burning of widows with their dead husbands. Even if it was practiced, it can be said that it was not popular or must have confined to the *rajanya* class. Though in the *Rig Veda* the life of widow was not characterized by restrictions, remarriage was allowed i.e., of a childless widow to get a son by levirate (*niyoga*). The *niyoga* was to be primarily with her brother-in-law and not with any stranger. The purpose being that the child would have the maximum amount of the family blood running in his vein and the property of the joint family would not be affected.¹² Widow remarriage and upholding the right of widow in her husband's property proves that Sati was not prevalent in the Vedic period.

(iii) Religious Rights: - Marriage is a spiritual union of husband and wife. The patriarchal society of the *Rig Vedic* Hindus too considered it to be the sacramental union. According to Satpatta Brahmana "*The wife is verily the half of the husband. Man is only half, not complete until he marries.*"¹³ The Taittiriya Samhita is to the same effect "*half is she of the husband that is wife.*"¹⁴ In the *shastra*, husband and

11. *Ibid.*

12. H.V. Sreenivasa Murthy, *History of India – Part I*, Eastern Book Company, Lucknow, 1993, P.131.

13. Satapada Brahmana V.16,10.

14. Taittiriya Samhita III, 1,2,57.

wife are referred to by several names such as husband is known as 'bhatri' because he supports his wife; he is also called 'pati' as he has the duty to protect her. The Mahabharata makes it clear that one must cherish woman as by doing so he virtually worships the goddess of prosperity herself and by afflicting her he afflicts the goddess of prosperity. Wife is not only half of her husband but she is also source of *Dharma*, *Artha*, *Kama* and even *Moksha*. In Ramayan, the wife is said to be the very soul of her husband. She is 'grihini' (the lady of the house) in her husbands household, 'sachiva' (wise counsellor), 'sakhi' (confidante) to her husband and dearest disciple of her husband in the pursuit of art.¹⁵ Her role is as 'dharmapatni' and 'sahadharmacharini'. Hence, both husband and wife were regarded as joint heads of household with female obedience at the centre of domestic bliss. An intellectual companions, friends and loving helpers in the journey of life they supported the partner in religious performance of duties. Hence, in the shastras it was prescribed that every Hindu must marry as the one who is unmarried was not competent to offer the ritual prayers and sacrifices. As a matter of fact, the duty of singing the mantras at the sacrificial ceremony was to be performed by the wife. She had to perform, like the husband, a special *upanayana* on the occasion of some sacrifices.¹⁶ The Ramayana provides us with instances wherein Sita is described as offering sandhya prayers i.e., ritual prayers which are offered with mantras in the morning, noon and evening. She was not seen as an obstacle in the religious path in fact her presence and co-operation were absolutely necessary in religious rites and ceremonies. It means that no religious ritual of Hindu Brahmins was supposed to be complete without the presence of the women. An incident of Ramayana is a proof of this fact wherein Lord Rama was performing "Ashvamedha Yajna" wherein his wife Sita was not with him and he

15. Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency, Faridabad, 1998, P. 58.

16. H.V. Sreenivasa Murthy, *History of India-Part I*, Eastern Book Company, Lucknow, 2003, P.114.

had to use the gold idol of his wife to compensate for her presence.¹⁷ This is evident enough that women used to enjoy high religious status and her presence was indispensable from the religious and spiritual point of view. Even the daughters were not unpopular in ancient India as they were allowed Vedic studies and were entitled to offer sacrifice to the God. The son was not absolutely necessary for this purpose.

(iv) Property Rights: - In the *Rig Veda*, the husband and wife are called “*dampati*” which indicates that the relationship between the sexes was based on reciprocity and autonomy in their respective spheres of activity. Both the husband and wife were joint owners of the property. Hindu women had right to inherit and possess the property.

Besides all the above rights, women during the *Vedic* period also attended the assemblies and state occasions and distinguished themselves in science and were considered as intellectual companions of their husband. She was not a mute participant in the affairs of the assembly in fact she enjoyed an equal voice with men. The *Vidatha* tradition of woman’s share in the public affairs can be traced in the place given to her in the list of *ratnins*.¹⁸ In the Taittiriya Brahmana there consists twelve *ratnins* out of which three, namely, *Mahisi*, *Vavata* and *Parivrikti* are women. This shows that one-fourth of those whose voice and support counted in the consecration of the king consisted of women.¹⁹

17. <http://www.mapsofindia.com/culture/Indian-women.html> [Visited on 27th Feb’ 2007].

18. H.V. Sreenivasa Murthy, *History of India-Part I*, Eastern Book Company, Lucknow, 2003, P.114.

19. R.S. Sharma, *Aspects of Political Ideas and institutions in Ancient India*, 79-81, [Quoted in H.V. Sreenivasa Murthy, *History of India-Part I*, Eastern Book Company, Lucknow, 2003, P. 1].

(C) POST-VEDIC PERIOD: -

Although the women were given footage in the Vedic society, we can not ignore the fact that as the Vedic age was progressing or we can say moving towards development and civilization the status of women started to deteriorate. It can be said that the post-Vedic period can be marked as the period from where the status of women declined in the Hindu society. Gradually the gender inequality crept in the society and the same women who held the status of goddesses and without whom no religious rights could be performed and whose opinion mattered even in political field was degraded to such an extent that she was deprived of not only her freedom but also basic rights which was given even to the 'shudras'. Manu who opined that where women are respected, divine graces adore that home himself gives a very contradictory opinion regarding the women in his "*Manusmriti*". The society was of view that women can not be left independent as she is fickle, quarrelsome, untruthful, a veritable pot of poison, therefore, she must remain under the control of man all her life.²⁰ Manu, who gave her a respectable place in the society, was also of view that if a woman doesn't confirm to the image which society has built for her than she should be beaten with a stick or rope as thick as one's thumb. We can say that society has an image for a woman and she had to mould into that image which was approved by the society. As far as she confirms to that image or does not deviates from the said image she shall be worshipped, but wherein she deviates herself from it she would be liable for punishment. Saint Tulsi Das also in his world famous epic "*Ram Charit Manasa*" declares that if women are liberated they shall become corrupt [*Jimi swatantra bhaye bigarahin Naaree*]. He even declares that the women

20. Gangotri Chakraborty, *Emerging Necessities of Gender Balance in law*, in Nirmal Kanti Chakrabarti and Shachi Chakrabarti's, *Gender Justice*, R. Cambray and Company Pvt, Ltd., 2006, P. 20.

deserves beating or punishment like and animal “*Dhol, ganwar, shoodra, pashu naaree sakal tadana ke adhikaaree*” which means that drum, rustics, shudras, animals and women, all deserve beating.²¹ These incidences are enough to provide us the picture of status and position of women in Hindu society in the ancient India which changed from better to worse.

OTHER RELIGIONS: - During the post-Vedic period the status and position of women in the Hindu society (which was the only religion practiced in India at that period) deteriorated to such an extent that in the society her status was not better than the slaves. Umpteen times she has been regarded as the source of all the sins of the world and is blamed for misfortunes to men in the world. In fact, it is also believed that women can not get salvation, in order to gain it she has to be incarnated as men. The *Rig Veda* is evident enough to provide us with incidences wherein women participated in political activities and no religious ritual was complete without her. However, with time this too underwent a surge of change and some religious cult not only prohibited the women to read the religious scriptures but also denied any religious rights of women to participate in any religious practices. These practices hindered and obstructed the upliftment of women in the society she was subjected to extreme discrimination and degrading attitudes. This was also the period where other religions (which can be said to be the branches of Hindu religion) started to flourish in India giving women a new lease of life as they provided a new outlook and attitude towards women. Out of these there are two distinct religions, i.e., Buddhism and Jainism, which developed and worked towards the better status and position of women in the society. It would be better if we discuss the status and position of women under these religions.

21. Manjula Batra, *Women and Law and Law relating to Children in India*, Allahabad Law Agency, Faridabad, P.3.

(i) **BUDDHISM:** - Buddhism flourished under the guidance of Lord Buddha. Buddhism can boast to be the only religion which provides the least discriminatory attitude towards women. Buddha made his appearance in India at that period wherein women were considered inferior to men – both physically and mentally. She was looked down upon as a mere possession or a thing. Though husband could marry as many times he wishes to wherein his wife fails to bear child or wherein no male child is produced by her but the same liberty was not given to women. Even her religious rights were denied. In fact, it can be said that Buddha was the first religious teacher who gave women equal and unfettered opportunities in the field of spiritual development. He made them eligible for admission to “*Bikkhuni Sangha*” – the Order of Nuns. By doing this he not only provided them with religious freedom but opened new avenues of culture and social service and ample opportunities for public life. It also brought recognition of their importance to the society and enhanced their social status.

In the Hindu society there were many practices, superstitious beliefs and meaningless rights and rituals which resulted in social injustices and prejudices that were rampant against women. Buddha by his teachings tried to extinguish such belief and thoughts. He gave emphasis upon ‘*Karma*’ (one is responsible for their own actions) and ‘*sansaric wanderings*’. This gave rise to considerable changes in the societies view towards women. Unlike any other religious teacher, Buddha paid a glowing tribute to women. He considered them to be more discerning and wise than men and also considered them capable of attaining perfection or sainthood.

According to Buddhism women had liberty to lead an independent life and go about their own business. Unlike the Brahmin’s, Buddhism didn’t believe in view that a son was essential for father’s passage to

heaven. Daughters became quite as good as sons and marriage was no longer a compulsory necessity.

However, these ideas providing freedom to women under Buddhism was short lived as the admission of women into the Order was a step too advanced for that period. The people were also unable to adapt themselves to the improved conditions and to top it all the Brahmins found that by such ideas their caste system will be undermined. These were the factors that caused the decline of the Order. Although Buddha elevated the status of women socially he also pointed out that though men and women are equal, their roles in the society as well as in family are different. This attitude can also be seen in the separation of monks and nuns. According to a rule ascribed to the Buddha, "*a nun even if she has been ordained for a hundred years, must salute every monk in the most reverential manner, even if he has only just joined the Order, must remain standing in his presence, raise folded hands and show him due honour.*"²² These incidents show that though Buddhism provided certain freedom to women but did not favour structural equalities.

Apart from all this we can not deny this fact that Buddha is considered as the first emancipator of women. Due to *Buddha-Dhamma* women were not despised off or looked down but were given equal status as that with men in their spiritual endeavors to gain wisdom.

(ii) JAINISM: - The origin of Jainism could be traced back to the ninth century B.C. The teachings of Jainism are attributed to *Parshvanatha* (the twenty-third *tirthankara*, who belonged to a royal family of Benaras) who gave up royal life and became an ascetic. However, it is *Vardhamana Mahavira*, his spiritual successor who is considered as the real founder of Jainism. Apart from some of

22. Albet Schweitzer, *Indian Thought and its Development*, 100.

the social issues like the sexual relationship, marriage, family, varna system etc, the Jain acharyas also discussed the role and status of women in the society. Jain acharyas accorded women an equal status to men. Tirthankara Mahavira made a distinctive contribution for raising the status of women in the society. During the post-*Vedic* period women partially had no place in the religious life of the society. She was neglected and was degraded by the people. Lord Mahavira removed the restrictions which were imposed on women. Under Jainism both the sexes were given equal opportunity in the matters of religion like the study of scriptures, observing the necessary duties, practice of '*vratas*' i.e., vows, entrance into ascetic order, practice of penance, making spiritual progress etc. It is stated that in Tirthankara Mahavira's fourfold religious order there were about 14000 *sadhus* (male ascetics); 36000 *sadhvi* (female ascetics); 1,00,000 *shravakas* (male householders) and 3,00,000 *shravikas* (female householders).²³ This shows that the female members outnumbered the male members in both the categories. This proves that the Jainism gave more priority to women than the men. Mother's of Tirthankaras are given special honour through communal worship.

Apart from religious freedom, equality of opportunity was accorded to women in several social spheres of action. In the field of education too women were given equal treatment. Infact, the importance of education was realized by *Rishabhadna*, the first Tirthankara. He advised his two young daughters, Brahmi and Sundari that "*only when you would adorn yourself with education your life would be fruitful because just as a learned man is held in high esteem by educated persons, learned lady also occupies the highest position in female world.*"²⁴ It is also said that he have imparted the knowledge of language

23. <http://www.jainworld.com/book/lifelegacymahavirs/index.asp> [Visited on 19th July 2007].

24. *Ibid.*

and mathematics to his daughters first and only then to his sons.²⁵ Jain women not only kept up the pace of female education but also made original contributions to literatures. The greatest name among them was Kanti who was one of the gems that adorned the court of Hoyasala King Ballal I (A.D. 1100 – 1106) in Karnataka. She was a redoubtable orator and poet. Similarly, a Jain lay Avviyara was also the most admired poet in Tamil language. Thus, Jain women are celebrated not only for their learning and their exceptional contributions in the field of education, culture and religion but they also excelled in the political field and proved themselves as remarkable warriors.

2. MEDIEVAL INDIA: -

Medieval India was not women's age it is supposed to be 'dark age' for them.²⁶ During the medieval period India saw many foreign conquests which resulted in deterioration of women's status in the society and their subjugation in the religious as well as legal sphere. With invasions of India by Alexander and the Huns, the position of women further degraded.²⁷ Due to these invasions her position was reduced to that of 'war prison'. Women were considered to be inferior to men and their place was at home. The identity of women remained that of wife, mother and daughter, apart from this she did not had any significant role. The advent of Mughals brought changes in the society of India since they brought with them their own culture. As a result of this the medieval Indian society was divided into religion and their respective customs, i.e., of Hindus and Muslims. The study of the status and position of women in medieval Indian society can, hence, be studied under the following heads: -

25. V.K. Dewan, *Law relating to Offences Against Women*, Orient Law House, New Delhi, 1996, P.35.

26. <http://www.mapsofindia.com/culture/Indian-women.html> [Visited on 23rd April 2007].

27. Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, 2005, P.21.

- (a) Under the Hindu society, and
- (b) Under the Muslim society.

(a) Under the Hindu Society: - The position of Hindu women was deteriorating since the post – Vedic period, but with the advent of Muslims in India, the Hindu society became more strict and rigid which resulted in further decline in the status and position of women in the society. As it is women were suffering from religious disabilities, the advent of foreign invader's put a sudden halt in their education and training too. In fact, there was decline in the literacy rate among Hindu women. They had to follow strict social observances and if violated they were severely punished. This rigidity or strictness in Hindu society gave rise to many social evils in the society which worked against women. One of the prime reasons of such rigidity can be that the original Indians wanted to shield their women from the barbarous Muslim invaders. In order to protect themselves the Hindu women started to use '*purdah*' (a veil) which covers body. This may be the reason that their freedom got affected. In order to protect their women Hindu's restricted their free movement which led to further decline in their status. Such problems changed the mindset of people. The people who used to regard girl child as a gift of goddess *Lakshmi* (the goddess of prosperity) began to consider a girl as a misery and a burden, which has to be shielded from the eyes of intruders and needs extra care. As a result girl child was not welcomed in the family. Birth of a daughter was considered inauspicious. Due to these beliefs the society started to practice female infanticide. Another misery which women had to face was that of child marriage. The said problem also reduced the age of marriage for girls. The girls were married off at the age of 8-10. They were not allowed access to education and were treated as the material being. The child marriage brought some more problems along with it such as increased birth rate, poor health of women

due to repeated child bearing, and mortality rate of women and children. The early marriages of girls resulted in explosion of child widows in the Hindu society. The condition of widows in medieval India was very bad. They were subjected to a lot of restrictions, such as, they were supposed to live pious life after their husband's death, were not allowed to enter any celebration, their presence in any good work was considered to be a bad omen, they were not allowed to remarry etc. In some of the cases their heads were shaved off. In the medieval India living as a Hindu widow was a sort of a curse. Another evil practice which was prevalent in medieval India was '*sati*' or '*sahagaman*'. It is the ritual of dying at the funeral pyre of the husband. There are incidents in the history which throws some light on this practice. The Rajput women preferred death to dishonour and performed '*jauhar*' in large numbers. This is attested to by the numerous '*satisatta*' stones found today in different parts of Rajasthan. They are similar to the '*mastikals*' or '*mahasatikals*' found in Karnataka.²⁸ Though this practice was not obligatory for women but if she practiced it she was highly respected by the society. *Sati* was considered a better option than living a life of a widow in the Hindu society.

Along with all these evil practices, the medieval India also saw rise in another practice which with time took an evil face i.e., dowry system. With time this custom took the face of an obligation on the part of the bride's family and was demanded by the bridegroom. There are instances mentioned in history wherein the marriages were broken due to unfulfillment of dowry and bridegroom marrying a women having more age than him. The menace of dowry grew during this period. It grew so much so that Akbar made reformation against the dowry system.

28. H.V. Sreenivasa Murthy, *History of India – Part I*, Eastern Book Company, Lucknow, 2002, P. 250.

Despite the above evil practices women had right to inherit the property of her husband and widow's too had right to alienate her estate. The scope of '*stridhan*' was expanded to include all kinds of property. In normal times the husband was not allowed to touch the property of his wife. However, Hindu women did not have honour to be the coparcener in the family property which may have resulted from all the imposed traditions and cultures of the society.

(b) Under the Muslim Society: - In the medieval India it was the Muslims who invaded India and it was their customs which paralyzed the Indian women in India for the said period. The status and position of Muslim women were in no way better than their Hindu counterparts when compared. In India, the Muslim followed the older traditions of ancient Persians which gave women an inferior position in the society. Strict veiling of women was the common practice among the Mohammedans in their native lands. Naturally in a foreign county like India, greater stress was laid upon it.²⁹ As the outsiders the Muslim men confined their women in between the four walls of the house and even if they stepped out of their house they had to come out in the '*burkha*'. This '*purdah system*' was imposed on them. In fact, a girl begins to observe seclusion as soon as she reaches the age of puberty. Muslim women had to follow the '*purdah*' very strictly. If, for any reason, a Muslim lady of rank discarded *purdah* even for a temporary period, the consequences for her were disastrous.³⁰

Although the religion which Muslim follows is Islam which is a democratic religion, however, in practice the women were treated as second class citizens. Women under the Muslim society did not enjoy any religious freedom or equality. She was not permitted to join men in general worship of the

27. The History and Culture of the Indian People-Vol VII [*The Mughul Empire*], Bhartiya Vidya Bhawan, Bombay, 1994, P.699.

30. *Ibid.*

God nor could take part in public life. Even the education to women was denied in the Muslim society, only few had any education. In relation to the marriage the men were allowed to marry more than one wife. A Sunni Muslim was permitted to have four wives at a time, while a Shia Muslim had the liberty to have even more wives than four.³¹ As polygamy was a norm for these invaders they picked up any women they wanted and kept her in their 'harems'.³² Under the Muslim personal law women had right to hold the property and to obtain divorce, but in reality she hardly could take any advantage of such rights. Not only this she was also denied any maintenance allowance by her husband. Basically she was a slave to her husband. However, this fact cannot be ignored that Muslim women in India have excelled not only in the field of education but also in the field of politics despite such rigid customs which was followed by the Muslims in the medieval period. The history shows the instances of *Razia Sultana* who was the sole woman ruler of the Muslim history in India and how men were not prepared to reconcile to the rule of woman. There are other instances like that of *Chandbibi*, *Begums of Bhopal* and Mughal princesses like *Jahanara* and *Roshanara* who played an active part in politics from behind the veil. These were the exceptional women who defied the rules and customs of then India. Even in the field of literature the names of Mughal royal household like *Gulbadan Begum* (daughter of Babur) who wrote 'Humayun – nama', *Jahanara* (daughter of Shahjahan) and *Zeib-un-Nisa* (daughter of Aurangzeb), who were poetesses. Besides these incidents, history is evident that Akbar did make some vital amendments in the personal laws of Muslims, especially in those relating to marriage and divorce. For example, he ordered that a man should marry only one wife, and that if she were barren, he

31. H.V. Sreenivasa Murthy, *History of India – Part I*, Eastern Book Company, Lucknow, 2002, P. 251.

32. <http://www.mapsofindia.com/culture/Indian-women.html> [Visited on 23rd April 2007].

could marry another. But normally the rule was 'one man, one wife.'³³ One more step which Akbar took was that no one should marry a woman who was 12 years older than himself and boys below 12 years of age should not be circumcised. This law was enacted because of the menace of the dowry system which gripped the Indian society during the medieval period. He also interfered with the personal laws of Hindus and made regulations relating to the age of marriage for boys and girls. Irrespective of the religion i.e., whether Hindu or Muslim he also made monogamy applicable to members of both the communities. He also took steps against the 'sati pratha' by allowing widow remarriages.

SIKHISM AND RIGHTS OF WOMEN IN MEDIEVAL PERIOD: -

The medieval Indian society was gripped with a serious crisis as the society was divided into two religions i.e., among Hindus and Muslims. There was in fact a gap between these two religions which resulted in the deterioration of status and position of women in India. Many historians believe that foreign invasions into India created a situation, which considered unsafe for Indian women specially the Hindu women. This subjugated the women further because they then became victim of unequal power equation.³⁴ In order to improve the situation of the society the honest attempts were made by the Bhakti saints to bridge the gulf between the two communities and to some extent they became successful to bring in the social reforms. Sikhism was one of the Bhakti cults which tried to improve the situation of the society. It can be said that Sikhism was a reaction against the oppression of the Muslims. Another factor which gave rise to the growth and development of Sikhism was the iniquitous barriers between

33. The History and Culture of the Indian People, Vol VII [*The Mughul Empire*], Bhartiya Vidya Bhavan's, Bombay, 1994, P.540.

34. Gangotri Chakraborty, *Emerging Necessities of Gender Balance in Law*, in Nirmal Kanti Chakraborti and Shachi Chkrabarti's, *Gender Justice*, R Cambray and Company Pvt. Ltd, P.20.

man and man which were built by the Hindu society through its caste-system. The Sikh Gurus laid down a healthy, egalitarian and progressive social order. These gurus advocated the principle of universal equality and brotherhood which transcended the narrow considerations of caste, creed, time, sex and colour. According to Sikh gurus women are equal to men in every field of life and they preached the public for equal rights and privileges for women – both in religious and socio-political fields. Unlike Hinduism, Sikhism does not debar women from attaining salvation. She can realize the highest religious goal while remaining a woman. She is not debarred from reading the scriptures and can also act as priest, conduct the service and lead a prayer in the *gurdwara*. She can join any congregation without any inhibition and restriction. She doesn't have to veil herself while sitting in a congregation. She can receive as well as impart baptism. She enjoys equal religious rights.³⁵ Guru Amardas opened 22 centres called "*Manjis*" and to manage them, he appointed 35 men and 52 women.³⁶ He not only assigned women the responsibility by supervising the community in certain sectors but also invested them with the office of preacher ship and missionary work. Women received great consideration from Nanak. She was given equal status with man. She was allowed to attend his sermons along with men. '*Purdah*' was discouraged. Women joined in the chorus in singing hymns. For '*langar*' men brought provisions and fuel wood, while women cooked food. Men and women both served meals to the '*pangat*'. Nanak condemned '*sati*' or the custom of self-immolation of widows on the pyres of their dead husbands.³⁷

The basic tenets of Sikh religion provide that women have full freedom for worship, education and vocation. She may work in a field or a

35. <http://www.allaboutsikhs.com/articles/role-and-status-of-women-in-sikhism.html> [Visited on 19th July 2007].

36. V.K. Dewan, *Law relating to Offences Against Women*, Orient Law House, New Delhi, P.35.

37. *The History and Culture of the Indian People*, Vol VII [The Mughul Empire], Bharatiya Vidya Bhavan's, Bombay, 1994, P. 659.

factory or go to the battlefield as a soldier. In fact, the Sikh history records with appreciation the historic deeds performed by some of the Sikh women, for example; Mata Gujri, Mata SahibKaur, Mai Bhago, Mai Sada Kaur, Maharani Jind Kaur and Maharani Sahib Kaur who not only participated in political affairs but also war affairs of the Sikhs.

As per Sikhism, women must be treated with a difference as she is the source of man's physical existence and his entire social life. The Guru said: "*How can they be called inferior when they give birth to great men? Women as well as men share in the grace of God and are equally responsible for their actions to Him.*"³⁸ As a matter of fact, the Sikh gurus denounced all those practices and restrictions which tended to reduce women to a position of inferiority. Hence, Sikhism regarded that man and woman complement each other which means that one is incomplete without the other. Sikhism under the guidance of Guru Nanak did not criticize any religion but stressed on this fact that woman play a useful role in a society. He also tried to remove this false notion that women were unclean, a source of sin, an evil or a seductress, and considered them as a respected member of the society. Overall, under Sikhism the women had a very significant role in the society and her status was equal to that of man.

3. PRE – INDEPENDENT INDIA: -

There were many intruders before the British who came to India and settled within her frontiers, adopted her superior culture and became a part of its land and its people. However, the British conquest over India had totally a different impact over Indian society and its culture from what India had known before. In contrast to Europe, which was in the vanguard of civilization in the 18th

38. Quoted in *The History and Culture of the Indian People*, Vol VII [*The Mughul Empire*], Bhartiya Vidya Bhavan's, Bombay, 1994, P. 659.

century, India presented the picture of a stagnant civilization and a static and decadent society. Thus, for the first time, India encountered an invader who considered himself racially superior and culturally more advanced.³⁹ When British entered India, the Indian society was basically divided into two religions – Hindu and Muslim. Both the religion had diverse systems of law. The Hindu community had their own law and the Muslim community had their own. Similarly the various tribes had their own law. Hence, there was no uniform law applicable to the people in general.

The Indian society was bowled over by the new western ideas and values in life introduced by this new ruler i.e., the British. As a result of this western impact over the socio-cultural life and due to the impact of education, the attitude, behaviour and living pattern of Hindu society changed. The advent of the British rule in India was the first time resulted in a conscious effort to tackle the instance of violence against women.⁴⁰ Initially the British Policy was not to interfere in the country's social and religious customs and the problems arising out of it as the East India Company was basically concerned with trade and commerce as well as spreading the rule of the Queen. However, gradually their non-interference policy was replaced by a more active approach towards identifying the need for reform. Moreover, the English-educated Indian welcomed modernity provided by the British and firmly believed that if such modernity is introduced to the Indian society, it would get rid of the barbarism existing in the Hindu society and could bring an era of civilization.

During the British Regime, apart from the efforts made by efforts made by the Governor-Generals of India to eradicate the social evils from

39. B.L. Grover and S. Grover, *A New Look at Modern Indian History*, S. Chand and Co. Ltd, New Delhi, 2003, P. 392.

40. Vijender Kumar, *Law Relating to Domestic Violence*, S.Gogia and Company, Hyderabad, 2007, P. 22.

the society generated against the women, the educated youths of Indian society brought two major movements – the Social Reform Movement of the 19th century and the Nationalist Movement of the 20th Century. Both these movements brought forward the question regarding the equality and the status of women in the society.

At the beginning of the 19th century there were numerous social evils existing in the society which were tolerated partly out of veneration for old customs and partly out of sheer inertia. With the conquest of British and English education some of the educated youth developed a revulsion against the subsisting social evils of the Hindu religion which were counter to the practices observed in the old times. Hence, the Indian leaders stimulated by the new knowledge sought to reform Hinduism from within and sought to purge it of superstitious beliefs and practices.

In the 19th century it can be seen that the Hindu society was going towards gradual but steady degradation in the position of women which attracted the attention of the Social Reformists. The degrading position of women in Hindu society at the beginning of the 19th century was indeed most deplorable. It was a long tale of suffering and humiliation almost from birth to death.⁴¹ These social evils were infanticide, early marriage, less educational facilities to women, *Sati*, no right over inheriting the property of husband, prohibition of remarriage of widow, polygamy, and various other absententions enforced upon women. With the help of the British Government, the reformists like Raja Rammohan Roy, Ishwar Chand Vidyasagar, M.G. Ranade, Mahatma Phule, Lokhitwadi, Aurobindo and others all over India raised their voice against the unjust practices of Hindu religion while revivalists like Dayanand Saraswati, Swami Vivekanada and Annie Besant believed in reviving the old Vedic society presumed to the ideal for

41. The History and Culture of the Indian People, Vol X [*British Paramountcy and Indian Renaissance (1818-1905 A.D.)*], Part II, Bhartiya Vidya Bhavans, Bombay, 1990, P. 26.

women. In order to know the significant works done by these reformists as well as revivalist with the help of the Britishers in the area of improving the degrading position and status of women in the society we must study each social evils against women separately and the reforms made by the reformists and revivalists in the respective fields. They are: -

(a) Sati: - The *Sati pratha* or self immolation was one of the worst and the most highlighted social evil brought by the Hindu society. Even before the British there were some Indian princes who had taken steps to abolish this cruel practice. The Indian rulers such as Akbar, the Marathas and the Peshwas had also taken steps towards the abolition. Although the East India Company adhered to its declared policy of non-interference with the social customs of the people of India, yet the early Governor-Generals like Cornwallis, Minto and Lord Hastings took steps to restrict the practice of sati by discouraging compulsion, forbidding administration of intoxicating drugs to the sorrow-stricken widow, putting ban on the burning of pregnant women or widows below 16 years of age and, above all, making compulsory presence of police officials at the time of sacrifice, who were to see that no compulsion was used.⁴² However, these restrictions proved to be inadequate and unsuccessful. It was the social reformist Raja Rammohan Roy (the founder of Brahma Samaj) who urged William Bentinck (then the Governor-General of India) to take necessary steps and declare sati as an illegal practice. As a result of this William Bentinck in Dec' 1829 declared sati an illegal practice and made it punishable by criminal courts as culpable homicide. However, the Regulation of 1829 was applicable to Bengal Presidency alone but later on was extended with slight modification to Madras and Bombay Presidencies in 1830.

42. B.L. Grover and S. Grover, *A New Look at Modern Indian History*, S.Chand and Co, Ltd., New Delhi, 2003, P. 183.

(b) Infanticide: - This was another horrible and cruel practice among the Hindus wherein the infant daughters were killed at their birth itself. Moreover, unlike the *Sati* system the practice of killing of infant girls had no religious sanction behind it. All over India this practice was more prevalent in Bengalis and the Rajputs as among them the birth of daughter was considered to be inauspicious. Another reason may be that in the certain tribes of Rajputs the marriage between the families of same clan or tribes was not allowed as a result the girl was given in marriage to a person outside ones clan which required social customs and conventions and in return it demanded a very heavy expenditure on the marriage ceremony. A Rajput was often heard to say "*accursed to the day when a women child is born to me.*"⁴³ To make the things worse if the parents could not marry off their daughters it was considered a social disgrace as well as violation of religious injunctions. In order to avoid such burden certain tribes started to practice killing their infant daughters at their birth. The Britishers as well as the reformists were of unanimous opinion of condemning infanticide. In 1785 the Bengal Regulations XXI and III of 1804 declared infanticide illegal and made it equivalent to committing a murder. Even the Government of India passed an Act in 1870 making it compulsory for parents to register the birth of all babies and providing for verification of female children for some years after birth.

(c) Remarriage of Widows: - The abolition of *Sati* is incomplete without widow remarriages which was although not prohibited in the Hindu religion, but was not prevalent among the Hindus. The Brahmo Samaj debated the question of widow remarriage and popularized it among the Brahmos. This had a great repercussion on the orthodox Hindu society. Even Ishwar Chandra Vidyasagar, a renowned Sanskrit scholar and Principal of the Sanskrit College, Calcutta, dug up old

43. Quoted in the History and Culture of the Indian People, Vol VII [*The Mughul Empire*], Bhartiya Vidya Bhavans, Bombay 1990, P. 699.

Sanskrit references and proved that vedic texts sanctioned widow remarriage. He sent a petition signed by 987 persons to the Government of India urging it for legislative action. As a result the Hindu Widows Remarriage Act, 1856 was enacted which legalized the widow remarriages. Despite this in Bengal widow remarriage reforms achieved little success.

In the Western India, Prof, D.K. Karve took up the cause of widow remarriage and in Madras Veerasalingam Pantulu made huge effort in the same direction. Prof. Karve not only devoted his entire life to uplift the Hindu widows and became the Secretary of the Widow Remarriage Association; he also refused to marry a teenager and married a Brahmin widow in 1893.

(d) Child Marriage: - Another reason for the degrading position of women in the Hindu society is the early marriage of the women. This not only increased the number of widows in the society but also aggravated the problem of *sati* in the society. In order to stop this practice legislative action in prohibiting child-marriage came in 1872, popularly known as Civil Marriage Act, wherein marriage of girls below the age of 14 and boys below the age of 18 years was forbidden. This Act was passed on account of courage and perseverance of Kasha Chandra Sen. However, this legislation was not applicable to Hindus, Muslim and other recognized faiths. As a result a Parsi reformer of the 19th century, B.M. Malabari, started raise his voice against child marriage and ultimately legislation was enacted which prohibited marriages of girls below the age of 12 years. The Act was called Age of Consent Act, 1891. The Sharda Act, 1930 further raised the age of marriage and provided that whoever will solemnize marriages of boys under 18 years and girls under 14 years of age will be punished.

(e) Abolition of *Purdah* System: - Seclusion of women by way of *purdah* system has been vehemently criticized by many eminent scholars. In fact, this system was

the main root cause for women's degrading position in the society as well as inequality in the religious, political as well as the social fields. The observation of *purdah* was basically practiced by the Muslim women but gradually the Hindu women too started to practice it or rather such practice was imposed on her. Although this social cause did not take much importance with the reformists as well as the British rulers, yet many worked towards abolishing this social evil. Gandhiji attacked the *purdah* system and have said, "*The sight of the screen made me sad. It pained and humiliated me deeply... Let us not live with one limb completely and partially paralysed... Let us tear down the purdah with one mighty effort.*"⁴⁴ The All India Women's Conference was established in 1927 and it too denounced the practice of *purdah* system and emphasized it as a social evil. Gandhiji also appealed to women to come out of their veil and participate in the nationalist struggle by picketing and spinning. The civil disobediences in thirties liberated the women from the oppressive custom of *purdah*.⁴⁵

(f) Polygamy: - Along with the above mentioned social evils which a woman had to go through, one more social practice which not only demeaned the woman's pride but also subjected her status in the society as that of chattels was the practice of polygamy or marrying more than one wife. On the one side, women were subjected to a barbarous as well as cruel practice of *sati*, and were prohibited to remarry even after the death of their husbands. On the other side, men could marry as many wives as they could not only after the death of their wife but also during the life time of his wife. Husbands were also permitted to keep the concubines. Although the social reformists fought against this social evil too but no legislation prohibiting such practice was passed by the Government of India.

44. Quoted in B.L.Grover and S. Grover, *A New Look at Modern Indian History*, S. Chand and Co.Ltd, New Delhi, 2003, P. 409.

45. Baidyanath Choudhury, *Human Rights and women in India*, IX CILQ 378 (1996).

(g) Denial of Education: - History is evident enough to prove that women had attained high education during the Vedic period. However, gradually till the period of the 19th century the situation of female education was practically unknown in most parts of India. Education to girls was discouraged. This was the greatest evil among all from which the women in the Indian society suffered. Women were denied educational right partly due to early marriage and partly due to superstitious belief that an educated woman is fated to become a widow.

The first effort towards female education was made by the Christian missionaries, almost immediately after the restrictions against missionary work in this country were removed by the Charter Act of 1813.⁴⁶ These Missionaries was inspired by the zeal of spreading gospel among the natives however, they thought that first of all it is necessary to eradicate the superstitions and idolatry from the minds of the Hindu women. Whatever may be the motive of these Christian missionaries but they were the first one to establish schools in India for educating girls. These schools could not attain success as the most necessary thing for the improvement of female education was to remove the prejudices against it from the minds of the people.

The social reformists too worked towards providing education to the girls. Raja Rammohan Roy, the founder of Brahmo Samaj, was the great defender of women's rights and some of the prominent members of the samaj started journals for the promotion of education and culture among women. The Arya Samaj made arrangements for women's education through institutions like "*Mahakanya Vidyalaya*" at Jullunder in the Punjab, and some others started here and there.⁴⁷ The Prarthana samaj and the Deccan Education society too made

46. The History and Culture of Indian People, Vol X [British Paramountcy and Indian Renaissance (1818-1905), Part II], Bhartiya Vidya Bhavan's, 1990, P. 284.

47. *Ibid*, P. 66.

important contributions to the cause of female education. An attempt in this direction was made by Pandit Gaurmohan Vidyalkar, who wrote in 1822 a pamphlet entitled '*strisiksha-vidhyaka* wherein he quoted numerous examples producing beneficial effect upon the intellectual and moral development of women and domestic peace and happiness. The most important landmark in the history of women's higher education in Bengal was the foundation in May, 1849, of a school in Calcutta by J.E.D. Bethune, whose name will be forever remembered as a great patron of female education.⁴⁸ Ishwar Chand Vidhyasagar too rendered his services to the cause of women's education in Bengal. He also opened thirty-five schools in Bengal to educate girls between November, 1857 and May, 1858. In Bombay the women led a comparatively free life as *pardah* was not practiced by the Marathas. Both in Bombay as well as in Poona English-educated men started to spread education to girls through schools. In fact, Jotiba Phule, a social reformist, took up the cause of women and downtrodden masses. In 1851 he opened a girl's school in Poona with the assistance of his wife. Despite the vigorous support of female education and work done for the said purpose the spirit of hostility against it continued among certain sections of people. *Purdah* system is also considered to be a great obstacle to girls attending schools. The Parsi community of Bombay too felt the need of such education.

The policy of the British Government in relation to women's education in India was still one of caution. Lord Canning's government declared that government cannot take such initiative in the matter of girl's education as the girls school was mainly supported by voluntary aid and the government used to encourage these schools by only giving grants-in-aids. After reviewing the situation regarding the female education in India the Education Commission of 1882 remarked that it was still in "*an extremely backward condition, and that it*

48. *Ibid*, P. 291.

needs to be fostered in every legitimate way."⁴⁹ After this the government of India granted aids liberally to the development of girl's school for the emancipation of female education. Not only the higher secondary education but the girls also started to receive college/university education after this. By 1901-02 there were 12 female colleges.

Women's participation in Politics and its impact on the status and position of the women in the society: -

The entire history of the struggle for freedom is incomplete without mentioning the active participation of women. Their courage, leadership and initiative not only displayed their political involvement for independence from colonial rule but it also gave them for reaching importance in the Indian society. There were many prominent women played a leading role in the freedom movement. During the uprising of 1857, women of the ling class came together along with men to fructify their ambition for an independent India.⁵⁰ The names of Maharani Ahilyabai Holkar, the famous Rani Lakshmi Bai of Jhansi who fought valiantly and led her soldiers to war against the British, and Begum Hazrat Mahal who is also remembered as the Begum of Oudh took active part in defending Lucknow against the British, are some of the examples of women who lit the candle of women's participation in the freedom movement. However, it was the later half of the 20th century wherein the struggle for freedom gained momentum and the participation of women increased for the said cause.

Women's role in the National Struggle for freedom is not restricted to non-violent *Satyagraha* Movement only; they also took active participation in violent or armed revolution. Women's early contribution to the

49. *Ibid*, P. 67.

50. <http://nrcw.nic.in/index2.asp?sublinkid=451> [Visited on 26th August 2007].

national movement started in the late 19th century with women's participation in the Indian National Congress. The National Movement for Independence took an important turn with the partition of Bengal in 1905, wherein women joined men in protesting the division by boycotting foreign goods and buying only those goods produced in the province of Bengal. Mrs. Nonibala Devi joined the new '*Jugantar*' party which was dedicated to violent movement in the early 20th century. Another form of National Movement for freedom started under the guidance of Shri Mohandas Karamchand Gandhi, who called women to join the "*Satyagraha*" Movement. This increased the participation of women in National Movement for freedom. There were some important women who played a very active role in the '*Swadeshi*' Movement. Gandhiji encouraged women to participate in the political movement of India. According to him no nation can prosper without the equal participation of women and men. Swami Vivekananda too in the last decade of the 19th century gave a tremendous impetus to the emancipation of women from seclusion and bondage. He had said that "*The countries and the nation which did not respect women have never become great nor will ever become great in future.*"⁵¹ Dr. Sarojini Naidu who joined the Home Rule movement launched by Annie Besant joined the Indian National Congress in 1915 and propounded the idea of Swarajya in her powerful speech at the Lucknow Conference in 1916. In 1921 she participated in the non-cooperation movement launched by Gandhiji and became the President of the Congress in 1925. She became the principal assistant of Gandhiji when he started his Civil disobedience movement in 1930. She was arrested but this did not deter her spirits and in 1942 she joined Quit India Movement launched by Gandhiji. The repeated jail terms only gave her more courage and she continued to take active part in the freedom movement. In the leadership of Sarojini Naidu women submitted a deputation in

51. Baidyanath Choudhury, *Human Rights of Women in India*, IX CILQ 376-378(1996).

Dec' 1917 wherein a memorandum to Montague demanding the voting facilities for women. As a result of this the British Parliament appointed a Committee Southborough Committee in 1918 to make recommendation regarding franchise and ultimately the Provincial Legislative Councils accepted the right of women for franchise. By the 20th century the Indian history saw the rapid entry of women into politics especially after 1919. Sarojini's daughter, Miss Padmaja Naidu, too played a great role in the freedom movement. Kasturba Gandhi, the wife of Gandhiji, too contributed to the freedom movement in a subtle manner. The names of Swarup Rani and Kamala Nehru (mother and wife of Jawaharlal Nehru) is worth mentioning as they gave their children and husband for the country's cause. Very few knows about the tales of bravery of Smt. Kamala Nehru when she faced lathi-charges, picketed liquor shops and languished in jail for the cause of Indian independence. Vijay Laxmi Pandit (sister of Jawaharlal Nehru) too played an important part in the freedom movement. Smt. Indira Gandhi's name is worth mentioning as she was the most remarkable women in modern India who participated actively in the national liberation struggle from her early years. During the 1930 movement she formed the "*Vanar Sena*" (a children brigade) to help freedom fighters. She also became a member of the Indian National Congress in 1938 and plunged into politics actively in March 1941. Besides them there were women not only from educated and enlightened families who joined Gandhiji in his non-cooperation movement but women belonging to rural areas too joined him for the said cause. In fact, women who joined the national movement were not only from the higher strata of Indian society, but from all walks of life, all castes, religious and communities. Overall the effect was that women's participation in the freedom movement made them come out of their shell and actively participate in the political revolution of the country.

Apart from the above mentioned women who participated in the non-violent movement of Gandhiji, there were some women of Bengal and other parts of India who played a key role in the armed revolution. Women played a major role in the Lahore Student's Union of Bhagat Singh and the Kakori Case. The *Mahila Rashtriya Sangha* was set up in 1928 by Latika Ghosh, an Oxford educated teacher. Veena Das who shot at the Governor of Bengal, and Kamala Das Gupta and Kalyani Das were all active within the revolutionary groups. In April 1930, the Indian Republican Army, a revolutionary group led by Surya Sen, attacked the city armoury of Chittagong. Kalyani Das, Priti Lata Waddedar, and other women were part of this revolutionary attack. Women fearlessly participated in violent and non-violent movements.⁵² Women even took part in the Indian National Army (INA), established by Netaji Subhash Chandra Bose. As a matter of fact he recruited about 1000 women for the Rani of Jhansi Regiment from different South East Asian countries, which was led by no other than Dr. Lakshmi Swaminathan. Women as young as 17 years of age were members of INA. These women were given same training as that given to men. Even their uniform was similar to that of men soldiers. INA has left a psychological impact on the women of India.

Besides the Indian women some of the British women too actively participated in the emancipation of women in India from the political aspect while fighting for its independence. In 1917, Annie Besant enlightened the British women who were settled in India since 1803 and launched the Home Rule agitation for the liberation of women. She was also elected the President of the Calcutta Session of the Indian National Congress. The Nagpur Session in 1919 was attended by about 200 women which was a striking evidence of the political awakening of the Indian women. Apart from her Sister Nivedita, though was born

52. <http://nrcw.nic.in/index2asp?sublinkid=451>[Visited on 26th August 2007].

in Ireland was impressed by the ideals of womanhood in India and remarked it to be the land of great women which in the British India gone through many stages of deterioration. In order to uplift their status in the society she not only attended the Benaras Congress but also supported the Swadeshi Movement. For the said purpose she propagated for the cause of India throughout America and Europe.

The above mentioned names are the list of those women who impressively participated in the freedom struggle. They not only fought for the freedom of the country but also fought for the cause of women. As per a Resolution passed on January 26, 1931 "*We record our homage and deep admiration for the Womanhood of India who in the hour of peril for the motherland forsook the shelter of their homes and with unfailing courage and endurance stood shoulder to shoulder with their menfolk, in the frontline of India's national army to share with them the sacrifices and triumphs of the struggle.*"⁵³ Hence, it can be concluded that due to the equal participation with the men in the national struggle, the traditional conceptions about the role and status of women in the society was changed and the attitude of the society towards them too changed. The change is evident wherein a number of women were made ministers, under-secretaries and deputy speakers of Provisional Legislatures when Congress Government was formed.

4. POST – INDEPENDENT INDIA: -

Policies regarding the emancipation of women during the British regime in India lifted up the status and improved the position of women to certain extent. Women's participation in the National Movement for independence too gave some kind of recognition to women in the society. Hence, when India became independent the framers of the Constitution enshrined the principles of

53. http://www.aicc.org.in/women_and_india%E?%80%99s_independence_movement.phl
[Visited on 26th August 2007].

equality, liberty and social justice as they were aware of the sociology of the problem of emancipation of the female sex. It was realized that in order to eliminate inequality against women in the independent India it is necessary to promote education and economic interests of women which can protect women from exploitation and provide social justice. The first Prime Minister of India, Jawaharlal Nehru had said that "*you can tell the condition of a nation by looking at the status of its women*" which is absolutely true as they are the mirror of a nations civilization. Hence, keeping this in mind the framers of the Constitution had enshrined the above mentioned ideals not only in the various parts of the Constitution as well as enacted various legislations wherein the rights of the women are protected against various forms of discrimination.⁵⁴

54. See, *infra*, National Instruments: Gender Justice and Protection of Women from Domestic Violence, under Chapter III: Domestic Violence and Gender Justice.

CHAPTER - III
DOMESTIC VIOLENCE
AND GENDER JUSTICE

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DOMESTIC VIOLENCE AND GENDER JUSTICE

Women constitute almost half of the world's population. She as the member of the world's society has contributed immensely in developing civilizations all over the world. Her contribution to the world is not less than that of the men, yet, she has been subjected to lots of discriminations and violence in all forms all over the world. The fact that she is a woman makes her inferior to men in all aspects of life by this patriarchal society. Women being a weaker section of the society are subjected to lots of violence in her day to day life not only outside her house but inside it too. The violence against women is in fact not a new phenomenon. It is as old as our civilization. It is also not confined to a particular class or to a particular country. It is a global problem. We observe March 8 as International Women's Day but we still see that women are becoming victims of violence and exploitation by the male dominated society all over the world. According to United Nations Report of 1980 women constitute one half of world's population, perform nearly 2/3 of its work hours, receive 1/10 of the world's income and own less than 1/100 of the world's property.¹ This statistics shows that women are placed at various disadvantageous positions due to gender difference and biasness.

Gender discrimination represents an ugly face of the society. Gender biasness is not only offensive to human dignity and human rights but has also emerged as a fundamental crisis all over the world. Human rights are the

1. Sarla Gupta, *Evolving new feminist jurisprudence-Violence Against women: A Policy of Neglect or a neglect of Policy*, 2005 Cr. L J, P. 279.

natural rights or the minimum rights which a member of the society must have against the State or other public authority by virtue of his being a 'member' of human family, irrespective of any other consideration. The human rights and fundamental freedoms are independent and have mutual reinforcement. Man and woman irrespective of their sex inherit their right and it is inalienable, integral and indivisible part of human rights. Such right is essential in order to develop one's personality, fundamental freedoms and participation of men and women equally in the political, social, economic and cultural fields which are referred not only for the international and national development, the stability of the family and the society but also for the growth of the society, culture and economy. Thus, all forms of discrimination on grounds of gender are violative of fundamental freedom and human rights. Gender injustice is itself a crime and violence against women. Despite this fact gender discrimination is pervading in almost all forms of institutionalized deprivation. Now that gender discrimination is increasing world wide the question of gender equality or gender justice is also emerging as a major challenge. Gender justice means that no one should be denied justice or discriminated only because of one's gender.

The term 'sex' and 'gender' are often used interchangeably in everyday life, but in sociological literature they are frequently differentiated.² The term 'sex' is biological difference which cannot be changed such as anatomy, physiology, hormones and chromosomes which are applied to differentiate between male and female. On the other hand, the term 'gender' is constructed socially by observing the roles played by male and female in the society. It is the behaviour, personality and other social attributes which are expected from men and women in the society. Such social attributes become the basis of masculine

2. J. N. Bhatt, *Gender Equality: Turmoil or Triumph?* AIR 1998 J 81.

and feminine roles. Unlike the term 'sex' the gender can be changed by looking at the roles played by individuals in the society.

The question of gender justice and gender equality is a very old and burning problem as contribution of both the sex is essential in order to attain a developed nation. Hence, it is important to recognize the inherent dignity and of equal and inalienable rights of all the members of the society which will lay the foundation of freedom, justice and peace in the world. If we will disregard and contempt the human rights that it will result in the barbarious acts which have outraged the conscience of mankind. However, women all over the world are still suffering from discrimination, exploitation and victimization. Despite playing major roles during various stages of their life as a daughter, wife, mother, sister etc and in spite of her contribution to the society women's position is still the same everywhere i.e. she is backward on account of various social, political, economic and psychological barriers and impediments. Hence, there is need for women to be empowered and men need to be oriented about their obligations towards women. By empowering women the society aims at eliminating discrimination and challenging gender injustice.

WOMEN EMPOWERMENT AND GENDER JUSTICE: -

Women empowerment played a vital role in bringing gender justice to women to some extent. The matter relating to women empowerment was given serious consideration only in the last two hundred years of western civilization. Women empowerment was associated with women's rights to provide equality to women in the society. The term 'women's rights' means those rights which are associated with the women's movement which is primarily active in attempting to bring about legislative, economic and educational reforms to eradicate sex discrimination in social institutions. The seeds from women

liberation to empower them were sowed during the industrial revolution in Europe. Until then the churches who governed the European countries opposed the idea of giving equal rights and status to women. Despite the fact that women's participation into economic, social and political scenario increased after the industrial civilization it was observed that still most women worked to serve their husbands, bear children, keep homes or if unmarried, support ageing parents. Even the artists portrayed them as objects of mystery and beauty. Although campaigns relating to women's right were held but it is an irony those campaigners were isolated and no movement as such emerged for women's right and their emancipation.

The Women's Right Movement marks July 13, 1848 as its beginning. On the said day in upstate New York, a young housewife and mother, Elizabeth Cady Stanton, was invited to tea with four women friends. In the course of their conversation Stanton pointed out the status of women under America's new democracy. She poured out that although the American Revolution had been fought just 70 years earlier to win patriots freedom from tyranny, but women had not gained freedom even though they had taken equally tremendous risks through those dangerous years. The new republic would benefit from having its women play more active roles throughout society. Stanton's friends agreed with her. Within two days of their afternoon tea together, this small group had picked a date for their convention, found a suitable location and placed a small announcement in the Seneca Country Courier. They called "A Convention to discuss the social, civil and religious condition and rights of women." The gathering would take place at the Wesleyan Chapel in Seneca Falls on July 19 and 20, 1848.³ This event is remarked as not only the beginning but the most important event which led to the

3. <http://www.legacy98.org/move-hist.html> [Visited on 3rd April 2008].

emancipation and empowerment of women all over the world. Even in the history of western civilization no similar public meeting had ever been called.

Elizabeth Cady Stanton, for the purpose of the said event used the Declaration of Independence as the framework for writing a "Declaration of Sentiments." In this Declaration of Sentiments Stanton laid down the same familiar words which framed their arguments in the following words: -

*"We hold these truths to be self-evident, that all men and women are created equal, that they are endowed by their Creator with certain inalienable rights that among these are life, liberty, and the pursuit of happiness."*⁴

The said convention criticized marriage laws, conditions of employment and property laws which were not in favour of women and infringed their rights as well as was discriminatory in nature. Stanton's version read, *"The history of repeated injuries and usurpations on the part of man towards woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world."*⁵ Stanton pointed out the areas wherein women are treated unjustly, they are as follows: -

- Married women were legally dead in the eyes of law.
- Women were not allowed to vote.
- Women had to submit to laws when they had no voice in their formation.
- Married women had no property rights.
- Husbands had legal power over and responsibility for their wives to the extent that they could imprison or beat them with impunity.
- Divorce and child custody laws favored men, giving no rights to women.
- Women had to pay property taxes although they had no representation in the levying of these taxes.

4. Women's Rights Conventions: Manifesto, Seneca Falls, 1848.

5. *Ibid.*

- Most occupations were closed to women and women did work they were paid only a fraction of what men earned.
- Women were not allowed to enter professions such as medicine or law.
- Women had no means to gain an education since no college or university would accept women students.
- With only a few exceptions, women were not allowed to participate in the affairs of the church.
- Women were robbed of their self-confidence and self-respect, and were made totally dependent on men.

This Declaration of Sentiments spelled out the status quo of the European-American women of America in 1848, while the position of enslaved Black women was even worse. The Convention was convened successful and over the two-days of discussion, the Declaration of Sentiments and 12 resolutions received unanimous endorsement, one by one with a few amendments.

The Declaration of Sentiments ended on a note of complete realism: - *“In entering upon the great work before us, we anticipate no small amount of misconception, misrepresentation, and ridicule; but we shall use every instrumentality within our power to affect our object. We shall employ agents circulate tracts; petition to enlist the pulpit and the press in our behalf. We hope this Conventions will be followed by a series of Conventions, embracing every part of the country.”*⁶

As hoped at the Seneca Falls Convention that it will be followed by a series of Convention, that just happened. Women Right’s Convention was held regularly from 1850 until the start of the civil war. Some drew such large crowds that people actually had to be turned away for lack of sufficient meeting space. Although the Convention can be marked as a certain

6. *Ibid.*

beginning of women's suffrage movement, however the goal of early women rights movement was not limited to the demand for suffrage but it was also concerned with the women's desire to gain control of their property and earnings, guardianship of their children, right to divorce, etc.

Towards the end of the 19th Century the women's right movement went on to address the wide range of issues spelled out at the Seneca Falls Convention and became increasingly focused on the right to vote as the symbol of equality. The struggle for vote gained momentum after the First World War. In America the struggle for right to vote by women was won in 1920, in Britain in 1928 and in France after the Second World War. Post-suffrage movement another matter which depicted the plight of women in the society which was not anticipated in the Seneca Falls Convention was initiated by a public health nurse Margaret Sanger i.e. the birth control movement. In the West the psychological harm and social deprivation affecting a mother and her unwanted child have been increasingly recognized.⁷ The idea of women's right to control her own body, and especially to control her own reproduction and sexuality, added a visionary new dimension to the ideas of women's emancipation. This movement not only endorsed educating women about existing birth control methods. It also spread the conviction that meaningful freedom for modern women meant they must be able to decide for themselves whether they would become mothers, and when.⁸ Margaret Sanger and her supporters faced criticism for enforcing this right for decades. In 1936, a Supreme Court decision declassified birth control information as obscene. It was not until 1965 that married couples in all states could obtain contraceptives legally. Abortion was also legalized. Even after this the legal battle to improve women continued but discrimination against them

7. Mamta Rao, *Law relating to Women and Children*, Eastern Book Company, Lucknow, P. 13.

8. <http://www.legacy98.org/move-hist.html> [Visited on 3rd April 2008].

remained. The spread of education broadened the horizons of women and the rights related to them. Another Movement which was initiated by Women Right's Movement was the economic/financial independence of women. Around 1960's Civil Rights Movement started which prohibited discrimination on the basis of sex, race, religion and national origin in the field of employment. This movement acted as the vehicle for social reform. By the seventies, the feminist's efforts and organizational work had greatly raised consciousness. Legal remedies against gender discrimination were made available. During the 19th Century and 20th Century jurisprudence served largely to reinforce the social structure which was concerned in providing equal status to women in the society.

In 160 years since the Seneca Falls Convention which is the landmark Women's Right Convention, progress has been made in providing equality to the women which was addressed by Elizabeth Cady Stanton in the said Convention. We have accomplished so much, yet lots of stones are still remains to be turned in this specific field. Still works are being done to remove discrimination of women in various fields through courts and conference rooms, the homes and organizations, workplaces, and numerous international instruments and national legislations.

INTERNATIONAL INSTRUMENTS: GENDER JUSTICE AND PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE: -

Although works were done in lifting the discriminatory veil from the society against women, yet it cannot be denied that irrespective of a country being developed, developing or underdeveloped, the position of women is unique in every society. She is still exploited and subjected to various forms of violence in this patriarchal society. Violence against women has crossed the national boundaries and has become a global problem. As according to U. N's

report, S. M. Jane Connors, Law Lecturer at London's School of Oriental and African studies and author of U. N. Report says – “*It is a popular misconception that the home is a place of safety, violence against women in the street does not but the more likely place for it to happen is in the home. The person most likely to perpetrate the assaults is the husband.*”⁹ In almost all over the world in the recent past, there has been persistent and frequent commission of crimes in different shape and size violating their basic rights and outraging their dignity and modesty.¹⁰ The gender inequality against women, thus, offends the human dignity and human rights. Human rights are those rights which every human being or individual must have against the State or any public authority for being a member of the human family irrespective of their race, caste, creed, sex, nationality, language etc.

Human rights are those rights which are basic to human survival. It is in fact operative with their birth and inherent in all the individuals irrespective of their caste, creed, religion, sex and nationality. These rights are essential for all the individuals as they are consonant with their freedom and dignity and are conducive to physical, moral, social and spiritual welfare. They are the basic and inalienable rights which are necessary for the material and moral uplift of the people. Thus, all those rights which are essential for the maintenance of human dignity, may be called human rights.¹¹ Hence, we can say that women's right is inalienable, integral and indivisible part of human rights. It is, thus, the need of both the international and national development that women should be given equal rights and freedom in political, social, cultural and economic scenario. All kinds of discrimination on the grounds of gender are violative of fundamental

9. Manohar Raj Sexena, *Women and Law*, AIR 1997 J 147.

10. Mohd. Wasim Ali, *Crimes against Women: An Appraisal of Increasing trend in India*, 1999 Cri. L J 17 (Journal Section).

11. H.O. Agarwal, *Human Rights*, Central Law Publication, Allahabad, 2000, P.2.

freedom and human rights. Gender injustice is, thus, the form of discrimination, crime and violence. Following are the international instruments which provide gender justice and protect the rights of women against the domestic violence:-

(a) The Charter of United Nations, 1945: -

Various International Conferences were held before the Second World War for providing gender equality to women, yet the status of women in the society remained static which became even worse during and after the Second World War. Soon after the Second World War, League of Nations was replaced by United Nations Organization. In San Francisco Conference United Nations Charter was adopted and 51 nations of the World approved and signed it. After the ratification of the Charter by the prescribed number of states United Nations came into force on October 24, 1945. United Nations was formed when there were a lot of obstacles for women both in terms of social backdrop and law which included inequalities in laws and customs concerning marriage and family. Women were denied equal opportunity even in the field of education. At the workplace they were denied the opportunity to be employed as well as equal pay. Women were also denied right to vote, to hold office or to participate in political life. However, with the establishment of United Nations it worked towards a better society by introducing various instruments for the emancipation of women and to enhance their dignity all over the world. It promoted women's empowerment and protected women's right and have worked for their human right, justice and equality. The United Nations makes its members mandatory to adopt methods for eradicating gender discrimination.

The Charter of United Nations, 1945 starts with the words "*We the people of United Nations.....*" which determines that we mean every human being irrespective of their gender, caste, creed or religion. Hence, the

opening words of the Charter speak in itself about gender equality. The main purpose for the establishment of United Nations is to save the world from the scourge of war, reaffirm faith in fundamental human rights, dignity and worth of human person by way of dedicating itself to ensure the universal recognition, in law, of equality of rights between men and women, by providing equal opportunities to women to realize their human rights and fundamental freedom.¹² The Charter also provides for achieving international cooperation in solving international problems of an economic, social, cultural and humanitarian character to encourage the promotion of human rights and fundamental freedom without any distinction as to race, sex, language or religion; and to be a centre for harmonizing the actions of nations in the attainment of these common ends.¹³ The Charter also provides that it is the responsibilities of General Assembly to respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁴ Similarly, the Economic and Social Council has been empowered to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.¹⁵ The Charter also empowers the Economic and Social Council regarding setting up of a commission for promotion of human rights.¹⁶ The Trusteeship system under the United Nation Charter has been given power to encourage respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world.¹⁷

12. *Ibid.*

13. Article 1(3) and (4), *The Charter of United Nations, 1945.*

14. Article 55(c), *Ibid.*

15. Article 62(2), *Ibid.*

16. Article 68, *Ibid.*

17. Article 76, *Ibid.*

Thus, the provisions of the United Nations Charter concerning human rights of women provide foundation and an impetus for further improvement in the protection of human rights.¹⁸

(b) Commission on the Status of Women, 1946: -

The United Nations Charter, 1945 under Article 68 prescribed that it is the responsibility of Economic and Social Council¹⁹ to set up a commission for the promotion of human rights. With respect to this provision ECOSOC established the Commission on the Status of Women in 1946. It was established in order to evaluate and monitor the condition of women. At first there were 9 members of the Commission which were appointed by the ECOSOC for a period of three years. The Commission on the Status of Women was composed of 15 members. The members of the Commission gradually increased to 18 members. Subsequently the membership increased to 21 members and then to 32. At present it consists of 45 members. The Commission meets biennially for session of three weeks and adopts its own resolutions and recommends draft resolution and declarations for adoption by the ECOSOC. The Commission has to submit its report on each session to the Council.

The main purpose of forming this Commission is to codify the legal rights of women with the factual information about the extent to which they are discriminated in the society, i.e. both in the existing law and practices. As a result, the Commission has done massive research and has done fact-finding efforts to assess the status of women worldwide and have produced country wise report. It has done valuable work for promoting the rights of women in various

18. Devinder Singh, *Human Rights: Women and Law*, Allahabad Law Agency, Faridabad, 2005, P 30.

19. Herein after referred to as ECOSOC.

areas be it political, economic, social and even educational. The functions of the Commission are as follows: -

- i. To prepare recommendations and report to the ECOSOC on promotion of women's rights in political economic, civil, social and educational fields;
- ii. To make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations.²⁰

For the purpose of developing the political, economic, social and cultural rights the Commission on the Status of Women began to develop working relationship with other bodies such as International Labour Organisation²¹ and the United National Educational, Scientific and Cultural Organisation.²² The Commission has requested the ILO to promote the principle of equal work and to complete a convention on this subject. Following this, the ILO adopted special instruments to carry on these measures.²³ Likewise the UNESCO was also requested by the Commission to provide equal opportunities for women in education. Apart from this, the Commission on the Status of women initiated the following Conventions:-

- Declaration and Convention on the elimination of all forms of discrimination against women;
- Convention on the political rights of women;
- Convention on the nationality of married women;
- Convention on the consent of marriage; and

20. Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, 2005, P. 40.

21. Hereinafter referred to as ILO.

22. Hereinafter referred to as UNESCO.

23. Devinder Singh, *Human Rights and Law*, Allahabad Law Agency, Faridabad, 2005, 32.

- Convention on the protection of women and children during emergency and armed conflict.

(c) Convention on the Political Rights of Women, 1954: -

The Convention was adopted by the General Assembly on 20th December 1952 to implement the principle of equality of rights of men and women contained in the Charter of United Nations. It came into force on 7th July, 1954. The Convention consists of 12 Articles and Preamble. As engraved in the charter of United Nations the principle regarding equality of men and women, the Convention in its Preamble contains the idea of recognizing the right of a person irrespective of their sex to take part in the government of his/her country directly or indirectly through freely choosen representative and has the right equal access to the public service in their country. The Preamble of the Convention also provides for equality in the status of men and women in the enjoyment and exercise of their political rights.²⁴

The main provisions of the Convention are as follows: -

- Women are entitled to vote in all election on equal terms with men, without any discrimination.²⁵
- Women are eligible for election to all publicly elected bodies, established by national law, on equal terms with men without any discrimination.²⁶
- Women are entitled to hold public office and to exercise all public functions established by national law on equal terms with men without any discrimination.²⁷

24. Preamble, *the Convention on the Political Rights of Women, 1952.*

25. Article I, *Ibid.*

26. Article II, *Ibid.*

27. Article III, *Ibid.*

- With respect to any dispute which may arise between two or more contracting State concerning the interpretation of application of this Convention, which is not settled by negotiation, shall at the request of anyone of the parties to the dispute be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.

(d) Convention on the Nationality of Married Women, 1957: -

Laws of nationality of different countries often bring them in conflict wherein the situation is such that a person possess nationality of more than one state, especially that of a women who acquires the nationality of her husband after getting married and continues to possess her original nationality too. Hence, the Commission on the Status of Women expressed the view in 1949 that a Convention on the nationality of married women should be prepared which would assure women equality especially with respect to the right to a nationality and prevent them from becoming stateless on being married and also at its dissolution. The draft of the Convention was, thus, prepared by the Commission and in 1957 the General Assembly adopted the Convention on the Nationality of Married Women, 1957. The contracting State Parties of the Convention have undertaken the following commitments²⁸: -

- i. Neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, and the change of nationality by the husband during the marriage, shall automatically affect the nationality of the wife.²⁹
- ii. Neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.³⁰

28. S.K. Kapoor, *Human Rights under International law and Indian Law*, 2001 P. 134-135.

29. Article 1, *the Convention on the Nationality of Married Women, 1957*.

30. Article 2, *Ibid*.

- iii. The alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures. However, the grant of such nationality may be subject to such limitations as may be imposed in the interest of national security or public policy.³¹
- iv. The present Convention shall not be construed as affecting legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.³²

(e) Universal Declaration of Human Rights, 1948:-

The world has been changing rapidly wherein often incidences of infringement of rights of human beings are witnessed. In order to cope with the manifold changes which are taking place, it was felt that there must exist a universal international law for the protection and promotion of certain basic rights in human beings. As a result of this need Universal Declaration of Human Rights³³ was drafted by the United Nations in 1948 for promotion and protection of Human Rights. The UDHR is the basic international pronouncement of the inalienable and inviolable rights of all members of the human family. It was adopted by the General Assembly by a vote of 48 to nil with eight abstentions. It has exercised a powerful influence both internationally and nationally. UDHR is the basic international instrument from which other conventions as well as national laws including legislations protecting women's rights have been and are being quarried. The Declaration consists of a Preamble and 30 Articles.

The Preamble to the Declaration provides "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the*

31. Article 3, para 1, *Ibid.*

32. Article 3, para 2, *Ibid.*

33. Hereinfter is referred as UDHR.

human family is the foundation of freedom, justice and peace in the world.” It also provides for “faith in the fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.”

The UDHR also provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.³⁴ The Declaration also proclaims the principle of equality and non-discrimination on the basis of race, colour, sex, language, religion, political, birth, status etc.³⁵ Basically the Declaration contains two kinds of rights i.e. civil and political rights which are proclaimed under Articles 3-21; and the Economic, social and cultural Rights are proclaimed under Articles 22-27. Following are the fundamental rights of women which are protected under the Declaration: -

- Right to life, liberty and security to everyone.³⁶
- The right to recognition everywhere as a person before the law.³⁷
- Equality before law and equal protection of law against any discrimination in violation of the Declaration.³⁸
- Right to nationality.³⁹
- Right to marry and to find a family and equal rights as to marriage during marriage and at its dissolution.⁴⁰
- Right to own property.⁴¹
- Right to equal access to the public services.⁴²

34. Article 1, *UDHR*.

35. Article 2, *Ibid*.

36. Article 3, *Ibid*.

37. Article 6, *Ibid*.

38. Article 7, *Ibid*.

39. Article 15, *Ibid*.

40. Article 16, *Ibid*.

41. Article 17, *Ibid*.

42. Article 21, *Ibid*.

- Right to social security and the right to realization of the economic, social and cultural rights.⁴³
- Right to work and equal pay for equal work.⁴⁴
- Right to rest and leisure.⁴⁵
- Right to a standard of living adequate for health and wellbeing of himself and of his family.⁴⁶
- Right to education including free education at least in the elementary and fundamental stages.⁴⁷
- Right to freely participate in the cultural life of the community.⁴⁸

(f) International Covenant on Economic, Social and Cultural Rights, 1966: -

The International Covenant on Economic, Social and Cultural Rights, 1966⁴⁹ was adopted by the General Assembly in 1966 and came into force on 3rd January, 1977. For its enforcement it required ratification from 35 member States which was deposited on 3rd October, 1976 and three months after it ICESCR came into force. The Covenant has a Preamble and 31 Articles which are divided into five parts.

The Preamble to the Covenant speaks about the recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The Covenant also reaffirms the principle of equality of men and women as regards to

43. Article 22, *Ibid.*

44. Article 23, *Ibid.*

45. Article 24, *Ibid.*

46. Article 25, *Ibid.*

47. Article 26, *Ibid.*

48. Article 27, *Ibid.*

49. Hereinafter referred to as ICESCR.

human rights but also enjoins the States to make that principle a reality.⁵⁰ Keeping the objectives in view ICESCR consist of a much more comprehensive catalogue of economic, social and cultural rights than the UDHR, however, such rights are not absolute and are subject to certain limitations.

(g) International Covenant on Civil and Political Rights, 1966: -

The International Covenant on Civil and Political Rights, 1966⁵¹ was adopted by the General Assembly in 1966. It required ratification from 35 member States to enter into force which was deposited on 23rd March, 1975 and thus, the Covenant entered into force on 23rd March, 1976. India acceded to the ICCPR on 10th April 1979 and it became effective for India on 10th July, 1979. The Covenant has a Preamble and 53 Articles divided into six parts. The ICCPR contains a longer and more comprehensive list of civil and political rights than the Universal Declaration of Human Rights.

The Covenant puts an obligation upon the State parties to undertake the responsibility for prohibiting any form of distinction of any kind, such as race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status.⁵² The Covenant further requires the State Parties to adopt legislative or other measures which may be necessary to give effect to the rights guaranteed in the Covenant itself in their domestic law.⁵³ It also provides for the State Parties to the Covenant to ensure all persons effective remedy against violation of their rights or freedoms.⁵⁴ Among other rights the Covenant provides for the right to life and liberty;⁵⁵ right to equality before Courts

50. Article 3, *ICESCR*.

51. Hereinafter referred to as *ICCPR*.

52. Article 2(1), *ICCPR*.

53. Article 2(2), *Ibid*.

54. Article 2(3), *Ibid*.

55. Article 6, *Ibid*.

and tribunals and right to a fair trial;⁵⁶ right to marry and found a family,⁵⁷ rights of the child;⁵⁸ and the most important of all right to equality before law and equal protection of the law.⁵⁹

(h) Declaration on the Elimination of Discrimination against Women, 1967: -

The General Assembly of United Nations adopted the Declaration on the Elimination of Discrimination against Women on 7th November, 1967. This Declaration was a precursor to the Convention on Elimination of All Forms of Discrimination against Women, 1979. This Declaration promotes the principle of equal remuneration, equal rights in the fields of economic and social life. It is based upon the principle laid down by the UDHR which proclaims the non-discrimination as all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms without any distinction of any kind including distinction relating to sex. The Preamble to the Declaration provides that although various international instruments for the protection of women are available yet discrimination against women exists. This discrimination violated the principle of equality of respect for human dignity. Hence, the main objective of this Declaration is to eliminate discrimination against women. The Declaration provides that appropriate measures shall be taken to ensure to women, married or unmarried equal rights with men in the fields of economic and social life.⁶⁰ It also provides for the establishment of adequate legal protection for equal rights by abolishing

56. Article 14, *Ibid.*

57. Article 23, *Ibid.*

58. Article 24, *Ibid.*

59. Article 26, *Ibid.*

60. Article 10, *the Declaration on the Elimination of Discrimination against Women, 1967.*

discriminatory laws, customs, regulations and practices etc. The Declaration also provide for equal rights in the field of education.

(i) Convention on the Elimination of All Forms of Discrimination against Women, 1979: -

The Convention on the Elimination of All forms of Discrimination against Women⁶¹ was adopted by the United Nations General Assembly on 18th December, 1979. As it is already discussed that the Declaration on the Elimination of Discrimination against Women, 1967 was precursor to CEDAW which was declared for the fulfillment of purposes stated in Articles 1,2, and 55 of the U.N. Charter. The CEDAW entered into force as an international treaty on 3rd September, 1981 after it was ratified by 20 countries. It was a major step taken by the United Nations for the promotion and protection of international women's rights. Currently, there are 97 signatories and 165 parties, according to the status tables reported in Multilateral Treaties Deposited with the Secretary-General.⁶²

CEDAW is the culmination of more than thirty years of work by the United Nations Commission on the status of women, a body which was established in 1946 to monitor the situation of women and to promote women's right. The Commission brought into light the areas in which women are denied equality with men. The efforts of the Commission for the advancement of women resulted in several declarations and conventions and CEDAW is one of the central and most comprehensive documents. It promotes the human rights specifically concerning women.

The Convention consist of 30 Articles and Preamble. In its Preamble the Convention explicitly acknowledges that extensive discrimination

61. Hereinafter referred to as CEDAW.

62. Quoted in <http://www.law-lib.utoronto.ca/resguid/women2.htm> [Visited on 17th April 2008].

against women continues to exist, and also emphasized that such discrimination violates the principles of equality of rights and respect for human dignity and it also is an obstacle to the participation of women in the political, social, economic and cultural life of their countries which in turn hampers the growth of the prosperity of society and the family. Hence, in its Preamble the Convention lays emphasis upon the maximum participation of women on equal terms with men in all fields.

The Convention for the first time defines “*discrimination against women*” which shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, whether married or unmarried, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶³

The Convention under Article 2 provides that the State Parties are under an obligation to pursue appropriate means and without delay a policy of eliminating discrimination against women and for the said purpose should undertake the following steps: -

- to embody the principle of the equality of men and women in their national constitutions and legislations if not yet incorporated and to ensure the practical realization of this principle;
- to adopt appropriate legislative and other measures prohibiting discrimination against women;
- to establish legal protection of the rights of women on an equal basis with men and to ensure the effective protection of women against any act of discrimination through competent national tribunals and other public institutions;

63. Article 2, *CEDAW*.

- to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- to take all appropriate measures to modify or abolish the existing laws, regulations, customs and practices which constitute discrimination against women;
- to repeal all national penal provisions which constitute discrimination against women.

The Convention gives positive affirmation to the principle of equality by requiring State parties to take “*all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*”⁶⁴

The State parties to the Convention have undertaken to take the following appropriate measures: -

- to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles of men and women.
- To ensure that family education includes a proper understanding of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.⁶⁵

64. Article 3, *Ibid.*

65. Article 5, *Ibid.*

The Convention provides that the State parties have undertaken to take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the fields of education,⁶⁶ employment,⁶⁷ health care,⁶⁸ and in other areas of economic and social life.⁶⁹ The Convention also accords to women equality with men before the law.⁷⁰ With regards to marriage and family relation the Convention obliges the State Parties to take following appropriate measures to eliminate discrimination against women: -

- The same right to enter into marriage;
- The same right to choose a spouse and to enter into marriage only with their free and full consent;
- The same rights and responsibilities during marriage and at its dissolution;
- The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

66. Article 10, *Ibid.*

67. Article 11, *Ibid.*

68. Article 12, *Ibid.*

69. Article 13, *Ibid.*

70. Article 15, *Ibid.*

- The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.⁷¹

Further, the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.⁷²

For the purpose of implementation of the Convention, it provides for the establishment of a Committee on the Elimination of Discrimination against Women.⁷³ The Committee shall consist at the time of entry into force of the Convention, of eighteen and after ratification of or accession to the Convention by the thirty five State party of 23 members who are experts of high moral standing and competence in the field covered by the Convention. Since, the Convention has been ratified or acceded to by a large number of States, for greater than 35, the Committee now consist of 23 members. The Committee seeks to ensure the implementation of the Convention through Reporting Procedure.

The Convention states that the State parties have to submit to the Secretary- General of the United Nations their report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect within one year after the entry into force of the State concerned and

71. Article 16.1, *Ibid.*

72. Article 16.2, *Ibid.*

73. Article 17, *Ibid.*

thereafter at least every four years and further whenever the Committee so requests.⁷⁴

The Committee shall send its report annually to the General Assembly of the United Nations through the ECOSOC which may make suggestions and general recommendations based on the examination of reports and information received from State parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from State Parties. The Secretary-General transmits the report of the Committee to the Commission on the Status of women for its information.⁷⁵

The Convention in its approach covers three dimensions of the situation of women. It deals with the civil and legal status of women in great detail. The Convention also speaks about the dimension of human reproduction as well as with the impact of cultural factors on gender relations. The Convention gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental rights. These forces take shapes in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women.

The Convention is in fact the very first effective international instrument which tried its best to provide elimination of discrimination against women in all fields. However, various critiques state that the implementation machinery of CEDAW is quite weak. Some has even described it as the Committee with no teeth mainly because it cannot compel Stat parties to give effect to the provisions of the Convention. It may simply make suggestions and general recommendations based on the examination of reports and information

74. Article 18, *Ibid.*

75. Article 21, *Ibid.*

received from State parties. It is also conspicuous by absence of provisions relating to inter-state communications system.⁷⁶

(j) Optional Protocol to the Convention on the Elimination of Discrimination against Women, 1999: -

Recently, the Optional Protocol to the Convention on the Elimination of Discrimination against Women was adopted and signed by the member States in 1999 for the purpose of further pursuing all appropriate means and without delay a policy of eliminating discrimination against women. In this Protocol the State also reaffirmed their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms. For the said purpose the State parties recognized the competence of the Committee to receive and consider communication submitted by or on behalf of individuals or group of individuals. Such communication shall be in writing with specific name of the complainant i.e. it shall not be anonymous. The Committee is empowered to request the State Parties to take interim measures to avoid damage to the victim. The State parties are obliged to submit to the Committee a report of the action taken within six months. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations.

(k) Declaration on the Elimination of Violence against Women, 1993: -

With the increase in the violence women world wide, the nations of the world have become concerned and number of important measures has been taken to eliminate it, yet, little could be done in this regard. As a result of

76. Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, 2005, P. 37.

this, the United Nations appointed a Special Rapporteur on violence against women and has developed a Declaration on the Elimination of Violence against Women which was adopted by the General Assembly in 1994.⁷⁷ This Declaration is the first international Human Rights instrument to exclusively deal with the issue of violence against women. The Declaration affirms that violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, and is concerned about the long standing freedoms in relation to violence against women.⁷⁸

The Declaration provides definition for the violence against women as any act of gender based violence which results in physical, sexual or psychological harm to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁷⁹ The Declaration, thus, gives a broad definition and provides that it is not limited to the following: -

- 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;

77. General Assembly Resolution No. 48/104.

78. The Preamble, *the Declaration on the Elimination of Violence Against Women, 1993*.

79. Article 1, *Ibid*.

- iii. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.⁸⁰

The Declaration also provides women equality for the enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field.⁸¹ It also obligates the States to condemn violence against women and not to invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.⁸²

(I) United Nations Conference on Women: -

Besides the various international Conventions and Declarations for the protection and safeguard of women rights, the International Women's Conference was started by the United Nation from the year 1975. Since then, there have been four successful conferences that address the obstacles blocking the advancement of women and they are as follows: -

- i. 1975 – Mexico City – First World Conference on Women;
- ii. 1980 – Copenhagen – Second World Conference on Women;
- iii. 1985 – Nairobi – Third World Conference on Women; and
- iv. 1995 – Beijing – Fourth World Conference on Women

The First World Conference on Women highlighted the themes of "*Equality, Development and Peace*." The Second World Conference on Women convened in Copenhagen in 1980, added three sub-themes: "*Education, Employment and Health*." In Nairobi, the Third World Conference on Women was held to Review and Appraise the Achievements of the United Nations Decade for

80. Article 2, *Ibid*.

81. Article 3, *Ibid*.

82. Article 4, *Ibid*.

Women: Equality, Development and Peace (1976-1985).⁸³ The Fourth World Conference was held in Beijing, China in September, 1995 to consider women's rights and concerns. This Conference laid the foundation in the field of human rights of women. This Conference resulted in a "*Platform for Action*" which is also known as the blueprint for advancement of women around the world. This Conference expanded the agenda for women's empowerment. The Platform for Action has recommended action in 12 critical areas of concern which has been identified as obstacles to the advancement of women and they are poverty, education, health, violence, Armed and other Conflict, Economic participation, power-sharing and decision making, National and international machineries, human rights, mass media, environment and development, and the Girl child.

