

LAWS AND SON PREFERENCE IN INDIA

A REALITY CHECK



About the author

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Acknowledgements

UNFPA has been working on multiple facets of the issue of gender-biased sex selection for almost a decade now. Along the journey there have not only been lessons and learnings, but also an equal number of questions. Questions, which if answered, can lead us to understanding what might trigger a change in attitudes towards girls and women. During this journey, we realised that discriminatory attitudes that determine socio-cultural preference for sons equally seem to underpin laws meant to prevent discrimination. This realisation led us to the present study on the influence of laws on son preference and daughter discrimination – often invisible and covert, but very much at work.

This study has revealed a number of gaps which, when filled, can surely act as triggers to change discriminatory mindsets as opposed to reinforcing them. Laws are found to be wanting on various fronts – in their non-implementation, in their total absence or through application of clauses with differential and at times, unfair impact on sons and daughters, men and women. Similarly, the study highlights positive and negative judgements, with a view to emphasising the positive role the judiciary and its judgements can play in breaking stereotypes that promote discrimination against girls and preference for sons. The study has provided concrete suggestions for policy makers as well as civil society to act on removing discriminatory provisions such as those in dowry, rape or tenancy laws, as well as framing critical laws such as those on addressing crimes in the name of ‘honour’ or rights of women to matrimonial property. The implications of non-implementation of existing laws are also detailed. Along with this, the need for support structures and mechanisms such as helplines, shelter homes, sensitisation of police and judiciary is emphasised so as to establish a connect between these actions and their inter-relationship with addressing discrimination.

I take this opportunity to acknowledge the efforts of Advocate Kirti Singh who carried out the study and worked tirelessly and passionately on writing this report. Without her in-depth knowledge of the law and perseverance in addressing gender issues, this report would not have been possible. Kirti Singh was assisted in her extensive legal research by Advocate Sandhya Kumari and Advocate Abhey Narula. Dr. Debjani Halder assisted Kirti with the social science research. Narula & Associates also helped by providing the required office facilities.

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Finally, I hope that this report becomes the starting point for a relook at laws from the standpoint of preventing son preference and daughter discrimination and providing an overarching framework to address discrimination in every walk of life as underscored by the Constitution of India. This study has not analysed potential discriminatory elements in policies and schemes as well as in customary laws, which is indeed another important step that needs to be taken on this collective journey.



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Abbreviations

AA	Appropriate Authority
AIDWA	All India Democratic Women's Association
ANM	Auxiliary Nurse Midwife
CARA	Central Adoption Resource Agency
CEDAW	Convention to Eliminate all Forms of Discrimination against Women
CEHAT	Centre for Enquiry into Health and Allied Themes
CMPO	Child Marriage Prohibition Officers
CMRA	Child Marriage Restraint Act
CRC	Convention on the Right of the Child
CSO	Civil Society Organisation
CSR	Child Sex Ratio
DAA	District Appropriate Authority
DLR Act	Delhi Land Reform Act
DPA	Dowry Prohibition Act
DPO	Dowry Prohibition Officers
DVCM	Dahej Vidrohi Chetna Manch
FIR	First Information Report
HMA	Hindu Marriage Act
HSA	Hindu Succession Act
ICRW	International Centre for Research on Women
IPC	Indian Penal Code
JJA	Juvenile Justice Act
LMP	Last Menstrual Period
MM	Metropolitan Magistrate
MPL	Muslim Personal Law
MTP	Medical Termination of Pregnancy
NCRB	National Crime Records Bureau
NCW	National Commission for Women
NFHS	National Family Health Survey
NHRC	The National Human Rights Commission
NPP	National Population Policy
OPD	Out Patient Department
PCMA	Prohibition of Child Marriage Act
PCPNDT Act	Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act
PDS	Public Distribution System
PNDT	Pre-natal Diagnostic Techniques
POCSO Act	Protection of Children from Sexual Offences Act
PWDVA	Protection of Women from Domestic Violence Act
RTE Act	Right to Education Act
SIMC	State Inspection and Monitoring Committee
SMA	Special Marriage Act
SRB	Sex Ratio at Birth
SRS	Sample Registration System

Purpose and Essence of the Study

Background

This study examines Indian laws which directly or indirectly advance the firmly entrenched tradition of son preference in our society. Research studies have pointed to discrimination against daughters as being the mirror image of son preference. The studies also support the idea that the existence of a strong son preference is indicative of greater discrimination against daughters.¹ Through this review of laws and the gaps therein it becomes clear that unless the vicious cycle of discrimination is addressed and the legal, social and economic status of a daughter improves, son preference is likely to continue.

The devaluation of girls and discrimination against them manifests itself in a number of ways. Discrimination begins even before birth with the practice of sex selection. This has been stated as one of the key reasons for the low child sex ratio (CSR), defined as number of girls for every 1000 boys in the 0-6 age group. The 2011 Census figure of CSR of 919 is lower than the CSR of 927 in 2001.²

¹ T.V. Sekher and Neelambar Hatti, *Discrimination of Female Children in Modern India: from Conception through Childhood*. Available at: http://www.unfpa.org/gender/docs/sexselection/indiapublishedpapers/UNFPA_Publication-39865.pdf, last visited on 12.05.2012.

² Government of India, *Primary Census Extract* (Ministry of Home Affairs, 2011). Available at: http://www.censusindia.gov.in/2011census/hlo/pca/PCA_Data_India.html last visited on 16.05.2013.

While the Census has not provided data on sex ratio at birth (SRB), defined as number of girls born for every 1000 boys born, data from other sources pegs SRB at 906 (SRS 2009-11).³

Studies regarding child nutrition and disease further point to pervasive discrimination against girls in an alarming number of homes across the country. Even the rates of hospitalisation of girls are lower than that of boys. Educational qualifications are yet another pointer.⁴ The girl may also suffer physical, sexual and psychological abuse within her natal and extended family as well as from neighbours. As she grows up she may be subjected to child marriage and within the marriage, to several different kinds of abuse including domestic violence and sexual abuse.

As a young woman she is denied the right to take independent decisions or assert her autonomy; she is denied the right to have a relationship or choose her partner in marriage. Dowry is normally given

“Throughout her life, a daughter is subject to various forms of discrimination which subjugate her and privilege the men in her family, including her brother and her spouse.”

when she gets married and in a large number of cases she is harassed for more dowry and subjected to violence. She is mostly denied her right to inheritance of property in her natal home. Hardly any laws or policies exist to address discrimination which may be pervasive and persistent and yet hidden within the four walls of the house.

In fact, throughout her life, a daughter is subject to various forms of discrimination which subjugate her and privilege the men in her family, including her brother and her spouse. Further, what is of concern is that in modern India, violence and discrimination against girls is increasing. This increase is also fuelled by certain actors who take advantage of the traditional preference for boys and discrimination against daughters for financial and other benefits. The increase in violence against girls and women is apparent from the latest National Crime Records Bureau (NCRB) data which has shown 31.02 percent increase in crimes against women since 2005.⁵

India has signed and ratified the Convention on the Rights of the Child (hereafter CRC) but has not taken adequate steps to implement the various Parts and Articles of the Convention, or to enact legislation in accordance with the Convention except in some areas.⁶ Some of the areas in which India needs to implement the CRC are ensuring that the basic rights to survival and development of children are met, including the need of all children particularly girls to nutrition, health and education. The CRC also outlines Protective Rights which include the right of children to

³ Government of India, Report, *Sample Registration System Report 2011* (Ministry of Home Affairs, 2011). Available at: <http://www.censusindia.gov.in/2011-common/vitalstatistics.html> last visited on 16.05.2013.

⁴ International Institute for Population Sciences (IIPS) and Macro International, *National Family Health Survey (NFHS-3), 2005-06: India*; Vol. I. (IIPS, Mumbai, 2007). Available at: http://www.nfhsindia.org/NFHS-3%20Data/VOL-1/India_volume_I_corrected_17oct08.pdf last visited on 26.05.2011.

⁵ Government of India, *Crime in India 2010* (NCRB, Ministry of Home Affairs, 2011). Available at: <http://ncrb.nic.in/CII2010/home.htm> last visited on 12.05.2012.

⁶ For instance, the Right to Education Act, 2009 came into force on 1st April 2010. Also see: <http://beta.thehindu.com/news/national/article3371111.ece?homepage=true> last visited on 12.05.2012.

be protected from all forms of physical and mental violence, injury or abuse, neglect, maltreatment or exploitation, including sexual abuse.

While an Act to protect children from sexual assaults and amendments in the Penal Code to address sexual violence against adult women have recently been passed, some lacunae remain. Marital rape is still not recognised in the law and only sexual assault of girls below the age of 15 years within marriage is considered a crime under the Indian Penal Code (IPC). Further the recent amendments introduced by the Criminal Law Amendment Bill, 2013, has raised the age of consent for sexual acts from 16 to 18. This will result in criminalizing consensual sex even between young persons and incarceration of young boys. The Act to punish sexual violence against children also defines children as all persons below 18 and thus punishes sexual intercourse below this age. Both these changes in the law fail to recognise the existing social realities in which

“Article 16 of CEDAW gives women the right to freely choose a partner and the right to enter into a marriage with their free and full consent.”

young people, including those below 18, may engage in sexual activity. The CRC further states that all children who are capable of forming their own views freely in all matters affecting them should be allowed to express their views. However, no laws exist to implement this right.

India has also ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and thus undertaken to eliminate discrimination against women and “embody the principle of equality of men and women.....

through appropriate legislation..... and to ensure, through law and other appropriate means, the practical realization of the principle”⁷ Article 16 of CEDAW gives women the right to freely choose a partner and the right to enter into a marriage with their free and full consent. It further gives the same rights to both partners during marriage and at the time of dissolution and the same rights and responsibilities as parents.⁸

Yet crimes in the name of ‘honour’ to stop a girl from marrying a person of her choice, and forced and child marriages are prevalent and mostly carried out with impunity. Child marriage, even of infants or children below a certain age, is not void under Indian law. Indian women do not have marital property rights and are still not equal guardians of their children. India’s obligation to abide by international conventions and treaties is stated in Article 253 of the Constitution which gives Parliament the power to make laws for implementing any treaty, agreement or convention or any decision made at an international conference, association or other body.⁹ Despite this commitment, laws, their absence or non-implementation continue to pose barriers to upholding the spirit of conventions such as CRC and CEDAW.

⁷ CEDAW, 1979, Article 2.

⁸ CEDAW, 1979, Article 16(1)(a) to (d).

⁹ Kirti Singh and Diviya Kapur, ‘Law, Violence and the Girl-child’, *Health and Human Rights: An International Journal*, Vol. 5, No. 2, p. 8-29.

It has rightly been said that the unequal economic and social status of women, which is an outcome of patriarchy and the deeply entrenched socio-cultural stereotypes about women, is also perpetrated by laws, regulations and policies that do not sufficiently address the subordinate status of women.¹⁰ This is true as much as for girls as for women.

Purpose of the Study

This study examines whether laws address the issue of son preference adequately. It does this by looking at the text of the law and seeing whether there are any loopholes which need to be plugged. Since any law is subject to implementation and interpretation, the implementation of the

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law, particularly criminal law, by State actors like the police has been closely examined. Laws which seek to give certain rights to women, like inheritance rights under the Hindu Succession Act, have been reviewed to see whether they are effective or not. The manner in which these laws have been interpreted by the courts has also been highlighted. Positive judgements which advance the law as well as negative judgements, which reveal the inadequacy of the written law or the gender bias that exists amongst sections of the judiciary, have been studied. In addition, the study examines the laws which overtly fuel or permit son preference with the inevitable consequence of discriminating against girls and women.

And finally, the study also assesses the absence of laws in certain critical areas of discrimination and violence. The lack of laws in certain spheres in which the daughter faces discrimination means that she is not recognised as an equal human being. The lack of laws to deal with certain types of violence also reveals that certain forms of violence against girls and women do not get recognised or addressed by the law.

Laws and Their Implementation

A number of legislations have been passed by the Indian State to end discrimination against daughters and to prosecute and punish those who commit violence against them.¹¹ These include civil laws¹² which have been passed to give equal rights to daughters. For instance, certain amendments to the Hindu Succession Act were made in 2005 to give equal rights in

¹⁰ Ministry of Women and Child Development, *Twelfth Five Year Plan Report of the Working Group on Women's Agency and Empowerment (2012-2017)*, available at: http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wcd/wgrep_women.pdf, last visited on 21.7.2012.

¹¹ The Indian legal system is divided into civil and criminal laws. While civil laws are governed by the Civil Procedure Code, criminal laws are governed by the Criminal Procedure Code. The Indian Evidence Act governs the manner in which evidence is led in both civil and criminal cases.