The World consists of more than one billion people in the world and a great majority of whom who live in unacceptable conditions of poverty specifically in the developing countries. Poverty of women has been resulted from various factors such as gender disparities in economic power-sharing, migration and consequent changes in family structure, absence of economic opportunities of autonomy, land ownership and inheritance, education and support services and minimal participating in decision making. Although primary enrollment in the educational institute are same among boys and girls, dropout rates are much higher among girls due to reasons like poverty, early marriage etc. Women have been guaranteed the right to enjoy the basic standard of physical and mental health. However, statistics shows that women are the fastest group of HIV infected adults. The women also die from complication due to pregnancy and unsafe abortions. Women are also subjected to violence which has no geographical barriers. It is a global problem. Women are subjected to sexual

83. Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, 2005, P. 40.

harassment, rape, dowry death, victims of domestic violence and all the other forms of violence everyday in developed as well as developing nations. During the armed and other forms of conflict women are the vulnerable victims who have to suffer the torture, disappearance and systematic rape, sexual slavery etc as a weapon of war as women often have no decision-making power during global conflict. Women are virtually absent from economic decision making including the formulation of financial, monetary, commercial and other economic policies as well as tax systems and rules governing pay. Women are strongly discouraged from decision making positions that involve economies.

According to the UDHR everyone has right to take part in the Government of his/her country, however, women participation in the government is more or less close to nil as negative stereotypes contribute to the discrimination which women faces. In the national as well as in international arena there are numerous machineries for the advancement of women. However, it is often found that the women are to take advantage of these machineries as they need to be educated in how to use technology in order to become introduced into mainstream society. In relation to human rights which is the birth right of all human beings and their protection and promotion is the responsibility of the Government. Out here also women often lack the ability to exercise them fully. In connection to the media, very few women work in world's media which allows men to reinforce the stereotypes portrayal of women that may not necessarily be true. Women are often required to be responsible for food and household managements; hence they are naturally more concerned about the environment. Lastly, since a very early period of her life a woman is discriminated. From the period they are born till the adulthood girl children are discriminated. They are treated as inferior to boys and are less likely to be encouraged and supported which in turn makes them dependant.

With regards to the above mentioned twelve critical problems faced by the women in the world the following declaration were adopted in the Fourth World Conference on Women held in Beijing:-

- To take necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women;
- Encourage men to participate in actions towards equality;
- To promote economic independence to women, provide employment and eradicate the poverty among women;
- To promote people centered sustainable development, including sustained economic growth, through the means of education, literacy training and primary health care for girls and women;
- To prevent and eliminate all forms of violence against women and girls;
- To ensure equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education;
- To promote and protect all human rights of women and girls;
- To ensure respect for international law to protect women and girls;
- To ensure women's equal access to economic resources;
- To ensure the success of the Platform for Action.

For the above mentioned programmes/objectives a strong commitment on the part of the government, international organizations, communities and individuals is required. With this only the discrimination and violence against women can be curbed from the world.

NATIONAL INSTRUMENTS: GENDER JUSTICE AND PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE: -

Half of the population of India consists of women yet women in India are economically backward. Women have always been discriminated and have suffered discrimination in silence and still are suffering. Although legislations were passed for the emancipation of women which protected women from various atrocities of the society yet, it was not effective. Soon after the independence the Government of India worked towards providing gender justice through various legislations. As a result of this following protections are available on the national front for the protection of women against domestic violence: -

(a) Constitution of India: -

In India the people often address women as *shakti*, *Laxmi*, *Saraswati* etc comparing her with various Goddesses. However, women in India have since time immemorial been in a disadvantageous position on account of several barriers and impediments. Gender equality, as an ideal, has always eluded the constitutional provisions of equality before the law or the equal protection of law. This is because equality is always supposed to be between equals and since the judges did not concede that men and women were equal, gender equality did not seem to them to be a legally forbidden inequality.⁸⁴ Seeing the past history of women's status in Indian society the Constitution makers of our country while drafting the Constitution were sensitive to the problems faced by women and made specific provisions relating to them. The Constitution provides various provisions which prohibit discrimination and violence against women in our country. The Preamble itself contains such ideals. The Preamble is resolved to secure to all its

84. S.P. Sathe, *Gender, Constitution and the Courts in Engendering Law-Essays in Honour of Lotika Sarkar*, Eastern Book Company, Lucknow, 1999, P.

citizens justice-social, economic and political; liberty of thought, expression, belief, faith and worship, equality of status and opportunity; and to promote among them fraternity assuring the dignity of an individual and the Unity of the Nation.⁸⁵ In order to attain the said objectives, the Constitution of India guarantees certain fundamental rights and freedom such as freedom of speech and expression,⁸⁶ protection of life and personal liberty,⁸⁷ etc. Indian women are beneficiaries of these rights in the same manner as men.⁸⁸ The Constitution also provides that the state shall not deny any person equality before the law and equal protection of the laws within the territory of India,⁸⁹ prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth⁹⁰ and the State is empowered to make any special provision for women and children.⁹¹ The Constitution also provides that in the field of employment there shall not be any form of discrimination on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them.⁹² Besides the fundamental rights the Constitution has also include the Directive Principles of State Policy wherein the state is under the duty for formulating policies and laws such as providing free and compulsory education to children,⁹³ providing adequate means of livelihood for men and women,⁹⁴ equal pay for equal work,⁹⁵ and maternity relief's.⁹⁶ Hence, it can be said that the fundamental rights and Directive Principles provides the

85. The Preamble of the *Constitution of India*.

86. *Ibid*, Article 19.

87. *Ibid*, Article 21.

88. Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, 2005, P. 23.

89. Article 14, *Constitution of India*.

90. *Ibid*, Article 15.

91. *Ibid*, Article 15(3).

92. *Ibid*, Article 16.

93. *Ibid*, Article 45.

94. *Ibid*, Article 39(a).

95. *Ibid*, Article 39(d).

96. *Ibid*, Article 42.

framework to achieve the ideals of the Preamble. Besides this the Constitution under Part IV-A provides some fundamental duties which also recognizes upholding the dignity of women as one of the duties.⁹⁷

(b) Legislative Provisions: -

Apart from the Constitutional provisions there are protective laws which have existed in our statute books and they are as follows: -

(i) Indian Penal Code: -

The Indian Penal Code existed in India since the British reigns. The Indian Penal Code, 1860 protects women against the cruelty inflicted upon her by her husband and her in-laws,⁹⁸ dowry death,⁹⁹ assaulting or using criminal force against a woman to outrage her modesty.¹⁰⁰ These provisions are available to protect women from the violence, to maintain her dignity in the society and not to subject her to violence. Under the Indian Penal Code the women are exempted from certain offences wherein the men can be punished. One such provision is Section 497 of the Indian Penal Code which exempts women from being an adulterer. The validity of this provision was challenged in the case of *Yusuf Abdul Aziz vs. The State of Bombay*.¹⁰¹ This section makes an abettor of adultery punishable, but provides that "*in such case the wife shall not be punishable as an abettor.*" This provision was challenged on the ground that it only punishes a male participant in the offence of adultery and exempts the woman from the punishment hence; it is violative of Articles 14 and 15(1) of the Constitution. It was argued that even though the woman may be equally guilty as

97. *Ibid*, Article 51-A (e).

98. Section 498-A, *Indian Penal Code*.

99. *Ibid*, Section 304-B.

100. *Ibid*, Section 354.

101. AIR 1954 SC 321.

an abettor, only the man was punished. Article 15(3) should be confined to provisions which are beneficial to women and could not be used to give them a licence to commit and abet crimes. The Court held that the classification under Section 497 is not based on sex alone. The Court found that no such restriction under Article 15(3) or a licence to commit offence of which punishment has been prohibited. The Court upheld the provision.

(iii) Criminal Procedure Code, 1973: -

Apart from this the Criminal Procedure Code, 1973 under various provision provides protection to women under certain circumstances such as protection in cases of arrest wherein the police officers are vested with wide discretionary powers of arrest. It provides that in making an arrest the police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested.¹⁰² However, in case of the women it provides that except in unavoidable circumstances no woman should be arrested after sunset and before sunrise. If one has to be arrested during night, the police officer must obtain prior permission of his next superior officer and furnish written reasons therefore. In some States only police officers of the rank of Assistant Sub-Inspector or above are empowered to affect the arrest of a woman and also to report all such arrests to their Sub-Divisional Police Officials/ District Superintendent of Police.¹⁰³

The Code further provides that whenever a woman is arrested the search shall be made by another female with strict regard to decency.¹⁰⁴ Police officer has power to search the place at the time of arrest but if any such place belongs to a woman than before entering such place such police officer shall give

102. Section 46(1), *Cr. P. C.*

103. L. Jayashree, *Custodial Offence Against Women-An Overall View*, 1992, Cr. L. J. 151.

104. Section 51, *Cr. P. C.*

notice to such woman for the same.¹⁰⁵ Wherein a woman is arrested than such person shall be examined under the Code by or under the supervision of a female registered medical practitioner only.¹⁰⁶

The code also provides that the inquiry into and trial or rape or an offence under Sections 376, 376-A to 376-D of IPC shall be conducted in camera.¹⁰⁷ The Code also provides that when any person accused of or suspected of any non-bailable offences is arrested or detained without warrant and is brought before the court he may be released on bail if such person is under the age of 16 years or is a woman or is sick or infirm person.¹⁰⁸

(ii) Other legislations: -

There are some civil laws which have made effort to improve the condition of women in the society such as the *Hindu Code Bill* which no longer regard women as the property of man. Marriage is now considered to be a personal affair and if a partner feels dissatisfied she or he has the right to divorce.¹⁰⁹ **The Hindu Marriage Act, 1955** has given right to women to go for divorce¹¹⁰ or defy an order for the restitution of conjugal rights.¹¹¹ Women also has right to inherit property of not only her husband but also of her father after marriage.¹¹²

Currently a legislation called **The Protection of Women from Domestic Violence Act, 2005**¹¹³ has been enacted which provides preservation of marriage and also provides civil remedy in the form of

105. *Ibid*, Section 47.

106. *Ibid*, Section 53.

107. *Ibid*, Section 327(2).

108. *Ibid*, Section 437(1).

109. <http://www.bu.edu/wcp/Papers/Huma/HumanSing.htm> [Visited on 26th August 2007].

110. Section 13(1) of *Hindu Marriage Act, 1955*.

111. *Ibid*, Section 9.

112. *Hindu Succession Act, 1956*.

113. See *infra* Chapter VII.

compensation. Besides these legislations many other legislations such as **Maternity Benefit Act, 1961** which provides maternity leave for the women; **Dowry Prohibition Act, 1961**¹¹⁴ which prohibits the giving, taking and demanding dowry and makes it an offence punishable under the Act; **Medical Termination of Pregnancy Act, 1971**¹¹⁵ wherein termination of pregnancy beyond 20 weeks without any justifiable reasons is punishable by law. This Act was passed to check female foeticide; supporting this Act legislation was passed which is known as **Pre-conception and Pre-natal Diagnostic Technique (Prohibition on Sex Selection) Act**¹¹⁶ which prohibits the use of advanced technology in determining sex of the foetus. It also checks on female foeticide.

The **Commission of Sati (Prevention) Act, 1987**¹¹⁷ protects women from the practice of Sati; **Special Marriage Act, 1954**; **Family Courts Act, 1984** was passed to provide for the establishment of family courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs; the **National Commission for Women Act, 1990** was passed to constitute a National Commission for women and to provide matters connected or incidental thereto. As a result of this Act National Commission for Women was constituted on 31st January, 1992 to exercise powers and perform functions assigned; the **Protection of Human Rights Act, 1993** was enacted in 1993 which provides for setting up of National Human Rights Commission and Human Rights Courts to meet the growing concern for human rights in the country. It would also be mandatory for the State Governments to constitute State Human Rights Commissions. The NHRC has started to function since September, 1993. The Parliament also enacted the **Legal Services Authorities Act, 1987**,

114. See *infra* Chapter IV.

115. See *infra* Chapter VI

116. *Ibid.*

117. See *infra* Chapter V.

with an aim to provide free legal aid and competent legal services to weaker sections of the society. The Act aims at ensuring the opportunity for securing justice and not a single citizen should be denied justice by reason of economic and other disabilities.

All these Acts have been enacted for guarantying protection to women in the society. With the help of these enactments women in today's India has made a distinguished status in various spheres of life as politicians, orators, lawyers, doctors, administrators and diplomats. This proves that in independent India women enjoy more liberty and equality than before.

CHAPTER - IV
DOWRY - A SOCIAL
MENACE ITS PRACTICE
AND PROHIBITION

husbands faced trials and others simply escaped.¹ In India 6,200 dowry deaths were reported in 1994.² Dowry, hence, has emerged as a major social evil which is vitiating and undermining the family's peace, harmony and growth.

EVOLUTION OF DOWRY SYSTEM IN INDIA:-

The evolution of dowry system in India can be traced back from the *Vedic* periods wherein the *Dharmashastra* has mentioned eight forms of marriages prevalent among Hindus. Out of these four were approved and four were unapproved. In the approved form of marriage i.e. Brahma, Daiva, Arsha and Prajapatya form of marriages father gives his daughter to a man decked with ornament and jewels. It is interesting to note that according to Megasthenes the Hindu Marriage is marked by the gift of "a yoke of oxen".³ In *Vedas*, giving away a daughter by patriarch in a marriage is considered to be one of the sixteen "sanskars" which may lead to salvation of man and it is also believed that without the "punya of Kanyadana" a man's life is incomplete. However, the *Dharmashastra* has laid down that the *Kanyadana* is incomplete till the bridegroom was given "dakshina". Hence, *kanyadana* should be accompanied by some hard cash, gold ornaments and usually household things. These were given as a gift to the bridegroom as "Vardakshina". The practice of *vardakshina* was purely a voluntary practice without any coercive overtones i.e. it was decided by the father of the bride according to his financial position or "yathashakti". History is full of evidence wherein *vardakshina* has been given by the bride's father. The *Atharvaveda* refers to a royal bride bringing with her the dowry of 100 cows. Draupadi, Subhadra and Uttara also brought with them rich presents of horses,

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1. Devinder Singh, *Human Rights Women and Law*, Allahabad Law Agency, Faridabad, 2005.
 2. Santosh Mandal, *Violence Against Women: Violation of Human Rights*, 2004 Cr. L. J. Journal Section 81 at 82.
 3. History and Culture of the Indian People, Vol II, Bhartya Vidya Bhavan, Bombay, 1990, P. 559.

elephants and jewels from their parents.⁴ Hence, originally dowry was not based on avarice and extortion but it was a token of love to the bridegroom from the bride's parents. The same was also given to the daughter so that she can settle herself in her matrimonial home with the basic necessities without any difficulties. The system of *vardakshina* with *kanyadana* was developed simply out of deep rooted affection and love towards their daughter by the parents. It may have started as the girls in ancient India were not educated and even if they were educated they were prohibited or were unwilling to take up any form of employment. As a result they were financially dependent upon their parents before marriage and on their husband or in-laws after marriage. One of the important reason for giving *dakshina* is that women were not entitled to share in joint property of her parental family, so the parent's used to gift her some hard cash, ornaments, gold, clothes, utensils etc which can be included in her *Stridhan*. However, later these two aspects of Hindu marriage i.e. *kanyadana* and *vardakshina* got entangled which created confusion and misconception. This confusion and misconception gave rise to the dowry system prevalent in today's India. Hence, once a religious ritual which was given by the parents of the bride out of affection and love changed into a system of grabbing wealth by the groom's family. The *vardakshina* became a callous, crass and commercial system wherein the groom's family started to demand dowry as a matter of right and precondition to a marriage. Thus, once a voluntary act became obligatory in nature. Now, the tendency of this increasing trend is such that bridegroom has become a saleable commodity in the marriage market.

Another reason for the increase in the dowry system in India is that during the medieval period especially after 13th Century the practice of

4. P.S. Jaswal and Nishtha Jaswal, *Anti-Dowry Legislation in India: An Appraisal*, 30 JILI 78 (1988).

dowry system had touched a great magnitude of evilness as it was considered to be a matter of prestige or self honour to give as much *dakshina* as possible. This trend was started by the Kings which was followed by the feudal lords as a symbol of status and prestige and above all to assert one's superiority over the other. This practice also effected the less fortunate in the society who suffered the most out of this system. Now the very concept of *vardakshina* has become coercive means of extorting money by the groom's parents. The practice started by the feudal lords and kings took a worst turn and has become a widespread social evil with menacing proportions which kills at least 17 women daily as reported by Moore M. in Consumerism Fuels Dowry Death Wave, The Washington Post, March 17, 1995.⁵ An article on Status of Women in India-A depressing Scenario, points out that dowry death takes place once in every 1000 minutes.⁶

EFFECTS OF DOWRY SYSTEM IN THE SOCIETY:-

Dowry has become a widespread social evil and menace. Its curse in the society is rising very rapidly. It has emerged as a social evil and is a burning problem of today.⁷ The dowry system in the ancient period was prevalent in the upper three casts of Hindu society viz. Brahmin, Kshatriya, and Vaishya, however, it does not mean that the system exists only in the Hindu society. The other society such as that of Muslims and Christians too are taken in by the evil of the dowry system. Among Muslims in Many parts of India there is a custom of giving cash to the bridegroom (*salami*) after the *nikah* ceremony with some clothes and jewellery to the bride by her parents who also bear the cost of her marriage. Even the Christians are not spared by the evils of such system. Kerela is

5. Quoted in Santosh Nandal, *Violence Against Women: Violation of Human Rights*, 2004 Cr. L. J. Journal Section, 82.

6. The Tribune-Chandigarh, 15th April 1999, Quoted in Sadhna Gupta, *Dowry death-law relating to Dowry Offence*, 2006 Cr. L J. Journal Section, 284.

7. *S. Gopal Reddy vs. State of Andhra Pradesh* AIR 1996 SC 2184.

reported to be the high literacy rate State in India. Dowry system is prevalent even in Christians of Kerala.⁸ The situation is such among Christians that the prevailing high rates of dowry makes marriages of Christian girls especially that belonging to poor family impossible or induce them to join nunneries or search desperately for jobs in other States. Hence, irrespective of to what religion you belong the motive of dowry is extortion of wealth from bride's family. It is becoming the deadliest enemy of a democratic society as it lays down the following effects in the society:-

(i) Effects on family: - Dowry as a growing menace has been vitiating and undermining the family peace, harmony and growth. Although earlier it was prevalent among wealthy and rich people it is now affecting people from all walks of life be he rich or poor. It has ruined a number of families and has created many unhappy homes.

(ii) Physical Violence and Criminal Assault: - Women who have been married off by their parents suffer physical violence and criminal assault by her husband and in-laws for not bringing sufficient dowry. There are certain incidents wherein even though the bride's parents fulfill the demand made by the bridegroom parents, yet they (brides) suffer physical violence and criminal assault as the bridegroom's parent's demands for more dowries and wherein the bride's parents are unable to fulfill such demands. These physical violence and criminal assault consists of acts such as wife-beating, cruelty, dowry death, desertion etc.

(iii) Unmarried girls: - Demand for unreasonable dowry and wealthy items results in number of eligible girl's unmarried as their parents are unable to fulfill the demands made by bridegroom parents. This again leads to their joining nunneries or ashrams or eventually leads them to a promiscuous life of which the society mocks and parents are helpless.

8. T.H. Khan, *Dowry Prohibition Act 1961: Its Efficacy*, 16 IBR 28 (1989).

(iv) Suicide: - There are many incidents where the unreasonable demand of dowry from groom's side and the unavailability of their parents to meet such demands, the girls commit suicide to mitigate the suffering of their poor parents.

(v) Rise in Child Marriages: - With the increase in the evil practices of dowry system the girl's parents try to marry off their daughters at tender ages to escape from the payment of unreasonable dowry. The general conception of the parents are that it is difficult to predict the future of the female child and the older she will get the quantum of dowry would increase. Hence, dowry system gives rise to other social problems.

(vi) Infanticide: - It is evident from the evil practices of dowry system that in an Indian household still the birth of girl child is not preferred as the parents worry that if a girl child is born in a family, it will result in beginning of the misery of the family as she has to be married off by paying a heavy price. Hence, incidents of infanticide still take place in India.

(vii) Abortion: - Dowry system gives rise to another evil like abortion. Generally, the women are forced to abort their girl child. As soon as the in-laws get to know that the child in the womb is girl they force their daughter-in-law to go for abortion. The reason being same that payment of dowry when she is of marriageable age.

(viii) Breakdown of marriages: - Dowry system has given rise to breakdown of marriages wherein the women is left to suffer without any fault of her.

(ix) Loss of sanctity of marriages: - Earlier marriages were a sacrament. But with the rise in the practice of dowry system marriages have been reduced to a commercial business wherein parents of the groom aims at making as much money as possible. Dowry is demanded on the basis of family status, groom's accomplishment and other material acquisition.

Despite the shortcomings of dowry system mentioned above, the system has occupied a pivotal role in our marriage system irrespective of any religion or any community. It has become a basic component of our marriage system.

LEGISLATIVE ENACTMENTS IN INDIA AGAINST THE EVILS OF DOWRY SYSTEM: -

The concept of dowry in the ancient Hindu community was different from what it is at present. The present form of dowry system was totally unknown in the ancient Hindu community. Although the dowry system has occupied an important role in marriage system in India, the evil concept of this system can be traced with the advent of westernization which gave rise to gross materialism, greed and desire for consumer goods and modernization which has brought forward the cash value in everything. These has in fact effected human relationships too which has now become commercialized. In the early societies brides were known to be *Laxmi* of the house (Goddess of Prosperity). When a bride was brought into the family, it was considered to be a great event and was looked upon as bringing a fortune into the family not by way of dowry but on account of the grace the young lady carried with and around her. However, with westernization the living costs are also rising. With this the people are being obsessed with gold and silver the prices of which are rising almost everyday. The desire to own luxurious goods and showing off to the relatives and neighbours is also increasing. Along with this the education is being expensive. The parents are using their sizeable income on their son's education. Hence, sons are treated as an investment to yield the returns. Price tags are attached to eligible bachelor which may vary according to the qualification and his status in the society (the service which he is holding or other attainments). Dowry has been serving as the

foundation for discrimination against women in India whether in their paternal home or in her in-laws home. It is giving rise to other social evils such as infanticide, and foeticide.

Greed in human beings seldom subsides. Hence, even if the bride has brought the demanded dowry the insufficiency of the parents to fulfill the post marriage dowry demand of the in-laws of their daughter often brings misfortune to their daughters such as beating, torture, cruelty, starving for days together, locked up in dingy rooms and above all dowry deaths. Dowry deaths may vary such as burning of the bride alive, poisoning, drowning, strangling, shooting etc. However, the most followed option for dowry death is that of burning the bride which lacks forensic advantages as it destroys the evidence of murder along with the victim and can easily be made to look like an accident. Dowry is a deep rooted evil which is the cause of many unfortunate deaths of young ladies which is brutal and barbarous. The offence is generally committed inside the house and more often the circumstances give an impression that it was a suicidal death. Above all the family members attempt to cover up such an offence rather than to expose it. In relation to curb the evils of dowry system the government has come forward with legislation to protect women from such social crime and also to punish the offenders who commit such crimes.

The Indian government had started its fight against the evil practices of dowry system long before the independence by enacting "*Sind Deti Leti Act, 1939*" which dealt with the evils of dowry system. This enactment was passed by provincial government of Sind. However, it failed to create any impact. The social reformers of the 19th Century and early 20th Century provided action against social evils including the dowry system. But it gained its momentum only during the last few decades when this system has taken acute form in almost all parts of the country and in almost all the sections of the society. The State

governments such as that of Bihar and Andhra Pradesh enacted the *Bihar Dowry Restraint Act, 1950* and the *Andhra Pradesh Dowry Prohibition Act, 1958* for their respective States. These legislations were an attempt to curb the dowry system in the said States. However, there was no legislation which could govern the practice of the dowry system at the Central level, which could be applied to everyone irrespective of to which State they belong. As a result of this the government, on account of pressure both at political and social level, finally on 24th April 1959 introduced the Bill on Dowry Prohibition Act, 1959 in the Lok Sabha. After discussions, the said Bill was referred to a Joint Committee of both the Houses of Parliament. Both the Houses of Parliament did not agree with the amendments as reported by the Joint Committee and ultimately the Bill was considered at the joint sitting of both the Houses of Parliament held on 6th and 9th May, 1961. As a result of this the Central Act against the evil practices of dowry system came into existence applicable to all irrespective to the fact that to which State they belonged. This legislation is called the Dowry Prohibition Act, 1961. To curb the evils of dowry system from our society following legislative enactments were done: -

(I) THE DOWRY PROHIBITION ACT, 1961: -

Dowry as a social menace remained unabated for a long time as the society gave its consent for such practice in the name of religious ceremony which became unavoidable system attached to marriages. It, thus, became essential for the state to intervene to eradicate the said problem. Therefore, a uniform legislation was passed by the Parliament in 1961 which is called the Dowry Prohibition Act, 1961 which was applicable not only to Hindus but to all other communities or to whomever residing in India. It superseded all other earlier laws passed by States i.e. the *Sind Deti Leti Act, 1939*; the *Bihar Dowry Restraint*

Act, 1950; and the *Andhra Pradesh Dowry Prohibition Act, 1958*. The Dowry Prohibition Act, 1961 came into force on 1st July 1961. The main purpose of the said Act was to prohibit the practices of giving and taking dowry. However, this Act was found to be ineffective in reducing the number of dowry deaths. As a result of this, the Act was amended twice i.e. by the Dowry Prohibition (Amendment) Act 1984⁹ and by the Dowry Prohibition (Amendment) Act 1986.¹⁰ Both the amendments were introduced to give effect to some of the major recommendations of the Joint Parliamentary Committee on dowry prohibition. The Amendment Act of 1984 made giving or receiving dowry a cognizable offence. Another Amendment Act, 1986 defined dowry death and made it compulsory to conduct postmortem of a woman who had committed suicide or dies in suspicious circumstances within seven years of her marriage.

Dowry is directly related to marriage which is Entry No. 5 under the heading “*Marriage and Divorce*” in the Concurrent List III of the Seventh Schedule of the Constitution of India. Thus, both the Centre and the States can legislate upon the subject. Hence, if there is a conflict then as per Article 254 the State law would be void to the extent of repugnancy subject to the provisions of Article 254.

The Dowry Prohibition Act, 1961’s validity has not been hitherto challenged in any court. It may be questioned on the ground that it is a part of religion the practice of which is being restricted by legislative interference. However, Article 38 of the Constitution of India seems to protect it which provides that it is the duty of the State to secure a social order for the promotion of welfare of the people. The Dowry Prohibition Act, 1961 consists of ten sections. Following are its important features: -

9. Came into force on 2nd October, 1985 [No. 63 of 1984].

10. Came into force on 8th September, 1986 [No. 43 of 1986].

(a) Meaning of the term Dowry: -Efforts to curb the evils of dowry system started during the British rule in India by the Indian Social Reformers as a result of this the then Provincial Government of Sind passed an enactment known as *Sind Deti Leti Act, 1939* to deal effectively with the dowry system. The said Act prohibited the giving and taking of dowry as well as prescribed limits for taking and giving dowry along with the prescribed punishment for violating the provisions of the Act. Even after the independence the brides in India were tortured and ill treated for not bringing or bringing insufficient dowry. Sudden arise in the cases concerning suicides by newly wedded woman or dowry deaths made the government to sit up and to take quick action by legislating an Act specifically to deal with the problem of dowry.

The term *dowry* has been defined in the **Webster's New Dictionary**¹¹ as: -

1. The money, goods or estate which a woman brings to her husband in marriage; the portion given with the wife;
2. A natural talent, gift or endowment: as poetry was her dowry;
3. A gift given to or for a wife.

As per **Wharton's Lex Lexicon** "*Dowry or Dote (Dos Mulieris) otherwise called Maritagium or marriage goods, that which the wife brings to the husband in marriage. This word should not be confounded with dower.*"

The **Law Lexicon of British India**¹² says Dowry or Dote (Dos Mulieris) was in ancient times applied to that which the wife brings to her husband in marriage; otherwise called maritagium or marriage goods; but these are

11. Webster's New Twentieth Century Dictionary, 1956.

12. 19th Edition, P. 364.

termed mere property goods given in marriage and the marriage portion. As per **Cambridge Dictionary**, Dowry is property which a woman brings to her husband.

The Dowry Prohibition Act, 1961 has given us the definition of *Dowry* which in itself is one of the important features of the Act as the term *dowry* in various dictionary has been given is not sufficient to cover all the atrocities connected with dowry system. The Dowry Prohibition Act, 1961 provides the definition of dowry as “*any property or valuable security given or agreed to be given either directly or indirectly –*

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

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

*at or before or any time after the marriage in connection with the marriage of the said parties but does not include dower or mehr in case of person to whom the Muslim Personal Law (Shariat) applies.*¹³

With regards to the expression “*Valuable Security*” which is used under Section 2, the Explanation II of Section 2 provides that it will have the same meaning as in Section 30 of the Indian Penal Code, 1860. The words *valuable security* denote a document which is, or purports to be, a document where by any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right. For instance, where a person A writes his name on the back of a bill of exchange, the effect of this endorsement is a valuable security.¹⁴ The term ‘*property*’ used under Section 2 of the Dowry Prohibition Act, 1961 has been used in a very wide sense and includes both the movable as well as immovable property. It will have the same meaning as was given to it by the

13. Section 2, *the Dowry Prohibition Act, 1961*.

14. Illustration to Section 30, *Indian Penal Code, 1860*.

Supreme Court in *Dwarkadas Shrinivas vs. Sholapur Spinning and Weaving Co.*¹⁵ i.e. it must be understood both in the corporeal sense as having reference to those specific things that are susceptible of appropriation and enjoyment as well as in its judicial or legal sense as a bundle of rights which the owner can exercise under the municipal law with respect to the use and enjoyment of these things to the exclusion of others. Hence, as per the definition of *dowry* as provided under Section 2 of the Act of 1961 following are the essential ingredients of dowry: -

- (i) there must be property or valuable security;
- (ii) which is given or agreed to be given;
- (iii) either directly or indirectly;
- (iv) by one party to a marriage to the other party to the marriage; or by the parents of either party to a marriage; or by any other person to either party to the marriage or to any other person;
- (v) at or before or any time after the marriage;
- (vi) in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

The above stated definition of *dowry* is the result of the Dowry Prohibition (Amendment) Act, 1984 which has drastically amended Section 2 on the recommendation of the Joint Parliamentary Committee on the Dowry Prohibition Law. The words "*as for consideration for the marriage*" substituted with the words "*in connection with the marriage of the said parties*" as the Joint Committee was of view that the omitted words would not serve the purpose the intention of the said Act. It is submitted that the substituted words include anything which is given or agreed to be given or taken or agreed to be taken as the words "*in connection with*" distinguishes dowry from presents. Dowry

15. (1954) SCR 674.

consists of those *presents* which are extorted or extracted from the bride's parents by making a demand and by saying that marriage would take place only if those demands were fulfilled. The coerciveness is an essential element of dowry which distinguishes it from the presents.

Another important amendment made on recommendation of the Joint Committee was to include the words "*at or before or at any time after the marriage.*" It is observed that marriage gives rise to continuous relationship between the two families. There are ceremonies which are associated with marriage such as child-birth, occasions of visits, festivals etc particularly in the first few years of marriage. It becomes an added burden on bride's family to gift expensive gifts to make up the deficiencies in the initial giving of dowry. The bride's treatment in her husband's home is linked with these gifts. Thus, the Committee in its reports has observed that dowry is not one isolated payment made initially at the time of marriage but a series of gifts given over a period of time before and after the marriage. Hence, it can not be denied that even after the marriage father of the bride is faced with continuous demand of dowry and if they are not met the bride is treated with cruelty which forces the parents to meet the demand. Hence, the Act substituted the words "*after the marriage*" with "*at any time after the marriage*" to widen the scope of the Act.¹⁶

Explanation I of Section 2 of the Dowry Prohibition Act, 1961 which ran "*For the removal of doubts it is hereby declared that any present made at the time of the marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section unless they are made in consideration for the marriage of the said parties.*" The Explanation I as per the opinion of the Joint Parliamentary Committee on Dowry Prohibition law was of the opinion that it

16. Substituted by the Amendment Act, 1986.

took away the teeth of the law as it does not include cash, ornaments, clothes and other articles as dowry unless they are taken as consideration for the marriage. It is obvious that the parents of the bride will never come forward at the stake of their girl's happiness to disclose that they had given such things as dowry. Hence, the said Explanation was omitted. However, omission of the Explanation does not mean that presents can not be given to bride or bridegroom individually or collectively. The provision relating to presents has been incorporated in sub-section (2) of Section 3 with some safeguards. Hence, the *dowry* now has a very wide scope after the amendments. Thus, in *Vemuri Venkateswara Rao vs. State*¹⁷ it was held that the amount of Rs. 20,000 and 1.5 acres of land agreed to be given at the time of marriage is dowry, even though the said land was subsequently transferred in the name of deceased as "*Pasupukumkuma*" as gift to daughter. Such assignment forms part of dowry.

In *Pawan Kumar vs. State of Haryana*¹⁸ after few days of the marriage, there was demand of scooter and television which when not being met lead to repetitive taunts and mal-treatment. The evidence qualifies such demand to be a demand for dowry in connection with the marriage and circumstances of the case constitute to be a case falling within the definition of *dowry* under Section 2 of the Act and Section 304-B of the Indian Penal Code.

The furnishing list of ornaments and other household articles, such as refrigerator, electrical appliances etc, at the time of settlement of the marriage amount to demand of dowry within the meaning of the Act.¹⁹ In *Inder Sain vs. State*²⁰ it was held that dowry consists of only those articles which are given or agreed to be given as regarding or reason or motive for solemnization of

17. 1992 Cr. L. J. 563.

18. AIR 1998 SC 958.

19. *Madhu Sudan Malhotra vs. K.C. Bhandari* 1998 (Supp) SC 424.

20. 1981 Cr. L. J. 1118.

marriage. Anything given after the marriage would be dowry if it was agreed or promised to be given as consideration of marriage.

In case of *L.V.Jadhav vs. Shanker Rao*²¹ the bridegroom's father demanded Rs. 50,000/- for payment towards the air fare of the bride and the father-in-law to join the husband in the United States. After marriage the bride was not sent to United States for non-payment of the sum demanded by the father-in-law. It was construed by the Supreme Court that it amounted demand for the dowry.

The bride in case of *Shobha Rani vs. State*²² produced a letter before the Court which reads that "*now regarding dowry, I still feel that there is nothing wrong in my parents asking for a few thousand of rupee. It is quite a common thing for which my parents are being blamed for harassment.*" The Supreme Court held it to be a demand for dowry. Hence, the Dowry Prohibition Act brought practically everything paid or agreed to be paid or demanded to be paid in connection with marriage within the purview of the definition of dowry. In *Prem Singh vs. State of Haryana*²³ the Apex Court was of the opinion that additional demand of dowry falls under the definition of 'dowry' in view of the amended provisions of Dowry Prohibition Act, 1961. Hence, such an additional demand will come within the purview of Section 2 of the said Act.

Although the term "*dowry*" has a wide scope still traditional presents given to bride or bridegroom at the time of marriage is not barred. The Punjab and Haryana High Court in *Vinod Kumar Sethi vs. State of Punjab*²⁴ held that the Dowry Prohibition Act does not bar the traditional giving of presents at or about the time of wedding which may be willing and affectionate gifts by the

21. AIR 1983 SC 1219.

22. AIR 1988 SC 121.

23. AIR 1998 SC 2628.

24. AIR 1982 P&H 372.

parents and close relations of the bride to her. Such presents and dowry given by the parents does not come under the definition of dowry. The tradition of giving presents at or about the time of wedding is an accepted practice which is described in the oldest Hindu scriptures and is continued in the society today with a greater zeal. Hence, a voluntary and affectionate giving of dowry and traditional presents would thus be plainly out of the ambit of the definition of dowry under Section 2 of the Act.

In *Satvir vs. State of Punjab*²⁵ it was held by the Supreme Court that all amounts paid by the parents of bride cannot become dowry. It should be any property or valuable security given or agreed to be given in connection with the marriage. Customary payment in connection with birth of a child or other ceremonies are prevalent in different societies, such payments are not enveloped within the ambit of dowry. However, wherein the in-laws and husband demand for presents on festive occasions having no connection with the marriage does not amount to demand of dowry but will be cruelty or harassment by in-laws.

The menace of dowry is spreading to other religions too. The payment of *mehr* as settled between the parties to a Muslim marriage cannot be denied. Dowry as specifically mentioned under Section 2 of the Act that dower or *mehr* does not amount to dowry. But a question remains unanswered that whether the amount paid by a Mohammedan in connection with his daughter's marriage to prospective bridegroom for purchase of property in joint names of daughter and would be son-in-law amounts to dowry? This question was raised in the case of *Kunju Maideen vs. Sayeed Mohammed*.²⁶ In this case the father of the girl agreed to give his daughter and her groom a sum of Rs. 3001/- to purchase an item of his

25. AIR 2001 SC 2828.

26. AIR 1986 Ker 48.

property in the name of his daughter and would be son-in-law. However, the marriage did not take place and the respondent did not return the amount of Rs. 3001/- which was obtained from the plaintiff. The suit was laid for the recovery of the said sum with interest from 14-2-1975. The respondents denied the receipt of the amount and their contention was that the suit is not maintainable as it does not come under the definition of dowry; hence the said suit is outside the purview of the Act. On a fair reading of the plaint, it was held by the Kerela High Court that the amount paid was not purchase of property in the name of daughter and would be son-in-law. The said sum was thus, not paid or agreed to be paid at or before or after the marriage as consideration for the marriage of the parties. Hence, the amount paid by the plaintiff does not come within the purview of Section 2 of the Dowry Prohibition Act.

With regards to “*Stridhan*” a Hindu married woman’s property, the lady’s right over such property is absolutely clear and unambiguous. She is the absolute owner of such property and can deal with it in any manner she likes – she may spend it, give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily the husband has no right or interest in it. However, he may use it in times of extreme distress or in famine, illness or like exceptions. However, it was held by the Supreme Court in *Pratibha Rani vs. Suraj Kumar*²⁷ that the right is purely personal to the husband and property so received by him in marriage could not be proceeded against in execution of a decree for debt.

The Punjab and Haryana High Court in *Vinod Kumar Sethi vs. State of Punjab*²⁸ held that the Dowry Prohibition Act does not affect the

27. AIR 1985 SC 628.

28. *Ibid* 24.

concept of stridhan of a Hindu married woman. Stridhan of a Hindu married woman can thus be placed under three categories: -

- i. Property intended for exclusive use of the bride for example her personal jewellery and wearing apparels, etc;
- ii. Articles of dowry which may be for common use and enjoyment in the matrimonial home; and
- iii. Articles given as presents to the husband or the parent-in-law and other members of his family.

Although *Stridhan* is a part of dowry the concept of dowry is wider than *Stridhan*. While dowry signifies presents given in connection with marriage to the newly wedded couple, *Stridhan* is confined to property given to or meant for the bride. Hence, it was held by the Punjab and Haryana High Court that the concept that as soon as the bride enters her matrimonial home her *Stridhan* becomes a joint property is not correct. If her husband or in-laws misappropriate such property of hers they are liable to be prosecuted. It means that penal actions can be taken against them. The Court in *Pratibha Rani vs. Suraj Kumar*²⁹ held that if despite the demands, wherein the husband and his parents refused to return to the wife the articles given in marriage it amounted to an offence of criminal breach of trust.

The Civil Service (Conduct) Rules, 1964 specifically prohibit government servants from giving and taking dowry or abetting the giving and taking of dowry.³⁰ Rule 13-A of the Central Civil Services (Conduct) Rules lays down the following: -

“No Government Servant shall –

- i. give or take or abet the giving and taking of dowry, or*

29. *Ibid* 27.

30. Government of India, Cabinet Secretariat, Deptt. Of Personal and Administrative Reform, Notification No, 11013/12/75 Est. (A) dated 13.2.1976.

- ii. *demand directly or indirectly, from the parents or guardians of a bride or bridegroom, as the case may be, any dowry.”*

A similar provision has also been enacted in the Indian Services (Conduct) Rules, 1968.³¹

(b) Penalty for giving, taking and demanding dowry: - The Dowry Prohibition Act, 1961 provides provision for penalty for giving, taking and demanding dowry. Section 3 of the Act provides penalty for giving or taking dowry. It provides that if any person after the commencement of the Act gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than 5 years and with fine which shall not be less than Rs. 15,000/- or the amount of the value of such dowry, whichever is more.³² However, the proviso to sub-section (1) provides that the Court may for adequate and special reasons to be recorded in the judgment impose a sentence of imprisonment for a term of less than five years.

This section has been totally amended although the head note is the same. The said amendments enhanced the punishments for the offence of taking or giving dowry. After the amendment Act 63 of 1984 and further amendment by Act 43 of 1986 now a minimum punishment has been laid down, and in addition of the punishment of imprisonment a fine of not less than Rs. 15,000/- or the amount of the value of such dowry, which ever is more has been imposed. Before the Dowry Prohibition (Amendment) Act, 1984 came into force; several States have amended the Dowry Prohibition (Amendment) Act, 1961. These amendments mostly enhanced the punishment for the offence of taking or giving dowry. For example, The Punjab Act has enhanced the jail term from six

31. *Ibid.*

32. Section 3(1), *the Dowry Prohibition Act, 1961.*

months to one year; and fine from Rs. 5000/- to Rs. 10,000/-. The Himachal Pradesh has enhanced the jail term from six months to one year but the maximum fine was restrained to the original sum only i.e. Rs. 5000/-. The West Bengal Act³³ provides minimum jail sentence for three months which may extend to three years and the minimum fine is Rs. 2000/- which may extend to Rs. 10,000/-. However, The Haryana Act,³⁴ the Bihar Act³⁵ and the Orissa Act³⁶ retain the same penalty as the original Act. The Andhra Pradesh Act³⁷ which is a pre Central Act makes all dowry offences including the offence of taking and giving of dowry as non-cognizable, bailable and compoundable. For the offence of giving and taking dowry jail term which may not exceed six months or a fine which may not exceed Rs. 1000/- is provided.

A new provision has been inserted in Section 3 of the Act through amendment which provides that nothing in sub-section (1) shall apply to or in relation to presents given at the time of marriage to the bride and bridegroom without any demand having been made.³⁸ Proviso to Clause (a) and (b) of Sub-section (2) provides that the lists of all presents given either to the bride or bridegroom should be maintained in accordance with the rules made under this Act.

The Dowry Prohibition (Maintenance of the Lists of Presents to the Bride and the Bridegroom) Rules, 1985 provide for the listing of the following: -

- (a) list of the presents given to the bride which is to be maintained by her, and
- (b) list of the presents given to the bridegroom to be maintained by him.

33. Act 35 of 1975.

34. Act 38 of 1976.

35. Act 4 of 1976.

36. Act 28 of 1961.

37. Act 1 of 1958.

38. Sub-Section (2), *the Dowry Prohibition Act, 1961*.

Further, it is provided under the rule that such lists should be prepared at the time of marriage or as soon as possible after the marriage. Rule 2(3) further provides that –

- i. lists should be in writing
- ii. the lists should contain the following: -
 - Brief description of each present.
 - Approximate value of present.
 - Name of the giver of present.
 - If related, a description of relationship with the bride.

However, it is an option of the bride and bridegroom to obtain the signatures on the list of the other party or any relation or any other persons present at the time of the marriage.³⁹ Explanation I and II to Rule 2 provides that where the bride and bridegroom is unable to sign on account of illiteracy or any other reason she or he may affix her/his thumb-impression in lieu of her/his signature after having the list read out to her/him and on obtaining the signatures on the list of the person who has so read out the particulars contained in the list.

The Committee observed that in order to ensure that the presents in the form of cash, ornaments, clothes or other articles made to the bride at or before or after marriage were exclusively for her benefit, hence, they should be listed and registered in her name. As a result of this sub-section (2) was inserted in the Act. It was made in order to secure the position of the bride and the gifts given to her are not misappropriated by her husband or in-laws. Such presents should neither be allowed to be transferred nor disposed of for a minimum of five years from the date of marriage without prior permission of the family court on an application made by her. This provision helps a woman in recovering her *Stridhan*

39. Rule 2(4), *the Dowry Prohibition (Maintenance of the Lists of Presents to the Bride and Bridegroom) Rules, 1985.*

after her marriage breaks down or she is expelled from the matrimonial home or is forced to leave it. Sub-section 2 of this Section provides that all the presents given to the bride and bridegroom at the time of marriage should be listed in two separate lists; one containing the lists of presents given to the bride, and the other containing the lists of presents given to the bridegroom. The bride should keep her list and the bridegroom should keep his. However, the Act does not provide for registration of the lists.

The Dowry Prohibition Act, 1961 also provides penalty for demanding dowry. It provides that wherein any person demands, directly or indirectly, from the parents or other relatives or guardian of bride or bridegroom, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with a fine which may extend to Rs. 10,000/-.⁴⁰ Proviso to this Section provides that the Court may for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than six months. Hence, Section 4 of the Act prescribes penalty for demanding dowry directly or indirectly. The original Section 4 has been amended by the Amendment Act of 1984⁴¹ which has brought two significant changes in the said Section viz. the minimum and maximum punishment has been laid down. In the original Section it was mentioned that no one can be punished for less than six months for the offence of demanding dowry as well as with fine. It was also provided that the jail sentence and fine could be given in the alternative. However, now as mentioned under Section 4 after the amendment in 1984, the minimum punishment for demanding dowry is not less than six months and the maximum is for two years along with fine which may extend up to Rs. 10,000/-. Another amendment made under Section 4 is for the

40. Section 4, *the Dowry Prohibition Act, 1961*.

41. Act 63 of 1984.

prosecution of the offender now no sanction of the State Government is needed. Originally the old section under its proviso it was laid down that no prosecution of the offender could take place unless prior sanction of the Court was obtained, and this provision was considered mandatory.

Various States have amended Section 4 of the Act. In some of the State statutes it is worded differently and some State statutes have enhanced the punishment. For instance, the Punjab Statute⁴² retains the original Section, but adds two more Sections 4-A and 4-B which makes certain acts punishable. The Act makes it a punishable offence if any person displays any presents made at the time of marriage in the form of cash, ornaments, clothes or other articles; or takes in a marriage party more than 25 persons exclusive of minors and the members of the band; or give in the form of *sagun* at the time of *thaka*, betrothal or marriage, anything the value of which exceeds eleven rupees; or gives to the parents or any other relation of a party to a marriage anything on the occasion of *milni* or any other ceremony performed in relation to betrothal or marriage; or serves to the marriage party more than two principal meals. Such acts are punishable with imprisonment for a term which may extend to six months or fine which may extend to Rs. 5000/- or with both.⁴³ Explanation to this section provides the meaning of the expression "principal meal" as lunch or dinner. The said statute also provides that any party to the marriage deprives the other party of the rights and privileges of marriage, or tortures or refuses to maintain the said other party, for non-payment of dowry, and any person who assists such party in the commission of such offence, shall be punishable with imprisonment for a term which may extend to one year, and fine which may extend to Rs. 5000/-.⁴⁴

42. Act 26 of 1976.

43. Section 4-A, *Ibid.*

44. Section 4-B, *Ibid.*

Similarly, the Himachal Pradesh Statute⁴⁵ also amended Section 4 of the Act by enhancing the punishment to one year. It was also provided through amendment that fine can be imposed in addition to the jail sentence. Like the Punjab statute it also added two Sections i.e. Section 4-A and Section 4-B which are similar to that of the Punjab Act. However, it added a provision that *“this section shall be in addition to and not in derogation of any provision on the subject contained in any other law for the time being in force.”*

The Haryana Act⁴⁶ contains the similar provision in clauses (c), (d), (e) and (f) of Section 3 of the Act. The West Bengal Statute⁴⁷ inserted a new Section 5 which is identical with the provision in Section 4-B of the Himachal Pradesh Act. However the Bihar⁴⁸ and Orissa State Statute⁴⁹ retains the original provision, although the Bihar State statute made a slight modification by imposing fine in addition to jail sentence and not in the alternative. Despite these changes the Andhra Pradesh Statute⁵⁰ does not makes demanding dowry as an offence.

All these state statutes are amended and have in fact inserted new provisions which are inconsistent with the original Act i.e. the Dowry Prohibition Act, 1961. But with the enforcement of Amendment Acts of 1984 and 1986 such provisions of the State statutes which are inconsistent with the Central Statute i.e. the Dowry Prohibition Act, 1961 will not have any effect.

The object behind Section 4 is to discourage the very demand of the property or valuable security as consideration for a marriage between the parties. It prohibits the demand for giving property or valuable security. The

45. Act 25 of 1976.

46. Act 38 of 1976.

47. Act 35 pf 1975.

48. Act 4 of 1976.

49. Act 28 of 1961.

50. Act 1 of 1958.

Supreme Court has rightly observed in *State of Himachal Pradesh vs. Nikku Ram*⁵¹ the evils of dowry in the following words: -

“Dowry, dowry and dowry: This is the painful repetition which confronts and at times haunts many parents of a girl child in this holy land of ours ‘where, in old days, the belief was where woman is worshipped, there is abode of God.’ We have mentioned dowry thrice, because this demand is made on three occasions: (i) before marriage; (ii) at the time of marriage; and (iii) after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture of the girl, leading to either suicide in some cases or murder in some.”

The Act thus discourages the very demand of dowry which causes all these evils. From the beginning of Section 4 of the Dowry Prohibition Act it is clear that for bringing a case under the said Section of the Act there must be a demand of dowry. However, a question arises that what are the essential elements of the offence covered under Section 4 of the Act? The High Courts of India differ in this point as according to some the offence of demanding dowry is constituted merely on the demand being made and to others for the Constitution of such offence it is also necessary that demand for such dowry should be accepted by the other party. In *Inder Sain vs. State of Bihar*⁵² and *Kashi Prasad vs. State of Bihar*⁵³ the High Court gave a very narrow interpretation and held that a mere demand for dowry if not associated with the consent of the other party would not attract the provisions of the Dowry Prohibition Act. In order to constitute the offence of demand for dowry it is essential that such demand should be accepted by the other party. The Calcutta High Court in *Shankarrao vs. L.V. Jadhav*⁵⁴ too

51. AIR 1996 SC 67.

52. 1981 Cr. L. J. 1116.

53. (1983) 4 SCC 231.

54. 1983 Cr. L. J 269.

was of the same opinion. However the Supreme Court in *L.V. Jadhav vs. Shankarrao*⁵⁵ (an appeal case) reversed the decision given by the Calcutta High Court in the said case which would amount to considerable miscarriage of justice in the subordinate courts and will frustrate the objective of the Act. The Supreme Court was of the view that the entire definition of the word 'dowry' should not be imported into Section 4 as the main objective of the Act is to stamp out the practice of demanding dowry in any shape and in any form either before or after the marriage. The Supreme Court was also of opinion that with regards to the definition of dowry a liberal meaning has to be used for interpreting Section 4 of the Act. The term 'dowry' as per Section 4 means that any property or valuable security which if consented to be given on demand being made would become dowry within the meaning of Section 4. The Supreme Court observed: -

"... .. We are also of the opinion that the object of Section 4...is to discourage the very demand for property or valuable security.....There is no warrant for taking the view that the initial demand for giving of property or valuable security would not constitute an offence and that an offence would take place only when the demand was made again after the party to whom the demand was made agreed to comply with it."

These differences among the High Courts were due to the definition of 'dowry' under the original Section 2 of the said Act which has now been amended. Instead of the words "*in consideration of marriage*" now after the amendment "*in connection with the marriage of the said parties*" has been used under Section 2, hence, now there is no scope for the controversy. Hence, mere demand for dowry constitutes the offence mentioned under Section 4 of the Act. In *Daulat Man Singh vs. C.R. Bansi*⁵⁶ the demand of dowry was made through the

55. AIR 1983 SC 1219.

56. 1980 Cr. L. J. 1171.

elder brother of the accused who was the son-in-law of the complainant. He wrote a letter addressed to his father-in-law that the accused demanded dowry. Thus, the demand of dowry was made indirectly through the agency of the brother. It was held that the demand for dowry constituted an offence. It is not necessary that the demand of dowry should be made at or near about the date of marriage. The Court held that mere demand for money as dowry for completing the marriage ceremonies on the pain of not completing the same if the demand was not met was sufficient to constitute the offence of demanding dowry under Section 4 of the Act, even though the bride's father did not consent or accede to the demand. This was confirmed by the Supreme Court in *L.V. Jadhav vs. Shankarrao*.⁵⁷ In the instant case the complainant averred that when the marriage ceremony was in progress the bridegroom and his father demanded in cash a sum of Rs. 50,000/- from the complainant on the pretext that money was required for the transport of couple from India to U.S.A where the bridegroom was employed as an engineer, and threatened that the ceremony would not be completed if the demand would not be met. Somehow the marriage was solemnized but the bride was not sent to U.S.A with her husband and it was told that she would not be allowed to join her husband unless her father pay Rs. 50,000/-. The demand for such sum was persisted. Later father of the bride lodged the complaint.

The Act under Section 4 is silent about the time during which the demand should be made. The Supreme Court in *S. Gopal Reddy vs. State of Andhra Pradesh*⁵⁸ held that the demand even if made before the marriage, amount to an offence under Section 4 of the Act. Mere demand of dowry is sufficient to bring home the offence to an accused and that any demand of money, property or valuable security made from the bride or her parents or other relatives by the

57. AIR 1983 SC 1219.

58. AIR 1996 SC 2184.

bridegroom or his parents or vice versa would fall within the mischief or dowry under the Act. As per the Supreme Court the marriage in this context would include a proposed marriage also, particularly where the non-fulfilment of the demand of dowry heads to the ugly consequence of the marriage not taking place at all. In the instant case the marriage between Vani and the petitioner was fixed. There were some talks regarding giving of dowry and the terms were finally agreed between them. The father of the girl agreed to give his daughter (i) house at Hyderabad; (ii) jewels, cash and clothes worth Rs. 1 lakh and (iii) sum of Rs. 50,000/- in cash for the purchase of a car. On occasion of Vani's youngest sister's birthday the first accused sent the sister Rs. 100/- in draft as birthday gift which was accompanied by a letter regarding the settlement of dowry. On several occasions he wrote letters to Vani demanding dowry. When he was approached for fixing marriage date he demanded Rs. 1 lakh instead of Rs. 50,000/- for purchase of car. He also insisted that the said amount should be paid before marriage. Later the marriage was fixed as 2/11/1985. On 1/10/1985 the accused wrote a letter to Vani asking her to cancel the date of marriage or to fulfil the demands made by his elders. When the accused brother came to Hyderabad Vani's father told him about the additional demand of Rs. 50,000/- made by the accused for the purchase of car. On his return from village the Second Accused (brother) asked Vani's father to pay Rs. 75,000/-. He also suggested that Rs. 50,000/- should be paid immediately for the purchase of the car and the balance of Rs. 25,000/- should be paid within 1 year after the marriage. Vani's father did not accept their suggestion. On 31/10/1985 when *Varapuja* was performed by Vani's father the accused was given papers of the house in the name of Vani along with a bank pass book. The settlement was for a Double Stored building but the papers were of single storey building which flared the situation. The accused threatened to get the marriage cancelled if he fails to comply with the settlement. Ultimately the marriage did not

take place. The accused returned all the articles given to him in *varapuja*. Aggrieved by this the father sent a complaint to the Director of National Police Academy where the accused was undergoing the training and also went to the Academy where he learnt that the accused was getting married to another girl on 30th March 1986 at Bolaram and even the invitation card was shown to them. Hence, a case was filed against the accused.

(c) Ban on Advertisement: - The Dowry Prohibition Act provides a provision for ban on advertisement for Dowry under Section 4-A. This Section has been inserted by the Amendment Act, 1986.⁵⁹ The Section bars any person to offer through any advertisement in any newspaper, periodical, journal or through any other media, any share in his property or of any money or both as a share in any business or other interest as consideration for the marriage of his son, or daughter or any other relative. It also prohibits a person to print or publish or circulate any advertisement referred to under Clause (a). The tenure of punishment is imprisonment for a term which shall not be less than six months, but which may extend to five years, or with fine which may extend to Rs. 15,000/-. However, the proviso to this Section provides that the Court may for adequate or special reasons to be recorded in the judgment impose a sentence of imprisonment for a term of less than six months.

This section has been introduced to prohibit open tenders for dowry through advertisements or display of any present made at the time of marriage in the form of cash, ornaments, clothes or any other articles. The said provision has also been introduced in Himachal Pradesh⁶⁰ and Punjab.⁶¹

59. Act 43 of 1986.(w.e.f 19-11-1986).

60. Act 25 of 1976.

61. Act 26 of 1976.

(d) Agreements relating to Dowry: - The Dowry Prohibition Act provides that any agreement for the giving or taking of dowry shall be void.⁶² It means failure to comply with the said agreement by either party will not be entertained by the law. Therefore, a suit for recovery of such amount agreed to be given as dowry is not maintainable and cannot be decreed.

In *Ramekbal Singh vs. Harihar Singh*⁶³ it was held that the amount paid at the 'tilak' under a contract contravenes the provisions of the Dowry Prohibition Act and the contract being an agreement prohibited by law cannot be enforced.

(e) Restoration of Dowry: - Although Section 5 of the Dowry Prohibition Act lays down that an agreement for giving or taking dowry is void. But it does not mean that wherein the father of the bride has given dowry to the taker (bridegroom or his family) he/they have right to retain it. Section 6 of the Act provides that dowry is given for the benefit of the bride and hence it is always for the benefit of the wife or her heirs. The taker of dowry does not have right to retain it. This provision provides that despite the restrictions imposed under the earlier provisions of this Act for taking or giving dowry yet the dowry is given and when such dowry is given to whosoever, whether the bridegroom, his parents or relations or any other person, they could hold it as a trust for the bride and must be transferred to her within the stipulated period of three months. Section 6 provides that where any dowry is received by any person other than the woman in connection with whose marriage it is given that person shall transfer it to the woman –

- i. if the dowry was received before marriage, within three months after the date of marriage;

62. Section 5, *the Dowry Prohibition Act, 1961*.

63. AIR 1962 Pat 343.

ii. if the dowry was received at the time of or after the marriage, within three months after the date of its receipt; or

iii. if the dowry was received when the woman was a minor, within one year after she has attained the age of 18 years;

and pending such transfer, shall hold it in trust for the benefit of the woman.

The Section also provides that wherein any person who receives the dowry fails to transfer the property received as dowry within stipulated time as mentioned under Sub-Section (1) of Section 6 he shall be punishable.⁶⁴ The Section also provides that wherein any woman dies before receiving the property given as dowry, the heirs of the woman shall be entitled to claim it from the person holding it for the time being.⁶⁵ The proviso to this sub-section also provides that wherein the woman in question dies within 7 years of her marriage otherwise than to natural causes, such property shall be transferred to her parents wherein she does not have any child; or wherein she has children then the property will be transferred to such children and pending such transfer, be held in trust for such children. Any person failing to transfer the dowry-property to the wife as laid down in sub-sections (2) and (3) shall be punishable with imprisonment which shall not be less than six months and may extend to two years or with fine which shall not be less than Rs. 5000/- and which may extend to Rs. 10,000/-.⁶⁶ This fine and sentence of imprisonment is in addition to the requirement that the dowry or a sum equivalent to the same has to be returned or given to the wife, and in case she is dead to her heirs, parents and children. A new Sub-Section (3-A) has been inserted by the Amendment Act 1984⁶⁷ which provides that wherein a person is convicted under Sub-Sections (2) and (3) for the

64. Section 6(2), *the Dowry Prohibition Act*.

65. Section 6(3), *Ibid*.

66. Section 6 (2), *Ibid*.

67. Act 63 of 1984.

failure for transferring the property to the woman entitled thereto or her heirs than before undergoing conviction the accused is required to transfer the dowry within specified period. Even if he fails than an amount equal to the value of the property may be recovered from him as if it were a fine imposed by such Court and paid to such woman or in case she is dead to her heirs. Lastly, under Sub-Section 4 it provides that nothing contained in this section shall affect the provisions of Section 3 or Section 4.

Hence, a person who receives the property as dowry and retains the same without transferring it to the woman entitled to it or her heirs is guilty of breach of trusts and a case can be instituted against such person for the recovery of the same or the property given as dowry.

The Kerela High Court in *M. Abbas vs. M. Kunhipathu*⁶⁸ held that there is no doubt that demanding, giving or taking or agreement to give or take dowry is an offence under Sections 3, 4 and 5 of the Act. But if dowry has been given and received instead of such provisions or in violation of these provisions than the receiver of dowry is under an obligation to transfer the property to the woman and he attains the position of a trustee until such transfer is made to the woman. Similarly, in *Bhai Sher Jung Singh vs. Virinder Kaur*⁶⁹ it was held that whatsoever property is given to the wife by way of gift or will, it will constitute her *Stridhan* and she is its absolute owner. Any person who holds the property of his wife and denies it to her is guilty of criminal breach of trust. A case, thus, can be filed against such person under Section 406, IPC. It is also observed that Section 27 of the Hindu Marriage Act, 1955 dealing with disposal of property presented at the time of marriage and Section 14 of the Hindu Succession Act, 1956 which provides that property of a female Hindu is her absolute property.

68. AIR 1975 Ker 129.

69. 1979 Cr. L. J. 493 (P&H).

These two laws in fact have put the Hindu female wholly at par with the Hindu male. However, these observations were not followed in *Vinod Kumar Sethi vs. State of Punjab*.⁷⁰ In this case Smt. Veena Rani married Vinod Kumar Sethi on 28th Jan' 1979. However the marriage did not subsist and on 18th April 1980 she addressed an application to the Senior Superintendent of Police, Bhatinda, that at the time of marriage she had received presents of ornaments, valuable clothes, furniture and other household articles besides Rs. 21,000/- from her parents and relations as dowry. She claimed that all these items of property is her *Stridhan* and she has absolute ownership over it. She further stated that after her marriage as a dutiful wife and daughter-in-law she with full faith in her husband and parent-in-law entrusted all the properties to them. She was mal-treated by them for extracting more dowries from her parents and relatives. When these were not satisfied she was expelled from her house in wearing apparel and deprived of all the articles of her dowry around January 1981. Thereafter she made demands for the return of the aforesaid property which allegedly had been entrusted to the husband and in-laws but they refused to do so. Hence, they have made breach of trust. However, the Punjab and Haryana High Court observed that from time immemorial Hindu law has recognized the individual ownership of the wife with regard to the property given at the time of marriage and this constitutes her *Stridhan*. The Court further observed that the very concept of matrimonial home connotes a joint ness of possession and custody by the spouses even with regard to the movable properties exclusively owned by each of them. No question of any entrustment or dominion over the property would normally arise during covertures or its imminent break up.

70. AIR 1982 P&H 372.

The controversy over *Stridhan* and its recovery was settled by the Supreme Court in *Pratibha Rani vs. Suraj Kumar*.⁷¹ In this case Pratibha Rani married to Suraj Kumar on 4-2-1972 at Ludhiana according to Hindu rites and customs. The father of Suraj Kumar (accused) and his three brothers and brother-in-law attended and actively participated in the marriage of the complainant (Pratibha Rani) and demanded dowry. The complainant alleged that Rs. 60,000/- inclusive of gold ornaments, and other things were given by her parents and relatives by way of dowry articles which were entrusted to all the accused and were taken into possession by them. Soon after the marriage she was harassed, teased and was often beaten by her husband and was ultimately thrown out of the house in the year 1977 along with her children. The complainant asked the accused to return her *Stridhan* which the accused refused to return. Even the parents of the complainant through their legal representative asked the accused to return the articles entrusted to them. But the respondent did not do so. The parents of the complainant directed the accused at the time of marriage to give the articles to the complainant for her use but the same was not done and the accused misappropriated the articles for his own use. He has, thus, committed criminal breach of trust punishable under Section 406, IPC. The list submitted by the complainant was of the jewellery and clothes which could be used only by the wife and not husband. The Court held that refusal to return such articles amounts to criminal breach of trust. The facts of the case reveals that the *Stridhan* property of the complainant was entrusted to the husband who refused to return the same to her. Hence, the wife is entitled to recover the same both under Section 27 of the Hindu Marriage Act and under Section 14 of the Hindu Succession Act. The Supreme Court in its judgment totally eliminated the view of Punjab and Haryana

71. AIR 1985 SC 628.

High Court in *Vinod Kumar Sethi's* case that the moment a woman enters her matrimonial home, her *Stridhan* property becomes a joint property.

In *Mary vs. Cherchi*⁷² the Division Bench found that the suit is maintainable even if it is *Stridhanam* or dowry notwithstanding the Dowry Prohibition Act on the basis that: "*Stridhanam is always the property of the woman whoever is given custody of the same. Woman can always claim it back and enforce the return of it. A suit for recovering this amount will not be hit by the Dowry Prohibition Act.*"

Section 6 of the Act provides that the receiver holds it as a trust for the benefit of the woman for whom it is given. Consequently, the beneficiary can file a suit under Section 56 of the Trust Act, 1882 for recovery of the trust property. In *Smt. G. Renuka vs. M. Papa Rao*⁷³ wife filed a suit against her husband and father-in-law for recovery of Rs. 17,150/- i.e. Rs. 15,000/- (principal) and Rs. 2,150/- (interest) being the amount paid by her father as dowry before her marriage. Her husband died during the pendency of the suit. The father of the appellant paid a sum of Rs. 15,000/- by way of a cheque dated 19-4-1974 in favour of the father-in-law on the Canara Bank, Warangal. Her marriage was performed on 3-7-1974. The Second defendant kept the amount in a fixed deposit and had not paid the amount to her. She filed a case seeking for a decree of nullity of marriage. She, thus, demanded the return of Rs. 15,000/- paid by her father as dowry but the same was not returned to her, hence, she filed the suit for recovery of the said amount with interest. The father-in-law in his written statement admitted the said facts. However, he claimed that the said amount was kept in fixed deposit for one year which was later withdrawn. Above this he also held that the appellant is not entitled to seek return of amount or interest therein since the

72. 1980 KLT 353.

73. AIR 1995 AP 130.

payment of dowry by her father was illegal and as the same was opposed to public policy.

The Court observed the decision of the Supreme Court in *G. Ramasubbaiah vs. G. Rajamma*⁷⁴ wherein it was held that “*If the dowry has been paid by one party to the marriage and received by the other party of the marriage after the commencement of the Act then it will come within the mischief of Section 3 of the Act, subject of course, to the provisions of Section 6. There is nothing in Section 3 which prohibits taking back the dowry paid before the Andhra Pradesh or Central Act came into force.* The Supreme Court also relied upon the judgment of Kerala High Court in *M. Abbas vs. M. Kunhipattu*⁷⁵ wherein the interpretation of Section 6 of the Act in the following words: - “*As per that Section the plaintiff is bound to transfer the property to the woman and he is a trustee until such transfer to the woman.*”

The Supreme Court, thus, held that the legislature itself provided under Section 6 of the Act that pending transfer of dowry, the person who received the dowry holds it in trust for the benefit of the woman. Thus, appellant is the beneficiary in the present case. The Court dismissed the argument of the respondent and held that the wife is entitled to recover it. The judgment delivered by the Orissa High Court in *Kamini vs. Purna Chandra*⁷⁶ is of great significance in the present times in view of the social evil of dowry and the ill treatment of wives who bring insufficient dowry. Generally, in the case of recovery of dowry the contentions of the respondents is that the wife had taken everything along with her while leaving the matrimonial house. In the present case, the wife filed a suit for recovery of articles or in the alternative the price of the articles given to her in dowry during marriage. It was alleged by her that she

74. 1975 (1) APLT 168.

75. AIR 1975 Ker 129.

76. AIR 1987 Ori. 134.

was ill-treated and was driven out of the house. However, the husband argued that she had taken away all the belongings. The Court held that on the basis of evidence adduced it was apparent that the wife had left the house under very unpleasant circumstances. Therefore, it cannot be believed that the defendant allowed her to take away all the ornaments she brought as well as the gifts she got. Hence, it was ordered by the Court that wife be given a sum of money towards the value of gold ornaments.

By introducing such provision and such judgment it is evident that the attitude of the Court is to deter the dowry hungry people who ill-treat the wives and drive them away keeping and amassing their dowry. However in such situation the Courts must be very objective and cautious as innocent respondents can be trapped in by unscrupulous wives.

(f) Cognizance of Offence: - Section 7 of the Dowry Prohibition Act provides provision for the cognizance of offences under the said Act. It provides that no Court inferior to that of a metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under the Act.⁷⁷ It is also provided under Section 7 that when a Court shall take cognizance of an offence under this Act. Under the old Section, the Court had no power to take cognizance of a case *suo moto* or the report of the police. But after the 1984 and 1986 amendments now a Court can take cognizance of an offence under this Act if any one of the following person can file a complaint: -

- (i) aggrieved person
- (ii) a parent or other relative of the aggrieved party, and
- (iii) any recognized welfare institution or organization.

77. Section 7 (1)(a), *the Dowry Prohibition Act*.

After the amendment now besides the above mentioned persons the Court can take cognizance of offences under this Act on the basis of its own knowledge or on the basis of a police report of the facts which constitutes an offence under this Act.⁷⁸

The provision also provides that wherein an aggrieved person makes a statement regarding a dowry offence can not be prosecuted for the statement.⁷⁹ For the purpose of this Section Explanation to Section 7(1) provides that '*recognised welfare institution or organisation*' means a social welfare institution or organisation recognized in this behalf by the Central or State Government.

In *Laj patria Sehgal vs. State*⁸⁰ Lajpatrai Sehgal married one RajKumari on March 3, 1980. On May 9, RajKumari died of burns. Rajkumari's father alleged that the father was given a list of articles to be given at the times of *shagun*. Those articles were in fact given to Lajpatrai at the time of *shagun*. Thereafter certain dowry demands were made and RajKumari's father gave what possibly he could at the time of the marriage, but it appeared that Lajpatrai's family's lust for financial gains remained unsatiable. Immediately after marriage i.e. on March 4, 1980 fresh demands for dowry were made, which Rajkumari's father could not meet. After the death of RajKuamari her father lodged a complaint at police station on May 13 under Section 306, IPC. The case was investigated by the CID (Crimes), Delhi Police, thereafter it was transferred to the CBI. However, no case was filed against Lajpatrai or his father or other relatives. On July 17 an application was made by the police for permission to investigate the non-cognizable offences under Section 3 and 4 of the Dowry Prohibition Act, 1961 which was permitted by Addl. Metropolitan Magistrate. Finally after investigations a complaint was filed against the respondent on 10th March, 1981

78. Section 7 (1)(b), *Ibid*.

79. Section 7(3), *Ibid*.

80. 1983 Cr. L. J. 888.

and on November 7, 1981, a *prima facie* case was established and the accused were charged with an offence under Section 4 of the Dowry Prohibition Act and was issued notice under Section 251 of the Code of Criminal Procedure, 1973 to Lajpatrai and other. Lajpatrai and others moved to Court for quashing the proceeding on technical grounds i.e. the police report could not be considered as a complaint and hence no proceedings were maintainable. However, it was held by the Delhi High Court wherein the suit was instituted that a complaint by the investigating officer could be complainant in terms of Section 7(b) of the Dowry Prohibition Act, 1961. It also held that in absence of any specific description as to who could lodge a complaint under the Dowry Prohibition Act, 1961 a complaint could be preferred by any person.

However in *Jhapri Chaudhari vs. State of Bihar*⁸¹ wherein cognizance of a dowry offence was taken on the basis of a charge-sheet submitted by the police. The Patna High Court observed that the Dowry Prohibition Act, 1961 specifically required that cognizance of an offence under the Act could be taken only on the basis of a petition or complaint and not on the basis of police report. In the present case, the Chief Judicial Magistrate did not take cognizance of the offence on the basis of the complaint filed by the aggrieved party, but instead, send the petition of complaint to the officer-in-charge of the police station for investigation as a police case. After investigation the police submitted a charge-sheet and thereafter the Chief Judicial Magistrate took the cognizance of the offence. The Patna High Court held that this was illegal and since no complaint was filed the order was without jurisdiction.

Now after the amendment of the provision by the Amendment Act of 1984, there is no scope for any such conflict. As now under Section 7 of the

81. 1983 Pat LJR 395. Also see *Reshima Devi vs. Ravindra Pahwa*, 1985 Cr. L. J. 1980.

Act the Court can now take cognizance of the offence on the basis of police report of the facts which constitute a dowry offence.

Time bar on the Complaint under Section 7 of the Act: - Under the original section 7 (a) of the Dowry Prohibition Act, 1961 it was stated that a complaint of a dowry offence must be made within one year from the date of offence. However, after the amendment of the Act now the Act is silent about the period of limitation in case of taking cognizance of offence. Even the Code of Criminal Procedure, 1973 introduced a period of limitation for the cognizance of certain offences. Section 468 of the Code of Criminal Procedure provide that for taking cognizance of offences punishable with imprisonment for a period not exceeding one year shall be one year; wherein the offence is punishable with fine only than it shall be six months; and wherein the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years it shall be three years. But in *Kashi Prasad vs. State of Bihar*⁸² the Patna High Court took the view that the Bihar State amendment of the Dowry Prohibition Act, 1961 dropped the period of limitation laid down under Section 7(a) of the Central Act, hence now the Bihar Statute did not stipulate any period of limitation within which a complainant for period of limitation within which a complaint for a dowry offence could be filed. Under such circumstances the provision contained in Section 468 of the Code of Criminal Procedure, 1973 would apply. Hence, the period of cognizance of dowry offences would be one year from the date on which the offence was committed.

However, in *Lajpatrai Sehgal vs. The State*⁸³ the Delhi High Court was of another view. It overcame the period of limitation laid down in the statute with a view to giving effect to the social purpose of the legislation. The Court observed that the dowry offence was committed on 26/27 January 1980 and

82. 1980 Cr. L. J. 612.

83. 1983 Cr. L. J. 888.

ultimately after investigations by CID and CBI the case was ultimately filed only after permission was granted on January 8, 1981. For procuring sanction of the Government for prosecution it took 45 days. The Court is, thus, of view that in the light of the Section 470 of Code of Criminal Procedure this period of 45 days was to be excluded in the computation of the period of limitation of one year. Section 470 (3) of the Code of Criminal Procedure, 1973 provides: -

“Where notice of prosecution for an offence has been given, or where, under any law for the time in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, there in computing the period of limitation the period of such notice, or as the case may be, the time required for obtaining such consent or sanction shall be extended

Explanation-In computing the period, the time required for obtaining the consent or sanction of the Government or any other authority shall both be excluded.”

In view of the above mentioned provision, the Delhi High Court in the present case held that the complaint was not time barred. In *Baikunthnath Jena vs. State of Orissa*⁸⁴ the bride was found dead within four months of marriage and there were also allegations of harassment and dowry demands. A magistrate took cognizance of a dowry death which was challenged by the husband on the ground that it was time-barred under Section 7 of the Dowry Prohibition Act wherein no Court could take cognizance of such an offence except on a complaint made within one year from the date of the offence. However, the Court held that after the Amendment of 1984, the limitation period is dropped and even if there was a bar of limitation, yet under Section 473 of the Code of Criminal Procedure, the court could take cognizance of an offence either

84. 1990 Cr. L. J. 2626.

on the motion of the aggrieved party or on its own motion if it was satisfied on the facts and the circumstances of the case, that the delay had been properly explained or that it was necessary so to do in the interest of justice. It was further held that the provisions of Section 473 Cr. P. C were applicable even to a case under Section 7 of the Dowry Prohibition Act before the amendment and in a suitable case, the delay might be condoned. Hence, the Court dismissed the petition of the husband.

In *Harbans Singh vs. Gurcharan Singh*⁸⁵ husband filed a petition under Section 482 of Cr. P. C. for quashing of a complaint filed by the wife pending before the trial Court on the ground that it was time-barred. The Court dismissed the petition and held that the date of commission of an offence under Section 4 of the Act would be the date when the demand was initially made and when the demand is repeated it constitutes a fresh offence. Thus, even though dowry items are initially demanded prior to marriage as consideration for the marriage and the demand is made again after marriage, an offence under Section 4 of the Act would be committed.

However, now the old Section 7 has been amended by the Amendment Act, 1984 and after it there is no period of limitation mentioned under the Dowry Prohibition Act, 1961. Moreover, the present amended Section provides that "*Nothing in Chapter XXXVI of the Code of Criminal Procedure, 1973 shall apply to any offence punishable under this Act.*"⁸⁶ Hence, from this provision it is clear that Section 468 of the Code will also not apply and it is also clear that there is no period of limitation under the present Act for taking cognizance of the offences mentioned under the Dowry Prohibition Act, 1961.

85. 1990 Cr. L. J. 1521(Del).

86. Section 7(2), *the Dowry Prohibition Act, 1961*.

Section 8 of the Dowry Prohibition Act makes the offences committed under the Act non-bailable and non-compoundable. However, before the amendment under the old Section 8, dowry offences were non-cognizable, bailable and non-compoundable. Section 8 of the amended Act provides the offences to be cognizable for certain purpose and to be non-bailable and non-compoundable. It states the following: -

“(1) The Code of Criminal Procedure, 1973(2 of 1974) shall apply to offences under this Act as if they were cognizable offences-

(a) for the purposes of investigation of such offences; and

(b) for the purposes of matters other than -

(i) matters referred to in Section 42 of that Code, and

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

(2) Every offence under this Act shall be non-bailable and non-compoundable.”

This amendment was made by the Act of 1984 as there has been a strong public opinion in favour of making dowry offences as cognizable offences. The Joint Committee with reference to the unamended portion of dowry offence being non-cognizable said: -

“The Committee feels that they are in favour of the offences under the Act being made cognizable, but there is an apprehension that it may lead to some harassment, particularly at the time of solemnization of marriage as the police will have power to make arrests without warrant in such cases. The Committee is, therefore, of the opinion that in order to ensure that no harassment is caused to the parties involved, the offence should be made cognizable subject to the conditions that no arrest shall be made by the police without a warrant or an order of the Magistrate.”

This recommendation of the Joint Committee was accepted and hence, dowry offences were made cognizable for the purpose of investigation of such offences and for purposes and matters other than those referred to in Section 42 of the Code of Criminal Procedure, 1973 and the arrest of a person without a warrant or an order of a Magistrate. In short it can be said that in connection with a dowry offences the police can not make arrest as in other cognizable offences. The Amendment Act, 1986⁸⁷ also replaced “*bailable*” with “*non-bailable*.” This amendment was made as the Court before granting bail involving non-bailable offences particularly wherein the trial has not yet commenced should be into consideration in various matters such as:

- i. nature and seriousness of the offence;
- ii. the character of the evidence;
- iii. the circumstances, which are peculiar to the accused;
- iv. a reasonable possibility of the presence of the accused not being secured at the trial;
- v. reasonable apprehension of witnesses being tampered with; and
- vi. the larger interests of the public or the State and similar other considerations.⁸⁸

By cognizance it means the Magistrate must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated by subsequent provisions of Chapter XV, proceeding under Section 200 and thereafter, sending it for inquiry and report under Section 202, Cr. P. C.⁸⁹

87. Act 43 of 1986 (w.e.f. 19-11.1986)

88. AIR 1984 SC 1503.

89. Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, P.105.

'*Taking Cognizance*' means any judicial action is permitted by the Code taken with a view to eventual prosecution preliminary to the commencement of the inquiry or trial. As per Section 173(1) the Magistrate after receipt of a police report may decide that there is no sufficient ground for proceeding further and drop the action or may take cognizance of the offence as per the provisions of Section 190 (1)(b) on the basis of the police report. As a result of these provisions dowry offences are made cognizable for the purpose of investigation of such offences and for the purpose of matters other than matters referred to in Section 42, Cr. P. C and the arrest of a person without warrant or without an order of Magistrate.