¹² Civil law may be defined as “That part of the law that encompasses business, contracts, estates, domestic (family) relations, accidents, negligence and everything related to legal issues, statutes and lawsuits, that is not criminal law”, available at <http://dictionary.law.com/Default.aspx?selected=195>, last visited on 5.9.2012.

inherited property to daughters. Certain special laws, some of which provide criminal¹³ and civil remedies, have also been passed after independence to deal with various forms of discrimination. These include the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection), 1994 (hereafter PCPNDT Act), The Dowry Prohibition Act, 1961 (hereafter DPA) and the Prohibition of Child Marriage Act, 2006 (hereafter PCMA). These standalone comprehensive laws punish those who violate them with imprisonment and fine like any criminal law and also provide for certain civil remedies like getting a marriage annulled in certain situations under the PCMA. Apart from these laws, the IPC criminalises certain acts in relation to marriage and childbirth. The IPC has also been amended to deal with crimes against women and new offences against women have been introduced in it like 'Dowry Death' (which seeks to punish dowry related murder) and 'Cruelty against a Woman' (which defines cruelty as harassment for dowry and mental and physical violence of a grave nature).

“For a law to be effective... it has to be implemented and enforced.”

For a law to be effective however, it has to be implemented and enforced. Though the Indian state has formulated laws to address the concerns of women and girls, their implementation leaves much to be desired. The PCPNDT Act was passed as far back as 1994 but it did not come into force till 1996. Very few convictions against those violating the law have been reported. The PCPNDT Act has been cited as an important example of non-implementation of a critical law. The authorities envisaged under the law to monitor, supervise and enforce the law, like the Appropriate Authorities, Advisory Committees, and State Supervisory Boards were not, and in some cases have still not been properly constituted/notified in some areas despite orders of the Supreme Court.¹⁴ Similarly, under the DPA, though it had been made obligatory on the part of the State to appoint Dowry Prohibition Officers (hereafter DPOs) to oversee the functioning of the Act and report violations, very few DPOs have been appointed. Those who have been appointed are often government officers with other duties whereas given the prevalence of dowry, independent DPOs are a necessity.

Critical Pegs of Implementation – the Police and the Judiciary

Other instances of non-implementation include deliberate police inaction in several criminal cases related to dowry and other crimes and non-registration and non-prosecution of such cases. Criminal laws continue to be honoured more in the breach than in the observance. Corruption, inefficiency and gender bias amongst members of the police force are factors which are reported in several cases in which ordinary women are involved. Delay in receiving justice through the courts in most criminal and civil cases has also been reported almost universally by women complainants and

¹³ Criminal Law may be defined as “That body of the law that deals with conduct considered so harmful to society as a whole that it is prohibited by statute, prosecuted and punished by the government”, available at <http://www.manupatrafast.com/pers/Personalized.aspx>, last visited on 5.9.2012.

¹⁴ *CEHAT & Ors. v. Union of India* AIR 2003 SC 3309.

victims of violence. In addition, increasing incidents of corruption in the court system are being alleged and reported. These highlight the need for extensive reforms in the police system and for judicial reform to make judges more responsive and sensitive to women's concerns. The fact that the implementation of the laws is so appalling is one reason why a number of activists working with women have opposed the framing of new legislation, particularly in criminal law. Their contention is that the laws that exist need to be implemented while simultaneously ensuring that the police and judicial system is accountable.¹⁵

Laws with Direct Implication for Son Preference

While a law that is not implemented is damaging, one that inadvertently propagates or advances son preference goes against the Indian state's commitment to gender equality. Some laws

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contain loopholes or provisions which continue to favour men and promote son preference and discrimination. The practice of dowry has been held as one of the reasons leading to daughter aversion and fuelling gender-biased sex selection. The DPA was passed to stem the practice of giving and taking dowry. However, the law itself indirectly fuels the practice of dowry through certain loopholes which make the conviction of an accused in a dowry case difficult. One such example is the vague definition of dowry in the Act.¹⁶

Some laws that still overtly seem to propagate son preference are personal laws which deal with inheritance rights. Even the Hindu Succession Act, 1956 which was extensively amended in 2005 still contains certain provisions which favour the husband's family. For example, Section 15 stipulates that the self acquired property of a female Hindu dying intestate will, in the absence of her husband and children, devolve upon the heirs of her husband and not her father and mother.¹⁷ Also, in the tenurial laws of Haryana,

¹⁵ AIDWA, *Commission Paper: Laws and Protection of Rights of Women*, (AIDWA, Ninth All-India Conference, Kanpur, November, 2010).

¹⁶ Dowry Prohibition Act, 1961, s. 3(2). In one case (*Appasaheb and Anr. v. State of Maharashtra* (2007) 9 SCC 721) the Supreme Court said that items given after the marriage could not be held as dowry unless a direct connection between the gift item and the marriage was proved. The Court held as under:
“In view of the aforesaid definition of the word “dowry” any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the said parties. Therefore, the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential. Being a penal provision it has to be strictly construed.”

¹⁷ The Hindu Succession Act, s.15, reads:
“General rules of succession in the case of female Hindus.- (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,-
(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband.
(b) secondly, upon the heirs of the husband.
(c) thirdly, upon the heirs of the father, and
(d) fourthly, upon the heirs of the father, and
(e) lastly, upon the heirs of the mother.”

Himachal Pradesh, Jammu and Kashmir, Punjab, Delhi¹⁸ and Uttar Pradesh,¹⁹ the tenancy devolves in the first instance on male lineal descendants in the male line of descent. The widow inherits only in the absence of these male heirs. In the first four states mentioned above, daughters and sisters are totally excluded as heirs. In addition, studies have also shown that Hindu women continue to be deprived of their inheritance through wills.

Absence of Laws – a Barrier to Gender Equality

As stated before, in certain areas no laws exist to deal with discrimination against girls and women.

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The absence of laws to address discrimination against girls at home allows the discrimination to continue without any remedy or punishment. Similarly, the absence of a law that gives an equal share to women in marital property is another instance of discrimination against women. Another law which needs to be enacted is a law to address crimes in the name of ‘honour’. Killings and crimes in the name of ‘honour’ are deeply gendered crimes²⁰ which seek to suppress the fundamental right of a girl to form a relationship of her choice and live with dignity.

Review of Existing Schemes and Policies

Just as new laws need to be formulated, so do existing schemes or policies need to be reviewed. These include rules and regulations that recognise only a son as the head of a household and not a daughter in the absence of a father and allow a son to get a government job if the father dies while in service. Furthermore, studies have pointed to the link between the two-child norm and the practice of sex selection in the pursuit of sons. Thus some state laws that promote a two-child norm have to be re-examined along with schemes that make the two-child norm an eligibility criterion to avail benefits.

Exercising Rights through Laws

Rights have to be first recognised and engrafted into the law to enable women and others to fight for them. Indeed laws have played an important role in securing rights for women in many areas and sometimes are the only recourse in a societal structure that is inherently patriarchal and resistant to change. Equally, for women to be able to access their legal rights, laws have to be systematically implemented and administered. Through a review of both negative judgements

¹⁸ However, the Delhi High Court has held that after the amendments in 2005 in HSA, Hindu widows and daughters will be given a share equal to those given to the sons/brothers. *Nirmala and Ors. v. Government of NCT of Delhi & Ors.* MANU/DE/2717/2010.

¹⁹ The Delhi Land Reforms Act, 1954, s. 50. See also Sections 48, 51, 52 & 53 of the DLR Act, 1954.

²⁰ Gender-based violence against women is defined as violence that is directed against a woman because she is a woman or that affects women disproportionately. See: Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993), Available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> last visited on 15.05.2012.

and positive landmark cases this study suggests how legislations could be amended or introduced to ensure that discrimination against daughters does not continue to be a part of the legal framework. This may not, by itself, be enough to reverse the deeply entrenched discrimination against daughters but would be more than a step in the right direction. This is because laws do set norms and drive social change when a shift in discriminatory mindsets and attitudes has a long way to go as seen in the case of *sati*, adult franchise or the fundamental rights upheld by the

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Constitution. At the same time, Government policies in the economic, social and political sphere have to operate in tandem with the law.

It is not enough to ensure that a government policy does not work against existing legislation, it is also necessary to ensure that it advances the purpose of the law. For instance, the Right to Education Act will not be effective for girls unless the government ensures that schools are located at a reasonable distance and provide basic facilities like toilets for girls and a safe and free environment.

Future Direction

Need for an Anti-Discrimination Law

The Indian Constitution has an explicit equality clause in Article 14 and forbids discrimination in employment²¹ and on certain grounds including the ground of sex,²² apart from allowing special provisions for women and children.²³ But this is not enough as is explained through various examples cited in this report. Laws and policies for children, particularly girls, and for women should be perhaps guided by a more explicit legal framework which spells out substantive equality rights for women in different fields and in greater detail and is applicable to both the State and private actors. This could be through an anti-discrimination law which will define and enlarge the contents of our constitutional rights both in the Chapter on Fundamental Rights and in the Chapter on the Directive Principles of State Policy. The Verma Committee which was set up in December 2012 after the gang rape of a 23 year old woman has suggested a Bill of Rights, a charter which spells out the rights guaranteed under the Constitution and the government should legislate along the lines suggested in the charter.

In the interim, however, the CRC has outlined the basic rights of all children in great detail. The provisions of CEDAW have added content and meaning to the understanding of women's equality rights and can act as a touchstone for future strengthening and enactment of laws.

²¹ The Constitution of India, 1950, Article 16.

²² The Constitution of India, 1950, Article 15(1).

²³ The Constitution of India, 1950, Article 15(3).

Customary Laws

This study does not examine customary laws and their impact on women and girls but acknowledges the need to undertake an intensive review and reform of such laws. Some of these laws contain provisions which actively discriminate against women and girls. One such customary law,²⁴ the Chota Nagpur Tenancy Act, 1908, was challenged in the Supreme Court. It was argued by the petitioner that,

“the customary law operating in the Bihar State and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management...the discrimination based on the customary law of inheritance is unconstitutional, unjust, unfair and illegal”.

The Supreme Court however, refused to strike down the Act. A study of the various customary laws is therefore essential and should be undertaken to evaluate the extent of discrimination against the girl/daughter and to suggest measures for reform.

In conclusion, all the laws examined in this study are closely connected with son preference and daughter discrimination. The analysis assesses three key aspects which include non-implementation of laws, absence of laws and laws that overtly or covertly fail to address discrimination or promote it. The chapters are organised thematically, each chapter reviewing in detail the provisions pertaining to one law. Each chapter also provides pointers for action by civil society as well as the government. The key findings and recommendations have been summarised in the concluding chapter.

²⁴ *Madhu Kishwar v. State of Bihar* AIR 1996 SC 1864.

Dowry - A Cause for Sex Selection or a Result of Son Preference?

Dowry is widely considered to be both a cause and a consequence of son preference. The practice of dowry inevitably leads to discrimination in different areas against daughters and makes them vulnerable to various forms of violence. Many studies have also shown that dowry, customarily given by a girl's family to a boy's family, can be a major drain on the family's resources and is perceived as an oppressive burden by parents. It is this perception that dowry has to be given for a daughter to be married, that leads to their unwantedness, and the birth of a daughter is viewed with great trepidation. Discrimination against daughters further increases with higher order births as the prospect of marrying and paying for the dowry of multiple daughters fuels an aversion for additional daughters.

Dowry leads to, in many cases, a devaluation of the girl as a human being. She is largely valued according to the dowry she has brought or is likely to bring in the future. If she has not brought or cannot bring 'sufficient' dowry, she is ill-treated, abused mentally and physically and, in a surprisingly large number of cases, killed or driven to suicide. Thus, dowry not only fuels daughter aversion at the time of birth but can also lead to extreme forms of violence against a woman within the family after marriage.

The practice of dowry has grown phenomenally during the past few decades¹ and has been identified as a major reason for son preference by various studies² and by several activists. It is essential to re-evaluate dowry laws and closely analyse the various obstacles which stop this

“The implementation of the law relating to dowry has been extremely weak and police inaction and bias in these cases have resulted in a low conviction rate apart from allowing dowry takers to function with impunity.”

law from being effective. This would entail examining the various provisions of the law in the Dowry Prohibition Act and the provisions of law which deal with harassment for dowry, dowry murders, and suicides related to dowry harassment. It has also been pointed out that the implementation of the law relating to dowry has been extremely weak and that police inaction and bias in these cases have resulted in a low conviction rate apart from allowing dowry takers to function with impunity. Dowry has also been an issue of low priority for policy and law makers.

The Dowry Prohibition Act, 1961

The current phase of the women's movement against dowry violence and for punishment for demand of dowry and recovery of dowry items started in the seventies and early eighties. Also, reports of women being burnt for dowry started appearing in the newspapers around this time. The Dowry Prohibition Act (hereafter DPA) was enacted in 1961. However this was seen as a mere paper tiger. The Committee on the Status of Women had pointed out various loopholes in this law, and the ineffectiveness of the law became apparent from the fact that even ten years after its enactment only a couple of cases had been decided under this Act.³

The campaign against dowry resulted in the amendments in the DPA in 1983, 1985 and 1986. Amendments were also made in the Indian Penal Code and the Indian Evidence Act, 1872. The amendments relating to dowry violence introduced two new types of offences on violence against women in the Indian Penal Code. A new Section 498A⁴ of the Penal Code⁵ dealt with “cruelty” and “harassment” for dowry. The Section defined cruelty as harassment of a woman

¹ Report of the Joint Committee of the Houses to Examine the Question of the Working of the Dowry Prohibition Act, 1961, C.B. (II) No. 333, presented on 11 August 1982, published by the Lok Sabha Secretariat, New Delhi.

² T.V. Sekher and Neelambar Hatti, 2007. 'Vulnerable Daughters in a Modernizing Society: from Son Preference to Daughter Discrimination in Rural South India' in I. Attane and C.Z. Guilmoto (eds.) *Watering the Neighbour's Garden: The Growing Demographic Female Deficit in Asia*, Paris, CICRED: 295-323; T.V. Sekher and Neelambar Hatti, 'Discrimination of Female Children in Modern India: from Conception through Childhood'; S. Sudha, S. Khanna, S. Irudaya Rajan, Roma Srivastava, 'Is Son Preference Emerging among the Nayars of Kerala in South India?'; N. Diamond-Smith et al., 'Too many girls, too much dowry: son preference and daughter aversion in rural Tamil Nadu, India', *Culture, Health & Sexuality*, October 2008; 10(7): 697-708.

³ Government of India, *Report of the Committee on the Status of Women in India* (Government of India, Department of Social Welfare, 1975).

⁴ The Indian Penal Code, s. 498A reads: "Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

by her husband or his relatives to coerce her or her relatives into giving dowry. Cruelty was also defined as wilful conduct which was likely to drive a woman to commit suicide or to cause her grave physical or mental injury. In fact, although the primary purpose of this Section may have been to deal with dowry violence, it recognised domestic violence for the first time and sought to punish it by imprisonment which could extend to three years with a fine. Thus, Section for 498A for the first time introduced punishment for “cruelty”, which could be termed as domestic

“Section 498A for the first time introduced punishment for “cruelty”, which could be termed as domestic violence.”

violence. Simultaneously, with the introduction of Section 498A, the Indian Evidence Act, 1872, was also amended “to provide that where a woman has committed suicide within a period of seven years from the date of her marriage and it is shown that her husband or any relative of her husband subjected her to cruelty, the court may presume that such suicide had been abetted by her husband or by such relative”. Subsequent years have shown how valuable this reform was in the Indian context.

A phenomenal number of cases have continued to be registered under these Sections. While there are many problems with the manner in which these cases have been dealt with by the police and in many instances by the judiciary, victims of dowry harassment and violence seem to have found some space in which they can voice their grievances.⁶

A later 1986 amendment to the IPC created a new offence called “dowry death”⁷ to combat the increasing incidence of dowry murders. Under this Section, if a woman died an unnatural death

Explanation

For the purpose of this section, “cruelty” means—

(a) any wilful 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.”

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for three years and fine; Cognizable if information relating to the commission of the offence is given to an officer in charge of a police station by the person aggrieved by the offence or by any person related to her by blood, marriage or adoption or if there is no such relative, by any public servant belonging to such class or category as may be notified by the State Government in this behalf—Non-bailable—Triable by Magistrate of the first class—Non-compoundable.

⁵ Inserted by Act 46 of 1983, s. 2 (w.e.f. 25-12-1983).

⁶ Kirti Singh, *Law, Violence and Women in India*, UNIFEM/UNICEF, New Delhi, p. 40.

⁷ Indian Penal Code, 1806, s. 304B, reads: “Dowry death

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

Explanation

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

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

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment of not less than seven years but which may extend to imprisonment for life—Cognizable—Non-bailable—Triable by Court of Session—Non-compoundable.

within seven years of marriage and it was shown that just before her death she had been subjected to cruelty or harassment by her husband or his relatives for dowry, such a death shall be deemed to have been caused by the husband or his relatives. The punishment for causing this death is imprisonment for a minimum of seven years and for a maximum of life.⁸

Context of the Act

The 1986 amendments also sought to provide preventive machinery by stipulating that the State Governments could appoint Dowry Prohibition Officers (DPOs). These officers would be responsible under the Act to prevent the taking, abetting, or the demanding of dowry, and see that the provisions of the Act were being complied with. The DPOs were also given powers under the Act to collect evidence against people who took dowry.⁹

After the amendments in the mid eighties, the demanding of dowry has also been made punishable for a period of not less than six months, which can be extended to two years and a fine. Dowry

“An important section was inserted which shifted the burden of proof from the complainant to the person being prosecuted for dowry.”

has been made a cognizable and non-bailable offence.¹⁰ This means that the police are bound to investigate all offences relating to dowry under the Act once they come to know about it. Bail can also only be got from the court. Unlike the previous Act, there is no limitation on the period within which a dowry complaint could be filed. An important section was inserted which shifted the burden of proof from the complainant to the person being prosecuted for dowry.¹¹ This means that once the case starts, the person who is accused will have to prove that he/she has not taken dowry.

Though these amendments and other amendments in the DPA brought about significant changes in the dowry law and made it much stronger, the practice of dowry continued to increase. A Joint Select Committee of Parliament which had examined the functioning of the Act and had considered evidence from across the country reported that the practice of dowry had spread across all castes and communities and was no longer confined to the Hindu upper castes who originally observed the practice of dowry.¹² Commenting on the dowry system in recent times, the Joint Committee of the Houses of Parliament on the Dowry Prohibition Act in 1982, had stated, “the twin evils of dowry and ostentation started percolating down from the rich to the poor, and covered alike the literate and illiterate, towns and villages and this evil system engulfed almost all sections of the society irrespective of caste, creed and religion.”¹³

⁸ *Supra* n. 8, p. 41.

⁹ The Dowry Prohibition Act, 1961, s. 8B.

¹⁰ The Dowry Prohibition Act, 1961, s. 8.

¹¹ The Dowry Prohibition Act, 1961, s. 8A.

¹² Government of India, *Report of the Joint Select Committee of the Parliament on Dowry*, New Delhi, 1981.

¹³ *Supra* n. 3.

DOWRY RELATED CASES FROM 2006-2011

Nature of Crime	2006		2007		2008		2009		2010		2011	
	Cases Regd.	Convi- ction Rate	Cases Regd.	Convi- ction Rate	Cases Regd.	Convi- ction Rate	Cases Regd.	Convi- ction Rate	Cases Regd.	Convi- ction Rate	Cases Regd.	Convi- ction Rate
Dowry Death	7,618	33.7	8,093	33.0	8,172	33.4	8,383	33.4	8,391	33.6	8,618	35.8
Cruelty by Husband and Relatives	63,128	21.9	75,930	20.9	81,334	22.4	89,546	19.8	94,041	19.1	99,135	20.2
DPA	4,504	27.3	5,623	23.1	5,555	23.9	5,650	21.5	5,182	20.0	6,619	20.8

Source: NCRB, (Ministry of Home Affairs), 2011

The manner in which the practice of dowry has spread and intensified and the reasons for this have been recorded in some studies.¹⁴ The crime data also shows the increase in dowry cases under the DPA and 498A and 304B IPC. The 2011 data¹⁵ showed that every five minutes a case of cruelty by husband and/relatives got registered; every 61 minutes a case of dowry death got registered; and every 79 minutes a case under the DPA was registered.

While the total number of cognizable crimes increased by 17 per cent from 2001 till 2011, crimes against women increased by an alarming 49 per cent during the same period. However, the

“The conviction rates remain low, indicating that most of these cases are not being prosecuted properly and that not enough proof is being tendered before the courts.”

conviction rates remain low, indicating that most of these cases are not being prosecuted properly and that not enough proof is being tendered before the courts.

Further, ‘Cruelty on account of Dowry’ and ‘Dowry Death’ account for an astounding 50.1 per cent of crimes against women. Of the reported crimes against women, 43.4 per cent were cases of cruelty against women. The NFHS-III¹⁶ (2005-06) had also reported that 40 per cent of ever married women had experienced spousal physical, sexual and emotional violence.

It is important to mention that while charge-sheets were filed in 94.4 per cent of these cases, the conviction rate was only 20.2 per cent according to the latest National Crime Records Bureau (NCRB) data. Though it has been alleged in various fora that women file false cases under Section 498A IPC and therefore they eventually withdraw/drop such cases, the crime figures of 2011

¹⁴ AIDWA, *Expanding Dimensions of Dowry* (AIDWA, New Delhi, 2003); Rajni Palriwala, ‘The Spider’s Web: Seeing Dowry, Fighting Dowry’ in Bradley, T.E. Tomalin and M. Subramaniam (Eds.) *Dowry: Bridging the Gap between Theory and Practice*. (Women Unlimited, New Delhi, 2009).

¹⁵ Available at: <http://ncrb.nic.in/index.htm>

¹⁶ International Institute for Population Sciences (IIPS) and Macro International, ‘Summary of Findings’, *National Family Health Survey (NFHS-3), 2005-06, India, xivi-xivii* (IIPS, Mumbai, 2007). Available at: [www.nfhsindia.org/NFHS.../Summary%20of%20Findings%20\(6868K\).pdf](http://www.nfhsindia.org/NFHS.../Summary%20of%20Findings%20(6868K).pdf) last visited on 26.06.2012.

show that fewer cases of cruelty by husband and in-laws (1.9%), of dowry death (0.2%) and under the DPA (2.9%), got withdrawn/compounded in comparison to other crimes against women like sexual harassment (4.1%), and hurt (2.8%).

Interlinkages with Other Laws & Socio-economic Factors

Apart from the socio-economic reasons which have fuelled the practice of dowry in India, laws which impact dowry both directly and indirectly need to be tackled to curb the practice of dowry. Even in the early eighties, those involved in the struggle against dowry had demanded equal inheritance rights for women and enforcement of these rights to get rid of dowry.¹⁷ Dowry does not and cannot replace inheritance rights for women. It in fact further devalues both the economic

“Apart from the socio-economic reasons which have fuelled the practice of dowry in India, laws which impact dowry both directly and indirectly need to be tackled to curb the practice of dowry.”

and social status of women. Other dimensions and practices such as arranged marriages which facilitate the negotiations around dowry, marrying off daughters while they are still very young, and the lack of appropriate education for girls so that they could work, all have an impact on the practice of dowry. Studies on dowry have also shown that though in earlier times presents were exchanged between both parties to a marriage, now gifts are given almost wholly by the bride's side. A further finding is that marriage has become the most important life-cycle ritual in the life of a woman, and this has been accompanied by more expenditure on the ceremony and on dowry to ensure a more suitable match for the girl.¹⁸

A review of dowry laws also points to the various reasons why this law has so far failed to seriously address the issue. In spite of the sweeping amendments in these laws in the eighties, important loopholes and flaws still remain. Also, as in several other criminal laws which have to be investigated and enforced by the police, the manner in which the police have dealt with cases under the dowry laws and continue to deal with them leaves much to be desired. It has been widely reported that the police, in several cases, have been found to be gender biased, corrupt, and inefficient. In the first instance, the police often do not even register an FIR¹⁹ as they are bound to do in law. Further they may not investigate the cases properly, they may routinely fail to gather important evidence, or they may not take statements of victims and other witnesses in time even if they are not consciously subverting a case. Interpretation of these laws by the courts in India, including the Trial Courts, High Courts, and the Supreme Court also reveals the gender bias prevalent in sections of the judiciary. Stereotypical notions of the role of a woman in her marital home and in the family

¹⁷ Memorandum of the Dahej Virodhi Chetna Manch, 1982.

¹⁸ Rajni Palriwal, 'Dowry in Contemporary India', in *Expanding Dimensions of Dowry*, AIDWA, 2002.

¹⁹ A First Information Report is a document which the police are mandated to prepare according to the Criminal Procedure Code 1973 the moment they receive information of a cognizable offence.

undermine an appreciation of the violence she has suffered and reinforce her secondary and oppressed position in the household. Apart from this, the delay in getting justice and the lack of access to courts are all obstacles that a victim of violence faces in negotiating the judicial system.

Challenges

A review of the DPA and the various cases that have been decided under this Act lays bare the multiple reasons due to which the DPA has failed to make an impact despite amendments made to it in 1983, 1985, and 1986. The text of the law and its interpretation and enforcement are all responsible to varying extents for this failure as are other socio-economic reasons which have been discussed above.

Definition of Dowry

“The definition of dowry has proved to be problematic right from the inception of the Dowry Prohibition Act in 1961.”

The problem begins with the definition of 'dowry'. Dowry has been defined in Section 2 of the DPA as any "property or valuable security given or agreed to be given, either directly or indirectly, by one party to the marriage to the other party to the marriage.....at or before or any time after the marriage in connection with the marriage....."²⁰ The words "in connection with the marriage" have been subject to varying interpretations even by the Supreme Court and have led to acquittals in cases under this Act and under Section 304B IPC and Section 306 IPC, the respective provisions for dowry murder and abetment to suicide to which the definition of dowry in DPA is applicable.

In fact, the definition of dowry has proved to be problematic right from the inception of the Dowry Prohibition Act in 1961. In the 1961 Act, dowry was defined as property given in consideration of marriage and it therefore had to be proved that the dowry had been given as a motive, reason or reward for the marriage.²¹ The definition also seemed to be restricted to the act of giving of dowry at the time of marriage. Subsequent amendments to the DPA in 1983/1984 broadened the definition of dowry to include the giving and taking and demanding of dowry before the marriage, at the marriage, and any time after the marriage. The words 'in consideration of marriage' were replaced by the words 'in connection with marriage'.