(g) Burden of Proof: - The Dowry Prohibition Act, 1961 provides that where any person is prosecuted for taking or abetting the taking of any dowry under Section 3 or the demanding of dowry under Section 4, the burden of proving that he had not committed any offence under those sections shall be on him.⁹⁰

This section has been inserted by the Amendment Act of 1986 with a view to make dowry prohibition law more effective. Hence, the burden of proof lies upon the alleged person that he did not commit the dowry offence of which he is accused.

(h) Dowry Prohibition Officers: - The Dowry Prohibition Amendment Act of 1986 also inserted a new Section 8-B which speaks about the Dowry Prohibition Officers. The insertion of this Section was made after the Joint Committee had suggested that Dowry Prohibition Officers should be different areas as one of the main reasons for the failure of the Act was lack of proper and effective machinery. Hence, the appointment of the Dowry Prohibition Officer will act as an effective

90. Section 8-A, *the Dowry Prohibition Act, 1961*.

machinery to evade this social evil from one society. According to this Section the State Government has power to appoint as many Dowry Prohibition Officers as it thinks fit and specify the areas in respect of which they shall exercise their jurisdiction.⁹¹ The said provision also provides the powers and functions of the Dowry Prohibition Officer. Each officer shall have: -

- (i) to see that the provisions of the Act are complied with;
- (ii) to prevent the taking or abetting the taking of, or the demanding of dowry;
- (iii) to collect such evidence necessary for the prosecution of persons committing offences under this Act; and
- (iv) to perform additional functions which may be assigned to him by the State Government or as specified in the rules made under this Act.⁹²

The State Government may confer such powers of a police officer to the Dowry Prohibition Officer provided that it should be notified in the Official Gazette. However, the powers of the Dowry Prohibition Officers will be subject to certain restrictions/limitations as specified by rules made under this Act.⁹³ For the purpose of ensuring sufficient performance of the Dowry Prohibition Officer the State Government is empowered to appoint an advisory board consisting of not more than five social welfare workers out of whom at least two shall be women from the area in respect of which the officer's exercise their jurisdiction.⁹⁴

(i) Powers of the Governments to make rules: - Both the Central as well as State Governments have power to make rules for carrying out the purposes of this Act. Section 9 of the Dowry Prohibition Act, 1961 lays down the provision

91. Section 8-B (1), *Ibid.*

92. Section 8-B (2), *Ibid.*

93. Section 8-B (3), *Ibid.*

94. Section 8-B (4), *Ibid.*

wherein the Central Government has power to make rules for the purpose of carrying out the purposes of this Act. As per the Act such rules may provide -

- (a) the form and manner in which and the persons by whom, any list of presents referred to in sub-section (2) of Section 3 shall be maintained and all other matters connected therewith; and
- (b) for the better coordination policy and action in respect of the administration of this Act.⁹⁵

The Act also provides that such rules shall be laid as soon as it is made before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following both the Houses agree in making any modification in the rule or where both Houses does agree that rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect.⁹⁶

Section 10 of the Act provides power to the State Government to make rules for carrying out the purposes of this Act. It also states that through notification in the official Gazette the State Government can make rules for carrying out the purposes of this Act.⁹⁷ As per the Act such rules may provide for the additional functions to be performed by the Dowry Prohibition Officers under sub-Section(2) of Section 8-B or with regards to the limitations and conditions to which the Dowry Prohibition Officer may exercise his functions under sub-section(3) of Section8-B.⁹⁸ The Act also states that every rule made by

95. Section 9 (2), *Ibid.*

96. Section 9(3), *Ibid.*

97. Section 10(1), *Ibid.*

98. Section 10(2), *Ibid.*

the State Government shall be laid as soon as may be after it is made before the State legislature.⁹⁹

The powers mentioned under Section 9 and Section 10 of the Dowry Prohibition Act are the rule making powers conferred on the Central as well as the State Governments respectively. In exercise of their power under Section 9 the Central Government has made the Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985. Similarly, the State Governments too exercised their power by amending the State statutes and rules provided that they are not inconsistent with the provisions of the Act.

The above mentioned provisions are the scheme and structure of the Dowry Prohibition Act, 1961 after the two amendments of 1984 and 1986. Despite providing the effective machinery and powerful provisions it seems that it is unable to eradicate the evils of dowry from our society as the crime still continues unabated. Hence, the need was felt to amend Indian Penal Code as well as the Indian Evidence Act and introduce new provisions which can provide a multi-pronged approach to combat the menace of dowry.

(II). PROTECTION OF WOMEN AGAINST THE OFFENCE OF DOWRY UNDER THE INDIAN PENAL CODE: -

The two amendments in the year 1984 and 1986 made the scheme and structure of the Dowry Prohibition Act, 1961 more strong and effective yet the offence of Dowry and its related crime continued to rise. The Parliament also witnessed the increasing number of dowry deaths. Hence, it was felt that a multi-pronged approach to combat the menace of dowry is essential. The Law Commission of India in its 91st report suggested a number of measures which was accepted and ultimately amendments were introduced in the Indian Penal

99. Section 10(3), *Ibid.*

Code and the Indian Evidence Act to create special provisions for eradicating the offence of dowry death. These amendments were made to deal effectively not only with the cases of dowry deaths but also cases of cruelty towards married woman by their in-laws.

Despite the Dowry Prohibition Act, 1961 and its two amendments in 1984 and 1986 violence against women in the form of harassment, abuse, condition forcing them to commit suicide and sometimes when they are burned alive for not bringing sufficient dowry or for not meeting the further demand for dowry are increasing in alarming rate. Hence, in order to combat the increasing menace of dowry deaths following amendments were provided and as a result of this following new sections were inserted in the Indian Penal Code by the Amendment Acts: -

(a) Dowry Death and Suicide: Section 304-B, Indian Penal Code: -

Section 304-B was inserted in the Indian Penal Code, 1860 by the Amendment Act of 1986.¹⁰⁰ This Section provides the punishment for committing the offence of dowry death with imprisonment of not less than seven years but which may extend to imprisonment for life. The Section provides as under: -

“(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that some before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death,” and such husband or relative shall be deemed to have caused her death.

100. Act 43 of 1986 (w.e.f. 8-9- 1986).

Explanation – For the purposes of this sub-section, “dowry” shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

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

Section 304-B thus defines what will constitute the “dowry death.” It also provides punishment for committing such a crime. As per Section 304-B following are the essential elements of dowry death: -

- (a) the death of a woman must be caused either by burns or bodily injury or not under normal circumstances;
- (b) Such death must have occurred within seven years of marriage;
- (c) Before the death she must have been subjected to cruelty or harassment by husband or a relative of the husband.
- (d) Such harassment or cruelty must be for the demand of dowry.

In order to prove the dowry death the above mentioned ingredient must be proved. However, Section 304-B does not create a new offence rather it reiterates in substance the offence under Section 302 IPC. Even prior to the enactment of Section 304-B in a number of reported cases the husband, mother-in-law etc have been convicted under Section 302 IPC for murdering the bride by pouring kerosene oil etc. Therefore, it cannot be said that for the offence of bride burning the conviction cannot be recorded under Section 302 IPC or that the offence covered under Section 304-B is a new offence.

One of the important features of this Section which can be said to be a departure from the normal feature of the Code is that a minimum of not less than seven years imprisonment is prescribed but this may extend to imprisonment for life. Dowry death also attracts Section 306 of Indian Penal Code which provides abetment of suicide. It states that – “*If any person commits suicide,*

whoever abets commission of such suicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

In *State of Punjab vs. Iqbal Singh*¹⁰¹ Mohinder Kaur, the deceased was a teacher while her husband Iqbal Singh was a clerk in Punjab State Electricity Board. Relationship between wife and husband were strained over dowry even to the extent that the wife had sought police protection apprehending danger to her life. An effort by the wife to get herself transferred to some other school was also foiled by the husband and pressure for dowry was steeped on death of wife's father. On 7th June 1983 Mohinder Kaur set herself and her three children ablaze at the residence of her husband Iqbal Singh. She took the extreme step of putting an end to her life as well as the lives of her three children since she apprehended that their fate would be worse after her death. Before putting an end to her life she left a note stating that her husband was demanding Rs. 35,000/- to Rs. 40,000/- by way of additional dowry and was ill-treating her under the influence of alcohol. She had also stated that her mother-in-law and sister-in-law also conspired and made false accusations against her and had also conspired to kill her on the night of 6th June 1983 by sprinkling kerosene/petrol on her but their plan misfiled. Children were also ill-treated and she was fed up on account of the beating and has therefore decided to put an end to her life and that of her children. It was held that the husband was responsible for creating circumstances which provoked or forced his wife to commit suicide and he was therefore, liable to be convicted under Section 306.

In *Satvir Singh and others vs. State of Punjab and another*¹⁰² the Supreme Court reflected in its judgment the scope of sections of Indian Penal

101. 1991 Cr. L. J. 1897(SC).

102. AIR 2001 SC 2828,

Code. In this case, Tejinder Pal Kaur got married to Satvir Singh, a businessman. Satvir's parents-Devinder Singh and Paramjit Kaur were also living at the same house. At the time of marriage Narendra Singh, father of Tejinder Kaur gave sufficient dowry. However, after about four to five months of the marriage she was harassed for not bringing a Car and a house as a part of dowry. Often she was taunted by them. In the meantime she gave birth to three children i.e. two sons and one daughter. On November 1995 her father gave Rs. 20,000/- to her husband yet she was showered with abuses. The immediate cause for the tragic episode was that one of the items of the meals (salad) contained excessive salt which was served by her to Satvir (husband). After tasting it he unleashed abuses to his wife which was supported by his mother and suggested "*why not end your life in front of one of the trains as many such trains are running nearby.*" As a result she left her house on 17-06-1996 at about 4 a.m. and reached railway line where she met with the accident which did not kill her but made her vegetable for life. Hence, case before the Court against Satvir and his parents were brought under Section 306, 304-B and 498-A IPC. In this case the Court held that Section 306 IPC must be read with Section 113-A of the Indian Evidence Act. Both these provisions read together enables the Court to punish the husband and the others who subjected a woman to cruelty as envisaged under Section 498-A IPC and such woman commits suicide within seven years of her marriage. It is immaterial for Section 306 IPC whether cruelty or harassment was "soon before her death" or earlier. It was "soon before her death" the provisions of Section 304-B IPC will be attracted otherwise Section 306 IPC can be resorted to. The Court held that there should be perceptible nexus between her death and harassment or cruelty inflicted on her. However, in the present case there was no specific evidence to show that wife was subjected to cruelty soon before attempt to commit suicide. Hence, the accused cannot be convicted under Section 116 IPC either by linking it with Section 306 or

with Section 304-B. Conviction and sentence under Section 116 is liable to be set aside and the accused persons were convicted under Section 498-A IPC. The fine was also modified to one lakh rupees per all the three accused.

Hence, the key ingredient of Section 304-B IPC is causing cruelty “soon before her death.” The expression “soon before her death” means within reasonable period of time. In the absence of evidence that the deceased wife was subjected to cruelty soon before her death, the husband is not liable for conviction under Section 304-B even though she might have died under mysterious circumstances.¹⁰³ In *Kodam Gangaram vs. State of Andhra Pradesh*¹⁰⁴ the wife died of 90% burns within seven months of her marriage and in her dying declaration she held her husband responsible for her death. By the time her father could reach the spot the body was already cremated. The main evidence adduced and also accepted by the Court was that a month before her death she along with her husband had visited her parents house and the accused had assured her that he would try to arrange it that the deceased was allowed to come back to matrimonial home. The deceased in her dying declaration held that she was prompted by the harassment to which she was subjected to which resulted in her taking the extreme step of committing suicide. The said incident is taken within the purview of “soon before her death.”

In *Sham Lal vs. State of Haryana*¹⁰⁵ Neelam Rani, wife of the appellant died of burns on 17-06-1987. They were married in 1983. It was alleged that there was dispute regarding dowry and that Neelam was sent back to her parent's home and was again taken back to nuptial home after a Panchayat which was held to resolve the dispute. This happened about ten to fifteen days prior to the occurrence. There was nothing on record that she was either harassed or

103. *Sarveshwar Singh vs. State of Rajasthan*, 1999 Cr. L. J. 2179 (Raj).

104. 1999 Cr. L.J. 2181 (AP).

105. AIR 1997 SC 1873.

treated with cruelty for or in connection with the demand for dowry during the period between her having been taken to the parental home and her tragic end. When Neelam's father Bhagwandas on hearing about the precarious condition of his daughter rushed to the hospital, he could only see her charred body. When he asked the appellant whether she was killed by him, the appellant answered with folded hands that it was a mistake on his part and for that he should be forgiven. Neelam died and her husband, his father and grandmother were charged for offences under Section 302, 304-B and 498-A IPC. In the absence of any eye-witnesses, the High Court on the basis of circumstances concluded that the appellant had killed his wife by setting her ablaze after dousing her with kerosene. However, the Supreme Court did not agree with the decision of the High Court. It was held that the appellant could not be convicted under Section 304-B as there was no evidence to prove that soon before her death Neelam was subjected to cruelty or harassment for or in connection with demand for dowry. However, basing on the evidence of the deceased's father and dying declaration which is admissible under Section 32 of the Indian Evidence Act, conviction under Section 498-A IPC is sustainable.

In *Venugopal vs. State of Karnataka* ¹⁰⁶ Vijayalakshmi died an unnatural death within two years of their marriage and that before her death she was subjected to harassment by her husband because she did not bring from her parents the remaining amount of dowry promised to him. She was not only harassed by the husband but was also ill-treated and beaten many times. At one time the neighbours intervened their fight after which they noticed that Vijayalakshmi was sitting under a tap with her body fully burnt. This clearly established that soon before her death she was ill-treated by her husband. The defense of the appellant was that she committed suicide. The High Court accepting

106. AIR 1999 SC 146.

the version of suicide thought it fit to acquit the appellant under Section 302 IPC but convicted him under Section 304-B as harassment was proved and the death had taken place within a year and half from her marriage. The Supreme Court, thus, dismissed the appeal and upheld the decision of the High Court of Karnataka for convicting the appellant under Section 304-B.

The Karnataka High Court while dealing with a case of dowry death in *Fatima Kom Mastausab Nadaf vs. State of Karnataka*¹⁰⁷ observed that the evidence must be reliable. In this case, the victim in her dying declaration alleged that she was set on fire by the mother-in-law after pouring kerosene over her. She also alleged harassment at the hands of her husband for dowry. This was in contrast to her earlier statement which she gave while was being removed to the hospital which was to the effect that her clothes had caught fire accidentally. In such cases, the Court warned that it must take judicial notice of the fact that there is a tendency to involve and implicate those to whom one is hostile which was missing in this case. The Court, thus, held that dying declaration can be the sole basis of conviction; hence the Courts must rigorously examine the dying declaration before a conviction can be based on it.

In *Public Prosecutor, High Court of Andhra Pradesh vs. T. Basava Punniah and others*¹⁰⁸ the deceased Sivakumari was married to the first accused about three years prior to the date of occurrence i.e. 26-06-1987. She died due to asphyxia. It was held that since death was caused within three years of marriage due to hanging, it occurred otherwise than under normal circumstances. There is ample evidence of harassment for dowry prior to death. Therefore, even if she had committed suicide by hanging, still the death comes within the scope of Section 304-B as she was subjected to cruelty by her husband and other relatives

107. 1999 Cr. L. J. 1175.

108. 1989 Cr. L. J. 2330(AP).

in connection with the demand for dowry. The same view was taken by the Court in *Premwati vs. State of Madhya Pradesh*.¹⁰⁹ It was held that Section 304-B(1) would be attracted not only when the death is caused by someone but also when the death occurs “unnaturally.” If occurrence of death is preceded by cruelty or harassment by in-laws for or in connection between the two is established, mere occurrence of death is enough though death may not have caused by the in-laws. Similar view was taken by the Supreme Court in *Shanti vs. State of Haryana*.¹¹⁰ In this case the deceased used to be ill-treated for not bringing enough dowries. On 26th April 1988 the father of the deceased came to know that deceased had died and was cremated by the two ladies with the help of another three persons. The Court, thus, held that because of cremation no post mortem could be conducted and the actual cause of death could not be established clearly. There is absolutely no material to indicate that it was accidental death. In the result it was an unnatural death; either homicidal or suicidal. But even assuming that it is a case of suicide even then it would be death which had occurred in unnatural circumstances. Even in such a case, Section 304-B IPC is attracted and this position is not disputed. The Supreme Court in *Pradip Singh and another vs. State of Jharkhand*¹¹¹ is of view that the words “soon before her death” do not necessarily mean immediately before her death. This phrase is an elastic expression and can refer to a period either immediately before death of the deceased or within a few days or few weeks before the death. In other words, there should be a perceptible nexus between the death of the deceased and the dowry related harassment or cruelty inflicted on her. In the present case, there was a clear nexus between the death of Gayatri who died within seven month of her marriage and the dowry related harassment inflicted on

109. 1991 Cr. L.J. 268 (MP).

110. AIR 1991 SC 1226.

111. AIR 2007 SC 2154.

her. The Supreme Court also held that even if Gayatri had committed suicide Section 304-B IPC can still be attracted.

In *Hiralal vs. State (Government of N.C.T.), Delhi* ¹¹² Sunita was married to Surendra on 26-11-1995. She committed suicide by consuming poison on 14-04-1999. Since her death was unnatural her husband and in-laws were charged with an offence under Section 304-B. The Court held that no definite period has been indicated and the expression “soon before” is not defined. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. Similarly, in *Kaliyaperumal vs. State of Tamil Nadu* ¹¹³ it was held that one of the essential ingredients of Section 304-B IPC is that the concerned woman must have been “soon before her death” subjected to cruelty or harassment “for or in connection with the demand of dowry.” The expression “soon before her death” is very relevant and the prosecution is required to show that soon before the occurrence there was cruelty or harassment to the woman victim. “Soon before” is a relative term and it would depend upon circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period and that brings in the importance of proximity test. It is left to be determined by the courts depending upon the facts and circumstances of each case. However, the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of woman concerned it would be no consequence.

112. 2003 Cr. L. J. 3711 (SC).

113. AIR 2003 SC 3828.

From the above mentioned cases it is clear that there must be consistent demand of dowry from the accused. In *Prem Singh vs. State of Haryana*¹¹⁴ Sumitra (deceased) was married to Accused one, Prem Singh. There were repeated demand of dowry after marriage and this fact was stated by the deceased to her parents. When Sumitra gave birth to a male child her parents expected that this might bring harmony between their daughter and son-in-law. They gave a she-buffalo but the appellants were not satisfied and the harassment of dowry continued. Smt. Shanti(A-2), the mother of appellant A-1 was residing separately from A-1 in a separate house. A-2 was not proved to be present at the time of incident. Deceased died due to burn injuries within seven years of her marriage. The evidence of witnesses regarding demand of additional amount of dowry by accused was consistent and corroborated. The mere fact that accused (appellant) took deceased to hospital does not demolish the prosecution case as regards unnatural death of deceased. Guilt of accused was held to have been proved beyond doubt and his conviction under Section 304-B was held to be proper.

Again in *Ram Kumar and another vs. State of Haryana*¹¹⁵ the deceased Rajdulari was married to the first appellant on 20th June 1984. The case of the prosecution is that the appellants had demanded dowry ever since the marriage and demanding articles like Television, Sofa set and other articles of furniture etc. Whenever the deceased visited her parents she used to tell them that the appellants were ill-treating and harassing her on demand of dowry. The sister of the deceased, Bimla was married to the 1st Appellants brother on the same day of the marriage of the deceased. The '*muklawa*' ceremony of younger sister took place about one and half month prior to the occurrence. On 7th April 1988 three

114. AIR 1998 SC 2628.

115. AIR 1999 SC 1491.

persons came to the house of the deceased's father and told that Raj Dulari was having severe pain in the stomach and that they should go to see her. On getting this information the mother of the deceased went along with her husband to the appellant's house but none of them was found. They found that Raj Dulari was also not in the house and found their second daughter Bimla was locked up in a room on the first floor. She told them that the appellants had given beating to Raj Dulari during the day and when she tried to intervene she was detained in the locket room. They found the dead body of Raj Dulari near a well outside the house. Charges were framed against the appellants under Section 304-B and under Section 498-A IPC. The Court held that there was no demand of dowry and harassment for Raj Dulari if it would have been so the '*muklawā*' ceremony of Bimla would not have been performed. This contention has no substance as the marriage of both the sisters took on the same day hence there was no purpose in stopping the '*muklawā*' of the younger sister. It was also contended by the appellants that the deceased had written five or six letters to her parents but none of them has been produced. However, the Court held that the evidence placed before the Court is sufficient to prove the charges. The absence of the said letters does not disprove the case of the prosecution. It was held that there is ample evidence to prove the harassment by the appellants. The appeal was thus dismissed.

In *Pawan Kumar vs. State of Haryana*¹¹⁶ the deceased, the wife of the appellant died of burn injuries within seven years of marriage. The wife committed suicide because of mental cruelty and maltreatment at the hands of her husband on account of non-fulfilment of dowry demands. The Supreme Court held the appellant liable for causing dowry death under Section 304-B and Section

116. AIR 1998 SC 958.

498-A IPC as well as for abetting suicide under Section 306 IPC as because of his treatment the wife had committed suicide.

In *Mugeshwar Prasad Chaurasia vs. State of Bihar* ¹¹⁷

Sudama Devi was married to Ram Pukar son of the appellant Mungeshwar Prasad in 1992. Sudama Devi died of unnatural circumstances on 24-01-1995. Ram Pukar (deceased husband) and his parents were charged under Section's 304-B and 201 IPC read with Section's 34 and 498-A IPC. The parents of Ram Pukar were sentenced to Rigorous Imprisonment for seven years under Section 304-B and for two years under Section 201, while no separate sentence was awarded for offence under Section 498-A. Ram Pukar was convicted for 9 years Rigorous Imprisonment under Section 304-B. All three convicted persons appealed to the High Court but the convictions as well as sentence were confirmed by the High Court. The parents of Ram Pukar appealed to the Supreme Court as both of them were more than 80 years old. The convicted persons were alleged to have subjected the deceased to harassments with demand for dowry and after her death she was hurriedly cremated. Four witnesses were examined by the prosecution to prove that Sudama Devi was subjected to harassment with demand for dowry. All of them said that husband of Sudama Devi demanded dowry a few months prior to her death. None of the witnesses said that the appellants (parents of Ram Pukar) asked for more Dowries. Hence, the conviction of the in-laws was held not sustainable.

The Supreme Court in *Shobha Rani vs. Madhukar Reddi* ¹¹⁸

added a new dimension wherein a demand for dowry entitles the wife to get a decree for dissolution of marriage. Hence, it can be said that Section 304-B IPC has given a new dimension to the concept of cruelty for the purposes of

117. AIR 2002 SC 2531.

118. AIR 1988 SC 121.

matrimonial remedies. In this case, Shobha Rani and Madhukar Reddi were married on 19th December 1982. But their happiness did not last longer. They started to exchange letter with bitter feelings and began to accuse one another. Hence they thought of winding up their marriage by mutual consent. But it did not materialized and ultimately the wife moved the Court for divorce on the ground of cruelty. In her divorce proceeding she complained about the demand of dowry by the husband and his parents. As evidence she exhibited the letters written by her husband wherein the husband and his parents were demanding dowry from the appellant. The Supreme Court held that the facts and circumstances brought out by the appellant do justify an inference that there was demand of dowry. The demand for dowry is prohibited and is also covered under Section 4 of the Dowry Prohibition Act, 1961. Thus, demand of dowry amounts to cruelty.

The Supreme Court in *State of Punjab vs. Iqbal Singh*¹¹⁹ held that “*the legislative intent behind incorporation of Section 113-A of the Indian Evidence Act and Section 304-B of IPC was to strengthen the hands of the prosecution in a crime generally committed within the privacy of residential houses.*”

There are cases regarding dowry deaths wherein conviction could not be made due to lack of evidence. The Supreme Court in *State of Himachal Pradesh vs. Nikku Ram*¹²⁰ settled the following matters: -

- (a) Demand made after solemnization of marriage constitutes dowry under Section 2 of the Dowry Prohibition Act, 1961.
- (b) Where the injuries found on the person of the deceased are not sufficient to cause death, Section 304-B is not attracted.

119. 1991 Cr. L. J. 1897 (SC).

120. AIR 1996 SC 67.

(c) Abetment of suicide under Section 113-A of Evidence Act cannot be presumed to in the absence of evidence showing harassment of the victim within the meaning of explanation (b) of Section 498-A IPC. For similar reasons the offence under Section 306 IPC may also not be made out.

In the present case, Roshani married Nikku Ram on 6-2-1985. After five six months it is alleged that the husband of the deceased (Roshani), her mother-in-law (Batholi Devi) and sister-in-law (Kamala Devi) started taunting Roshani for bringing less dowry. Demands for T.V, Electric fan, buffalo etc were made through Roshani which not having been fulfilled the aforementioned persons started treating her with cruelty. The harassment gradually increased so much that on 20-06-1988 her mother-in-law is alleged to have given a blow with *drati* (a sickle like instrument) causing an incised wound on the forehead of Roshani. Unable to bear the torture she consumed naphthalene Balls which proved fatal and she died on 20th June itself due to cardio-respiratory arrest. Applying the aforementioned standards the Supreme Court held that the prosecution failed to bring home the offence either under Section 304-B or 306 IPC against any of the respondents. Hence, no case can be made against the husband. The offence of hurt under Section 324 IPC was made against the mother-in-law of the deceased for which she would be punished only with a fine of Rs. 3000/- as she being 80 years within two months of pronouncement of the judgment. In case of default she will undergo simple imprisonment for one month. Fine if paid shall be made over to the parents of Roshani.

Similarly in *Harbanslal vs. State of Punjab*¹²¹ the husband was alleged to have killed his wife by setting her ablaze. The only substantial piece of evidence relied upon by the prosecution was the recovery of the dead body with extensive burns from the house of the appellants. The Court held that it

121. AIR 1996 SC 1186.

was insufficient and inconclusive to hold the accused as guilty. The circumstances create only suspicion about the complicity of the appellant but mere suspicion cannot be allowed to take the place of proof. Again in *State of Haryana vs. Rajinder*¹²² the Supreme Court was of view that mere extra-judicial confession allegedly made before villagers did not prove the offence in the absence of other evidence. The accused was also acquitted in *Kulwant Singh vs. State of Punjab*¹²³ where an extra-judicial confession by the accused was alleged but found doubtful in nature. The chain of circumstances was also not complete.

The Supreme Court in *Soni Devrajbhai Babubhai vs. State of Gujarat and others*¹²⁴ was faced with one problem that wherein dowry-death has incurred prior to the insertion of Section 304-B IPC than under such situation can the accused be convicted under the provisions of such Section? The Supreme Court held that Section 304-B is a substantive provision creating a new offence and not merely a provision effecting a change in procedure for trial of a pre-existing substantive offence. As a consequence, accused cannot be tried and punished for the offence of dowry death provided in Section 304-B IPC with the minimum sentence of seven years imprisonment for an act done by them prior to creation of the new offence of dowry death. The Supreme Court is of opinion that this would clearly deny to them the protection afforded by Clause (1) of Article 20 of the Indian Constitution which provides the following: -

“Article 20: Protection in respect of conviction for offence-

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”

122. AIR 1996 SC 2978.

123. 1996 Cr. L. J 2674 (P&H).

124. AIR 1991 SC 2173.

Hence, this provision of the Constitution makes it clear that the accused cannot be tried under Section 304-B IPC if the offence has been committed before its insertion in the Code. However, it can not be said that such cases of dowry deaths are not covered under any other provisions of Indian Penal Code. In *Smt. Lichhamadevi vs. State of Rajasthan*¹²⁵ mother-in-law was tried for killing her daughter-in-law. In the present case Pushpa was married to Jagdish Prasad. On 29th January 1977 she was found in flames in the kitchen. On hearing her pathetic cries, the neighbours rushed towards the house. However the relatives were not there. The neighbours took her to the hospital where she died the next day. The relationship between mother-in-law and Pushpa was not cordial on account of unsatisfied dowry. Hence, Pushpa used to be harassed by her mother-in-law. To avoid it Pushpa left her husband's house and remained with her parents. She returned about 4-5 days before the incident. It is alleged that the appellant lifted one 'bhagons'(pan) and struck over the forehead of Pushpa causing injury and expressing at the same time that she felt like burning her alive. In the same night at about 8 O'Clock the neighbour saw the flames coming out of the tin-shed which was used as kitchen of the house. People also heard a cry 'bachao-bachao'. As a result of this the neighbours rushed and found that the doors of the kitchen were closed with iron chain fastened from outside. Fumes and fire were billowing out of the kitchen. When the neighbours removed the iron chain they found a woman in flames. Before her death Pushpa stated at about 5:30 a.m. that her mother-in-law poured kerosene on her and set fire. The Apex Court, thus, tried the accused under Section 302 IPC and awarded life imprisonment for the mother-in-law. However, the Supreme Court deprecated the indifferent attitude of the investigating machinery in not prosecuting the husband and brother-in-law.

125. AIR 1998 SC 1785.

Again in 2001 the Supreme Court was confronted with another problem in *Shamnsaheb M. Multani vs. State of Karnataka*.¹²⁶ In this case a question was raised that whether the accused could be convicted in a case for an offence under Section 304-B IPC without the said offence forming part of the charge? In this case the accused was alleged to have caused the death of a bride after subjecting her to harassment with a demand for dowry within a period of 7 years of marriage. He was charged with an offence under Section's 302 and 498-A IPC. However, the offence of murder was not established against the accused. Nonetheless, all the other ingredients necessary for the offence under Section 304-B would stand established. A question comes for consideration is that in the absence of the charges against the accused under Section 304-B IPC, can the Court convict the accused of that offence? The Supreme Court held that where the accused is called upon to defend only a charge under Section 302 IPC, the burden of proof never shifts onto him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under Section 304-B IPC as he was defending a charge under Section 302 IPC, it would lead to a grave miscarriage of justice when he is alternatively convicted under Section 304-B IPC and sentenced to the serious punishment prescribed there under, because he is deprived of the opportunity to disprove the burden cast on him by law. Therefore, the case in the trial Court should proceed against the appellant from the stage of defense evidence. He is put to notice that unless he disapproves the presumption, he is liable to be convicted under Section 304-B IPC. In the instant case a bride in her incipient 20's was whacked to death at her nuptial home. After gagging her mouth the assailants treated her for sometime as a football by kicking her incessantly and thereafter as a hockey puck by lambasting her with truncheons until she died of bilateral tension

126. AIR 2001 SC 921.

harmothrorax. Her husband and his brother and father were indicted for her murder. But when all the material witnesses turned hostile to the prosecution the trial Court being foreclosed against all options acquitted them.

(b) Cruelty to Married Women by Husband and in-laws: Section 498-A, Indian Penal Code: -

The Criminal Law (Second Amendment) Act 1983 introduced Section 498-A to the India Penal Code. It came into force on 25th December 1983. This section basically deals with cruelty met by married women by husband and his relatives. The Section reflects the anxiety of the society to provide protection to the weaker spouse. The basic object is to protect the woman. From her childhood women is subjected to cruelty. Even after entering the institution of marriage, she has been harassed and ill-treated by her husband and her in-laws. Sometimes the life for a woman in the family of the husband becomes so intolerable and miserable that it drags woman to end her life. In such situation, Section 498-A IPC comes into play and plays an important part in protecting her and to bring justice to her. Section 498-A provides the following: -

“498-A: Husband or relatives of husband of a woman subjecting her to cruelty – Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation – For the purposes of this Section, ‘cruelty’ means –

- (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for*

any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”

Hence, in order to bring a case under Section 498-A IPC following criteria must be met: -

- (i) the woman must be married or she may also be a widow.
- (ii) She must be subjected to cruelty by her husband or the relative of her husband;
- (iii) That such cruelty consisted of either: -
 - (a) harassment of the woman with a view to coerce meeting a demand for dowry; or
 - (b) a willful conduct by the husband or the relative of her husband of such a nature as is likely to lead to lady to commit suicide or to cause grave injury to her life, limb or health;
- (iv) That such injury mentioned above may be physical or mental.

The expression “*cruelty*” and its legal concept have varied from time to time and from one society to the other with the change in social and economic conditions. There was no precise definition of cruelty as it may be subtle or brutal, it may be physical or mental, it may be in words, gestures or mere silence. Hence it is difficult to give a precise definition of cruelty. In *Russel vs. Russel* ¹²⁷ cruelty was defined as “*Conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger.*” Under the English Statute, Matrimonial Causes Act, 1973 cruelty is one of the facts indicative of a breakdown of marriage, and

127. (1897) AC 305.

the wordings of the clause are such as to give cruelty a very elastic meaning.¹²⁸
The clause provides the definition cruelty in the following words: -

“The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.”

Even under the modern Hindu Law cruelty is a ground for both divorce and judicial separation. Earlier in the English Law intention was considered to be an essential element of cruelty, however, in the modern law intention is not an essential element the act of the respondent can itself constitute the cruelty. Hence in *P. Sanyal vs. Sarla*¹²⁹ wherein the wife gave a potion thinking it to be a love potion and that it will keep her husband in her palm but the love potion turned out to be a deadly poison which resulted in hospitalization of the husband for a considerable time, thereby creating a reasonable apprehension and hence, the husband was granted the decree of divorce.

The Indian Courts have been faced with questions of various forms in relation to the matters relating to cruelty. In the absence of any specific definition the Court had relied upon the facts and circumstances of the cases to determine the offence of cruelty. In *Bhagwat vs. Bhagwat*¹³⁰ the Bombay High Court was faced with one such problem i.e. should act or conduct constituting cruelty be aimed at the petitioner. In reply the Court held that wherein the husband tried to strangulate wife's brother on one occasion and on another occasion her younger son. It was established that on both the occasions husband acted in a fit of insanity. Such conduct of the husband amounts to cruelty.

Most of the wives in Indian society still live in joint families. Thus, in most divorce case filed on the ground of cruelty a question generally comes up before us that should the act or conduct complained of is that of the

128. Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency, Faridabad, 1997, P. 127.

129. AIR 1961 Punj 125.

130. AIR 1967 Bom 80.

respondent? Whether the cruelty of any other member of the joint family amounts to cruelty on the part of the respondent? In *Shyam Sunder vs. Santadevi*¹³¹ soon after the marriage, the wife was locked up, kept without food, ill-treated by the joint family members, while the husband stood there idly, without least caring to protect his wife. It was held that an intentional omission to protect his wife from the ill-treatment of the members of the joint family amounts to cruelty on the part of the husband. However, in *Gopal vs. Mithilesh*¹³² the Court held that husband's stand of neutrality between his mother and wife and thereby allowing his wife to be nagged by his mother did not amount to cruelty to the wife; this was the normal wear and tear of a Hindu family life.

Classification of Cruelty: - Cruelty can be classified under the following two heads: -

- (i) **Physical cruelty:** - Acts of physical violence by one spouse to another resulting in injury to body, limb or health, or causing reasonable apprehension of the same but have been traditionally considered as cruelty. However, the acts of physical violence amounting to cruelty differ from case to case, depending upon the susceptibility and sensibility of the party concerned.
- (ii) **Mental Cruelty:** - The conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other.

From the above discussion about "cruelty" it can be said that exact definition for it is difficult as the human beings and their actions are diverse and infinite that it is almost impossible to expect a definition exclusive or inclusive which can be applicable to every particular act or conduct and will not fail in any given

131. AIR 1962 Ori 60.

132. AIR 1979 All 136.

circumstance. Hence, the Karnataka High Court in *Srikant Bangacharya Adya vs. Anuradha*¹³³ held that to the cruelty is to limit its applicability which is not advisable in as much as it is not possible to comprehend the human conduct and behaviour for all time to come.

Section 498-A IPC has for the first time made an effort to define "cruelty" and in its effort has given a very wide definition. There is no vagueness or absurdity in the definition. In *Balkrishna Pandurang Moghe vs. State of Maharashtra*¹³⁴ it was held that the definition of the word 'cruelty' in the explanation to Section 498-A is with a view to remedying the mischief, and achieve the object with which the enactment was made. Merely, because the said definition is different from the dictionary meaning of the word 'cruelty' it is not possible to hold that it is either vague or obscure. Similarly, in *Madhuri M. Chitnis vs. Mukund M. Chitnis*¹³⁵ it was held that the meaning and definition of cruelty given in Section 498-A is not vague. The ordinary dictionary meaning of cruelty does not apply to Section 498-A so as to meet a social challenge to save the married woman from ill-treatment and ensure that woman live with dignity in their matrimonial home. The Court held that the sole constituent of an offence under Section 498-A is willful conduct. Willful means the deliberate behaviour on the part of the offender amounts to cruelty.

In order to bring charges against the husband and in-laws it is essential for prosecution to prove that the husband and in-laws have subjected the wife to cruelty or harassment for or in connection with a demand of dowry or for in other circumstances. Wherein the wife committed suicide as she was repeatedly taunted, maltreated or mentally tortured right from next day of marriage. There was even a quarrel between wife and husband only a day before her death proves

133. AIR 1980 Kant 8.

134. 1998 Cr. L. J. 4496 (Bom).

135. 1992 Cr. L. J. 111 (Bom).

that she was harassed. Such harassment or cruelty need not be physical. Mental torture given would be sufficient to prove the cruelty under Section 498-A IPC.¹³⁶ In *Arun Vyas and another vs. Anita Vyas*¹³⁷ the Supreme Court classified that the essence of the offence under Section 498-A is cruelty. It is a continuing offence and on each occasion on which the woman is subjected to cruelty, she has a new starting point of limitation. In *Akula Ravinder vs. State of Andhra Pradesh*¹³⁸ the marriage between the deceased and Accused 1 took place in the month of April, 1984. At the time of marriage a demand of dowry of Rs. 10,000/- was made but the parents of the deceased paid Rs. 8,000/- and promised to pay the balance amount after marriage. However, they could not pay. The in-laws harassed the deceased for the payment of the balance amount. The husband used to work in Army and used to come now and then and used to demand the balance of the dowry from the parents of the deceased. He also joined his parents to harass the deceased. The deceased died in the month of April 1987. The dead body showed some external injuries. The case was registered. The post mortem was done and the doctor opined that death was homicidal in nature and was not a suicidal. The conviction of the accused was made under Section 498-A IPC.

In *Baliram Prasad Agarwal vs. State of Bihar*¹³⁹ a tragic fate visited a young married woman aged 28 years named Kiran Devi who is alleged to have been forced to commit suicide by falling in a well situated on the back side of the house of the accused. Kiran was married to Paran Prasad Agarwal in 1977. Even after 5-6 years of marriage she was unable to give birth to a child. For this her mother-in-law (who is not surviving) and the elder brother of the husband wanted him to marry some other girl by killing Kiran. Kiran's father

136. *Pawan Kumar vs. State of Haryana* AIR 1998 SC 958.

137. AIR 1999 SC 2071.

138. AIR 1991 SC 1142.

139. AIR 1997 SC 1830.

got her treated by gynecologist and subsequently gave birth to two sons. Still Kiran used to face cruelty. They persisted in demanding dowry which was not fulfilled. For this they used to beat her and torture her causing danger to her life. Earlier also she tried to jump in the same well about four years ago. But she was saved by the neighbour. One time she even made a report before the concerned Police Station against her husband and in-laws. The Court ordered to convict the husband and brother-in-law of offences punishable under Section 498-A IPC as the chain of circumstances shows that there is no hypothesis about their innocence.

A horrendous bed room murder of a young married girl (Urmila Devi) was brought before the Supreme Court in *State of Uttar Pradesh vs. Ramesh Prasad Misra*.¹⁴⁰ In this case, Urmila Devi was married to Ramesh Prasad Misra who was a practicing advocate at Karwi. On 25th April 1985 hardly after 5 months of her marriage she met with cruel death. She was carrying 4-6 weeks pregnancy. As per the autopsy doctor the condition of the body clearly indicated force and pressure put upon her. The dead body was found burnt which shows through her post mortem report that the burns were post-mortem as her entire body was burnt except feet. The entire case lies upon the circumstantial evidence. The alibi given by the respondent was that he went to visit his sister straight from the Court and had kept his coat in a shop. His sister was having fever. However, it was found that the sister was having usual fever which did not warrant him to go straight from the Court to his sister's house without coming to his house. Even if he went on 25th September the distance between Karwi and his sister's village is 70 Km from which he would have returned on 26th evening. However, he said that he started in the morning on 27th September 1985 from sister's house and went straight to the Court. He got the news of his wife's death on 11 a.m. but went to Police Station at 2:10p.m. He even said that may be a stranger killed the deceased.

140. AIR 1996 SC 2766.

Even if a stranger had really stayed and committed murder by strangulation why would he burn the dead body to create evidence to alert the neighbours? Hence, the Apex Court convicted the respondent under Sections 302, 498-A and 201 of IPC. But his death sentence is converted to life imprisonment i.e. rigorous imprisonment.

Again in *Mangilal vs. State of Rajasthan*¹⁴¹ the appellant filed an FIR with the Mahatma Gandhi Police Chauki, Jodhpur, Rajasthan on 16th September 1998 alleging that the second respondent used to beat his wife and harass her without any reasons. The fact in the present case which gave rise to the complaint was that on 15th September 1998, the appellant was informed that Munki was seriously ill and had been admitted to Jodhpur Hospital. It was stated that when the appellant went to the hospital he found Munki in Emergency ward. It was stated that Munki had been informed the appellant that she had been beaten and administered a glass of pesticide by her husband. On the basis of FIR, a complaint under Section 498-A and Section 323 IPC was registered. Subsequently Sections 307 and 324 were also added. The second respondent was then tried for the said offences. However, he was acquitted on 27th March 2000 by the Second Additional District and Sessions Judge. Against the order of acquittal the appellant filed Criminal Revision Petition, which has been dismissed by the impugned judgment dated 5th July 200. Hence this appeal was made. The Supreme Court, thus, held that the reasoning of the Second Additional District and Sessions Judge is entirely erroneous and cannot be sustained. It could not be said that there was no oral or direct evidence available in this case. The Apex Court held the accused to be guilty of the offences under Sections 307, 324 and 498-A IPC.

141. AIR 2001 SC 2937.

The Apex Court in *Pyarelal vs. State of Haryana*¹⁴² is of view that the death of Usha Rani in the present case was occasioned not on account of any demand of dowry but because of various factors such as driven out of the house, harassment and maltreatment (she consumed insecticide and died on 19-12-1987), her father not opening his arms to give her shelter and to bring another child in such circumstances. Whatever demands of dowry arose after marriage as well as the difference between the parties were settled and got receded when she went back to cohabit with her husband. The cruelty inflicted on the deceased would be relevant in maintaining a case under Section 498-A IPC. However, the respondent was acquitted of the charge of Section 3-4-B IPC.

Similarly, in *Daulat Singh vs. State*¹⁴³ Lajjwati Devi (deceased) was solemnized marriage with the accused (Daulat Singh). After six months of the marriage, they started living separately from the father of the accused. Whenever the deceased used to come to her parental house she used to demand money from her parents for giving it to her husband which the parents used to give. It is also alleged that the deceased had not given birth to any children; therefore, she was being treated cruelly in her matrimonial house. It is further alleged that before the death of the deceased, she came to her parental house and asked her parents to give her Rs. 5000/- as her husband demanding the same and if she would not take the said money her husband would kill her. The father of the deceased told her that he will arrange the money within a day or two and asked her to stay at his house till the arrangement of money is made. But the deceased did not accede to the request of her father and she went away to her matrimonial house. On 11-10-1986 a report was lodged by the accused himself to the patti patwari alleging that his wife had committed suicide by getting herself

142. AIR 1999 SC 1563.

143. 2007 Cr. L. J. 1854.

hanged from a rope. However, the evidence of the doctor who conducted post-mortem held that there were injury marks on neck which can be resulted from strangulation and not by hanging. Even the neighbours confirmed that there were frequent quarrels between the accused and the deceased. In the said case the accused could not give plausible explanation of death of his wife by strangulation. Hence, it is found that there is complete chain of circumstances which lead to interference that accused alone had committed murder as the death was caused in night and he alone was sharing the room with deceased. Hence, the Apex Court held that he shall be convicted under Sections 302, 201 and 498-A IPC.

In *K. Prema S. Rao and another vs. Yadla Srinivasa Rao and others*¹⁴⁴ the accused husband pressurized and harassed the deceased to part with the land received by her from her father as '*stridhan*'. As a method adopted for harassment the Postal mail of her relatives sent to her was suppressed by the husband who was in a position to do so being a Branch Post Master in the village. When the letters were discovered by the wife and she handed them over to her father she was driven out of the house. This cruel conduct of the husband led the wife to commit suicide. On basis of such evidence the Apex Court found the conviction of the accused for the offence of cruelty under Section 498-A IPC by the trial Court and High Court to be proper. However, a question was raised that mere omission or defect in framing charges disable the Criminal Court from convicting the accused for the offence which is found to have been proved on the evidence on record? In this case the Supreme Court held that wherein there has been omission to frame charge against the accused under Section 306 IPC, the accused can be convicted under it as it has already been proved that as a result of his cruel treatment the wife was driven to commit suicide. This offence attracts the provisions of Section 306 IPC. Moreover such omission to frame charges has not

144. AIR 2003 SC 11.

resulted in any failure of justice as provided under Section 215 Cr. P. C. Thus, there would be no necessity to remit the matter to the trial Court for framing charge under Section 306 IPC and direct a retrial for that charge. In a similar case in *Packirisamy vs. State of Pondicherry*¹⁴⁵ wherein the accused husband was living with another woman, the act of the accused to keep his concubine as wife and bringing up child constitutes cruelty within the definition encompassed in Section 498-A IPC. The Madras High Court observed that such acts of accused would certainly destroy normal mental frame of deceased who was simple housewife. Due to this she was unable to bear the mental agony committed suicide by self-immolation. Thus presumption under Section 113-A of Evidence Act arises. It was held that the accused husband is guilty of cruelty under Section 498-A IPC and abetment of suicide under Section 306 IPC.

Cruelty by in-laws is also attracted under the provisions of Section 498-A IPC as generally the heinous crime of cruelty meted by the bride is done within the walls of house and family is so closely knit that rarely the members will stand against the other. In *Laxman Anaji Dhundale and Anorther vs. State of Maharashtra*¹⁴⁶ the husband and in-laws were convicted under Sections 498-A, 300 and 34 of IPC. In the present case, Kalpana was married to Rajendra Dhundals, 1st Accused on 18-03-2001. Within 15 days of her marriage the deceased returned to her parents place along with her husband and informed them that her husband is demanding ornaments for the purpose of construction of a new house. She told her father to give the money to her husband otherwise she would be required to dispose of her ornaments. On this, the father of Kalpana informed his son-in-law that he has Rs. 5000/- which the accused refused to take and demanded Rs. 10,000/- for the time being. The father of the deceased paid Rs.

145. 2005 Cr. L. J. 467.

146. AIR 2007 SC 1876.

5000/- and assured accused No. 1 that he would give the balance amount of Rs. 5000/- after 15 days. During this period Kalpana informed her parents that she has been harassed to get the balance amount by her husband. To this her father assured the accused that he will arrange the sum. The next day, however, he received information to him that while fetching water she fell into a well. However, it was proved that her death was not accidental. In fact she was murdered as she had external as well as internal injuries in her body. The accused No. 1 was convicted under Section 302/34 IPC. The in-laws of Kalpana were also found guilty under Section 498-A/34 IPC. However, the Apex Court was of view that since this is a case of circumstantial evidence and we have to see whether the chain of links connecting the in-laws (Accused 2&3) is established beyond reasonable doubt. There is no credible evidence showing that the accused No. 2&3 caused the death of the deceased. Therefore, appellants in this case (Accused 2&3) are entitled to benefit of doubt and hence, the appeal was allowed.

Similarly in *Ran Singh and another vs. State of Haryana*¹⁴⁷ wherein woman was subjected to cruelty by her husband and in-laws. It was alleged by the complainant that his daughter was harassed by her husband and in-laws for non-fulfillment of dowry demand. The Session Court discharged the in-laws as no case was made against them. However, the High Court held that in-laws are persons “who could misappropriate” and “who could practice cruelty” and thus, they are liable for prosecution. The Apex Court held that the statement of the High Court without assigning reasons to it is not proper and thus, their prosecution is invalid.

With respect to the term “relative of the husband” an interesting question came up before the Kerela High Court. In *John Idiculla and*

147. AIR 2008 SC 1294.

another vs. State of Kerela and another ¹⁴⁸ a question was raised before the Court that wherein the husband who married second-wife during the subsistence of his earlier marriage be treated as the “relative of the husband” for the purpose of Section 498-A IPC? If so, under what circumstances? Will an offence under Section 498-A IPC lie against such a “second wife” if she inflicts cruelty on the legally wedded wife of the husband? To this the Kerela High Court held that in such situations the test under Section 498-A IPC is whether in the facts of each case, the second-wife is treated by friends, relative, husband or society as a “wife” and consequently as “the relative of the husband” for purpose of Section 498-A IPC. Proof of a legal marriage in the rigid sense as required under the civil law is unnecessary for establishing an offence under Section 498-A IPC. The expression “marriage” or “relative” can be given only a diluted meaning which a common man or society may attribute to those concepts in the common parlance for the purpose of Section 498-A IPC. A second wife who is treated as wife by the husband, relatives, friends or society can be considered to be “the relative of the husband” for the purpose of Section 498-A IPC. If she inflicts cruelty on the legally wedded wife of the husband, an offence under Section 498-A IPC will lie against her.

In *Smt. Shanti vs. State of Haryana* ¹⁴⁹ the Apex Court was dealing with a conviction under Section 304-B IPC a question was raised that whether the provisions of Sections 304-B and 498-A IPC were mutually exclusive? To this the Apex Court held that Sections 304-B and 498-A IPC cannot be held to be mutually exclusive. It is true that “cruelty” is a common essential to both the Sections and that has to be proved. The Explanation to Section 498-A gives the meaning of cruelty. In Section 304-B there is no such explanation about

148. 2005 Cr. L. J. 2935.

149. AIR 1991 SC 1226.

the meaning of cruelty. However, the background to these offences is common; hence, we have to take the meaning of “cruelty” or “harassment” given in the Explanation to Section 498-A IPC. Moreover, Section 304-B deals with “dowry death” and punishment with regard to it and such death must have occurred within seven years of the marriage. However, no such period is mentioned in Section 498-A and the husband and his relative’s would be liable for subjecting the woman to “cruelty” any time after the marriage. Further the Court held that it must be borne in mind that a person charged and acquitted under Section 304-A can be convicted under Section 498-A without charge being there, if such a case is made out. But from the point of view of practice and procedure and to avoid technical defects it is necessary in such cases to frame charges under both the Sections and if the case is established they can be convicted under Section 498-A in view of the substantive sentences being awarded for the major offences under Section 304-B. Again the Supreme Court in *Noorjahan vs. State*¹⁵⁰ held that Sections 304-B and 498-A IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Sections and that has to be proved. In *Amrish Kumar Agarwal vs. State of Uttar Pradesh*¹⁵¹ the question before the Court was whether an offence committed by the husband before the coming into force of Section 498-A can be tried as against him by the State under this Section. The Court held that it cannot be done as Section 498-A unless the legislature says so, cannot be given a retrospective application. The harassment for insufficient dowry took place in 1982-83 and Section 498-A was introduced later. The case was remanded to the trial Court to try an offence if made out against the accused under any other Section.

150. AIR 2008 SC 2131.

151. 2000 Cr. L. J. 1324 (UP).

(III) Evidence Act and Presumption as to Dowry Death: -

In order to make the amendments in the Indian Penal Code more effective, amendment in the Indian Evidence Act, 1872 was considered to be necessary. As a result of this Section 113-B was added to the Indian Evidence Act, 1872 which deals with presumption as to dowry death.¹⁵² It states that –

“Section 113-B: Presumption as to dowry death – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death, such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation – For the purposes of this Section, ‘dowry death’ shall have the same meaning as in Section 304-B of the Indian Penal Code.”

The provisions of this Section is mandatory in nature, however, it simply enjoin upon the court to draw such presumption of dowry death on proof of circumstances mentioned therein which amounts to shifting the onus on the accused to show that the married woman was not treated with cruelty by her husband soon before her death.¹⁵³

In *Hem Chand vs. State of Haryana*¹⁵⁴ where the death was caused by strangulation and evidence available showed that dowry was being demanded and the accused husband was also subjecting his deceased wife to cruelty, it was held that presumption under Section 113-B of the Evidence Act will be applied. Similarly, the Apex Court in *Kailash vs. State of Madhya Pradesh*¹⁵⁵ held that no presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or

152. Inserted by Act 43 of 1986, S. 12 (w.e.f. 19-11-1986).

153. *Krishna Lal vs. Union of India* 1994 Cr. L. J. 3472 (P&H).

154. (1994) SCC 727. Also see *State of Uttar Pradesh vs. Ramesh Prasad Mishra* (AIR 1996 SC 2766).

155. AIR 2007 SC 107.

harassment the dispute stood resolved and there was no evidence of cruelty or harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defense, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too state before the date of death of victim. Again the Supreme Court in *State of Rajasthan vs. Jaggu Ram*¹⁵⁶ held that Section 113-B of the Evidence Act lays down that if soon before her death a woman is subjected to cruelty or harassment for, or in connection with any demand for dowry by the person who is accused of causing her death then the Court shall presume that such person has caused the dowry death. The presumption under Section 113-B is a presumption of law and once the prosecution establishes the essential ingredients mentioned therein it becomes the duty of the Court to raise a presumption that the accused caused the dowry death. It was also held by the Apex Court that a conjoint reading of Section 304-B IPC and Section 113-B of Evidence Act shows that in order to prove the charge of dowry death, prosecution has to establish that the victim died within 7 years of marriage and she was subjected to cruelty or harassment soon before her death and such cruelty or harassment was for dowry. The expression “soon before her death” has not been defined or time period has not been mentioned in either of the statutes. Therefore, the Court in each case has to analyze the facts and circumstances leading to the death of the victim and decide whether there is any proximate connection between the demand of dowry, the act of cruelty or harassment and the death.

In *Baldev Krishan vs. State of Punjab*¹⁵⁷ the wife died due to burn injuries in matrimonial home, circumstantial evidence showing clothes drenched in kerosene oil and mouth gagged with a piece of cloth rules out suicide

156. AIR 2008 SC 982.

157. (1997) 4 SCC 486.

or accidental death. Hence, presumption under Section 113-B of Evidence Act arises. Similarly in *Amarjit Singh vs. State of Punjab*¹⁵⁸ where a wife was last seen alive in the company of her husband and her death was unnatural and homicidal, the husband became under a responsibility by virtue of the provision in Section 106, Evidence Act to account for the circumstances of death because he alone must have known about them.

Besides Section 113-B which provides provision with regards to the presumption of dowry death in which basically the husband and in-laws kills, burns, poison, strangulate the bride. But there are certain circumstances that the bride is tortured, is treated with cruelty or is harassed and ultimately she herself ends her life. Under the said circumstances who will be punished? For the said purpose Section 113-A was inserted in the Evidence Act which provides provision with respect to the presumption as to abetment of suicide by a married woman.¹⁵⁹ It runs as follows: -

“Section 113-A: Presumption as to abetment of suicide by a married woman – When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation – For the purposes of this section, “cruelty” shall have the same meaning as in Section 498-A of the Indian Penal Code (45 of 1860).”

158. (1989) Cr. L. J. (NOC) 13 (P&H).

159. Inserted by Act 46 of 1983, Section 7.

This provision, thus, creates a presumption against the husband and his family even if it was a case of suicide. The presumption is that the family must have abetted it by practicing cruelty upon her. The provision states that wherein it is proved with the help of available facts that a married woman was subjected to cruelty of her husband or his family members and she has committed suicide within seven years of her marriage the Court may presume that the suicide had been abetted by her husband or his family members. This is called presumption of abetment. The presumption will be raised by the Court only after taking into account all the other circumstances of the case.

In order to bring a case under this section following things has to be fulfilled then only the presumption will arise: -

- (a) whether the commission of suicide by a married woman was the result of abetment by her husband or relatives.
- (b) The suicide must have taken place within a period of seven years from the date of marriage.
- (c) There must be evidence to prove that her husband or his relatives had subjected her to cruelty.

Hence, in *Amarjit Singh vs. State of Punjab*¹⁶⁰ the Punjab and Haryana High Court held that wherein the habit of a husband to come home late after getting drunk and beating his wife comes under the purview of cruelty and hence will attract the presumption under Section 113-A. However, in *Jagdish Chandra vs. State of Haryana*¹⁶¹ it was held that wherein he comes home only drunk after a late night will not attract the provision of presumption under the said section.

In *Balaram Prasad Agarwal vs. State of Bihar*¹⁶² where a house-wife died by drowning in the family well in the courtyard of her in-laws

160. *Ibid* note 158.

161. 1998 Cr. L. J. 1048 (P&H).

162. AIR 1997 SC 1830.

and there were circumstances showing ill-treatment spreading over several years, it was held that the circumstances created the presumption that the ill-treatment continued till she was forced to commit suicide. However, the apex Court in *State of West Bengal vs. Orilal Jaiswal*¹⁶³ observed that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance discord and differences were not expected to induce a similar circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

The provisions of the section are applicable to the pre-amendment cases also. The Supreme Court in *Gurbanchan Singh vs. Satpal Singh*¹⁶⁴ held that these provisions do not create any new offences, right, but merely a matter of procedure and as such are retrospective and applicable to the present case.

(V) Provisions under the Criminal Procedure Code, 1973: -

There are provisions under the Criminal Procedure Code for the purpose of investigating the dowry death and thus, strengthens the amended provisions of the Indian Penal Code. Section 174 of Criminal Procedure Code empowers the police officers to make investigation into cases of suicide and other unnatural or suspicious deaths. The object of the proceeding is to ascertain

163. AIR 1994 SC 1418.

164. AIR 1990 SC 209.

whether a person has died under suspicious circumstances or an unnatural death and if so what the apparent cause of the death is.

Section 174(3) has been added by the amendment of the Criminal Law (Second Amendment) Act, 1983¹⁶⁵ which makes it mandatory for the police officer to send the body for post-mortem examination if: -

- (i) the case involves suicide by a woman within seven years of marriage; or
- (ii) the case related to the death of a woman within seven years of marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or
- (iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or
- (iv) there is any doubt regarding the cause of death; or
- (v) the police officer for any other reason considers it expedient to do so.

This amendment was enacted to deal with the increasing incidents of dowry deaths or cases of cruelty to married women by their in-laws. However, the statement under Section 174 cannot be used as substantive piece of evidence as a substantive piece of evidence as such a statement would be within the inhibition of Section 162 which provides *inter alia* that no statement of any person, if recorded, by a police officer in the course of investigation shall be signed by the person making it. Hence, this provision is a rule of public policy wherein the witnesses at the trial should be free to tell the truth unhampered by anything they might have been made to say to the police. Therefore, the statements under Section 174 can be at the most be used only as a previous statement to

165. Substituted by Act No. 46 of 1983, Section 3.

corroborate and contradict the person making it at the trial as held in *Ch. Razik Ram vs. Ch. J.S. Chauhan*.¹⁶⁶

Section 176 was added by the Amendment Act¹⁶⁷ wherein it is provided that inquiry by Magistrates into the cause of death in police custody and into other cases of unnatural or suspicious deaths can be made. It empowers the Magistrate to enquire into the cause of the death of the bride instead of or in addition to the investigation held by the police officer. Further, amendment to the First Schedule to the Code of Criminal Procedure was made which brought the offence of dowry death under the purview of cognizable and non-bailable offence which can be tried by the Court of Session.

From the above provisions it is clear that the law has facilitated the punishment of guilty and creates terror in minds which are criminally inclined. Although the legislature has done all it could but the problem still remains in fact it is growing in alarming proportion. It seems the law is adequate but its enforcement is below expectations with a marginal impact in society as it is a custom backed by the society and is followed consistently. Law can be ahead of public opinion, but, if the gulf is too wide, there is every likelihood of its non-observance and violation.¹⁶⁸

Recommendation and Suggestion on Amendments to the Dowry Prohibition Act, 1961 by the National Commission for Women: -

Despite the punishment prescribed under Indian Penal Code and a separate legislation particularly prohibiting the demand of dowry and to prevent dowry death, the issue relating to this social evil still exists in our society.

166. AIR 1975 SC 667.

167. Substituted by Act No. 46 of 1983, Section 4.

168. N.R. Madhava Menon, *The Dowry Prohibition Act: Does the law provide solution or itself constitute the problem*, 14 IBR (1987).

To discuss this issue and its prohibition a Convention was organized by the National Commission for Women on 22nd November 2005, New Delhi wherein after discussion it was felt that although the present law aptly prohibits the giving and taking of dowry, it is ineffective to curb this social evil. It was felt that there was a dire need to make the requisite amendments to the Act so as to make it effective. NCW made the following recommendations and suggestion to amend the Dowry Prohibition Act, 1961: -

- ❖ The definition of “dowry” should be changed. Sub-section 2 to Section 3 is proposed to be included within the broad definition of dowry. The expression ‘*present*’ in the present Act should be substituted by the term ‘*gift*’. A proviso regarding registration of lists of gifts to be introduced. Explanation-I should be introduced which provides meaning of the term “indirectly”. An explanation to provide the items that constitute “*gifts*” and a reference to items received in *Stridhan* and *Mahr* should be included to differentiate between the traditional gifts and presents. It means the Dowry Prohibition Act does not bar traditional giving of presents at or about the time of wedding and such presents or dowry given by the parents is therefore not at all within the definition of the statute. An explanation should be added to explain the term “*voluntary*” in relation to the exchange of gifts.
- ❖ With respect to the penalty for giving or taking dowry it is suggested that separate penalty for giving and taking of dowry. It is also suggested that penalties should be introduced for the non-maintenance of lists of gifts received at the time of the marriage. Further it is recommended that Section 7(3) of the Present Act should be incorporated as Section 3(4) wherein the Giver of the dowry can be treated as an aggrieved person and it becomes important to state that such an aggrieved will not be liable to prosecution.

- ❖ The provision relating to the death of the woman in unnatural circumstance should be deleted and all property obtained as dowry to revert to the parents of the woman or her children shall be made as in case of her death the dowry property of the woman as per the existing provision will dwell among the heirs of the woman wherein even husband who takes dowry is entitled to receive a portion which is in itself injustice to the victim of dowry death.
- ❖ A clause regarding the jurisdiction of the Courts should be included. The term “*any recognized welfare institution or organization*” to be replaced by “*any recognized service provider or protection officer*”. The provision of Protection Officer and Service Provider is needs to be incorporated in the Dowry Prohibition Act. Substitution of “*Dowry Prohibition Officer*” with “*Protection Officer*” should be made in order to avoid the overlapping of powers and confusion in the minds of common people, it is important to assimilate the two. Insertion of a new section-Section 7A containing the procedure for obtaining orders of relief’s should be made.
- ❖ Insertion of new Section 8C should be made in order to provide duties of the Government to prohibit its servants from giving and taking Dowry or abetting the giving and taking of Dowry.
- ❖ The Central Government and the State Government should be empowered to decide the qualification, appointments, etc of the Protection Officer, issuing special instruction with regard to government employees and to create wide publicity of the Act.

Apart from the above recommended changes in the Dowry Prohibition Act, following changes are recommended and suggestions are made by NCW in the following matters:-

- ❖ With respect to wordings of Section 304-B IPC the Committee recommends that the words 'soon before' used in the Section must be deleted and should be replaced by the words 'anytime before'. The minimum punishment in Section 304-B (2) be raised from seven years to 10 years. After the words 'imprisonment for life' in Section 304-B (2) the words "or death" may be added. The said changes should be brought to keep this offence at par with murder and by no stretch of imagination it is less grave an offence than the murder, and to create deterrence in the minds of the people indulging in such heinous crime. Further importance of prompt medical examination and investigation should be made essential so that the evidence is not destroyed.

CHAPTER - V
DOMESTIC VIOLENCE:
PREVENTION AND PUNISHMENTS

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DOMESTIC VIOLENCE: PREVENTION AND PUNISHMENTS

Atrocities against women are being committed all over the world. Whether it is a developed nation or developing country or even in the third world countries the plight of women is same all over the world. She is perceived as the weaker class who is subjugated to the heinous crimes. She is always at the receiving end of the crimes as a victim whether outside the domain of her house or inside it. Although emancipation of women is being done and to some extent the society became successful in emancipating women by providing justice, equality and liberty to the weaker class of the society. However, the focus of the society as well as the legislature has always been on eradicating the violence against women outside their homes by the strangers. But it is also a known fact that the cruelest crime's a woman is subjected to are at the hands of those she trusts and loves. The previous chapter provides the discussion on Dowry, dowry deaths and punishments for committing dowry deaths/murder under a separate legislation specifically for prevention of Dowry i.e. Dowry Prohibition Act, 1961; Indian Penal Code; Indian Evidence Act and the Code of Criminal Procedure. This chapter deals with various forms of domestic violence which a woman has to undergo before her marriage or after it, prevention and punishments for committing such a crime against the women. This chapter will also discuss some of the crimes committed against the women in the domestic household which are not covered under any legislation yet it is committed and the abuser/accused gets

away without being punished. Following are the crimes committed against the women, its prevention and punishments for committing such a crime: -

1. BIGAMY: -

When we go back to history we see that the institution of marriage did not exist among the primitive society. More or less humans used to live life like animals at that period. Man was so much engaged in the satisfaction of his primary needs i.e. hunger and shelter that there was no time or occasion to think of refinement. Sex life was absolutely free. Only after his two discoveries namely discovery of fire and domestication of animals he started to lead some civilized life, although the sex relationship still remained unregulated. As a result of this only maternity of the child was known and paternity of the child couldn't be determined. Gradually a stage came wherein the concept of possession or ownership seized the human mind and now the human male came up with the idea of knowing his children. The quest of a man to know the paternity of children gave rise to the institution of marriage. After the concept of marriage was developed it was seen as exclusive union between woman and man. However, it remained exclusive union for the female sex only and was not strict for the male sex. Due to such differentiation in the concept of the marriage to both the sex, the institution of marriage or the marriage system was basically divided into three kinds namely Monogamy, Polyandry and Polygamy. The term "monogamy" denotes that a person is permitted to have only one wife or one husband at a time. The monogamy marriage system is essentially of Christian origin. "Polyandry" refers to a marriage system which permits a woman to have more than one husband at a time. "Polygamy" denotes a marriage system wherein a man is permitted to have more than one wife simultaneously. Hence, polyandry and polygamy are the bigamous marriage wherein a man or a woman has more than one wife or

husband. However, monogamy is a strict rule for the women though not so strict for men. The reason behind it is that the descent is to be traced through male and hence the fidelity of the wife has to be secured to know the paternity of his children. Hence, it can be said that women are under man's absolute power.

Marriage generally means a legally and socially sanctioned union between man and woman which provides status to them and their offspring and is regulated by laws, rules, customs, beliefs and attitudes that prescribes the right and duties of the partners. Thus, when a spouse marries for the second time when his/her marriage is subsisting than it can be said that he/she is practicing polygamy or polyandry system of marriage. In other words he/she is guilty of bigamy or has committed the offence of bigamy. Thus, bigamy includes both polygamy and polyandry. In the present day society even though the offence of bigamy is punishable by law yet we can see that there are many men who commit this offence against their wives and even if the wife knows she quietly accepts the fact.

Polygamy system of marriage was recognized among the Hindu's from the ancient times till 1955. However, in Bombay it was prohibited by a statute of 1948 and in Madras by an Act of 1949. Polyandry was not recognized by the Hindu's, although it prevailed in some regions by custom in North and South i.e. in Lahaul Valley in Himachal Pradesh and among *Thiyyas* of South Malabar. In India, polyandry and polygamy have been abolished and monogamy has been made a rule for all the Hindus. The Hindu Marriage Act, 1955 under Section 5(i); The Special Marriage Act, 1954 under Section 4(a); The Parsi Marriage and Divorce Act, 1936 under Section 4; as well as the Indian Christian Marriage Act, 1872 under Section 60 provides that a party to a marriage should not have a spouse living at the time of marriage. Hence it is a condition precedent to every marriage. Thus, all these laws prohibit bigamy. If a party to a

marriage has a spouse living at the time of marriage he is guilty of committing the offence of bigamy. It is important to note that the phrase “*spouse living*” means lawfully wedded wife/husband. That the first marriage is not null and void. In *Jaganatham vs. Savitramma*¹ a man and a woman belonging to *Parika* and *Yatha* communities respectively were living as husband and wife for a very long time and had children. The man married another woman. Thus, the wife he was living with files a suit against the man. It was held that their marriage was proved and the mere fact that they belonged to different communities is not sufficient to hold their marriage void.

The Hindu Marriage Act, 1955 under Sections 11 and 17 make bigamy an offence. Section 11 of the Act makes a bigamous marriage void as the said provision provides the following: -

“Section 11. Void Marriages – Any marriage solemnized after the commencement of this Act shall be null and void and may on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes only one of the conditions specified in clause (i), (iv) and (v) of Section 5.”

From the language of the above section it becomes clear that the first wife of the bigamous marriage has no right to file a petition for nullity of marriage as Section 12 clearly lays down that a petition for a declaration that the marriage null and void can be filed only by either party to the marriage as it was held in *Kedar Nath vs. Suprava*.² However, in *Surjeet Singh vs. Mohinder*³ it was held that the first wife can file a suit in a civil court for a declaration under Section 9 of the Code of Civil Procedure read with Section 34 of the Specific Relief Act that

1. AIR 1972 AP 377.

2. AIR 1963 Pat 311.

3. AIR 1988 P&H 156.

the second marriage of her husband is null and void. She can also file a petition for divorce under Section 13(1)(i).

The Hindu Marriage Act, 1955 under Section 17 makes bigamy an offence. It lays down that: -

“Section 17. Punishment of bigamy – Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had husband or wife living; and the provisions of Section 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly.”

Under the Hindu Personal law before the codification a Hindu husband could contract a valid second marriage or even polygamy. This privilege was available for only the men; no similar rights were given to a Hindu wife. However, after the codification as already discussed above under Section 5(i), 11 and 17 bigamy is prohibited and offending party is liable for prosecution under Sections 494 and 495 of Indian Penal Code. Similarly, bigamy is considered a barrier in contracting valid marriage even under the Special Marriage Act, Parsi Marriage and Divorce Act and Christian Marriage Act. However, with respect to the Muslim Personal law a Muslim man can marry four wives at a time but marriage by him to a fifth wife is illegal. Although bigamy is not an offence with respect to Muslim law only in case of men. It will be an offence wherein a woman marries another man when her marriage is still subsisting. Thus, it can be said that polygamy to Muslim men is limited to four wives only.

INDIAN PENAL CODE AND BIGAMY: -

The subject relating to the number of spouses a man or a woman could marry was initially in the exclusive domain of religion. Various communities have their own set of rules and guidelines in their religio-legal literature about time. Be it the Hindus, Buddhist and Jain religion or the Muslim

law which was introduced in India by the Mughal's about a thousand years ago, they all incorporate detailed rules and guidelines relating to marriage and its discipline – including the number of spouses they are permissible to marry at a time. Even the Christians, Jews and Parsis had their own religious laws which speak about marriage as well as permissibility of plurality of spouses. The latest religion added to the galaxy of Indian faiths, viz. Sikhism, too treated the issue spiritually, taking as its basis the indigenous religious tradition and local usage in this regard.⁴ However, with respect to the number of spouses a person can marry or take at a time varied from one religion to another as the said issue was accepted and acknowledged by different religion differently.

In 1860 finally during the reigns of the Britishers the newly enacted Indian Penal Code was introduced which contained provisions relating to bigamy. Before the enactment of 1860's Indian Penal Code Indian people living in different parts of British India were governed by the Hindu and Islamic criminal laws. With respect to marriage and bigamy the newly enacted Indian Penal Code contained two consecutive Sections 494 and 495 which deal with polygamy. These two provisions were clearly an innovation introduced into Indian law by the British rulers and there were expectedly based on the British law.

Bigamy had been treated as an offence in England long before the enactment of Indian Penal Code. Earlier there were ecclesiastical courts which had jurisdiction to penalize bigamists, although the specific penal legislation was first promulgated in 1603. The said legislation was enacted in the aftermath of the decision in *Rye vs. Fuliambe*⁵ bringing forth the extent of bigamous marriages in the country. The statute declared bigamy to be an offence except when the first spouse was missing or absenting himself or herself for seven

4. Kiran B. Jain, *Vice of Bigamy and Indian Penal Code: Ramifications of an Archaic Law*, 32 *JILI* 386 (1990).

5. (1602) Moo. K.B. 683.

years, or in case the earlier marriage had been dissolved or declared void by the ecclesiastical court.⁶ When the Indian Penal Code was being drafted by T.B. Macaulay, the Offences against Persons Act, 1828 re-enacted the law on bigamy and sought to enforce it more stringently by making no exceptions for situations where an earlier marriage was subsisting in any form. Again after the IPC was enacted but before its enforcement, England enacted its new Offences against Persons Act, 1861 wherein the law on polygamy was contained in Section 57.

Under the Indian Penal Code bigamy is an offence under Sections 494 and 495. Section 494 provides that –

“Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.”

This section, thus clearly lays down bigamy as a matrimonial offence which is punishable by law. It declares that whether the remarriage is done by husband or a wife, in either case it is an offence if it takes place during the life of first husband or wife. Hence, following are the salient features of this section: -

- The section prohibits both the polygamy and polyandry system of marriage.
- The offence is of penal nature.
- The said provision will be applied to the civil law if the said law prohibits the second marriage to the extent of treating it as “void.”
- The offence prescribed under the said provision will be established only when the first spouse is living and marriage with him or her is legally subsisting.
- The provision will be attracted only if the second marriage is a marriage in the eye of the law.

6. *Ibid* Note 4 at P. 387.

- This provision will not be attracted where the first marriage is declared by a competent Court to be null and void.
- The said provision will also not apply to a case where the first spouse has been missing for seven years or more or in the circumstances in which law of evidence and most of the personal laws would raise presumption of death.

Along with this the Indian Penal Code 1860, under Section 495 provides that wherein bigamy is committed with concealment of former marriage from person with whom subsequent marriage is contracted. It provides that –

“Whoever commits the offence defined in the last preceding section having concealed, from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.”

Hence, it can be said that Section 495 of IPC is a special rule under the general law laid down under Section 494. Some essential elements and ingredients of the Offence of bigamy which is applied under Section 494 will also be applied under Section 495 with an additional ingredient i.e. here there is concealment of the existence of an earlier marriage from the person with whom the subsequent marriage is contracted. In other words the offence of bigamy under Section 495 of IPC will be applied under the following circumstances: -

- When a person married for the second time.
- When such person married for the second time by concealing from his/her new spouse that he/she is already married.

Thus, bigamy whether polygamy or polyandry, would attract application of Sections 494 and 495 only if the resulting marriage is void by

reason of its taking place during the life of first husband or wife. Bigamy will be an offence only if the family law governing him/her treats it as void. Hence, where bigamy is permissible by the family law applicable to such person, it will not be an offence under the IPC.

When the Indian Penal Code was enacted in 1860 the communities of India were not governed by the codified laws, rather they were governed by the traditional or conventional laws. The Hindu's, Buddhist's, Sikh's and Jain's had their own religious laws or customary law wherein polygamy was not prohibited; hence they were outside the scope of Sections 494 and 495. Although polygamy was outside the ambit of the provisions of the Code, polyandry among these communities could attract the application of these provisions, except where customary law permitted it. Jews and Parsis too had their custom and usage which did not specifically prohibit polygamy. Similarly, among Muslims polygamy was permitted up to four wives. Hence, they too remained outside the purview of Sections 494 and 495. Although among Muslims too fifth marriage of a Muslim man and Second marriage of a Muslim woman could attract the provisions of the Code if it could be shown that such a marriage was void under the school of Muslim law applicable to a particular case. Hence, only the Indian Christians in British India treated both polygamy and polyandry as void and, thus, they came within the purview of the Sections 494 and 495.

The other communities in India, now in the present circumstances come under the purview of these two provisions. There was process of reforming laws applicable to marriage to invalidate bigamy started in British India within the decade in which IPC had come into force. Parsis were the first ones to prohibit bigamy in 1865.⁷ Then the Christian's enacted two statutes of

7. Parsi Marriage and Divorce Act, 1865, Ss. 4, 5, 9 & 30, replaced by Parsi Marriage and Divorce Act, 1936, Ss. 4, 5, 11 & 32(d).

family law in 1869 and 1872 which declared bigamy to be void.⁸ The first law on civil law was enacted in 1872 which prohibited bigamy and which was made available to those who could give up their religion and personal law.⁹ The Brahmosamjhis too were willingly subjected to an anti-bigamy statute.¹⁰ Later, provincial legislation in Bombay (*Bombay Prevention of Hindu Bigamous Marriage Act, 1946*); Madras [*Madras Hindu (Bigamy Prevention and Divorce) Act, 1949*]; Sourashtra (*Sourashtra Prevention of Hindu Bigamous Marriages Act, 1950*); and Madhya Pradesh (*Madhya Pradesh Prevention of Hindu Bigamy Act, 1955*) wholly prohibited bigamy for Hindus, Buddhists, Sikhs and Jains. After the independence of India Hindu Personal law was codified and finally in 1955 Hindu Marriage Act Prohibited bigamy for all these communities throughout the country. In the State of Jammu and Kashmir too the new law was adopted by local legislation.¹¹ Now Hindus, Buddhists, Sikhs, Jains, Christians and Jews come under the purview of Sections 494 and 495 IPC. Though Muslims can marry up to four wives but marriage with the fifth wife will attract the provisions of Sections 494 and 495. Even the parties to civil marriages attract the application of the said provisions.

JUDICIAL INTERPRETATION OF SECTION'S 494 AND 495: -

In order to attract the provisions of Section 494 following things has to be established: -

- (i) there has been an earlier marriage of the accused;
- (ii) it was a valid marriage under the law applicable; and

8. Indian Divorce Act 1869, Ss. 10, 18 & 19(4); Christian Marriage Act 1872, S. 60(2).

9. Special Marriage Act 1872, Ss. 2(1), 15, 16 & 17, replaced by Special Marriage Act, 1954, Ss. 4(a), 15, 24(i), 43 & 44.

10. Brahma Marriage Act, 1872, Ss. 2(i) & 15.

11. Jammu and Kashmir Hindu Marriage Act, 1955.

- (iii) the same is legally subsisting when the alleged second marriage takes place.