²⁰ The present definition of dowry in the Dowry Prohibition Act, 1961 reads as under:

"2. Definition of 'dowry'- In this Act, "dowry" means any property or valuable security given or agreed to be given directly or indirectly -

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

(b) by the parent 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 mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation II. - The expression "valuable security" has the same meaning as in Section 30 of the Indian Penal Code (45 of 1860)."

²¹ *Inder Sen v. State* 1981 CLJ 1116.

However, this definition has also proved to be problematic. In a leading judgement of the Supreme Court (*Appasaheb v. State of Maharashtra*),²² the Court held that “*the giving or taking of property or valuable security must have some connection with the marriage of the parties and the correlation between the giving and taking of property or valuable security with the marriage of the parties is essential.*” In this case, a dowry related death had taken place. In a memorandum to the Chief Justice of India, a mass women’s organisation had pointed out that “the words ‘in connection with marriage’ must obviously be taken to mean that articles, money etc. have been demanded as a result of or because of the marital relationship between the parties. In other words, Section 2 of the Dowry Prohibition Act stipulates that the demand for dowry can only arise in a marital relationship.”²³ The organisation had also pointed out that if Section 2 of the Dowry Prohibition Act is not interpreted in this manner, no dowry which is demanded after the marriage ceremony will come within the purview of the

“Another judgment of the Supreme Court also held that payments made at the time of birth of a son, and on other ceremonies was not dowry... (but) failed to point out that these payments could amount to dowry if they were not voluntarily given.”

definition. Another judgement of the Supreme Court also held that payments made at the time of birth of a son, and on other ceremonies was not dowry. In this case, the Supreme Court failed to point out that these payments, could amount to dowry if they were not voluntarily given. A review petition by All India Democratic Women’s Association (AIDWA) pointed out that by doing this “*the Hon’ble Court has failed to distinguish between customary gifts and dowry/dowry payments. It is a part of every day (sic) experience that ... dowry after the marriage is demanded precisely on occasions such as birth of a child or on a festival and such customary events. Women are harassed for dowry on these occasions when gifts and money are demanded from them on pretext that (the) giving is customary on these occasions. In other words, the girl’s parents are often coerced into meeting these demands.*” However, the review petition was dismissed.²⁴

In another judgement (*Satvir Singh v. State of Punjab*), prior to the above judgement, the Supreme Court held that the crucial words in the definition of dowry in Section 2 of the DPA are the words ‘in connection with the marriage’ of the said parties. The Court went on to state that the customary payments in connection with the birth of a child or other ceremonies “*are not enveloped within the ambit of dowry.*” A number of negative judgements by the Supreme Court on this issue held variously that a husband’s demand for the victim’s share in ancestral property, and demands for gifts/money after the birth of a male child were not dowry demands.²⁵ In *Jagjit Singh v. State of Punjab*,²⁶ relying

²² (2007) 9 SCC 721.

²³ Letter by AIDWA to the Chief Justice of India, K.G. Balakrishnan, in 2007.

²⁴ *Ran Singh and Anr. v. State of Haryana and Anr.* AIR 2008 SC 1294.

²⁵ See also *Baldev Singh v. State of Punjab* (2008) 13 SCC 233, *Kaamesh Panjiyar @ Kamlesh Panjiyar v. State of Bihar* (2005) 2 SCC 388, *Anil Kumar Gupta v. State of U.P.* (2011) 3 SCALE 453.

²⁶ AIR 2009 SC 2133.

on the case of Appasaheb the Court stated that “...the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential. Being a penal provision it has to be strictly construed.” In this case, a demand for money had been made by the husband from the wife’s parents for the purchase of a house. All these cases were cases of dowry deaths. While in the Appasaheb case and in Anil Kumar Gupta’s case the accused were acquitted of the offences of dowry death and 498A, in the other cases mentioned above the sentences of the accused were reduced – all because of the definition of dowry. These cases have also set an inappropriate precedent which is being followed by courts all over the country.

There have been some positive rulings by the Supreme Court, but these did not overrule the earlier negative judgements; the Court simply tried to distinguish those judgements on the basis of facts of the case. Thus, in one recent case²⁷ in which a demand for a two-wheeler had been consistent and persistent, the Supreme Court held that it was a demand for dowry. In *Bachni Devi & Another v. State*

“The courts have interpreted the Section on definition of dowry extremely narrowly, going according to the letter of the law and not the intention or spirit with which the amendments were made.”

of Haryana,²⁸ the Supreme Court held that the appellants’ demand for a motorcycle for use of the second appellant’s business was in fact a demand for dowry. Kanta was a poor woman whose father was a rickshaw puller and could not afford to give her husband a motorcycle. Kanta was killed after her mother-in-law Bachni Devi and her husband had openly demanded the motorcycle. Though, a charge of murder should have been levelled in this case, the accused husband and mother-in-law got away with only seven years’ imprisonment as prescribed in the Act.

Though the negative judgements have rightly been criticised for incorrectly interpreting the definition of dowry, it is true that the words ‘in connection with the marriage’ in Section 2 of the

Dowry Act are somewhat irrelevant and vague and provide an escape route through which many an accused have got acquitted after committing the offence of murder/dowry death. The courts have interpreted the Section on definition of dowry extremely narrowly, going according to the letter of the law and not the intention or spirit with which the amendments were made. Women’s organisations and the National Commission for Women (NCW) have demanded that the words ‘in connection with the marriage’ should be deleted as they can be interpreted in such a way that demands for money/assets made after the marriage are not recognised as dowry, resulting in grave injustice to the woman.²⁹

²⁷ *Bansi Lal v. State of Haryana* AIR 2011 SC 691.

²⁸ (2011) 4 SCC 427.

²⁹ The National Commission for Women, *Recommendations and Suggestions on Amendments to the Dowry Prohibition Act, 1961*.

It is relevant to mention that the Law Commission in its 91st Report on dowry deaths had stated that the emphasis in the definition of dowry in DPA is ‘on the contemporaneity or immediate connection with the event of marriage.’ It further stated that what was of relevance in cases of dowry death was the relationship of marriage and the cluster of postnuptial facts which brought untold unhappiness to the woman.³⁰ The Law Commission’s 91st Report had suggested that dowry be defined in the following terms:

“‘dowry’ means money, or other things estimable in terms of money, demanded from the wife or her parents or other relatives by the husband or his parents or other relatives, where such a demand is not properly referable to any legally recognized claim and is relatable only to the wife’s having married into the husband’s family.”

“The Joint Committee of Parliament to examine the working of the DPA had also recommended that the words ‘in consideration of marriage’ should be omitted altogether to better serve the purpose of the Act.”

Most, however, have suggested that the term ‘in connection with the marriage’ should be altogether dropped from the definition of dowry in Section 2 of the DPA. During the discussion of the Dowry Prohibition Amendment Bill in 1984 in Rajya Sabha, it was also pointed out that the words ‘in connection with the marriage’ are vague.³¹ It was also argued that the definition was defective and the phrase ‘in connection with’ was not very different from the phrase ‘in consideration of marriage’; and women’s organisations had demanded that the phrase should altogether be dropped.³² It was pointed out that it was very difficult to prove that the demands which were made when a son-in-law travelled abroad, or when a grandson was born, or when a daughter-

in-law got married were in connection with the marriage. Furthermore, it was pointed out that most of the dowry deaths were because of the harassment and the demands made for years after marriage which the fathers of the brides could not meet. It is relevant to mention that the Joint Committee of Parliament to examine the working of the DPA had also recommended that the words ‘in consideration of marriage’ should be omitted altogether to better serve the purpose of the Act.³³

The words ‘in connection with the marriage’ are redundant and serve no purpose except to create confusion about the true meaning of dowry. The interpretation of the words ‘in connection with

³⁰ According to the Commission: “[t]he Dowry Prohibition Act, 1961 focuses itself mainly on the economic hardship and social ignominy caused by demanding dowry as a price for entering into the marriage. Our recommendations, in contrast, are concerned with the physical agony and ignominy caused directly to the woman in leading her life in the husband’s family. This report is concerned with as state of affairs, a continuum, rather than with a demand made at a particular point of time. Greed for money may be common to both; scant respect for the woman as an individual entitled to maintain her human dignity may also be common to both; and yet, there is a shift on emphasis. The wife is now threatened (directly or indirectly) that her social status as a wife will be jeopardised if the demand is not met. This threat is addressed to the wife and it is she who is the visible victim. The threat ultimately culminates in the extinction of her life. For effectively covering these nuances of the situation, the definition of dowry in the Act of 1961 would not be sufficient.”

³¹ Rajya Sabha debates on the Dowry Prohibition (Amendment) Bill, 1984, dated 23 August, 1984, p. 386.

³² Smt. Margaret Alva, Rajya Sabha debates on the Dowry Prohibition (Amendment) Bill, 1984, dated 23 August, 1984, p. 390.

³³ *Supra* n. 11, p 27.

marriage' by the Supreme Court, in the two cases referred to above, has and will continue to affect thousands of women who are seeking justice after being systematically harassed for dowry for different lengths of time after their marriage. The government should take urgent action to amend the definition of dowry in Section 2 of the DPA and delete the words 'in connection with the marriage'.

DPA: A Gender Neutral Legislation

The DPA is a gender neutral legislation, which defines dowry as property/valuable security given by one party to the marriage to the other party. Thus, it is presumed that dowry can be given either from the girl's side or from the boy's side. However, the social reality is that dowry is always given

“The definition (of dowry) fails to recognise that the practice of dowry only affects women adversely and is a gendered problem.”

by the bride's parents and relatives and sometimes collected by the bride herself. The definition of dowry should therefore not have been couched in gender neutral terms as it lays down a false premise that dowry is or can be given from the groom's side also. The definition therefore fails to recognise that the practice of dowry only affects women adversely and is a gendered problem. This sort of neutral provision can only give an opening to an unscrupulous male party to contend that it was forced to give dowry.

Yet another problem that has arisen with the definition of dowry is the fact that presents given to the bride or to the groom are excluded from the definition, subject to the following conditions:

- These should have been given without any demand having been made for them.
- The presents should be entered in a list.
- The presents should be of a customary nature and their value should not be excessive and should be in accordance with the financial status of the person by whom or on whose behalf such presents are given.³⁴

³⁴ The Dowry Prohibition Act, 1961, s. 3, reads: "Penalty for giving or taking dowry - (1) If any person, after the commencement of this 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 five years, and with the fine which shall not be less than fifteen thousand or the amount of the value of such dowry, whichever is more:
Provided that the Court may, for adequate and special reasons to be recorded in the judgement, impose a sentence of imprisonment for a term of less than five years.
(2) Nothing in sub-section (1) shall apply to or, in relation to, - presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf):
Provided that such presents are entered in list maintained in accordance with rule made under this Act;
Presents which are given at the time of marriage to the bridegroom (without any demand having been made in that behalf):
Provided that such presents are entered in a list maintained in accordance with rules made under this Act;
Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.

The line between what amounts to 'dowry' and what 'presents' are however, remains blurred since it is difficult to establish what the financial status of a person is and then to prove that what was given was excessive. The Joint Select Committee of Parliament and women's organisations had suggested that a definite ceiling should be put on the money that could be spent on presents in terms of a percentage of the earnings of a person, but this suggestion was not accepted by the government while amending the DPA in 1983. The stipulation that a list should be maintained by the bride and the bridegroom of the presents could obviously only apply to the presents given at the time of the marriage. Further, making a list and getting it signed by both parties is not considered proper in most parts of the country. The NCW has suggested that a penalty be imposed for not maintaining a list. However, this might go against the bride and her family, who often function under considerable social and familial pressure at the time of marriage.

Penalty for Giving or Taking Dowry

Section 3 of the DPA states that any person who gives or takes dowry will be punished for a term not less than five years and with fine which will not be less than Rupees fifteen thousand or an amount which is equivalent to the amount of dowry given.³⁵ The problem with Section 3 on penalty is that it

“The problem with Section 3 on penalty is that it equates both the giver and taker of dowry, which is not justified.”

equates both the giver and taker of dowry, which is not justified. Though it is wrong to give dowry and to deprive a daughter of her share in parental property, the giver of dowry is normally under tremendous pressure to do so from the taker. The giver also is under the impression that the dowry will bring respect and goodwill to his daughter and add to her status and the status of the family. He perhaps also feels that his daughter will not be able to get married without this. Even poor people who have no property and can ill-afford to give dowry do so to marry off their daughters.³⁶ This fact has also been highlighted by case-laws on the subject. Several dowry death cases are cases of poor women who had been harassed and

tortured by demands of dowry. The *Dahej Virodhi Chetna Manch* (DVCM)³⁷ had demanded that the giver be exempted from punishment, while the NCW has suggested that a lesser punishment be accorded to the giver. However, if the givers of dowry are also punished, then no complaints will be filed under the Act. At present, the Act contains a section³⁸ which exempts an aggrieved person from prosecution if she/he makes a statement. Nevertheless, this provision is not enough since though the aggrieved wife may make a statement, the wife's parents may be subject to prosecution under the Act. Also, the accused husbands and their families have started bringing complaints under the Act to prosecute the wife's family, and some lower courts are entertaining these complaints.