Hence, the most important thing which has to be proved that there has been an earlier marriage of the accused. Where there has been no earlier marriage, the existence of which can be proved to the satisfaction of court, there will be no room for the application of Section 494. The existence of an earlier marriage can be proved with reference to the form of its solemnization and its validity; and both these aspects will be considered under the matrimonial law applicable to the accused. Various personal and customary laws require the performance of necessary ceremonies and rites in order to constitute a valid marriage between the parties. What ceremonies are necessary depends upon the customs of the community to which the parties belong.¹² The Supreme Court in a series of cases emphasized the strict proof of essential ceremonies of marriages in order to prove that the offence of bigamy is committed. In *Bhaurao Shanker Lokhande vs. State of Maharashtra*¹³ the appellant Bhaurao was married to Indubai in 1956 and again married Kamalabai in 1962 during the lifetime of the first wife Indubai. The facts clearly reveal that the accused was intending to marry Kamala and both of them went through some form of marriage. To defeat the charge of bigamy, validity of the second marriage was challenged by the appellant on the ground that the essential ceremonies for a valid marriage were not performed. On the other hand, it was contended for the state that it was not necessary for commission of the offence of bigamy under Section 494 IPC that the second marriage was a valid one and that a person going through any form of marriage during the lifetime of the first wife would commit the offence even if the second marriage be void according to the law applicable to the person. However, the Supreme Court held that for the

12. V. Raveendra Reddy. M. L, *Law relating to Bigamy – Need for Change*, 16 IBR 34 (1989).

13. AIR 1965 SC 1564.

offence of bigamy both the marriages must be valid according to the law applicable to the parties. The fact of their living as husband and wife and its recognition by the society was irrelevant in the eyes of law as held in *Kanwal Ram vs. Himachal Pradesh Administration*.¹⁴ In Himachal Pradesh amongst a community a special form of marriage is in vogue. It is called '*praina*'. In this form the following ceremonies are essential. First some agnatic relation of the bridegroom goes to the bride's home and offers her *suhag*. Then a relation of the bride called *prainu* brings her to the house of the bridegroom there at the door of the bridegroom's house coins are put in a pot and puja and katha are held. The bride then elders the house on picking up the pot and makes obeisance to her father-in-law and mother-in-law and other elders of the family. Lastly, with feasting the ceremonies end. In this case the ceremony of *praina* form of marriage was not proved as a result conviction on a charge of bigamy was set aside. The court in this case also held that the admission of marriage by the accused is no evidence of marriage for the purpose of proving an offence of bigamy or adultery. The decision taken by the Supreme Court in *Kanwal Ram's case* was followed in *Priya Bala vs. Suresh Chandra*.¹⁵ Similarly in *Bolaram Barualti vs. Surjya Barualti*¹⁶ it was held that mere admission of the second marriage by the accused is not enough. The performance of necessary ceremonies is a vital question in bigamy case. On failure to prove that necessary ceremonies were performed, prosecution for bigamy cannot succeed. In *Bhaurao Shankar Lokhande vs. State of Maharashtra*¹⁷ it was held that a marriage is not proved unless the essential ceremonies required for its solemnization are proved to have been performed. Where the evidence of the witness called to prove the marriage showed that the

14. AIR 1966 SC 614.

15. AIR 1971 SC 1153.

16. AIR 1969 A&N 90.

17. AIR 1985 SC 1564.

essential ceremonies had not been performed, the factum of the second marriage held not proved. Another thing which has to be proved is that the second marriage was the sexual relationship between the husband and the other woman. The sexual relationship between the two was considered as a proof of essential ceremonies which is necessary to constitute a valid marriage must be presumed to have been performed as held in *Priya Bala vs. Suresh Chandra*.¹⁸ In the case of *Laxmi Devi vs. Satya Narayan*¹⁹ although the “*saptapadi*” could not be proved but it appeared that both were living as husband and wife. It was held that merely because the appellant was not able to prove the second marriage, that does not mean that the appellant wife should be left in the lurch. In *Dr. N.A. Mukherji vs. State*²⁰ a physician was prosecuted for bigamy. It was alleged that three ceremonies of marriage at three different times were performed; one was of moon ceremony, second ceremony was of exchange of garlands in the Kali temple after walking seven steps, an imitation of *saptapadi*, and the third ceremony was performed before the Guru Granth Sahib, an imitation of that performance of such mock ceremonies of marriage does not constitute valid ceremonies, and therefore the prosecution for bigamy failed. It is proved that no valid ceremony was performed as the parties belonged to two different Hindu communities and the marriage ceremonies performed by them were mere imitation of the ceremonies of their respective communities. It is, thus, essential from the above mentioned case that the first marriage should also be a valid one capable of creating a legal marital relationship.

Basically in order to prove the offence of Section 494 IPC it is essential that the first marriage is performed validly. In *Benodini Howladar vs.*

18. AIR 1971 SC 1153.

19. (1994) 5 SCC 545.

20. AIR 1969 All 489.

*Emperor*²¹ as well as *Gajja Nand vs. Emperor*²² it has been held that want of guardian's consent will not make an earlier marriage invalid – a woman married with the consent of her father, though in his absence, cannot be married again. Thus, where the first marriage is void under the law applicable to the parties the second marriage cannot be bigamous. In *Puninti Venkataramana vs. State of Andhra Pradesh*²³ it was held that marriage performed during minority will be a valid marriage so as to make a fresh marriage bigamous.

In order to attract the provisions of Section 494 IPC another element which is essential is that the second marriage should be void under the personal law governing the parties by reason of its taking place during the life time of the first spouse. Another thing which has to be observed is that the alleged second marriage can be proved only reference to a proper solemnization of the marriage i.e. the second marriage should also be properly solemnized with due rites and personal law or the customary law applicable to the parties; otherwise it would remain out of the ambit of Section 494. In a large number of cases courts insist upon strict proof of the second marriage and, thus, it gives rise to some complicated problems about proving the second marriage. Among Hindus marriage is a sacrament which must take place through *shastric* or customary ceremonies.²⁴ The High Courts in number of cases have followed the suit that in the absence of strict proof of marital rites having been properly performed, an alleged second marriage cannot be recognized as marriage under Section 494 IPC. However, the Calcutta High Court in *Binapani Debi vs. Ajit Banerjee*²⁵ has apparently been inclined to recognize the existence of a second marriage even on the basis of its established reputation. The view taken by the Calcutta High Court

21. AIR 1927 Cal 48.

22. AIR 1922 Lah 19.

23. AIR 1977 AP 43.

24. Section 7, *the Hindu Marriage Act, 1955*.

25. 1983 Cr. L. J. 1440.

seems to be more reasonable as among Hindu's there are many communities and the nature and divergence of marital rites among them makes the judge made law requiring meticulous compliance with them as a pre-condition to prosecution for bigamy rather unreasonable. Another reason is that generally second marriages are performed secretly. Hence, direct evidence of performance of essential ceremonies cannot be expected in such cases. In such situations wherein the Court insists on strict proof in those cases, it is impossible for the prosecution to establish the offence of bigamy. When second marriages are being performed in secrecy knowing full well that it is an offence and the Courts too insist on strict proof, it amounts to encouraging perjury. It is submitted that law should punish not only the act of undergoing a full second marriage in relation to bigamy but also the act of undergoing any form of marriage ceremony though not complete one, but part of marriage ritual. In order to root out polygamy, we must amend the provisions relating to bigamy in such a way that the act of undergoing any form of marriage ceremony by a person during the life time of his/her spouse shall come within the definition of the offence of bigamy.²⁶

Bigamy requires *mens rea* as an essential ingredient for constituting the offence of bigamy like any other offence even though it does not specifically speak of intent of knowledge, fraud or deceit. This has been specifically classified by the courts in a number of cases. Thus, where a married person marries again in good faith and without any criminal intent, the provision of Section 494 shall not apply. Along with *mens rea* there must also be *actus reus*. A mere wrong belief that there is a first marriage is not sufficient. There must be proof on the part of the complainant that the accused had gone through a form of legal marriage observing all the requisite formalities. When this is established and

26. V. Raveendra Reddy M.L, *Law relating to Bigamy – Need for change*, 16 IBR 34 (1989) P. 35.

the other spouse is proved to be living, proof of existence of the marriage is only a formality and the evidence of the complainant to that effect may be sufficient. Hence, it is essential that at the time of the second marriage the accused was already a married man or woman and the previous marriage must be legal and existing. For the existence of marriage, it is essential that both husband and wife should be living. Death of one will automatically put an end to the marriage. However, in case of *Santosh Kumari vs. Surjit Singh* ²⁷ the court permitted husband to marry again on the application of the first wife. This raised a vital question that whether such decree permitting the second marriage of the husband is valid? In this case both the parties were Hindu and were married according to Hindu rites. There was no allegation that any divorce had taken place between the parties or their marriage had been declared void by any competent court of law. The wife filed a suit for declaration that the husband be allowed to marry another woman during her life time on the ground of non fulfillment of his sexual desire from his weak and ailing wife. On such application a decree was passed permitting the husband to contract second marriage. It was held that such a decree was absolutely wrong and illegal and against the provisions of the Hindu Marriage Act and the Indian Penal Code.

CONVERSION AND BIGAMY: -

India is a secular country wherein people of various religions reside together. The Constitution of India under Part III provides all its citizens right to freedom of religion.²⁸ The people as per these provisions have freedom to practice and profess any religion which they desire. All these religions have various personal rules in respect of marriage and its essential characteristics. In some religion marrying more than one spouse is permissible on the other hand it is

27. AIR 1990 HP 77.

28. See Article 25-Article 28, *the Constitution of India*.

an offence in other religion. These differences in the marriage system pose a major problem. Although Conversion from one religion to another is permissible. Hence, the future of the first spouse becomes questionable, along with the validity of such marriage which was performed after the conversion. The real problem lies in those cases when a married male belonging to a monogamous religion becomes convert to polygamous religion and remarries without divorcing his first wife. The questions under such circumstances are whether such marriage is valid? Whether such person is guilty of the offence of bigamy?

In *Skinner vs. Orde*²⁹ a Christian widow used to live and cohabit with a Christian male who had already a wife living. To legalise their cohabitation they converted to Islam. Then they got married in accordance with Mohammedan Law. The Allahabad High Court expressed doubts of the legality of this marriage which their Lordships of the Privy Council thought that they were well warranted in entertaining.

In *John Jiban Chandra vs. Abhinash*³⁰ in a suit for succession to property, it was held by the Calcutta High Court that if an Indian Christian domiciled in India marries an Indian Christian woman domiciled in India and subsequently converts to Islam, his second marriage with a Muslim woman under Muslim law is legal.

Again the question of bigamy arose before the Madras High Court in the case of *Marthamma vs. Muniswamy*.³¹ In this case a Hindu man embraced Christianity and married a Christian woman according to the rites of Roman Catholic Church. Later, he converted to Hinduism and married a Hindu lady. A case of bigamy was filed under Sections 494 and 495 IPC against him. The Madras High Court acquitted him holding that he was not guilty of the

29. 14 MIA 309.

30. AIR 1939 Cal 417.

31. AIR 1951 Mad 888.

offence of bigamy. It was so held on the ground that then under the Hindu law polygamy was allowed. A landmark judgment was delivered by the Apex Court in *Sarla Mudgal, President Kalyani and others vs. Union of India and others*.³² Herein the Court held that a husband already married under the Hindu law committed bigamy punishable under Section 494 IPC on his entering a second matrimonial alliance after converting himself to Islam. Besides this the second marriage taking place under Muslim law is the violation of the Hindu Marriage Act, 1955 which provides for strictly monogamous marriages, the second marriage was also in violation of principles of natural justice, equity and good conscience since both the parties i.e. the husband and the first wife were not Muslims. Again in *Manikyamma vs. Sudarshan Rao*³³ Manikyamma the appellant married A-1, the respondent according to Hindu rites. Later A-1 married A-2 according to Hindu rites. On coming to know that the first wife may take action, A-1 and A-2 converted to Islam and again married according to Muslim rites. A-1 and A-2 were prosecuted for the offence of bigamy. It was held by the Andhra Pradesh High Court that the marriage between A-1 and A-2, though performed according to Hindu rites, could not be established as the performance of essential ceremony of *saptapadi* is not proved. In this case the parties belonged to Kamma community and therefore *saptapadi* is a must. The court further held that the marriage between A-1 and A-2 as per the Muslim rites is not valid. The Court found that conversion of A-1 and A-2 into Islamic religion is of a doubtful one. There is no evidence about conversion except the admissions made by the accused. They are observing Hindu formalities and they are not observing Muslim faith. They are called by their Hindu names in the villages. The marriage though performed according to Muslim rites, cannot be treated as a valid marriage as the evidence reveals that

32. 1995 SCC (Cri) 569.

33. 1988 (2) ALT 614.

they have no faith and they are not following Mohammadanism prior to or subsequent to the marriage. The marriage between two Hindus according to Muslim rites, therefore is not valid. It was held that as the marriage between A-1 and A-2 either under Hindu law or Muslim law is not valid. Hence, Section 494 is not attracted. From the above case law it can be assumed that the accused cannot be held to be guilty of the offence of bigamy if the conversion is a bonafide one. A person is held to be guilty of bigamy only when the second marriage becomes void as per the personal law of the parties by reason of taking place during the lifetime of the other spouse. As the convert's second marriage under Muslim law is not void, he cannot be convicted of the offence. In *Baby vs. Jayanti*³⁴ the question of solemnization of marriage between two persons who previously belonged to scheduled castes in Maharashtra and later converted to Buddhism came up for consideration. According to the sect the following constitutes the essential ceremony of marriages. The bride and bridegroom after taking their bath and wearing new clothes are brought to the marriage hall. In the marriage hall the photographs of Lord Buddha and Dr. B.R. Ambedkar are placed in a chair and those photographs are worshipped and garlanded by them. Thereafter, both the bride and bridegroom stand with folded hands before these two photographs respectfully bowing to those photographs recite the mantras "*Budham Saranam Gachhami; Dharmam Saranam Gachhami; Sangham Saranam Gachhami.*" Thereafter, sacred ceremonial mantras i.e. "*magalasthake*" are recited. The bride and bridegroom garland each other happily, that they shall conduct their family relations with happiness. After this oath is taken the people present shower flowers followed by distribution of betel-leaves and betel-nuts to guests. In the said case ceremonies in respect of second bigamous marriage were proved and the conviction followed.

34. AIR 1981 Bom 283.

However, motivated conversions create certain problems as the motive for conversion is immaterial for the question of validity of conversion. In such motivated conversion especially in case of bigamy a person by 'sham conversion' from monogamous religion to polygamous religion takes second wife besides the first one without exposing to penalty and thereby the object of monogamous marriage law is defeated. This very act amounts to committing fraud upon the law.

2. CHEATING AND FRAUD IN MARRIAGE: -

Women face another form of atrocities in the hands of men which are generally termed as mock marriages. Under the Indian Penal Code there are two provisions relating to mock marriages which are in fact invalid marriages and they are as follows: -

- (a) Cohabitation caused by a man deceitfully inducing a belief of lawful marriage. This is also generally known as cheating in marriage.
- (b) Marriage ceremony fraudulently gone through without lawful marriage. This is known as fraud in marriage.

CHEATING IN MARRIAGE: -

The Indian Penal Code under Section 493 provides provision with regards to cohabitation caused by a man deceitfully inducing belief of lawful marriage. This is known as cheating in marriage. It provides that wherein a man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him and to cohabit or have sexual intercourse with him in that belief, shall be

punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.³⁵

In order to attract this provision the following essential ingredients in an offence must be present: -

- (i) causation of a false belief in the existence of lawful marriage by a person;
- (ii) cohabitation or sexual intercourse with the person causing such belief.

From the above points it is clear that the Section does not penalize mere cohabitation or sexual intercourse with a woman who is not lawfully married to him. It only punishes a man for obtaining the body of a woman by a deceitful assurance that he is her husband. This Section, thus, punishes the offence committed when a man either married or unmarried induces a woman to become his wife, but in reality his concubine.

In India we have various religions as a result of which there are various forms of the marriage ceremonies depending on the race or religion to which the person entering into the marriage belongs. When these races are mixed or when religions can be changed or dissembled in India, the offence prescribed under Section 493 IPC is more easily committed by a person by falsely causing a woman to believe that he is of the same race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which according to the law under which she lives is valid. For example where a person is half English and half Asiatic by blood but calls himself a Mohammedan or Hindu and by deception causes a Mohammedan or a Hindu woman to go through the ceremony of marriage in a form which she deems valid and to cohabit with him, he has committed this offence.

35. Section 493, *Indian Penal Code*.

The essence of the section is the deception caused by a man on a woman in consequences of which she is led to believe that she is lawfully married to him, while in fact they are not lawfully married. In order to establish deception there must first be allegation that the accused falsely induced her to believe that she was legally married to him. In a case where both the man and woman fully know that they are not husband and wife and no ceremony of marriage takes place between them, there is no question of one of them believing otherwise.³⁶

In *Moideen Kutty Haji vs. Kunhikoya*³⁷ where the allegation was that though they were not husband and wife, they had a sexual union during late hours in the night for a pretty long time and there was only a promise to marry in future, and the further allegation was that one day they went for registering the marriage but the man ran away from there and even thereafter she was submitting herself to him regularly for liaison, the facts could not at all attract Section 493, IPC.

It can be said that Section 493 IPC only punishes a man for obtaining the body of a woman by a deceitful assurance that he is her husband. In order to prove deception by such person it must be established that accused had dishonestly or fraudulently concealed certain facts or made false statement knowing it to be false. In *State of Gujarat vs. Batuk Hiralal Mehta*³⁸ it was alleged that the accused aged 58 years induced N aged then 24 years by performing a form of marriage to believe herself to be lawfully married to the accused and then she surrendered her virtue to him. The case had some peculiar features such as the age difference between the accused and N. The accused had

36. K.D. Gaur, *A Text book on the Indian Penal Code*, Universal Law Publishing Company, 2006, 721.

37. AIR 1987 Ker 184.

38. 1974 Guj LR 391.

given N some financial help. She was also promised by the accused that he would maintain her throughout her life. It was in this situation that the relationship between the two was developed into a sort of relationship of a married man living with married woman who was at that time not divorced according to law or whose divorce was doubtful. The facts of the case portray the character of the accused as a man given to sex indiscriminately and wantonly. He stands condemned morally. However, his conduct and character cannot be taken into sole consideration in reaching a conclusion that the accused had deceitfully induced the complainant woman to believe that legal marriage was performed and that on such a belief, the woman was induced to cohabit with him. Hence, it was held that the prosecution failed to make out the relevant ingredients of inducement as a result of this the accused is acquitted.

Similarly in *Raghunath Padhy vs. State of Orissa*³⁹ the petitioner, a married Brahmin boy aged 22 years, entered into some sort of a marriage ceremony with a Brahmin widow residing near his house. The two lived as husband and wife and she became pregnant by him, but later he become tired of her, deserted her, and went back to his first wife. The Orissa High Court held that Section 493, IPC is not attracted because from the mere fact that he made a breach of promise as regards registration of marriage, it cannot be inferred that from the very beginning he had no intention of marrying her at all and he just wanted to practice fraud on her by undergoing some sort of fake marriage ceremony, knowing fully well that such a ceremony would not constitute valid marriage. His subsequent act of desertion of a pregnant woman, however censurable would not suffice to make him criminally liable. However, the decision of the Orissa High Court is criticized on the ground that the accused was already married as a result of which he is debarred from marrying again during the life time of his wife.

39. AIR 1957 Ori 198.

Hence, it is obvious that the accused deceitfully induced the widow of entering into some sort of marriage ceremony, which he cannot legally perform unless he divorces his first wife.

In *Sammun vs. State*⁴⁰ it was held by the Madhya Pradesh High Court that wherein a man promises a woman that he would marry her and presented her as his wife before others does not come within the purview of this Section. Similarly, the Orissa High Court in *Amrita Gadia vs. Trilochan Pradhan*⁴¹ held that where there was no proof that the accused had falsely induced a woman to believe that she was married to him by mere exchange of garlands, and the accused and the woman cohabited, and when she became pregnant the accused promised to marry her shows that he was conscious that no proper marriage between the two had taken place, so there was no deception on his part.

The offence mentioned under Section 493 is purely of personal nature; hence the prosecution could be initiated only by the aggrieved party on a complaint made to the Magistrate of the first class. Section 198 of the Code of Criminal Procedure also states that no court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by the person aggrieved by the offence, and there are certain provisos to it. In *Ashwin Nanubhai vs. State*⁴² it was held that where a case against a man was started on a complaint made by the woman victim, but during the pendency of the case the woman died, under such circumstances on the death of the complainant her mother can be substituted as a party and the case would proceed as per law. The offence mentioned under Section 493 IPC is punishable

40. 1988 Cr. L. J. 498 (MP).

41. 1993 Cr. L. J. 1022 (Ori).

42. AIR 1967 SC 983.

up to ten years of imprisonment with fine. The offence under this Section is non-bailable, non-cognizable,⁴³ and non-compoundable.⁴⁴

FRAUD IN MARRIAGE: -

The Indian Penal Code under Section 496 provides the provision with regards to marriage ceremony fraudulently gone through without any lawful marriage. Such an offence is also termed as fraud in marriage. It states that whoever, dishonestly or fraudulently goes through the ceremony of being married, knowing he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.⁴⁵ This Section thus seeks to punish fraudulent or mock marriages. It applies to those situations where a fake ceremony is gone through pretending it to be a valid marriage. Such a marriage would not constitute a valid marriage –

- (a) in which one of the parties is deceived by the other into the belief that it does constitute a marriage, or
- (b) in which effect is sought to be given by the proceeding to some collateral fraudulent purpose.

For example: I **A** in order to attain **B**'s property enters into a fake ceremony to give a pretext of marriage, which he never intended and meant to perform. **A** is liable under this Section. With regards to the question of bigamy under Section 494, Indian Penal Code such an act will not be covered under Section 494 as no valid marriage is intended. Hence, in order to attract an offence under Section 496 Indian Penal Code following ingredients must be present: -

- (i) the accused must have gone through the ceremony of being married;

43. Criminal Procedure Code, 1973, Schedule I.

44. *Ibid* Section 320.

45. Section 496, IPC.

- (ii) the performance of such ceremony should not constitute a lawful marriage;
- (iii) the accused must have known that his going through such ceremony did not amount to his lawful marriage;
- (iv) the accused must have acted dishonestly or with intent to defraud.

Therefore, in order to constitute an offence under this Section the prosecution must prove that the accused knew that there was no valid marriage and he had gone through a show of marriage with a fraudulent or ulterior motive. Whether the victim and the accused have cohabited or not is not essential. In *Re Vallai Mudali* ⁴⁶ while returning home with head-load of fuel the girl was seized by the accused who tied a "tali" around her neck and the act was committed to spite the girl and her parents, it was held that the act of the accused in tying the 'tali' did not in the circumstances amount to going through the ceremony of being married knowing that she was not thereby lawfully married within the meaning of Section 496 IPC as the accused must be presumed to have knowingly that according to the custom of the community that act did not constitute a ceremony of being married.

Wherein the marriage ceremony is rendered to be a valid marriage in the eye of law Section 496 IPC is not attracted. In *Khitish Chandra vs. Emperor* ⁴⁷ an accused who belonged to the 'Barna' sub-caste of 'Brahmins' representing himself to be a 'Barendra Brahmin' went through the ceremony of marriage with the daughter of the complainant who was a 'Barendra Brahmin' and who would not have given her daughter in marriage to the accused for the misrepresentation and on account of the marriage, the complainant was excommunicated and thus suffered harm to her mind and reputation. It was held

46. AIR 1947 Mad 193.

47. AIR 1937 Cal 214.

that the marriage not being invalid the accused could not be convicted under Section 496 IPC but was liable to conviction under Section 419 IPC.

In *Ashwin Nanabhai vs. State of Maharashtra*⁴⁸ a front door neighbour of a Maharashtrian Brahmin lady fell in love with K, a minor daughter of the Brahmin lady. The appellant K both in 1955 consulted a lawyer in connection with their proposed marriage, the appellant then being aged 19/20 years and K being 14/15. The lawyer suggested in view of the minority of the parties the consent of their guardians should be obtained before the marriage. K had been suffering from enlargement of heart and was advised to give up her studies. The mother of K having been informed about the infatuation between K and the appellant eventually agreed to their marriage despite initial reluctance. On 20th October 1960 the marriage was agreed to be registered before the Marriage Registrar. According to the wish of the appellant no publicity was given to the marriage and even the other members of the two families were not invited. On the 24th at about 4 p.m. the appellant, his close friend J and another gentleman represented to be the Marriage Registration Officer. Thereafter he declared that the appellant and K to be husband and wife though this marriage was performed in secrecy, the couple started living openly as husband and wife from that very night. Later the appellant married another girl P by name and enquiries in the office of the Registrar of marriage revealed that the marriage between K and the appellant had not been registered at all. On these facts the Supreme Court held that appellant guilty under Section 496 IPC. However, in *Kailash Singh Parihar vs. Pirti Parihar*⁴⁹ the accused entered into a second marriage during the pendency of a special appeal against a decree of divorce in violation of Section 15 of the Hindu Marriage Act, 1955. It was held that since the pendency of the appeal was not kept

48. AIR 1970 SC 1998.

49. 1982 Cr. L. J. 1005 (Raj).

secret from the girl or her parents, the act of the accused cannot be said to be dishonest or fraudulent and hence Section 496 IPC is not attracted.

The main essence of Section 496 IPC is that there should be a dishonest or fraudulent abuse of marriage ceremony and for this complaint by the person aggrieved is necessary as held in *Prasanna Kumar vs. Dhanalaxmi*.⁵⁰ In this case it was held that wherein the matter relates to the marriage of H with W2 complaint by W1 is not tenable because by the alleged mock marriage W1 is not being deceived.

The offence under this Section is non-cognizable, non compoundable and can be tried by the Magistrate of first class.

DIFFERENCE BETWEEN SECTION 493 AND SECTION 496 OF THE INDIAN PENAL CODE: -

Sections 493 and 496 IPC are some what alike and both of them deal with mock or fraudulent marriages. However, both the Sections have some basic differences. Section 493 IPC makes it an offence wherein a man deceitfully makes a woman believe that the accused is her lawfully wedded husband and induces her to live with him as husband and wife. Whereas under Section 496 IPC the offence is committed wherein a person dishonestly or with a fraudulent intention goes through a marriage ceremony knowing that his is thereby not lawfully married. Hence under Section 493 IPC performance of marriage ceremony is not essential as it relates to the offence wherein a woman is deceived by a man who make her believe that he is her husband, in fact he is not married to her, and induces her to cohabit and have sexual intercourse with her. On the other hand, under Section 496 IPC a fake ceremony is performed in order to deceive the

50. 1989 Cr. L. J. 1829 (Mad).

victim and the accused is fully aware of this fake ceremony and the validity of their marriage.

Section 493 IPC affects only man. It means that under Section 493 IPC law punishes only a man. Whereas Section 496 IPC affects a person of either sex i.e. both a man and a woman may be held guilty under Section 496 IPC.

Under Section 493 IPC deception is one of the most essential conditions followed by cohabitation or sexual intercourse to hold a person liable for the offence. While under Section 496 IPC no form to symbolize marriage is required. A mere verbal deception that the woman is married is sufficient. In other words, in order to prove the offence under Section 496 IPC deception, cohabitation or sexual intercourse is not a *sine qua non*, but a dishonest or fraudulent abuse of the marriage ceremony is sufficient.

Besides these differences between the two sections of the Indian Penal Code it is essential that in both the cases, a form of marriage which is not valid must have been gone through with a fraudulent intention. If all the forms of a valid marriage have been gone through, even with unwilling bride or bridegroom the marriage cannot be said to be invalid, nor can a subsequent disclaimer of a marriage validly performed makes it invalid. In *K.A.N. Subramanyam vs. Ramalkshmi*⁵¹ it was held that it is necessary for an offence under Sections 493 and 496 IPC to establish that the deceit and the fraudulent intention contemplated by the provision should have been there at the time of marriage.

3. SATI OR SELF-IMMOLATION: -

In the Indian society there exists a peculiar system which is discriminatory to women. This system is the traditional practice of Sati which is

51. 1971 Mad L. J. (Cr 604).

practiced in the Indian society since ancient period. Sati is described as the traditional Hindu practice wherein a widow immolates herself on her husband's funeral pyre. As per this system the widow is burnt to ashes on her dead husband's pyre. Sati was prevalent among certain sects of the society in ancient India who either took the vow or deemed it a great honor to die on the funeral pyre of her husband. In the ancient Hindu society a widow who practiced Sati by burning herself on her husband's funeral pyre was considered to be a virtuous woman and was believed to directly go to heaven, redeeming all the forefathers rotting in hell, by this "meritorious" act. Basically the custom of Sati was believed to be a voluntary Hindu custom in which the woman voluntarily decides to end her life with her husband after his death. The main purpose of dying in his funeral pyre is that even after her husband's death she can be united him forever. This may be the main reason for such a custom as under the Hindu practices there was no place for divorce or remarriage because marriage under the Hindu personal law (i.e. before the enactment of the Hindu Code) was considered to be a sacramental union by which both the husband and wife are united not only in this life but for seven births to come. Hence, there being no room for divorce or remarriage, this practice was followed by the women in the Hindu society. However, the practice of Sati which was a voluntary one distorted into a criminal practice of forcing women to their deaths to make them chaste.

ORIGIN OF SATI: -

Sati or self-immolation is described as a Hindu custom in India. However, Sati pratha is nowhere mentioned in the Hindu scriptures as an essential custom to be practiced by a widow which it was made out to be. In fact the first woman known as Sati in the Hindu religions literature did not commit suicide on her husband's pyre. She was the consort of Lord Shiva who burnt

herself in fire as protest against her father who did not give her consort Lord Shiva the respect which she thought he deserved. While burning herself she prayed to be reborn again as the new consort of Shiva, which she became and her name in the new incarnation was Parvati.⁵² Another famous woman in Hindu literature who is titled as Sati was Savitri. When Savitri's husband Satyawati died, the Lord of death, Yama arrived to take his soul. Savitri begged Yama to restore Satyawati and take her life instead, which he could not do. So Savitri followed Lord Yama a long way. After a long way in which Yama noticed that Savitri was losing strength but was still following him and her dead husband. He offered Savitri a boon, anything other than her husband's life. Savitri asked to have children from Satyawati. In order to give Savitri her boon, Lord Yama had no choice but to restore Satyawati to life and so Savitri gained her husband back.⁵³ These two women along with other women in Hindu mythology were exceptionally devoted to their husband which symbolized the truthful Indian wife who would do everything for their husband, hence, they were named Sati. These virtuous women did not commit suicide on their dead husband's pyre. Therefore it can be said that the custom of burning of widow alive on her dead husband's pyre probably did not evolve from religious background but from social background. However, there is one such incident which is mentioned in Hindu mythology wherein Sati, the wife of Daksha was so overcome at the demise of her husband that she immolated herself on his funeral pyre and burnt herself to ashes. Since then her name 'Sati' has come to be symptomatic of self-immolation by a widow.⁵⁴

Whatever may be the cause of adopting this system by the society, Sati in today's world is considered to be an illegal practice and is punishable by law. There are many theories with regards to the origin of Sati.

52. <http://adaniel/tripod.com/sati.htm> [Visited on 21st September 2008].

53. *Ibid.*

54. <http://www.vivaaha.org/sati.htm> [Visited on 15th November 2008].

Scholars differ on the origin of Sati practice. Some have dated it back to the period of the *Vedas* (approximately 5500 years old). It is often claimed that *Rig Veda* sanctions or prescribes Sati. It consists of verses to be used at funerals. Whether they even describe Sati or something else entirely is disputed. The hymn is about the funeral by burial and not by cremation. Even *Atharva Veda* offer advice to the widow on mourning and her life after widowhood, including her remarriage. However, the *Manusmriti* which is often regarded as the culmination of classical Hindu law, and hence its position is important. It does not mention or sanction 'sati' though it does prescribe life-long asceticism for most widows.⁵⁵ The *Puranas* have examples of women who commit sati and there are suggestions in them that this was considered desirable or praiseworthy. In the *Ramayana* Tara in her grief at the death of husband Vali wished to commit Sati. Hanuman, Rama and the dying Vali dissuade her and she finally does not immolate herself. In the *Mahabharata*, Madri the second wife of Pandu, immolates herself she holds herself responsible for the death of her husband who had been cursed with death if he ever had intercourse. He died while performing the forbidden act with Madri, who blamed herself for not having rejected his advance, although she was well aware of the curse.⁵⁶

Another theory which is prevalent states that Sati was introduced to prevent wives from poisoning their wealthy husbands and marry their real lover. One theory prescribes that Sati began with a jealous queen who heard that dead kings were welcomed in heaven by hundred's of beautiful women called Apsaras. Hence, when her husband died she demanded to be burnt on her dead husband's pyre so as to arrive with him to heaven and to prevent the Apsaras from consorting her husband.

55. <http://en.wikipedia.org/wiki/suttee> [Visited on 21st September 2008].

56. *Ibid.*

Although Sati is considered an Indian custom or a Hindu custom it was not practiced all over India by all Hindus but only among certain communities of India. Immolation was more prevalent among the priestly and martial castes. Brahmins and Kshatriyas were the castes wherein a bride was looked upon as a burden as she represented a drain on the family's income while contributing nothing towards it. Hence, when her status as a bride was such, her miseries double when she becomes a widow. Her presence in the family was dreaded and she was considered to be an object of ill omen. Besides after the death of her husband she was considered a dead weight to her in-laws family. A widow was an unwanted burden. She is considered inauspicious as a result of this a widow is prevented from participating in the house-hold work, her voice, her appearance was considered unholy, impure and something that was to be shunned and abhorred. Thus, without her husband a woman's existence was not tolerated. She was tortured and ill-treated by the relatives of her husband. As a result of this an extreme outcome was adopted by the society i.e. immolation of the widow, which the women generally accepted happily.

Another auxiliary reason which made self-immolation a prevalent practice is the impossibility of widow re-marriage. Widow re-marriage is nowhere encouraged in ancient scriptures and was always looked down by the society. It arises from the taboos and prejudices that sanctified virginity of a bride as an important reason. There was also a belief that a widow, especially a young one would fall into immoral practice for sensual pleasure. Hence, the practice of Sati was adopted by the society. However, the *Vedic* practice was for a widow to marry her dead husband's younger brother. During the sutra period she was allowed to marry any near kinsman, in the earliest *Dharmasutra* (Gautama) without enjoining any restriction and in the later (Bandhayana and Vasishtha) enjoining ascetic practices for a short period only. Later on, however this

asceticism alone remained and became life long. But there is no mention of widow burning. Later on we find *Anumarana* is prescribed for a widow as an alternative to life long asceticism. Another reason is that wife were made to believe to adopt this practice or to undergo this practice on the account that if they do so the wife is believed to raise her dead husband even from hell and make him a participant of her heavenly bliss.

Observing the Caste system in ancient India wherein the society was divided into four castes, viz. Brahmin, Kshatriya, Vaishyas and Shudras. The Brahmins were the superior castes. The practice of Sati existed among the higher castes i.e. among Brahmins and Kshatriyas. As the caste system grew more rigid, the Sati became more strict.⁵⁷ The practice of Sati existed among the higher castes mainly because it was given an honorable and prestigious outlook among the masses which is adopted by the higher Castes. Hence, we can say that the practice of Sati must have started for maintained or preserving one's Caste.

Sati practice is considered to be originated in India. However, sacrificing the widow in her dead husband's funeral or pyre was not unique only to India. In many ancient communities it was an acceptable feature. This custom was prevalent among Egyptians, Greek, Goths, Scythians and others. Among these communities it was a custom to bury the dead king with his mistresses or wives, servants and other things so that they could continue to serve him in the next world. Due to this fact another theory which is doing the rounds is that Sati was probably brought to India by the Scythians invaders of India. When these Scythians arrived in India they adopted the Indian system of funeral, which was cremating the dead. And so instead of burying their Kings and his servers they

57. K. Jamanadas, *Sati was started for Preserving Caste*, http://www.ambedkar.org/research/Sati_Was_Started_For_Preserving_Caste.htm [Visited on 4th April 2008].

started cremating their dead with his serving lovers. The Scythians were warrior tribes and they were given a status of warrior castes in Hindu religious hierarchy. Many of the Rajput clans are believed to originate from Scythians. Later on other castes who claimed warrior status or higher also adopted this custom.⁵⁸

Whatever might have been the reasons for adopting this practice by the society, Sati was said to be a voluntary act which is evident from many of the incidents of self immolation which have occurred since ancient period. Sati often emphasized the marriage between the widow and her deceased husband as rather than the mourning clothes; the to-be sati was often dressed in marriage robes and other finery. She is often seated or lying down on the funeral pyre beside her dead husband. In ancient scriptures there are many accounts which has described woman walking or jumping into the flames after the fire had been lit, and some describe women seating themselves on the funeral pyre and then lighting it themselves. However, this voluntary act by the widow's because a barbaric act of the society wherein women were physically forced to their deaths. There are various pictorial and narrative accounts which often describe the widow being seated on the unlit pyre, and then tied or otherwise restrained to keep her from fleeing after the fire was lit. Some accounts state that the woman was drugged. One account describes men using long poles to prevent a woman from fleeing the flames.⁵⁹

Sati was a practice, generally which wife used to follow, on death of their husband; however, there are some incidents which mention mothers practicing it on the death of their son. Maharani Raj Rajeshwari Devi of Nepal became regent in 1799 in the name of her son, after the abdication of her husband who became a sanyasi. Her husband returned and took power again in 1804. In

58. <http://www.sos-sexism.org/English/sati.htm> [Visited on 21st September 2008].

59. <http://en.wikipedia.org/wiki/suttee> [Visited on 21st September 2008].

1806 he was assassinated by his brother and ten days later on 5th May 1806, his widow was forced to commit suicide. In even more rare cases it has been noted that husbands too committed Sati on their wives pyres.

There exist different communities in India and Sati was performed for different reasons as well as in different manners. The communities where the man married one wife, on his death the wife put an end to her life on the pyre. But even in such communities not all widows committed Sati. The women who committed Sati were highly honored and their families were given lot of respect. Hence, it can be said that Sati was seen as halo of honour.

SATI AND JAUHAR: -

The practice of Jauhar is often confused with Sati and they are considered to be same as both these practices have been practiced in the society living in the territory of modern Rajasthan. However, Jauhar and Sati has some basic differences which differentiate both the practices from each other.

'*Jauhar*' is related with '*saka*' wherein both the men and women of the Rajput caste opt for voluntary death in order to avoid capture and dishonour at the hands of their enemies. *Jauhar*⁶⁰ was originally the voluntary death on a funeral pyre of the queens and royal women folks of defeated Rajput castes. It consists of mass suicide carried out in medieval times by Rajput women. Mass self-immolation by women was called *Jauhar*. This was usually done before or at the same time their husbands, brothers, fathers and sons rode out in a charge to meet their attackers and certain deaths, the upset caused by the knowledge that their women and younger children were dead, no doubt filled them with rage in this fight to the death called *saka*.⁶¹ Hence, *Jauhar* in the Rajput caste was followed by *saka*. *Jauhar* and *saka* was practiced by the Rajput castes since the

60. Also spelled jowhar.

61. <http://en.wikipedia.org/wiki/Jauhar> [Visited on 15th November 2008].

Mughal times. During that period North India was under foreign subjugation. The most powerful kingdom set up by the invaders was the Sultanate of Delhi. In order to escape the ordeals received from the invaders which consist of dishonour, rape of women-folk, slavery, conversion of religion, forced marriage etc *Jauhar* was practiced by the Hindu Kshatriya castes. Rajputs who formed the mobility and ruling classes and castes of Rajasthan and northern India.

There are many instances of *Jauhar* (and *saka*), however there are not well recorded. King Vijaipal's wife may have committed *Jauhar* at the fort of Bayana but this is based on ambiguous information from the "Timan Garh." It is now in Karauli district of Rajasthan. The women-folk of the family of Silhadi the military power-broker may have committed *Jauhar*.⁶² There are number of historical instances of *Jauhar* especially during the Khilji and Tughlag times. However, the best known cases for *Jauhar* are the three occurrences at the fort of Chittor which are as follows: -

- (a) **First *Jauhar* of Chittor:** - Ala-ud-din- Khilji, the Sultan of Delhi besieged Chittor fort, which was under the control of Rana Rawal Ratan Singh who was allowed one final glimpse of his wife Rani Padmini in a mirror before he was at the gates and held hostage for Padmini. Padmini sent misleading information that she would join Ala-ud-din, but she was to come with 700 women as befitted her status. As a result of this the Rajputs were able to infiltrate about 2000 men into Ala-ud-din's camp. The Rajputs thus, whisked Ratan Singh out from under the Khilji's nose. Ala-ud-din returned to Delhi to come back better equipped early the next year. The Rajput defense failed as a result of this second attack and the men perished on the battlefield while their womenfolk led by Maharani Padmini, performed *Jauhar*. The saga of Rani Padmini and the *Jauhar* she led are legendary.

62. *Ibid.*

(b) **Second Jauhar of Chittor:** - In 1528 AD after the Battle of Khanna, Rana Sanga dies. Soon after his death Mewar and Chittor came under the regency of his widow Rani Karmavati. The kingdom was menaced by Bahadur Shah of Gujarat, who besieged Chittorgarh. Without relief from other forces and facing defeat Rani Karmavati along with other women committed *Jauhar* on March 8, 1535, while the Rajput army fought the Muslim army and were perished in the said battle.⁶³ However, there is one romantic legend of dubious veracity that Karmavati had asked assistance of Humayun by sending him a Rakhi with a request for his help as a brother. The help arrived too late which resulted in the second *Jauhar* performed at Chittor.

(c) **Third Jauhar of Chittor:** - In September 1567, Akbar then Emperor besieged the fort of Chittor. Rana Udai Singh II, his sons and the royal women using secret routes escaped soon after the siege began. The fort was left under Jaimal Rathore and Patta Sisodiya's command. One morning Akbar found Jaimal inspecting repairs to the fort which had been damaged by explosives and shot him. The bullet hit Jaimal in the leg and wounded him seriously. On the same day the Rajputs realizing that defeat was certain, the Rajput women committed *Jauhar* in the night of February 22, 1568 AD and the next morning, the Rajput men committed *saka*.⁶⁴

From the above incidents it can be said that *Jauhar* along with *saka* which was similar to some extent to Sati system was practiced by the Hindu kshatriya community due to the alien invasions in India during the Medieval period to protect themselves from dishonour, slavery, forced marriages, rape of women, change of religion and other atrocities by the invaders. From the

63. *Ibid.*

64. *Ibid.*

13th Century onwards up to the coming of the British the position of women was insecure due to the arbitrary power structure associated with the feudal society and the rule of the Sultans of Delhi.⁶⁵

Although *Jauhar* and Sati may seem to be the same practice as both of them are the voluntary act by the women wherein they burn themselves alive in the funeral pyre. However, there are some differences between them. *Jauhar* is the mass self-immolation by the women in the funeral pyre, on the other hand, Sati is self-immolation by a single woman in the funeral pyre of her husband. *Jauhar* is committed to avoid capture and dishonour of royal women, whereas Sati is committed in order to rescue one's husband from the hell and to be his companion even on his death. *Jauhar* is always related with *saka* wherein the men go to the battlefield to fight the enemies. *Jauhar* is performed before the *saka* i.e. women burn themselves alive in funeral pyre before the death of their men. On the other hand, Sati is performed after the husband dies. *Jauhar* and *saka* were committed by both the partners and only at times of war, while Sati is performed by widowed women only. Despite these differences *Jauhar* and Sati are placed in the same platform wherein self-immolation is performed by the women. Hence, in spite of the difference they are the same as both these practices involve self-immolation by the wife whether widowed or married.

RECORDED INSTANCES OF SATI: -

There are no reliable figures for the numbers who died by sati across the country. A local indication of the number is given in the records kept by the Bengal Presidency of the British East India Company. The total figures of known occurrences for the period 1813-1828 is 8,135; another source gives a comparable number of 7,944 from 1815-1828, thus giving an average of about

65. <http://www.vivaaha.org/sati.htm> [Visited on 15th November 2008].

507-567 documented incidents per year in that period. Raja Ram Mohan Roy estimated that there were ten times as many cases of Sati in Bengal compared to the rest of the country. Bentick, in his 1829 report, states that 420 occurrence took place in one year in the Lower Provinces of Bengal, Bihar and Orissa, and 44 in the Upper Provinces (the upper Gangetic plain). Given a population of over 50 million at the time for the Presidency, this suggests a maximum frequency of immolation among widows of well under 1%.⁶⁶

TABLE – 1

SL. NO.	YEAR	INSTANCES OF SATI IN INDIA
1.	6 th Century AD	Kadamba King Raviverma's wife committed Sati after his death.
2.	908 AD	First documented instance of Sati – Heggadetommo's widow Balkka goes Sati
3.	1510	Portugues traveler Barbosa visits the Vijayanagar empire and witnesses Sati prevalent in the Kshatriya community.
4.	1623	Italian traveler Pietro-Della Valle's account of a Sati ritual at Ikkeri by a woman named Girjakkamma who belonged to Terlenga Community.
5.	1805	Dewan Purnayya in Mysore Court of Wodeyars gives consent to a Brahmin widow to undergo Sati. This is historically rare instance of an upper caste woman undergoing Sati.
6.	1850	Colonel Sleeman's account of a Sati ritual wherein he has mentioned that one Umed Singh Upadhyaya passed away in the village of Gopalpur and his wife wanted to go Sati as till then Sati was banned by Lord William Bentick.
7.	1987	In the State of Rajasthan a young widow aged 18 years named Roop

66. <http://en.wikipedia.org/wiki/suttee> [Visited on 21st September 2009].

		Kanwar committed Sati stirring a social debate on the topic. People who assisted her in suicide are arrested. But Roop Kanwar is idolized and attained the status of a deity.
8.	1997	Police in Northern India prevented a widow from committing sati.
9.	1999	A woman hysterically jumped on her husband's pyre.
10.	2002	Kuttu Bai, a 65 year widow commits sati in the State of Madhya Pradesh.
11.	18 th May 2006	Vidhyawati committed Sati by jumping into the blazing funeral pyre of her husband in Rasi-Bujurg Villagae, Fatehpul District in the State of Uttar Pradesh.
12.	21 st August 2006	Janakrani burnt to death at the funeral pyre of her husband Prem Narayan in Sagar District.

Besides the incidences stated in Table 1 there are other instances of Sati which had occurred in the country since ancient period which are worth mentioning. The wife of Goparaja, the general of the Gupta King Bhanugupta, is known to have ascended the funeral pyre of her husband in A.D. 510. Some Queens of Kashmir and Queen Rajyavati of Nepal (8th Century) performed the Sati rite. Gundambe, the wife of Nagadeva, a minister of Calukya Satyasvya of the Deccan (10th Century), burnt herself with her husband, who had lost his life in battle. During the reign of the Cola King Rajendra I of South India, a sudra woman named Dekabbe burnt herself at the news of the death of her husband in A.D. 1057.⁶⁷ Similarly King Harsavardhana's mother Yasomati burnt herself to ashes as soon as it became definite that her husband would be passing away within a short time. From these instances of Sati it is proved that the practice of Sati was popular in Northern India, some provinces of South India, and in Central India.

67. D.C. Ganguly, *Some Aspects of the Position of Women in Ancient India*, The Cultural Heritage of India, Volume II, P. 598.

HISTORY OF LEGAL BATTLE AGAINST SATI: -

The practice of Sati system since the ancient period was even though a voluntary act of the widow, still the barbarism involved in this system to end a vibrant life to the flames of a funeral pyre has always been a favorite topic to voice one's own views particularly against this system. Banabhatta, a poet who wrote during the reigns of Harshavardhana (the last Buddhist Emperor prior to Palas) was the first author opposing the practice. He was view that –

*“This practice which is called Anumarana is utterly fruitless. This is a path followed by the illiterate this is manifestation of infatuation, this is a course of ignorance, this is an act of fool hardiness, this is short-sightedness, this is stumbling through stupidity, viz. that life is put and end to when a parent, brother, friend, of husband is dead. Life should not be ended, if it does not leave one of itself.”*⁶⁸

In the 17th Century, Medhatiti, who was a commentator on various theological works pronounced that Sati is like suicide and is against the *Shastras/Vedas*, the Hindu Code of Conduct. With respect to the Sati system he said that – *“One shall not die before the span of one's life is run out.”* The first guru of the Sikhs, Guru Nanak Saheb too spoke out against the practice of Sati.

Apart from the renowned scholars the barbarism involved in Sati system also provoked the rulers of India to prevent this horror of self-immolation. Under the Delhi Sultanates some of the Sultans did try to discourage the custom of Sati which prevailed among large section of the Hindu population, particularly the upper classes and the Rajputs who eulogized the practice of Sati under the Brahmanic domination. In fact, the earliest known governmental efforts to halt the practice were undertaken by Muslim rulers. Mohammed-bin-Tughlaq

68. Kadambari: Edited by Kashinath Pandurang Parab, Niraysagar Press, 1890, purva-bhag, pp 339-9.
[Quoted in http://www.ambedkar.org/research/Sati_Was_Started_For_Preserving_Caste.htm
[Visited on 15th November 2008].

was the first medieval ruler who placed restrictions on its observance. Humayun issued a royal fiat against Sati which he withdrew later. It was in fact, Akbar who insisted on a strict rule against the said practice. Akbar issued an order wherein a licence had to be obtained before a widow could immolate herself within his dominions. The law was meant to prevent any compulsion or force used against an unwilling widow. Akbar did not forbid the Sati altogether, he had issued definite orders to the Kotwals that there 'should not suffer a woman to be burnt against her inclination.' Din-i-Ilahi, Akbar's new faith also condemned this practice.⁶⁹ The Kotwals were instructed to delay the woman's decision for as long as possible. Pensions, gifts and rehabilitative help were offered to the potential Sati to wean her away from committing the act. Children were strictly forbidden from the practice.⁷⁰ It is said that sometimes Akbar have personally intervened to save unwilling widows from the practice of Sati. Once he rescued the widow of Jai Mal from being burnt and put her son in prison for compelling her to burn herself. Various travelers who visited India during the reigns of Mughals have described that the permission of the governor was absolutely essential before a widow could be allowed to be burnt. The later Mughal Emperors did not make any change in the existing law Aurangzeb was the only emperor who issued definite orders (1664) forbidding sati in his realms altogether, but his orders seem to have had no appreciable effect on the populace, who continued to followed the customs as before.⁷¹ Although the Mughals continued to put obstacles in the way but the practice continued to be carried out in the areas outside Agra.

Portuguese the earliest Europeans who established themselves in Goa tried to override local customs and practices including Sati as they

69. P.N. Chopra, *Some Experiments in Social Reform in Medieval India*, The Cultural Heritage of India, Volume II, P. 632.

70. Maja Daruwala, *Central Sati Act-An Analysis*, <http://www.pulc.org/from-archives/Gender/sati.htm> [Visited on 21st September 2008].

71. *Supra* Note 69, P. 632-633.

attempted to Christianize territories in their control. The Portuguese banned the practice in Goa by about 1515, though the practice of Sati was not prevalent out there. In their own spheres the Dutch and French too banned sati, but their writ ran in and around their factories only. The Dutch and the French banned the practice of Sati in Chinsurah and Pondicherry. However, the efforts to ward off the evils of Sati were formalized only during the British reign. The British who by then ruled much of the subcontinent, and the Danes, who held the small territories of Tranquebar and Serampore, permitted it until the 19th Century. Although attempts were made to limit or ban the practice of Sati by individual British officers in the 18th Century but without the backing of the British East India Company. The first formal British ban was imposed in 1798, in the city of Calcutta only, however, the practice continued in the surrounding regions. Towards the end of the 18th Century the evangelical church in Britain and its members in India started campaigns against Sati. William Carey and William Wilberforce were the leaders of such campaigns wherein both appeared to motivate the Indians to convert to Christianity. These movements put pressure on the company to ban the act, and the Bengal Presidency started collecting figures on the practice in 1813. The Britishers who first entered India through East India Company established their power and ruled India. No matter how abhorrent they found Sati system their approach towards the sati system in its initial stage remained much like the Mughals. Similarly like the Mughal Emperors the British too tried to regulate it by requiring that it be carried out in the presence of their officials and strictly according to custom. It was under Lord William Bentick that a formal legislation was enacted to curb the evils of Sati. When Bentick was made Governor General in Calcutta he found that in response to the claims that the British legalization of Sati (if voluntary) in 1813 had actually increased the number of deaths by Sati, he requested reports from British district officials about the occurrence of Sati and

solicited the opinions of Hindu elites in Calcutta about the legitimacy of the ritual. In November 1829, he circulated a minute or memorandum in which he outlined his reasons for deciding to prohibit the ritual of Sati. In this minute, written a year after his arrival, Bentinck provided reasons why the British first allowed sati, if it were legal and then the justification for his decision to prohibit the practice and thus reverse the policies of his predecessors.⁷² After conducting an opinion poll thorough his administrators to discover whether legislation against sati was advisable and whether Hindu resistance could be contained, he found positive response. Thus, in the following month after he circulated his minute Bentinck and his council of three other Britons promulgated a regulation declaring the practice of sati an illegal act and punishable in British Criminal Courts. He finally within 18 months of his appointment as the Governor of Bengal, passed the Sati Regulation, XVII of 1829 on 4th December. The highlights of the said regulation are as follows: -

- Sati was declared illegal and a criminal offence.
- Zamindars, petty land owners, local agents and officers in charge of revenue collection were made accountable to immediate communication to the officers of any intended sacrifice to their nearest police station.
- In case of willful neglect, the responsible officer was liable to fine of Rs. 200/- or 6 months of jail for default.
- On intimidation, the police official was to go to the spot and declare the gathering illegal, prevail upon the crowd to disperse, explain that any persistence was likely to make them all liable to a crime and if necessary prevent the sati from taking place or go and inform the nearest magistrate of the names and addresses of all those present.

72. *Sati: Official Documents, Lord William Cavendish Bentinck*, <http://chnm.gmn.edu/wwh/p/103.html> [Visited on 21st September 2008].

- If the sacrifice was over, a full and immediate inquiry had to be undertaken in the same way as for any unnatural death.
- Aiding and abetting a sacrifice whether voluntary or not was to be deemed culpable homicide.
- Punishment was at the discretion of the court according to the nature and circumstances of the case.
- For any violence or compulsion or helping or assisting in burning of a widow while she laboured under a state of intoxication or stupefaction or because any other cause impede her free will, the Court was constrained to pronounce death penalty.

Lord William Bentinck laid down this legislation with the support of some enlightened Indian reformers and the most renowned one is Raja Ram Mohan Roy, a Bengali reformer who started his campaign against the Sati practice from about 1812. He was the founder of Brahma Samaj. He not only campaigned against the evil practice of Sati but also fought for the right of the Hindu widow to remarry. He was motivated by the experience of seeing his own sister-in-law commit sati. He visited various cremation ground in Calcutta to persuade widows not to commit sati, formed watch group to do the same, and wrote and disseminated articles to show that it was not required by the scriptures.

The regulation passed by Lord William Bentinck i.e. the Sati Regulation; XVII of 1829 was only applicable in the Calcutta Province. But even before the regulation was passed, the orthodox Hindu Petitioned Lord Bentinck to stop the abolition claiming it to be a “privilege” of believers. The orthodox Hindu formed a group and collected funds to petition against the regulation in the Courts.⁷³ The ban was challenged in the Courts and the matter went up to Privy

73. http://www.nwmindia.org/Law/Commentary/historical_perspective.htm [Visited on 15th November 2008].

Council in England. In the said petition the petitioners argued that the ban went against the basic assurance given in George III Statute 37 whereby the Hindus were assured complete non-interference with their religion. The abolitionists argued that there was really no freedom of religion that could go beyond what was “compatible with the paramount claims of humanity and justice.” In 1832 the appeal was heard by the Privy Council. Of the 7 councilors three finally voted against Bentinck’s regulation but finally the regulation was upheld. Gradually, Madras and then Bombay followed the suit and passed their own legislation banning the Sati. Sati remained legal in some princely states for a time after it had been abolished in land under the British control. Slowly even the local rulers who came under the yoke of the British also conceded legislation against sati in conformity with the British regulations. The last state to permit it was Jaipur. But the rulers of Jaipur too banned the practice in 1846.

PROVISIONS AGAINST THE PRACTICE OF SATI UNDER THE INDIAN PENAL CODE, 1860: -

The Charter of 1833 to the East India Company empowered the government to make laws for British India with due respect for native custom and usages. As a result of this the Indian Penal Code, 1860 was drafted under the East India Company T. B. Macaulay, brilliant academician and lawyer was given the brief formulating a comprehensive criminal code of universal application through the entire subcontinent. He had no doubt in his mind that Sati was a barbarous practice which could brook no justification. But the administration of 1860 and the Law Commissioners who revised the first draft were unnecessarily alive to the sensitivities of high caste brahminical feeling and watered down the

murder provisions in relation to sati.⁷⁴ Instead of penalizing the act of sati an exception was enacted under Section 300 wherein a mitigation was provided for murder when “*the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent.*”⁷⁵ Despite this concession under the IPC, taking life is absolutely prohibited to everyone in every circumstance. However, the punishment varies depending on the nature and circumstances of the offence.

However, wherein the ritualistic public burning or burying alive of a woman is shown to be involuntary, it is murder under Section 300, IPC. The IPC also provides a provision wherein even if the woman was a willing participant, her death still amounts to culpable homicide.⁷⁶ Even where a Sati is deemed to be a suicide i.e. voluntary self-killing, the presence of any intoxicant or anything which in fact inhibit free will makes the abettor as culpable as if he had helped murder the victim.⁷⁷ The punishment for this is exactly is same as that for murder. The act of committing sati can also be punished for abetment to commit suicide.⁷⁸ Wherein the act of Sati is incomplete a person helping to achieve it is caught by the attempt Sections of the IPC. Depending upon the circumstances, the crime may be covered under Chapter XVI of the Code such as attempt to murder;⁷⁹ attempt to culpable homicide not amounting to murder⁸⁰ and attempt to commit suicide which is an offence for the women as well. Although there is no specific provision which directly criminalizes the act of sati but as per the provisions of the Indian Penal Code such act can be brought within the purview of

74. Maja Daruwala, *Cental Sati Act-An analysis*, <http://www.pulc.org/from-archives/Gender/sati.htm> [Visited on 21st September 2008].

75. *Indian Penal Code*, Exception 5 of Section 300.

76. *Ibid*, Section 299.

77. *Ibid*, Section 305.

78. *Ibid*, Section 306.

79. *Ibid*, Section 307.

80. *Ibid*, Section 308.

the Code. Abetment can take the form of instigation, conspiracy to do an act or make an illegal omission, intentional aiding, or willful misrepresentation or willful concealment.⁸¹ All these acts are punishable under the Indian Penal Code. These acts also constitute in the commission of Sati. Again depending on the facts, the aider could be abetting murder, or culpable homicide. The provisions present under the Code are enough to punish the persons who are guilty of making any human sacrifice including widow burning.

LAWS AGAINST THE PRACTICE OF SATI IN INDEPENDENT INDIA: -

Indian Penal Code, 1860, was the sole legislation which though did not contain direct provisions for prohibiting or criminalizing the practice of Sati but the commission of sati and other acts related to it could be brought within the purview of the Court. Besides this Code in the independent India there were three more laws which were in force till 1987 which regulated sati system in India. These regulations are mentioned hereunder: -

- Bengal Sati Regulation, 1829.
- Tamil Nadu Sati Regulation, 1830
- Rajasthan Sati (Prevention) Act, 1987.

These regulations to some extent were successful in prohibiting the practice of Sati in their respective area of concern. However, an incident of September 4, 1987 in Deorala Village of Sikar District in Rajasthan shocked the whole world as on the said day an 18 year old girl named Roop Kanwar consigned her to flames or burned alive on the pyre of her husband Maal Singh Shekhawat. She was dressed in her bridal finery and walked at the head of funeral procession to the centre of village and ascended the funeral pyre of her husband. The family lit the pyre fully aware that she was sitting on it alive. There were hundreds of onlookers who

81. *Ibid*, Section 107.

watched the proceedings without any attempt to object to it. In fact, the relatives fed a thousand people in honour of “*sati mata*.” This infamous incident came to be referred as “sati case” the first after the independence.

Shocked by this incident women activists filed a petition in the Rajasthan High Court. As a result the High Court ordered the State government to prevent the function of glorifying sati from taking place on the 13th day of Roop Kanwar’s death. The ceremony nevertheless was held with much fanfare. In fact, a procession was taken around in which a festive “*chunnari*” was draped over a *trishul* to resemble the form of a woman which was set ablaze in the presence of VIP’s, politicians, legislators and thousands of people. Slogans like “*Sati Mata ki Jai*”; “*Jab tak suraj-chand rahega Roop Kanwar tera naam rahega*” were chanted by the people in procession. Devasted by the glorification of Sati the women’s groups and the activists pressurized the Rajasthan Government which led to the promulgation of the Rajasthan Sati (Prevention) Ordinance, 1987 on October 1, 1987, prohibiting the glorification of Sati. The Central Government followed it with a legislation called the Commission of Sati Prevention Act, 1987. It is the sole legislation on this issue which applies to the whole of the country except the State of Jammu and Kashmir. As per this central legislation sati or burning or burying alive of widows or women is revolting to the feelings of human nature and nowhere enjoined by any of the religions of India as an imperative duty. It is also an effective measure to prevent the Commission of Sati and its glorification. Following are the features of the Commission of Sati (Prevention) Act, 1987: -

(a) Definitions: - The Central Act which is called the Commission of Sati (Prevention) Act, 1987 provides us with various definitions. It describes the meaning of Sati. The term “sati” is an ancient Sanskrit term, meaning “a chaste

woman” or “a virtuous woman”, or “who thinks of no other man than her own husband.” However, the term is used principally to refer to the faithful wife who “becomes sati” through self-immolation on the funeral pyre of her husband. The practice by which the wife joins her husband in the flames and became sati is termed as *sahamarana*, “dying together”, also known as *shagamana*.⁸² The Act defines the term “Sati” as burning or burying alive of any widow along with the body of her deceased husband or any other relative or without any article, object or thing associated with the husband or such relative; or any woman along with the body of any of her relatives, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the women or otherwise.⁸³

The Act makes glorification of Sati an offence. It provides the definition of “*glorification*” in relation to Sati as the observance of any ceremony or the taking out of a procession in connection with the commission of sati, or supporting, justifying or propagating the practice of sati in any manner; or arranging of any function to eulogies the person who has committed sati; or to create any trust, to collect funds or to construct temples, or other structure; or to carry on any form of worship or the performance of any ceremony with a view to perpetuate the honour of, or to preserve the memory of a person who has committed sati.⁸⁴ With reference to it, the Act also defines “temple” in connection with glorification of sati as any building or other structure, whether roofed or not, constructed or made to preserve the memory of a person who committed sati or which is used or intended to be used to carry on worship or for the observance of any ceremony in connection with the commission of sati.⁸⁵

82. Robert L. Hardgrave, Jr., *The Representation of Sati: Four Eighteenth Century Etchings by Baltazard Solvyns*, <http://asnic.utexas.edu/asnic/liardgrave/satiact.eft.htm> [Visited on 15th November 2008].

83. *The Commission of Sati (Prevention) Act, 1987*, Section 2(c).

84. *Ibid*, Section 2(b).

85. *Ibid*, Section 2(c).

(b) Punishments for Offences relating to Sati: - Part II of the Central Act lays down punishments for Offences relating to sati under the following categories: -

(i) Attempt to commit sati: - The Act states that whoever who attempts to commit sati and does any act towards such commission shall be punished with imprisonment for a term which may extend to one year or with fine or with both. However, the said provision also provides that the Special Court constituted under Section 9 shall before convicting any such person shall take into consideration the circumstances leading to the commission of the offence, the act committed, the state of mind of the person charge of the offence at the time of the Commission of the act and all other relevant factors.⁸⁶

(ii) Abetment of Sati: - The Act provides that if any person commits sati, whoever abets the commission of such sati, either directly or indirectly shall be punishable with death or imprisonment for life and shall also be liable to fine.⁸⁷ It also lays down that wherein a person attempts to commit sati, whoever abets such attempt, either directly or indirectly shall be punishable with imprisonment for life and shall be liable to fine.⁸⁸

With respect to abetment of sati, the Act also lays down the acts which may also be deemed to be an abetment as per the said legislation⁸⁹ and they are as follows: -

- Any inducement to a widow or women to get her burnt or buried alive along with the body of her dead husband or with any other relative or with any article, object or thing associated with the husband or such relative,

86. *Ibid*, Section 3.

87. *Ibid*, Section 4(1).

88. *Ibid*, Section 4(2).

89. *Ibid*, Explanation (a)-(g) of Section 4.

irrespective of whether she is in a fit state of mind or is labouring under a state of intoxication or stupefaction or other cause impeding the exercise of her free will;

- Making a widow or women believe that the commission of sati would result in some spiritual benefit to her or her deceased husband or relatives or the general well being of the family;
- Encouraging a widow to remain fixed in her resolve to commit sati and thus instigating her to commit sati;
- Participating in any procession in connection with the commission of sati or aiding the widow or woman in her decision to commit sati by taking her along with the body of her deceased husband or relative to the cremation or burial ground;
- Being present at the place where sati is committed as an active participant to such commission or to any ceremony connected with it;
- Preventing or obstructing the widow or woman from saving herself from being burnt or buried alive; and
- Obstructing or interfering with, the police in the discharge of its duties of taking any steps to prevent the commission of Sati.

Along with this Part V of the Act provides that in case of a prosecution of an offence under Section 4 against any person than the burden of proving that he had not committed the offence shall lie on him.⁹⁰ The Act also lays down that wherein a person is convicted of an offence under sub-Section (1) of Section 4 in relation to the Commission of Sati than such person shall be disqualified from inheriting the property of the person in respect of whom such sati has been committed or the property of any other person which he would have

90. *Ibid*, Section 16.

been entitled to inherit on death of the person in respect of whom sati has been committed.⁹¹

(iii) Glorification of Sati: - Glorification of Sati has been prohibited under the said Act and any such act mentioned under Section 2(b) of the Act shall be liable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than Rs. 5000/- but which may extend to Rs. 30,000/-.⁹²

(iv) Special Powers: - The Act prescribes certain special powers to the Collector or the District Magistrate. It lays down that the Collector or the District Magistrate may by order prohibit sati or abetment to the commission of sati by any person or areas specified in the order. The Collector and District Magistrate are also empowered to prohibit the glorification of Sati.⁹³ The Act also prescribes punishment comprising imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than Rs. 5000/- but shall not exceed Rs. 30,000/- for contravening the order given by the Collector or the District Magistrate.⁹⁴

(v) Removal of Certain Temples or other Structures: - The Central Act prohibits construction of Temples or other Structures for the purpose of glorifying Sati. The State Government under the said Act has power to direct the removal of certain temples or other structures if it is satisfied that such buildings has been in existence for not less than 20 years and is carrying out the worship or performance of any ceremony with a view to perpetuate the honour of or to preserve the

91. *Ibid*, Section 18.

92. *Ibid*, Section 5.

93. *Ibid*, Section 6(1) and (2).

94. *Ibid*, Section 6(3).

memory of any person in respect of whom sati has been committed. The Collector and the District Magistrate too have such powers. And if the orders of the State Government or the Collector or the District Magistrate is not complied with than these persons shall cause the temple or other structure to be removed through a police officer not below the rank of a sub-Inspector at the cost of the defaulter.⁹⁵

Leaving aside the above provision, history is evident that *Maha-Sati* Stones (hero stones) were erected in memory of brave women who committed sati and are periodically worshipped. The custom of sati is deeply embedded in Hindu society and immolated widows are commemorated and revered in temples built in the sati sites. In fact, the India's coalition government in 2001 was pressurized by the Historical Sati Temple Preservation Committee to give national monument status to some 300 temples across the country that glorifies the burning of widows. In the independent India the most infamous sati in memory was the suicide of the 18 year old Roop Kanwar on the pyre of her husband in the village of Deorala, Rajasthan on 4th September 1987. Dr. Narasimhan says the brick platform that makes the sati site draws on an average 100 visitors per day and 5 times more on special days. In fact, Rajasthani women in traditional and colourful attire prostrate themselves before the platform seeking the benediction of the *satimata*, the girl who is believed to have become defied through her fiery immolation on the pyre of husband.

The commercialization aspect of Sati is prohibited under certain other legislations in India. The Civil Procedure Code provides that where donations has been given at the *satisthal* and is used for an illegal purpose, like building a temple against the public policy than such donations when they are at the hands of a Committee can be diverted away from their illegal purpose.⁹⁶ An

95. *Ibid*, Section 7.

96. *The Code of Civil Procedure*, Section 92.

amendment to the Income Tax Act is also made wherein exemption is not granted to those who make charitable donations to temples which commemorate or have come up as a consequence of an ancient or recent sati. Hence, the people will be discouraged to donate to such charitable institutions. This amendment was made specifically to exclude Sati temples from benefits given to charitable institutions.

The Collector or the District Magistrate also have power to seize such funds or property wherein they are satisfied that any funds or property have been collected or acquired of glorification of the commission of any sati or which may be found under circumstances which create suspicion of the commission of any offence under this Act.⁹⁷ The seizure of such funds or property shall be reported by the Collector or District Magistrate to the Special Court and shall await the orders of such Special Court as to the disposal of the same.⁹⁸ The Act under Section 13 provides that where a person has been convicted of an offence under this Act, the Special Court trying such offence may, if it is considered necessary so to do, declare that any funds or property seized under Section 8 shall stand forfeited to the State.

(vi) Constitution of Special Courts and their Powers: - The Act states that all offences under this Act shall be tried by a Special Court constituted under this Act. Hence, it is clearly stated that the offences can be tried only by the Special Courts. It also lays down that the State Government shall, by notification in the Official Gazette, constitute one or more Special Court for the trial of offences under this Act and such Special Court shall exercise jurisdiction in respect of the whole or such part of the State as may be specified in the notification. The Special Court shall be presided over by a judge to be appointed by the State Government with the concurrence of the Chief Justice of the High Court. A person not below the

97. *The Commission of Sati (Prevention) Act, 1987*, Section 8(1).

98. *Ibid*, Section 8(2).

rank of Session Judge or an Additional Sessions Judge shall be qualified for appointment as a judge of a Special Court.⁹⁹

A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts. A Special Court for the purpose of trial of any offence shall have all the powers of a Court of Session and shall try such offence in accordance with the proceeding prescribed in the Criminal Procedure Code for trial.¹⁰⁰ The Act also lays down that wherein a Special Court is trying any offence under this Act it may also try any other offences with which the accused may be charged under Criminal Procedure Code at the same trial if the offence is connected with such other offence.¹⁰¹ The Special Court is also empowered to convict the accused person under this Act with any such other offences and pass any sentence authorized by this Act or any punishment thereof.¹⁰² With respect to inquiry or trial, the proceedings shall be held as expeditiously as possible and in particular where the examination of witnesses has begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, and if any Special Court finds the adjournment of the same beyond the following date to be necessary, it shall record its reasons for doing so.¹⁰³

For every Special Court the State Government shall also appoint Special Public Prosecutor. The qualification for public prosecutor is that he should be an advocate for not less than seven years practice or who has held

99. *Ibid*, Section 9.

100. *Ibid*, Section 11.

101. *Ibid*, Section 12(1).

102. *Ibid*, Section 12(2).

103. *Ibid*, Section 12(3).

any post for a period of not less than seven years under the State requiring special knowledge of law.¹⁰⁴

(vii) Obligations of Certain persons to report about the Commission of the Offence under this Act: - All officers of Government are required and empowered to assist the police in the execution of the provisions of this Act or any rule or order made there under. All village officers and such other officers who are specified by the Collector or the District Magistrate in relation to any area and the inhabitants of such area shall report any matter if they believe that sati is about to be, or has been committed in the area to the nearest police station.¹⁰⁵

(viii) Powers of Central Government to make rules: - The Central Government is empowered under Section 21 to make rules for carrying out the provisions of this Act, by notification in the Official Gazette. In exercise of the powers conferred by Section 21 of the Act, the Central Government made Commission of Sati (Prevention) Rules, 1988. Under the said Rules, methods of making order for removal of temples or structures under sub-Section (1) and (2) of Section 7¹⁰⁶ are prescribed. The Rules also defines “prohibitory order” as an order issued under Section 6¹⁰⁷ and how such orders shall be made.¹⁰⁸

SATI AND JUDICIAL INTERPRETATION: -

Sati is practiced by Indian women since ancient period which became rampant during the invasions by foreign rulers like the Mughals, Portugues, Dutch, East India Company etc. Although these foreign rulers after establishing themselves as the rulers in India made efforts to curb this social evil,

104. *Ibid*, Section 10.

105. *Ibid*, Section 17.

106. *The Commission of Sati (Prevention) Rules, 1988*, Rule 5 and Rule 6.

107. *Ibid*, Rule 2(1).

108. *Ibid*, Rule 4.

still the people used to practice it. The practice of Sati was controlled to some extent during the reigns of Britishers in India; however, it was not abolished totally. Even in independent India Sati is practiced. The most highlighted horrified case of widow burning or Sati can be seen in the 18 year old Roop Kanwar's case of Deorala, District Sikar, Rajasthan. On her husband's death on 4th September 1987 she climbed the funeral pyre of her husband and burnt alive in the presence of the whole village in the name of having attained sati hood. In Rajasthan alone it was the 26th of such incident. It was not new incident, but the only difference in this case was that the women's groups went on the streets to agitate and prevent the open violation of law by *firstly* murdering the widow and *secondly* by glorifying this act in the name of Sati. The women's groups moved the Rajasthan High Court and got together to stop this act. They forced the Government to bring in the Rajasthan Sati Prevention Ordinance (RSPO), 1987 by October 1, 1987 and later the Central Government to bring in the Commission of Sati Prevention Act, 1987. The law, thus, made Sati punishable offence and any activity to glorify the commission of Sati. Despite these laws, in the State, in the districts and cities of Jaipur, Alwar, Sikar there was open violation of law and a large number of rallies with naked swords, chanting slogans in praise of Sati and Roop Kanwar were seen in these places. 22 cases were filed by the Rajasthan police in these districts under the RSPO. By November the police had filed the charge sheets in these 22 matters. The accused challenged the charge sheets in the Rajasthan High Court who dismissed the charge sheets by December 1987. The Government of Rajasthan challenged the judgment of the High Court before the Supreme Court. The matter came for hearing in 1991. In January 2003, the Supreme Court reversed the Rajasthan High Court judgment in these cases and sent them back for trial to Jaipur.

Finally by June 2003, the trial began in the Sati Court Jaipur. The first Judge of this Special Court was taken ill and after his untimely demise a second judge called Shiv Singh Chauhan was appointed. The Court concluded the matter by 31st January 2004 wherein it acquitted all the accused in four of 22 cases that underwent trial. The main reason for their acquittal was stated to be the absence of eyewitnesses to the immolation which took place in the presence of hundreds of onlookers. In fact the Court declared that the prosecution had not been able to prove that Roop Kanwar was alive when she sat on the pyre and was burnt to death. Those acquitted included former minister and vice president of the Rajasthan BJP, Rajendra Singh Rathore, former Bhartiya Yuva Morcha President, and the nephew of vice president Bhairon Singh Shekhawat, Pratap Singh Kachariawas, president of the Rajput Maha Sabha, Narendra Singh Rajawat, former IAS officer Onkar Singh and advocate Ram Singh Manohar. The judgment came as a big blow to the various movements struggling for women's rights and human rights.¹⁰⁹

CRITICISM OF THE JUDGMENT GIVEN BY THE SPECIAL SATI COURT ON JANUARY 31ST 2004: -

The judgment given by the Special Sati Court on January 31st 2004 came as a big blow to the various groups who are struggling for women's rights and human rights. It was fully criticized by various people and scholars. Since then groups have been protesting against the government of Rajasthan to act immediately to rectify this miscarriage of justice as they feel that if the government of Rajasthan does not appeal in the Rajasthan High Court against these acquittals, chances of justice in the future are reduced in other pending cases.

109. Kavita Srivastava and Prem Krishna Sharma, *Trial by Fire*, <http://www.sabrang.com/cc/archieve/2004/mar04/sreport3.html> [Visited on 15th November 2008].

Reactionary groups who wish to see the revival of Sati will gain encouragement. These groups and the other scholars who abhor sati criticized the judgment given by the Special Sati Court acquitting 11 accused in four of the cases of 22 cases filed in accordance to the Ordinance passed by Rajasthan Government on the following grounds: -

(i) Misrepresentation of the provision defining ‘glorification’ of Sati: - One of the most glaring problem with this judgment is the manner in which the Court interpreted the provisions defining ‘glorification’ of Sati practice as defined under Section 2(b) of the Act and Section 5 of the Rajasthan Ordinance, 1987. The Court held that the offence of glorification must be in relation to a particular incident. Therefore first the incident must be proved in order to hold the accused guilty for the offence of glorification in relation to that incident. Therefore first the incident must be proved in order to hold the accused guilty for the offence of glorification in relation to that incident. This approach of the Court itself is perverse and unacceptable.

(ii) The Supreme Court judgment was misinterpreted: - The Sati Court has also misinterpreted judgments of the Rajasthan High Court and Supreme Court given in the same matter in 1987 and 2003. When the Supreme Court remanded the case back to the trial court, it clearly meant that the decision of the Rajasthan High Court is completely quashed and all the matters are open for trial by the Sati Court. But the Sati Court began with the premise that the Rajasthan High Court had already given judgment with regard to Section 6 and hence, the offences under Section 6 were not worthy of trial.

(iii) Defining Sati: - The definition of “Sati” provided under the Rajasthan Ordinance, 1987 was not taken into account into its true sense as the judgment referred to the mythological character of Sita and Anusuya, calling them sati’s and argued that anyone refers to Sita or Anusuya cannot be held guilty of glorifying

sati. This argument by the critiques is held irrelevant and exposes the mindset of the Court. The argument in no way is connected to the legal definition of the practice of Sati. The fact of the case wherein the accused were hailing Roop Kanwar as Sati and raising slogans in her honour is clearly evident of glorifying the practice of sati which is an offence in its legal sense. They were not honouring Sita or Anusuya but were glorifying the burning of Roop Kanwar alive on her husband's funeral pyre.

(iv) Ignorance of Evidence: - The Sati Court ignored to take certain evidence in cognizance which could help the case. The Court while acquitting the accused refused to rely on the statement of the policemen who have consistently supported the prosecution case. The Court even ignored the fact that there is a published document, a pamphlet which glorifies not only Roop Kanwar's incident but the practice of Sati. The Court refused to consider this evidence on the mere ground that the portions of the pamphlet that amounted to glorification were not specifically pointed out by the prosecution.

(vi) Failure to proceed the case by Prosecution: - It was also alleged that the prosecution half-heartedly proceeded the case or deliberately by doing so helped the accused persons. Similarly the charge-sheets which were filled within a month of the various glorification incidents in 1987 were an act of mere tokenism to assuage movements that were demanding justice in these cases. Besides this there were major loopholes even in the investigation of the said incident.

Still the prosecution of 18 cases of "sati glorification" is pending in the Sati Court. Devasted by the verdict of Sati Court various women's groups in Rajasthan protested outside the Rajasthan State Assembly and about 700 women from about 12 Districts of Jaipur marched the city streets and protested outside the Secretariat demanding Government to file an appeal immediately in the Rajasthan High Court against the acquittal of the accused as well as to take the

18 cases pending before the Sati Court seriously and a special committee of legal experts to set up to argue the cases.

TABLE – 2: CHRONOLOGICAL LIST OF EVENTS¹¹⁰

DATE	EVENTS
4/9/1987	18 years old Roop Kanwar of Deorala Village, District Sikar became a widow
4/9/1987 (Before after Noon)	Roop Kanwar was forced to climb on her husband's funeral pyre and was burnt alive in the name of Sati, in the presence of the whole village.
1/10/1987	Rajasthan Government brought in the Rajasthan Sati Prevention Ordinance and later the Central Government brought in Commission of Sati Prevention Act, 1987.
November 1987	22 cases were filed by Rajasthan Police in the District of Jaipur, Alwar and Sikar under the Rajasthan Sati Prevention Ordinance, 1987.
December 1987	Rajasthan High Court dismissed the charge-sheets which were challenged by the accused in the High Court
1991	The matter was brought before the Supreme Court by the Government of Rajasthan challenging the High Court Judgment.
January 2003	The Supreme Court reversed the Rajasthan High Court Judgment in these cases and sent them back for trial to Jaipur.
June 2003	Trial began in the Jaipur Special Sati Court.
31/1/2004	The trial was hastened up in January and on 31 st Jan'2004, the Special Court on Sati Prevention and Sessions Court in jaipur acquitted all the eleven accused in hour of the 22 cases on glorification of Sati.

There are innumerable cases of Sati which are still not reported. The social evil called "sati" is still in existence even after 179 years of passing the first legislation banning Sati. It still continues to haunt the Hindu

110. Source from Kavita Srivastava, *She was burnt alive! But they glorified the murder*, <http://www.nwmindia.org/Law/Commentary/sati.htm> [Visited on 15th November 2008].

society and endangering the existence and human rights of women to lead a respectable and fearless life. The people of India still cannot convict people for glorifying the heinous and barbaric act like Sati.

Recommendation and Suggestion on Amendment to the Commission Of Sati (Prevention) Act, 1987: -

The Commission of Sati system in India has to some extent been curbed from the society due to the introduction of the Commission of Sati (Prevention) Act, 1987. However, with the recent decision of the Special Court in the Roop Kanwar's Case through light upon the mentality of the public as well as the judiciary that despite it the sati system is followed still in India but now it is not glorified like it used to be in the ancient period or before the enactment of the Act. Various recommendations are proposed by the government in the Act such as omission of the words "*nowhere enjoined by religions to*"; definition of the Sati should include putting an end in whatever manner the life of helpless women; Section 3 to be omitted as attempt to commit sati under it is not an offence; Section 4 to be Sati murder and emphasis should be laid on preventive measures. Besides this NCW recommends the substitution of title An Act to provide for additional, ancillary or incidental matters connected with the prevention of Sati Murder. Preamble to the Act be omitted. Instead of Commission of Sati (Prevention) Act it be called '*Commission of Sati Murder (Prevention) Additional Provisions Act.*' Substitution of '*Sati Murder*' for Sati in Section 2(1) (3). Section 8(2) to be substituted to read as- '*every Collector or District Magistrate acting under sub-section (1) shall report the seizure to the court and shall await the order of such court for the disposal of the same.*' Ss 3-5, Ss 9-14, Ss 16-17 be omitted.