³⁵ *Ibid*

³⁶ Kirti Singh, *Separated and Divorced Women in India: Economic Rights and Entitlements* (forthcoming: SAGE Publications, New Delhi, 2012)

³⁷ Dahej Virodhi Chetna Manch, an umbrella organisation formed by various women's organisations/groups to reform dowry laws in the early eighties.

³⁸ The Dowry Prohibition Act, 1961, s. 7.

Other Challenges in the DPA

Apart from what has been stated above, some of the other glaring weaknesses in the DPA are that it does not put any ceiling on marriage expenses apart from presents. It does not provide for an effective legal mechanism to check and stop the giving and taking of dowry – it does not step in when the actual giving and taking of dowry is taking place. The Act does not contain any provision to prevent a marriage in which dowry is being exchanged from taking place by way of injunctions.

“State governments have failed to appoint an adequate number of DPOs, and even those that they have appointed are officers who already have other government duties.”

Women’s groups and others have repeatedly pointed out that unless preventive steps are taken to curb dowry, the law would be ineffective. The complaints against dowry were also always made (and are still made) when the relationship between the parties broke down or when a dowry murder occurred. No machinery had been conceived of to stop the initial give and take of dowry, or in other words, to prevent the offence from taking place.

State Governments have failed to appoint an adequate number of DPOs, and even those that they have appointed are officers who already have other government duties. The negligence on the part of the State Government points to the lack of seriousness about implementing the DPA. State Supervisory Boards were also not appointed “to advise and assist” these officers. In a 2005 case in the Supreme Court,³⁹ it was pointed out that even though the Court had insisted on appointment of DPOs and framing of rules for their functioning, most of these officers did not have independent charge in the district concerned and often held two positions. In this writ petition, directions were also asked from the Court to ensure that marriages, along with a list of presents, were registered. This would help to identify dowry takers, apart from ensuring that women could more easily retrieve their dowry.

The above discussion highlights some of the major lacunae in the DPA. To begin with, the definition of dowry is couched in gender neutral terms and implies that dowry is not only given by the girl or her relatives to her prospective husband or husband and/or his family but is also given by the husband to his prospective wife or wife and/or her family. This is totally against the ground reality, and the definition can thus be misused to bring a false case against a wife and/or her family. The second major problem is that dowry is defined as ‘valuable security’ (property and assets/cash) given before, at the time of, and after the marriage in connection with the marriage. This has led to a series of Supreme Court judgements which have absurdly reasoned that anything given will only be construed as dowry if it can be shown to have been given ‘in connection with the marriage’. Courts have also held that anything given on special occasions, festivals, and ceremonies will

³⁹ In *Re: Enforcement and Implementation of Dowry Prohibition Act, 1961*, AIR 2005 SC 2375.

not amount to dowry. Further, no legal remedy has been provided under the Act to stop the giving and taking of dowry. Apart from this, the implementation of the Act shows that the government accords a low priority to the issue of dowry which accounts for a major portion of the crimes against women. The government has not paid enough attention to appointing DPOs to implement and monitor the DPA. Finally, lavish marriages have become the norm and the DPA does not set any limit on marriage expenses. The limit set on presents is vague and is not being enforced.

Dowry Death

As stated before, the offence of 'dowry death' was a new offence which was inserted in the Penal Code as it was impossible to prove cases of murder for dowry. The courts have accordingly held that once there is a demand for dowry and resultant harassment for non-payment of it and the victim dies under unnatural circumstances within seven years of marriage,

“The courts have held that once there is a demand for dowry and resultant harassment and the victim dies under unnatural circumstances within seven years of marriage, a presumption of dowry death becomes inevitable.”

a presumption of dowry death becomes inevitable.⁴⁰ Of course, a further requirement of the Section is that the harassment should have been soon before the death. The courts have further held that Section 304B will apply even if the deceased had committed suicide.⁴¹

However, a major problem has been that a lot of dowry murder and cruelty cases have been prosecuted so badly that the accused have been acquitted.⁴² Another issue that has arisen in a number of cases is the interpretation of the words “soon before her death”. The High Courts and the Supreme Court have given varying interpretations. In one case, the Supreme Court held that since the dying declaration, which showed that the victim had been harassed soon before her death, had not been satisfactorily proved, no dowry death was established. However, in the case of *Yashoda v. State of Madhya Pradesh*,⁴³ the Supreme Court held that determination of the period would depend on the facts and circumstances of a given case, and further stated that for want of any specific period, the concept of reasonable period would be applicable.⁴⁴ It emphasised on the existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. Thus, the decisions have largely depended upon the periods that the courts have considered as constituting “soon before”. Whereas some courts have held that harassment two days prior to the death could not be said to be “soon before” the death of

⁴⁰ *Vemuri Venkateswara Rao v. State of Andhra Pradesh* 1992 CrLJ 563 (AP), See also *Pawan Kumar v. State of Haryana* (1998) 3 SCC 309; *Kans Raj v. State of Punjab* 2000 CriLJ 2993.

⁴¹ *Satvir Singh v. State of Punjab* AIR 2001 SC 2828 relying on the case *Shanti & anr. v. State of Haryana* 1991 CriLJ 1713; *Kans Raj v. State of Punjab and Ors.* 2000 CriLJ 2993; *State of A.P. v T. Basava Punnaiah* (1990) 1 Crimes 611 (AP).

⁴² *Kejabai and Anr. v. State of Chhattisgarh* 2011 (4) UJ 2577 (SC).

⁴³ (2004) 3 SCC 98, approved in *T. Aruntperunjothi v. State through SHO, Pondicherry* MANU/SC/8091/2006.

⁴⁴ *Ashok Kumar v. State of Haryana* AIR 2010 SC 2839.

the victim,⁴⁵ other courts have held that even several days would fall under the period “soon before”. A demand has therefore been raised by various women’s organisations and groups and the NCW that the words “soon before her death” should be deleted.

It is also pertinent to mention that under Section 304B a minimum sentence of seven years of imprisonment has been prescribed, while the maximum is life imprisonment. Since dowry deaths are in fact murders, it has been felt that the period of seven years is too short a period and the punishment prescribed under this Section should be the same as murder. What is disturbing is the fact that in several cases the courts do not even sentence the accused persons for this minimum period of seven years. Another problem is that several cases of murder do not get registered as murder cases but only as dowry death cases, presumably because of the lighter sentence that is prescribed under this Section. In a recent positive case, the Supreme Court directed that the charge of murder be also levelled along with the charge of dowry death.⁴⁶

Abetment to Suicide

One of the most significant amendments introduced in the Indian Evidence Act in 1983 was a section which allowed the courts to presume that, in certain circumstances, a husband or his relative had abetted the suicide of a woman.

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While talking about the introduction of Section 113A of the Indian Evidence Act, the Supreme Court⁴⁷ clarified that the courts can presume that suicide by a woman has been abetted by the husband or his relation if two factors are present: (a) the woman has committed suicide within a period of seven years from the date of marriage, and (b) the husband or relation had subjected her to cruelty. Cruelty would be as defined in Section 498A of the IPC. The Supreme Court went on to state that the “*legislature had realised the need to provide for additional provisions in the IPC and in the Indian Evidence Act to check the growing menace of dowry death.*”⁴⁸ In some of the earlier cases, the Supreme Court gave extremely positive judgements to punish the husband or

his relatives who had abetted the suicide by demanding dowry and persistently ill-treating the woman.⁴⁹ However, the punishment awarded in an abetment to suicide case is often less than

⁴⁵ *M. Mohan v. The State represented by The Deputy Superintendent of Police* AIR 2011 SC 1238.

⁴⁶ *Rajbir alias Raju and Another v. State of Haryana* (2010) 12 Scale 319.

⁴⁷ *Brijlal v. Premchand and Ors.* 1989 (2) HLR 126.

⁴⁸ Kirti Singh, ‘Violence against Women and the Indian Law’, *Violence, Law and Women’s Rights in South Asia*, Savitri Goonesekere (ed.), SAGE Publications, New Delhi, 2003.

⁴⁹ *Gurcharan Singh v. Satpal Singh* 1990 (1) HLR 353 SC.; *Bhagwan Singh v. Comm. of Delhi* AIR 1983 SC 826; see also *Ramesh Kumar v. State of Punjab* 1987(1) HLR 189 but see a negative judgement *Wazir Chand v. State of Haryana* AIR 1989 SC 378 in which the court relied upon technicalities to let off the accused.

the minimum prescribed under the law.⁵⁰ In a negative case,⁵¹ however, the Supreme Court did not convict the accused for abetment to suicide despite constant mental and physical torture and dowry harassment but only held the accused guilty under Section 498A and Section 3 of the DPA 1961 which are punishable with only three years' imprisonment.

Section 498A – Cruelty to Women

As has been described above, Section 498A was introduced in 1983 to deal with dowry-related harassment and other forms of acute mental and physical cruelty which could lead a woman to commit suicide or cause grave injury or danger to her mental and physical health. This provision of law has been fairly extensively used to file complaints by women victims of prolonged violence, particularly in dowry-related cases as it is the only criminal law which deals with domestic violence against a wife. However, women have found it difficult to access this law because of the gender bias, corruption and inefficiency of the police. A recent resolution⁵² by certain women's groups and organisations highlights the obstacles faced by women in using the law as follows:

“Even when a complaint is registered, the investigation is lackadaisical and in many cases does not end in conviction because of the poor quality of evidence. Delay and gender-bias amongst the members of the judiciary adds to the problem.”

“It is also our experience that women victims of violence do not file complaints under this Section unless they have suffered prolonged harassment and torture in their marital homes. It is only when they are not able to tolerate the daily, repeated violence that complaints are filed.”

However, women's organisations have found it extremely difficult to use the law for the benefit of the victims. The police do not normally register a case when a victim approaches them. In many instances, they in fact try to persuade the victim not to make a complaint and trivialise the violence that she has suffered. Women have also complained that they have found the police corrupt and inefficient apart from being gender-biased. In many metropolitan cities like Delhi, special Crime Against Women Cells have been set up ostensibly to help women victims. However, these cells first try to settle these cases through counselling which often means telling the woman to compromise. Even if cases are settled by this process, the settlements are often on inequitable terms for the women concerned. Finally, even when a complaint is registered, the investigation is lackadaisical and in many cases does not end in conviction because of the poor quality of evidence. Delay and gender-bias amongst the members of the judiciary adds to the problem.

⁵⁰ *Bikshapathi & Ors. v. State of A.P.* 1989 (2) HLR 430 AP.

⁵¹ *Kishangiri Mangalgiri Goswami v. State of Gujarat* AIR 2009 SC 1808; See also *Amalendu Pal @ Jhantu v. State of West Bengal* 2010 AIR (SC) 512 which relied on the case of *Kishangiri Mangalgiri Goswami v. State of Gujarat* re acquittal of accused under s. 306 IPC and only confirmed conviction under s. 498A for three years' imprisonment. See also *M Mohan v. The State represented by The Deputy Superintendent of Police* AIR 2011 SC 1238.

⁵² Resolution dated 19.11.2011 by AIDWA and others available in the AIDWA office.

Furthermore, in the last few years there have been moves by certain organisations of men “affected” by complaints under this Section to dilute the law and to make Section 498A ineffective. Certain court judgements⁵³ have also remarked that the Section is being misused and have recommended that it be diluted. The Petitions Committee of Rajya Sabha⁵⁴ recently examined the provisions of this Section, and the Law Commission of India circulated a questionnaire to re-examine Section 498A. However, as pointed out by women’s groups, these efforts to dilute the law are mostly by persons against whom the law has been used and groups that are perturbed that a law exists to address domestic violence and dowry harassment. In other words, these groups do not think of domestic violence or dowry harassment as a serious offence and do not want the *status quo* to change. If the law itself is diluted, this would mean that the crime is not considered serious. As a resolution points out:

“If Section 498A is made non-cognizable, this would mean that the police will not investigate the offence even if it is reported to them. Thus, if a woman is facing domestic violence, she cannot call the police even

“ It is only in cases in which death has occurred that the accused, most often, get punished for cruelty and harassment under Section 498A. ”

if there is a serious threat of injury. If the offence is made bailable, this would mean that the husband cannot be arrested. If Section 498A is made compoundable, it will only result in the women facing yet more pressure to compromise. In any event, if a compromise is reached in these cases, these are getting recognised by the courts, including the High Courts, who readily quash the criminal proceedings. Diluting Section 498A in any way would mean undermining the seriousness of the offence of cruelty and domestic violence. The propounders of these proposals are mostly interested parties and those being dealt with under this law who feel that dowry harassment is not a crime.”

In fact, complaints under Section 498A should be dealt with in the same manner as complaints under other serious crimes. A perusal of judgements under this section shows that there are hardly any cases in which the accused have been held guilty under Section 498A on its own.⁵⁵ It is only in cases in which death has occurred that the accused, most often, get punished for cruelty and harassment under Section 498A.⁵⁶ Thus, in a significant number of cases of dowry death and abetment to suicide, the accused get off with a couple of years’ imprisonment. This shows that rather than being misused, very few convictions under Section 498A take place in cases in which no death occurs.