Besides this consequential amendments are suggested in the other statutes. It is suggested that in the Indian Penal Code Section 303A should be inserted as Sati murder i.e. “(1) *who ever burns or buries alive...to prevent the commission of sati murder.*” Section 303 B should also be added for punishing glorification of sati murder. It is also suggested that changes should be made under Section 39(1) (v) with respect to duty of public to give information relating to sati murder and its glorification. Amendment Ss. 303A and 303B – cognizable, non-bailable, and prescribing the punishment, which may extend to Rs. 30,000,00/-. Even in the Indian Evidence Act Section 113AB may be inserted for casting duty on the person charged with an offence under Section 303A with onus to prove otherwise.

4. MARITAL RAPE: -

Women have been facing cruel crimes committed against them in the society. They have always been considered as a weaker class in the society who has always been subjugated from ages. Although lots of attention has been paid on eradicating violence against women outside the home i.e. the crimes committed by the strangers, but the ultimate truth is that she is subjected to the most heinous forms of violence at the hands of the person who she loves and trusts the most. One such violence which a woman has to face is committed by her husband which is termed as marital rape.

People are often heard saying that “marriages are made in heaven.” But with this there is also this fact that although to some extent this saying may be true but here in Earth majority of women go through hell after their marriage which is supposedly made in heaven. Marriages from ancient period have been considered to be a sacramental union i.e. a tie which can never be broken as it is a relationship which is established birth by birth. According to

Smritikars even death cannot break this relation of husband and wife which is not only sacred and religious but is a holy union as well. The object of marriage was to enable man and a woman perform religious duties and to beget progeny.¹¹¹ She is known as *Ardhangini* i.e. half of her husband and union with a woman completes a man. The concept of marriage is all about love, compassion, compromise and mutual consent. Although marriage does sanction having sex but only when both partners are willing. It certainly does not mean that the husband has right to have sex with his wife whenever and wherever he pleases. However, in India, the role of men and women has been socially constructed. Women are given a moral order or “dharma” which is called “Stridhan” – the dharma of women entails devotion to one’s husband. A woman’s career is her husband. This means a woman’s obligation in life is to serve her husband and provide him with children. He is essentially her “Lord” for the very meaning of the word “Pati” means both husband and lord. Obedience to and dependence upon men characterizes women’s traditional roles in the family. The ideal wife is one whose sole joy in life is to satisfy her husband. Her only concern is to perform properly any of the services demanded by her husband.¹¹² Leaving aside the above view it is clear that wherein wife does not consent over having sex than rape is committed. The very fact that it is done by one who lives in the house does not mean that it is not rape; in fact it makes it even more of a crime.¹¹³

DEFINITION OF MARITAL RAPE: -

Marriage is a sacrosanct union. This is known to the world. Thus, whenever the term “rape” is heard we generally think about a crime committed by a stranger, an evil, malicious person but no of us think it in the

111. B.M. Gandhi, *Hindu Law*, Eastern Book Company, Lucknow, 2008, P. 246.

112. <http://www.csuchico.edu/~cheing/syllabi/asst001/spring99/paritta/paer1.htm> [Visited on 21st September 2008].

113. Kritika Venugopal, *Criminalisation of Marital Rape*, Cr. L. J. 2006, J. 307.

context of marriage, as the general view is that husband cannot rape his wife. After all, how can a husband be accused of rape if he is only availing his conjugal rights? However, marital rape is prevalent throughout the society irrespective of any cultural barriers, religion or the boundaries of the countries. Women all over are subjected to marital rape which is equally a heinous crime as that of the rape committed by a stranger. Rape is Rape, regardless of the relationship between the rapist and the victim.¹¹⁴ In this case also women's bodies are outraged, regardless of their educational qualifications, class or status.

Although there is no specific legal definition of Marital rape but it can be used to describe sexual acts committed without a person's consent and / or against a person's will, when the perpetrator (attacker) is the woman's husband or ex-husband. In other words, "*Marital rape is any unwanted sexual acts by a spouse or ex-spouse, committed without consent and/or against a person's will, obtained by force, or threat of force, intimation, or when a person is unable to consent. These sexual acts include intercourse, and or oral sex, forced sexual behaviour with other individuals, and other sexual activities that are considered by the victims as degrading, humiliating, painful and unwanted.*"¹¹⁵ Marital rape is also called wife rape.

DIFFERENCE BETWEEN STRANGER RAPE AND MARITAL RAPE: -

Regardless of the relationship between the rapist and the victim, rape is a very personal and intimate traumatic experience which a victim has to undergo. Although women who have been raped by their husbands (ex-husband), lovers, colleagues, a friend. Live-in partner feel the same experience and reactions to rape as that by a woman raped by strangers, but there are certain

114. <http://www.hiddenhurt.co.uk> [Visited on 16th April 2008].

115. Kritika Venugopal, *Criminalization of Marital Rape*, Cr. L. J, 2006, J. 307.

differences between stranger and intimate rape (marital rape). The main difference between stranger rape and marital rape is as follows: -

(i) Stranger rape is committed against a woman by someone she does not know or with whom she does not share any experience or history and thus, when the assault happens women have no doubt about what is happening. In other words she is aware of the crime of rape committed on her. Although in such situations the victim often wonders what she has done to precipitate the assault and blames herself. However, in marital rape the circumstances are very different. Unlike stranger rape wherein the victim suffers from a physical and sexual violence, the victim of marital rape suffers from above along with betrayal of trust. As in case of marital rape the person is known to you, whom you thought you know intimately, and whom you trust or with whom you share a home and often in certain cases children. The same person who was compassionate, loving and with whom you shared your fear and sorrows and whom you believe will not hurt you intentionally has actually hurt you. Thus, marital rape is destructive because it betrays the fundamental basis on which marital relationship is based upon. The woman in such a situation is generally confused as she cannot understand whether her husband has actually raped her. She feels humiliated and betrayed.

(ii) Stranger rape is a sexual act of violence outside the victim's normal relationship. Whereas, marital rape is the outcome of an abusive relationship and is very emotional possibly along with physical abuse.

(iii) Stranger rape generally involves a certain degree of physical violence while in case of marital rape a certain amount of coercion will be applied which is enough to control the victim.

(iv) In case of stranger rape a woman faces the trauma for once only which is enough to traumatize her throughout her life time. On the other hand, victims of marital rape faces it often day after day as she is living in with a rapist who can apply force and commit rape on her whenever and wherever he wants.

KINDS OF MARITAL RAPE: -

Marital rape is categorized into three kinds by legal scholars which are prevalent in the society which are as follows: -

(a) Violent Rape/Battering Rape: - Rape itself is a violent assault on women. In case of violent or battering rape the women experience both physical and sexual violence in the relationship. Herein the abuser uses enough physical violence upon the victim to cause her injury apart from any injuries due to the rape itself. For example: - injuries to genital area or breasts. It may also include punching his wife or injuring her with a knife. Many abusers generally force their wives to submit to sexual acts after a physical assault where the husband wants to make up or to prove her forgiveness and to further intimidate and humiliate her. In some cases women are battered during sexual violence. The majority of marital rape victims fall under this category.

(b) Force-only Rape: - Generally in this form of marital rape the husband/abuser use only the amount of force to control or to hold the wife in certain position. For example: - holding down the victim by her arms or wrists to prevent her from defending herself or to escape from the hold of the abuser. In this form of marital rape battering may not be characteristic of these relationships. This assault is common wherein woman refuses sexual intercourse. In most cases of force-only rape, coercion plays an important role. The victim may also be so

confused and numbed by constant emotional abuse that she simply does not know how to act or react when sex is forced on her.

(c) Sadistic Rape/Obsessive Rape: - In some cases of marital rape the sadistic/obsessive rape is also present. In this kind of marital rape the victim is tortured and is forced to comply with or undergo deeds designed to further humiliate her or to do perverse sexual acts. These acts are often physically violent. For example: -the abuser urinates on the victim, acting out a fantasy of torture; or using other objects during rape etc. Pornography is frequently involved with sadistic forms of rape.

The above mentioned are the three kinds of marital rape but it is difficult to make a clear-cut lines between them as rape on wife can involve any of the above or a combination of them. For example: -the abuser husband may use coercion along with enough force to control or hold victim wife initially but then may use increased violence if the victim struggles.

EFFECTS OF MARITAL RAPE: -

Despite the historical myth that marital rape is relatively insignificant event causing little trauma to the victim but the research indicates that marital rape often has severe or long-lasting consequences for women. The effects of marital rape can be of two types viz. Physical and psychological.

(a) Physical effects: - Physical effects of marital rape include injuries to private organs i.e. vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who are battered and raped frequently suffer from broken bone, black eyes, bloody noses and knife wounds that occur during the sexual violence. Campbell and Alford (1989) report that one half of the marital

rape survivors in their sample were kicked, hit or burned during sex.¹¹⁶ The physical effect also include specific gynecological consequences such as vaginal stretching, miscarriage, still births, bladder infections, sexually transmitted diseases, infertility and in some cases HIV.

(b) Psychological Effects: - Women who are raped by their husband, boyfriend, partner or live-in partner, are likely to suffer severe emotional or psychological consequences along with the physical violence. In case of marital rape the women who are raped by their partners often experience not one but multiple assaults, hence it is not surprising that marital rape survivors seem to suffer severe and long-time psychological consequences. Again the psychological effects of marital rape can be classified into the following two categories: -

- (i) Short term psychological effect:** - It include Post-traumatic stress disorder (PTSD), anxiety, shock intense fear, depression and suicidal ideation. Compared to women raped by strangers and those whom they don not know well, marital survivors report even higher rates of anger and depression.
- (ii) Long term psychological effect:** - It includes sleeping disorder, eating disorder, depression, intimacy problem, negative self-assessment, sexual dysfunction, flashbacks of rape and emotional pain.

CAUSES FOR MARITAL RAPE: -

In a marriage wherein women are raped by their husband or partner, their rights are being violated by someone with whom they share their lives and homes and above all trust them. Various scholars have researched over

116. Raquel Kennedy Bergen, *Marital Rape*, <http://www.vaw.net.org/DomesticViolence/Research/VAWnetDoes/ARmrape>. [Visited on 15th January 2009].

the reasons of such behaviour by the abuser and have come to conclusion that all around the world majority of women become victim of marital rape due to following reasons which gives rise to heinous crime of marital rape: -

(i) Since ancient period woman has been considered as the property of man which he possess and has physical as well as non-physical control. Thus, it can be said that marital rape is the result of this patriarchal nature of the society where man has every right to do as he pleases with his wife. This position of women in a family is very much clear from the ancient scriptures of Tulsidas and Manu. In his *Manusmriti* Manu has said “*Day and night women must be kept in dependence by the males of their families. Her father protects her in youth, and her sons protect her in old age: a woman is never fit for independence.*”¹¹⁷ Thus, since ancient period woman relegated to private domain and she was excluded from the outside world. In the 19th Century, even the European scholars like John Stuart Mill have stated that – “*A female slave has an admitted right, and is considered under a moral obligation, to refuse her master the last familiarity. Not so the wife, however brutal a tyrant from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.*”¹¹⁸ These archaic views of the society clearly points out the position of women in the society due to which even husbands violated her rights by committing marital rape on her.

(ii) Rape in a marriage is not always about sex. It is about showcasing power over his victim i.e. about the amount of pain the tormentors can inflict emotionally and

117. Manusmriti IX, Verses 2 and 3 as cited from F. Max Muller (ed), *The Sacred Books of the East*, 1964, pp: 327-328. [Quoted in Kritika Venugopal, *Criminalization of Marital Rape*, Cr. L. J, 2006, J. 306-307].

118. J.S. Mill, *The Subjection of Women*, ed. S.M.Okin, Indianapolis, IN: Hackett, 1988, P. 33 [Quoted in Vasundhara Goel, *Topic role of Judiciary in untying the knot: Judicial process and Unconstitutionality of 'Marital Rape' Exception under IPC*, Cr. L. J, J. 229.

psychologically upon their victims. Marital rape is about balance of power wherein men want to show their wives that in their relationship he is strong one and by forcing them to have sex with them; they shift the power equation in their power.

(iii) Sociologists say that wherein the financial status of wife is stronger than her husband, the men are always threatened by their wife's financial independence as they feel that the sole bread earner gives women a sense of power. Hence, in order to sub-side this sense on women men see that they should punish their wives by using force and debase her dignity. Due to this factor women in a marriage are subjected to marital rape.

(iv) The social evils like infanticide of female child and dowry system in our society which is still prevalent in today's India can also be seen as one of the causes for marital rape as the girl child due to both these practices of the society are not considered important member of the society. The husbands often rape their wife for not bringing enough dowries as a way of punishment or for not begetting sons.

(v) One of the most important reasons for marital rape is that women, specifically in India, are generally married off at a very young age and are inexperienced about sexual activities. These girls can be easily exploited and face marital rape without knowing it to be a wrong infringing their rights.

(vi) Marriage in various religious scriptures has been considered as a sacramental union. Most of the women and even literate ones believe this and despite being raped by her partner continues to succumb to her husbands need due to fear that she may be rejected by the society if she will revolt against it or if she will refuse

her husband, the husband will move towards the greener avenues for satisfying his need or for pleasures.

(vii) Another reason of marital rape is that often a woman does not fight back her husband as not to disturb children sleeping nearby, thereby risking them witnessing the rape; moreover shock or confusion at what is happening paralyses her and real concern for her abuses (husband), which results in her not wanting to do anything which may harm or injure her rapist even to the detriment of herself.

PROBLEMS IN PROSECUTING MARITAL RAPE: -

Marital rape is a very intimate crime committed by husbands on their wife's or is committed by partners of the women which generally occurs behind closed door and are hidden behind the sacrosanct curtain of marriage. Hence, it becomes quite difficult to prosecute the abuser for marital rape. Following are the problems which come up while prosecuting an abuser/husband/partner for marital rape committed on his wife: -

(i) Many women who are victim of marital rape have great difficulty in defining it a rape because the traditional idea which is prevalent in the society is that it is impossible for a man to rape his wife. The reason for this is that during their marriage, vows are exchanged and one such vow is that the other spouse has right over your body and sexuality i.e. we have abdicated any say over one own body and sexuality. A marriage, thus, sanctions having sex. When wife is raped she often question her right to refuse sexual intercourse with her husband because she believes that once she ties the knot of marriage it is her duty to succumb to the wants of her husband even if she does not want it.

(ii) Generally the survivors of marital rape are less likely to report marital rape as the woman feels that reporting rape in marriage may become even more complicated because of woman's relationship to her assailant. Women who has been victim of marital rape is hesitant to report the matter because of family loyalty, fear of the abuser's retribution, inability to leave the relationship due to dependence upon the abuser, or they may not know that rape in marriage is against the law.

(iii) Women who have been victim of rape in marriage feel uncomfortable in discussing the sexual violence experienced with their partner as by disclosing such incident she thinks her private life will be disclosed to the public and will be talk of the town. Thus, disclosing or reporting it will further cause her more humiliation.

(iv) Women are reluctant to report such incident because many women who experience forced sex in marriage do not define it as rape. To them, rape can only be committed by a stranger and sex in a marriage is seen as an obligation and they define forced sex as their "wifely duty" and not rape. Due to this view, women who experience marital rape are unlikely to seek outside assistance to stop the violence.

(v) One of the most important problems which is faced in prosecuting the abuser for marital rape has been the reluctance of the various legal systems to recognize it as a crime at all.

(vi) Another problem is prosecuting the abuser for rape in marriage arises during the procedural level. While the law in theory may hold no difference between a spouses or other person, in practice when the case comes to the court there will be

difficulties in proving that rape in fact took place. The main reason for it is that in a marriage, sexual relations are to be expected and if the defense claims consent, then the evidential burden is a very difficult burden for the prosecution to discharge.

(vii) Research indicates that even if when women gather courage to report marital rape, there is often a failure on behalf of others including police officers who provide inadequate response; religious advisors who give emphasis upon wife's duty to obey their husband; battered shelter advocates who fails to adequately address the problem of marital rape; and rape crisis centers.

LEGAL POSITION OF MARITAL RAPE IN OTHER COUNTRIES: -

The World Health Organisation in a study conducted in 1997 has reported that one in five women have been a victim of rape or attempted rape in her lifetime and most of these rapes are committed by family members. Various researches prove that at least 20-50% of women in the world are victims of wife abuse and marital rape. In India itself 14-36% of men admit to have forced their wives to have sex with them. Despite these revealing facts the law still remains deficient with respect to criminalize marital rape. Till now, marital rape has been criminalized in fifty one countries in the world and unfortunately India is not one of them.

The United States Department of Justice in its National Violence against Women Survey examined the prevalence of different types of rape; they found that marital rape account for approximately 25% of all rapes. They also estimated that 10% to 14% of married women experience rape in marriage. The problem relating to marital rape has received relatively little attention from social scientists, practitioners, the criminal justice system and larger society as a whole, despite the prevalence of marital rape at this rate. Till 1970's

the society was reluctant to acknowledge the fact that husband can rape his wife as generally the society believe that husband cannot be convicted of raping his wife as with the marriage husband is entitled to have sexual intercourse with his wife, which is implied under the contract of marriage. It also shows the archaic understanding that wives are still treated as the property of their husbands and marriage contract is entitlement to sex (with or without the consent of his wife). In 1993, marital rape became a crime in all fifty States, under at least one section of the sexual offence codes. However, it is remarkable that only a minority of the States has abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, resistance requirements still apply. In seventeen States and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in thirty-three States, there are still some exemptions given to husbands from rape prosecution. When his wife is most vulnerable (for example she is mentally or physically impaired, unconscious, asleep etc) and is legally unable to consent, a husband is exempted prosecution in many of these thirty-three States.¹¹⁹

In England, the principle in the form of Judicial Dictum, was given by Chief Justice Sir Mathew Hale when he said that “*By their mutual matrimonial consent and contract the wife hath given up herself in this unto her husband, which she cannot retract*” in the year 1763.¹²⁰ From this it is clear that earlier in England the general rule was a man could not be held guilty of rape upon his wife for the wife is in general unable to retract the consent to sexual intercourse which is a part of the contract of marriage. The position in England, earlier to the Sexual Offences Act, 1956 rape is an offence. However, the decision

119. <http://www.ebc-india.com/lawyer/articles/645.htm> [Visited on 21st September 2008].

120. History of the Pleas of the Crown (By Chief Justice Matthew Hale) 1 Hale PC (1736) 629. [Quoted in C.S. Raghu Raman, *Matrimonial Rape-exemption from prosecution for Husband-State of the law in England, Scotland and India*, Cr. L. J. 2005 J 357.

of House of Lords in *DPP vs. Morgan*¹²¹ that a man may have the belief that the woman had agreed to have sex with him even if that belief was unreasonable, created much resentment in England which led to changes in the law. Hence, in 1976 a change was brought in the Sexual Offences Act wherein it was declared that “*a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of intercourse does not consent to it...*” The House of Lords while delving into the propriety of the Common Law rule pertaining to marital rape exemption in the 20th Century ruled in *R vs. R*¹²² that marital rape exemption is not in tune with the modern “marriage” and marital partnership of spouses. The House of Lords was of opinion that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common law fiction, which no longer represented the position of wife in present day society, and that it should no longer be applied. Thus, marital rape exemption was abolished in its entirety in 1991. This judgment was also affirmed by the European Court of Human Rights in the case of *SW vs. U.K.*¹²³ Amendment to the statutory was made through Section 147 of the Criminal Justice and Public Order Act, 1944. Recently in *R vs. C*¹²⁴ the Chief Justice Judge, Nelson and Mecombe critically examined Sir Hale’s principle. In the said case the accused Mr. Barry C was married to his wife in 1967 and it came to end in 1971. The incident of rape took place while they were married. The husband wanted to have sexual intercourse but she did not agree as she was discharged from hospital after unwanted miscarriage and was very weak. She was raped by her husband. Rape took place in 1970. The jury accepted her evidence

121. (1975) 2 All ER 347.

122. (1991) 4 All ER 481.

123. (1996) 21 EHRR 363.

124. (2004) All ER 1.

and rejected his denial and convicted him for raping his wife. Thus, now marital rape is a criminal act in U.K.

The legal position of marital rape in Scotland was similar to that of England. Even in Scotland the ancient proposition which had governed Courts in Scotland for many years was similar to CJ Hale's principle. There also it was a general rule that husbands could not be convicted for raping their wives. However, in *H.M. Advocate vs. Duffy*¹²⁵ and *H.M. Advocate vs. Paxton*¹²⁶ it was held by the Justices that the exemption did not apply where the parties to marriage was not cohabiting. The High Court held that the exemption if it had ever been part of the law of Scotland was no longer so.

Again Lord Emslie, the Lord Justice General in *S vs. H.M. Advocate*¹²⁷ held that a wife is not obliged to obey her husband in all things nor to suffer excessive demands on the part of her husband. Nowadays it cannot be seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays that whatever the position may have been in earlier centuries that it is an incident of modern marriage that a wife consents to intercourse in all circumstances including sexual intercourse obtained only by force. Hence, husband is guilty of raping his wife and shall go on trial. Lord Emslie also held that the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections is no longer acceptable. Thus, in Scotland, as observed by Lord Emslie that rape had always been essentially a crime of violence and aggravated assault and doubted whether it was ever contemplated by the common law that a wife consented to intercourse against her will and obtained by force.

125. 1983 SLT 7.

126. 1984 JC 105.

127. 1989 SLT 469.

In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 of the Crimes Act 1961 was enacted. Now subsection 4 of the said section provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time of the sexual connection occurred. In *R vs. D*¹²⁸ it was held that the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence. Therefore, now there is no distinction in principle to be drawn between sexual violation in marriage and outside of marriage.

In Mexico, the country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists could be imprisoned for 16 years. In Sri Lanka recent amendments to the Penal Code to pass judgment on rape in the context of partners who are actually living together. There are some countries that have begun to legislate against marital rape as they refuse to accept marital relationship as a cover for violence in the home. For example: the Government of Cyprus, in its contribution to the Special Rapporteur, reports that its Law on the Prevention of Violence in the Family and Protection of Victims, passed in June 1993, clarifies that "*rape is a rape irrespective of whether it is committed within or outside marriage.*"¹²⁹

LEGAL POSITION OF MARITAL RAPE IN INDIA: -

Wife since ancient period has been considered as the property of her husband. By consenting to a marriage a woman/wife is considered to have given her irrevocable consent to sexual intercourse to the husband, hence, the husband cannot be guilty of rape which he may commit upon his wife. It is, in fact, the general conception of the society that husband cannot be convicted for

128. (1987) 2 NZLR 272 (CA).

129. <http://www.ebc-india.com/lawyer/articles/645.htm> [Visited on 21st September 2008].

committing rape on his wife. In the 17th Century Sir Matthew Hale, C.J, made a statement that “*the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind into the husband, which she cannot retract.*”¹³⁰ From this statement he made it clear that a woman does not have the right sex with her husband. Thus, the husbands has right to sexual access over their wives which is in direct contravention of the principles of human rights and provides husbands with a licence to rape the wives.

India Penal Code, 1860 operates in India as a substantive criminal law of India. This Code was drafted by T.B. Macaulay and his colleague Law Commissioners. It inherits its legacy from the common law rules and sexual mores which prevailed in the United Kingdom during the first half of the 19th Century and criminalizes ‘rape’. Rape has been defined under Section 375 IPC as a coercive non-consensual sexual intercourse with a woman “without her consent” or “against her will.” It states that a man is said to commit ‘rape’ under six circumstances which are as follows: -

- (i) against her consent;
- (ii) without her consent;
- (iii) with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death;
- (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, she is of unsound mind or intoxicated or the administration by him personally or through another of any stupefying or unwholesomeness substance, she is

130. 1 Hale, *History of the Pleas of the Crown* 629 (1778) [Quoted in *Ibid* Note 129].

unable to understand the nature and consequences of that to which she gives consent; and

(vi) with or without her consent, when she is under 16 years.

However, Exception to Section 375 IPC provides that Sexual intercourse by a man with his own wife, the wife not being under 15 years of age is not rape. The Exception is, undeniably, based on the traditional common law definition of rape i.e. rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear or fraud and the term 'unlawful' in this context means sexual intercourse outside the bond of marriage.

There is another provision under the Indian penal Code which prohibits/punishes a man for having sexual intercourse with his wife. Section 376-A, IPC states that whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. This provision was added in the Indian Penal Code, 1860 in 1983. The said provision was amended based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India. The Section punishes a man for raping his wife only under the circumstances that the spouses should be living apart under a decree of separation or under any custom or usage applicable to their caste or community. The section clearly indicates that the husband cannot be prosecuted for rape on his wife even when the husband has intercourse with her against her will. However, this section is silent when the wife is living separately from her husband on the strength of a mutual agreement for the purposes of Section 125 (4) of the Code of Criminal Procedure, 1973 and the husband has committed rape upon her. Section 376-A, IPC is also not clear about the situation wherein the husband commits rape on his wife during the period

when the spouses are living separately for a minimum period of 1st year or more prior to the presentation of a petition for divorce by mutual consent under the Hindu Marriage Act. Again the Section does not clearly states that can a husband be prosecuted for rape upon his wife wherein she is living separately from her husband under circumstances given in Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956.

The Indian Penal Code under Section 376 prescribes punishment for rape. It provides that when a husband is found guilty of matrimonial rape when his wife is below 12 years of age, he shall be punished with imprisonment for a mandatory minimum period of 7 years, as in ordinary cases of rape since no special dispensation is found guilty of rape on his wife who is between 12 to 15 years of age, he can be punished with imprisonment which may extend to 2 years or with fine or with both.

Hence, in India marital rape is recognized in the following two categories: -

- (i) when the wife is under the age of 15 years; and
- (ii) when both are living separately under a decree of a Court.

Under the above circumstances if the husband has sexual intercourse with his wife he commits rape and is punishable by law. Except these circumstances husband cannot be held guilty of committing rape on his wife if he has sexual intercourse without the consent of his wife as the general view is that when a man marries a woman, sex is also a part of the package. The provisions of IPC too makes it clear that it is the right of the husband to have sexual intercourse with his wife as by marrying him she has consented to sex and it is the duty of the wife to have sexual intercourse with her husband even if she is unwilling. Since sexual relations are part of the marriage set-up, a woman cannot refuse to have sex with her husband. Similarly, a husband cannot be said to have raped his wife. Even the Law

Commission refused to recognize marital rape apart from the above two circumstances and instead recommended that the exception should not be deleted since that may amount to excessive interference with the marital relationship.¹³¹

MARITAL RAPE AND THE CONSTITUTION OF INDIA: -

The Constitution reflects the national soul of a country. Constitution of India is one such document which organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the culture and experiences of the country and operates as a vehicle for national progress and unity. Hence, Constitution is not to be construed as a mere law, but as the machinery by which law are made. Laws passed in the country should be in conformity with the principles and ideals enshrined in the Constitution. In relation to marital rape the Indian Penal Code, 1860 provides certain provisions by which the husbands can be prosecuted and punished for committing rape upon their wives under two circumstances as discussed above and apart from these two circumstances husbands cannot be prosecuted or punished as when a man marries a women, sex is also a part of the package. However, in a study that was done in New Delhi it was seen that numerous young, married women are faced with the problem of non-consensual sex. The study shows that between 3-23% of married women are faced with the problem of marital rape. In Uttar Pradesh, one-third of men aged 30 or less and one-fourth of older men reported ever perpetrating non-consensual sex on their wives. Another study in Uttar Pradesh similarly reports that young men are significantly more likely to have recently perpetrated sexual violence on their wives than those married longer. In three states in India (Punjab, Rajasthan and Tamil Nadu), about two-third of

131. The Law Commission of India, 172nd Report on Review of Rape Laws, Para 3.1.2.1, March 2000. [Quoted in Sudhanshu Roy and Iti Jain, *Criminalizing Marital Rape in India: A Constitutional Perspective*, Cr. L. J, 2008, J.81 at 85].

men aged 15-24 and 43% of men 36-50 had perpetrated violence on their wives in the 12 months preceding the study.¹³² Despite this fact the Law Commission refuse to lift the exemptions provided under Section 375 and Section 376-A IPC.

The Constitution of India under Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India. The equality clause enshrined in Article 14 of wide import. It states that equals should not be treated unequally and unequal are not treated equally. In other words, Article 14 does not prohibit legislation from making a classification or giving differential treatment or having a limited goal, provided such classification is reasonable and based on a objective criterion. The Supreme Court in *State of West Bengal vs. Anwar Ali Sarkar*¹³³ has laid down two requisites of a valid classification which are as follows: -

- (i) The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others.
- (ii) The differentia must have a rational relation to the object sought to be achieved by the legislation.

It was, thus, held that any law which makes a classification which is unnecessary or irrelevant to the purposes of the legislation, is deemed to be outside the framework of the Constitution. What is a reasonable classification will however depend upon what the judges think to be reasonable. With respect to the landmark judgment of the above case it is submitted that the doctrine of marital exemption to rape does not satisfy the test of equality as it fails to meet the above mentioned requirements of a valid classification on the following grounds: -

- (a) The doctrine of marital exemption to rape is not founded on a intelligible differentia. Section 375 IPC protects a woman against forceful sexual intercourse

132. <http://www.jhuccp.org> as visited on 19th May, 2005 as Quoted in Kritika Venugopal, *Criminalization of Marital Rape*, Cr. L. J. 2006, J. 307 at 309.

133. AIR 1952 SC 75.

against her will and without her consent. It, thus, criminalizes the offence of rape. Thus, the Section grants women the right of protection from criminal assault on their bodily autonomy and protects their right of choice as autonomous individuals capable of self expression. It regards rape as a crime wherein the choice of an individual is violated. However, Section 375 IPC provides an exemption which does not regard a forceful sexual intercourse in a marriage as rape. Thus, this exemption withdraws the protection granted by Section 375 IPC from a married woman on the basis of her marital status. This differential treatment of a married women and classification between married and unmarried woman it can be assumed that such exemption is based upon the fact that in a marriage the wife is presumed to have given an irrevocable consent to sexual relationship with her husband. However, such assumption is not correct and is not based on any intelligible differentia as provided by the aforesaid judgment. Such assumption is irrational. Like any other person married woman too have their right of choice and bodily autonomy. She too needs protection of the law in their private spheres. Such exemption, thus, takes away or woman's right of choice and indeed deprives her of autonomy and personhood. Thus, the classification made under Section 375 IPC is unnecessary, unintelligible and violates the mandate of Article 14 of the Constitution of India.

(b) The classification made under Section 375 IPC between married and unmarried women has no rational relation with the object of the Section to protect women from criminal assault on their bodily autonomy. Thus, withdrawing the protection of Section 375 IPC from the victim of rape solely on the basis of the fact that she is married is irrelevant for the purposes of the legislation and thus, violated the test of classification under Article 14 of the Constitution of India.

The Constitution of India under Article 21 confers on all persons the fundamental right to life and personal liberty. After the decision of the

Supreme Court in *Maneka Gandhi vs. Union of India*¹³⁴ Article 21 now has become source of all forms of rights aimed at protection of human life and liberty. In *Maneka Gandhi's case* the court gave a new dimension to Article 21. It was held that the right to 'live' is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. The same view was elaborated by the Apex Court in *Francis Coralie vs. Union Territory of Delhi*¹³⁵ wherein it was held that the right to live is not restricted to mere animal existence. It means something more than just physical survival. This was further affirmed by the Supreme Court of India in *Bandhua Mukti Morcha vs. Union of India*.¹³⁶ In the light of the expanding approach of Article 21, the doctrine of marital exemption to rape violates a host of rights of a woman which have emerged from the expression right to life and personal liberty under Article 21 which are as follows: -

(a) Right to live with human dignity: - As discussed above the right to live is not merely confined to physical existence but includes within its ambit the right to live with human dignity i.e. it is not restricted to mere animal existence but to lead a life with human dignity and all that goes along with it i.e. the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human being. Thus, the right to live with human dignity is one of the most inherent qualities of the right to life which recognize the autonomy of an individual

The Supreme Court in a landmark judgment in the case of *Bodhisathwa Gautam vs. Subhra Chakraborty*¹³⁷ held that “*women also have the right to life and liberty; they also have the right to be respected and reacted as*

134. AIR 1978 SC 597.

135. AIR 1981 SC 746.

136. AIR 1984 SC 802.

137. (1996) 1 SCC 490.

equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life.” It was also held that rape is a crime against basic human rights and is violative of the victim’s most cherished of the fundamental right i.e. the right to life contained in Article 21. Rape is not merely an offence under the Indian Penal Code, but it is a crime against the entire society. Rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. In *Chairman, Railway Board vs. Chandrima Das*¹³⁸ it was held by the Court that rape violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. Thus, the exemption provided under Section 375 IPC is also violative of a woman’s right to live with human dignity as it legitimizes the right of the husband to compel his wife into having sexual intercourse against her will and without her consent which goes against the very essence of right to life under Article 21 and is hence unconstitutional. The marital exemption to rape as provided under Section 375 IPC draw a distinction between rape victims on the basis of their marital status which indirectly portrays that married women do not have a right to live with human dignity in a marriage. Thus, the exemption strikes at the fundamental rights of a married woman as provided under Article 21 of the Constitution.

(b) Right to Privacy: - The Indian Constitution does not mention anywhere the right to privacy, however, in a series of cases, the Supreme Court has recognized that a right to privacy is constitutional protected under Article 21 of the Constitution. In *Govind vs. State of Madhya Pradesh*¹³⁹ it was held that right to privacy is a part of Article 21. In *R. Rajagopal vs. State of Tamil Nadu*¹⁴⁰ which is popularly known as “*Auto Shankar case*” the Supreme Court has expressly held

138. AIR 2000 SC 988.

139. AIR 1975 SC 1378.

140. (1994) 6 SCC 632.

that right to privacy under Article 21 includes the right to be let alone. Hence, wherein a woman is raped or any form of forceful sexual intercourse by the husband violates the right to privacy of the wife. Hence, the doctrine of marital exemption to rape violates a married woman's right to privacy by forcing her to enter into a sexual relationship against her wishes. In *State of Maharashtra vs. Madhukar Narayan*¹⁴¹ the Supreme Court held that every woman was entitled to sexual privacy and it is not open to for any or every person to violate her privacy as and when he wished. Thus, even in a marriage there exists a right of privacy to enter into a sexual relationship. Marriage does not give right to the husband to access his wife's body as or whenever he pleases. Thus, the exemption provided under Section 375 IPC violates the right of privacy of a married woman and is unconstitutional.

(c) Right to bodily self-determination: - Like the right to privacy, the Constitution does not expressly recognize the right of bodily self-determination, although such right also comes within the framework of Article 21 of the Constitution. The right to self-determination means that an individual is the ultimate decision maker in matters associated with his/her body or well being. In this light the consent to sexual intercourse is one of the most ultimate and personal choices of a person. Women too have this personal choice. It is a form of self-expression and self-determination. Any law which takes away the right of expressing and revoking such consent deprives a person of this Constitutional right protected under the legal framework of right to life and personal liberty under Article 21. Thus, the marital exemption deprives a married woman her right to bodily self-determination in respect of one of the most intimate and personal

141. AIR 1991 SC 207.

choices which include the consent to sexual intercourse. Hence, the marital exemption as provided under Section 375 IPC is unconstitutional.

(d) Right to good health: - The right to good health is recognized as a part of right to life under Article 21 of the Constitution. In a historic judgment in *Consumer Education and Research Centre vs. Union of India*¹⁴² the Supreme Court held that the right to health is a fundamental right under Article 21 of the Constitution and it is essential for making the life of a person meaningful and purposeful with dignity of person. Again the Supreme Court in *State of Punjab vs. Mohinder Singh Chawla*¹⁴³ held that right to health is an integral part of right to life. However, the marital exemption doctrine of rape violates the right of good health of a victim as it causes serious psychological as well as physical harm. The Supreme Court in *Bodhisattwa Gautam vs. Subhra Chakraborty*¹⁴⁴ held that rape destroys the psychology of a woman and pushes her into a deep emotional crisis. The right to good health of a woman is also violated in a marriage wherein the wife is subjected to forceful sexual intercourse in a marriage which may lead to the communication of a Sexually Transmitted Disease (STD). Thus, the marital exemption doctrine of rape under Section 375 IPC violates the Constitutional guarantee of right to good health as provided under Article 21 of the Constitution, and hence such provision is unconstitutional.

From the above argument it can be submitted that the marital exemption doctrine of rape as provided under Section 375 IPC is violative of the doctrine of classification under Article 14 and various rights emanating from Article 21. It also does not pass the test of a “*just, fair and reasonable law.*” It is, thus, unconstitutional.

142. (1995) 3 SCC 42.

143. AIR 1997 SC 1225.

144. (1996) 1 SCC 490.

CRIMINALISATION OF MARITAL RAPE: SOME ARGUMENTS: -

The above discussion regarding the marital exemption doctrine of rape puts emphasis upon the criminalization of marital rape. However, there are many people who are against the criminalization of rape and have advanced various arguments for not criminalizing marital rape. The argument by the people against its criminalization is attacked by some constructive arguments which support the cause of the actual criminalization of marital rape and they are as follows: -

1. One of the most common arguments put against marital rape is that in a marriage the wife is presumed to have given an irrevocable consent to sexual relationship with her husband. This justification is based on Mathew Hale's notion that marriage implies permanent consent to sex. It means that by marrying a woman man has right over her body and by criminalizing marital rape, it may lead to the break up of homes. This argument is fatally flawed as in a marriage woman do not consent to be assaulted by their husband. It is unreasonable to assume that women voluntary consent to being raped by their husband simply because they have entered into a marriage. This is further supported in an unanimous decision of the House of Lords in *R vs. R*¹⁴⁵ wherein the Court held that – “.....*marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale's position involves that by a marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of her health or how she happens to be feeling at that time.....A wife is not obliged to obey her husband in all things nor suffer excessive sexual demands on the part of her husband.*” As regards to the question of breaking up marriages the situation wherein the

145. (1991) 4 All ER 481 at 484.

wife is facing marital rape how is it possible for her to continue to live in such marriage wherein she is facing the physical and mental trauma subjected by her husband where he forces himself upon her. A marriage where the husband forces himself upon his wife is as good as finished.

2. It is argument that by criminalizing marital rape a husband can be prosecuted for raping his wife which will violate the sanctity of marriage and obstruct marital privacy. It is propounded that a line has to be drawn between public and private life and the executive and the judiciary cannot enter the four walls of a domestic household.

This argument has been criticized on the ground that although marital relationship between husband and wife is private matter but it is impossible to extend marital privacy of acts which are non consensual. The proponents argue that marriage is a sacrament and its integrity should be protected at all costs. But wherein the husband forces his wife into sexual intercourse against her wishes the sanctity of marriage becomes iniquitous. Thus, it is hard to imagine that charging or prosecuting husband for raping his wife is more disruptive of a marriage than the act of violence by the husband.

With regards to the argument that the criminal law should not include into matters within a marriage, such argument has overlooked the fact that in India, criminal law does intrude into family affairs under Section 498-A IPC wherein husband and his relatives are liable for prosecution on the grounds of cruelty. This argument indicates the double standard of the Indian legal system only in context of rape laws which is unjust and unfair towards married women.

3. The proponents against the criminalization of marital rape argue that marital rape is less serious and traumatic than non-marital rape as the offender is known to the victim and it is very uncommon offence. However, this argument is also

criticized on the basis that the fact that the women are subjected to non-consensual sexual intercourse is enough to prove the serious nature of the crime. In fact, marital rape is more a serious offence than the non-marital rape because here the victim is subjected to violence by someone whom she trusts and relies upon. On being raped by such person she is traumatized to an extent that she is unable to trust him or live with him. The non-marital rape is an offence which the victim faces once but in marital rape a woman is subjected to violence everyday as she lives with the offender. Thus, to exclude instances of non-consensual sex when the partners are married from the scope of Section 375 IPC is arbitrary and unfair towards victims of rape in marriage.

The offence is uncommon which is argued by the proponent not in favour of criminalization of marital rape has also been criticized as it is highly under reported crime because of social stigma attached to it that a woman has regular sexual relationship with her husband and a few instances of non-consensual sexual intercourse are not as serious and traumatic as a rape by a complete stranger. Moreover, the wives are made to believe that it is their duty to provide husbands with sex otherwise, the husbands would look in different avenues and commit adultery.

4. Another argument which puts justification to continue with the marital rape exemption is that an offence like marital rape is very tough to prove and it may also lead to false charges leveled against the husband. However, it is argued that just because the offence of marital rape is difficult to prove should not deter the policy maker as only after passing a law we will be able to know the difficulty in prosecuting for rape. The first step should be to criminalize marital rape than only the question regarding lack of proof or consent will arise. Moreover, even just passing a law would definitely act as a deterrent to husbands and would not give

them a free rein to do as they please with their wives. The mere reason that the crime is difficult to prove gives no reason to not to pass a law.

Regarding the fabrication of false charges against husbands by the wives it is argued that such a reason for not criminalizing marital rape is baseless on the ground that although women are considered to be vindictive liars as a result of which the disgruntled wives may try to prosecute their husbands on false charges. But can we guarantee that there is no chance of fabricating false charges by unmarried women, yet they are protected by the law. Moreover, in India marriage is a sacred institution and women will voice their rights only if they are being violated. Hence, the policy maker should not deter in criminalizing marital rape for the fear of stray cases of fraud.

5. There has been an argument that passing a law criminalizing marital rape would lead to hurting the sentiments of various religious sections. However, it has to be noted that every religion talks of upholding the dignity of a woman. Recognizing marital rape as a offence will only further the objective of religions which speaks of upholding the dignity of woman. Moreover, religious considerations have never been a deterrent in laws being passed otherwise laws against sati; child marriage etc would have never been passed.

MARITAL RAPE AND THE ROLE OF JUDICIARY: -

With regards to the law relating to marital rape there has been massive legislative and judicial activity around the world for the past three decades. In the landmark judgment of *People vs. Libereta*¹⁴⁶ the New York State's highest Court abolished the marital rape exemption. It observed that there was "*no rational basis for distinguishing between marital rape and non-marital rape. The various rationales which have been asserted in defense of the exemption are either*

146. 474 N.E. 2d. 567 (N.Y. 1984).

based upon archaic notions... or are unable to withstand even the slightest scrutiny.” Further the Court observed that “*rape is not simply a sexual act to which one party does not consent. Rather it is degrading violent act which violates the bodily integrity of the victim and frequently causes severe, long lasting physical and psychic harm... A married woman has the same right to control her own body as does an unmarried woman.*” The Court, thus, went on to hold that marital exemptions present in the New York Statutes were unconstitutional. By striking down the exemption of marital rape the court did not create a new crime but expanded the scope of the criminal statute.

Similarly the House of Lords in *R vs. R*¹⁴⁷ while recognizing the offence of marital rape observed that husbands impunity as expounded by Hale CJ can no longer exist. The Court held that “*this is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is only duty having reached that conclusion to act upon it.*” Australia,¹⁴⁸ Canada,¹⁴⁹ New Zealand,¹⁵⁰ Ireland¹⁵¹ and Scotland¹⁵² have abolished the marital rape exemptions from their penal statutes. The Supreme Court of Nepal recently declared that husband who forces their wives to have sex can be charged with rape.¹⁵³ From these changes it is clear that in various countries around the world a violent crime as rape, whether inside or outside marriage should be regarded as a crime. Unfortunately, India has been a stranger to the

147. (1991) 1 All ER 747.

148. The exemption to marital rape in Australia came to an end by the decision of the High Court of Australia in *The Queen vs. L*, 66 ALR 36 (Austl 1991).

149. Marital rape was abolished in Canada, 1983.

150. Marital rape was abolished in New Zealand in 1985 when Section 128 was enacted to the Crimes Act, 1961.

151. The change in Irish law was brought by two highly publicized cases in early 1990's.

152. The marital rape exemption was abolished by the decision of the High Court of Justiciary in *S vs. H.M. Advocate*, 1989 SLT 469.

153. <http://www.isiswomen.org/womenet/lists/we/archive/msg0111.htm> [Visited on 7th January 2009].

event. The Indian judiciary in number of cases have laid down that rape is the most hatred crime against the basic human right and violative of the woman's life. Yet in the context of the marital rape the judiciary has turned a blind eye. One of the reason is that the Indian judiciary is highly influenced by the principle of strict construction of the Indian Penal Code. The legislature and the law commission too refuse to recognize the offence of marital rape under the pretext of not interfering with the family life. The Kerala High Court in *Sree Kumar vs. Pearly Karum*¹⁵⁴ wherein there was a dispute on divorce which was going on between the husband and wife and parties agreed to continue to reside together. The wife stayed with the husband for two days during which she alleged that she was subjected to sexual intercourse by her husband against her will and without her consent. It was held that because wife was not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent, offence under Section 376-A will not be attracted. Hence, husband was not guilty of having raped his wife. Thus, the Indian judiciary is of view that rape within marriage is not possible. Recently in *Sakshi vs. Union of India*¹⁵⁵ SAKSHI an organization which is involved in issues on women and children, filed a case under Article 32, Constitution of India, by way of PIL asking for directions concerning the definition of rape in the IPC. It requested to include all forms of penetration as sexual intercourse contained in Section 375 IPC. However, it was held that the definition of rape contained in Section 375 IPC cannot be enlarged to include all forms of penetration. Thus, it can be said that law is the reflection of the patriarchal mindset wherein women has no sexual autonomy. She has no right over her bodily integrity. It is pity that wherein all over the world the legislature

154. MANU/RE/0660/1998.

155. AIR 2004 SC 3566.

and the judiciary are criminalizing marital rape, the Indian legislature and the judiciary still view it from the old mind set which still believes that the husband cannot commit rape on his wife.

Changes proposed in the Criminal Law (Amendment) Act, 2006 with respect to certain provisions in IPC, Code of Criminal Procedure and Indian Evidence Act:-

The Supreme Court in *Sakshi vs. Union of India*¹⁵⁶ recognized the inadequacies in the law relating to rape and had suggested that the legislature should bring about the required changes. The Law Commission thus examined the entire law relating to rape and sexual assault in Indian Penal Code and suggested a complete overhauling of the law. It felt the need for a new law on sexual assault as the existing law does not define and reflect the various kinds of sexual assault which women are subjected to in our country. On the basis of 172nd Report of the Law Commission a Bill was drafted to amend the laws relating to sexual assault in Section 375, 376, 354 and 509 of the Indian Penal Code and the relevant Sections of the Code of Criminal Procedure 1973 and the Indian Evidence Act, 1872. This Bill is called the Criminal Law Amendment Act, 2006. However it is yet to be enforced. Following are the changes prescribed under the said Act: -

I. Changes in the Indian Penal Code, 1860:- The Amendment Act, 2008 prescribed certain changes in the Indian Penal Code by substitution the existing Sections. Firstly, it states that Section 375 of the IPC be substituted by the following: -

“Section 375. Sexual Assault: Sexual assault means-

1. AIR 2004 SC 356.

- (a) the introduction (to any extent) by a man of his penis, into the vagina (which term shall include the labia majora), the anus and urethra or mouth of any woman or child;*
- (b) the introduction to any extent by a man of an object or a part of the body (other than the penis) into the vagina (which term shall include the labia majora) or anus or urethra of a woman;*
- (c) the introduction to any extent by a person of an object or a part of the body (other than the penis) into the vagina (which term shall include the labia majora) or anus or urethra of a child.*
- (d) Manipulating any part of the body of a child so as to cause penetration of the vagina (which term shall include labia majora) anus or the urethra of the offender by any part of the child's body;*

In circumstances falling under any of the six following descriptions:

Firstly – against the complainant's will;

Secondly – without the complainant's consent;

Thirdly – with the complainant's consent when such consent has been obtained by putting her or any person in whom the complainant is interested, in fear of death or hurt;

Fourthly – with the complainant's consent, when the man knows that he is not the husband of such complainant and that the complainant's consent is given because the complainant believes that the offender is another man to whom the complainant is or believes herself to be lawfully married;

Fifthly – with the consent of the complainant, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the complainant is unable to

understand the nature and consequences of that to which such complainant gives consent;

Sixthly – with or without the complainant’s consent, when such complainant is under eighteen years of age.

Provided that consent shall be valid defense if the complainant is between sixteen years and eighteen years of age and the accused person is not more than five years older.

Explanation: Consent means the unequivocal voluntary agreement by a person to engage in the sexual activity in question.”

It also provides that recasting of Section 376 IPC should be done. However, only the relevant portions applicable for the purpose of criminalizing marital rape and punishing sexual assault are mentioned below: -

“Section 376. Punishment for Sexual Assault: 1(a) whoever, except in the cases provided for by sub-section (2) commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to 10 years and shall also be liable to fine.(b) if the sexual assault is committed by a person in a position of trust or authority towards the complainant or by a near relative of the complainant, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine....

2(f) commits sexual assault on a person when such person is under 16 years of age.....

2(j) while committing sexual assault causes grievous bodily harm, maims, disfigures or endangers the life of a woman or minor.

2(k) commits persistent sexual assault

Shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.”

The Act contains insertion of a new section i.e. Section 376 D in the IPC which provides provision with respect to unlawful sexual contact and punishment thereto in the following words: -

“Section 376D. Unlawful Sexual Contact –(1) Any man who with a sexual purpose touches, directly or indirectly, with a part of the body or with an object, any part of the body of a woman, without the consent of such woman, shall be punished with simple imprisonment for a term which may extend to three years or with fine or with both.

Provided that, if the man is related to the woman, he shall be punished with imprisonment of either description for a term which may extend to 7 years and with fine.

- 2 (a) *Whoever, with a sexual purpose, touches, directly or indirectly, with a part of the body or with an object any part of the body of a minor, or*
- (b) *Whoever, with a sexual purpose, invites, counsels or incites a minor to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites or the body of the minor,*

Shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine.

3. *Whoever being in a position of trust or authority towards a minor or being a person with whom the minor is in a relationship of dependency,*
- (a) *touches, directly or indirectly, with a sexual purpose, with a part of the body or with an object, any part of the body of such minor or*

(b) with a sexual purpose, invites, counsels or incites a minor to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites or the body of the minor

Shall be punished with the imprisonment of either description which may extend to seven years and shall also be liable to fine.”

The amendment Bill suggests to delete Section 354 IPC and Section 377 IPC. A new Section 377 shall be inserted which provides the following:-

“Section 377. Any adult person who has sexual intercourse with another adult person against the will and without the consent of the other adult person shall be punishable by imprisonment of either description up to seven years and with fine.

Explanation 1: Penetration is necessary to constitute an offence under this section.

Explanation 2: Penetration of the anus or mouth by the penis or penetration by an object or part of the body into the anus or vagina is necessary to constitute the sexual intercourse necessary for the offence described in this section.

Explanation 3: No consent is obtained for the purpose of the above section if it has been obtained by coercion or under undue influence or if the person giving the consent suffers from intoxication or unsoundness of mind or mistake or to the identity of the offender.”

The amendment Bill also proposed to amend Section 509 IPC in the following words: -

“Section 509. Word, gesture or act with a sexual purpose or with the intention to insult a woman: Whoever, with a sexual purpose or with the intention to insult any woman, utters any word, makes any sound or gesture, or exhibits any object or a part of the body intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the

privacy of such woman, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.”

Apart from this new Sections 509A and 509B is added in the IPC and they cover the following offence and provide punishments for the same:

“Section 509A. (i) Whoever, with a sexual purpose utters any word, makes any sound or gesture or exhibit any object or a part of the body intending that such word or sound shall be heard or that such gesture or object shall be seen by a minor, or

(ii) Whoever makes a minor witness any sexual activity, Shall be punished with an imprisonment of either description for a term which may extend to 5 years but shall not be less than 3 years.

Explanation 1: *“Minor” for the purpose of this section will be any person under the age of sixteen years.*

Section 509B. Any person who stalks a woman with the intention to cause, (a) serious harm or injury to that woman or a third person or (b) apprehension or fear of serious harm or injury to that woman or to a third person shall be punished with imprisonment of either description which may extend to 7 years or with fine or with both.

Explanation 1: *For the purpose of this section a person shall be taken to stalk a woman if, on at least 3 occasions, that person*

(a) follows or approaches the woman or

(b) loiters near, watches, approaches or enters a place where the woman resides, works or visits or

(c) keeps the woman under surveillance or

(d) interferes with the property in possession of the woman or

- (e) gives or sends offensive material to the woman or leaves offensive material where it is likely to be found by, given to or brought to the attention of the woman or*
- (f) acts covertly in a manner that could reasonably be expected to arouse apprehension or fear in the woman or*
- (g) Engages in conduct amounting to intimidation, or an offence under Section 509.*

Explanation 2: *“harm” means physical harm as well as mental harm.”*

II. Changes in the Code of Criminal Procedure: -The Amendment Bill also recommends changes to be brought in the Code of Criminal Procedure, 1973 by inserting two sub-sections in Section 160 i.e. *“(3) Where under this chapter, the statement of a female is to be recorded either as first information of an offence or in the course of an investigation into an offence and she is person against whom an offence under sections, 375, 376, 376A, 376B, 376C,376D, 377 or 509 of the India Penal Code is alleged to have been committed or attempted, the statement shall be recorded by a female police officer and in case a female police officer is not available, by a female government servant available in the vicinity and in case a female government servant is also not available, by a female authorized by an Organisation interested in the welfare of women or children.*

(4) Where in any case none of the alternatives mentioned in sub-section (3) can be followed for the reason that no female police officer or female government servant or a female authorised by an organisation interested in the welfare of women and children is available, the officer in charge of the police station shall, after recording the reasons in writing, proceed with the recording of the statement of such female victim in the presence of a relative of the victim.”

Modification to the proviso to sub-section (1) of section 160 is also recommended by raising the age from 15 years to 16 years. In addition to the modification, the said provision should be substituted in the following words:

“Provided that no male person under the age of 16 years or woman shall be required to attend at any place other than the place in which such male person or woman resides. While recording the statement, a relative or a friend or a social worker of the choice of the person whose statement is being recorded shall be allowed to remain present.”

Insertion of a new section is recommended i.e. Section 164 A which will be inserted in the Code of Criminal Procedure. It provides the following:

“Section 164A.(1) Where, during the stage when any offence under section 376, Section 376A, section 376B, section 376D, is under investigation and it is proposed to get the victim examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of the complainant or of some person competent to give such consent on his/her behalf. In all cases, the complainant should be sent for such examination without any delay.

Provided that if the complainant happens to be a female, the medical examination shall be conducted by a female medical officer, as far as possible.

(2) The registered medical practitioner to whom the complainant is forwarded shall without delay examine the person and prepare a report specifically recording the result of his/her examination and giving the following details:

- (i) The name and address of the complainant and the person by whom he/she was brought,*
- (ii) the age of the complainant,*
- (iii) marks of injuries, if any, on the person of the complainant,*

- (iv) *general mental condition of the complainant and*
- (v) *Other material particulars, in reasonable detail.*
- (3) *The report shall state precisely the reasons for each conclusion arrived at.*
- (4) *The report shall specifically record that the consent of the complainant or of some person competent to give such consent on his/her behalf to such examination had been obtained.*
- (5) *The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.*
- (6) *Nothing in this section shall be construed as rendering lawful any examination without the consent of the complainant or any person competent to give such consent on his/her behalf.”*

The insertion of new sections 53A in the Code of Criminal Procedure is also recommended in the following words:-

“Section 53A.(1) When a person accused of any of the offences under sections 376, 376A, 376B, 376C, 376D or 377 or of an attempt to commit any of the said offences, is arrested and an examination of his/her person is to be made under this section, he/she shall be sent without delay to the registered medical practitioner by whom he/she is to be examined.

(2) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:

- (i) the name and address of the accused and the person by whom he was brought,*
- (ii) the age of the accused,*

- (iii) marks of injury, if any, on the person of the accused, and
(iv) Other material particulars in reasonable detail.
- (3) The report shall state precisely the reasons for each conclusion arrived at.
- (4) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.”

Consequent to the proposed amendments in the IPC, the existing entries in respect of section 376 C to 376 D, 377 and 509 will have to be substituted in the First Schedule to the Code of Criminal Procedure 1973. Similarly, consequent upon proposed amendment of Section 376 of IPC, sub-section (6) of Section 198 Cr. P.C shall be amended in the following manner: -

“The words “sexual intercourse” shall be substituted by the words “sexual assault” and the word “fifteen” shall be substituted by the word “sixteen”.”

Apart from this a new sub-section shall be added in Section 164 of the Cr. P. C. which is as follows:-

“(b) Any statement made under sub section (a) by a young person under the age of eighteen years who is a victim of sexual assault under Section 375, 376 or Section 509 shall, except in exceptional circumstances be video taped.”

A proviso to the following effect shall be added under Section 273 above the Explanation clause therein-

“Provided that where the evidence of a person below eighteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court shall, take appropriate measures to ensure that such person is not confronted by the accused. These measures may include video taping the evidence of the complainant in a place to be decided by the Court, or placing a

screen between the complainant and the accused and others. Provided further that the cross examination of a young person below eighteen years shall be carried out by the court on questions put to it by the accused or his counsel.”

One of the most vital recommendations made in the amendment Bill is amendment in Section 309 Cr. P. C. which provides the following: -

“Section 309 Cr.P.C – sub-section (1) of section 309 a proviso to be added that provided that where the inquiry or the trial relates to an offence under section 376 to 376 E (both inclusive) of the IPC the judgment shall, as far as possible be delivered within a period of 6 months from the date of commencement of the trial.”

III. Changes in the Indian Evidence Act: - The Law Commission also recommended changes in the Indian Evidence Act, 1872. With respect to Section 45 of the Evidence Act it shall be amended to add a clause (d) under illustrations as under:-

“Where the question is whether a child who is unable to talk of sexual abuse has been subjected to sexual abuse as defined in S.375 IPC or S. 376 IPC or elsewhere the opinion of an expert that the symptoms and behaviour of the child are such that they show that the child has suffered from such abuse are relevant.”

The recommendations are made for the modification of Section 114A of the said Act which is as follows: -

“Section 114A: Presumption as to absence of consent in certain prosecutions for sexual assault. – In a prosecution for sexual assault under (a) or clause (b) or clause(c) or clause (d) or clause (e) or clause (g) or clause (h) (i) or (j) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted

and such other person states in his/her evidence before the court that he/she did not consent, the court shall presume that he/she did not consent.

Explanation: "Sexual intercourse" in this section and sections 376A to 376C shall mean any of the acts mentioned in clause (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

It also recommends that after section 53, the following Section be inserted:-

"Section 53A. In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

It is also recommended that clause 4 in section 146 should be added and should provide the following:-

"(4) In a prosecution for an offence under section 376, 376A, 376B, 376C or 376D or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his/her general immoral character, or as to his/her previous sexual experience with any person for proving such consent or the quality of consent."

A new Section will be inserted in the Indian Evidence Act to make the video taped or other statement of the minor complainant of sexual assault admissible in evidence as follows: -

"In any trial or inquiry related to the sexual assault of a minor under Section 375, 376 and 509 of the Indian Penal Code, the video taped statement of the minor made to a Magistrate is admissible in evidence if the complainant while testifying adopts the contents of the video taping."

5. WIFE BATTERING: -

Women face unique problems in our society and majority of these heinous crimes against women are committed by people who are respected members of the society. These crimes committed against women cannot be proved under the existing Indian Evidence Act as the crimes alleged to be committed against them are not considered criminal acts by the society at large. Wife beating/battering is one such crime. Wife battering is not something new to our society as the history is evident that it occurred in various ages. Wife beating was present even in the primitive societies. In fact, in primitive India women were treated as chattels. Even the eminent scholars like Saint Tulsi Das declared in his famous epic "*Ram Charit Manas*" that "*Dhol ganwar shoodra pashu naree sakal taadana ke adhikaaree.*" According to him the women deserves beating or punishment like an animal. Wife battering is not common to any particular class, religion or community, it exists in every class, religion and community. No matter to what class, religion or community a woman belongs she is subjected to this heinous crime. Although wife battering has become the most appalling crime yet it has emerged as one of the least recognized crime. In fact, it is a crime which is not even reported. Due to this the exact statistics of wife battering is not known.

REASONS FOR NOT REPORTING THE CRIME OF WIFE BATTERING/BEATING:-S

The women who are subjected to the crime of wife beating/battering do not report this crime due to the following reasons: -

(i) **Absence of Specific law:** - One of the main reasons is absence of any particular law under which woman can bring an action against her husband for this crime. Although under the criminal justice system there are provisions under

which the crime relating to wife battering can be brought, however, the criminal justice system is lenient at this point as the husband is immune from being sued by his wife for assault and battery. Even if the complaint is made the police fail to make arrests; the prosecutors fail to bring such cases to trial and in most of the cases a victim is denied crime compensation for injuries if she is related to the offender. Even the senior counsel and prominent women's rights activist Indira Jaisingh is convinced that the reason for the reluctance of women to access criminal justice system is lack of adequate remedies for the victims. The convoluted procedures and the limited benefits that the criminal justice system offers to women are the major hurdles that prevent women from taking action against perpetrators of domestic violence.¹⁵⁷

(ii) Psychological factor: - In our society role of husband and wife has been prescribed. From time immemorial women are treated as chattels and property of her husband. Wife, thus, has obligation to obey her husband. Due to this gender role played by both the husbands beat their wife with utter impunity as they are convinced that wives will accept the beating as their fate and will not disclose it to anyone. Even if she protest against it or disclose it, no one will interfere i.e. neither the neighbours nor the relatives as it is considered as private matter.

(iii) General mentality of the Society: - Generally the crime in relation to wife battering is not a crime which is openly discussed in the society. In fact wherein a woman is a victim of general violence like wherein a man assaults a woman on the street, it will be taken seriously. The police and the people around and afterwards the Courts would promptly intervene. But wherein a husband assaults his wife the people treat it as a family matter. Even if there are witnesses of wife beating the

157. Shobha Saxena, *Wife Beating – Need for effective and Realistic Legislation*, Cr. L. J. 2000 J 94 at 95.

neighbours, relatives and friends leave apart informing or reporting the matter to the police no one comes forward to rescue such women as the general mentality of the society is that it is the private matter between the husband and his wife which will be solved in no time and any intervention by the neighbours, relatives and friends would further complicate the issue and create problems. It is also believed that even if they intervene both the husband and wife will patch up and those who intervene will be the odd man out. As a result of this the parties who intervene will have to face the wrath of the husband and spoil their good relationship.

(iv) Role of the Police in such cases: - In the case of wife battering even when informed the police does not intervene as it will not earn them any laurels and will only be a waste of efforts because even if the wife complains initially for battering but there are large number of cases in police records where the wives have withdrawn complaints after the police started the investigations and found positive evidence against the husbands. There are several cases wherein wives initially make formal complaint but later on not only withdrawn the complaint but have also given an application asserting that the charges were false and she has no grievance against the husband. Moreover, even if a case is made against the husband the leniency by the criminal justice system makes the policemen lenient for the future cases too as most of the time the husband is acquitted or the charge is dismissed for want of evidence and even if convicted receives probation or suspended sentences. Rarely, the husbands get punishments. All these circumstances affect the policemen to play an active role in case of wife beating.

(v) Lack of support from the family members and others: - In case of wife battering even if the woman initiates the case against her husband, she literally receives any support from her relatives, leave apart from her in-laws even her parents don't support her. Even if the family members, relatives and sometimes

N.G.O's provide initial support to the victim of wife battering, with the passing period she is left alone with very few friends and well wishers. Ultimately she is left to fend for herself and continue to live with the abuser and relive the tragedy that has befallen her. Hence, women hardly report the matter.

(vi) Religious and Cultural Belief: - Religion and cultural belief is one of the reasons due to which woman faces wife battering at the hands of her husband. The society in India is based upon patriarchal structure. Due to this the cultural heritage makes most of the woman very tolerant and submissive. Thus, when women face this criminal act they do not initiate a case instead they blame themselves and their fate for their sorry state and hope that everything will become all right. Religion is one of the major source of law in India and it is also one of the major agent in the oppression of woman and inequality in the society. All religion in the World has restricted the rights of women. It prescribes unequal moral obligations between husband and wife. There are number of texts of various religions which emphasize the subordination of women in India. This incorporates the idea of male dominance in all spheres of life and makes the woman feel that they are not independent and self-determining persons. Thus, in our culture women are taught to be passive, dependent and submissive since her childhood and be economically and emotionally dependent upon them even if the husband behaves in harsh and brutal manner. These prove that women are prepared since childhood to face coercion, sexual assaults and violence both within and outside the family circle.

(vii) Lack of education and economic inequality: - Although the incidents of wife battering cut across all social barriers of caste, class, religion etc and women from every section of the society are exposed to such form of crime, the main reason for such crime in India is the higher rates of illiteracy and unemployment

among women. It is very evident from various surveys that instead of immense career options in medicine, science, technology, business and other fields, still large number of women in India pursue traditional subjects in the colleges and universities. They are encouraged by all to develop their skills in household chores no matter what her field of employment is. Since our society wants women to be dependent upon her husband, there is economic inequality between men and women which contributes towards this crime. In India majority of women is dependent upon their husbands for financial support as she lacks education due to which she cannot avail any job. She is economically inactive. This has placed them at the whim of their husbands who might not look after their economic needs if she complains of any marital conflicts. She does not have her own residence which puts her in disadvantage to bring a case against her husband as she cannot leave her matrimonial home due to financial dependence upon her husband or her parent's family. Thus, women do not report such crimes.

(viii) Criminal Justice System and delayed judgment: - In India although there are various legislation which protects the married women, yet the women does not initiate a case against her husband as she believes that the criminal justice system will not help her condition. Although our justice system is impartial but due to lack of education and unemployment (financial dependence upon her husband) the battered wives have inadequate resources to have the services of the private lawyers. Along with this the corruption of the police and Courts, the huge expenses of the Courts as well as the inadequate poor legal aid programmes have made the justice system inaccessible to illiterate and dependent women. Even if she initiates or has means to proceed with her allegation due to procedural delays and innumerable adjournments of the case, the witnesses who are willing and enthusiastic are driven away. This is also one of the reasons that the husbands

often dupe their wife by apologizing upon their deeds and promise to conduct good behaviour. Trusting the words of their husbands wives often withdraw the case. Wherein the women are reluctant to withdraw the case the husband create pressures on the women by threatening her or using muscle power to withdraw the case or not to contest it in the court. Moreover, the cases relating to wife beating are regarded as problems of mutual adjustment or just a passing phase of marital relations which will solve by itself with time. In fact in the empirical survey of the prevailing social realities 109 judges were questioned out of which 99% said that they would not opt for legal redress in a case of domestic violence involving their own daughter or other female relatives.¹⁵⁸ In most of the cases of wife beating the criminal justice system is not invoked because the victim fears that the Court testimony will expose her personal life and she will be blamed for another crime simply for the purpose of harassment or to make a good bargain.¹⁵⁹

WIFE BEATING AND LAWS AGAINST IT – ITS EFFECTIVENESS:

Women hold an inferior status in the society irrespective of any cast, class, religion or even a nation whether it is developed, developing or third world country. Since primitive period she is seen as the property which a man possesses and is treated as chattels. With the advancement of civilization the thoughts of man are changing as a result of which legal protection is granted to women against various atrocities which the woman faces in the society. The ancient scriptures in India places women in high pedestals and compare her to Goddesses who should be worshiped. It even contains that the society which respects women will God. Even then all sorts of exploitation, harassment, cruelties

158. Shobha Saxena, *Wife Beating – Need for effective and realistic legislation*, Cr. L. J. 2000 J 94 at 95.

159. Subhash Chandra Singh, *Protection of Battered wives: A Searching look for some alternative ways*, Cr. L. J. 1996 J 129 at 130.

and other atrocities are committed on women in our society. One such crime is wife beating which is present in our society since primitive period.

The Indian legal system treats the women as a special group and protects them from various atrocities. The Constitution of India promotes and provides special provision in the interest of women. The Constitution provides that “*The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*”¹⁶⁰ It also provides that “*Nothing in this Article shall prevent the State from making any special provision for women and children.*”¹⁶¹ Thus, Article 15 (1) directs the State not to discriminate against a citizen on grounds only of religion race, case, sex or place of birth or any of them. Women and children require special treatment on account of their very nature. Article 15 (3), thus, empowers the State to make special provisions to ameliorate their special condition and provide political, economic and social justice. As a result of this the State in the field of Criminal law along with other s has granted protection to the women which have been upheld by the Courts too. The Constitution also provides that “*No person shall be deprived of his life or personal liberty except according to procedure established by law.*”¹⁶²

Despite the constitutional protection and various legislature woman suffers at the hands of their husbands. However, in the last few decades attempts have been made to improve the status of women in the family and society. With a view to give legal protection to battered wives the Criminal Law (Second Amendment) Act, 1983 introduced Section 498-A to the Indian Penal Code. The said provision defines the term “cruelty” and prescribes punishment to the husband and his relatives if they subject women to cruelty. This provision seeks to curb atrocities on women including those arising out of dowry demands.

160. *The Constitution of India*, Article 15(1).

161. *Ibid*, Article 15(3).

162. *Ibid*, Article 21.

The Criminal Law (Second Amendment) Act, 1983 also brought a significant change in the traditional presumption theory of proof, to give a better protection to battered women. The said Amendment Act inserted Section 113A to the Indian Evidence Act so that the Court could draw an inference of abetment of suicide under Section 306 IPC. The Criminal Law (Second Amendment) Act, 1983 also amended Section 174 of the Criminal Procedure Code which makes a postmortem compulsory on the body of a woman who died within seven years of her marriage.¹⁶³

Keeping in view the principles of the Constitution, the legislatures enacted new laws and made amendments to the existing ones. Still the intra-family violence is rising which depicts that the laws and the criminal justice system is not effective in breaking the cycle of violence against women. The present provisions are not sufficient enough to punish the husband who batters his wife. Section 498-A IPC does not attract every form of harassment or every form of cruelty as in order to prosecute husband it must be established that beating and harassment was with a view to force the wife to commit suicide or to fulfill illegal demands of the husbands and in-laws. A complaint under Section 498-A IPC will only succeed if there is an "unlawful demand" by the husband for some money or valuables. Similarly, the presumption under Section 113A of the Indian Evidence Act as to the abetment of suicide arises only where the woman has been subjected to cruelty by her husband or his relatives just before she attempted to commit suicide. Again Section 174 (3), Criminal Procedure Code is attracted wherein women dies within seven years of her marriage. Wife battering is such a crime against women wherein there can be no demand for dowry by the husband and in-laws, yet the woman is subjected to it on daily basis. In fact, she is beaten up without any specific reason by her husband. Such torture at the hands of the most

163. sub-section 3 to Section 174, Cr. P. C was added.

trusted person may drive her to commit suicide which can happen even after seven years of marriage and sometimes beating is so severe that may even cause death which may occur at any phase of her marriage. Under these circumstances the provisions of Indian Penal Code, Indian Evidence Act and Criminal Procedure Code will remain ineffective as the crime will not attract the said provisions. Thus, even if cases are brought forward the husbands are either acquitted or had the charge dismissed for want of evidence. Even if convicted receives probation or suspended sentences. Moreover, wife beating is not seen as a crime. It is seen as a private matter between husband and wife which will come to an end at some point. Even the wife feels so. Any complaint against it may cause permanent disharmony between the law and eventually lead to divorce. Hence, there is a need to recognize wife battering as a specific crime by differentiating it with cruelty as defined under Section 498-A of the Indian Penal Code.

6. CHILD SEXUAL ABUSE IN THE FAMILY: -

Human beings are rational beings. They are born equal in dignity and right. By virtue of their being human they possess certain basic rights which are inalienable. Such rights or claims are known as human rights. In today's world these rights are violated in various ways and in different directions. The principle of equality as envisaged by the International Covenants/Conventions and various constitutions of the world are grossly violated by way of social-political exploitation by the superior of the inferior. Since the rise of the civilization the most vulnerable group in our society i.e. children face various forms of exploitations and discrimination in their day to day life. "Children are citizen's of tomorrow" – this saying is universally accepted, yet they are the ones who are in the most disadvantageous position due to their being children which makes them defenseless and easy targets both mentally and physically.

Children are the most important assets of a nation as they are considered as future of a country. It is the responsibility of the society to look after their well being and provide them with appropriate and healthy environment to develop their individuality which will result in not only the growth and development of a nation but will also built a healthy society. Though the above mentioned things are accepted notion in the world, yet in our society the basic rights of the children are violated. Children are exposed to all forms of exploitation and discrimination. One such form is the sexual abuse of a child which is not only shameful and shocking to know that the person involved in such crimes are not only violating the fundamental rights of the children but is also responsible for destroying the future of the entire nation. Childhood means a carefree time filled with love and joy which becomes ugly and frustrated for the children who undergoes sexual abuse.

Child sexual abuse is the term used in reference to sexual activity involving a child that has at least one or two characteristics. The said crimes occurs within a relationship where it is deemed exploitative by virtue of an age difference or care taking relationship which exists between the abuser and the child by using threat, coercion or force. Sexual abuse is faced by children to whatever class, caste, creed, religion or sex they belong. Finkelhol's study reveals that 20% of the female and 10% of male students had been sexually abused children. Survey conducted by international statistics on child sexual abuse reveals at least two out of four girls and one out of six boys are victims of sexual abuse.¹⁶⁴ Child sexual abuse is a global phenomenon. It is common to both developed and developing countries though degree and intensity may differ.

164. Surekha Raman, *Violation of Innocence, Child Abuse & the Law*, Vol 10, Lawyers Collective, October – November 1995, P. 6.[Quoted in Sunil S. Hosamani, *Protection of Girl Child Against Sexual Abuse*, I B R Vol XXXIII (1 to 4) 2006, P. 222.

CHILD SEXUAL ABUSE: MEANING AND DEFINITION: -

Child Sexual Abuse¹⁶⁵ is a complete violation of a child's dignity and their human rights as prescribed by the International instruments and Constitution of various countries. CSA has definitional problem as the sociological analysts and legal experts lacks mutual support and acceptance. Some studies limit the term "child abuse" to "*children who have received serious physical injury caused willfully rather than by accident*" (Garden and Gray, 1982: 5).¹⁶⁶ The said definition was vehemently criticized by the sociological analysts as the term "*serious*" in the definition is ambiguous and "*physical injury*" can be of diverse nature. Kempe & Kempe (1978) have defined child abuse as "*a condition having to do with those who have been deliberately injured by physical assault.*"¹⁶⁷ This definition too has limited scope as it restricts abuse only to those acts of physical violence which produce a diagnostic injury. Hence, the acts of neglect and maltreatment of children which do not produce an injury could not be covered under the said definition but which are equally harmful. Burgess (1949:143) has given a wider definition of child abuse as "*any child who receives non-accidental physical and psychological injury as a result of acts and omissions on part of his parents or guardians or employees.....*"¹⁶⁸ Hence, this definition includes verbal abuse, threats of physical violence and excessive physical punishment which do not require medical attention are also included in the definition of child abuse. Legally CSA can be defined as *any physical and mental injury, sexual abuse, negligent treatment or maltreatment of a child under circumstances which may indicate that a child's health or welfare is harmed or threatened thereby.* CSA is thus, an act which exposes a child to, or involves a child in, sexual processes

165. Hereinafter referred as CSA.

166. Ram Ahuja, *Child Abuse and Child Labour*, Social Problems in India, Rawat Publication, Jaipur & New Delhi, 2004, P. 219.

167. *Ibid.*

168 *Ibid*, P. 220.

beyond his or her understanding or contrary to accepted community standards. CSA includes implying, using, inducing or coercing, any child to engage in illicit sexual conduct, it also includes the use of children in assisting with other person to engage in explicit sex.¹⁶⁹ CSA covers the sexual maltreatment of both infants and adolescents. The conduct vary from acts constitution incestuous abuse to rape to a mere sexual assault of a varying intensity starting from mere caressing to fondling of the private parts of the child causing disturbances to the child's well being, it also can include child pornography, exposure of genitals to the child, making indecent overtures to the child.¹⁷⁰ UNICEF has defined CSA as "*the involvement of a child in a sexual activity to which he or she is unable to give informed consent (and may not fully comprehend), or for which the child is not developmentally prepared and cannot give consent, or which violates the laws or social taboos of society.*" In other words CSA means different kind of behaviour such as touching and playing with a child's sexual parts. It can mean forcing the child to have sex. It also includes exposing children to adult sexual activity or pornographic movies and photographs. It can mean having children pose, or undress in a sexual fashion in a film or in person.

CSA has been defined by different persons in different manners. In order to understand this sensitive and complicated term each word in CSA needs a categorical consideration. *Firstly*, the word "*child*" should specify specific age. In India there are various legislations which have been enacted for attaining different objectives and goals. These legislations adapt various limits of age to define child. The said term is used in different context while defining a

169. P.D. Mathews, *Sexual Abuse to the Children and the Law*, Legal News and Views, 1996, October, P. 30 [Quoted in Bhavani Prasad Panda and Minati Panda, *Child Sexual Abuse: Problems of Definition and Proof in the Criminal Justice Administration*, Law and Child Part – I, R. Cambray & Co. Pvt. Ltd, 2004, P. 234].

170. Bhavani Prasad Panda and Minati Panda, *Child Sexual Abuse: Problems of Definition and Proof in the Criminal Justice Administration*, Law and Child Part – I, R. Cambray & Co. Pvt. Ltd, 2004, P. 234.

relationship be it incapacity, infancy or need for special protection. There are different conceptual image of the child with regards to the right of the child to be maintained, children undergoing temporary disabilities claiming special treatment and protective discrimination etc. The Convention on the Rights of Child provides that “..... *a child means every human being below the age of 18 years... ..*”¹⁷¹ The Government of India has thus directed that all legislations need to comprehensively adapt the definition of child as per the Convention. As a result of this, recently the Juvenile Justice (Care and Protection of Children) Act, 2000 makes effort to uniformly adopt the age range of the child falling below 18 years of age. *Secondly*, the word “*abuse*” has to be understood to understand CSA. As per Black’s Law Dictionary the word “*abuse*” means everything which is contrary to a good order established by usage, departure from reasonable use, improper use, physical or mental maltreatment, deception. The Oxford Advance Dictionary defines “*abuse*” to mean wrong or bad use or treatment, exploit, unjust or corrupt practice, acts which are insulting and offensive. Chambers Dictionary defines abuse as to make a bad use of, to take undue advantage of, to betray, to misrepresent, to deceive, to revile, to maltreat, to violate, an evil or corrupt practice, deceit, hurt, betrayal, ill usages, outrage etc. Hence, as per dictionaries “*abuse*” is an evil or corrupt practice, deceit, betrayal, molestation, violation and comes in many form. The word “*abuse*” does not refer to any one specific type of act, but covers a wide spectrum of behaviour. The term “*child abuse*”, thus, covers a very wide range of acts and maltreatment of children which may include child battering, extreme punishment, hard labour, emotional abuse, sexual abuse, incest, abandonment etc. As a whole, CSA includes child molestation, incest and rape. CSA is the physical or mental violation of a child with sexual intent, usually by an older person who is in some position of trust/power vis-à-vis the child. The term

171. *The Convention on the Rights of Child*, Article 1.

paedophile refers to any adult who habitually seeks the company of a child children for the gratification of his/her sexual needs.

KINDS OF CHILD SEXUAL ABUSE: -

Children are often abused at the hands of the State, society and family in the most shameful and objectionable ways. Child abuse is usually classified into four major types of abuse: -

- (a) Child neglect;
- (b) Physical Abuse;
- (c) Emotional Abuse; and
- (d) Sexual Abuse of a Child (CSA).

Out of these four major kinds of child abuse, CSA is the least frequently reported form of child abuse i.e. only 6% of CSA is reported. CSA has been defined as “*the involvement of dependent and immature children in sexual activities they do not fully comprehend to which they are unable to give informed consent*” (Kempe 1978: 127).¹⁷² CSA includes incest, rape, buggery or any paedophile activity for the gratification of the abuser. The abuser usually has a sexually dysfunctional or unsatisfying relationship with their partner, sexual relations may be violent or inadequate or non-existent, and the child becomes a convenient substitute.¹⁷³ Sexual abuse has many forms. Sometimes it can be so subtle that a child may not even be aware that the abuse is taking place. The child just feels uncomfortable with it. CSA is not often identified through physical indicators alone. Like any other kind of abuse, CSA can be verbal, physical or emotional. CSA includes a variety of sexual offences can be classified under the following groups: -

172. Ram Ahuja, *Child Abuse and Child Labour*, Social Problems in India, Rawat Publication, Jaipur and New Delhi, 2004, P. 220.