⁵³ *Dr. Sunil Kumar Sambhudayal Gupta and Ors. v. State of Maharashtra* (2010)13 SCC 657, *Bhaskar Lal Sharma and Anr. v. Monica II* (2009) DMC 256 SC; *Sushil Kumar Sharma v. Union of India and Ors.* 2005 SCC (Cri.) 1473; *Savitri Devi v. Ramesh Chand and others* (104 [2003] DLT 824.

⁵⁴ Committee on Petitions of Rajya Sabha under the Chairmanship of Shri Bhagat Singh Koshyari, M.P. on the petition praying for amendments in s. 498A of Indian Penal Code, 1860.

⁵⁵ *Kejabai and Anr. v. State of Chhattisgarh* 2011(4) UJ 2577 (SC). This was a case in which the accused had been charged with dowry murder under s. 498A and only punishment for a short term of six months was ordered. In some cases like *Nandyala Venkataramana v. State of Andhra Pradesh* (2010) 13 SCC 653, punishment was awarded under s. 304B and s. 498A IPC. However, the sentences were ordered to run concurrently.

⁵⁶ *Bansi Lal v. State of Haryana* AIR 2011 SC 691.

These few convictions are only in cases of gross violence. In a 2009 case from the Supreme Court, Section 498A was held to be proved only because the husband had attempted to burn his wife.⁵⁷ However, the husband's sentence was reduced from two years to 13 months, a period which he had already spent in jail. In this case, the husband should have in fact been charged and held guilty for attempt to murder.

It has been pointed out that if there are any false complaints under Section 498A, these should also be dealt with according to law on a case by case basis. It is relevant to mention that several laws in our country are being misused by certain sections in our society. However, no one talks about amending these laws because of possible misuse. Women's groups have therefore demanded that Section 498A should be strictly implemented and women victims of violence should get prompt attention.

Conclusion and Recommendations

This review shows how the practice of dowry leads to violence and discrimination against women. The impact of dowry on 'son preference' and indeed on 'daughter aversion' has been widely

“The non-implementation of the law against dowry, the biases and inadequacies of the criminal justice system, and the lacunae in the law all contribute towards making the law against dowry ineffective.”

acknowledged by various studies and activists working in the field. However, diverse and multiple forces seem to be working for the retention of the practice of dowry. In a society in which a high premium is placed on marriages, in which arranged marriages are the norm and parents feel obligated for religious and cultural reasons to perform this ceremony for their daughter, the demand for dowry has flourished. This demand is propelled and aided and abetted by market forces which advertise consumer items specially tailored for the supposed "ideal" wedding. The media's coverage of lavish weddings further glamourises them. Insurance companies specially

design policies to be used at the time of marriage of daughters, while some government schemes dole out money particularly at the time of the wedding of daughters. All these result in fuelling the abhorrent practice of dowry. In addition, the non-implementation of the law against dowry, the biases and inadequacies of the criminal justice system, and the lacunae in the law all contribute towards making the law against dowry ineffective.

Although actions by different actors are required to stem the growing tide of the practice of dowry, the chief amongst these actors is the Government which is under an obligation to implement the law. Some suggestions for action by the Government, the police, the legislature and women's groups/NGOs are detailed below.

⁵⁷ *Satish Kumar Batra & Ors. v. State of Haryana* AIR 2009 SC 2180.

State Action

- The law relating to dowry should be implemented by the appointment of DPOs at the district level in every state. These officers should have an independent charge so that they can concentrate on fulfilling their functions as described under the Act.
- A set of guidelines should be issued to the police detailing standard operating procedure so that the police are able to investigate cases of dowry harassment and murder properly and efficiently.
- Directions should be issued to the police to treat a complaint under Section 498A as a serious criminal matter. The police should be directed to promptly respond to a call from a woman who apprehends danger or is hurt. If there is any danger to the life or physical/mental well-being of a woman, the police should immediately take action against those who are responsible and take them into custody.
- If a complaint is made of non-return of dowry or *stridhana*, the police should immediately initiate a search and seize procedure.
- There should be no pressure on a woman to take part in a settlement process if she wants to register a case. Conciliation and settlement of a case should only be carried out if a woman wants to undergo such a process.
- Police investigation into cases of Section 498A, Dowry Death and Abetment to Suicide should be thorough. The police should take prompt statements from all the witnesses, including the woman and her relatives and collect the documents which are available.
- If a woman has been subjected to physical violence and 'cruelty', she should be sent for prompt medical examination. In cases of mental torture, she should be referred to a psychologist and be sent for counselling.
- The police should advise the complainant of her rights under the Section 498A IPC and the Protection of Women from Domestic Violence Act, 2005 and help her by sending her to a Service Provider or an appropriate person or women's group that can help her.
- Cases under the DPA, Section 498A, Section 304B, Section 306 and cases of Dowry Murder should be tried by a fast-track court and within a specific time period.

Socio-legal Support Services

- If she needs shelter, the woman and any child/children with her should be sent to an appropriate shelter home. The number of short stay homes should be increased, and at least one short stay home in each block should be set up with the help of central funding. The midterm appraisal of the Eleventh Five-year Plan of the Planning Commission had recommended that the two schemes for setting up these homes, namely 'Swadhar' and the 'Short Stay Home' should be merged; and it had stated that if this was done, many more victims of violence could be provided shelter.⁵⁸

⁵⁸ Planning Commission (Government of India), *Midterm Appraisal Eleventh Five Year Plan 2007-12*, Oxford University Press, New Delhi, 2011.

Amendment of Law

The law relating to dowry should be amended as under:

- The definition of 'dowry' in Section 2 should be amended by stating that dowry would mean any property or valuable security given or agreed to be given by the wife or her relatives/friends to the husband or his relatives/friends before, at the time of or after the marriage. This would make the definition gender specific.
- The words, "in connection with marriage" should be dropped from the present definition of dowry.
- Section 2 should also state that presents are exempted from the definition of dowry provided they are reasonable, do not exceed a certain percentage of the giver's income, and are entered in a list supposed to be maintained under the Dowry Prohibition Act, 1961. A punishment in the nature of a fine should be levied on persons who do not maintain the list of presents given at the time of marriage, as this will persuade them to do so.
- When marriages are registered under the various registration acts or in religious places/by priests, a copy of the list of presents can be attached with the registration certificate.
- A ceiling should be put on wedding expenditure. This could be a percentage of the parents' income. A similar ceiling should be put on the number of food items that can be served at a wedding. An example of the success of a similar order by the Government can be found in Pakistan.
- The giver of dowry should not be equated with the taker of dowry; and if he/she has to be punished as per the law, he/she must not be punished in the same manner as the taker. The punishment for the giver could be a term of performing community service to be decided by the court.
- The DPA should be amended to provide for injunctions to stop a marriage in which dowry is about to be given and taken. These injunctions should be allowed to be issued by the nearest magistrate on the application of the dowry prohibition officer or a social worker or the affected party, her relative or friend/representative.
- In the definition of 'dowry death' the presumption that the accused has caused the death arises only if dowry harassment has taken place soon before the death. Section 304B should be amended by deleting the word 'soon' from the phrase 'soon before the death'.
- The punishment for 'dowry death' should be the same as that for murder. Presently, the punishment for dowry death is imprisonment for a term not less than seven years but which may extend to life. Since dowry death is in fact murder, imprisonment should be for life.
- Dying declarations should be recorded by the magistrate in all critical burn cases of women in which dowry related or other form of harassment is suspected.

Action by Women's Groups/Organisations and Other Citizens

- Women's groups, organisations working for human rights, organisations working amongst the youth, and all concerned citizens should come together to launch an anti-dowry campaign to publicly denounce all practices that strengthen son preference and dowry. This would include rituals which fuel son preference, ostentatious marriages and media advertisements that promote dowry. Mass campaigns against the practice of dowry including public pledges against the taking of dowry should also be organised. The campaigns should also promote marriages by choice and dowry-less marriages, since arranged marriages provide the ideal circumstances under which dowries are negotiated.

Discriminatory Laws of Inheritance

The different personal laws of inheritance and succession discriminate against daughters and wives to varying extents. As is well known, personal laws govern the various religious communities in India. Even within a community, different laws govern different sets of people. For instance, before the Hindu Succession Act, 1956 (hereinafter called “the HSA”) Hindus were governed either by the *Mitakshara* law of inheritance or the *Dayabhaga* law or other schools of law, depending on which region of the country they lived in.¹ Tribal women were and still are governed by the norms and customs of their tribes in matters of inheritance. However, what is of vital significance is that a large number of these personal laws contain provisions which are discriminatory. This discrimination is the result of gender bias which is inherent in the structure and wording of the laws and sometimes in the manner in which they have been interpreted by the Courts and other authorities.

¹ See *Pushpalatha N.V. W/o Nemraj v. V. Padma Widow of Vasantha Kumar D.N., Asha N.V. W/o Shantharaj, N.V. Tejkumar and N.V. Bahubali (Appi)* AIR 2010 Kant 124 which states: “Prior to the Act of 1956, Hindus were governed by Sastric and Customary laws which varied from region to region and sometimes they varied in the same region on a caste basis. As the country is vast and communications and social interactions in the past were difficult, it led to a diversity in the law. Consequently, in matters of succession also, there were different schools, like *Dayabhaga* in Bengal and the adjoining areas; *Mayukha* in Bombay, Konkan and Gujarat and *Marumakkattayam* or *Nambudri* in Kerala and *Mitakshara* in other parts of India with slight variations. The multiplicity of succession laws in India, diverse in their nature owing to their varied origin, made the property laws even more complex”.

Apart from this, even when a law exists on paper it does not automatically get translated into practice within a family due to the existence of various factors including patrilineal ideologies, the belief that the daughter belongs to another family after marriage, the feeling that the daughter has already been provided her share through dowry and the increasing greed for property in a highly consumerist society.

The Hindu Law of Inheritance

The disparity in property rights on the basis of gender is deep rooted and can be traced back to ancient times.² For instance in ancient Hindu law, the norm was that of the *Mitakshara* Joint Hindu Family. It has been said that “*the fundamental conception of the Hindu joint family is a*

“The disparity in property rights on the basis of gender is deep rooted and can be traced back to ancient times.”

common male ancestor with his lineal descendants in the male line. Even under early Hindu law, the rights of sons were recognised and they acquired equal interest with the father in the ancestral property as coparceners.”³ The joint family traces its origin to the ancient patriarchal system. The law of heirship had close connection with the doctrine, “He who inherits the property, also offers the *pinda*.”⁴ “The nearest heirs mentioned in the *Smritis* are the son, grandson and the great grandson.”⁵ The *Vedas* also contain passages “alluding to...the necessity for a son...to partition among

sons and to exclusion of women from inheritance.”⁶ Under the *Sastric* Hindu Law women had very limited rights to property but had a right to maintenance and could sometimes receive property in lieu of this right.⁷

When we look at the law related to Hindus, we see that various progressive changes have been made during the last century and in the first few years of this century. With each change, women’s rights have expanded.

While the Indian Constitution stipulates that all citizens will be treated as equal before the law and have equal protection of the laws,⁸ and that there will be no discrimination on the ground of sex,⁹ these guarantees in the Fundamental Rights chapter have not helped Indian women secure equal property rights. Challenges to these laws on the ground of unconstitutionality and violation of Fundamental Rights have mostly been turned down by the courts, including the Supreme

² Sudarsana Natchiappan (Chairperson), *Report of the Standing Committee of Parliament on Law and Justice*, available at: <http://hrln.org/.../Report_of_the_Parliametary_Standing_Committee_05May.pdf>, last visited on 25.07.2011.

³ Mulla, *Principles of Hindu Law*, Satyajeet A Desai (ed.), Butterworths India, Nagpur, 2010, p. 277.

⁴ Introduction, The Hindu Succession Act, 1956 [30 of 1956, dt. 17-6-1956].

⁵ *Mayne’s Hindu Law & Usage*, Justice Ranganath Misra (rvsd.), Bharat Law House, New Delhi, 2006, p.12.

⁶ Kane, 4 to 7 as referred in *ibid*, p. 15.

⁷ *Supra* n. 5, p. 1159.

⁸ The Constitution of India, 1950, Article 14.

⁹ The Constitution of India, 1950, Article 15 (1).

A Law for Women

The Hindu Women's Right to Property Act, 1937 "introduced far reaching changes in the law of succession and was obviously intended to give better rights to women by recognizing their claim to fair and equitable treatment in certain matters of succession". This Act specified that in the case of separate property, the widow of the deceased was entitled to the same share as her son. Also, if the son was not alive, his widow and the widow of a predeceased son of a predeceased son became entitled to the son's share. In the case of a *Mitakshara* Joint Family, the widow took the place of her husband (Mulla, *Principle of Hindu Law*, Satyajeet A Desai (ed.), Butterworths India, Nagpur, 2010, pp. 121-22). The three female heirs mentioned in sub-section 1 of Section 3 were treated in the same manner as the male inheritors. The widow who inherited also got a right to seek partition (*Harekrishna v. Jujesthi* 1956 AIR Ori 73, *Thimmi Ammal v. Venkatarama* AIR 1960 Mad 347).

In the words of the Supreme Court:

"Under the Sastric Hindu Law, the share given to a Hindu widow on partition between her sons or her grandsons was in lieu of her right to maintenance. She was not entitled to claim partition. But the legislature by enacting the Hindu Women's Right to Property Act, 1937 made a significant departure in that branch of the law; the Act gave a Hindu widow the same interest in the property which her husband had at the time of his death, and if the estate was partitioned she became owner in severity of her share, subject of course to the restriction on disposition and the peculiar rule of extinction of the estate on death actual or civil."

(Munnalal v. Rajkumar AIR 1962 SC 1493, followed in AIR 1967 SC 1786 and (1969) 2 SCC 586)

Court. For instance, in the case of *Madhu Kishwar v. State of Bihar*,¹⁰ the petitioner had challenged Sections 7 and 8 of the Chota Nagpur Tenancy Act, 1908 as these recognised only male descendants and heirs. However, the Court refused to hold that these Sections were violative of the Constitution and further held that the term 'male' descendants could not be read as including both male and female descendants. The Court held that *"rules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Non uniformities would not in all events violate Article 14. Judge made amendments to provisions, over and above the available legislature, should normally be avoided (sic)"*. This Supreme Court judgement was contrary to an earlier judgement of the Rajasthan High Court in the *Jani Bai*¹¹ case in which the Court had held that the State cannot confine the

¹⁰ AIR 1996 SC 1864. See also *Narashimaha Murthy v. Smt. Susheelabai and Others* AIR 1996 SC 1826 in which the Supreme Court justified the retention of s. 23 of the Hindu Succession Act. Before the 2005 Amendments, this Section stopped daughters and wives who inherited a residence from asking for their share in this if a male heir (son or sibling) was living in the said residence. There is not even a whisper in the judgement about s. 23 being inequitable as far as women inheritors were concerned.

¹¹ *Jani Bai v. State of Rajasthan and Ors.* AIR 1989 Raj 115.

grant of allotment of land under the Rajasthan Colonisation Act, 1954 “only to the male issue denying the same to the female issue who is otherwise equally eligible and similarly placed as the male issue for getting allotment of the land under these Rules.” The Court held that the word ‘son’ in the legal provision must be read as issue to include women also. In the *Ahmedabad Women’s Action Groups & Others v. Union of India*¹² case, the personal laws of various communities, including the Muslim law relating to inheritance and the provision in the HSA which allows a Hindu the unfettered power of disposing of a property by will were challenged. The Supreme Court refused to hear this case on merits and held that the case involves “issues of state policy with which the court will not ordinarily have any concern.” The Court also pointed out that in the past when similar challenges had been made, the Supreme Court had held that the remedy lies with the legislature. The courts have thus been reluctant to strike down any personal law and have been content to exhort the Government to bring about equality legislation.

There have been some positive cases in the area of succession, but these have not hinged on the law being unequal and biased and thus violative of the Constitution. As is well known, in *Mary Roy v. State of Kerala*¹³ the petitioners had challenged the Travancore Christian Succession Act, 1092 as being discriminatory against women and hence violative of the right to equality in Article 14 of the Constitution. This Act provided that a widow or mother who became entitled to succession of an immovable property will only have a life interest in the property till her death or remarriage. The Act also discriminated against a daughter as she was entitled to only one-fourth the value of the share of the son or Rupees five thousand, whichever was less. It was further provided that she would not be entitled to even this sum if *stridhana* was provided or promised to her. However, the Court held that since the Indian Succession Act, 1925 had been extended to the territories of

A Discriminatory Provision

The 174th report of the Law Commission points out that the “*patrilineal assumptions of a dominant male ideology are clearly reflected in the laws governing a Hindu female who dies intestate. The law in her case is markedly different from those governing a Hindu male. The property is to devolve first to her children and husband; secondly, to her husband’s heirs; thirdly, to her father’s heirs, and lastly to her mother’s heirs.*” The Commission criticises the fact that these provisions allow the property to be inherited “*through the male line from which it came either back to her father’s family or back to her husband’s family.*” It was pointed out by the Commission that the Hindu Code Bill, as originally framed by the B. N. Rao Committee and piloted by B. R. Ambedkar, had recommended abolition of the *Mitakshara* coparcenary and joint family system.

Law Commission of India, 174th Report, “Property Rights of Women: Proposed Reforms under the Hindu Law”, May 2000.

¹² (1997) 3 SCC 573. See also *Shehnaaz Sheikh and Ors. v. Union of India, Sushila Gopalan v. UOI* AIR 1962 SC 1493.

¹³ *Mary Roy v. State of Kerala* AIR 1986 SC 1011.

the former state of Travancore by an Act (Part-B States (Laws) Act, 1951) the Travancore Christian Succession Act was no longer applicable and stood repealed. In other words, the Court held that the succession law applicable to Christians in Travancore was the Indian Succession Act, 1925.¹⁴ The Court further held that since it had held that the Travancore Christian Act was no longer applicable, there was no need to decide whether the Travancore Christian Act was violative of the Constitution or not.

After independence, the Hindu Succession Act, 1956 was enacted, giving certain rights of inheritance to women both in self-acquired and *Mitakshara* joint family property. However, daughters and wives were not made coparceners in the joint family and therefore were not treated equally with the sons. This and other provisions in the HSA restricted a daughter's and wife's right

“After independence, the Hindu Succession Act, 1956 was enacted, giving certain rights of inheritance to women both in self-acquired and *Mitakshara* joint family property.”

to property on an equal basis with brothers and sons. The HSA was amended again in 2005 to give daughters the same rights as sons had in the *Mitakshara* Joint Hindu Family property. Prior to this, certain States had also amended the law to make daughters coparceners. However, the joint family system was retained and wives were still not made coparceners in the joint family, though through a progressive Supreme Court judgement a widow got the same share in the joint family property as the other members when her husband died. Traditionally, according to *Mitakshara* law, though a wife cannot herself demand a partition, she is entitled to a share upon partition between her husband and his sons.

Another problem with the HSA 1956, which remains even after the 2005 amendments, is the discriminatory manner in which a woman's property devolves upon her heirs in comparison to the devolution of a male's property. Unlike the male whose Class-I heirs are his wife, mother and children or their representatives in their absence, the woman's property devolves in the absence of her children and husband in a highly discriminatory manner. Firstly, if she has inherited the property from her father or mother, the property devolves upon the father's heirs. Secondly, if she has inherited property from her husband/father-in-law, the property devolves upon her husband's heirs. Thirdly, even her self-acquired property, in the absence of her husband and children, devolves upon the heirs of her husband and only in the absence of these heirs devolves upon her mother and father.

A recent Supreme Court judgement¹⁵ upheld this method of devolution while acknowledging the unfairness and injustice which this provision led to. In the case before the Supreme Court, a widow who had been ill-treated and deserted by her in-laws and had thereafter lived with her parents and had worked and built up a career had died. The Supreme Court held that her estate would devolve upon her in-laws in terms of Section 15 of the HSA.

¹⁴ Chapter II of Part V of Indian Succession Act, 1925 lays down the rules governing intestate succession other than Parsis. Chapter I of Part V makes it clear that Part V will not apply “to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.”

¹⁵ *Omprakash v. Radhacharan* (2009) 15 SCC 66.

A critical issue is the right to will which was introduced in the HSA 1956.¹⁶ This right to will was not available to Hindus governed by the *Mitakshara* law earlier.¹⁷ The right to will the property has been a part of the Indian Succession Act, 1925 introduced by the British and has been a part of common law. In the years that have followed, the right to will has reportedly been used against women for disinheriting daughters and wives. Women's groups have demanded that the right to will should be restricted and should not be allowed to be used for disinheriting wives and daughters. It is pertinent to point out that under Muslim Personal Law only one-third of a person's property can be willed.

Till 1956, however, women who inherited property or got it in lieu of maintenance were not full owners of this property and could not alienate or sell it except in case of legal necessity or for religious purposes.¹⁸ The only exception to this was a woman's *stridhana*¹⁹ property which she could alienate or dispose of or sell according to her wish. However, the *stridhana* property of a woman could be alienated by her husband in situations of distress.²⁰ She therefore had what is known as a "limited estate".²¹ Daughters also only had a right to maintenance and could not inherit property. The HSA 1956 for the first time declared that "any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not a limited owner."²²

The object of this Section was to remove the disability of a woman to acquire and hold property as an absolute owner and to convert any estate already held by a woman on the date of the commencement of the Act as a limited owner into an absolute estate.

¹⁶ The Hindu Succession Act, 1956, s. 30.

¹⁷ Law Commission of India, 174th Report, *Property Rights of Women: Proposed Reforms under the Hindu Law*, May 2000, p. 37.

¹⁸ *Supra* n. 5, p. 1159; Mayne also mentions that the Bombay school of *Mitakshara* and *Mayukha* schools were another exception to the rule of non-alienation of the non-*stridhana* property by the women.

¹⁹ In Modern Hindu Law, the term '*stridhana*' denotes not only the specific kinds of property enumerated in the *Smritis*, but also other species of property acquired or owned by a woman over which she has absolute control; ... which accordingly devolves on her own heirs. Properties gifted to a girl before the marriage, at the time of marriage or at the time of bidding farewell or thereafter are her *stridhana* properties. It is her absolute property with all rights to dispose of at her own pleasure. Her husband or other members of his family have no control over the *stridhana* property. Her husband may use it during the time of his distress but nevertheless he has a moral obligation to restore the same or its value to his wife. See: *Mayne's Hindu Law & Usage*, Justice Ranganath Misra (rvsd.), Bharat Law House, New Delhi, 2006, p. 1028,

²⁰ *Supra* n. 5, p. 1159.

²¹ See *Atava Akkulamma v. Gajjela Papi Reddy* 1995 (1) ALT 68. Paragraph 6 of this judgement quotes two previous judgements (*Devi Mangala Prasad v. Mahadev Prasad*, 1934 PC 234 (sic) and *Kamala Devi v. Bachula* 1957 AIR 434) on the 'limited' estate of a widow as under: "A widow or other limited heir is not a tenant-for-life but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heirs of the last full owner upon her death. The whole estate is for the time vested in her, and she represents it completely. As stated in a Privy Council case (*Janaki Ammal v. Narayaha Samy*, (1916) 43 IA 207, her right is of the nature of a right of property; her position is that of owner; her powers in that character are however, limited; but, so long as she is alive, no one has any vested interest in the succession."

²² The Hindu Succession Act, 1956, s. 14 reads: "Property of a female Hindu to be her absolute property:

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation - ...

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

The explanation to this Section gave a wide definition to property and stated that “property” includes both movable and immovable property acquired by a female Hindu by inheritance²³ or devise, or at a partition²⁴, or in lieu of maintenance or arrears of maintenance, or by gift²⁵ from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

The provision is retrospective in the sense that it enlarges the Hindu woman’s estate into an absolute estate even in respect of property inherited or held by a woman as a limited owner before the Act came into force.²⁶ The courts have interpreted this provision liberally to give the widest effect to the intent of the legislature in favour of women’s right to full ownership to such property and

“The Hindu Succession Act, 1956 for the first time gave daughters, wives and mothers an equal right in a male Hindu’s self-acquired property along with the sons if he died without making a will.”

have held that where a woman is possessed of property (whether it is in her actual or constructive possession) she becomes the absolute owner though she may have acquired the property before the Act. If she alienates such property subsequent to the commencement of the Act, the reversioners cannot question it though the alienation is not for any religious purpose or for legal necessity of the family.²⁷

The Hindu Succession Act,²⁸ which was passed in 1956, for the first time gave daughters, wives and mothers an equal right in a male Hindu’s self-acquired property along with the sons if he died without making a will, and all became Class-I heirs.²⁹ The figure on the following page shows and enumerates all the relatives who formed a part of Class-I heirs before the 2005 Amendments to the HSA.

The 174th Report of the Law Commission pointed out that the Schedule of Class-I heirs was discriminatory, as in the schedule “*the principle of representation³⁰ goes to up to two degrees in the male line of descent; but in the female line it only goes up to one degree and that though the widows of a predeceased son and grandson are Class-I heirs, the husbands of a deceased daughter and granddaughter are not heirs*”.

²³ *Atava Akkulamma v. Gajjela Papi Reddy* 1995 (1) ALT 68.

²⁴ *Tulsamma v. Seshareddi* AIR 1977 SC 1944.

²⁵ *Kalawati Bai v. Suryabai* 1991 SC 1581.

²⁶ *Supra* n. 5, p. 1160.