173. <http://www.billyonline.org/related/abuse.htm> [Visited on 6th January 2009].

1. SEXUAL ASSAULT: - In this form of CSA the abuser usually touches a minor for the purpose of sexual gratification for example incest, rape, sodomy and sexual penetration with an object. Sexual assault is defined as sexual actions or advances without the consent of one party. However, slight the penetrative contact of a minor's body, if the contact is performed for the purpose of sexual gratification will amount to sexual assault.

2. SEXUAL MOLESTATION: - The form of CSA wherein the abuser engages in non-penetrative activity with a minor for the purpose of sexual gratification i.e. through exhibitionism which includes exposing a minor to pornographic material or to sexual acts of others, adult sexual activity, touching and fondling child's genitals, exposing or showing one's genitals to the child, having a child pose, undress or perform in a sexual fashion or to peep into bedroom or bathroom of the minor, will be covered under sexual molestation.

3. SEXUAL EXPLOITATION: - The CSA wherein the abuser victimizes a minor for advancement, sexual gratification or profit i.e. by prostituting a child and trafficking a child for the purpose of child pornography is called sexual exploitation of a child.

4. SEXUAL GROOMING: - It is the form of CSA wherein the social conduct of a potential child sex offender who seeks to make a minor more accepting of their advances for example by developing a friendly and trusting relationship with the minor or through on line chat room etc.

Leaving apart Sexual Exploitation, CSA in its other forms are not even identified as often the case go unreported. One of the main reason for this is that in contrary to the popular myth about CSA that it takes place at the hands of strangers on the street, statistics have revealed that maximum number of children

who are victims of CSA are abused at home by the adults who are related to them or known to them or their families. Generally, the abuse occurs at the home of the perpetrator. CSA by family members of victims is also known as incestuous abuse. In conservative societies like ours incest is less likely to be reported to the police out of fear and social disgrace. Families often choose to resolve the issue privately because according to them it is not a criminal matter. However, the truth is incest may be more traumatic than rape by strangers as such sexual abuse can be continued over a period of time and due to fear and social disgrace the victim remains helpless to protect herself from such abuses. The abuser is someone known to the child, and may be part of her day to day life such as father, brother, cousin, servant or friend.

Approximately 20% to 25% of women and 5% to 15% of men are sexually abused when they were children. Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often fathers, uncles or cousins; around 60% are other acquaintances such as friends of the family, babysitters, or neighbours; strangers are the offenders in approximately 10% of child sexual abuse cases. Most child sexual abuse is committed by men; women commit approximately 14% of offences reported against boys and 6% of offences reported against girls. Most offenders who abuse pre-pubescent children are pedophiles.¹⁷⁴ WIN News (1999) reports that in Mumbai, 60% of rape victims are between the ages of three and sixteen, with 50% below the age of ten.¹⁷⁵ Tata Institute of Social Sciences found that 30% of girls and 10% of boys had been sexually abused, with 50% happening at home.¹⁷⁶ Virani (2000) states that 50% of sexual abuse cases involved family members and close family members and close relatives and occurred at home. Samvada in 1996

174. http://en.wikipedia.org/wiki/Child_sexual_abuse [Visited on 22nd December 2008].

175. <http://www.pandys.org/csaindia.pdf> [Visited on 22nd December 2008].

176. *Ibid.*

conducted a study wherein it was revealed that 75% of the serious sexual abusers were adult family members.

When we hear of CSA by family members, it is often assumed that it happens in low-class and uneducated families. However, various studies have revealed that CSA by family members does not belong to one strata but it come from all strata of the society and the reasoning in believing such is that CSA by family members receive the most attention. As reported above men as found in most cases are responsible for CSA but women too can be perpetrators.

CAUSES OF CHILD SEXUAL ABUSE: -

Children have been abused through out the human history. One of the major violation to which children are exposed to is the CSA. Sexual exploitation of children is known worldwide and the world society has stood up together to curb this evil. In comparison to it CSA by the family members has been recently recognized. CSA is painful and unprovoked acts of violation against children. However, recognition of this crime is only in particular countries and cultures which sees it as a major social problem. The abolition of incest was accomplished at the beginning of human culture. Its prohibition on incest is universally accepted rule which is found in every country and every religion. The taboo on incest within the immediate family is one of the few known cultural universals. In fact, it is said that the society which approves of incest serve to emphasize rather than to disprove the universality of intra-family incest taboos. Despite this CSA is a serious problem all over the world including India. Incidences of incest or CSA by family members in India is not a unique problem, it existed in our society since a very long period. In India it is recently recognized as a grave social as well as curb this evil and protect the rights of the children to help them develop as healthy individuals it is important for us to know the causes

of CSA by family members or incest. Following are the causes which lead to this crime against children: -

(i) Status of women in Indian society: - In Indian society more girls are victims of CSA and incest in comparison to the boys. One of the major reasons is that from the beginning of Indian civilization women in India are treated as second-class citizens who should be kept in house. Women face discrimination in every field be it schooling where the girls are kept away from the schools, or wherein the girls are treated as curse on the family or burdens a because during marriage family has to part with huge sum of family property as a price for her dowry. Women are considered as weaker member of the society who are subjugated to men and various crimes are committed against them to prove their second-class citizenship. One such crime is CSA or incest wherein women are sexually abused since their childhood within their family by the family members. These family members can be their father, brother, cousins, uncles and other relatives.

(ii) Population and poverty: - In case of population India stands in second position next to China. It is also one of the poverty-stricken countries. These two factors often compel the people live in close quarters. Young girls of the family, thus, have to live with dozens of male family members which puts them at extreme risk in their own house.

(iii) Indian Preference for Virgin Bride: - In the patriarchal Indian society one of the major criteria for marriage is the desire of the brides groom for only a pure and virgin bride. Hence, wherein a girl child is abused it makes nearly impossible for her to get married. This leads to refusal of the child to disclose the crime. Even if the child discloses it to her parents, they do not report the crime to the police for fear and social disgrace. They fear that it might become public which will hinder

their family's reputation in the society. Moreover, if the case is brought before the criminal justice system and even if the victim wins the case, part of the punishment has to be suffered by the victim because she will require a high dowry if she can get married at all.

(iv) Conservative Indian Society: - In our conservative society subjects relating to sex and personal safety are not discussed. It is considered as a taboo to talk about sex. This leads men to feel that they can fulfill their sexual gratification from any source available or possible. Sadly these sources include even the children. Another reason is the lack of sex knowledge and refusal to discuss the issue. Since talks relating to sex are a taboo in the conservative Indian society, children are not educated regarding sexual abuse when they are young. Due to their lack of knowledge about sexual abuse they are being subjected to it. In fact, as the statistics revealed that children who are very young i.e. between 1-10 years of age are exposed to this crime. Belonging to the young age they don't even understand the gravity of crime committed against them. Hence, these children are unable to tell their parents about the said crime. Even if the child knows about the nature of crime he is exposed to, yet due to the social taboo on sex talks such child is not confident to disclose the act to someone who might be able to help.

(v) Unreported cases of CSA and Incest: - Often CSA and incest go unreported. In fact, children rarely report these cases with the intention of doing so. *Firstly*, the child is so young that he/she does not fully understand the nature and effects of those actions. In such crimes the children are abused by the people they know and even be fond of. This is another reason for them to keep quiet about the abuse. In some cases the abused children identify with their abusers and start seeing them as their protectors. A victim of CSA or incest is, thus, gratified by the attention showered on him/her by the abuser or has strong feelings towards the abuser. Due

to their tender age the child cannot understand the gravity of the abuse which can hurt them in the long term. Moreover, even if the child is not comfortable during his abuse, he/she is incapable of reporting the matter to the Police Officers or judges themselves. They generally disclose the matter to their close ones (often parents or relative) who fully understand the impact of reporting the matter and report the case. However, in our conservative society even the parents do not report the matter out of fear and social degradation. The result is increase in CSA and incest in our society.

Secondly, in India CSA has unfortunately has not been viewed as a separate offence which causes physical and emotional damage to the child. This is despite the fact that all personal laws in India make incestuous relationship prohibitive. CSA and incest is viewed in the context of child labour, child prostitution and child trafficking for which legal provisions have been made. *Finally*, the extent and application of the existing legal and constitutional provisions do not appear adequate to address the issue of child abuse, yet in the absence of any legislative measures specially addressing the issues of child abuse cases with regards to it is being dealt under the provisions of the said provisions only. Moreover, the matter relating to difficulty in proving the offence becomes a major hindrance in prosecuting the case.

(vi) Problems in identifying CSA and incest: - CSA and incest are such crimes which are committed in great secrecy and due to family intimacy. It is the incidence which is committed by an adult wherein the child is abused without his/her consent and also without the knowledge of other family members. Often the abuser uses threat, coercion or force upon the child for not disclosing it to others. The child is thus exposed to repeated sexual abuse at the hands of the abuser. It is seen that in most cases the abuser is father, step-father, brother,

cousins or other relatives and under such circumstances it is seen that even if the child complains of the matter it is ignored or brushed aside or is not taken seriously. The person to whom the child discloses the matter that the child is cooking up the matter to crave attention or simply lying. Sometimes the child is ridiculed by such person for lying. The child feels it useless to inform such matter to any body as nobody is going to believe him/her. Even if the other family member comes to know about the incident they keep quiet about the matter as reporting it would mean ridiculing the family's reputation in the society. Ultimately the child remains silent and suffers at the hands of his/her abuser. Thus, there is no appropriate statistical data which can be prepared to show the number of children who are victims or has been victims of CSA and incest in our society. This is one of the major reasons due to which CSA and incest remains unidentified in our society.

(vii) Criminal Justice System and CSA: - In case of CSA or incest the victim faces several traumas and one of the traumas which a child faces after sexual assault is by the criminal justice system of our country. First of all as mentioned above there is no legislation which defines the term "*Child Sexual Abuse.*" Due to the absence of any standardized definition different meanings may be attached to it which may affect the result of any research conducted. Secondly, the laws are too weak which affects prosecution of matters relating to CSA and incest. The cases become weak as there is inadequate investigation and insufficient medical evidence to prove the case. Even the witness of the child who is victim of CSA and incest is often questioned on the grounds of not understanding the nature of question put to them along with problems regarding the competency and credibility of a child witness. The NCW too is of view that the existing law does not address the increasingly visible offence of CSA and contains serious

contradictions that inhibit women as well as children from reporting crimes of sexual abuse.

(viii) Children do not transmit disease: - In the world of HIV and AIDS viruses the adults fears to go to the brothels to satisfy their sexual gratification as the fear that the prostitutes in the brothels may transfer them not only sexually transmitted disease but may also pass on deadly HIV and AIDS viruses which may cost them their lives. Thus, in order to satisfy their sexual gratification they look for targets at home who are easy to find, vulnerable, can be controlled by imposing threat, coercion or fraud and most important of all cannot pass them on any such viruses. The abusers find children more suitable for their need as the basic assumption is that children are not HIV infected and do not spread AIDS. Another myth attached to such belief is that having sex with a virgin child can cure AIDS and other sexually transmitted diseases.

(ix) Family disorganization: - The family environment and family structure also play a vital role in CSA and incest. Various analysis of family environment has revealed that conflict between parents and weakening of inhibitions leading to neglect of the children; absence of affectionate parent-child relationship within the family that fails to give support and protection to child; alcoholism of the earning male member, his lack of accountability; lack of control on the children; adulterous relation of either parents; dominance of step father; and social isolation of the family (i.e. not participating in social networks or community activities) were factors which exposes a child to CSA and incest.

(x) Psychological disorders of the Abuser: - CSA and incest is all about corruption. The abusers are psychopaths or mentally ill persons who want control over the other person. Several studies have revealed that the abusers of CSA and incest are generally those persons who have themselves been victims of child

abuse. However, not all victims go on to become abusers. It depends upon individual predispositions and situational factors.

CONSEQUENCES OF CHILD SEXUAL ABUSE AND INCEST: -

Child Sexual Abuse and incest describes criminal as well as civil offences wherein an adult engages in sexual activity with a minor or exploits a minor for the purpose of sexual gratification. An adult who indulges in sexual activity with a child is performing a criminal as well as immoral act which is not considered normal or the behaviour which is not socially acceptable. Depending upon the seriousness, the duration of abuse and the sort of abuse which the children faces at the hands of their abusers, the trauma or problems faced by them can broadly be divided into following categories: -

(i) Psychological effect: - The children who face CSA and incest usually suffer from short-term as well as long-term psychological harm. The children who have been victim of such crime suffers from fear, panic attacks, sleeping problems, night mares, irritability, outburst of anger and sudden shock reactions when being touched. The victims of CSA and incest suffer from little confidence and self respect, and respect for one's own body may change. They have poor self image which affect their self-esteem. Through nightmares, sudden memories or unexplainable physical problem they are unintentionally confronted with memories of the abuse as a result such children relive the event of the abuse. Such children also suffer from disturbing behavioural pattern that harms the body as it is found that they can get easily addicted to alcohol and other substances and suffer from depression in which they may try to end their life. They lead a self-destructive life and often lead towards prostitution.

(ii) Social Effects: - The Children who are victims of CSA and incest have poor communication and coping ability; failure in developing social relationships; mistrust and have little confidence in other people; isolation and withdrawal from interactional settings especially talks about the period of sexual abuse and the abuser. Such persons hesitate to go to school, work or even outside their home and isolate themselves. They experience learning problem in school as they feel after abuse that they are weak in every field especially studies. Such persons are not satisfied by their work they are engaged in. A high percentage of victims do not feel self-reliant and hence depend upon others for their emotional and social support. They usually fear loss of control in their relationships. Usually the persons who have been victim of sexual abuse may develop anti-social behaviour.

(iii) Sexual Effects: - The victims of CSA and incest suffers from sexual problems like loss of interest in love making with one's partner as such spouse may get confused by certain remark, touch or behaviour of his/her partner which brings back memories of the abuse and the abuser. Such person might feel pain while making love, not wanting to make love and problems in getting aroused. A good number of child victims had a feeling that their physical needs were not being met to their satisfaction.

(iv) Physical Effect: - The victim of CSA and incest may suffer from some short-term as well as long-term physical injury. Usually the victim suffers from abdominal pain, menstrual pain; pain while making love, intestinal complaints, nausea, headache, back pain, painful shoulders etc i.e. all kinds of chronic pain. The pain is often inexplicable. CSA may cause internal laceration and bleeding. In severe cases it causes damage to internal organs which may even cause death. CSA may cause infections and sexually transmitted diseases. Depending on the

age of the child, due to lack of sufficient vaginal fluid, chances of infections are higher. Eating disorders can also be experienced by the victims of CSA and incest.

PROTECTION OF CHILD UNDER THE INTERNATIONAL INSTRUMENTS:-

The development and growth of the entire community of the world depends upon the health and well-being of its children. Children are the national assets and future of a nation, hence, their welfare is of utmost importance to every nation. Justice V. R. Krishna Iyer in his "*Jurisprudence of Juvenile Justice: A Preambular Perspective*" has rightly remarked that –

*"The hallmark of culture and advance of civilization consists in the fulfillment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to its full stature, physical, mental, moral and spiritual. It is the birth right of every child that cries for justice from the world as a whole."*¹⁷⁷

However, all these wishful and optimistic saying remains worthless when we see all kinds of atrocities committed against children due to their vulnerable nature and as an easy target to all. Such incidences cast a shadow on the promises made to improve and provide them their rights. The problems relating to children and their rights gained international concern. Kofi A. Annan, Secretary-General of the United Nations in 'The State of the World's Children 2000' observed that –

*"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace."*¹⁷⁸

177. Quoted in Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, 2005, P. 388.

178. *Ibid.*

In the international field the attention grabbed by the problems of children to various forms of exploitation led to the passing of various instruments to protect the rights of children. The beginning of the movement to protect the rights of the children can be traced back to the mid 19th Century wherein an article was published in June 1852 by Slagvolk titled "The Rights of the Children." This was followed by "Children's Rights" in 1892 by Kate Kliggins. The articles contained the human working conditions of the children. Due to these articles legal position of children in England began to change with the introduction of factory laws which concentrated on the amelioration of working conditions of employees especially children. In 1923 the Council of the newly established non-governmental organization i.e. "Save the Children International Union" adopted a five-point declaration on the rights of the child. This was the beginning of international concern over the situation of children. Following are the international instrument which protects the rights of the Children from various forms of atrocities committed against them: -

(i) Universal Declaration of Human Rights, 1948: - The General Assemble of United Nations Organisation adopted the Universal Declaration of Human Rights¹⁷⁹ on December 10th 1948. It provides some protection for the safeguarding of the rights of the children and protects them from exploitation. The UDHR recognizes not only inherent dignity but also equal and inalienable rights of all members.¹⁸⁰ The Declaration states that everyone has the right to life, liberty and security.¹⁸¹ It also prescribes that no one be subjected to torture or to cruel inhuman and degrading treatment or punishment.¹⁸² As per the Declaration childhood is entitled to special care and assistance. Children, whether they are

179. Hereinafter referred to as UDHR.

180. *UDHR*, Article 1.

181. *Ibid*, Article 3.

182. *Ibid*, Article 5.

born in or out of wedlock, enjoy same social protection.¹⁸³ It also contemplates that everyone has the right to education. Parents of the child have a right to choose the kind of education that shall be given to their children.¹⁸⁴

(ii) International Covenant on Civil and Political Rights, 1966: - This Covenant was adopted by the General Assembly in 1966. The Covenant¹⁸⁵ provides that every human being has the inherent right to life which shall be protected by law.¹⁸⁶ It also provides that every person has right to liberty and security of person.¹⁸⁷ The Covenant also prescribes that every child shall have without any discrimination related to sex, caste, creed, religion etc the right to such measures of protection as are required by his status as a minor, on the part of his family society and the State.¹⁸⁸

(iii) International Covenant on Economic, Social and Cultural Rights, 1966: - The International Covenant on Economic, Social and Cultural Rights¹⁸⁹ was adopted by the General Assembly in 1966. Family is responsible for the healthy development of a child. Hence, the Covenant emphasizes the protection and assistance to the family which is the natural and fundamental group unit of the society and particularly for its establishment as it is responsible for the care and education of the dependent children.¹⁹⁰ It also provides that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage and other conditions.

183. *Ibid*, Article 25(2).

184. *Ibid*, Article 26.

185. Hereinafter referred to as ICCPR.

186. ICCPR, Article 6.

187. *Ibid*, Article 9(1)

188. *Ibid*, Article 24.

189. Hereinafter referred to as ICESCR.

190. ICESCR, Article 10(1).

The Covenant speaks about protecting children from various forms of exploitation.¹⁹¹ The Covenant also puts burden upon the State parties to recognize the right of everyone to education as it is necessary for the full development of the human personality and sense of its dignity.¹⁹²

(iv) Declaration on Social Progress and Development, 1969: - The United Nations General Assembly adopted Declaration on Social Progress and Development in 1969. It promotes the growth and well-being of the family members and also discusses the importance of the family as a basic unit of society. Particularly the children and youth should be assisted and protected.¹⁹³ It also under Part II speaks about the protection of the rights of the child.¹⁹⁴

(v) Declaration of the Rights of the Child, 1959: - The General Assembly of United Nation adopted a new declaration on 20th November 1959 for child welfare and protection. Through this Declaration the United Nation reaffirmed their faith in the fundamental human rights and in the dignity and worth of human being. The Declaration states that the child by reason of his physical and mental immaturity must be provided with special safeguards and care along with appropriate legal protection before as well as after birth.¹⁹⁵ It states that the child shall enjoy all the rights without any discrimination on the basis of race, colour, sex, creed, religion, birth, status etc.¹⁹⁶ It prescribes special protection to children and enable them to develop physically, mentally, morally, spiritually and socially in a normal manner and in conditions of freedom and dignity by providing them appropriate

191. *Ibid*, Article 10(3).

192. *Ibid*, Article 13.

193. *Declaration on Social Progress and Development*, 1969, Article 4,

194. *Ibid*, Article 11(b) and (o).

195. *Declaration of the Rights of the Child, 1959*, Preamble.

196. *Ibid*, Principle 1.

- (c) The right to development which includes right to education, support for early childhood development and care, social security, and the right to leisure, recreation and cultural activities.
- (d) The right to participation containing the views of the child, freedom of expression, access to appropriate information, and freedom of thought, conscience and religion.

The Convention for the first time provides a uniform definition of “child.” It states that ‘child’ means any human being below the age of 18 years under the law applicable to the child.²⁰³ It states that the State Parties is under an obligation to take appropriate measures to ensure that the child is protected against all forms of discrimination.²⁰⁴ The State Parties should undertake to protect and ensure the best interests of the children.²⁰⁵ The State Parties as per the Convention are under obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the case of parents, legal guardians or any other person in whose care they are.²⁰⁶ It also directs the State Parties to recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.²⁰⁷ It is the duty of the State to recognize the right of the child to education.²⁰⁸ The Convention provides that the State Parties shall undertake appropriate national, bilateral and multilateral measures to protect the child from all forms of sexual exploitation and sexual abuse.²⁰⁹ The State Parties shall protect the child against all other forms of exploitation

203. *Convention on the Rights of the Child*, Article 1.

204. *Ibid*, Article 2.

205. *Ibid*, Article 3.

206. *Ibid*, Article 19.

207. *Ibid*, Article 27.1.

208. *Ibid*, Article 29.

209. *Ibid*, Article 34.

prejudicial to any aspect of child welfare.²¹⁰ It also levies duty upon the State Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse; torture or any form of cruel, inhuman or degrading treatment.²¹¹ The Convention also sets up a Committee on the Rights of the Child to monitor the implementation of the provisions of the Convention by the member States who have ratified it.²¹²

These instruments protect the rights of the child and their protections against exploitation have been provided at international level and are considered as the basic international instrument regarding protection of children against their exploitation.

PROTECTION OF CHILD AGAINST SEXUAL ABUSE IN INDIA: -

Violation of the rights of the children is not new to our society. Children being the most vulnerable section of the society become victims of exploitation and ill-treatment easily. Since ancient period children in India have been succumbed to the various atrocities committed against them in our society. As the Member State of the above mentioned international instrument, India has pledged to protect its children against all forms of crimes committed on them, including Child Sexual Abuse. In order to curb all forms of violation against children and having been ratified the international instruments following protective measures are available in India: -

210. *Ibid*, Article 36.

211. *Ibid*, Article 39.

212. *Ibid*, Article

(A) CONSTITUTIONAL PROVISIONS: -

“Children are the future of a nation” – The Constitution makers knew this and their vision of India would not be a reality if the children of the country are not nurtured and educated. Being the most vulnerable group of the society, children become easy targets for exploitation. The rising trends of violation of the rights of the children and various forms of atrocities committed against them, the makers of the Constitution have provided certain provisions to safeguard their interests which are as follows: -

(i) The Preamble: - The Preamble to the Constitution of India sets out the main objectives of the Constitution which it intends to achieve. The Preamble to the Constitution of India promises: -

*“... .. to secure all its citizens: justice, social, economic and political,
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity; and
To promote among them all
Fraternity assuring the dignity of the individual and the unity of
Nation...”*

Hence, the Preamble to the Constitution of India provides positive direction to be taken by policy makers for the protection of weaker sections of the society. The Constitution of India recognizes and guarantees equal rights to all its citizens.

(ii) Fundamental Rights: - The Constitution of India provides fundamental rights to its citizens. There are certain fundamental rights which provide protection of children from exploitation and abuse. The Preamble to the Indian Constitution speaks of equality of status and of opportunity hence it provides that the State shall not deny to any person equality before the law or the equal protection of the laws

within the territory of India.²¹³ Children require special treatment on account of their very nature hence; the Constitution empowers the State to make special provisions for women and children. ²¹⁴ It prescribes that no person shall be deprived of his life or personal liberty except according to procedure established by law.²¹⁵ Hence, every person has fundamental right to life and personal liberty. The expression “life” assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in workplace and leisure. In *Francis Coralie vs. Union Territory of Delhi* ²¹⁶ Bhagwati J. held that “*the right to life with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being.*” Again Bhagwati J. relying on Francis Coralie’s case held in *Badhua Mukti Morcha vs. Union of India* ²¹⁷ that -

“It is the fundamental right of everyone in this country... .. to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life and breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article’s 41 and 42 and at least, therefore, it must include protection of the health and strength of workers men and woman, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and

213. *The Constitution of India*, Article 14.

214. *Ibid*, Article 15 (3).

215. *Ibid*, Article 21.

216. AIR 1981 SC 746 at 753.

217. AIR 1984 SC 802.

maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State..... has the right to take any action which will deprive a person of the enjoyment of these essentials.”

Hence, Article 21 protects children from all forms of exploitation including child sexual abuse and incest as such crimes committed against children not only violates their right to live with human dignity and exposes them to various health hazards.

Education is basic human rights as it enables a person to live life with human dignity that develops him as well as contributes to the development of his country. Thus, Article 21-A²¹⁸ of the Constitution has recognized education a fundamental right for all children of age 6-14 years. The Constitution also provides that the Parliament shall have the power to make laws for prescribing punishments for those acts which are declared to offences under Part III of the Constitution or the acts which violates the fundamental rights of the citizens.²¹⁹ Hence, the Parliament has power to make legislations prescribing punishments for the violation of rights of the children due to child sexual abuse and incest as these acts hits at the fundamental rights of the children.

(iii) Directive Principle of States Policy: - Directive Principle of States Policy is contained under Part IV of the Constitution. It sets out the aims and objectives to be taken up by the States in the governance of the Country. Article 39 under it provides certain principles of policy to be followed by the State. It states that the state shall direct its policy towards securing the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or

218. Inst. By the Constitution (86th Amendment) Act, 2002, Section 2.

219. *The Constitution of India*, Article 35 (a) (ii).

strength.²²⁰ With this provision the Constitution provides that child can be protected from the abuse of dignity of life, which may include sexual abuse. Article 39 also provides that the State shall direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.²²¹ Through these provision, the Constitution of India provides protection of children and development of their personality may be secured; and the children may be protected from exploitation and abuse committed against them.

The Constitution also provides that the State shall within the limits of its economic capacity and development, makes effective provisions for securing the right to education.²²² It also states that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.²²³ This Article has substituted the old one by the Constitution (86th Amendment) Act, 2002. The old provision provided the provision for free and compulsory education for children until they complete the age of 14 years. The Constitution also prescribes that it is the duty of the State to raise the level of nutrition and the standard of living and to improve public health.²²⁴ These provisions under Part IV of the Constitution of India are actually providing the protection of human dignity of children.

(iv) Fundamental Duties: - The Constitution of India while providing fundamental rights has also prescribed certain fundamental duties to every citizen.

220. *Ibid*, Article 39 (e).

221. *Ibid*, Article 39(f); subs. By the Constitution (42nd Amendment) Act, 1976, Section 7, for clause (f) [w.e.f. 3-1-1977].

222. *Ibid*, Article 41.

223. *Ibid*, Article 45.

224. *Ibid*, Article 47.

Fundamental duties are provided under Part IV-A which was inserted by the Constitution (42nd Amendment) Act, 1976. With relation to the protection of children it states that it is the duty of the person who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.²²⁵ This provision was added to this part by the Constitution (86th Amendment) Act, 2002.

(B) INDIAN PENAL CODE: -

Child Sexual Abuse is the gross violation of the human rights of the children to live their life with human dignity. It has become one of the most pressing international as well as national problems. The rising cases of child rape, molestation etc proves that children being the most vulnerable group of the society are facing various forms of offences committed against them. CSA and incest has proved that children are neither secured outside their home nor inside it as they are subjected to sexual exploitation both inside and outside their house.

With regards to CSA there is no comprehensive law to deal with; however the Indian Penal Code lays down certain provisions which can bring the offences relating to CSA and incest under its ambit. The Indian Penal Code states that whoever induces any minor girl under the age of 18 years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to 10 years and shall be liable to fine.²²⁶ It also prescribes for punishment wherein minor girls are imported from foreign country or the State of Jammu and Kashmir for the purpose

225. *Ibid*, Article 51A(k).

226. *Indian Penal Code*, Section 366-A.

of forced intercourse or illicit intercourse. The punishment prescribed under it is imprisonment which may extend to 10 years, and fine.²²⁷

The Indian Penal Code defines “rape.” The CSA and incest can be brought under its ambit. The said provision provides various circumstances wherein sexual intercourse by a man with any woman may amount to rape.²²⁸ It also provides punishment for the rape of the child with the imprisonment for a term which shall not be less than 10 years but which may be extended for life and shall also be liable to fine.²²⁹

“Woman” is described under the Indian Penal Code as a female human being of any age.²³⁰ Hence, a minor girl is also described as woman. CSA and incest against a girl child, thus, can be brought within the ambit of outraging the modesty of the children. Modesty is the attribute to female sex and she possesses it from her very birth. The Indian Penal Code punishes any assault or use of criminal force to any woman intending to outrage the modesty of a woman with imprisonment of either description for a term which may extend to two years or with fine or with both.²³¹

(C) CODE OF CRIMINAL PROCEDURE, 1973: - The Criminal Procedure Code, 1973 provides that no child under the age of 12 years should be required to attend any place other than the Place where he/she resides for the purpose of interrogation by the police.²³² It also provides that the report of a police officer on completion of investigation into the assault of child rape or indecent sexual assault on the child should include the medical examination report of the child victim and

227. *Ibid*, Section 366-B.

228. *Ibid*, Section 375.

229. *Ibid*, Section 376.

230. *Ibid*, Section 10.

231. *Ibid*, Section 354.

232. *Code of Criminal Procedure*, Section 160.

the accused. The medical report should include the age of the child; injuries to the body of the victim; general mental conditions of the victim; and the exact time of examination.²³³ If the magistrate thinks it fit the trials can be conducted in camera for an offence under Section 376-Section 376D of IPC.²³⁴ If the Court conducting the trial finds that the examination of witness is important for the ends of justice and their attendance cannot be procured without unreasonable delay, expense or inconvenience, the court may dispense with their attendance and issue a commission for their examination.²³⁵ It also empowers the magistrate to whom commission is issued to summon the witness before him and take down evidence.²³⁶ Parties to the trial may forward written interrogatories to the Commission Magistrate, in which case the Commission Magistrate shall examine the witness on such interrogatories. The parties can also appear in person or by pleader and examine the witness.²³⁷ The Commission Magistrate is required to return the Commission along with the deposition of witnesses examined to the Court which issued the commission. The Commission along with the depositions shall be open to inspection by the parties and be read in evidence by either party. It shall also form part of the record.²³⁸ It also states that Courts can grant compensation to the witnesses.²³⁹

(D) INDIAN EVIDENCE ACT, 1872: -

The Act states that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by

233. *Ibid*, Section 173.

234. *Ibid*, Section 327.

235. *Ibid*, Section 284.

236. *Ibid*, Section 286.

237. *Ibid*, Section 287.

238. *Ibid*, Section 288.

239. *Ibid*, Section 357.

tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind.²⁴⁰

(E) THE IMMORAL TRAFFIC (PREVENTION) ACT, 1986: -

The Act although is not directly related to CSA and incest but it prevents and punishes any person for procuring or attempt to procure a child with or without his consent for immoral purpose with rigorous imprisonment for a term not less than 7 years but may extend to life.²⁴¹ It also punishes a person who detains a child or minor in any premises with an intent to have sexual intercourse with imprisonment not less than seven years but which may extend to 10 years and shall also be liable to fine.²⁴²

(F) THE INFORMATION TECHNOLOGY ACT, 2000: -

The Information Technology Act, 2000 provides publication and transmission of pornography as an offence. It states that 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 person who are likely 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 five years and with fine which may extend to one lakh rupees. In case of second conviction with imprisonment of either description for a term which may extend to ten years and with fine which may extend to two-lakh rupees.²⁴³

240. *Indian Evidence Act*, Section 118.

241. *The Immoral Traffic (Prevention) Act, 1986*, Section 5.

242. *Ibid*, Section 6.

243. *The Information Technology Act, 2000*, Section 67.

(G) THE CHILD MARRIAGE RESTRAINT (AMENDMENT) ACT, 1978: -

Child marriage is also a form of CSA and violates a child's freedom to enjoy childhood. There are thousands of child marriages reported throughout the country. In order to prevent it the Child Marriage Restraint (Amendment) Act, 1978 was enacted. The said Act lays down the minimum age for marriage. Now the marriageable age for girls is 18 years and for boys 21 years.

(H) THE GOA CHILDREN'S ACT, 2003: -

Childhood is the most precious stage of a person's life, however, incidents such as CSA and incest makes not only their childhood but their entire life a hell. The constitution has prescribed that it is the duty of the guardians of the children as well as the government to ensure them right to life. In order to curb the offence of sexual abuse against children Goa is the only State in India which has taken the initiative in making certain rights available to children as they are empowered to do so under the Directive Principles of State Policy. Goa has, thus, enacted the Goa Children's Act, 2003, which contains certain provisions that address the sexual abuse of children in general.

The Act provides certain definitions which are essential to curb this evil. It defines "child" as any person who has not completed the age of 18 years.²⁴⁴ "Child in need" is also defined as the children whose rights are being violated or who need special attention or protection.²⁴⁵ Child Sexual Abuse is not defined under any legislation in India. The Act defines "child abuse" as maltreatment of the child which includes psychological and physical abuse, neglect, cruelty, sexual abuse, emotional maltreatment; any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a

244. *The Goa Children's Act, 2003, Section 2(d).*

245. *Ibid, Section 2(l).*

human being; and unreasonable deprivation of his basic needs for survival such as food and shelter, or failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death.²⁴⁶ "Sexual offence" is defined as all forms of sexual abuse²⁴⁷ and has been classified under three categories,²⁴⁸ namely: -

- (a) Grave sexual assault: It covers all forms of intercourse; vaginal, oral, anal, use of objects, forcing minor to have sex with each other, deliberately causing injury to the sexual organs, making children pose for pornographic photos or films;
- (b) Sexual Assault: It covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language.
- (c) Incest: It is the commission of a sexual offence by an adult on a child who is a relative or is related by ties of adoption.

The Act also lays down punishments for all the above three forms of sexual offences.²⁴⁹ The punishment prescribed for grave sexual assault is 7-10 years imprisonment and a fine of Rs. 2 lakhs. The punishment for sexual assault is a sentence of up to three years and a fine of Rs 1 lakh; and the punishment for incest is imprisonment for a period of one year and a fine of Rs. 1 lakh. Three months from the commencement of this Act, any adult staying with an unrelated child is required to register with the Director, Women and Child Development.²⁵⁰ If the Director deems necessary, he/she will authorize the District Inspection Team to

246. *Ibid*, Section 2(m).

247. *Ibid*, Section 2(x).

248. *Ibid*, Section 2(y).

249. *Ibid*, Section 8(2).

250. *Ibid*, Section 8(4) &(5).

inspect the case and submit a report with recommendations.²⁵¹ Failure to inform the Director beyond the period of 3 months can attract the fine of Rs. 1 lakh and imprisonment for a year.

The Act is a welcome measure which provides provision for setting up of one or more Victim Assistance Units which shall facilitate the child to deal with the trauma of abuse and assist the child in process involved with appearing as a witness before any Court or authority handling a case of abuse of child.²⁵² The Act also prescribes that the State shall carry out child sensitization programme for police officers at all levels and sensitization training for all those involved in the healing, rehabilitation and other assistance programme for child victims.²⁵³ The Act also prescribes for setting up of a Children's Court to try all offences against children.²⁵⁴ The setting up of a child friendly court will help to minimize the double trauma that abused children are subject to in courts. Thus, it can be said that the Goa Children's Act, 2003 is a unique and unusual legislation which prescribes punitive measures against the offenders who sexually exploit the children.

(I) THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) 2000: -

The Act substituted the old Act of 1986 and came into effect on 1-4-2001. The Act in the definition of 'child in need of care and protection' includes the child who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts.²⁵⁵ It also prescribes that if any person who has actual charge of a juvenile assault, abandons, exposes or

251. *Ibid*, Section 8(6).

252. *Ibid*, Section 8(19).

253. *Ibid*, Section 8(20) &(21).

254. *Ibid*, Section 27.

255. *The Juvenile Justice (Care and Protection of Children) Act, 2000*, Section 2(d)(vi).

willfully neglects the juvenile; or causes or procures him to be assaulted, abandoned, exposed or neglected in any manner likely to cause such juvenile or the child unnecessary mental or physical suffering, he shall be punishable with imprisonment up to six months or fine or both.²⁵⁶ In order to discharge the duties towards the 'child in need of care and protection' the State Government under the Act is empowered to constitute for every districts one or more Child Welfare Committee.²⁵⁷ There is also a provision for the establishment of Children's Home under the Act for the purpose of reception of child in need of care and protection during the pendency of any inquiry and for their care, treatment, education, training development and rehabilitation.²⁵⁸ Shelter Homes are also set up to provide shelters to the children in need of urgent support.²⁵⁹

(J) THE COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005: -

To protect, promote and defend the rights of the child as prescribed by the United Nations Convention on the Rights of the Child, 1989 recently a new legislation is enacted i.e. the Commission for Protection of Child Rights Act, 2005. This Act came into force on 15th February 2007. The main purpose of this legislation is to set up a National Commission for Protection of Child Rights.²⁶⁰ The Act provides provision for setting up NCPCR in the Country.²⁶¹ It is a statutory body to protect, promote and defend the rights of the child. The main functions of the Commission is to examine the safeguards as provided by or under any law and recommend measures for their effective

256. *Ibid*, Section 23.

257. *Ibid*, Section 29.

258. *Ibid*, Section 34.

259. *Ibid*, Section 37.

260. Hereinafter referred to as NCPCR.

261. *The Commission for Protection of Child Rights Act, 2005*, Section 3.

implementation; to inquire into violation of child's right and recommend initiation of proceedings in such cases; inquire into complains and take *suo motu* notice of the matter relating to violation of child's right, non-implementation of laws, non-compliance of policy decision, etc.²⁶² In relation to the inquiries under clause (i) of Sub-Section 1 of Section 13, the Commission shall have all powers of a Civil Court as provided under the Code of Civil Procedure.²⁶³ The Commission may recommend the concerned government to initiate proceeding for prosecution against such person; approach Supreme Court or the High Court for their direction; and to recommend the concerned government for grant of interim relief to the victim or members of his family.²⁶⁴ The Commission has to submit annual report to both the Central Government and the State Government.²⁶⁵ Like the Goa Children's Act, this Act too sets up Children's Court for the purpose of speedy trials of offences against children or of violation of their rights.²⁶⁶

However, despite these legislations and their provisions protecting the rights of the child and punishing the offenders violating their rights, the crimes against children are raising especially Child Sexual Abuse. There is no stoppage of such incidents wherein children are exploited and abused. In fact, such crimes are increasing at the alarming rate.

JUDICIAL ACTIVISM TO PROTECT CHILDREN AGAINST CHILD SEXUAL ABUSE AND INCEST: -

We happen to cross news in our day to day life about children being victims of rape and other forms of sexual abuse. Despite the aforementioned legislative enactment along with the Constitutional provisions which prescribes

262. *Ibid*, Section 13.

263. *Ibid*, Section 14.

264. *Ibid*, Section 15.

265. *Ibid*, Section 16.

266. *Ibid*, Section 25.

prevention and protection of exploitation of children and their sexual abuse are still increasing. One of the reasons for this may be lack of implementation of the legislative and constitutional mandates by the implementing authorities as well as lack of co-ordination between policy making and implementation. Under these circumstances the judiciary has intervened to protect the rights of the children from various forms of exploitations, specifically Child Sexual Abuse.

In *Ganshyam Mishra vs. The State*²⁶⁷, the victim was a young girl of 10 years and the offender was an adult of 39 years. The offender was the victim's school teacher. Taking advantage of his position he induced her to come inside the schoolroom where he raped her. The appellate Court ordered for enhanced punishment for 3 years to 7 years rigorous imprisonment. The modesty of a woman is her sex and whoever uses criminal force with intent to outrage it commits an offence under Section 354 IPC. "Women" means female human being of any age, hence, a girl child is covered under the ambit of Section 354 IPC. This was highlighted by the Apex Court in *State of Punjab vs. Major Singh*.²⁶⁸ In this case a female child of seven and a half months was raped by the accused. The Supreme Court considered the female child to be a woman under Section 354 IPC and held that the accused had outraged and intended to outrage her modesty. The accused had walked into the room where the child was sleeping and committed rape on her.

In *Gorakh Daji Ghadge vs. The State of Maharashtra*²⁶⁹ a 13 year old girl was raped by her own father in his home. The High Court stated that crimes in which women are victims need to be severely dealt with and in extreme cases such as wherein the accused is the father of the victim who thought it fit to deflower his own daughter to gratify his lust, such a person should get the most

267. AIR 1957 Ori 78.

268. AIR 1967 SC 63.

269. 1980 Cr. L. J. 1380.

deterrent sentence for such crime. In *Jagdish Prasad Sharma vs. State*²⁷⁰ a girl child aged three and a half years old was sexually abused by the accused. The Court convicted the accused for rape and sentenced for rigorous imprisonment for life. The Supreme Court in its landmark judgment in *Gaurav Jain vs. Union of India*²⁷¹ held that protection of basic human rights and dignity of life of the children and prevention of sexual abuse of children is essential. Children too have the right to equality of opportunity, dignity and protection by the society. It is the duty of the State to take appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, including sexual abuse. The State parties are under an obligation to ensure protection of children as every child has the inherent right to life, which is granted by the Constitution under Article 21.

In *Sakshi vs. Union of India*²⁷² the petitioner contended that with the rising cases relating to CSA the interpretation of Sections 375 and 376 IPC and other sections are not consistent with the current state of affairs in society. It was also submitted that there is the need for a law on CSA. It was also submitted that the expression sexual intercourse contained in Section 375 IPC should include all forms of penetration as the narrow understanding and application of rape under Section 375 and Section 376 IPC runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade child sexually, which in turn effects the sexual integrity and autonomy of children. Moreover, even if a case of sexual abuse is filed the child who have been the victim of such an offence has to undergo the ordeal in the trial before the Court. Hence, it requested the Supreme Court to lay down certain rules for holding the trial of child sexual abuse and amend the trial procedure and taking witness of the victim in the

270. 1995 Cr. L. J. 2501.

271. AIR 1997 SC 3021.

272. AIR 2004 SC 356.

Court. As per the directions of the court the Law Commission of India reviewed the laws relating to the statement of the victim of sexual abuse.

CHAPTER - VI
MOTHERHOOD AND MATRIMONIAL
CAUSES AND CURE

CHAPTER-VI

MOTHERHOOD AND MATRIMONIAL CAUSES AND CURE

Women in India since the ancient period have been deprived of her rights. Many heinous crimes are committed against her even today. One of such crime is female infanticide and foeticide, which takes away the rights of the girl child even before she is born. Not only this, it also strikes at the motherhood of the woman as well as causes matrimonial woes in her life. The practice of female infanticide and foeticide is a gross violation of human rights. It depicts the low status of women in a society and reflects on the issue of gender discrimination which begins from the womb and ends up in her tomb. This practice is in existence in India since generations. It cut across the boundaries of caste, class, religion and even the division between the rural and urban comes to an end. Hence, it exists in every strata of the society. This practice of killing the girl child either before birth or after birth merely because she is a female is one of the extreme forms of discrimination and violence against women. In fact, female foeticide and infanticide is the beginning of the suffering of a woman in the course of her life, and now the situation in India is such that the ratio of women to men has been decreasing every year. In 1901 the gender gap was 972 females per 1000 males. The survey which was conducted in 1981 shows that the sex ratio has declined from 935 females per 1000 males in India. However, after 20 years when the survey was conducted it showed that the situation has gone worse as now the

ration of female per 1000 male is only 927.¹ The 2001 census conducted by the Government of India, showed a sharp decline in the child sex ratio in 80% districts of India.² The said census revealed that there were 795 women for every 1000 men in Punjab,³ which is the poorest sex ratio of all the States in Punjab. This is the most imbalanced ratio of sex in the world. The decline in the sex-ratio in the successive censuses in India since 1872 proves that the girl child is neglected in India right from the beginning of her birth. The biggest challenge which India is facing today is of the female infanticide and foeticide.

Female infanticide and foeticide, though, are both related to crimes committed against the girl child yet there is a slight difference in the timing of killing of the girl child. '*Female infanticide*' means intentional killing of the girl child just after she is born alive or at any time before the completion of one year. The practice of female infanticide is an age old practice wherein girl child is killed just after her birth as she is not wanted in the family. In fact, there is an entire village in Rajasthan wherein it is a record that all the children born out there are male child. No girl child is born in the village for the past decades.⁴ This practice shows that in India, on the one hand, wherein we worship women in the form of various Goddesses, the arrival of the girl child in the family is not welcomed. However, '*female foeticide*' is not a new form of crime; it is an advanced form of female infanticide wherein the girl child is killed even before she steps into this world by using advanced technology. The difference between two of them lies only in the timing and method of killing the girl child. Both the methods of killing the girl child is an extreme manifestation of violence against women as it not only

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1. <http://everything2.com/e2node/Female%2520infanticide%2520in%2520India>[Visited on 14th January 2009].
 2. http://www.savegirlchild.org/declining_sex_ratio.html[Visited on 14th January 2009].
 3. <http://www.merineews.com/catFull.jsp?articleID=124946>[Visited on 14th January 2009].
 4. <http://www.rediff.com/news/2001/oct/24spec.htm> [Visited on 14th January 2009].

depict discrimination against the girl child and women but also a crime against motherhood.

BACKGROUND OF FEMALE INFANTICIDE:-

Infanticide was a common form of crime committed against the girl child in the ancient cultures, including India. Earlier during the Carthage the practice of infanticide was in the form of child sacrifice to the supernatural figures or forces. However, many societies regarded child sacrifice as morally repugnant and did not consider infanticide a religious or spiritual act. Although the practice of child sacrifice has become less common but it still continues in some of the extremely high poverty and populated parts of the world such as China and India. Particularly, the girl child is at more risk in such practices as a sex-selective infanticide. The infanticide was a common method among Jews in ancient period. One of the frequent methods used for infanticide was simply to abandon the infant, leaving it to die by exposure or whatever other fate will befall on her. Another method of infanticide was to severely malnourish them which may put them at increased risk of death by accident or disease. However, the ancient Jewish practice condemned infanticide.

In Roman history, parents traditionally brought their newborn to the *pater familias*, the family patriarch who would then decide whether the child was to be kept and raised or left to die by exposure. The Twelve Tables of Roman Law obliged the *pater familias* to put to death a child with visible deformities. Roman texts describe the practice of smearing the breast with opium residue so that a nursing baby would die with no outward cause.⁵ In the Solomon Island, some people reportedly kill their first-born child as a matter of custom. Then they

5. <http://www.newsworldencyclopedia.org/entry/Infanticide>[Visited on 14th January 2009].

adopt a child from another island, a practice suggesting the complex and diverse factors which contributes to infanticide.⁶ The condemnation of infanticide spread with Christianity. During the U.S. Slavery the infanticide was practiced because the enslaved women thought it better to kill their children rather than to subject them to a life without freedom.

CAUSES OF FEMALE INFANTICIDE IN INDIA:-

The Indian culture is the ramification of patriarchal values and traditional discriminative practices. The *Atharvaveda* says, “*The birth of a daughter, grant it elsewhere, here grant a son*”. This saying in the Holy Scriptures sums up the Indian attitude towards female children who are subjected to multifarious travails inflicted upon them and also acquires a more virulent form when seen from the perspective of the girl child as the discrimination between boy and a girl begins even before her birth. The rights of the girl child as a human being are being violated even before they open their eyes to the harsh realities of the world. She becomes the victim of unjust cultural practices and their life is sacrificed at the convenience and the altar of our society’s arbitrary religious practices which becomes the plight of the girl child. The practice of female infanticide is not a new concept in India in fact it has existed in different parts of India since ancient period which has now taken a different shape due to technological advancement. Following are the main factors which gave rise to this social evil:-

(1) Preference of son in the family: - The basic ground for the practice of female infanticide is preference of the son in the family. Where the birth of a son is a matter of celebration and rejoices, the birth of a daughter is considered a curse

6. *Ibid.*

to the family. The main reason behind such social thinking is that sons are the fixed deposit of their parent's life which can be used in their old age, whereas girl child is seen as the property of others and will be of their no help; in fact they are financial burdens upon their parents. Sons are called upon to provide the income; they are the ones who do most of the work in the field and hard labour. Hence, sons are looked to as a type of insurance. Moreover, having at least one son is mandatory in order to continue the familial line i.e., *Vansha*. The paternal or ancestral property is known as the Hindu Undivided Family which was equally divided among sons, thus, a male child is necessary to maintain the property rights. In such a situation many sons is an additional value of a family. Another reason for not preferring a female child is that women are considered in India as impure because of menstruation and child birth.

(2) Cultural Factors: - The Indian society is a male dominated society, which places the male gender in a place much higher in value than the female gender. This has cultivated a deep-rooted preference for producing boys over girls. The value of male and female children are different in our society, hence, the sex-related infanticide may be practiced simply to increase the proportion of children of the preferred sex, i.e., male. Where in a culture the childbearing is strongly tied to social structures, infants born outside those structures such as illegitimate children, children of incest, children of cross-caste relationships, etc., may be killed by the family members to conceal the violation of the taboo. Besides these one of the most important cultural factors supported or justified for the sex-selective infanticide and foeticide is the concept of "*Vanshodharak*" wherein the male child has to perform last rites of his father among the Hindus. Under the Hindu religion, a Hindu must beget a son (*putra*) in order to attain *moksha* which is ultimate goal of every person, as son is said to be rescuer who can rescue his

considered to be a source of monetary loss to the family not only among the poor but also in the well to do families. Due to this social evil female infanticide and foeticide is in increase.

(5) Lack of education: - In India maximum percentage of people are illiterate. In 1951, shortly after independence, the Census recorded that only 25% of men and 7% of women were literate. By the 1991 Census, female literacy has risen to 39%. Census 2001 provisional figures indicate that 54.16% of women and men are now able to read and write. Still 245 million Indian women cannot read or write, comprising the world's largest number of unlettered women.⁷ Due to this high percentage in illiteracy, people do not understand the importance of a female child in our life. They still believe in superstition which was once prevalent in the society and has been passed on to them. The women folks are especially deprived of education since their childhood which gives rise to the problems like female infanticide and foeticide detrimental to the society at large.

(6) Advanced technology: - Female infanticide in India has changed its concept to female foeticide due to the advanced technology. One of the leading factors which have increased the decrease in female sex ratio in India is the advanced technology such as ultra sound scanning, amniocentesis, and in vitro fertilization. The ultrasound scanning is a non-invasive technique which has gained popularity in determining sex of the foetus. This technology is available even in remote villages of India. Amniocentesis was introduced in 1975 to detect the foetal abnormalities but it soon began to be used for determining the sex of the baby. Due to these technologies the family comes to know the sex of the baby and if it is not the desired sex the foetus is aborted. Recently, another advanced technology

7. <http://wcd.nic.in/CEDAW4.htm> [Visited on 14th January, 2009].

has penetrated the society which is facilitating the decreasing ratio of female sex in India, i.e., in vitro fertilization. The science has invented this method for those who are not capable of conceiving children normally. In vitro fertilization ensures the birth of a baby of the desired sex without undergoing abortion. Ironically, in India this method is used to avoid giving birth to girl children. Hence, even the medical profession is being part of the gender biased society in India. In fact there is a slogan alleged to be given by doctors who are engaged in foeticide is "*Better to spend Rs. 1000 now and save Rs. 10 lakh later.*"

(7) Oppression of women in the Society: - In the patriarchal society of India women are victims of patriarchal ideology that oppresses them. In case of sex selective infanticide and foeticide the women (i.e. mother) often has no say. The decision to kill the female infants and to abort the female foetus is in the hands of the husband and in-laws. Generally in India midwives are very common and they are entrusted with the additional responsibilities to assist the mother in childbirth. For extra fees they are instructed by the senior women in the patriarchal family to euthanize the female babies. Even in case of sex-selective abortions the women is not asked of her opinion to keep the foetus. Where she does not agree to abort the foetus she is threatened with dire consequences. The mother of the baby does not have right to say anything against it as she fears of being abandoned by her husband or of being homeless, which generally happens when such women oppose the in-laws or against such practice.

METHODS OF KILLING FEMALE INFANTS:

The female infanticide was practiced since ancient period and there are number of methods for killing the infants which have been handed down through the generations, much like the recipes. Sometimes soon after the birth of

the child the infants are fed milk laced with sap from poisonous plants. Sometimes the infant is fed milk laced with paddy husk as soon as they are born; it slits the tender gullet with its sharp sides as it slides down the tiny throat. Now due to modern technology the modern family uses pesticide or the sleeping pills. The infants are sometimes suffocated with a pillow. With the passing years the government through various studies is cracking down various methods of infanticide. From a quick and relatively painless procedure it has turned into a long, painful and torturous one such as starvation and dehydrates the infant. Sometimes the infants are wrapped in a wet towel or dipped into cold water soon after delivery so that it would contract pneumonia. With these methods infanticide will not be proved as to support it there will always be medical prescription claiming the infant to be suffering from pneumonia. The infants are sometimes fed a drop of alcohol to create diarrhea which is another certifiable disease. There are times when the mother of the child is not allowed to breastfeed her child or she herself does not feed with an intention to starve the infant.

With the advancement in technology, the sex-selective abortion has become common in most parts of India. This is the modern way to prevent girl child to be born alive. The ultrasound devices are used to determine the sex of the fetus. The sex determination scan cost anything from Rs. 300 upwards. The whole package, including abortion of the female foetus costs about Rs. 7000. The portable ultrasound devices can be taken anywhere due to its size, as a result the facility of knowing the sex of the child is available even in the remote villages of our country. Even though in some of the remote places female infanticide are practiced, the modern technology helps such family to know the sex of the child in advance (i.e. before it is born alive) saving them to kill it after birth by the traditional methods. Now the unwanted female are simply aborted or in other words killed in the womb itself. Another method of determining the sex of

the foetus is amniocentesis which was introduced to ascertain birth defects or genetic defects in the infants such as abnormalities. Unfortunately, this method is used only for the purpose of knowing the sex of the foetus. Hence, it can be said that now the sophisticated methods have replaced the crude methods of killing the female child. It is more surprising that the attitude of some of medical practitioners reveal that they view sex determination tests as a “human” service provided by them to the couples who does not want to have more daughters as they feel that it is better to avoid the situation rather than regret over it later. They also feel that it is a necessary weapon to control the population. Many justify that aborting a female foetus is preferable to condemning an unwanted daughter to a lifetime of neglect and abuse. Some of the eminent economists also endorse the argument that abortion of females is preferable to neglect, and assert that if the sex ratio of India further worsens as a result of these tests and technologies, then the law of supply and demand will operate and raise the value of women; thus, curbing these tests and technologies is unnecessary or even retrograde.⁸

EFFECTS OF DECLINING FEMALE SEX RATIO:

The rate at which the female sex ratio of our country is declining can impose serious repercussions for the future. It is feared that the decline in female sex ratio can impose difficult in finding match for the male children, as with such rate it is apprehended that it would lead to families where there would be only males. The society which has come a long way to be civilized by introducing the concept of marriage especially monogamy will again go back to the primitive societies wherein there was no form of marriage and sex life was free from any taboos, as there will be limited numbers of female in the society. Such

8. Nidhi Misra, *Legal Aspects of Foeticide and Infanticide-An Indian Perspective*, Law and Child-I, R.Cambray &Co. Pvt. Ltd, 2004, 262.

situation will be against our cultural ethos. Polyandry form of marriage will be call of the time and problems relating to paternity of the children will again haunt the society. One of the adverse effects of declining female sex ratio is that if the situation will not improve and the female sex ration will continue to decline than it will lead to degradation of moral values and degradation in society. The violence against women will reach its peak in the forms of incidence of rape, molestation and other forms of immorality, as the society will consist of only males and very few females the men will opt for immoral methods of fulfilling their sexual gratification.

The above mentioned are the long term effects of female infanticide and foeticide. Along with this there are some instant effects of female infanticide and foeticide in our society. One of the worst effects is that women in our society are expected by her in-laws and husband to give birth to a son and if she gives birth to a daughter she has to suffer lots of humility and insult at the hands of her in-laws and husband. Due to this the woman is pressurized to undergo many tests which are available for the determination of sex of the foetus and abort it if it is a female. The constant pressure on women to give birth to a son and to undergo repeated abortions makes her suffer from physical as well psychological traumas. It also hampers her health as she becomes habitual aborter. The decline of fertility in urban and educated family however, the preference for a son remains strong due to this the woman has to undergo the tests available to determine the sex of the foetus and abort again and again which may result in the decline in the fertility of the woman to produce any children. Men tend to marry younger women to raise in fertility a rate which has resulted in high rate of population growth. Another phenomenon attached to it is that for the purpose of marriage young girls are being abducted. The Hindustan Times recently reported

that young girls from Assam and West Bengal are kidnapped and sold into marriage in neighbouring Haryana.⁹

INTERNATIONAL INSTRUMENTS AGAINST THE PRACTICE OF FEMALE INFANTICIDE AND FOETICIDE:

Every human being has right to life. However, the existence of a new life in the womb of its mother apparently becomes very short if it happens to be a female. Even if the child is born alive there are various methods by which she can be disposed of. The girl child suffers various forms of atrocities even before she is born; in fact her existence in this world is at stake due to increase in the decline of female sex ratio all over the world, especially in the Asian countries. There are various international instruments which protects the rights of a girl child.

The **Universal Declaration of Human Rights, 1948**, recognizes not only inherent dignity but also equal and inalienable rights of all members.¹⁰ It states that everyone shall have the right to life and liberty as the security of persons.¹¹ The **International Covenant on Civil and Political Rights, 1966**, provides that every human being has inherent right to life. This shall be protected by law and no one shall be arbitrarily deprived of his life.¹² It also promotes right to liberty and security to every person.¹³ In order to provide all children to develop physically, mentally, socially, spiritually, and morally, the United Nations General Assembly adopted the **Declaration of the Rights of the Child** in 1959. The Declaration provides that the child by reason of his/her

9. <http://www.iheu.org/node/1049> [Visited on 15th January 2009].

10. Article 1, *UDHR*.

11. Article 3, *Ibid*.

12. Article 6, *ICCPR*.

13. Article 9.1, *Ibid*.

physical or mental immaturity needs special safeguards and care including its appropriate legal protection before as well as after birth.¹⁴ It also confers right to enjoy all the rights set forth in the declaration without discrimination on account of race, colour, sex, language, religion...¹⁵ The Declaration also provides special protection to child and also the right to opportunities and facilities given by law and by other means to enable it to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and conditions of freedom and dignity.¹⁶ The child should have right to name and nationality.¹⁷ The children also have right to social security and to grow and develop in health.¹⁸ The Declaration also provides that the child has a right not to be separated from its mother, and the society and public authorities shall extend particular care to children without family or adequate means of support.¹⁹ The children have right to free and compulsory education at least up to the elementary stages,²⁰ right in all circumstances to be among the first to receive protection and relief,²¹ and above all right to be protected from practices which may foster racial, religious and any other form of discrimination.²²

The United Nations General Assembly resolved the **Beijing Rules** in 1986 wherein the **Standard Minimum Rules for the Administration of Juvenile Justice** was adopted. It provides that all the actions concerning children whether undertaken by the public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies

14. The Preamble, *Declaration of the Rights of the Child*.

15. Principle 1, *Ibid*.

16. Principle 2, *Ibid*.

17. Principle 3, *Ibid*.

18. Principle 4, *Ibid*.

19. Principle 6, *Ibid*.

20. Principle 7, *Ibid*.

21. Principle 8, *Ibid*.

22. Principle 10, *Ibid*.

shall be for the best of interest of the child.²³ It also provides that every child has an inherent right to life,²⁴ and a right to development.²⁵ It is the duty of the state to ensure implementation of these rights in accordance with law and their obligations.²⁶ The United Nations General Assembly also adopted the **Declaration on the Right to Development** in 1986. According to this Declaration the State shall undertake at the national level all necessary measures for the realization of the right to development and shall ensure equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and fair distribution of income.²⁷

In 1989, the United Nation's General Assembly adopted a major convention to protect the rights of the children, i.e. the **Convention on the Rights of Child**. The Convention provides that the primary consideration in all the matters concerning the children should be for the best interests of the child. It provides variety of rights of the children and the most important of all is the inherent right to life and it is the duty of the State Parties to ensure that the maximum extent possible the survival and development of the child.²⁸ The child as per the Convention shall be registered immediately after birth and shall have the right from birth to a name and nationality. The child also has the right to know and be cared for by his or her parents.²⁹ The State Parties as per the Convention shall take appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence.³⁰ The State Parties should recognize the right of the child to the enjoyment of the highest attainable

23. Article 3(1), *Standard Minimum Rules for the Administration of Juvenile Justice*.

24. Article 6, *Ibid*.

25. Article 6(2), *Ibid*.

26. Article 7(2), *Ibid*.

27. Article 8, *Declaration on the Rights to Development*.

28. Article 6, *Convention on the Rights of the Child*.

29. Article 7, *Ibid*.

30. Article 9, *Ibid*.

standard of health and to facilities for the treatment of illness and rehabilitation of health.³¹ It also provides that the child should be protected against all forms of exploitation which is prejudicial to any aspect of the child's welfare.³² The Convention provides that an international Committee shall be established on the Rights of the Child which shall consist of 10 independent experts and this Committee has the competence to hear the State reports.³³ The Committee mentioned under it was established in 1991 and have set aside from time to time for general discussions on particular topics. At its eighth session it discussed matters relating to girl child.

The Convention on Elimination of All Forms of Discrimination against Women provides the meaning of the term "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex.³⁴ It recognizes the ability of a woman to control her own fertility as a fundamental right to her full enjoyment of the full range of human rights to which she is entitled. It also provides equality in access to health care, including family planning, appropriate services in connection with pregnancy, period, granting free services where necessary, as well as adequate nutrition during pregnancy lactation.³⁵

The World Summit for Children, 1990, was a follow-up action to the Convention. The Summit was held at the UN headquarters which enabled the national leaders to focus on issues affecting the future of the children. In 1993 a **World Conference on Human Rights** was held wherein the urgency with regards to the protection and implementation of the rights of the

31. Article 24, *Ibid.*

32. Article 36, *Ibid.*

33. Article 43, *Ibid.*

34. Article 1, *CEDAW.*

35. Article 10, *CEDAW.*

child was discussed. It underlined the importance of the role of UNICEF in the protection and promotion of the rights of the child. The UNICEF in this regards gave a new perception to the promotion of rights of the child by declaring that the human rights begins with Children's Rights.

The **American Convention on Human Rights** guarantees that every person has a right to have his life respected. This shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.³⁶ The **Convention of Human Rights and Fundamental Freedom of the Commonwealth of Independent States** provide that everyone's right to life shall be protected and no one shall be deprived of his life intentionally.³⁷

The **Cairo Declaration of Human Right in Islam** provides that life is a god given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies, and the States to protect this right from any violation.³⁸ The European Convention of Human Rights recognizes that everyone has right to life and such right shall be protected by law.³⁹

NATIONAL INSTRUMENTS AGAINST THE FEMALE INFANTICIDE AND FOETICIDE:

The discrimination against women starts from her house itself as the family in general desire for a male child. She faces covert violence even before she is born. To eliminate her methods like female infanticide and foeticide is adopted by the family who desire for a male child. The practice of female

36. Article 4(4), *American Convention on Human Rights*.

37. Article 2, *The Convention of Human rights and Fundamental Freedom of the Commonwealth of Independent States*.

38. Article 2, *Cairo Declaration of Human Rights in Islam*.

39. Article 2, *European Convention on Human Rights*.

infanticide and foeticide is not uncommon in Indian society. It is in practice in our country since centuries, and is still prevalent in certain parts of the country. It is reported that female infanticide existed in India since 1789 in several district of Rajasthan; along the western shores in Gujarat – Surat and Kutch; and among a clan of Rajputs in eastern part of Uttar Pradesh.⁴⁰ In the 18th Century, infanticide was initially documented by British officials who recorded it in their dairies during their travels. The scopes of the problem of infanticide become clear in 1871, in the setting of India's first census survey. At that time it was noted that there was a significantly abnormal sex ratio of 940 women to 1000 men. This prompted the British to pass the Infanticide Act in 1870, making it illegal. But the Infanticide Act was difficult to enforce in a country where most birth took place in the home and where vital registration was not commonly done.⁴¹ The method of eliminating girl child is still in practice and has in fact taken a new shape at the hands of advanced technology. The fall in the rate of sex ratio in India especially post independence became more rapid. Out of all the States in India, Punjab tops the list with 793 girls per 1000 boys, Haryana is second with 819 girls per 1000 boys, Chandigarh stands third with 845 girls per 1000 boys in the age group of 0 to 6, Delhi is fourth on the list with 865 girls per 1000 boys and Gujarat occupies fifth place with a 878 girls per 1000 boys.⁴² The female infanticide and foeticide is one of the issues that is gaining much importance from all quarters these days due to adverse consequences the society may face by the rapid decline in the female sex ratio. India being the founder member of the United Nation has made its best

40. Sneha Lata Tandon and Renu Shrama, *Female Foeticide and Infanticide in India: An Analysis of Crimes against Girl Children*, International Journal of Criminal Justice Sciences, Vol 1(1), 2006.

41. Rita Patel, "The Practice of Sex Selective Abortion in India: may You Be the Mother of a Hundred Sons", www.ucis.unc.edu/resources/pubs/carolina/abortion.pdf [Visited on 28th Dec' 2008]

42. Padma Bhargav, *Female Foeticide: Society sans women*, <http://www.canadafreepress.com/2006/india090106.htm> [Visited on 28th Dec' 2008].

effort to implement the provisions of the international instruments in its national front. In order to combat the discrimination against the girl child in the name of female infanticide and foeticide which is a grave social problem and a social evil, following protections are available for the girl child:

1. CONSTITUTION OF INDIA: -

In order to protect a girl child from the evils of female foeticide and infanticide, the Constitution of India under Part III confers certain rights of the child. It provides right to equality in general.⁴³ It also prescribes right against discrimination on the ground of religion, race, caste, sex, etc.⁴⁴ One of the most important rights which the Constitution provides is that right to life and liberty.⁴⁵ This right is supported and conferred by various decisions of the Supreme Court such as in *Maneka Gandhi vs. Union of India*⁴⁶ and *Francis Corelli's Case*.⁴⁷ The Constitution under Part IV provides that every person has right to opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and to protection of the childhood and youth against exploitation and against moral and material abandonment.⁴⁸ It also provides that it is the duty of the state to provide early childhood care and education for all children until they complete the age of six years.⁴⁹ An unborn person can be brought within the ambit of person under the said provisions and in fact it possesses the right to be born and stay alive. This right is being denied without due process of law. The practice of infanticide and foeticide selectively resorted to in the case of female children only would make them violative of Articles 14 and 15

43. Article 14, *Constitution of India*.

44. Article 15, *Ibid*.

45. Article 21, *Ibid*.

46. AIR 1978 SC 597.

47. AIR 1981 SC 746.

48. Article 39 (e) and (f), *Ibid*.

49. Article 45, *Ibid*.

as such practice would violate not only the right to equality as provided by the Constitution, to the girl child but also hits at the right to equality of the woman who is carrying the baby in her womb to decide whether she wants the child or not irrespective of to whatever sex the unborn child belongs. Such practices also rob the right to life and liberty of the girl child under Article 21 wherein every person has right to life. The girl child too has right to be born and not aborted, killed or abandoned just because she is a girl. She too have right to remain alive after birth and not to be killed at any moment after birth; she also have right to her mind, her body, right to childhood and rights to a healthy family environment. Such practices also makes the protection provides under the Directive Principles of States Policy mere provisions wherein protection is provided without any implementations. Along with these, the Constitution also provides certain fundamental duties to its citizen wherein it is the duty of every citizen to develop the scientific temper, humanism and the spirit^fof inquiry and reform and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. The State has a duty to equip the child in every way so that it could efficiently perform the duty enjoined upon it.⁵⁰

The Government of India formulated national policy for children by Resolution dated 22-08-1974.⁵¹ The policy was made as per the duties conferred upon the State to protect the rights of the child by the Constitution. The policy chalked out certain programmes to enforce the rights conferred upon a child by the international and national charters. The Indian Government ratified the Convention on the Rights of the Child on 2nd December 1992. The Government being the signatory to the World Declaration on the Survival, Protection and

50. Article 51-A, *Ibid*.

51. G. Kameshwari, *Basic Rights of A Child – Born and Unborn*, AIR 2002 J141 at 143.

Development of Children and the World Summit established the Department of Women and Child Development under the Ministry of Human Resource Development has formulated a **National Plan of Action for Children**. It formulated a National Plan of Action exclusively for the girl child (1991-2000) in 1992 for the "*Survival, Protection and Development of the Girl Children.*" The Plan recognized the rights of the girl child to equal opportunity, to be free from hunger, illiteracy, ignorance and exploitation. Towards ensuring survival of the girl child, the objectives of the Plan were as follows:

- Prevent cases of female foeticide and infanticide and ban the practice of amniocentesis for sex determination;
- End gender disparity in infant mortality rate; eliminate gender disparities in feeding practices, expand nutritional interventions to reduce severe malnourishment by half and provide supplementary nutrition to adolescent girls in need;
- Reduce deaths due to diarrhea by 50% among girl children under 5 years and ensure immunization against all forms of serious illnesses; and
- Provide safe drinking water and ensure access to fodder and drinking water nearer home.

To raise the overall status of the girl child the Government also launched the **Balika Samridhhi Yojana** in 1997. This initiative by the Government was taken in order to change the attitudes of the family towards the girl child and her mother. Under it about 25 lakh girl children born every year in families below the poverty line are to be benefited. The first component of the scheme, which has already been launched provides Rs. 500/- as a post-delivery grant to the mother of the girl child. This scheme was launched by the then Prime Minister I.K. Gujral on 2nd October, 1997. The main objective behind this scheme was to "change the negative attitude of the Family and the community to the girl

child at birth and towards her mother.” The other components proposed under the scheme are provision of annual scholarships to the beneficiaries when they go to school i.e. Rs 300 at the junior level and Rs. 1000 at the senior level. This scholarship will be deposited in the account of the beneficiary so as to provide her added benefit and assistance for taking upon income generating activity when they attain the age of maturity. The amount payable to the child will depend upon the fact that for how many years such child undergone school education. However, the scheme has limitation to the first two daughters, and becomes ineffectual for the every daughter born after the two children.

Similarly, the State Government too made efforts through various schemes to tackle the issue of problems related to female infanticide and foeticide. For Example; in Haryana Government introduced a scheme called **Apni Beti Apna Dhan** on 2nd October 1994. The Scheme aimed at making girls financially independent and provides monetary assistance of Rs. 3000/- to the family at the birth of first three girls. The mother of the girl child will be given Rs. 500/- within 15 days of each girl’s birth for the post delivery needs of the mother for increased nutritional requirements. The said sum will be delivered in the hands of mother at her door steps. The Government will invest the sum of Rs. 2500/- in the name of the girl child in Indira Vikas Yojna within three months of her birth. This investment is made available to the girl when she reaches 18 years of age. In 1995 the Haryana Government expanded the scope of the said scheme and announced a sum of Rs. 35,000/- and Rs. 30,000/- against Rs. 25,000/- for the girls who agree to defer the encashment of their Indira Vikas Yojna. In the first year of the implementation, the scheme provided Rs. 500/- to 36,000 women in the State and invested Rs. 2500/- each in Indira Vikas Patra for more than 23,000 girls.

On the same ground the Tamil Nadu State Government too introduced two schemes to tackle the problem of female infanticide and foeticide

in the state. The first scheme is called “cradle baby scheme” wherein instead of killing the girl child, she is given in adoption. It offers shelter and upkeep for the baby girls who have been abandoned by their parents. The scheme involved placing of the unwanted girl child at the primary health centres and one percent reservation in job for the ‘cradle babies’ when they grow up. However, the scheme failed because of poor implementation and neglect of the abandoned child. The second scheme initiated by the Tamil Nadu Government involves an incentive of Rs. 5000 to be invested in the name of 1 of 2 girls if the couple has only two girls and no son and if the family is below poverty line and one of the parents agrees to undergo sterilization. The investment made in the name of the girl child will be made available to her when she is 20 years of age. However, even this scheme has not been well received as the incentives were not made immediate and therefore, the scheme held no charm to lure such parents. These two schemes failed miserably. Ultimately the Tamil Nadu government has formulated various plans of action under Vision 2000 Programme wherein one such plan was Nutrition Programme which concerned the health of the pregnant women. The government under this scheme initiated campaigns to educate women and made efforts to raise their economic status through employment schemes.

Besides this recently, the religious organizations too are taking active participating by condemning the practice of female foeticide and infanticide as against the religious practices. Even the Indian Medical Association is organizing campaigns against the problem relating to female foeticide and infanticide in collaboration with various NGO’s working in this field.

2. LEGISLATIVE ENACTMENTS:-

The Constitution confers duty upon the State to protect the rights of the girl children against the practice of infanticide and foeticide. The

increase in the instances of female infanticide and foeticide resulted in the alarming decline in the female sex ratio of our country. Hence to curb the evil of infanticide and foeticide and to protect the girl child from such discriminatory and inhuman practice certain legislative measures were taken by the Indian government which is as follows:-

(a) Indian Penal Code: -

The Indian Penal Code was enacted in 1860 and contained certain provisions which brought female infanticide within its ambit. Various censuses taken at that time showed that the practice of female infanticide is prevalent in large scale in various parts of India. This Code was enacted to also check the practice of female infanticide. It treats female infanticide as culpable homicide and murder. Female infanticide means intentional killing of a girl child after she is born alive by any members of the family, parents of the child or any person who assists them. Hence, female infanticide is an offence which can be brought under the offence of culpable homicide. The Code provides that whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.⁵² It also provided that culpable homicide under the said provision include to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or have completely born.⁵³ Female infanticide can also be covered under Section 300 which provides for provision with respect to murder. The said section states that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or the offender commits it with full knowledge that his

52. Section 299, IPC.

53. Explanation 3 of Section 299, *Ibid*.

act will cause death of the person, or to cause such bodily injury with an intention to kill the person, or the act of the offender is dangerous that it will in all probability cause death of the person. Female infanticide is covered under it because the offender knows that by his/her such act the infant will die or the offender does the act with an intention to cause the death of the infant.

The Indian Penal Code also provides protection of a girl child against female foeticide. Female foeticide or abortion in India was governed by the Indian Penal Code till 1971. The Code does not use the term foeticide or abortion, it uses the term miscarriage. Miscarriage means premature expulsion of child or foetus from the mother's womb at any period of pregnancy before the term of gestation is complete. It provides the protection of a foetus under certain circumstances. Section 312-316 of the Code made abortion punishable offence. It provides that whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment of maximum three years or with fine or with both; and if any woman be quick with child, shall be punished with imprisonment of maximum seven years and shall also be liable to fine.⁵⁴ Explanation to Section 312 states that a woman who causes herself to miscarry, is within the meaning of section 312. However, this provision has an exception which provides that miscarriage may only be caused in good faith for the purpose of saving the life of woman. The provision also uses the term 'quick with the child' which means when the woman starts to feel the particular experience from about the fourth or fifth month of pregnancy. The symptoms are popularly ascribed to the first perception of the movement of the foetus. As per the law 'quick with child' means having conceived i.e. when embryo has assumed foetal form and started moving in the womb. In order to prove the offence under the said provision following things are necessary to prove:-

54. Section 312, *Indian Penal Code*.

- That the woman was pregnant whether it is initial stage of pregnancy or is quick with the child,
- That the accused did some act likely to cause a miscarriage,
- That the accused did so voluntarily,
- That such woman did miscarry in consequences,
- That such miscarriage was not caused in good faith i.e. to save woman's life.

The Code also provides that a person who aids and facilitates a miscarriage is liable for the abetment of the offence of miscarriage under section 312, even though the abortion did not take place.⁵⁵ However, there is one exception to this provision i.e. abortion is permitted on therapeutic medical grounds in order to protect the life of the mother. In *Rex vs. Bourne* (an English case)⁵⁶ a girl under 15 years, who was criminally assaulted in the most revolting circumstances became pregnant. An eminent obstetrics surgeon and gynecologist who terminated the pregnancy were charged with causing abortion against the law under section 58 of the Offences Against the Person Act, 1861. It was held that since the operation was done *bona fide* to save the life of the mother practically from the physical and mental breakdown the defendant is entitled to an acquittal. Similarly, in *Sharif vs. State of Orissa*⁵⁷ termination of pregnancy of a minor girl was performed to save the life of the mother. In this case the accused accompanied the girl with her consent to the nursing home, who wanted to terminate the pregnancy to avoid social stigma. The accused did not instruct her to go for termination. The accused was charged with section 312. It was held that the accused is not liable for causing the girl to miscarry. The offence is non-

55. Section 109, Explanation 2, IPC.

56. (1938) 3 All ER 615.

57. (1996) CrLJ 2826 Ori.

cognizable, bailable, non-compoundable offence, can be tried by the Court of Sessions.

The Code also provides that whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment of life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.⁵⁸ The most essential element in this Section is that the act of abortion must have been done without the consent of the woman. Under this section the person procuring the abortion is alone punished i.e. the woman whose abortion is done is not punished. The woman is punishable under section 312. In *Dr. Akhil Kumar vs. State of M.P.*⁵⁹ a woman living separately from her husband for 3 to 4 years got conceived as a result of illicit intercourse with her distant cousin. Where her pregnancy was for 24 weeks she approached a Medical Practitioner^d who pushed Menstrogen Forte injection into her which caused her death. The literature of Menstrogen Forte clearly stated that the effect of such injection could be miscarriage. The plea of the accused physician that he had pushed that injection to determine if she was pregnant was not believed because the 6 month old pregnancy was writ large on her abdomen discernible from outside and the doctor was convicted for attempt to cause miscarriage. In *Moideenkutty vs. Kunhikaya*⁶⁰ an allegation was made by a woman who was pregnant. It was alleged that the accused took her to a doctor who terminated her pregnancy. The termination of pregnancy was done under medical advice. However, the Court held that the case against the accused could not be made out as the woman willingly submitted herself to abortion and even after the abortion had sexual intercourse with the accused and there was nothing to show that

58. Section 313, IPC.

59. 1992 Cri. LJ 2029.

60. AIR 1987 Ker 184.

abortion was at the instance of the accused. Further, it was not clear from the allegation that whether he was only accompanying the lady at her request and whether he even made a request to the doctor to have the abortion done. Finally, the doctor who conducted the abortion was not made an accused, which showed that she had no complaint against him.

The offence mentioned under Section 314 is cognizable, non-bailable, and non-compoundable and may be tried by the Court of Sessions and is punishable with imprisonment up to ten years of either description and shall also be liable for fine.

The Code also punishes any act which is done with intent of causing miscarriage causes the death of such woman. It provides that whoever with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. It also states that if the said act is one without the consent of the woman, the accused shall be punished with either the imprisonment for life, or with the punishment above mentioned.⁶¹ It is not essential for the offence that the offender should know that the act is likely to cause death.⁶² In *Maideen Sab vs. State of Karnataka*⁶³ the deceased mother of 4 children became pregnant. The son-in-law of a pregnant woman left her at the house of the accused doctor. Her dead body was recovered from the place where it was buried in the accused house. The dead body was exhumed after about 12 days. It was found in a decomposed state. The accused made extra-judicial confessions to three different persons to the effect that the death took place during abortion. Circumstantial evidence also proved this fact beyond reasonable doubt. The fact that the accused was absconding was proved by

61. Section 314, *IPC*.

62. Explanation to Section 314, *Ibid*.

63. 1993 Cr LJ 1430 (Kant).

his surrender to the court. His conviction under the section was confirmed and he was sentenced to five years rigorous imprisonment, however, the fine was set aside. Again in *Jacob George vs. State of Kerala*⁶⁴ a homeopath operated upon a pregnant woman to cause abortion but she died a few hours after operation because her uterus got perforated. His conviction was upheld under Section 314, however, the Apex Court reduced his sentence to one already undergone but enhanced the fine of Rs. 5,000 to Rs. 100000 to be deposited in the name of the minor son of the deceased and also passed the detailed orders as to how the money was to be utilized. The court discussed the purpose of punishment at length and emphasized the need of awarding compensation liberally but reasonably to meet the ends of justice. However, in *Vatchhalabai Maruti Kshirsagar vs. State of Maharashtra*⁶⁵ a nurse attempted to cause miscarriage of a pregnant girl but was unsuccessful. On the third day another person, the accused who was an attendant, made an attempt and succeeded and as a result of this the girl died. She died of septicaemia which had developed from ruptures and tears in the internal parts of vagina. There was no evidence to show that ruptures and tears had occurred at the hands of the accused. It was held that the conviction of the accused under Section 314 was not proper.

With the help of the above judicial decision it is clear that it is not essential for the offence that the offender should know that the act is likely to cause death. The provisions of Section 314 will also be attracted even if the accused has taken proper precaution in order to prevent risk to the life of woman. The offence committed under the said section is non-cognizable, non-bailable and non-compoundable and will be tried by the Court of Sessions.

64. 1994 Cr LJ 3851.

65. 1993 Cr LJ 702(Bom).

In order to curb the social evil called infanticide the Code provides that whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causing it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which extend to ten years, or with fine, or with both.⁶⁶ The section thus makes an act offence if the accused has intention to inflict injury to the child which results in the destruction of the child's life. However, there is an exception to this rule i.e. if the said act is done in good faith for the purpose of saving life of the mother then such act is outside the purview of this section. The said offence is non-cognizable, non-bailable and non-compoundable and shall be tried by the Court of Session.

The Code also provides that whoever does any act causing the death of a quick unborn child by an act amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.⁶⁷ The offence provided under Section 316 is non-cognizable, non-bailable and non-compoundable and shall be tried by the Court of Session. This provision will be attracted under the following circumstances:-

- That the woman was quick with child;
- That the accused did an act to cause the death of the child;
- That the circumstances under which the act was done was such as to make the accused guilty of culpable homicide if the death has been caused;
- That such act did cause the death of quick unborn child.

66. Section 315, *IPC*.

67. Section 316, *Ibid*.

Illustration to Section 316 states that A, knowing that he is likely to cause the death of a pregnant woman does an act which, if it caused the death of the woman would amount to culpable homicide. The woman injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

Unless the act is done against the mother with an intention or with a knowledge which brings it within the purview of Section 299, it can not constitute an offence under this section merely because the death of a quick unborn child has resulted from an act against the mother. In *Murugan vs. State*⁶⁸ a husband striking his wife dead was held guilty of the offence under this section. The medical evidence showed that she was carrying a male child of 20 weeks. A foetus gets life after 12 weeks of conception. The principle laid down in Section 301 is applied here.

In India we read and hear more or less every day that an unwanted girl child was left in the garbage, disposed off in plastic bag, wells, secluded areas etc. With an intention to prevent the abandonment or desertion by the parents of the child under the age of twelve years or by the person having the care of such child, the Code provides that such parents or such person if expose or leave the child with the intention of wholly abandoning such child shall be punished with imprisonment of either description for a term which may extend to seven years or with fine, or with both.⁶⁹ It also provides that wherein the child dies as a consequence of the exposure then the charge for murder or culpable homicide will be applicable.⁷⁰ The offence mentioned under this section is cognizable, bailable, non-compoundable and shall be tried by a magistrate of first class. The term “*expose*” means to put outside physically, so that such an act puts some

68. 1991 Cr LJ 1680 Mad.

69. Section 317, *IPC*.

70. Explanation to Section 317, *Ibid*.

physical risk to the person who has been put out. With reference to a child, it would mean to put it somewhere where the child could not receive the protection which is essential for its tender age for example; putting it outside the house, whereby the child would be at risk of the climate, wild beasts etc. The exposure to the child means exposure by which danger to life may immediately ensure. The term “*leave*” means leaving of a child without any protection. Even an illegitimate child comes under the purview of this section.

The Code also provides that whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.⁷¹ This section deals with secret burial of a child. It will apply only where one intentionally conceals the birth of a child from the world at large. This section also intended to prevent infanticide. In order to prove the offence under this section following things must be proved:

- The birth of the child;
- Secret burying or disposing of the dead body of a child; and
- With intention to conceal the birth of such child.

If it is foetus only then Section 312 and 511 of the Code will be applied. The offence is cognizable, bailable and non-compoundable offence triable by the Court of Session or the magistrate of first class. In an unreported criminal case in 1895 the accused gave her new born illegitimate dead child to a woman with instructions to dispose of it secretly, and the latter carried out the instructions by throwing it into a river, it was held that the accused was not guilty of a substantive offence under this section, though the fact more appropriately

71. Section 318, *Ibid.*

came under the definition of abetment.⁷² In *Lulano Lotha*⁷³ the court found that there was no evidence to show that the accused, a teenaged tribal girl was carrying and there was also no evidence of any child birth or its secret disposal nor was there any evidence that the girl complained of any pain in her private parts at the time of her medical examination soon after the alleged delivery, it was held she could not be convicted under this section merely on the basis of her judicial confession which was not voluntary as it was made while she was still under the influence of the police.

Hence, the Indian Penal Code recognizes the problem of female infanticide and female foeticide as a social evil and tries to prevent such a practice by imposing punishment of grave nature along with fine.

(b) The Medical Termination of Pregnancy Act, 1971:-

The Indian Penal Code till 1971 governed the law on abortion. It permitted 'legal abortion' without criminal intent to kill the foetus and which is done in the good faith for the express purpose of saving the life of the mother. Abortion is a major cause of maternal morbidity and mortality in India because most of the abortions are not reported and the sex selective abortions are carried out secretly. Due to these factors it is difficult to maintain the statistics of abortion in India and the available statistic is also inadequate as the hospitals keep records of only legal and reported abortions. According to the Consortium on National Consensus for Medical Abortion in India, every year an average of about 11 million abortions take place annually and around 20,000 women die every year due to abortion related complications. Most abortion related maternal deaths are

72. Quoted in Ratanlal & Dhirajlal, *The Indian Penal Code*, Wadhwa and Company Law Publishers, Nagpur, 1997, 452.

73. 1981 Cr LJ 522 (Gau).

attributable to illegal abortions.⁷⁴ The laws provided were not deterring families from sex selection abortions as a result of this it has been reported that from the survey of one million household in 1998 by the Indian government at least 50,000 female fetuses in 1997 were aborted. Lots of people in India are turning towards abortion for girls due to factors mentioned above and this in turn is resulting in the decline of female sex ratio. In order to prevent the misuse of induced abortions which may even cause the death of the mother along with the removal of the foetus, most countries in the world have created strict abortion laws where only the qualified doctors under stipulated conditions can perform abortion on a woman in a clinic or hospital. India too legalized abortion in 1971 with an aim to regulate the illegal abortions in India. It is estimated that around four million Indian women still resort to illegal abortions because of social taboos, and from the quacks i.e. who are not skilled practitioners and minus the medical facilities. This results in the death of the woman also. Now the abortions in India are governed by the Medical Termination of Pregnancy Act, 1971.⁷⁵ Another reason for passing out the abortion law is the boom in the population of our country which has reached more than 1.1 billion people, only next to China.

The MTP Act carves out exceptions to the provisions contained in the Indian Penal Code which criminalize the performance of an abortion. Hence those abortions which fall outside the purview of the MTP Act and the exceptions contained within the Indian Penal Code are regarded as illegal and punishable.

Pregnancy is the condition of having a developing embryo or foetus in the female. It is the condition resulting from the fertilized ovum. Although the Act is related to abortion it does not define the term "*abortion*".

74. http://en.wikipedia.org/wiki/Abortion_in_India [Visited on 14th Jan' 2009].

75. Hereinafter referred to as MTP Act.

Abortion is the spontaneous or artificially induced expulsion of an embryo or foetus. In legal context it is usually referred to induced abortion. Webster's Ninth New Collegiate Dictionary defines abortion as the expulsion of a non-viable foetus; a spontaneous expulsion of a human foetus during the first 12 weeks of gestation; illegal abortion. The Wikipedia Dictionary defines abortion as "*The removal or expulsion of an embryo or foetus from the uterus, resulting in, or caused by, its death.*"⁷⁶ The difference between abortion, miscarriage, and premature labour is not recognized in law and all are referred as abortion. Sometimes it is used to signify expulsion of the contents of a pregnant uterus during the 1st, 2nd and 3rd trimesters of pregnancy respectively. Abortions may be classified into various categories depending upon the nature and circumstances under which it occurs. It may either be: -

- (i) Natural abortion: - which is a common phenomena and may occur due to many reasons such as bad health, defect in generative organs of the mother, shocks, fear, joy etc.
- (ii) Accidental abortion: - it very often takes place because of pathological reasons where pregnancy cannot be completed and the uterus empties before the maturity of foetus.
- (iii) Induced abortion: - which is voluntary action of a person with an intent to destroy the uterus. It may be procured at any time before the natural birth of the child.⁷⁷

Throughout history, induced abortions have been a source of considerable debate and controversy.

76. Manisha Garg, *Right to Abortion*, http://www.legalserviceindia.com/articles/adp_tion.htm [Visited on 7th April 2009].

77. Kirti Dwivedi, *Medical Termination of Pregnancy Act, 1971: An Overview* <http://www.legalservicesindia.com/articles/pregact.htm> [Visited on 7th April 2009].

The MTP Act defines the term “Registered Medical Practitioner” as a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics.⁷⁸ The Medical Termination of Pregnancy Rules, 2003, provides that in case of a Medical Practitioner who was registered in a State Medical Register shall have experience or training in the practice of gynaecology and obstetrics for a period of not less than three years. In case of a medical practitioner who is registered in a State Medical Register had experience at any hospital for a period of not less than one year in the practice of obstetrics and gynaecology; or he should have performed at least five out twenty five cases of medical termination of pregnancy independently in a hospital established or maintained or a training institute approved for this purpose by the Government. Such training will enable the Registered Medical Practitioner to do only 1st Trimester terminations (up to 12 weeks of gestation) or for terminations up to twenty weeks.⁷⁹ The Act provides the termination of pregnancy can be performed by the Registered medical practitioner⁸⁰ under the following grounds: -

- The continuance of the pregnancy would involve the risk to the life of the pregnant woman or of grave injury to her physical and mental health;
- There is substantial risk that if the children were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped;
- Where the pregnancy is caused by rape and continuation of pregnancy would mean to constitute a grave injury to the mental health of the pregnant woman.

78. Section 2(d), *MTP Act*.

79. Rule 4, *the MTP Rules, 2003*.

80. Section 3, *Ibid*.

- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children as the unwanted pregnancy can constitute grave injury to mental health of the pregnant woman.

The Act under Section 3(2) lays down the conditions for the performance of abortion by the registered medical practitioner. It states that such medical practitioner may terminate the pregnancy. Wherein the pregnancy has exceeded 12 weeks but does not exceed 20 weeks; and not less than two registered medical practitioners are of view that it may impose risk to the woman than such pregnancy can be terminated. After 20 weeks of pregnancy abortion is prohibited except when it is immediate necessity to save the life of the mother. With this provision the Act has provided waiver of restrictions on the number of doctor's opinion. Section 3(4) provides that no pregnancy shall be terminated except with the consent of the pregnant woman provided she is not a minor or lunatic where the consent of the guardian is essential. The right of a patient is thus protected by the Act. In order to safeguard the privacy of the women, the Government has formulated the procedure for obtaining the consent of the woman before MTP and forwarding it to the appropriate authority in a sealed envelope marked "secret" and destroying of all the records after five years is stated.⁸¹ The consent given by a pregnant woman for the termination of her pregnancy shall be sent to the head of the hospital or owner of the approved place or the Chief Medical Officer of the State and shall be kept in the custody of the concerned registered medical practitioner.⁸²

81. Rule 9 of the *Medical Termination of Pregnancy Rules, 2003*.

82. Regulation 4, *MTP Regulations, 2003*.

In *Javed and others vs. State of Haryana and others*⁸³ upholding the constitutional validity of the provisions in Panchayats and Zila Parishads, Haryana Panchayati Raj Act, 1994 was challenged which read as under:-

“Section 175(1) No person shall be a Sarpanch, up-sarpanch or a panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who-

.... (q) has more than two living children;

Provided that a person having more than two children on or up to the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.

Section 177(1) If any member of a Gram Panchayat Samiti or Zila Parishad-

(a) Who is elected, as such, was subject to any disqualification mentioned in Section 175 at the time of his election;

(b) During the term for which he has been elected, incurs any of the disqualifications mentioned in Section 175

Shall be disqualified from continuing to be a member and his office shall become vacant.”

The Apex Court observed that the said provisions were not violative of Article 14 or Article 25 of the Constitution. One of the objects of such enactment is to popularize family welfare/ family planning programme which is consistent with the National Population Policy. The Court also observed that if anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and i.e. of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attached to it.

83. AIR 2003 SC 3057.

Similarly in *Bharatbhai Dhanjibhai Modi Nagarwada vs. The Collector in his Office Porbandar and others*⁸⁴ the Collector, Porbandar issued a show-cause notice dated 14/05/2007 under the provisions of Section 11(1)(h) of the Gujarat Municipalities Act, 1963 wherein the petitioner was called upon to show cause why the petitioner should not be removed from the office of the Councillor of Porbandar Municipality as the petitioner's third child was born on 16/12/2006 and the petitioner was disqualified under the above clause read with section 38 which provide that the Councillor who has more than two living children for the period of one year from the date of commencement of the Gujarat Local Authorities Law(Amendment) Act, 2005 shall be disabled from continuing to be a councilor and his office shall remain vacant. The petitioner challenged the constitutional validity of Section 11(1) (h) of the Gujarat Municipalities Act, 1963 as violative of petitioner's fundamental right under Articles 14 and 21 of the Constitution of India and also on the ground that it is inconsistent with the provisions of Section 3(2) of the MTP Act. Relying upon the judgment given by the Supreme Court in *Javed's case* the High Court held that the statutory provisions under challenge do not take away the right of the wife to enjoy the marital bliss, nor do they infringe upon her right to prevent pregnancies. Referring to Explanation II of Section 3 of MTP Act the court held that the petitioner and his wife had option to abort the unwanted pregnancy. Hence, the Court held that it fails to see how the impugned provisions of the Gujarat Municipalities Act can be said to be inconsistent with the provisions of the MTP Act.

In *Murari Mohan Koley vs. the State and Another*⁸⁵ a woman wanted to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner who was a registered medical practitioner for an

84. AIR 2008 Guj 106 (DB).

85. (2003)

abortion. The petitioner agreed to it for consideration. But somehow the condition of the woman worsened in the hospital and she was shifted to another hospital. The woman died although the abortion was not done. The Court held that the petitioner had acted in his good faith hence he can get exemption from any criminal liability under section 3 of the MTP Act, 1971. In *Shri Bhagwan Katariya and Others vs. State of M.P.*⁸⁶ the woman was married to Navneet. Applicants are younger brothers of said Navneet while Bhagwan Katariya is the father of Navneet. After the complainant conceived, the husband and other family members took an exception to it, took her for abortion and without her consent got the abortion done. The Court held that if we refer to Section 3 of MTP Act, 1971, a doctor is entitled to terminate the pregnancy under particular circumstances and if the pregnancy was terminated in accordance with the provisions of law, it must be presumed that without the consent of the woman it could not be done. In this case a permanent scar has been carved on the heart and soul of the woman by depriving her of her child, hence, the doctor is liable.

A peculiar case came up before the Supreme Court in *State of Haryana vs. Smt. Santra*⁸⁷ wherein it was stated that the respondent underwent a sterilization operation at the General Hospital, Gurgaon. She had already seven children and wanted to take the advantage of the scheme of sterilization launched by the State Government. She was issued a certificate that her operation was successful, and she was also assured that she would not conceive in future. The respondent therein conceived and ultimately gave birth to a female child. She filed a suit against the State Government seeking recovery of Rs. 2 lakhs as damages for medical negligence. The suit was decreed for a sum of Rs. 54,000/- with interest. The said decision was confirmed by the Appellate Court as well as by the

86. (2000) Quoted in Manisha Garg, *Right to Abortion*,

http://www.legalserviceindia.com/articles/adp_tion.htm [Visited on 7th April 2009].

87. AIR 2000 SC 1888.

High Court. The Apex Court rejected the contention on behalf of the State of Haryana that it was not bound to pay the damages for the negligence of the Medical Officer for performing unsuccessful sterilization operation. The claim ultimately stood confirmed. The said judgment was considered by a larger Bench of the Supreme Court in *State of Punjab vs. Shiv Ram* ⁸⁸ and it was held that the said case was decided on its own facts as negligence in conducting the sterilization operation was successful and there was assurance that she would not conceive any more. However, the said case does not lay down the law of universal application. In the present case, the Apex Court referred to various aspects of medical sciences in this context and observed that operations of sterilization are not 100% safe and secure. In exceptional circumstances in spite of successful operation a sterilized woman can become pregnant due to natural causes and in such cases the best remedy available to her is to get the pregnancy terminated as it is permissible under the provisions of the 'Act. In view of the said provisions termination of unwanted child is legal and valid. Therefore if a woman has conceived, unwanted pregnancy can be terminated. The Court further observed that: “.....*It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone the sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.*” Similar question came up for consideration in the Supreme Court in *Kanaka Rana vs. State of Orissa & Ors.* ⁸⁹ In this case, a writ petition was filed asking for payment of adequate compensation to the petitioner for the negligence on the part of the opposite parties. The petitioner claims that she is a poor woman. Her husband is a mechanic and earns his livelihood by running

88. AIR 2005 SC 3280.

89. AIR 2009 Ori 17.

truck repairing garage at Jajpur. After having two baby girls, petitioner and her husband decided not to have a third child and opted for family planning operation of the petitioner. Tubectomy was conducted by the medical officer, Jajpur Road PHC on 15-01-1994. However, she gave birth to a female child on 25-12-2000. Husband of the petitioner reported the matter to various authorities of the Health and Family Welfare Department and asked for damages, but no action was taken. Therefore, this writ petition was taken. Therefore, this writ petition has been filed seeking compensation for conducting unsuccessful Tubectomy. The Apex Court held that the petitioner should have avoided the said child through abortion which is permissible under Section 3 of the Medical Termination of Pregnancy Act, 1971. In case she did not opt for abortion and gave birth to a child it could not be an unwanted child. Above all there is nothing on record to show as to under what circumstances the operation has failed. It is settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. Hence, the present petition is dismissed as it does not meet the aforesaid legal requirement.

The Act specifically provides that no pregnancy shall be made in accordance with the Act at any place other than a hospital established or maintained by Government; and a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time-to-time.⁹⁰

90. Section 4, *MTP Act*.

“Hospital” under this Act means the establishment which is maintained by the Central or the Government of the Union territory. It also include nursing home, clinic, medical centre, medical or teaching institution for therapeutic purposes and other like institutions. The MTP Rules, 2003, provides that no place shall be approved under Section 4(b) unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions, and unless the facilities such as in case of the 1st trimester a gynaecology examination/labour table, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities for transportation; and in case of the 2nd trimester an operation table and instruments for performing abdominal or gynaecological surgery, anaesthetic equipment, resuscitation equipment and sterilization equipment, drugs and parental fluids for emergency use notified by the Government time to time.⁹¹ Hospitals and other such institutions shall maintain an Admission Register for recording the details of the admissions of women for the termination of their pregnancies which shall be kept for a period of five years. It shall be a secret document.⁹² The Act however, provides certain exceptions which legalize the abortion such as if the abortion are performed in good faith and it is essential to terminate the pregnancy to save the life of the pregnant woman.⁹³

The Amendment to this Act in 2002 substituted the old one and now it prescribes punishment with rigorous imprisonment for term which shall not be less than two years but which may extend to seven years to any person who is not a registered medical practitioner and terminates the pregnancy of a woman.⁹⁴ It also punishes any person who terminates any pregnancy in a place other than

91. Rule 5, *MTP Rules, 2003*.

92. Regulation 5, *MTP Regulations, 2003*

93. Section 5(1), *Ibid*.

94. Section 5(2), *Ibid*.

prescribed by the Act with rigorous imprisonment for a term which shall not be less than two years but may extend up to seven years.⁹⁵ It also punishes a person who is owner of the place which is not approved under Section 4(b) of the Act with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.⁹⁶ As per the Explanation 1 to Section 5 the term “owner” means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act. The Act also provides that no suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is done in good faith or as permitted under the Act.⁹⁷

The Central Government and the State Government are empowered by this Act to make rules by notification in the Official Gazette to carry out the provisions of this Act viz. the rules regarding the experience or training⁹⁸ and with respect to the opinions of the practitioners for the termination of pregnancy, certificate provided by such practitioners, their preservation and disposal, information by the medical practitioner of any abortion or prohibiting the disclosure of intimations given or information furnished in pursuance of such regulations.⁹⁹ As per the power conferred by the Act the Central Government has framed the Medical Termination of Pregnancy Rules, 2003, and in exercise of the power conferred by Section 7 the Central Government has framed the Medical Termination of Pregnancy Regulations. Despite the legislation, rules and regulations made for the purpose of licensing, monitoring and regulation of hospitals and clinics engaged in conducting sex determination tests and abortions,

95. Section 5(3), *Ibid.*

96. Section 5(4), *Ibid.*

97. Section 8, *Ibid.*

98. Section 6, *Ibid.*

99. Section 7, *Ibid.*

still we see thousands of sex-selective abortions taking place in India and majority of it is done in an unauthorized clinics and unauthorized persons which endanger the life of the mother.

Suggestion of NCW for Amendments in the Medical Termination of Pregnancy Act, 1971 by NCW:-

The NCW suggests certain changes in the Medical Termination of Pregnancy Act, 1971. It has recommended that Section 2, clause (a) should be revised to broaden the definition of guardian to include an individual having the care of the person of a minor women or a women of unsound mind. It is also suggested that the definition of “*lunatic*” should be deleted from Section 2 of the Act. Explanation I of Section 3 Clause (2) should be amended to include offences under Sections 376A to 376D of IPC as within its scope. Section 3, clause (4) should be revised so as to make it clear that the consent of the women concerned must be obtained in every case. And Further, it is suggested that Section 5 Clause (2) should be amended so as to indicate clearly which particular offence is constituted if a person who is not a registered medical practitioner performs abortion.

(c) The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994: -

Women are created at par with man in all aspects. She has equal rights with in this world. Neither is superior to the other. Female foeticide has emerged as a burning social problem during the last few years in India. From the very beginning girl child in India is treated as an additional burden, an extra mouth to feed. The birth of the son is regarded as essential in Hinduism which has now been adopted by the other religion too and many prayers and lavish offerings

are made in temples in the hope of having a male child.¹⁰⁰ In every religion women have equal rights with men and both of them are important element of the world. Thus, to deprive women arbitrarily of their rights and privileges, or to deprive them to even being born or killing them in infancy is both immoral and unjust, a violation of God's Law. It has a detrimental effect on the society and the individuals who are involved in this practice are responsible for such acts.¹⁰¹

With the advent of new and advanced technologies developed by the Medical Science new apparatus for detecting any abnormalities in the foetus was invented. With the help of these apparatus the parents could know the defects and may terminate the pregnancy. Such devices are known as pre-natal diagnostic tests. Following are the three forms by which we can know the in born defects in a child:-

- **Ultrasonography:** - It is the most common technique as it is non-invasive and can identify upto 50 percent of abnormalities related to the central nervous system of the foetus.
- **Amniocentesis:** - Amniocentesis is meant to be used in high risk pregnancies, in women over 35 years. Amniocentesis is advised in the cases when the pregnant woman has a history of one abnormal child-mentally or physically challenged; when either parent has a congenital defect; when couple fall within the high-risk category of producing a defective child; when a previous child has been born with Down's Syndrome or neural tube defects; when parents have hereditary and metabolic disorders, to detect hemophilia, a rare blood disease; and when sex has to be determined for sex-linked hereditary diseases. Amniocentesis tests can detect 1500 genetic abnormalities which help in advising parent to decide whether they would

100. Krishna Chandra Jena, *Female Foeticide in India: A Serious Challenge For the Society*, Cri LJ 2008, J 55 at 56.

101. Bahais View Point, PUCL Bulletin, September 2001, Quoted in *Ibid*.

have child carried till full term or whether they would prefer to get it aborted.

- **Chronic Villi Biopsy (CVB):** - CVB is used to diagnose inherited diseases like thalassaemia, cystic fibrosis and muscular dystrophy.

These scientific techniques which were developed to know the genetic diseases are now used as sex-selection techniques with the help of which the parents are aborting the female foetus. Out of these the most commonly used technique is ultrasonography as it is the cheapest among all the techniques. Amniocentesis entered India in 1975 and from then on it became a method through which sex of the foetus can be known. These techniques were misused towards ensuring the pre-birth elimination of females and have given raise to female foeticide which has resulted in the decline in the female sex ratio in India. In 1980 when women's group first exposed the misuse of the technology, only a few people were alarmed. It was not expected that the pre-natal diagnostic techniques would become so widespread and affordable that they would be available all over the country with devastating consequences on the child sex-ratio.¹⁰² Earlier female infanticide was prevalent in rural India only but with the advent of these technologies in India the people of all spectrum avail these techniques for the purpose of sex-selective abortions which is also known as gender selection abortions.

The alarming fall in the female sex ratio in the past few decades compelled the Parliament to realize the grave implication arising out of the misuse of the pre-natal diagnostic techniques and therefore intended to regulate its use only for certain medical purposes. It realized that such techniques is leading in high rate of female foeticide in India which is discriminatory against

102. G. Kameshwari, *Sex Selection and Sex Selective Abortion-Problems and Perspectives*, CrLJ 2006, J-217 at 217-218.

the female sex and also affects the dignity and status of women. Thus, the Parliament passed the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.¹⁰³ It came into force on 1-1-1996. Despite the intent and purpose of the Act it proved to be inadequate and poorly implemented and the sharp decline in the child sex-ratio in the last decade is the stark illustration of this reality. Hence, a PIL was filed in the Supreme Court by the Centre for Enquiry into Health and Allied Themes (CEHAT), Mahila Sarvangeena Utkarsh Mandal (MASUM) and Dr. Sabu M. George urging effective implementation of the Act.¹⁰⁴ The main aim for filing this PIL was to ensure the implementation of the Act, plugging the various loopholes and launching a wide media campaign on the issue. The second goal was the amendment of the Act to include pre and during conception techniques like X and Y chromosome separation pre-implantational Genetic Diagnosis (PGD). Finally, in 2001 the Apex Court provided certain direction to the Central Government for the implementation of the Act and to make recommendations. It directed the Supreme Court to create public awareness against the practice of pre-natal determination of sex and female foeticide. And to implement with all vigour and zeal the Act and the Rules framed in 1996. The Court also gave directions to the Central Supervisory Board to hold meeting at least once in six months as provided by the Act. The Board shall review and monitor the implementation of the Act and shall issue directions to all the State as well as Union Territories Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. The Board shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in the implementation of the Act and to make recommendations to the Central Government. The Board will

103. Hereinafter will be referred to as PNDT Act.

104. *Centre for Enquiry into Health and Allied Themes (CEHAT) vs. Union of India*, AIR 2001 SC 2007.

require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and foeticide and to ensure the implementation of the Act. With reference to the Supreme Court order and recommendations of the CSB the Parliament on Dec' 20 amended the Pre-Natal Diagnostic Techniques Act and titled it the Pre-Conception and Pre-natal Diagnostic techniques (Prohibition of Sex Selection) Act, 2002. The Act provides for the regulation of the use of prenatal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders. It also prevents the misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide. The main objectives of the Act are as follows: -

- Prohibition of the misuse of prenatal diagnostic techniques for determination of sex of foetus leading to female foeticide;
- Prohibition of advertisement of the techniques for detection or determination of sex;
- Regulation of the use of techniques only for the specific purposes of detecting genetic abnormalities or disorders;
- Permission to use such techniques only under certain conditions for registered institutions;
- Punishment for violation of the provisions of the Act; and
- To provide deterrent punishment to stop such inhuman acts of female foeticide.

The Act consists of 34 sections divided into eight chapters. The Act provides definition for “pre-natal diagnostic techniques” as all pre-natal diagnostic procedures and pre-natal diagnostic tests.¹⁰⁵ “Pre-natal diagnostic tests” means ultrasonography or any test or analysis of amniotic fluid, chorionic villi,

105. Section 2(j), *Ibid.*

blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital abnormalities or haemoglobinopathies or sex-linked diseases.¹⁰⁶ It also defines “pre-natal diagnostic procedures” as all gynecological or obstetrical or medical procedures such as ultra-sonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic tests.¹⁰⁷ The definitional difference between pre-natal diagnostic procedure and pre-natal diagnostic test is that in former procedures are employed for sex-selection whereas the later is to detect certain kinds of diseases. The Act also provides legal definition of many biological terms. It defines “*conceptus*” as any product of conception at any stage of development from fertilization until birth including extra embryonic membranes as well as the embryo or foetus.¹⁰⁸ “*Embryo*” is defined as a developing human organism after fertilization till the end of eight weeks (56 days).¹⁰⁹ “*Foetus*” is defined as a human organism during the period of its development beginning on the fifty seventh day following fertilization or creation (excluding any time in which its development has been suspended) and ending at birth.¹¹⁰

The Act also provides regulation of Genetic Laboratories and Genetic clinic unless registered under the Act shall conduct pre-natal determination technique activities. They can not employ or take services of any person whether on honorary basis or on payment who does not possess the prescribed qualifications. No medical geneticist, gynaecologists pediatrician, registered medical geneticist, gynaecologists paediatrician, registered medical

106. Section 2(k), *Ibid.*

107. Section 2(i), *Ibid.*

108. Section 2(ba), *Ibid.*

109. Section 2(bb), *Ibid.*

110. Section 2(bc), *Ibid.*

practitioner or any other person shall conduct such tests at a place other than registered one.¹¹¹ The Act also prohibits sex selection and provides that no person shall conduct sex selection on a woman or on man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.¹¹² The Act also prohibits sale of ultrasound machines to unregistered persons, clinics, laboratories etc. provides that no person shall sell any ultrasound machine or imaging machine or scanner or any other machine capable of sex detection foetus to any genetic centre, genetic laboratory, genetic clinic or any other person not registered under the Act.¹¹³

There is an important provision under the Act which lays down that no pre-natal determination tests shall be conducted except for abnormalities, viz., chromosomal abnormalities; genetic metabolic diseases; haemoglobinopathics; sex linked genetic diseases; congenital anomalies; any other abnormalities or diseases specified by the control supervisory board.¹¹⁴ Section 4 also provides that the pre-natal diagnostic techniques may be conducted if any of the following conditions are fulfilled, namely:-

- (i) age of the pregnant woman is above 35 years;
- (ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;
- (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
- (iv) the pregnant woman or her spouse has a family history or mental retardation or physical deformities such as, spasticity or any other genetic disease; and

111. Section 3, *Ibid.*

112. Section 3A, *Ibid.*

113. Section 3B, *Ibid.*

114. Section 4, *Ibid.*

- (v) Any other condition as may be specified by the Board.

Section 5 of the Act provides that side and after effects of such diagnostic procedure must be explained to the pregnant women and her written consent to undergo such procedure be obtained in the prescribed form in the language which she understands. No person shall communicate to the pregnant woman or her relative or any other person the sex of foetus by words, signs or in any other manner. Similarly, the Act prohibits the determination of sex by techniques including ultrasonography for determining the sex of foetus.¹¹⁵ In *Vijay Sharma and Another vs. Union of India*¹¹⁶ the petitioners were married couple having two children. They were desirous of expanding their family provided they are in a position to select the sex of the child. They were desirous of having a male child. They approached various clinics for the selection of the sex of the foetus by pre-natal diagnostic techniques. However, all clinics denied the treatment on the ground that it is prohibited under the Act. They contended that they only want to balance their family and also stated that a married couple already having child belonging to one sex should be permitted to make use of the pre-natal diagnostic techniques to have a child of the sex of their existing child. In fact, ideal ratio of females to males can be maintained if such is allowed. The petitioners challenged the constitutional validity of the Sections 2, 3-A, 4(5), and 6(c) of the Act. The Court held that if such sex selection is allowed that it will violate the very essence of the Act which would result in unprecedented imbalance in male to female ratio having disastrous effect on society. It can prevent birth of a female child and is as bad as foeticide. The challenged provisions of the Act are thus not arbitrary, unreasonable or violative of Article 14 of the Constitution. The Court thus, rejected the petition.

115. Section 6, *Ibid.*

116. AIR 2008 Bom 29.

The provisions of the Act are backed by supervisory and administrative machinery. The Act provides for the constitution of the Central Supervisory Board,¹¹⁷ the State/Union Supervisory Board,¹¹⁸ Appropriate Authority and Advisory Committee.¹¹⁹ The Central Supervisory Board shall be controlled by the Central Government. Section 16 empowers the Board to perform the following function:-

- (a) to advise the Central Government on policy matters relating to use of and against the abuse of PNDDT;
- (b) to review and monitor implementation of the Act and rules made there under and recommend to the Central Government changes in the said Act and rules;
- (c) to create public awareness against pre-natal determination of sex of foetus leading to female foeticide;
- (d) to lay down[†] code of conduct to be observed by persons working at genetic counseling centres, genetic laboratories and genetic clinics;
- (e) any other functions as may be prescribed under the Act.

The Act empowers the Central and the State Government to constitute an advisory committee to assist appropriate authority to discharge its functions. The Appropriate Authority shall have power in respect of the following matters:

- summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made there under;
- production of any document or material object relating to clause (a);
- issuing search warrant for any place suspected to be indulging in sex-selection techniques or pre-natal determination; and

117. Section 7, *Ibid.*

118. Section 16 A, *Ibid.*

119. Section 17, *Ibid.*

- any other matter which may be prescribed.¹²⁰

The Act made it compulsory for all Diagnostic Laboratories like the Genetic Counselling Centres, Genetic Laboratories, Genetic Clinics and Ultrasound Clinics, etc having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection or renders any such services should register themselves under the Act.¹²¹

The Act also prohibits advertisement relating to pre-conception and pre-natal determination of sex, provides that no person or organization, genetic counseling centre or centre having ultrasound machine or any other technology capable of undertaking determination of sex of foetus or sex issue shall issue, publish or cause to be issued or published any advertisement in any form regarding facilities of pre-natal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place. Further, no person or organization including genetic counseling centre or genetic clinic shall issue, publish, distribute etc. and advertisement in any manner regarding pre-natal determination of sex by any means whatsoever, scientific or otherwise. Any person who contravenes the prohibition shall be punished with imprisonment for a term, which may extend to three years and fine not exceeding to Rs. 10,000/-.¹²² It also provides that any medical geneticist, gynaecologist, registered medical practitioner, who owns a genetic counseling centre or clinic or is employed at such place and renders professional or technical service to or at such a centre and who contravenes any of the provisions of the Act or rules made thereunder, shall be punished with imprisonment for a period not exceeding three years and fine not exceeding Rs. 10,000/-. On subsequent conviction the imprisonment will be for a

120. Section 17A, *Ibid.*

121. Section 18, *Ibid.*

122. Section 22, *Ibid.*

period not exceeding five years and fine not exceeding Rs. 50,000/-.¹²³ It also states that the name of medical practitioner shall be reported by the appropriate authority to the State Medical Council for necessary action including suspension of registration if the charges are framed by the Court till the disposal of the case by the Court, if he is convicted, name shall be removed from register for five years and permanently for the subsequent offence.¹²⁴ In *Dr Pradeep Ohir vs. State of Punjab and another*¹²⁵ the petitioner was a medical practitioner. He was running Satyam Diagnostic Centre inside Ohir Nursing Home. On July 9, 2002, an inspection of the said centre was made and it was found that the petitioner violated Section 5(a)(b)(c) of the PNDT Act, 1994 and Rules 9(1)(4) and (10) of the Pre-conception and Pre-natal Diagnostic Technique Rules, 1996. He was convicted under Section 23 (1) of the said Act. As a result of this an order dated 7/11/05 was passed by the Medical Council removing his name from the State Medical Register for a period of 5 years under Section 23(2) of the Act. He challenged this order and also the subsequent order dated 21/08/06 whereby the Medical Council reaffirmed its earlier decision to remove the name of the petitioner from the State Medical register. The Court held that the removal of his name from the State Medical Register on his conviction under the Act is directly and automatically flowing from his conviction under the same provisions because the Section 23(2) uses the word “shall” and not the word “may”. Since, both the subsections are part and parcel which provides penalty for the alleged offence, the whole of Section 23 of the said Act is a penal provision which attracts the rigour of Article 20 of the Constitution of India. The court also held that the removal of petitioner’s name from the State Medical Register shall not be removed for more than the period prescribed in the Statute.

123. Section 23(1), *Ibid.*

124. Section 23(2), *Ibid.*

125. AIR 2008 P&H 108(DB).

The Section also provides punishment for any person who seeks the aid of genetic counseling centre or registered medical practitioner for sex-selection or conducting pre-natal diagnostic centre, he shall be punished with imprisonment for a period not exceeding three years and fine not exceeding Rs. 50,000/- for the first offence and for any subsequent offence with imprisonment which may extend to 5 years and with fine which may extend to Rs. 1 lakh.¹²⁶ However, this provision will not apply to woman, who was compelled to undergo such diagnostic techniques or such selection.¹²⁷ Section 24 provides that unless the contrary is proved the Court shall presume that the pregnant women was compelled to undergo such test by husband or any other relative and such person shall be liable for the abetment of the offence. The Act under Section 25 provides that whoever contravenes any of the provisions of the Act or rules made there under for which no penalty has been prescribed under the Act, shall be punished with imprisonment for a period not exceeding three months or fine not exceeding Rs. 1000/- or both and for continuing contravention an additional fine not exceeding Rs. 500/-. Where an offence under the Act is committed by a company every person who at the time of committing the offence was in charge of and responsible to company shall be deemed to be guilty of the offence and liable to punishment.¹²⁸ Every offence under the Act is cognizable, non-bailable and non-compoundable¹²⁹ and no court other than that of a Metropolitan Magistrate or Judicial Magistrate I class shall try any offence punishable under the Act.¹³⁰ In *Hemanta Rath vs. Union of India and Others*¹³¹ a writ petition was filed in public interest by Hemanta Rath, that the State of Orissa is not implementing the

126. Section 23(3), *Ibid.*

127. Section 23(4), *Ibid.*

128. Section 26, *Ibid.*

129. Section 27, *Ibid.*

130. Section 28, *Ibid.*

131. AIR 2008 Ori 71.

provisions of Pre-Conception and Pre-natal Diagnostic Technique Act even though the Act was brought into existence in 1996 and was amended in order to make its provisions more effective by the Amendment Act 14 of 2003. The said amendment has come into existence with effect from 14/02/2003. The said PIL was filed noticing series of news items in the newspapers and in the electronic media that there has been recovery of hundreds of skeletons, skulls, body parts of children from different parts of the State. It has been complained in the petition that without constitution of appropriate authority, the provisions of Section 28 become nugatory. Therefore, the complaint in the petition is that there is total inaction both on the part of the State and the Central Government in the matter of implementing the provisions of the Act which was enacted for preventing infanticide and foeticide. The State and the Central Government both filed affidavits wherein they have disclosed that immediate steps are being taken and doctors and staffs of Nursing Homes and Ultrasound Clinics are arrested. However, it has not been stated that whether bodies have been created by the State Government under Section 17 of the said Act or whether any steps have been taken under Section 28 of the said Act for filing of complaint. The Court thus, directed that the Appropriate Authorities as contemplated under Section 17 of the said Act and as defined under Section 2(a) of the said Act has been constituted. Such authorities must act strictly in terms of the provisions of the said Act. If, however, such Committee has not been constituted, it must be constituted within six weeks from the date of service of the order upon the Chief Secretary of the State. After its constitution it must take strict measures to implement the provisions of the said Act. The State is thus under both a statutory and constitutional obligation to implement the provisions of the said Act.

The amended Act has been passed for so long yet we hardly find any conviction under the Act. The continuing decline of the sex ratio is

evident enough to show the failure of this Act. Though the law relating to female foeticide has been recently made more stringent but it is not proving to be effective. Although the legislation is aimed at achieving high aspirations, it suffers still from some lacunae and the most important of all is the implementation of the Act itself. Again a PIL was filed by CEHAT in the Supreme Court which is known as *CEHAT vs. Union of India*.¹³² Under the said case the Supreme Court further directed the Central Government, State Government and the Union Territories that:-

- information should be published by way of advertisements as well as on electronic media till there is awareness in the public that there should not be any discrimination between male and female child;
- quarterly reports submitted by the Appropriate Authority to the Supervisory Board has to be consolidated and published annually for the information of the public;
- appropriate authorities have to maintain the records of all the meetings of the Advisory Committee;
- the National Monitoring and Inspection Committee constituted by Central Government for conducting periodic inspection should continue to function till the Act is effectively implemented. The reports of the Committee have to be placed before Central Supervisory Board and State Supervisory Board for any further action;
- public must have access to the records maintained by different bodies constituted under the Act;
- Central Supervisory Board has to ensure that all the States appoint State Supervisory Boards as required under Section 16-A and the multimember Appropriate Authorities as required under Section 17(3)(a).

132. AIR 2003 SC 3309.

As a result of this order of the Supreme Court a new section has been inserted in 2003 i.e. Section 31-A which provides that if any difficulty arises in giving effect to the provisions of the Act the Central Government can by order published in the Official Gazette, make such provisions of the Act as appear to it to be necessary or expedient for removing the difficulty within three years from the date of commencement of the Amendment Act and such order shall be laid as soon as may be after it is made before each House of the Parliament. The Central Government also set up National Inspection and Monitoring Committee for the implementation of the Act.

Recommendation of the All India Conference of State Secretaries convened by NCW in New Delhi on 11th August, 2005 for effective implementation of the Act: -

Despite the Amendment the Act could not make significant impact at grassroots level because of the difficulties associated with the implementation of the Act. The situation remains grim and this is reflected in the overall sex ratio in various states where female infanticide and foeticide still prevails. In order to understand the ground realities and impediments, in the implementation of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, the National Commission for Women, decided to organize an All India Conference to debate the issue and to involve the concerned Government departments and NGO's in the consultative process. Hence, an All India Conference of State Secretaries was convened at the Vigyan Bhawan, New Delhi on 11th August, 2005, by the National Commission for Women. In the said Conference following recommendations were made: -

- ❖ The Conference recommended for advocacy, awareness and sensitization of the matter. For this the Commission welcomed the idea of setting up the

National Surveillance Cell to counter the practice of sex-selection. For this purpose the help of retired senior police officers, lawyers, NGO's and women commissions will be taken. The Appropriate authorities and the Advisory Committees will be provided with the copy of the judgment of the Supreme Court in *CEHAT & Ors* case and they will be made aware of the provisions of the Act, Rules as well as programmes will be undertaken to sensitize them. The NCW with the help of Ministry of Health & Family welfare, State Governments, State Women Commission, the medical fraternity and NGO's would launch a campaign against sex-selection in a concerted manner and to create awareness among medical fraternity society and the public. There is a need to empower women and educate them along with creating awareness and sensitizing MP's, MLA's, Government servants, and to involve them in the campaign against sex selection. Interactions with the religious leaders shall be made to make them co-operate in preventing the sex-selection. Programmes and Plans relating to "Value Girl Child" shall be initiated and systems of awards shall be made to encourage the government servants to participate in such programmes. Documentation, research, consultations with the stakeholders, sessions in medical colleges, short films on the issue, campaigns in colleges and schools, help of the media etc shall be made in furtherance of the said objective.

- ❖ The Conference also recommended the State level inspection and monitoring Committee wherein representatives of the State Commission for Women, Social Welfare Department, Legal Activists, NGO's shall be the members. This Monitoring Committee shall be constituted at District level to assist the Appropriate Authorities in regularly visiting and monitoring registered clinics. Records of all diagnosis done by the ultrasound machines

or other machines as well as other relevant data used for the purpose of pre-natal diagnosis should be maintained for at least two years or as directed by the Appropriate Authorities. Periodic meetings of the Appropriate Authority and Advisory Committee should be held and the NCW and the State Commissions should be authorized to ask for these reports for its independent assessment. NCW is empowered by the National Commission for Women Act to investigate and inquire into the proper implementation of any Act. The Appropriate authority should also be empowered to conduct inquiry leading to search, seal and seize the machines, records and documents.

- ❖ The Commission provides that the provisions of the Act should be strengthened. For this purpose an expert Committee shall be made comprising of representatives from the Ministry of Health & Family Welfare, Advocates and the representatives from the medical fraternity to look into the provisions of the Act and make suitable recommendations on the amendments. In case of violation of the provisions the Appropriate Authority shall have power to seize any ultrasound machine or other equipment capable of detecting sex of foetus. Rule 11(2) takes away the rigor of the punishment as it permits the clinic/laboratory to run without registration. It takes away the teeth from the Act as often it is misused by the persons indulging in this heinous crime. Submission of Form F should be made mandatory. Fast track Courts should be set up to provide remedial measures. Disincentives and other coercive measures to ensure small family norms must be dropped from all population policies and measures at Central and State levels.

RIGHT TO ABORTION OF THE MOTHER VIS-À-VIS RIGHT TO LIFE OF A FOETUS: -

Abortion in India was practiced earlier by many but as it was illegal, it was practiced in a clandestine manner. However, passing of the Act made medical termination of pregnancy legal and with certain conditions for safeguarding the health of the mother. Abortion is severely condemned in *Vedas*, *Upanishads*, *purans* and *smriti*. Even the Code of Ethics of the Medical Council of India under Paragraph 3 states that: *I will maintain the utmost respect for human life from the time of conception*. The Supreme Court of India has said in various cases that the right to privacy is implicit in Article 21 of the Constitution of India and right to abortion can be read from this right.

The right to abortion of a woman depends on certain circumstances which must fall into the following categories:-

- To preserve the life or physical or mental well-being of the mother;
- To prevent the completion of a pregnancy that has resulted from rape;
- To prevent the birth of a child with serious deformity, mental deficiency, or genetic abnormality; or
- To exercise birth control, that is to help from having a child for social or economic reasons.

The United Nations has maintained that the reproductive freedom is a basic human right and as per this the woman has right to terminate her pregnancy. However, this right although recognized by various countries but it is yet to be politically accepted. Although the MTP Act recognizes the free choice of woman to decide whether and when she will terminate her pregnancy and makes guardian's consent irrelevant in case the woman is of the age of 18 years

and above. Such as in *Kamalavalli vs. C.R. Nair*¹³³ wherein the petitioner, a 28 year old woman and a victim of rape, had sought permission to terminate the pregnancy which was granted subject to the doctor's opinion. However, in another case where the father of a minor girl filed a writ petition before the Madras High Court for a direction from the Court to terminate the pregnancy of his minor daughter. The High Court dismissed the writ petition and held that abortion cannot be forced on a minor girl when she is willing to bear the child. It is quite clear from the nature of the aforesaid writs that some fathers are disturbed at finding themselves powerless in such situations and want the law to be changed so as to give them some powers of decision to control the reproductive functions of their minor daughters. Under the MTP Act the father's consent is essential only in case the minor daughter wants to terminate the pregnancy and not when she chooses to complete the full terms and give birth to a child.¹³⁴

The MTP Act recognizes the free choice of woman to decide whether and when she will terminate her pregnancy and makes guardian's consent irrelevant in case the woman is of the age of 18 years and above. Thus, a question arises that whether woman can terminate her pregnancy without the consent of her husband? If so, does her act amounts to cruelty towards her husband? This question came up before the Court in *Satya vs. Shri Ram*.¹³⁵ In this case the court observed that in this sort of a case, the court has to attach due weight to the general principle underlying the Hindu Law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son who can offer a funeral cake and libation of water to the names of his ancestors, and held that termination of pregnancy at the instance of wife but without the consent of her

133. 1984 Cr LJ 446 (Mad).

134. The Hindu, Dec 4, 1993. [Quoted in Subhash Chandra Singh, *Right to Abortion: A New Agenda*, AIR 1997 Journal Section p 129 at P. 129 & 130].

135. AIR 1983 Punj & Har 252.

husband amounts to cruelty. Similarly, in *Sushil Kumar Verma vs. Usha*¹³⁶ the wife who became pregnant within one month of her marriage got the foetus aborted the following month in a government approved pregnancy termination centre with the help of a registered medical practitioner without consulting her husband. The husband was kept completely in dark about the fact of pregnancy as also of its abortion. The husband being aggrieved filed a petition for divorce on the ground of cruelty which was dismissed by the Court. But the High Court held that aborting foetus in the very first pregnancy by the wife is a deliberate act without the consent of the husband amounts to cruelty.

In *D. Rajeshwari vs. State of Tamil Nadu*¹³⁷ an unmarried girl of 18 years who prayed for issue of a direction to terminate the pregnancy of the child in her womb, on the ground that bearing the unwanted pregnancy of the child of three months made her to become mentally ill and the continuance of the pregnancy has caused great anguish in her mind, which would result in the grave injury to her mental health, since the pregnancy was caused by rape. The court granted the permission to terminate the pregnancy. In *Dr. Nisha Malviya and Another vs. State of M.P.*¹³⁸ the accused had committed rape on minor girl aged about 12 years and made her pregnant. The allegations are that the two other co-accused took this girl, and they terminated her pregnancy. So the charge on them is firstly causing miscarriage without the consent of the girl. The Court held that all the three accused are guilty of termination of pregnancy which was not consented by the mother or the girl. Hence, the case laws shows that a woman has an absolute right to abortion and no one can take away this right from her. The Judiciary has been playing a vital role in securing these rights to women.

136. AIR 1987 Del 86.

137. 1996 Cri. L J 3795.

138. 2000 Cri. L J 671.

The right of the woman to abort coincides with the right to life of a foetus. The present legislations in our country violates some of the basic rights of the woman i.e. her right with planning or preventing the birth of a child. Through these legislations their rights are violated as the legislations considers abortion as an illegal act which is severely restricted by law.

One of the most important rights of an unborn child is its right to birth. Right to life is a well established right which is recognized by various international instruments and by the Constitution of various countries. Sex-selection and abortion on this basis violates these rights. Right to life is available to "persons." A vital question in this situation thus arises i.e. is foetus a "person" or is it a part of the mother? Does a foetus enjoy this right? And if it does when do the foetus attain the personhood? There are number of questions which come up while discussing the right of the foetus.

The Constitution of India recognizes the sanctity of life, yet has failed to adequately protect the life of the foetus as under Article 21 right to life is guaranteed to every "person". The concept of personhood complicates the position of legal status of foetus. Although the right to life under Article 21 is recognized in several cases but it is hardly available to the unwanted girl child. Hence, the right of the girl child may be construed in broader terms and should be inferred as

- Right to be born and not to be aborted only because she is a girl;
- Right to remain alive after birth and not to be killed at any moment after birth;

- Right of the girl child to her mind her body, right to childhood and right to a healthy family environment.¹³⁹

Besides the Constitutional protection there are number of Statutes in India which protects the right to life of an unborn person. The Indian Penal Code under its various provisions which has already been discussed above has protected the right of the foetus by prohibiting miscarriages under certain circumstances. The Medical Termination of Pregnancy Act, 1971, too restricts the right to terminate the pregnancy and the Pre-conception and Pre-natal Diagnostic (Prohibition of Sex Selection) Act, 2002 protects the rights of the girl child who are yet to be born.

The law recognizes legal personality to unborn children. A child in mother's womb is by fiction treated as already born and regarded as person for many purposes. Thus, a gift may be made to a child who is still in the mother's womb. Even under the Hindu law of partition a child in mother's womb is entitled to be allotted a share in the property along with the other living heirs subject to a condition i.e. the child should be born alive. The proprietary rights of an unborn child are fully recognized by Indian law. Similarly, the rule against perpetuity under the Transfer of Property Act, 1882 also seeks to protect the proprietary rights in favour of unborn persons.¹⁴⁰ Its object is to protect the property for long a period from the possibility of alienation by their owners being unborn persons.

The Supreme Court in *Bandhua Mukti Morcha vs. Union of India*¹⁴¹ held that "it is a fundamental right of everyone in this country assured under the interpretation of Article 21 to live with human dignity.....it must

139. Jessy Kurian, *A Cry Unheard Female Foeticide and Female Infanticide*, Legal News & Views, Vol 17 No.11, Nov, 2003 [Quoted in Krishna Chandra Jena, *Female Foeticide in India: A Serious Challenge for the Society*, Cr LJ, 2008, J 55 at 60].

140. Section 14, *Transfer of Property Act, 1882*.

141. AIR 1984 SC 802.

include the tender age of children to develop in a healthy manner and in conditions of freedom and dignity.” Thus, in addition to the right to birth, the unborn child has the right to healthy growth in unpolluted environment. The British Parliament in 1976 passed the Congenital Disabilities (Civil Liability) Act wherein action may lay against a person or authority whose breach of duty to a parent results in a child being born with disability, abnormal or unhealthy. Similarly, the Nuclear Installations Act, 1965, recognizes liability for compensation in respect of injury or damage caused to an unborn child by occurrences involving nuclear matter or emission of ionizing healthy growth and safe birth to an unborn child.¹⁴² The Code of Criminal Procedure too provides that the High Court shall order of execution of capital sentences on a pregnant woman be postponed or it may commute the sentence to imprisonment for life, thereby indirectly recognizing the right to life of the foetus.¹⁴³

From the above discussion it is clear that foetus should enjoy the right to life. The foetus has right to life which begins from the point of conception. The foetus should be recognized as a separate entity enjoying distinct legal right and is not a part of the mother. Thus, the concept of personhood is a myth and a mere creation of law. This must not come in the way at the time of conferring the rights to the foetus and failure to recognize it would amount to discrimination and violative of Article 14 and Article 21 of the Constitution.

Various scholars have argued on the point that whether abortion should be prohibited which will protect the right to life of the foetus at the cost of infringement of the right of the woman to abort? Or whether legalizing abortion which will protect the right of the woman to abort but will endanger the life of the foetus? The pro-life activists in favour of prohibiting abortion states that

142. G. Kameswari, *Basic Rights of a Child-Born and Unborn*, AIR 2002 Journal Section, P. 141 at 144.

143. Section 416, *the Code of Criminal Procedure*.

the issue of the foetus life, which raises the question of whether one person's desire for autonomy can extend to ending another's existence. They state that the killing of the innocent is a crime and foetus is also an innocent life. Many women suffer from emotional trauma after having an abortion. Abortion also increases women's risk of breast cancer and may also damage or infect the uterus and the fallopian tubes making women infertile. It also leads to menstrual disturbances. They also state that an embryo is a human being and hence, entitled to be protected from the moment of conception and therefore has a right to life which must be respected. Abortion, thus, according to the pro-life activists is homicide. Even the Madras High Court in *V. Krishnan vs. G. Rajan*¹⁴⁴ held that the MTP Act does not confer or recognize the absolute right to terminate pregnancy in any person. The Court in this case observed that "*Even the pregnant woman cannot terminate the pregnancy except under the circumstances set out in the Act. Even during the first trimester, the woman cannot abort at her will and pleasure. There is no question of abortion on demand.*" Therefore, even the Courts take conservative stance towards the women's right over her own body.

The Women Activists, however, contends that a pregnant woman should have 'personal liberty' to destroy any foetus of her own if she finds it intolerable. The unwanted pregnancies to women impose a kind of slavery upon her and infringe her sense of self-respect and dignity. For a more emancipated woman, pregnancy is not an advantageous status but a burden which she has to bear for many months if she is forced to bear the child. Forced pregnancy is not advantageous from both the woman as well as child's perspectives. Thus, in contrast the planned pregnancy is more advantageous and the children in such case receive more attention from the parents. Women should thus, have the right of

144. Quoted in Shalu Nigam, *Law Against Practice of Female Foeticide and Infanticide*, Legal Education Series No. 36, Indian Social Institute, New Delhi, P. 45.

sexual and reproductive right. The women activists also argue that if abortion is banned or is more restricted, the society will again return to the olden days wherein abortion is done by quacks endangering the life of the woman herself. The women as a result will resort to some unhygienic measures to abort the foetus. Moreover, if she is forced to carry on with her pregnancy she may carry it but after the birth of the child may abandon the child which in fact impose more danger to the life of the baby. Hence the women should be allowed to terminate her pregnancy at an earlier stage.

Recently in 2008 a petition was filed by Harish Mehta and Nikita Mehta and a gynecologist Dr. Nikhil Datar, in the Bombay High Court under Article 226 of the Constitution wherein the petitioner mentioned that she is pregnant with her first child. It was discovered that the unborn child was suffering from a congenital complete heart block during a routine check up in the 24th week. One pediatrician observed that soon after the birth the baby would require the placement of a pacemaker that lasts for 4 or 5 years. This means that the child would require at least five pacemaker replacement surgeries throughout life. Doctors noted that this would seriously compromise the life of the child and also expressed the fears of a possible intra-uterine death of the foetus. The petition also said that being a school teacher Nikita Mehta does not want to have a compromised quality of life for her own child and cannot afford the extraordinary expensive treatment which may or may not give results. The petition has urged the court to strike down the provision of the Medical Termination of Pregnancy Act, 1971 that makes abortion illegal after 20 weeks and to allow such medical termination of pregnancy in cases where the life of the mother or the child is in danger up to 26th week. The Bombay High Court rejected

the plea for abortion of the petitioners.¹⁴⁵ The petitioner filed an appeal to the Supreme Court against the judgment of the Bombay High Court.

The right to life of the foetus and right to abortion of a woman should thus, make a balance that the right to life and personal liberty as guaranteed by Article 21 of the Constitution should be interpreted in such a manner so as to include the right to life of the foetus especially in the age of rampant sex-selective abortions and the right to abortion of a woman with a condition that she is not terminating her foetus on the basis of sex-selection. Abortion is perfectly legal in India and the legislation too does not raise any moral or religious issues. It should be the used as the last resort. Thus, the right to life under Article 21 should be interpreted in such a manner so as to strike a balance between the right to life of the foetus and right to abortion of a woman.

145. The facts of the case have been referred from <http://www.medindia.net/news/Medical-Termination-of-Pregnancy-Act-Under-Scanner-39995-1.htm> [Visited on 7th April 2009] as well as the Telegraph,

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A CASE FOR SEPARATE LEGISLATIVE ENACTMENT FOR DOMESTIC VIOLENCE

Women serves man with sincerity as mother, wife, friend, guide, companion and nurse, yet she suffers all forms of violation and atrocities of all kind are instituted against her. Women have been victims of violence and exploitation in this male dominated society. The phenomenon of violence against women is age old and existed in this society since ancient period. She is subjected to violence not only outside her home but also inside it. Marriage which meant to be a social security for women has become society's social institution wherein women face various forms of discrimination in the hands of the person whom they trust and love. Each year more than 10 million married women experience violent episodes during which their husbands and in-laws try to inflict pain and serious injuries on their person.¹ Incidents show that she is stamped, strangled, and burned with matches, cigarettes and hot irons. She is kicked, beaten up by her husband, sexually abused by her relatives and often denied the minimum requirement for her existence. The concept of the primitive period still continues to prevail in the patriarchal society that woman still is a commodity which a man possesses; she is the property of the man and should be under his control. Hence, men can treat her as he wish. She is thus, subjected to violence even inside her house. The National Family Health Survey (NFHS) carried out in 29 states during

1. Subhash Chandra Singh, *Violence Against Women: A Case Against Patriarchy*, Cr LJ 2001 J 105 at 106.

2005-2006 and released in 2007 reveals over 37 percent married women in the country are victims of physical or sexual abuse by their husbands. As per the report of United Nation Population Fund as many as 70% of married women between the ages of 15-48 suffer domestic violence. A nationwide survey by the International Centre for Women's Research shows that 52% of women suffer at least one incident of physical or psychological violence in their lifetime. And as per UNICEF report 2006 around 69 million children witness violence within homes in India.² Thus, Sydney Brandson has rightly pointed out that "*Statistically it is safer to be on streets after dark with a stranger than at home in the bosom of one's family, for it is there that accident, murder and violence are likely to occur.*"³

The issue relating to domestic violence has become a major issue all over the world. A debate over the issues relating to domestic violence is going on since the late sixties and has gained its momentum as a result of the increase in domestic violence. Domestic violence is a universal problem; however, the issue of domestic violence in India came into focus in 1980's as a result of spread of mass media which covered incidents of torture of the brides, dowry deaths, female infanticide, sexual abuse etc. It is one of the main causes of the Women Movement all over the world. Women's Movement in India is basically revolved around the domestic violence against women. Every day we come across reports in newspapers and television regarding violence on women within the family. Despite the presence of a large number of legislations regarding the protection of women, violence against women has increased substantially. Large number of cases involving domestic violence i.e. violence within the family are

2. <http://www.wecanendvaw.org/india%20detail.htm>[Visited on 14th Feb' 2008].

3. Sydney Brandon in M. Borland (Ed): *Violence in family*, (1976) 1. [Quoted in Mamta Rao, *Law Relating to Women & Children*, Eastern Book Company, Lucknow, 2005, P. 152.

coming to light almost everyday due to the vast expansion of electronic media.⁴ The existing law was not sufficient to include the domestic violence of all kinds as they are inadequate to deal the domestic relationship. Thus, the need for a new legislation to understand domestic violence, covering all forms of domestic violence and penalties for violation of the provisions of the Act was found important. As a result of this the Parliament ultimately passed the Protection of Women from Domestic Violence Act 2005 to address the problems of domestic violence faced by women in India.

DOMESTIC VIOLENCE: DEFINITIONAL ASPECT:-

Women are subjected to the violence in the domestic front since a very long period but it came into light only after the encroachment of the electronic media in our households. Unlike the other crimes domestic violence occurs within the four walls of the house and the strangers or the outsiders can't have access to what is going inside the house. This makes it more dangerous for the women who are facing this form of violence. It is thus essential to determine what we mean by domestic violence.

One of the toughest tasks is to define domestic violence. In order to know what constitutes domestic violence it is essential for us to know what violence is. Violence is an act of aggression that crosses the boundary of other person's autonomy and identity. In other words it is a coercive instrument by which a person asserts his will over another, to prove or feel a sense of power. Domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built on male superiority and female inferiority, sex stereotyped roles and expectations and economic, social and political predominance of men and dependency of women. Domestic Violence is a

4. Shyamal Kumar Mukherjee, *Protection of Women From Domestic Violence Act 2005-Need for Amendment*, Cr LJ, 2008, Journal Section, J 207.

gender specific offence.⁵ In simple words domestic violence means an abusive, violent, coercive, forceful, or threatening act or word inflicted by one member of a family or household on another. It occurs when a family member tries to physically or psychologically dominate or harm the other. It may also include behavioural patterns that are characterized by the misuse of power and control by one person over the other in an intimate relationship. It includes violence by an intimate partner including a cohabiting partner and by other family members. The term 'domestic' is related to the relationships exist between the people involved and not where the violence is committed.⁶ The domestic violence occurs when a family member, partner, or ex-partner attempts to physically or psychologically dominate the other. Domestic violence differs from other forms of violence because it occurs within an ongoing relationship; which is expected to be productive, supportive and nurturing.

Domestic violence against women can occur within or beyond the household. Similarly, we can observe that the domestic violence against women at their natal home and at their matrimonial/conjugal home. The Indian society prefers the son which endangers the existence of daughters in such households, thus, in this light the girl child is subjected to violence such as infanticide and foeticide; abandonment of the girl child; child abuse and incest; child labour; deprivation of basic needs i.e. ignorance of health, medical care, food, education etc. The woman is subjected to violence at her matrimonial/conjugal home which includes sexual abuse; wife battering; dowry demand; cruelty; forced to do undignified jobs.

5. Ashirbani Dutta, *Domestic Violence as Human Rights Violation: A Reality that Bites*, Cr LJ, 2005, Journal Section, J 25.

6. Vijendra Kumar, *Law Relating to Domestic Violence*, S. Gogia & Company, Hyderabad, 2007, P.2.

The Protection of Women from Domestic Violence Act defines 'domestic violence' as any act or omission or commission or conduct of the following shall constitute domestic violence in case it:-

- (a) harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal or emotional abuse and economic abuse;
- (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or any property or valuable security;
- (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b);
- (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.⁷

The Act, thus, gives a very comprehensive definition of domestic violence.

DOMESTIC VIOLENCE: A CYCLE OF VIOLENCE:-

Domestic violence differs from other forms of violence as the tension and disagreements in domestic violence differs from the other forms of violence. In other forms of violence incidents of abuse and violence generally repeat themselves in a fairly clear pattern. However, the victims of domestic violence do not live in situations of continual abuse or the abuse and violence they face do not have a particular pattern. Instead in case of domestic violence there is are periods in violence cycle when abuse is not present. The cycle of domestic violence is made up of three repeating phases:

7. Section 3, *The Protection of Women from Domestic Violence Act, 2005*.

- (i) **Tension Building:** - It is the first phase of violence. During this phase the abuser engages in increasingly abusive behaviours such as calling names, constant criticism, harassment, public embarrassment and humiliation, and minor battering incidents. The victim reacts to this behaviour in a typical fashion by rationalizing and denying the behaviour and not recognizing that this represents the beginning of a cycle. This denial and rationalization reinforces the perpetrator's need for power and control and the victim often reacts by withdrawing and avoiding contact with the perpetrator so as to not 'set him or her off.'⁸
- (ii) **Battering incident:** - The second phase of violence is the battering incident which increases to a level above minor battering. This phase represents an act of physical, emotional, or sexual violence against the victim, often accompanied by severe verbal abuse. This phase is of very short duration but the physical and emotional injuries inflicted by the batterer or abuser may take a lifetime to heal. The abuser does not understand or acknowledge his/her anger during this phase, and the victim tends to blame herself/himself for provoking the abusive act. The victim usually minimizes the abuse and the perpetrator quickly forgets what happened.⁹
- (iii) **Honeymoon Stage:** - This is the third state wherein the victim often responds with anger or threats after the abuser abuses and the abuser begins to feel that he/she must apologize and act lovingly to the victim. In this stage the perpetrator gives gifts, flowers, compliments, promises to change, and other non-threatening behaviour to the victim. This

8. <http://ohcm.gsfc.nasa.gov/family/domestic/whatis.htm> [Visited on 28th April 2008].

9. *Ibid.*

behaviour encourages the victim to stay in relationship and strengthens his/her sense of hope for positive change.¹⁰

Unfortunately, the cycle of violence is usually continuous. The perpetrator again go to Phase one i.e. without any change on behalf of the victim Phase three leads to Phase one and the cycle continues.

FORMS OF DOMESTIC VIOLENCE: -

Domestic violence is a pattern of violent, abusive and coercive behaviour used by one partner in a relationship to gain and maintain power and control over another person. It is not a marital conflict, mutual abuse, a lover's quarrel or a private family matter. It consists of repeated, severe beatings and control. Various research shows that domestic violence exist in the following forms which has also been provided under the Protection of Women from Domestic Violence Act, 2005¹¹: -

- (a) **Physical Assault/Abuse:** - "Physical abuse" means any act or conducts which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force. It consists of any direct physical violence ranging from unwanted physical contact (rape) to murder. It also consists of indirect physical violence, including destruction of objects, striking or throwing objects near the victim, causing harm. It includes shoving, pushing, restraining, hitting or kicking. Physical assaults may occur frequently or infrequently, but in many cases they tend to escalate in severity and frequency overtime.

10. *Ibid.*

11. Explanation to Section 3, *The Protection of Women from Domestic Violence Act, 2005.*

(b) Sexual Assault/Abuse: - "Sexual Abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. It means any time one partner forces sexual acts which are unwanted or declined by the other partner. This includes rape and instances of coerced sex through threats, intimidation or physical force, unwanted sexual acts and sexual assaults. It consists of incest also. The sexual violence and incest mentioned under this form can be use of physical force to compel a person to engage in a sexual act against the will, whether or not the act is completed; attempted or completed sex act involving a person who is unable to understand the nature or condition of the act unable to decline participation, or unable to communicate unwillingness to engage in the sexual act, e.g., because of underage, immaturity, illness, disability, or the influence of alcohol or other drugs, because of intimidation or pressure, or because of seduction and submission; and abusive sexual contact.

(c) Verbal and emotional Assault/Abuse: - "Verbal and emotional abuse" includes insults, ridicule, humiliation, calling names and insults or ridicule specially with regard to not having a child or a male child; and repeated threats to cause physical pain to any person in whom the aggrieved person is interested. It, thus, consists of verbal threats of physical violence to the victim, the self or others, including children, ranging from explicit, detailed and impending to implicit and vague as to both content and time frame. Non verbal threats like gestures, facial expressions and body postures are also included. It is also know as psychological assault/abuse as the abuser controls what the victim can and cannot do, it also include withholding information from the victim, deliberately doing something to make the

victim feel diminished or embarrassed, isolating the victim from friends and family.

(d) Economic Assault/Abuse: - “Economic Abuse” means deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, *stridhan*, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance; disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her *stridhan* or any other property jointly or separately held by the aggrieved person; and prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Thus, it means controlling the victim’s money and other economic resources. Usually, this involves putting the victim on a strict allowance, withholding money at will and forcing the victim to beg for the money until the abuser gives them some money. It is common for the victim to receive less money as the abuse continues. This also includes preventing the victim from finishing education or obtaining employment, or intentionally squandering or misusing communal resources.

THEORIES OF DOMESTIC VIOLENCE: -

In order to understand the nature and extent of domestic violence against women, to identify the major social factors associated with domestic violence and to suggest measures to control and minimize the occurrence various theories has been developed by various scholars. There are some of the theories of domestic violence which help us explain the causes of domestic violence and they are as follows: -

(a) Resource theory: - The resource theory was suggested by William Goode in 1971. As per this theory the domestic violence rests upon the notion that the decision-making power in family relationship depends to a large extent on the value of resources each person brings to the relationship. It means that women who are dependent on the spouse for economic well being does not have any say in the matter of the family. The husband decides for the family. This theory is also called the Status Inconsistency Theory. It suggests that violence against women by men is an inevitable result of status inequalities. A man perceives his status consistent with his traditional power in the family, and uses it to inflict violence over the women.¹² It also means that dependency gives women fewer options and few resources to help them cope with or change their spouse behaviour especially if she has children to take care of, as it increases the financial burden and makes it difficult for women to leave her matrimonial home.

(b) Social Control Theory: - As per this theory there is a general perception in our mind that familial relationship can not be broken off easily and it is due to this reason the family members who are victims of domestic

12. Vijender Kumar, *Law Relating to Domestic Violence*, S. Gogia & Company, Hyderabad, 2007, P 7.

violence in their daily interaction with the members who inflict such injuries resort to violence rather than break up their ties with such member of their family.

(c) Patriarchal Perspective of Domestic Violence: - The society in our country is a patriarchal society. Women tend to be victim of domestic violence due to this patriarchal form of family as in such families the males are a dominant force in the family. Thus, patriarchal society is one of the primary causes of never ending violence over the women.

(d) Social stress and learning Theory: - Stress is one of the reasons of domestic violence. With the increased pressures a person living in a family may feel stress due to inadequate finances or other problems which may further increase tensions. Although stress does not always gives rise to violence but may be one of the ways that some people respond to stress. Due to increased stress and conflicts about finances and other aspects the person resort to violent behaviour to express his helplessness to control his financial status and violent behaviour he want to express his masculinity. Through the violent behaviour he wants to maintain his control over the other spouse or members of the family. It also suggests that the person who in his young age has observed or gone through domestic violence resort to domestic violence or violent behaviour against his spouse, he is likely to imitate such behaviour in his married life too. Studies have revealed that the impact of witnessing parental violence in childhood is a stronger prediction of violence in adulthood.¹³ Hence, this theory is also known as social learning theory. Thus, the behaviour of such person will be to learn

13. S. Sanyal, *Causes and Consequences of Domestic Violence*, in Nirmal Kanti Chakrabarti and Shachi Chakrabarti's, *Gender Justice*, R. Cambray & Company Pvt. Ltd., 2006, P. 137.

form their childhood and likely to continue it. Often violence is transmitted from one generation to another more in a cyclic manner. The National Family Health Survey (NFHS-3) has revealed that women whose mothers were beaten by their fathers were more likely to be in an abusive marriage themselves. 33% of women whose mothers experienced spousal violence had themselves experienced spousal physical or sexual violence, compared with the percent of women whose mothers did not experience spousal violence.¹⁴

- (e) **Symbolic Interaction Theory:** - It explores the different meanings of violence and the consequences of such meanings in a situational setting. This theory suggests that domestic violence is a result of interactional processes that exist within the society.¹⁵

Recently, a new conceptual framework called Dependency Framework Theory¹⁶ has been evolved and is being used to understand the phenomenon of domestic violence against women. The term “dependency” means the conditions over which the victim of domestic violence does not have any control, such as economic, social or physical etc.

CAUSES OF DOMESTIC VIOLENCE: -

Violence in any form is always disliked and disapproved by a stable individual. It is the outcome of aggression and hostility which one holds towards another person. Domestic violence is one such form of violence which has

14. The Hindu, November 10, 2008, P.8.

15. *Supra* 13.

16. A Research Study Report, “*A Study of the Nature, Extent, Incidence and Impact of Domestic Violence Against Women in the States of Andhra Pradesh, Chattisgarh, Gujarat, Madhya Pradesh and Maharashtra*”, Yugantar Education Society, 2000, p. 34. [Quoted in Vijender Kumar, *Law Relating to Domestic Violence*, S. Gogia & Company, Hyderabad, 2007, p. 8].

become a global phenomenon which not only inflicts injury upon the victim and deprives them of their right to live with human dignity but also disturbs the stability of a family. The various theories mentioned above helps us to understand the various causes of domestic violence, hence, with the help of the theories we come to a conclusion that there is no single factor which results in domestic violence or which explains that why men assault women and cause the incidences of domestic violence. It is in fact a result of many inter-related factors having different social and cultural contexts. The factors may be social, cultural, and psychological or which is closely related to the family. Following are the main causes which gives rise to domestic violence: -

- (i) In case of spousal abuse there is no one factor which leads to domestic violence. Many factors joined together gives rise to spousal abuse. One of the factor which leads to spousal abuse is the age of both the offender and the victim i.e. the age difference between them; low income which results in financial problems; growing up in a violent family; alcohol addiction or substance abuse, unemployment; sexual difficulties; low job satisfaction etc.
- (ii) Social and cultural influences upon individuals contribute to domestic violence. Mostly the victims of domestic violence are women and girl child. The reason for this is that most societies are patriarchal society wherein women have a definite role to play. The men are the bread earners which makes their position in the family secured and strong. The men due to his superiority in the family as well as the society think himself to be invincible. Even the traditional laws and customs of the society permit them to punish their wives. This is the result of patriarchy system of our society. The patriarchal system also contributes

to the lower economic status of women which makes them dependent on their husbands. The dependency of women upon their husband further increases the abusive attitude of the husband towards his wife as it limits a victim's ability to leave the abusive relationship.

- (iii) Another incident which is causing the incidence of domestic violence is the age old cultural and religious ideology that is women are the property of their husband and by beating their wives the husbands are chastising their wives.
- (iv) The men in the family control the property and even the ownership rights of women have always been put in the backseat. This concept of ownership in turn legitimizes control over the woman's sexuality. The personal laws in India too deny woman her rights to property and these have been used as tools for dominating women by the men.
- (v) The personal laws in India have always been biased. Women in every religion have always been downtrodden. They never favoured the rights and interests of women. For example; the muslim women in India still does not have right to divorces, lack of maintenance norms, property rights, custody of children etc. Similarly, the Hindu personal law has never given women a chance to be at par with the men.
- (vi) Isolation of women in their families and communities is also one of the important factors that contribute to increased violence especially in situations where the women have little access to family or local organizations.
- (vii) The social evils such dowry system which is still prevalent in India among various castes and classes of people still after the legislation against it, is the sad picture of the society wherein due to non fulfillment

of dowry amount results in dowry deaths and the brides suffering from cruelty at the husbands.

- (viii) Daughters in a family are seen as burdens. This is another social factor which increases the incidence of domestic violence in our society. This has given birth to social evils such as female infanticide and foeticide.
- (ix) Lack of support from the maternal home makes women facing domestic violence vulnerable and the abuser becomes more bold and abusive as he knows that no one will help the victim.
- (x) Religion too has played a vital role in domestic violence as the religions which are prevalent in India lays down certain roles which have to be played by both the male and female in the society and it is very clear that in most of the religion the women are dominated by their men. She leads a life of dominance. She is dominated from all sides and spends her life living with such domination.

EFFECTS OF DOMESTIC VIOLENCE:-

Women who are being subjected to domestic violence often do not leave the troubled relationship and continues to suffer at the hands of her perpetrator. She simply resents and thinks that what she got is what she deserved. There are some women who want to preserve the marriage as their status outside it is marginal. Most of the women in India are not educated and has poor opportunities of finding a livelihood, some fear that if they leave their matrimonial home they will not have any shelter as even the maternal family will resent her decision to leave her husband. To top it all there is always fear of unwanted attentions from men in the society if she leaves her matrimonial home. She fears of losing custody of her children and hence can be deprived of even meeting with them. All these fear stops a woman from approaching a legal solution to her

problem. However, such women if continue to live in the environment wherein she is subjected to domestic violence every now and then she may face certain problems and such incidence has certain effect upon her as well as the others such as children which are as follows: -

(a) Social Impact: - Women facing domestic violence inhibit them from playing an active role in decision making in the family and influences their participation in public activities. The Children who see gender based violence within their family has serious repercussions such as nervousness, irritation and apprehensive. Such children also perform poorly in the school. The daughters who witness the domestic violence against their mother or themselves become sexually permissive and develop hatred against men. They are more likely to attempt to commit suicide, engage in teenage prostitution, and commit sexual assault crime. Even the men who were exposed to domestic violence when they were children too gets effected by it and are more likely to commit suicide, resort to drugs and alcohol and are twice more likely to abuse their own wife than sons of non-violent parents.

(b) Economic Impact: - The domestic violence against women has a serious impact on the economy within the household. It leads to decreased efficiency and productivity as domestic violence constraints human development, economic growth and productivity; it operates as a drain on financial resources and undermines the viability of the family as a key unit of production.

(c) Psychological Impact: - Domestic violence against women not only effects a woman physically such as broken limbs, burns, disfigurement,

cuts, bruises, temporary or permanent disability, unwanted pregnancies, sexual abuse, gynecological problems, wounds, headaches, miscarriages, sexually transmitted disease etc. Due to constant violence against her she may get psychologically disturbed such as low self-esteem, compulsive behaviour, eating disorders, stress, phobia, obsessions, sexual dysfunction, emotional disability etc.

DOMESTIC VIOLENCE: A HUMAN RIGHT ISSUE: -

The incidence of domestic violence against women can thus, be treated as Human Rights issues as the social, economic and psychological impact of Domestic violence clearly depict that it violates number of rights which is guaranteed to women by virtue of various national, international and regional instruments. These rights are as follows:-

- i. It violates the right to identity of the women as it reinforces and reproduces the subordination of women to men denying women her very right to a separate identity of her own.
- ii. It violates the women's right to affection which is the basic requirement for human existence.
- iii. It violates the right to peace and enriching relationship which is also the fundamental requirement by every individual.
- iv. The incidence of domestic violence denies the right to equal protection before law to the women which every human being is entitled to.
- v. It denies right to personal development by restricting the movement of women, to mix freely with the people in the society and to participate in various activities, curtails her prosperity in career or working fields, academic field, acquiring skill to develop her personality and prevents her right to personal development.

- vi. The women are denied of right to social and political participation as domestic violence subjects her to home confinement. This does not give her equal access to the public service of the country and to take part in the conduct of public affairs, including decision-making is denied.
- vii. It violates the right to freedom of expression to women as she suffers silently and due to various fears does not assert her opinion against her husband.
- viii. The incidence of domestic violence denies women the right to optimum standard of physical and mental health as unlike the other forms of violence which happens outside the domestic domain the victim of domestic violence undergoes prolonged physical and mental trauma.
- ix. The domestic violence denies women right to life and right to personal liberty and security as the victim has to face fatal consequences and is deprived of the liberty of free existence and right to security.
- x. It also deprives a woman of her right not to be subjected to torture, cruel, inhuman or degrading treatment as in domestic violence this very right is violated and women suffers not only from physical and mental problems but also moral integrity.
- xi. It denies women right to associate freely.

The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action, 1995 have acknowledged that domestic violence is undoubtedly a Human Right issue and serious deterrent to development.¹⁷

17. Justice A.K. Sikri, *PWDV Act, 2005: Implementation & Enforcement*, Nyaya Deep, P. 61 at 66.

NEED FOR A NEW LAW ON DOMESTIC VIOLENCE: -

Protection of women against the domestic violence is provided under various civil and criminal laws. When we see the civil remedies against the domestic violence there are various personal laws in India which are existing but the only relief which they provide is judicial separation or divorce. The battered wife can only sought these remedies i.e. also after repeated assaults or serious injury. Such remedy terminates the close environmental and emotional connections within which the assaultative behaviour occurred. However, if often see that women hardly opt for these remedies due to religious, cultural or economic reasons as even though she is entitled to separate residence and maintenance from her violent husband under the personal law for herself and her children, in practice the husband defaults often in payment and seeks to evade liability. The alimony amount ordered by the court for her maintenance in case of a divorce may be insufficient for her needs.¹⁸ The sum becomes even meager if the husband remarries. Further the women does not opt for this remedy is the social stigma which will loom over her i.e. stigma of being a divorced woman. This stigma often becomes an obstacle in her life for example to remarry, to raise the children if she has any, to find an appropriate job, etc. Hence, the combination of such factors and eventualities coerce women to desist from seeking a divorce and instead endure the physical violence from their husbands.¹⁹ And with respect to the Tort actions between spouses, they are not popular especially in India.

There are various provisions under the criminal law in India which grants remedies to the battered wife. Under the Indian Penal Code there are provisions which address the issues of domestic violence. Section 498-A was introduced in 1983 which is significant in bringing domestic violence out of the

18. See S.24 under *the Hindu Marriage Act, 1955*; S.18 and S.20 of *the Hindu Adoptions and Maintenance Act, 1956*; and S. 125 of *the Code of Criminal Procedure, 1973*.

19. M.V. Sankaran, *Intra-Family Violence and the Law*, IBR Vol 13(1): 1996, P. 93.

closet, but this section specifically deals with dowry demands and ignores the other factors of domestic violence. Section 304B too deals with dowry death. Besides these the Parliament also enacted the Dowry Prohibition Act, 1961, which too deals with demand of dowry. Hence, the protection of women under these criminal laws only dealt with domestic violence wherein the women has to suffer torture or is battered for more demand of dowry. These legislations has in fact ignored the fact that there are other forms of violence also which a women faces in her domestic life, such as infanticide, foeticide, marital rape, sexual abuse, wife beating etc wherein there is no demand of dowry yet she is exposed to violence in her domestic life. Moreover, in these cases the women are reluctant to file a case against her husband due to fear of breakdown of her marriage plus she does not want to constraint herself from the legal proceeding which it requires. The roles of the police in such cases are also disputable as the general conception is that it is the matter between husband and wife which will be solved with time.

It can be said that the civil and criminal laws are not enough to deal with the everyday domestic violence in the lives of women because the domestic violence is the kind of violence which women faces in their private domain. No doubt the criminal laws and civil laws are effective in providing protection to women in public domain but when we talk about the violence in private domain their exist a lacuna in the capacity of the legal system to deal with the problem of domestic violence. Another thing which must be kept in mind is that domestic violence does not consist of violence among the marital partners but it covers even the children, aged parents, co-habitants and in-laws among other relationship. Hence, the issues such a marital rape, child sexual abuse or incest, female infanticide and foeticide, wife beating etc are not covered by the criminal and civil law and even if it is covered it is not sufficient. There is thus, a huge gap

in our legal system. These elements give rise to the need for a separate legislation on domestic violence.

THE PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE ACT, 2005: AN OVERVIEW: -

The existence of domestic violence in the society has been acknowledged in the Vienna Accord of 1994 and the Beijing Platform of Action 1995. The United Nations too recommended the intervention of the State to protect women against violence of any kind especially the violence which occurs at home. Women's movement in India has been campaigning for the elimination of violence against women for the past few decades. With regards to this movement many legislations for protecting the rights of women and to curb violence against women have passed and to some extent all these legislations have been successful in curbing the respective violence against women. Although these legislations have limited the violence to some extent but with regards to everyday domestic violence faced by women these legislations were silent. Hence there was a need to legislate the domestic violence in India.

(A) HISTORICAL BACKGROUND OF THE ACT: -

The women's groups in India since the early eighties were campaigning to bring out an effective legislation to counter domestic violence. In 1992, Lawyer's Collective drafted and circulated a Bill on domestic violence, which was widely circulated amongst women's groups and organizations including the National Commission for Women. In 1994, NCW came out with its draft Bill on domestic violence which was vehemently criticized by women's

organizations.²⁰ Hence, in 2001, the Lawyer's Collective formulated the "Domestic Violence Against Women (Prevention) Bill". Several aspects of violence against women and girls within the family was taken into consideration after nation-wide consultations with many women's group and the Bill propose a mechanism for women to approach the court for a protection order to prevent further violence and ensure that they do not have to leave their home. The Bill was given to the government for consideration.

The Government of India circulated another bill in December 2001 named "Protection from Domestic Violence Bill, 2001." However, due to terror attack on Indian Parliament on 13 December 2001 the Bill could not be introduced. Finally the Government of India introduced the Protection from Domestic Violence Bill No. 12 of 2002 in the Lok Sabha on 8th March 2002. Again a Bill was drafted by the Government with the change in its name i.e. the Protection of Women from Domestic Violence Bill, 2005. It was passed by the Lok Sabha on 24th August, 2005 and the Rajya Sabha on 29th August, 2005. It received the assent of the President of India on 13th September, 2005 and came on the Statute Book as "the Protection of women from Domestic Violence Act, 2005." It came into force on 26th October, 2006. The passing of the much awaited Protection of Women from Domestic Violence Act, 2005 represents a major victory for women's right in India.²¹ This landmark judgement protects women whether married or unmarried, against the abuse and threats of their husbands, partners or other male members of their family.

20. Ashirbani Dutta, *Domestic Violence as Human Rights Violation: A Reality that Bites*, Cr LJ 2005 J 25 at 29.

21. Minal M. Bapat, *Protection of Women from Domestic Violence Act, 2005: A New Direction to ensure Women's safety in the home*, Cri LJ, 2007, J 175.

(B) STATEMENT OF OBJECTS AND REASONS OF THE ACT:-

Domestic violence is one of the human rights issues which must be addressed as it is serious deterrent to development. Women at home faces physical as well as mental violence at the hands of the men folks and the kind of physical violence they face are not necessarily confined to homicidal deaths by way of stabbing, strangulation or setting them afire. The domestic violence can originate from minor offences such as pulling hair, pinching, pushing, hitting, throwing things, abuses etc. Ignoring these minor incidence may lead to fatal form of violence. All the international instruments speak about protection of women from all kinds of violence especially the ones which occur within the family. Although the domestic violence was in existence since a long period but it remained invisible in the public domain due to the factors which are already discussed above. Following are the statement of Objects and reasons of the Act: -

- (1) Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.
- (2) The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

(3) It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

(4) The Bill, *inter alia*, seeks to provide for the following: -

- (i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.
- (ii) It defines the expression “domestic violence” to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.
- (iii) It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial

home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

- (iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.
- (v) It provides for appointment of Protection Officers and registration of non-governmental organizations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.

(5) The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions contained in the Bill.

The Statement of Objects and reasons attached to the Protection of Women from Domestic Violence Act, 2005 shows that the Act intends to provide protection to women from domestic violence faced by them in their households at the hands of men.

(C) SALIENT FEATURES OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: -

The passing of this Act was a victory for the women's group who were campaigning for the protection of rights of women in their household.

The Act is a civil law remedy which seeks to address the situation of women in the household where she is continuously battered. Its main aim is to stop the violence within the household, to help the women during the intense phase of abuse, and the availability of protection orders or residence orders for stopping the violence. It also provides support mechanism as well as a tool for women to negotiate their rights from a position of equality. It not only protects married women but also women who are living in with their partners, and also children from domestic violence. At the same time the Act also creates a balance between the civil and criminal law since it allows for the simultaneous use of the existing criminal provisions. The Act is combination of civil and criminal remedies as the civil remedies is tailored to meet the circumstances of each case, criminal sanctions provide a great deterrent effect among perpetrators. Following are the main features of the Act which helps us to understand the Domestic violence even better: -

(i) Definitions under the Act: -

The Act provides us with some vital definitions which help us to understand the domestic violence in a better way. Section 2 of the Act provides us with some important definitions. The Act defines “*aggrieved person*” as any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.²² “*Domestic relationship*” means a relationship between the persons who live or have at any point of time lived together in a shared household when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.²³ The term domestic relationship has been given a very wide meaning as it includes

22. Section 2(a), *the Protection of Women from Domestic Violence Act, 2005*

23. Section 2(f), *Ibid.*

any two persons who have lived together in a shared household at any point of time. Such persons must be related by either consanguinity or marriage. Thus, even the near relatives of the wife will be included. For example mother-in-law stays with the wife for a week and then goes back home is also covered under the Act. Another question comes up before us is that now the concept of live-in relationship which is very common in western countries is being adopted by Indians so whether they will be covered under the domestic relationship or not? Generally we understand domestic relationship as the relationship which has come up by the nature of marriage. The personal laws in India provide that such relationship is not recognized and the children born to them are children born out of wedlock. The relationship between such persons is called void. Even Section 125 Cr.P.C. provides that only wife, aged parents, children are entitled to receive maintenance, and do not recognize persons having illegitimate relationships entitled to maintenance except illegitimate children. Section 125(4) Cr.P.C. specifically prohibits wife living in adultery from claiming maintenance. However, the Protection of Women from Domestic Violence Act, 2005 provides that wherein people are living together as partner but their marriage can not be proved would also come under the ambit of a domestic relationship.

This question came up for consideration in *M. Pilani vs. Meenakshi*.²⁴ In this case the petitioner filed a plaint against the respondent for declaring that he and the respondent are not married to each other and for consequential injunction restraining her from representing and receiving the benefits as his wife and for costs. In the said proceeding, the respondent had taken out an application in I.A No. 2325 of 2007 for maintenance of Rs. 10,000/- per month for food, cloth, shelter and other basic necessities. The said application was filed under Section 20 read with Section 26 of the Protection of Women from

24. AIR 2008 Mad 162.

Domestic Violence Act, 2005. The petitioner contended that he and the respondent have not lived together at any point of time and hence the respondent can not claim protection under the said Act. To this, the respondent contended that as per the petitioner has put forth in his petition that the respondent had close relationship with the petitioner. The relationship was so close that they even had sexual intercourse. The plaintiff contends that he only had consensual sex with the respondent and it is not synonymous with the living in relationship. The Supreme Court held that the Act does not contemplate that the petitioner and the respondent should live or have lived together for a particular period or for few days. From the averments made by the petitioner in his plaint and in his counter affidavit, one can infer that both of them seems to have shared household and lived together at least at the time of having sex. Hence, the respondent can claim maintenance under the said Act and their relationship will fall under the domestic relationship. The Supreme Court upheld the decision of the Family Court which has rightly granted maintenance to the respondent.

The Act also provides definition of “*shared household*” which means a household where a person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right title interest or equity and includes such a household, which belong to the joint family of which the respondent is a member irrespective of whether the respondent or the aggrieved person has any right, title, or interest in the shared-household.²⁵ The expression “*shared household*” has been given a very wide meaning under the Act. It includes the house where all the relatives have been

25. Section 2(s), *Ibid.*

living. The Act protects and assists women facing domestic violence within the four walls of the household. Thus, from the definition of shared household it is clear that the aggrieved person has, irrespective of whether she has a title or interest, a right to reside in the shared household. She can not be removed from the house except by the procedure established by law.

The expression “*shared household*” can be explained in the case of *S.R. Batra vs. Smt. Taruna Batra*.²⁶ In this case the respondent (Taruna Batra) was married to Amit Batra on 14th April 2000. After the marriage the respondent started to live with her husband Amit Batra in the house of his father who is appellant No. 2. Amit Batra filed a divorce petition against his wife and alleged that a counterblast to the petition the respondent filed an FIR under section 406, 498A, 506 and 34 of Indian Penal Code and got her father-in-law, mother-in-law, married sister-in-law and her husband arrested by the police. They were granted bail only after 3 days. Taruna shifted to her parent’s residence because of the dispute with her husband. She alleged that later on when she tried to enter the house of the appellant No.2 she found the main entrance locked and hence she filed a suit for mandatory injunction to enable her to enter the house. However, the appellants alleged that when the respondent along with her parents forcible broke open the locks of the house. They also alleged that the respondent has been terrorizing them for sometime and hence sometimes they had to stay in their office. The appellants also submitted that their son had shifted to his own flat at Mohan Nagar, Ghaziabad before the above litigation was started between the parties. The Id. Trial judge granted temporary injunction on 4/3/2003 and held that the petitioner was in possession of the 2nd floor of the property and granted a temporary injunction restraining the appellants from interfering with the possession of Smt. Taruna Batra. Against the said order the appellants filed an

26. AIR 2005 Del 270.

appeal before the senior Civil Judge, Delhi who by his order dated 17/09/04 held that Taruna was not residing in the 2nd floor of the premises in question; even her husband was not living in the suit property and matrimonial home could not be said to be a place where only wife was residing. He also held that Smt. Taruna Batra had no right to the properties other than that of her husband. He allowed the appeal and dismissed the temporary injunction. Aggrieved by this Smt. Taruna Batra filed a petition under Article 227 of the Constitution which was disposed of by the impugned judgment. The Learned Single Judge of the High Court held that the said property was the matrimonial Home of Smt. Taruna Batra. Even if her husband has started to live separate it will not make it a matrimonial home. Mere change of residence by the husband wouldn't shift the matrimonial home especially when the husband had filed a divorce petition against his wife.

The respondents (petitioners) again filed an appeal in the Supreme Court and finally in 2007 it held that the Supreme Court does not agree with the High Court regarding the matrimonial home.²⁷ As held in *B.R. Mehta vs. Atma Devi & Others*²⁸ the rights of the spouses in England to matrimonial home are governed by the Matrimonial Homes Act, 1967 however, there is no such law in India. Under the said Act the rights which may be available under any law can only be as against the husband and not against the father-in-law/ mother-in-law. In this case, the house in question belongs to the mother-in-law of the respondent and not to her husband. Hence, Taruna Batra cannot claim any right to live in the said house. In addition to it with regards to the question whether the house can be termed as shared household or not within the provision of the Act? According to the counsel of the respondent he relied upon sections 17 & 19(1) of the Act and stated that the house in question comes within the meaning of the shared

27. AIR 2007 SC 1118.

28. (1987) 4 SCC 183.

household. However, the Supreme Court held that if the aforementioned submission is accepted then it will mean that wherever they lived together in the past becomes a shared household for example; husband's father, grand parents, uncles etc. Such a view would lead to chaos and would be absurd. Relying upon Section 19(1)(f) of the Act the court held that she should be given an alternative accommodation. Such claim can be made only against the husband and not her in-laws or other relatives. The Supreme Court is of view that shared household would mean only the house belong or taken on rent by the husband or the house which belongs to the joint family of which the husband is a member. The property in question does not belong to the husband. It belongs to the mother-in-law and hence cannot be called a shared household. The Court held that the definition of shared household is not happily worded and appears to be the result of clumsy drafting but we have to give it an interpretation which is sensible and which does not lead to chaos in the society. Hence, the Supreme Court allowed the appeal and impugned order of the High Court was set aside.

In *P. Babu Venkatesh and Others vs. Rani*²⁹ the question which came up before the Court was whether the house where parties last resided can be called "shared household"? The Court held that the wife is entitled to seek residence right in shared household. In the said case the dispute has arisen after husband alienated the house in favour of his mother. The Court held that it is irrelevant that there is a case of divorce lying pendent between the parties as it will not affect her right to seek ex parte residence order under Section 23(2) of the Act.

In *Rajkumar Rampal Pandey vs. Sarita Rajkumar Pandey*³⁰ the petitioner challenged the order of the Court granting relief of residence to wife under the Act as his contention was that the house in which the residence orders is

29. AIR 2008 (NOC) 1772 (Mad).

30. AIR 2009 (NOC) 1013 (Bom).

awarded to the wife is not “shared household”. He also produced some documents of sale of house executed by his mother. The Court held that it is impossible to believe that the husband in the said house does not have any undivided interest after his father’s death. The documents produced by the petitioner with respect to the sale of the residence by his mother also proved to be false and making false statements that shared certificate was issued by society in favour of his mother during course of hearing just to defeat the legitimate right of wife was found to be bogus. The Court further held that the husband having interest in the house by virtue of inheritance and he was not party to alleged sale transaction, the house can be treated as “shared household” wherein wife lived in domestic relationship with husband. Thus, the residence order is found to be proper. Similar problem was raised in *S. Prabhakaran vs. State of Kerala and Others*.³¹ In this case, it was held by the Court that “shared household” means a household over which husband in his capacity as a member of joint family has some subsisting right, even assuming he does not have any exclusive right, title or interest is not correct. Thus, wife has right to live in household be it joint family house of husband or residential building of parent-in-law, if wife lives or has at any stage lived in a domestic relationship either singly or along with husband.

With regards to the live-in relationship there is no tests or standards which has been proposed however, it must be proved that the relationship must have been in ‘the nature of marriage’. First there should be oral evidence about her living with the male partner. Second, any correspondence or documents which show that the woman is living in the same household as the husband must be brought forward.³² The existence of a sexual relationship or

31. AIR 2009 (NOC) 1017 (Ker).

32. N.K. Acharya, *Commentary on Protection of Women from the Domestic Violence Act, 2005*, 1st Ed. 2006, P. 19 [Quoted in Vijender Kumar, *Law Relating to Domestic Violence*, S. Gogia & Company, Hyderabad, 2007, P 64].

consummation must also be proved to show that the relationship is in the nature of marriage.

The Act also defines the term “*respondent*” as any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act. Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.³³ The question with regards to the term respondent came up before the court in *Nand Kishore & Others vs. State of Rajasthan & Another*.³⁴ In this case it was contended that the term respondent does not include the female relatives. However, the court held that if Section 2(q) of the Act and its proviso is read together, nowhere it suggests that relatives of husband or male partner have to be a male. For relatives the term ‘relative’ is used and not ‘male relative’. Therefore, female relatives are not excluded from the definition of respondent contained in Section 2(q) of the Act.

(ii) Protection Officers and Service providers: their duties and functions:-

The Act defines “*Protection Officer*” as an officer appointed by the State Government under the provisions of this Act. It also provides the procedure through which such protection Officer is to be appointed. The Act provides that the State Government shall appoint such number of Protection Officer in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under this Act. The Protection Officer shall be as

33. Section 2(q), the PWDV Act, 2005.

34. AIR 2008 (NOC) 2383 (Raj); 2008 Cr LJ 264 (M.P).

far as possible a woman and shall possess such qualifications and experience as may be prescribed. The terms and conditions of the service of the Protection Officer and the other officers subordinate to him shall be such as may be prescribed.³⁵ The appointment of Protection Officer is the main purpose of the implementation of this Act as it gives extra security to the women in the household. With regards to the qualification and experience of the Protection Officers the Central Government has made the Protection of Women from Domestic Violence Rules, 2006. It states that the Protection Officers may be of Government or members of non-governmental organizations. Every person appointed as Protection Officer shall have at least three years experience in social sector. The tenure of the office of the Protection Officer shall be a minimum period of three years and the State Government shall provide necessary office assistance to the Protection Officer for the efficient discharge of his or her functions under the Act.³⁶

The Act also provides that if any person has reason to believe that an act of domestic violence has been or is being committed may give information about the same to the Protection Officer. Such person will be exempted from any civil or criminal liability for giving such information.³⁷ With regards to the information, the person giving such information may give it orally or in writing to the Protection Officer. And wherein oral information is given it should be reduced in writing by the Protection Officer and shall be signed by the person giving such information. The Protection Officer has to keep the record of the identity of the person giving such information.³⁸

35. Section 8, the PWDV Act, 2005.

36. Rule 3, *the PWDV Rules, 2006*.

37. Section 4, *the PWDV Act, 2005*.

38. Rule 4, *the PWDV Rules, 2006*.

The Protection Officer under the Act has following duties and functions to perform: -

- To assist the Magistrate in the discharge of his functions under this Act;
- To make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;
- To make an application in such form and in such manner as may be prescribed to the Magistrate, if the aggrieved person so desires, claiming relief for issuance of a protection order;
- To ensure that the aggrieved person is provided legal aid under the Legal Services Authorities Act, 1987 and make available free of cost the prescribed form in which a complaint is to be made;
- To maintain a list of all service providers providing legal aid or counseling, shelter homes and medical facilities in a local area within the jurisdiction of the Magistrate;
- To make available a safe shelter home, if the aggrieved person so requires and forwards a copy of his report of having lodged the aggrieved person in a shelter home to the police station and the Magistrate having jurisdiction in the area where the shelter home is situated;
- To get the aggrieved person medically examined, if she has sustained bodily injuries and forward a copy of the medical report to the police station and the Magistrate having jurisdiction in the area where the domestic violence is alleged to have been taken place;

- To ensure that the order for monetary relief under Section 20 is complied with and executed, in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973; and
- To perform such other duties as may be prescribed.³⁹

The Protection Officer shall be under the control and supervision of the Magistrate, and shall perform the duties imposed on him by the Magistrate and the Government by, or under this Act.⁴⁰

Along with the above duties the Protection Officer, if directed to do so in writing, by the Magistrate shall: -

- Conduct a home visit of the shared household premises and make preliminary enquiry if the Court requires clarification, in regard to granting ex-parte interim relief to the aggrieved person under the Act and pass an order for such home visit;
- After making appropriate inquiry, file a report on the emoluments, assets, bank accounts or any other documents as may be directed by the Court;
- Restore the possession of the personal effects including gifts and jewellery of the aggrieved person and the shared household to the aggrieved person;
- Assist the aggrieved person to regain custody of children and secure rights to visit them under his supervision as may be directed by the Court;
- Assist the Court in enforcement of orders in the proceedings under the Act in the manner directed by the magistrate, including orders under Section 12, Section 18, Section 19, Section 20, Section 21 or Section 23 in such manner as may be directed by the Court;
- Take the assistance of the police, if required, in confiscating any weapon involved in the alleged domestic violence.⁴¹

39. Section 9(1), *the PWDV Act, 2005*.

40. Section 9(2), *Ibid*.

The role of the protection officer is to work in tandem with service providers. “*Service providers*” has been defined by the Act as the registered entity under the Act.⁴² Service providers are any voluntary association registered under the Societies Registration Act, 1860 or a company registered under the Companies Act, 1956 or any other law for the time being in force with the objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance shall register itself with the State Government as a service provider for the purposes of this Act.⁴³ The Act also lays down the powers of service providers which are as follows: -

- Record the domestic incident report in the prescribed form if the aggrieved person so desires and forward a copy thereof to the Magistrate and the Protection Officer having jurisdiction in the area where the domestic violence took place;
- Get the aggrieved person medically examined and forward a copy of the medical report to the Protection Officer and the police station within the local limits of which the domestic violence took place;
- Ensure that the aggrieved person is provided shelter in a shelter home, if she so requires and forward a report of the lodging of the aggrieved person in the shelter home to the police station within the local limits of which the domestic violence took place.⁴⁴

41. Rule 10(1), *the PWDV Rules, 2006*.

42. Section 2(r), *the PWDV Act, 2005*.

43. Section 10(1), *Ibid*.

44. Section 10(2), *Ibid*.

The Act further provides immunity to the service provider or any member of the service provider for anything done or intended to be done in good faith under the Act from any suit, prosecution or other legal proceedings.⁴⁵

(iii) Procedure for obtaining orders of Relief's: -

The Act lays down the procedure for obtaining orders of relief's under the provisions of the Act. It states that an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under the Act.⁴⁶ The Act provides a proviso to this provision i.e. before passing any order on such application; the magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider. The Act lays down that the application made to the Magistrate under this Act shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.⁴⁷ The Magistrate shall endeavour to dispose of every application within 60 days from the date of its first hearing.⁴⁸ The Act also provides that a notice of the date of hearing of an application for relief shall be given by the Magistrate to the Protection Officer who shall get it served in Form VII by such means as may be prescribed by the Central Government on the respondent and on any other person within a maximum period of two day or such further reasonable time as may be allowed by the Magistrate.⁴⁹ A declaration of service of notice made by the Protection Officer in Form VII shall be a proof of service of notice.⁵⁰

45. Section 10(3), *Ibid.*

46. Section 12(1), *Ibid.*

47. Section 12(3), *Ibid.*

48. Section 12(5), *Ibid.*

49. Section 13(1), *Ibid.*

50. Section 13(2), *Ibid.*

The Madras High Court in *M. Palani vs. Meenakshi*⁵¹ held that the Id. Practitioner appearing for the petitioner was emphatic in her argument that since in this case the report of the Protection Officer has not been obtained, the order of the Id. Judge of the Family Court at Chennai is liable to set aside. Further, the Court held that Section 12 contemplates the application to Magistrate and the proviso contemplates an order passed by magistrate under the provision after he receives a report from the Protection Officer. The proviso to Section 12 reads that the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider. Such proviso has not been incorporated in Section 26 of the Act. Thus, a conjoint reading of both Sections 12 and 26 will make it clear that when a Magistrate passes an order, he shall receive the report from the Protection Officer but whereas such a report is not contemplated, when an order is passed by the Civil Court or by the Family Court. Hence, the order passed by the Family Court was upheld and the Magistrate can pass the order of maintenance accordingly.

Similarly in *Smt. Neetu Singh vs. Sunil Singh*⁵² the petitioner questioned the legality and correctness of the order passed by the Id. Judge, family Court, Bilaspur on an application filed by the appellant under Section 12 of the PWDV Act, 2005 where by the Id. Judge held that since application has been filed under section 12 of the Act which ought to have been filed before the Magistrate and the relief sought for falls under the jurisdiction of the Civil Court, therefore, it be returned to the appellant for filing the same before the competent court having jurisdiction. The Chhatisgarh High Court held that the scheme of the Act specially as per the provisions of Section 26 of the Act, the appellant herein is entitled to such relief available to her under Section 12 of the Act, 2005, which can be

51. AIR 2008 Mad 162.

52. AIR 2008 Chh 1.

entertained only by the Magistrate having jurisdiction. An application under Section 12 cannot be filed before the Family Court because proceedings under Section 12 have to be filed before the Magistrate and Magistrate is competent to entertain the application. Thus, the decision of the Family Court was not illegal or infirm. The appeal, therefore, is liable to be dismissed. However, the appellant is entitled to move an application under Section 26 of the Act before the Family Court in the maintenance proceeding which is said to be pending before that Court.

In *Sunil Sharma vs. Smt. Vinita Sharma*⁵³ it was held by the Court that since the husband was Advocate by profession and also earned Rs. 3000/p.m. by working in a company thus, quantum of maintenance to wife of Rs. 3000/p.m. is not improper.

Again in *Milan Kumar Singh and another vs. State of Uttar Pradesh and another*⁵⁴ problem with respect to filing of the case under Section 12 came into light. Section 12 read along with Rule 6 provides that the application to the Magistrate by the aggrieved party shall be in Form II or as nearly as possible thereto. The use of words “*as nearly as possible thereto*” shows the intention of the legislature that no complaint will be rejected if it is not filed in the prescribed Form II. The Court held that with respect to filing the complaint to the Magistrate the aggrieved person can file the complaint directly to Magistrate concerned. It is choice of the aggrieved person to directly approach the Magistrate or she can approach protection officer and in case of emergency to the service provider. The Court also held that the complaint cannot be rejected merely on the basis that it does not contain verification note on the complaint itself. Complainant filing the

53. AIR 2009 (NOC) 1021 (Raj).

54. AIR 2008 (NOC 152) (All); 2007 (5) ALJ 679.

complaint swears the content of the complaint by affidavit which is sufficient compliance of prescribed procedure.

(iv) Role of Police Officers: -

A complaint of domestic violence can be lodged directly with police. The police is required to record a Domestic incident report on lodging of complaint. “*Domestic incident report*” means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person.⁵⁵ Such report is to be forwarded to the Protection Officer and Magistrate. The Act lays down that when the incident of domestic violence is reported to the police officer, it is the duty of the police officer to inform the aggrieved person the following things: -

- Of her right to make an application for obtaining relief by way of a protection order, an order for monetary relief, a custody order, residence order, a compensation order or any such order under this Act;
- Of the availability of service of service providers;
- Of the availability of services of Protection Officers;
- Of her right to free legal services under the Legal Services Authorities Act, 1987;
- Of her right to file a complaint under Section 498A of the Indian Penal Code, 1860, wherever relevant.⁵⁶

Proviso to Section 5 provides that nothing in this Act shall be construed in any manner as to relieve a police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

55. Section 2(e), *the PWDV Act, 2005*.

56. Section 5, *Ibid*.

Apart from the above duties the police officers are also under an obligation to take cognizance of breach of Protection Order and file a charge sheet.⁵⁷ The police continue to play their role under existing laws and take appropriate action such as investigation, arrest etc. for cognizable offences under the Indian Penal Code – offences like grievous hurt, rape, dowry death, Section 498A used in domestic violence cases.⁵⁸

(v) Duties of Government (Central and State): -

Section 8 of the Act empowers the State Government to appoint as much Protection Officers in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under the Act. The Act also imposes certain duties upon the Government both at the Centre as well as the State. It lays down the following duties of the Government: -

- To ensure that the Act is given wide publicity through public media at regular intervals;
- To give periodic sensitization and awareness training to all functionaries such as government officers, police and judiciary;
- Effective coordination between services provided by all ministries and departments concerned and conduct periodic review;
- Ensure that Protocols for functionaries including courts are prepared and put in place;
- State governments to register the Service Providers under the Act. List of Service Providers must be given to the Protection Officers and published in the newspapers and government websites; and

57. Section 31 and 32, *Ibid.*

58. Section 36, *Ibid.*

- Budgetary allocations are the responsibility of the state governments.⁵⁹

(vi) Counseling under the Act: -

The Act empowers the Magistrate to direct at any stage of the proceedings under this Act, the respondent or the aggrieved person either singly or jointly to undergo counselling with any member of a service provider. The member of the service provider providing the counseling shall possess such qualifications and experience as laid under Rule 11. Where any counseling has been ordered under this Section, the Magistrate shall fix the next date of hearing of the case within a period not exceeding two months.⁶⁰ This provision is very useful and relevant as it will help the parties to settle the matter.

(vii) Kinds of relief provided under the Act: -

The Act is aimed at providing civil remedy to the aggrieved person on the incidence of domestic violence. The Act provides various kinds of relief which are civil in nature and meant to work within the private sphere of the women. Following are the kinds of relief provided under the Act:-

(a) Protection Orders: -

The Magistrate may pass protection order after he gives both the parties an adequate opportunity of being heard and is satisfied that domestic violence has or may take place. Such order may prohibit the respondent from: -

- Committing any act of domestic violence;
- Aiding or abetting in the commission of acts of domestic violence;

59. Section 11, *Ibid.*

60. Section 14, *Ibid.*

- Entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;
- Attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;
- Alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her *stridhan* (Women's Property) or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;
- Causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence.⁶¹

The protection order prevents the perpetrator to commit any acts of domestic violence against the complainant. It must be passed directing the respondent not to aid or abet any of his family members to commit acts amounting to domestic violence. As per the Act the magistrate may also pass an order to the respondent to stop all forms of communication with the aggrieved person with a view to preventing any harassment which a woman might face.

In *P. Babu Venkatesh and Others vs. Rani*⁶² the court held that the protection order awarded by the Judicial Magistrate to the wife to reside in the house which was in question that whether the house is a shared household or not, the Judicial Magistrate giving a direction to the police authority concerned to

61. Section 18, *Ibid.*

62. AIR 2008 (NOC) 1772 (Mad).

break open the lock and give protection to wife to reside in the said house is not illegal.

(b) Residence Orders: -

Wherein the Magistrate is convinced that the incidence of domestic violence has occurred or is going to occur he may pass a residence order which consists of the following elements: -

- Restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
- Directing the respondent to remove himself from the shared household;
- Restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
- Restraining the respondent from alienating or disposing off the shared household or encumbering the same;
- Restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate;
- Directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require.⁶³

Section 19(2) empowers the Magistrate to impose additional conditions and pass any other direction in order to protect the safety of the aggrieved person or her child. Section 19(3) lay down that the Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence. The Act empowers the

63. Section 19(1), *Ibid.*

Magistrate under Section 19(5) to pass an order directing the officer in charge of the concerned police station to give protection to the aggrieved person or to assist in implementation of the residence order. The Act also provides that the Magistrate may impose on the respondent an obligation to discharge rent and other payments and to direct the respondent to return to the aggrieved person her *stridhan* or any other property or valuable security to which she is entitled.⁶⁴

(c) Monetary Relief: -

The Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but not limited to: -

- The loss of earnings;
- The medical expenses;
- The loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and
- The maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 Cr.P.C or any other law for the time being in force.⁶⁵

Sub-section (2) of Section 20 provides that the monetary relief shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed. The section also empowers the Magistrate to order lump sum or monthly payments for maintenance.⁶⁶ Section 20(6) provides that on the failure of the respondent to make payments of the monetary relief, the Magistrate may direct the employer or a debtor of the

64. Section 19(6) and 19(8), *Ibid.*

65. Section 20(1), *Ibid.*

66. Section 20(3), *Ibid.*

respondent to directly pay to the aggrieved person to deposit with the Court a portion of the wages or salaries or debt due to or accrued to the respondent.

In *Rajesh Kuru vs. Safurabai and Others* ⁶⁷ with regards to monetary relief a question was raised before the Court i.e. whether the maintenance to aggrieved person in case of domestic violence Court is competent to award maintenance to aggrieved person and child of aggrieved person in accordance with provision of Section 20 of the Act or Section 125 of Cr. P. C. To this the Court held that the golden rule of interpretation of statute is that the words of a statute must *prima facie* be given their ordinary meaning. The words of provisions under Section 20 of the Act are clear, plain and unambiguous. The provisions are independent and are in addition to any other remedy available to the aggrieved under any legal proceeding before the civil court, criminal court or family court. The provisions are not dependent upon Section 125 Cr. P.C. or any other provisions of the Family Courts Act, 1984 or any other Act relating to award of maintenance. In case of award of maintenance to the aggrieved person under the provisions of the Act, the Court is competent to award maintenance to the aggrieved person and child of the aggrieved person in accordance with the provisions of Section 20 of the Act. Aggrieved person is not required to establish the case in terms of Section 125 Cr.P.C. Under Section 125 Cr. P. C. the Court is empowered to award maintenance wherein a person has liability to maintain his wife and children but does not do so. In case of domestic violence, the Court is empowered to grant such relief if the person is aggrieved as a result of the domestic violence and may grant monetary relief in terms of maintenance which would be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved party is accustomed and also empowered to lump sum or monthly maintenance or to direct the employer or a debtor of the respondent to

67. AIR 2009 (NOC) 813 (Chh).

directly pay to the Court a portion of the wages or salaries. However the Magistrate is not empowered to grant relief in such form in accordance with Section 125 Cr. P. C. At the time of interpretation of Statutes, the Court is required to see whether the provisions of the statute are plain, unambiguous and capable of giving them their ordinary meaning.

(d) Custody orders: -

The Magistrate at any stage of hearing of the application for protection order or any other relief under the Act may grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify if necessary the arrangements for visit of such child or children by the respondent. The Act also provides that if the Magistrate is of opinion that any visit of the respondent may be harmful to the interest of the child or children the Magistrate shall refuse to allow such visit.⁶⁸

The Magistrate under this section while granting custody orders have to do think about the impact of domestic violence on the children, rather than the technical issues of custody and guardianship. The Magistrate may order the child to remain with the aggrieved woman, or may direct its restoration to the aggrieved woman. The respondent is bound to pay maintenance for the child or children. While granting custody, the Magistrate has to give emphasis on the interest of the child i.e. if the child prefers to stay with the aggrieved woman, the Magistrate may restore the child to her, or if the child prefers to stay with the respondent, then after examining relevant factors, the Magistrate may order the respondent to take the child home. In *Sheila vs. Phirozshaw*⁶⁹ it was held that the Magistrate while granting the custody of the child or children the child's or children's interests are to be kept in mind and not the legal rights of the parties. So

68. Section 21, *Ibid.*

69. AIR 1981 Bom 175.

long as the child is happy and comfortable he may continue to live with his guardian.

The order of the Magistrate given under Section 21 is temporary in nature, but will continue to operate until it is altered, after receiving the consent of the aggrieved woman or till any competent Civil Court decides to order for an alteration.

In addition to other relief's as may be granted under this Act, the Magistrate may on an application made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.⁷⁰ The Magistrate is also empowered to pass interim order as he deems just and proper and if he is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an *ex parte* order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent.⁷¹ In *Abhijit Bhikaseeth Anti vs. State of Maharashtra and Another*⁷² it was held by the court that the Magistrate can grant *ex parte* ad interim relief in exercise of powers under Section 23. However, before granting interim relief opportunity of hearing is to be granted to respondent. Further, the Court also declared that the interim reliefs granted in exercise of powers under Section 23 are appealable. The appellate Court would interfere with the discretionary order passed under Section 23 only when the said discretion was exercised arbitrarily, capriciously or perversely or when the Court

70. Section 22, *Ibid.*

71. Section 23, *Ibid.*

72. AIR 2009 (NOC) 808 (Bom).

while granting relief ignored settled principles of law regulating grant of or refusal of interim relief.

The Act also provides a provision of appeal wherein an appeal from the order made by the Magistrate shall lie to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, whichever is later.⁷³ In *Manish Tandon vs. Richa Tandon and Others*⁷⁴ the question with regards to the maintainability of appeal under Section 29 and Section 482 Cr. P. C can be done together was raised. The Court held that the word 'order' used in Section 29 connotes all types of orders passed by the Magistrate under the Act of 2005 including the order granting interim maintenance under Section 23(1) as well as *ex parte* interim maintenance under Section 23(2). Since the word 'order' has not been qualified by any suffix or prefix in Section 29, the clear legislative intent is that each and every type of order, irrespective of its description and nature, passed by a Magistrate has been made appealable to the Court of Sessions Judge under Section 29. The remedy of filing an appeal under Section 29 therefore, being an alternative and equally efficacious remedy petitioner under Section 482 Cr. P.C. would not be maintainable. It was not open to the petitioner to have by passed the appeal forum by straight way approaching Court under Section 482 Cr. P. C.

Again in *Abhijit Bhikaseth Anti vs. State of Maharashtra and Another*⁷⁵ it was held that an appeal under Section 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties.

The concept of granting relief is new under the Act and is in fact a welcoming change as the relief's sought for and granted are all of civil

73. Section 29, *Ibid.*

74. AIR 2009 (NOC) 507 (Utr).

75. AIR 2009 (NOC) 808 (Bom).

nature which will help in reducing the incidence of domestic violence in our society.

However, besides this the Act also provides that wherein the respondent commits breach of protection order given under Section 18 of the Act he shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.⁷⁶ Similarly the Act also punishes the Protection Officer who fails or refuses to discharge his duties as directed by the Magistrate in the Protection order with imprisonment of either description which may extend to one year or with fine which may extend to twenty thousand rupees or with both.⁷⁷

The Protection of Women from Domestic Violence, 2005 is the long awaited legislation which is comprehensive law dealing with the domestic violence. The legislation intends to provide protection and assistance to the women facing domestic violence within their homes.

76. Section 31, *Ibid.*

77. Section 33, *Ibid.*

CHAPTER - VIII
EPILOGUE

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EPILOGUE

Domestic violence is one of the worst forms of crime committed against the women as in this form women are subjected to violence not from any strangers but from the members of her family. Women are subjected to domestic violence since a very long period but it came into light only after the encroachment of the electronic media in our households. Domestic violence occurs within the four walls of the house and the strangers or the outsiders can not have access to what is going inside the house. This makes it more dangerous as unlike other crimes domestic violence can not be detected. Although in India the issue of domestic violence came into focus in 1980's as a result of spread of mass media which covered incidents of torture of the brides, dowry deaths, female infanticide, foeticide, sexual abuse etc. but it will not be wrong to say that efforts were being made to protect women from domestic violence since the ancient period itself. During the *vedic* period women enjoyed a fair amount of freedom and equality with men especially in the fields of education and religion. Manu in his *Manusmriti* has quoted that -

“Yatra Narayastu Pujayante Ramante Tatra Devta”

It means where women are worshipped God themselves inhabit that place. In other words, where women are respected, divine graces adore that home. How far this is true can be seen from the history of our country. It was only in principle and was hardly in practice. It remained only an ideal and was not practiced in true sense. However, the status and position of women in the Indian society changed from bad to worse with the development and civilization. During this period the other

religion apart from Hindu religion started to flourish in India which gave new lease of life to the women. These religions were Buddhism, Jainism and Sikhism. During the British regime there were numerous social evils existing in the society and the Governor-Generals of India made efforts to eradicate these social evils from the society generated against the women. Policies regarding the emancipation of women during the British regime in India lifted up the status and improved the position of women to certain extent.

In the independent India the framers of the Constitution of India enshrined the principle of equality, liberty and social justice as in order to curb all the social evils against women in our society it is first essential to provide gender equality to women in independent India and to promote education and economic interests of women which in turn can protect women from exploitation and provide social justice. The Constitution has granted certain fundamental rights and freedom to women such as right to equality; freedom of speech and expression; protection of life and personal liberty; prohibition of discrimination on the grounds of religion, race, caste, sex, descent, and place of birth, residence or any of them. Besides the fundamental rights the Constitution also provides certain directives for the States to follow in formulating policies and laws for the protection of women against various forms of atrocities.

Gender discrimination is one of the reasons for inflicting domestic violence upon women. Gender biasness has emerged as a fundamental crisis all over the world. In order to eradicate gender biasness resulting in discrimination and injustice to women, it is essential to empower the women. In the international front the United Nations along with the help of its organs have passed various Conventions and Declarations which promote the rights of women. These Conventions and Declarations provide them empowerment which is essential to challenge gender injustice done against her in the society. These

Conventions and Declarations have helped the member States to frame legislations and policies for protecting women against various forms of atrocities committed against her. One such Convention which is the landmark for the emancipation of women all over the world is the Convention on the Elimination of Discrimination against Women which was adopted in 1979. India was the signatory state of the said Convention and has also ratified it. Recently, the Optional Protocol to the Convention on the Elimination of Discrimination against Women was adopted and signed by the member states in 1999 for the purpose of further pursuing all appropriate means and without delay a policy of eliminating discrimination against women. The Convention sets up a Committee. The Committee seeks to ensure implementation of the Convention through Reporting Procedure. Under the said provision the State parties are required to submit their report on the legislative, judicial, administrative or other measures adopted by them to give effect to the provisions of the present Convention at least every four years or whenever the Committee requests. However, India having ratified the Convention has sent only one report till date. Along with this, despite being the signatory State of the Convention as well as the Optional Protocol India has till now not ratified the Optional Protocol which is sad as it cripples the efforts made by the Convention itself.

Besides the above fact, it can not be denied that no other international instrument unlike CEDAW refer to the problem of domestic violence especially of rural women but one of its drawbacks is that the Committee which has been established under it in unlike the Human Rights Committee under the Protection of Human Rights Act and does not consider individual complaints. Even the monitoring and reporting procedure of CEDAW Committee and Special Rapporteur do not result in legally enforceable remedies but only give non-binding recommendations. CEDAW Committee does not provide immediate relief to the

aggrieved women. The enforcement machinery of CEDAW is extremely weak and it depends entirely upon the State's self-reporting. The member states too have reservations with respect to its different provisions such as India and many other countries have made reservations with respect to Article 29 of CEDAW and as a result of this the countries have stopped intervention of ICJ, depending only upon the domestic Courts involving arbitrary state practices. This has crippled the CEDAW. The approach of the implementation of the provisions of CEDAW is very loose or casual. Committee of CEDAW usually suffers from lack of resources and meet annually only for 2 weeks to consider reports to meet the exigency of the situation, since 1997.¹ CEDAW Committee has second session each year to cope up with the inadequacy of situations.

Along with certain drawbacks of CEDAW even the procedure of individual complaints available to women under the ICCPR and Torture Convention of 1984 is long and arduous. With regards to the monitoring and reporting procedure only state parties can submit their report. The individual reports will be granted only if it reports systematic nature of violence which does not include complaints of domestic violence. The Human Rights Committee is helpless with regards to the problem arising with respect to domestic violence against women as it can only give recommendations and not restrict the violence as it is not a Court. The Committee of Torture Convention can be used to protect victims of domestic violence under Article 22 of the Torture Convention but till now, this remedy has never been used. The Commission on Status of Women too does not address specific complaints in the manner so as to bring relief to the victims of human rights violation. Even the law enforcement officials lack gender

1. Ashirbani Dutta, *Domestic Violence as Human Rights Violation: A Reality that Bites*, 2005 Cr. L. J. (J)25.

sensitivity to deal with the victims of domestic violence, which increases their sufferings.

These loopholes in the international, regional and national mechanism is leading to immense number of women being subjected to domestic violence. Hence it is better to call upon the international human rights community to recognize its responsibility to address the said problem. Along with this understanding domestic violence as human rights violation will contribute to a new perspective of women as sufferers of this violation. In order to ensure justice to the victims of domestic violence it is suggested that all international human rights instruments should drive their attention towards the problem faced by the rural women to protect them against domestic violence, where the problem is rampant. The time allotted to the Committee of CEDAW for their annual meeting should be extended. The individual complaints mechanism should be made available to the Committee of CEDAW to provide relief to victims of domestic violence. Domestic Violence has taken a gross shape in SAARC nations hence, these nations must come up with a Convention to fight this evil.

Despite the fact that Family Courts Act was passed in 1984 with an aim to make the legal process less technical and speedier unfortunately, family courts have not been established throughout the country. It is suggested that throughout the country family courts should be established and a provision for providing free legal aid should be made therein. The family conciliation agency should also be established in cities as well as rural areas. Apart from this knowledge of legal enactment should be communicated to the masses with the help of media like TV, cinema etc.

The Constitution of India provides provision for free legal aid under Article 39 (A). On this basis the Parliament has enacted the Legal Services Authorities Act, 1987 which provides for free and competent legal services to the

weaker section of the society. Despite it this Act has failed to protect women from bride burning and other forms of atrocities committed against her. It is suggested that with a view to provide legal assistance to needy women the University and the law colleges should set up legal aid centers with regular staff and funds with a view to utilize the resources of the student community in constructive channels for providing legal aid to women. Through clinical legal education law students would learn that besides a means for livelihood it is also an instrument of social engineering. Legal aid cells should be established to generate awareness about ones legal rights. The Central and the state Governments must undertake the financial responsibility for implementing it.

Women in India face various forms of domestic violence and one such violence which she faces is in the name of dowry. Dowry in India was prevalent among Hindus as it was believed that giving away daughters by patriarch in a marriage is considered to be one of the 16 “*sanskars*” as without the “*punya of kanyadana*” a man’s life is incomplete. Even in the Dharmashastra it has been laid down that *kanyadana* is incomplete till the bridegroom was given “*vardakshina*”. Thus, the concept of dowry originally was voluntary which was given by the parents of the bride to the bridesgroom out of love and affection. Slowly, this system changed into the system of grabbing wealth by the groom’s family. The system which was prevalent among Hindus started to capture the attention of other religions too and now it has become an evil concept posing threat to the life of innocent girls. The incidences such as constant demand of dowry even after marriage, beating, torture, cruelty, starving for days, locked up in dingy rooms, burning the bride alive, drowning, strangling, poisoning, shooting, etc have become fad with the money hoggers. Dowry is the deep rooted evil which is the cause of many unfortunate deaths of young women which is brutal and barbarous. The Indian Parliament enacted the Dowry Prohibition Act, 1961, as it

felt it essential for the State to intervene in order to eradicate this social evil which is giving birth to other social evils. Although the Act made an attempt to punish giving and taking of dowry an offence but the Act did not prove to be effective. The Act was amended twice i.e. in 1984 and in 1986. Besides the Act, the Parliament also introduced Section 304-B and 498-A to the Indian Penal Code which relates with the Dowry death and cruelty committed against wife by the husband and in-laws in connection with the demand of the dowry.

The problem of dowry and the evil practices associated with it still prevails in our society. In fact, it has widened its ambit by influencing other communities wherein dowry was not even the traditional practice. The problem of dowry is too complex and involves multi-dimensional analysis and multi-level strategies as it appears that at the base of the problem, the factors responsible are socio-cultural and economic. The dowry demands and cases brought against it has raised the divorce petitions and contributed to an irretrievable breakdown of marriage wherein still the sufferer are the women. The problem of dowry is associated with the institution of marriage where security and placement of a girl in her matrimonial family is involved; hence, it has to be tackled delicately. It is suggested that the dowry related crimes should be treated by the Family Courts which provide a more congenial atmosphere for both the parties to settle their differences amicably. It is also suggested that instead of punishing the husband and the in-laws with imprisonment, he should be deprived of certain civil rights such as disqualification from holding any public office or contesting election etc. or his name should be widely published in local newspaper and the amount of fine imposed upon him should be equivalent to the value of dowry property taken or demanded by him. With respect to the investigation in dowry cases, it should be entrusted to the women police officers as far as possible because they are socially and psychologically more fit to handle such situation. The anti-dowry laws should

be modified with respect to the procedure including evidence to make things easier for the prosecution.

Pandit Nehru has aptly remarked that "*Legislation can not by itself normally solve the deep rooted social problems. One has to approach them in other way too, but legislation is necessary and essential, so that it may give that push and have that educative factors as well as the legal sanctions behind it, which help public opinion to be given a certain shape*". Thus, law alone cannot tackle the problem of dowry as it is a traditional evil and a socio-legal problem. In order to curb this evil the members of the society should come forward and actively cooperate with the law-enforcement agencies to abate this menace. Collectively we can fight against this evil. There is a need to create social awareness and mobilize the public opinion against dowry system through a public legal education at all levels, particularly in rural areas. In order to end this evil from our society we should also take help from the voluntary organizations to educate people to bring revolution against this evil. The government should work towards providing women better economic status, programmes of legal aid to women should be organized and the women facing dowry related problem should be given legal aid, empower the voluntary organizations for preventive and strategic services to victimized women, to develop the family court as the judicial centre for gender justice jurisprudence etc. The children should be made aware of the dowry problems and its menaces in the schools and colleges. The educated boys and girls should discharge their duties as the citizens of India by imparting their services with an oath to reject dowry. The help of the press, media and Television should also be taken for educating the public about the dowry system and the consequences the accused has to undergo, if convicted. Besides this, separate dowry cells dealing with dowry cases in police stations as well as in the voluntary organizations should be set up to deal with the dowry related cases to make the

law efficient. The accused should be socially out caste by the society. Special courts should be established to deal with the cases relating to dowry in addition to the deterrent punishment for such offences. The provision of Section 8-B of the Dowry Prohibition Act dealing with the appointment of the Prohibition Officer be implemented in letter and spirit to achieve the purpose of the Act.

Besides this the Parliament should attach a clause of restitution for the victims or their dependents (children) be added to Section 304-B and Section 498-A of the Indian Penal Code to protect them from further exploitation. Recently allegations have come up with respect to the 'misuse' of Section 498-A of the Indian Penal Code which can lead to new legal terrorism as reported in the **Malimath Committee Report**, the **Singhal Report** and by a sitting Judge of the Delhi High Court in *Savitri Devi vs. Ramesh Chand and others*.² As per the Malimath Committee Report, the Section should be made bailable and compoundable to give a chance to the spouses to come together. The Delhi High Court in *Savitri Devi vs. Ramesh Chand and others*³ has held that the discussion of Section 498-A IPC extensively hits at the foundation of marriage and has not proved good for the health of the society at large. The Supreme Court too in *Sushil Kumar vs. Union of India and others*⁴ agreed that many a frivolous cases were filed by women to harass their husband and in-laws. The Court held that it is the duty of the legislature to plug the loopholes in the law passed by them. The Hon'ble Bench further held that "*the object is to strike at the root of dowry menace. But by misuse of the provisions a new legal terrorism can be unleashed. The provision is intended to be used as a shield and not an assassin's weapon. If (the) cry of "wolf" is made too often as a prank, assistance and protection may not be available when the actual wolf appears.*" The Court further held that the

2. 104(2003) Delhi Law Times, 824.

3. *Ibid.*

4. (2005) 6 SCC 281.

investigating agencies should not follow a straight-jacket formula in matters of dowry, torture, dowry deaths and cruelty. Thus, it is essential to make certain amendments to Section 498-A IPC in such a way that the provision is not robbed off its main purpose. The aim should be to circumvent the misuse of the said provision. First of all the definition of cruelty should be amended as cruelty includes more than just physical and mental abuse. The definition should address all forms of cruelty. And secondly, there should be a civil law which can provide emergency protection to the victim in addition to the criminal remedies. It is essential to provide complete protection and safety to women facing violence.

Violence against women in the domestic front has many faces. The existing law deals with these crimes. One such crime is bigamy which men commit against their wives. Although the Indian Penal Code and the existing civil laws are enough for preventing and punishing the person committing bigamy yet they are unable to keep a check on men who commit bigamy by changing ones religion which makes it difficult for his wife to bring a case against him under the personal law/civil law which govern them and moreover makes her marriage equal to null and void under her husbands other religion. Even if the wife is able to bring a case against her husband on the ground of bigamy the ultimate result is the breakdown of the marriage which leaves her no where to go as there is always a social stigma attached to a divorced women. Similarly, women are also subjected to cheating and fraud in marriage wherein a man deceitfully induces the women to believe that he is her lawfully wedded husband or fraudulently go through a marriage ceremony without lawful marriage. In these situation the women is aggrieved by the abuser as she is mentally and physically robbed by her abuser and ultimately either have to compromise with her fortune and continuously live with him or leave such person. Again the social stigma of having lived with a stranger gets attached with her, this hampers her reputation in the society and

people start looking down at her as a fallen lady. Thus, either way the women are stigmatized by the society for no fault of her. There should be a concrete solution to this problem and the legislatures should be more sensitive towards this problem.

In the Indian society there exist a peculiar system which is discriminatory to women and robs her of her right to life and personal liberty. This system which is followed in the Indian society is "sati system". The practice of Sati system has to some extent been curbed due to the enactment of special legislation called the Commission of Sati (Prevention) Act, 1987, which prevent the commission, abetment and glorification of sati. Although there are very few cases of sati in recent years but there are few incidences even in the 21st Century which proves that still the sati is practiced in India. The most controversial case of Sati in independent India is that of Roop Kunwar who burnt alive in the presence of whole village in the name of attaining sati hood. Not only was this but her death glorified wherein people convened public meetings in which they hailed Roop Kunwar. The press photographers covered the event and policemen made recording of speeches of the persons extolling the sacrifice of Roop Kanwar. Almost sixteen years of the incident and filing of the case for glorification of the death of Roop Kunwar on January 31st, 2004, the Special Court on Sati Prevention-cum-Sessions Court in Jaipur gave its judgment acquitting all the accused. The case is an example of how the best cases can be killed by delays, bad presentation of evidence and lastly by convoluted legal interpretations. Thus, it is suggested that the problem of violence against women of which the practice of Sati is an example has to be visualized in a wider context and cannot be viewed in isolation from the status of women in the society. This system is not only discriminatory but in fact endanger a woman's right to life and personal liberty as this practice makes a woman to burn herself alive at the pyre of her husband which also depict the helplessness and dependence of women upon others. Thus, it is

essential to note here that legislation alone cannot by itself solve deep-rooted social problems. Sati system is a problem which has emerged from the society, hence, to curb this evil altogether it is essential to tackle this problem in some other way along with the legal support such as creating opportunities for economic independence for women, essential education and awareness, alternative accommodation and a change in attitude and mindset of society. The judiciary should also be aware that there should not be delay in giving decisions under these kinds of cases and should feel responsible to curb this evil from the society. Most of all the women herself should change her attitude about herself. Hence, to curb this social evil the need of the hour is to restructuring society in terms of power and role relationship while emphasizing the egalitarian values.

Another crime to which women are subjected is “*marital rape*”. Marital rape is a common crime against a woman but it is being clouded in the veil of family prestige on the one hand and on the other hand the law does not treat it as a crime. The general perception of the society is that rape cannot be committed against one’s own wife as by binding herself into matrimonial ties it is her duty to provide sexual satisfaction to her husband. This implies that having sex anytime, anywhere and of any sort is an implied term of the contract of marriage, and the wife could not breach that term of the contract. Even if a woman brings a case against her husband for marital rape in the court of law, it can actually work against women. There are many cases wherein on the grounds of frigidity, impotency and non-responsiveness women have been served divorce proceedings. Thus, before bringing a case against her husband of marital rape she often is in dilemma that on the one hand she suffers at the hand of her husband and on the other hand she may lose the security and status in the society. Moreover, the Indian Penal Code although recognizes marital rape but only if the wife is below 15 years of age and the punishment prescribed is maximum imprisonment for a

term not more than 2 years or both which is quite less in comparison to the punishment provided for rape outside the marriage. Hence, it is suggested that the Parliament should recognize marital rape as an offence/crime against women which may impose physical as well as mental harm on the victim of the offence because unlike in rape by the stranger the woman has to live with her rapist everyday and which in turn imposes more incidence of abuse. The exemptions in the Indian Penal Code should be removed and marital rape without the consent of one's wife should be criminalized. The punishment for marital rape should be increased or at least be made same as the one prescribed for rape under Section 376 of the Indian Penal Code. Rape is a rape whether it is committed by the stranger or whether by the husband as in both the cases women's dignity is hurt. The fact that the accused is her husband should not make the sentence lighter. It is also suggested that the husband should not make a defense that the wife did not fight back and resisted forcefully or screamed and shouted as there are many factors which stops her from doing so. Thus, there is an immediate need to criminalize marital rape under the Indian Penal Code. It is suggested that if marital rape is proved the women should be given choice whether to bring a case for divorce or whether to continue to live with the husband. There should be corresponding changes in the matrimonial laws. However, mere declaration of a conduct as an offence is not enough. Something more is required to be done for sensitizing the judiciary and the police. The masses should also be educated about this crime and criminalization of marital rape can only be attained if the society acknowledges it and challenges the prevailing myth that rape by ones spouse is inconsequential.

Women also suffer battering at the hands of her husband which is also one of the crimes which a woman faces in her matrimonial home. There are various reasons for not reporting cases of wife battering due to societal

norms and general thinking of the society that it is an internal matter. Although the law in India has tried hard to protect battered women yet there are incidences of marital violence which are on rise. The main reason for this is that the wife battering is generally associated with the demand of dowry, which is not always true as in some of the cases women are battered in the absence of the demand of dowry. Under these circumstances the law is not sufficient; hence, there is a need to enact separate legislation specifically to deal with the problem of wife battering or to amend the Indian Penal Code to introduce a provision punishing the wife battering. It is very difficult to detect the source/reason for such violence which in turn makes it difficult to reduce it. It is observed that if there is legal and punitive action against this family matter it is not effective and results in divorce or separation of the parties, which is not the desired object of any legislation in this age wherein the number of divorce is increasing. Hence, it is essential to deal with the problem of wife battering through the intervention of non-governmental organization or other social institution like the women's organization, Village Panchayat or Jati Panchayat. Another step which the Government can take is to introduce self-defense courses for girls in schools and colleges to make them strong and brave to deal with the problems which they face in their marital life. And above all to launch a social action plan to help women overcome poverty.

Domestic violence is not only generated against the women in the family but sometimes children are subjected to cruelty in the family which is generally known by the name sexual abuse/incest. The child sexual abuse/incest is not only shameful and shocking but also violates the fundamental rights of the children and is responsible in destroying the future of the entire nation. The issue of child sexual abuse is slowly gaining recognition. However, child sexual abuse/incest is not known to the Indian Penal Code as a specific offence. Such offences can be brought under section 375 IPC i.e. rape. Child sexual abuse, as

discussed in the respective chapter, can be of various forms, as a result of this Section 375 of IPC is not sufficient to deal with it. Section 375 IPC covers only the penile penetration of the vagina and the punishment for it ranges from seven years upwards. Unfortunately, Section 375 IPC neglects sexual crimes which include digital, oral or object penetration, as well as sexual crimes against men. This makes the law insufficient to deal with child sexual abuse which can be faced by both the girl child as well as the male child which is evident from the various incidences that have recently come to light through media.

In April 2008 the news which took the world by storm was that of an Austrian man named Josef Fritzl an engineer by profession who kept his daughter Elisabeth locked up in a windowless cellar underneath the house where he lived with his wife Rosemarie and raped repeatedly his daughter in that cell for almost 24 years and have even confessed to fathering seven children by raping his own daughter.⁵ Recently, in March 2009 in Mumbai a woman of 25 years have lodged a complaint against her father that her father was sexually abusing her for the past 9 years. She went to the police when she learnt that he had also started abusing her younger sister. This case is famously called the Mira Road incident.⁶ Another survivor of incest/sexual abuse is a 26 year old Calcutta man who disclosed that he too was sexually abused by his father. Another boy of 19 years of age too revealed that he has incestuous relationship with his mother. At awareness programmes conducted by **Elaan**, a Calcutta-based support group for incest survivors said that 3-4 percent of boys in the campaign had sexual encounters with older women relatives.⁷ Such incidences shows that even in the Indian society children are subject to sexual abuse and even the boys are victims of child sexual abuse/incest in the Indian society. In India child sexual abuse/incest cases are

5. The Telegraph, 29th April 2008, P. 2.

6. The Telegraph, 29th March 2009, P. 12.

7. *Ibid.*

handled under various sections of the Indian Penal Code which are laws meant for adults. Hence, the existing laws are not sufficient to deal with the said problem. We need a separate legislation to deal with the crimes consisting of child sexual abuse/incest.

Although there is no central law on the subject but being a capital hub for all the wrong reasons specifically paedophilia the State of Goa has enacted the Goa Children's Act, 2003 which thrives to protect, promote, and preserve the best interests of children in Goa and to create a society which is child friendly. However, this Act fails in certain respect especially in its implementation by the State. One positive development in this regard has been the preparation of a draft by the Ministry of Women and Child Development. The Offences Against Children Bill, 2005 is in circulation since January 2007 which is hailed by child rights activists as a landmark document which specifically aims at protecting children's rights under debate. Rajmangal Prasad, Director of *Pratidhi* (an NGO) has said "*So far there was not a single law aimed at safeguarding children and protecting them against abuse. Offences against children were so far booked under laws under the IPC, which at times failed to result in prosecution and conviction simply for the reason that crimes involving children need to be handled with different tools*"⁸ According to him if the proposed draft does becomes a law, it will go a long way to check the sexual abuse of children.

Despite various legislations and constitutional provisions protecting and preventing the sexual abuse of child there is no stoppage of such types of incidents of exploitation and abuse and the number of such cases are increasing rapidly. Hence, there is a need for judicial intervention as sharply felt in *Vishal Jeet's Case*⁹ and *Gaurav Jain's Case*.¹⁰ However, the intervention of

8. <http://arpancsa.com>[visited on 6th January 2009].

9. AIR 1990 SC 1412.

judiciary is not sufficient due to the lacuna in prosecution. Even due to procedural defect the abusers get acquitted or their sentences are minimized. In the Case of *Sakshi vs. Union of India*¹¹ it was submitted that the statement of the victim should be taken in camera, in fact the whole trial should be taken in camera. With regards to the statement of the victim especially in the child sexual abuse it is now recognized that extra-judicial statements of children is sine quo non for a successful prosecution. Secondly, during the cross-examination the victim should not be exposed to direct confrontation or cross-examination to prevent double victimization and harassment as happened in the case of *Gurmit Singh*.¹² In order to provide fair trial the accused would have the opportunity to attempt to challenge the truth of the statements therein through every method other than direct confrontation of the victim. These techniques include sequestrian screens, late-relay videotaped statement. This way a correct balance can be struck between the rights of the victim and the accused.

In order to combat the evils of child sexual abuse/incest it is essential to teach the children about what is safe touch and what is unsafe touch. The children as well as the adults should be educated about the sexual abuse, the police too should be educated about the subject and laws should be strengthened. The victim of CSA may feel destroyed, face social isolation, lonely and frightened as they don't get family emotional support; hence, in order to take them out of this drudgery it is essential to provide them with medical facilities specifically the psychological treatment. Apart from this the educational institutions should also perform their duties and social obligations by importing the social awareness and proper education to the children, so that they may protect themselves and fight against this social evil. It is said that "*Prevention is better than cure*" thus, the

10. AIR 1997 SC 3021.

11. AIR 2004 SC 356.

12. 2004 Cri. L J 5.

State has the duty to take proper care and give protection to child at all times. Recently, the Criminal Law (Amendment) Bill, 2006 was drafted on the basis of 172nd Report of the Law Commission to amend the laws relating to sexual assault in Section 375, 376, 354 and 509 IPC and the relevant sections of the Cr. P. C. 1973 and the Indian Evidence Act 1872. The said Bill should immediately be enacted and enforced as it will cover all the offences mentioned above i.e. marital rape and child sexual abuse to be precise.

Women face atrocities in the society since her childhood. Female infanticide and foeticide is one such crime which deprives a woman even her right to life i.e. even before she is born. In spite of various stringent provisions in the existing laws, female infanticide and foeticide is on increase which is evident from the decline in the sex ratio of our country as per the latest census. The problem lies not only in the attitude of the people towards the girl child but also due to lack of political will among the policy makers of our country and implementers. Moreover, there are lacunae in our legislations also. The existing laws to prevent female infanticide and foeticide are only an eye wash as there are certain weaknesses in laws and secondly, the laws are not implemented properly. The problem relating to female infanticide and foeticide has moral sanction and societal consent in our patriarchal society which makes the implementation of the existing laws difficult. Mostly, the crime goes unreported as generally the crime is perpetrated on her by the family members. The social support to the practice on top of that makes it difficult to prove. Although the laws prohibit use of technologies such as ultrasonography, amniocenteses and chorion biopsy for the purpose of sex selection of the foetus there has not been a single conviction for female foeticide countrywide although complaints have been registered with the police. Even if the persons were convicted light punishments are given to them. Making mother an offender creates more hurdles as in most of the cases the

mother does not have any say in such cases. She too is subjected to pressure of the society, her husband and in-laws. In fact, she too suffers, her motherhood right is violated. The laws thus, regulate and not eliminate the problem of sex determination and female foeticide. The Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act is ineffective because of the liberal law of abortion allowing foeticide in certain cases. It excludes a third party to make a complaint thus eliminating voluntary form of vigilance. Though the Act provides for imprisonment and fine but no prosecution has been made under it. Lack of awareness among the people and medical professionals themselves is a big hurdle in implementing the provisions of the Act.

The infanticide and foeticide in our country is somewhere related to our tradition i.e. begetting a son which is must. Due to the development in technological advancement this tradition is creating havoc in the Indian society. Thus, it is observed that there is a great necessity to recognize female infanticide and foeticide as serious crimes. It is much more complex than the any other type of crimes. Hence, it is suggested that first of all it is important to define female infanticide and foeticide in a broader perspective which will include the evolution of terminology which will indicate its all pervasive crimes. The definition should also include the neglect of female child. The crime generally goes unreported as the information of the sex of the foetus takes place behind closed doors, thus, registration of birth, marriage, pregnancies and deaths should be made essential. Above all the complaints by the third parties should also be entertained.

Laws prohibiting female infanticide and foeticide have been recently made more stringent but still it is proving to be ineffective. Law needs more teeth and political commitment. Appropriate Authorities should be constituted at the District level for the strict implementation of the Act. Moreover, help from the professional medical association may help in the enforcement of the

Act. It is suggested to create awareness about the ban on sex determination tests and hazards of repeated abortions. Such awareness should be spread orally, in print or through audio-visual media. The creation of awareness will help build an environment favouring women's rights. The society should encourage their daughters to participate in social and religious rituals which may promote them and raise question regarding the stereotyping of the men and women's role in the society.

The efforts to curb the evils of female infanticide and foeticide will remain distant dream if the men of the society are not involved in the programmes relating to promotion of women's right as their involvement in such programmes will help them develop an understanding about the rights of women. Empowerment of women is the tool with which we can raise the status of women in the society. People should be made aware about providing education to their girl child because to change the social attitude towards the girl child it is essential to revamp the education system which can also elevate the status of women. Women should also be made aware about the sensible use of her reproductive rights which will be helpful in stimulating an environment conducive for the girl child. Women should be encouraged to build self-esteem and pursue higher education which will improve her stand in the society in the long run. All this can be done with the help of the Government, NGO's and other social organizations. The people should be discouraged to continue the dowry system which to certain extent has given rise to this social evil and the Government should ensure strict implementation of existing legislation in this regard.

Giving rise to the evils of female infanticide and foeticide is the advanced technologies which can detect sex of the foetus resulting in sex selective abortions. Although these technologies are neutral but it is us who have used it in such a way that it is hampering the society we are living in. Sex

detection and sex selective abortions are spreading like a disease in our society which has become outside our control despite the legislations and judicial pronouncements. It is suggested that the Central Government and the State Government should take the implementation of the Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act seriously and ensure that the Boards, Authorities and Committee is constituted in each State and Union Territories. The Government should also ensure to select only those persons as the members of these bodies who are sensitive to the issue, have sufficient time to spare for the cause and are serious in their endeavour to ensure the implementation of the Act. The functioning of the enforcement machinery has to be periodically and effectively monitored. Besides this the Government should widely publicize the provisions of the said Act; workshops should be organized to create awareness why there is necessity to ban the sex determination tests; steps should be taken to maintain the list of centre wherein such techniques are used and inspect their records periodically for detecting any violation of the provisions of the Act; the Government should also employ decoy agents to check whether sex determination is being conducted in any of the said centre or not; there should not be any delay in taking actions and prompt action should be taken in case of any violation of the provisions of the Act. In order to curb the practice, the imperative is to sensitize the society about the gender issues. The Government should also start policies like the Tamil Nadu Governments “*Girl Protection*” Program wherein the government open a bank account in the name of the girl child at her birth, depositing between Rs. 15,000/- to Rs. 22,000/- during her childhood, depending on the number of girl child in the family.¹³ Another problem which came up before us the right of the foetus and the right of the mother to abort specifically in the case of *Harish Mehta*

13. http://www.catholic.org/international/international_story.php?id=269198page=1&2 [Visited on 15/01/09].

and *Nikita Mehta* wherein the couple wanted to abort their child due to the complete heart blockage of the foetus which can lead to abnormality if the child is born. They contended that the Medical Termination of Pregnancy Act and the Pre-conceived and Pre-natal Diagnostic Technique Act both violate their fundamental right to abort the child. Keeping their condition in mind a new Bill proposing amendment in the Medical Termination of Pregnancy Act which will permit abortion even after 20 weeks of pregnancy provided that the foetus will be born with abnormalities or severe heart diseases was introduced in Rajya Sabha on 19th December, 2008.¹⁴ If the bill is passed it will bring landmark changes in the abortion laws in India. It will end unwanted pregnancies and benefit lots of mother provided that the bill should seriously follow the proposed provision of following the termination of pregnancy as mandatory conducted only under the supervision of a medical board so that the provision is not misused. Above all it is essential to create an environment which is pro-women which can only be achieved through stringent law combined with the determined will. The problem of female infanticide and foeticide should be seen from a wider perspective and needs the change in the attitude and the mind set of the society towards women. Above all feeling has to be culminated in the heart of the people that women are an important part of this society without which the world cannot function.

The violence against women was on rampage in spite of the above legislations. Thus, the need for a separate law on crimes committed against women in domestic domain was felt. Ultimately the Protection of Women from Domestic Violence Act, 2005, was brought into force on 26th October 2006 which was the result of some consistent campaign by the women's movement. A law on domestic violence was due for a long period and the present Act is in fact a

14. http://news.indiainfo.com/2008/12/210812210826_new_abortion_bill_rajya_sabha.html
[Visited on 7th April 2009].

comprehensive law dealing with domestic violence. As soon as the Act came into force more than 7,913 cases have been filed across India.¹⁵ However, it's only been two years of passing of this Act and it suffers from some inadequate resource allocation and implementation. The question with respect to its efficacy has come up for consideration. Although the present Act covers crimes such as marital rape, child sexual abuse, and wife battering and provides punishments for it but it appears that the framers of the Act completely lost their way and ended with drafting more a penal law thus, it has become another penal law which deals with the offenders than a law dealing with the social problems of our society.

It is also contended that the implementation of the provisions of the Act is not uniform and there is clearly great variability in the implementation of the law. There are some states which have relatively done well in comparison to the others such as Maharashtra had appointed 3,687 Protection Officer, Assam had only 27 and Gujarat only 25. Andhra Pradesh had allocated Rs 100 million for the implementation of the Act, but there are other states like Orissa which lagged far behind. The role of the protection officer, who plays a central role in facilitating women's access to justice under the Act, came in for a lot of attention. Question was raised with respect to the qualification of the persons qualified to be the protection officer as the Act is silent with respect to the educational qualification necessary for the post of protection officer. This question was raised because although the protection officers have been appointed at the district levels in all the states, they were actually government officials from various departments vested with this additional charge. This affected their capacity to intervene effectively into the matter of domestic violence. Hence, it is suggested to appoint those personnel's only who are not government officials from various

15. Sidharth Luthra, *The Domestic Violence Act: Can We Make a Success of it?*, Halsbury's Law monthly, April 2008, P. 24.

departments so that they can discharge their duties fruitfully. Also the educational qualification of the person to be appointed as the protection officer should be laid down because educational qualification is important in understanding the nature of violence committed on women and will also help in implementing the provisions of the Act more effectively. Moreover, in some cases it has been found that the Protection Officers appointed under Section 8 of the Act are usually fresh graduates from the University and appointed on ad-hoc basis. Their inexperience becomes an obstacle in discharging their duties effectively. They also do not have the infrastructure and the support staff to assist them. Hence, it is suggested that the persons who are appointed as the Protection Officer must be given training which is essential for implementation of the Act and sensitization programs for functionaries should be arranged. They must be provided with adequate staff and help. Even the police should be directed to cooperate and recognize their authority. Another thing which must be kept in mind while appointing Protection Officer is that being the Second most populated country the Protection Officer's should be appointed keeping in view the population and local needs of jurisdictions. The Protection Officer's should be given specialized training/orientation must be given to Protection Officer to enable them to implement and meet the objects of the Act. To avoid the excess workload and ensure efficiency there must be adequate number of Protection Officer allocated. Even the Service Providers should be monitored routinely and evaluated to ensure the standards the Act seek.

Right now there have been only 22 cases filed in various High Courts under the said Act as reported by the Lawyers Collective Women's Right Initiative which is an NGO working with the assistance of UNIFEM's South Asia Office for monitoring the implementation of the Act. The reason for this is that most of the cases are filed in the lower courts whose judgment are not available for the public as they are not in computerized form. Moreover, there are certain

groups which have labeled the Act as a law which propagate inequality as only the women are protected under this Act. The history is evident that there are incidents wherein even men are subjected to domestic violence. In fact, there are about five petitions in various High Courts which argue that the Act violates the constitutional right to equality because it provides relief only to women. There are some men organizations who have written to the minister for Women and Child Development, Renuka Chowdury demanding to be covered under the said Act.¹⁶ The contention of these men organizations was with the passing of this Act numbers of cases have come up before the Court for consideration, but all were not true. Wives file cases against their husbands and in-laws to harass them. The men group also contended that women should be prevented from filing multiple maintenance cases. Earlier when this Act was not enforced usually false cases were filed under Section 498A IPC and with the passing of this Act it has become easier for the women to harass her husband and in-laws as the Act makes the offence cognizable and non-bailable under Section 32. Hence, the chance of being misused still remains in the new law. It is thus suggested that there should be a provision wherein penalty should be provided for the wife if she files a false case against her husband or in-laws, provided that the burden of proof should lie on the husband and in-laws.

Another impediment to the effective implementation of this law has been the Supreme Court judgment in *S.R. Batra vs. Taruna Batra*¹⁷ wherein the Apex Court ruled that married women were not entitled to reside in the premises owned by the in-laws in cases where their husbands had separate property. The judgment of the Supreme Court poses a problem for the women

16. Vineeta Pandey, *Now, men seek cover under Domestic Violence Law*, <http://www.dnaindia.com/report.asp?newsid=1170084> [Visited on 7th April 2009].

17. AIR 2005 Del 270.

living in a situation of violence within the household she shares with their in-laws. Thus, it is opined by many public oriented person that such decision should be reviewed. It is suggested in this context it's high time that the Parliament should think about bringing necessary changes in the Prevention of Domestic Violence against Women Act, 2005 to prevent its misuse before it's too late.

The Act empowers the Magistrate to counsel the parties at any stage of the proceedings either singly or jointly which seems to be absurd as counseling should be done before the parties come to the Court for settlement of their dispute hence, it is suggested that the Act should provide provision with respect to counseling to the parties in a conflict under the Act before they come to the Court and not after they file their case. The reason for this is that the option of counseling is not readily available with the Magistrate and the Service Providers have not been notified by the Government to do this job. Hence, the Act should direct the service provider to counsel the parties before they bring their case in the court. Besides this another problem which is being an obstacle in the successful implementation of this Act is that the victims do not seek legal remedies because they are not familiar with the legal procedure and also they do not have faith in the legal system. Thus, it is suggested that the Government should encourage the girl education through their various policies as it is found that the women who are less educated faces domestic violence. Education will provide them with knowledge about the existing laws and give self-confidence. Besides this to ensure the active working of the Act the Central and the State Governments must ensure adequate funding and resources for the creation and maintenance of infrastructure envisaged under the Act. The governments in the State level and Centre should fulfill the duties placed on them under Section 11 of the Act, including periodic sensitization and awareness programmes for members of the judicial services and other stakeholders. Legal support through lawyers and other trained professionals has to

be made available to Protection Officers and other stakeholders. Legal services authorities must also engage themselves to aid and support legal literacy and programmes relating to generate awareness of the Act and its provisions. There is a need for appropriate medical facilities and shelter homes to provide temporary relief to the victims of domestic violence to which the Act of 2005 is silent. The medical facilities and shelter homes will provide the victim a safe and caring environment. Apart from this even the police officers should be sensitized about the offence of domestic violence.

Another drawback of the Act is that no relief for male-child abuse victims can be lodged under the Act as it is provided that the aggrieved person must be a female. Thus, boys are outside the scope of the Act. This needs to be corrected as it is reported in various newspapers and electronic media that even male-child are sexually abused. With the development in the society new forms of relationship is also developing in our society and India is not lacking behind. With the openness the homosexual relationship and lesbians relationship is discussed in today's society it is a fact that domestic violence also occur in such relationship wherein people of the same sex are living together. The Act of 2005 has not touched this area at all. Its reason may lie in the provision of IPC wherein under Section 377 it penalizes unnatural sexual offences i.e. sexual relationship between the same sexes. This mindset should be changed and alterations should be made in both the IPC and domestic violence in such relationship should be recognized under the Protection of Women against Domestic Violence.

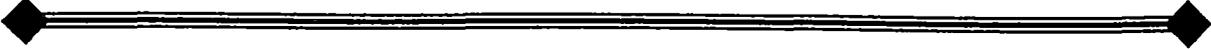
As reported by the British Law Commission *“Domestic Violence is not simply a legal problem which can be eradicated by the appropriate legal remedies. It is also a social and psychological problem, which can be eliminated by fundamental changes in society and in attitudes to women and*

*children. While legal remedies are an attempt to alleviate the symptoms of domestic violence, they can do little to tackle causes.”*¹⁸

The various enactments by the Indian Government for curbing all forms of violence committed against women in the domestic domain which we have termed as “domestic violence” had good intention to achieve its goal but due to lack of its implementation in proper manner as well as its shortcomings have created the obstacle in attaining it. The originations of these crimes are the result of our mindset only; hence, in order to bring reform in the society it is essential for us to reform ourselves than only it will be possible to curb these crimes against women which will result in emancipation of women in our society.

18. Report on *Family Law & Domestic Violence and Occupation of the Family Home* (1993), para 2.8. [Quoted in Justice A. K. Sikri, *PWDV Act, 2005: Implementation & Enforcement*, Nyaya Deep, P. 60 at 73].

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