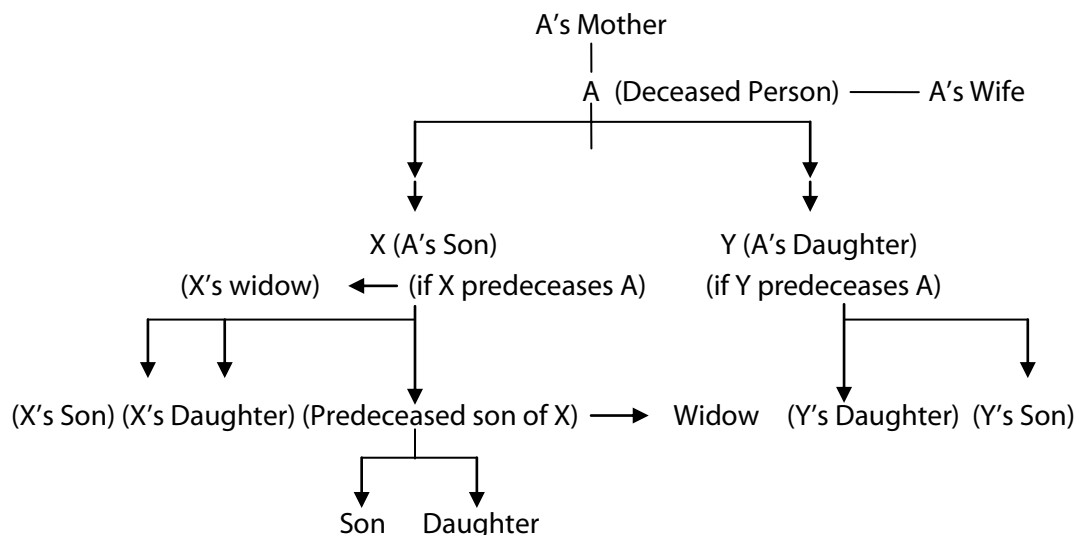
²⁷ *Kotturu Swami v. Veeravva* 1959 SC 577; Also see, *Supra* n. 5, p. 1161; *Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma* 1996 SC 869.

²⁸ The Hindu Succession Act, 1956, s. 1, states that the Hindu Succession Act applies to Hindus, Buddhists, Jains and Sikhs. However, members of any Scheduled Tribe within the meaning of Clause (25) of Article 366 of the Constitution have been exempted from the application of the law.

²⁹ S. 8 to s. 13 of the Hindu Succession Act, 1956 specified the general rules of succession of a Hindu male dying intestate. Daughters, widows and the mother inherited equally and simultaneously with the other heirs. See Schedule I to the Hindu Succession Act which lists the Class I heirs as under: “Class I: Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son.”

³⁰ By representative heirs I mean the heirs who would inherit if the heir in the earlier generation was not alive, like son of a predeceased son.

Class-I Heirs before 2005 Amendment of the Hindu Succession Act, 1956



Source: This figure is based on the figure depicting Class-I heirs in 'Family Law Lectures: Family law II', LexisNexis-Butterworths, New Delhi, 2004, p. 355.

However, the 1956 Act retained the system of inheritance which was prevalent in a joint Hindu family governed by the *Mitakshara* law.³¹ It stated that if a male Hindu died after the commencement of the Act and had an interest in a *Mitakshara* coparcenary property, his interest would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. However, the Act made an exception if a daughter or wife or mother was alive at the time of the death and said that "the interest of the deceased in the *Mitakshara* coparcenary property shall devolve by the testamentary or intestate succession under this Act and not by survivorship".³²

A Positive Judgement for Widows

In *Gurupad v. Hirabai* the Supreme Court decided the issue in favour of the widow. It stated, "Whether a partition had actually taken place between the plaintiff's husband and his sons is beside the point for the purposes of Explanation 1. That Explanation compels the assumption of a fiction that in fact a partition of the property had taken place – the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share." The Supreme Court therefore held that when the husband died it should be deemed that a partition had taken place immediately before his death and his wife and sons and he have all been allotted equal shares. Therefore, after the HSA 1956 the wife would be given a share equal to that of the other coparceners plus a share in the husband's share of the property along with the other Class-I heirs.

1978 SCR (3) 761; this judgement was followed in *Shyama Devi v. Manju Shukla* [1994] 6 S.C.C. 342. Also see *State of Maharashtra v. Narayan Rao* AIR 1985 SC 716

³¹ S. 6 of the unamended Hindu Succession Act, 1956.

³² *Ibid*, Proviso to s. 6.

Thus, a daughter also got an equal share along with her mother and paternal grandmother but as far as joint family (ancestral) property was concerned, daughters could only inherit a share in their father's share of the property. Sons, on the other hand, inherited a share equal to that of their father when they were born and the father's share thus became less. In other words, under the *Mitakshara* system, joint family property devolved and still devolves on birth within the coparcenary. This meant that till 2005 with every birth or death of a male in the family, the share of every other surviving male heir either got diminished or enlarged. After the father died, the sons

“ (Before the 2005 amendment) daughters could only inherit a share in their father's share of joint family (ancestral) property, while sons inherited a share equal to that of their father. ”

once again inherited from the father's surviving share along with the daughter, etc. The Act further specified that the share of the deceased has to be determined by way of a notional partition between the coparceners.³³ Since a widow was and is supposed to get a share equal to her husband's share in the joint family when a partition takes place between its members, the question that arose in quite a few cases was whether the widow's share should be actually determined at the time of the notional partition. While the judgement in some cases was that this should be done and the widow should get a share equivalent to the other coparceners,³⁴ other judgements held that this could not be done.³⁵

The 1956 Act, however, restricted a woman's right to ask for her share in a house-property which she had inherited if other members of the family resided in the said property. It stated that the female heir would get her share only if there was a partition by the male heirs to get their shares in the said property.³⁶ The only right that the female heir had was a right of residence in the dwelling house if she was unmarried or she had been deserted or separated or was a widow. The Supreme Court upheld Section 23 of the HSA.³⁷ Also, though the HSA allowed inheritance by the son's widow, it was biased in so far as it disinherited the widow if she remarried.³⁸

³³ *Ibid*, Explanation to s. 6.

³⁴ *Rangubhai Lalji v. Laxman Lalji*, 68 (Bom.) L.R. 74; *Sushilabai Ramachandra Kulkarni v. Narayanarao Gopalrao Deshpande and Ors.*, A.I.R. (1975) Bom. 257; *Vidyaben v. Jagadishchandra N. Bhatt*, A.I.R. 1974 Guj. 23; *Ananda v. Haribandu*, A.I.R. 1967 Orissa 194.

³⁵ *Shiramabai Bhimgonda v. Kalgonda* [1963] 66 Bom. L.R. 351.

³⁶ S. 23 of the unamended Hindu Succession Act of 1956 reads: "Special provision respecting dwelling-houses. Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class-I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

³⁷ *Narashimaha Murthy v. Sushilabai* AIR 1996 SC 1826.

³⁸ *Supra* n. 3, pp. 1222-23.

When the HSA was amended in 2005³⁹ after a sustained campaign by women's groups and others, it took women several steps closer to achieving gender equality and abolishing the ancient patrilineal system of inheritance. Though the *Mitakshara* joint family was not abolished, the Act made the daughter of a coparcener, a coparcener in her own right by birth (in the same manner as the son) and specifically stated that she would have the same rights and liabilities in

“When the HSA was amended in 2005, it took women several steps closer to achieving gender equality and abolishing the ancient patrilineal system of inheritance.”

the coparcenary property as the son.⁴⁰ The Act did away with Sections 23 and 24 of the 1956 Act which had restricted a female heir's rights to enjoy a dwelling house and a widow's right. The 2005 amendment also amended Schedule 1 of the Class-I heirs of a male in the HSA, giving the predeceased daughter's daughter's heirs the same rights as were earlier given to the predeceased son's son's heirs.

The 174th report of the Law Commission of India while commenting on HSA 1956 had pointed out that since the *Mitakshara* coparcenary consists of father, son, son's son and son's son's son, etc., it is “a wholly patrilineal regime, wherein

property descends only through the male line as only the male members of a joint Hindu family have an interest by birth in the joint or the coparcenary property. Since a woman could not be a coparcener, she was not entitled to a share in the ancestral property by birth. A son's share in the property in case the father dies intestate would be in addition to the share he has on birth.”

After stating that “social justice demands that a woman should be treated equally both in the economic and social sphere” and after noting that Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka had changed the law and made women coparceners in the *Mitakshara* Joint Family, the Law Commission recommended that this should also be done in the HSA 1956. In spite of noting that Kerala had gone one step further and abolished the Hindu joint family system altogether, it did not recommend this rational model.⁴¹ The Law Commission also noted that if daughters are made coparceners, the overall number of coparceners increased and this would have an indirect effect of reducing the widow's successional share.

However, the Act stops short of giving complete equality and the amendments are not comprehensive enough. To begin with, the *Mitakshara* Joint Family System is in itself hierarchical. It is structured on different levels of inequality between widows and daughters, elder sons and younger sons. In some states of south India, wives do not get an equal share in the ancestral property even on partition.⁴²

³⁹ No. 39 of 2005.

⁴⁰ The Hindu Succession Act, 1956, s. 6: Devolution of interest in coparcenary property.

⁴¹ 174th Report of Law Commission of India, *Property Rights of Women: Proposed Reforms under the Hindu Law*, May 2000, pp. 44-45.

⁴² Kirti Singh, “The Women Inheritors”, National Confederation of Human Rights Organisations, available at <http://nchro.org/index.php?option=com_content&view=article&id=335:the-women-inheritors&catid=15:women&Itemid=25>, last viewed on 31.8.2012.

Land Laws

Another critical and problematic provision in the 1956 Act was Section 4(2), which specifically protected special laws in every state ostensibly to address the issue of fragmentation of agricultural holdings, fixation of land ceiling and devolution of tenancy rights in agricultural holdings.

It is pertinent to mention that the states of Delhi, Uttar Pradesh, Punjab, Haryana, Himachal Pradesh and Jammu and Kashmir do have special laws; and these laws deny women equal rights of succession in tenancy rights, including the rights of a tenure holder (owner).

For instance, in the order of succession in the Delhi Land Reform Act, the 'male lineal descendants in the male line of descent' are first on the list; the widow and father are next on the list. Unmarried daughters are ninth on this list.

The deletion of Section 4(2) HSA by the Lok Sabha can be interpreted to mean that the HSA no longer permits succession of any property – including agricultural land – that is contrary to the

“Many contend that agricultural land, including succession to tenancy rights, is a state subject and the state laws will remain until the states themselves abrogate them.”

provisions of HSA. Previously, court judgements have upheld special laws relating to devolution of tenancy rights citing Section 4(2) HSA, and one of the effects of the deletion is that they will no longer be able to rely on this section to deny women rights on agricultural land.⁴³

However, while Section 4(2) has been deleted, the special state laws that deal with agricultural land continue to exist on paper. This raises a question: What is the validity of these laws with respect to their effect on women's property rights? Regarding this crucial issue, two interpretations exist. Many contend that

agricultural land, including succession to tenancy rights, is a state subject and the state laws will remain until the states themselves abrogate them. During a debate in the Lok Sabha in 2006, Law Minister H R Bharadwaj had said that since agriculture is a state subject, the Centre would soon write to state governments and, if necessary, call a meeting to amend these laws.⁴⁴ Though this promise was made in 2006, the State laws have still not been changed.

In fact, some women's groups had recommended that Section 4(2) be amended to categorically state that in all laws relating to agricultural land, daughters and wives should be given inheritance rights equal to that of sons.⁴⁵ They contend that the government does have the right to do this because laws of succession fall under the Concurrent List. It has also been recommended that the HSA should specifically state that succession to agricultural property/land will be governed by the HSA.⁴⁶ It is relevant to mention that the laws which deal with agricultural land in some states allow

⁴³ Kirti Singh, 'About Matters of Inheritance', *Women's Equality*, 1.5.2006.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Poonam Pradhan Saxena, *Family Law Lectures: Family law II*, LexisNexis-Butterworths, New Delhi, 2008, p. 339-40.

the application of personal laws to succession or explicitly state that the personal laws of the parties will be applicable under these laws.⁴⁷ These states are Rajasthan, Madhya Pradesh, Andhra Pradesh, Gujarat, Bombay (Maharashtra), West Bengal, Karnataka, Maharashtra, Kerala and Tamil Nadu. However, since these States apply personal laws which are in themselves inequitable for certain communities, these may not provide a complete solution to the problem. Certain other States also like Bihar, Odisha and Jharkhand make personal laws applicable to the land laws but make certain exceptions in favour of Tribal and customary laws.

A recent positive judgement⁴⁸ of the Delhi High Court shows how the deletion of Section 4(2) of the HSA should be interpreted in favour of giving equal rights to women. The case had been filed by a widow and her two minor daughters to claim their share in the agricultural land left by the deceased husband/father. The *Tehsildar* refused to mutate the agricultural land in favour of the petitioner widow and her two daughters in view of Section 50 of the Delhi Land Reform Act, 1950.

The Court held that the provisions of the HSA have overriding effect over the provisions of the Delhi Land Reforms Act and that “*the latter provisions would have to yield to the provisions of the HSA, in case*

“There is no reason why a woman’s property, whether inherited or self-acquired, should not devolve in the same manner as a Hindu male’s property.”

of any inconsistency. The rule of succession provided in the HSA would apply...” The Court therefore said that the share of the deceased Inder Singh should be divided equally between his sons and the petitioners who were his widow and daughters.

As stated above, Section 15, HSA, which specifies how the property of a female Hindu will devolve, also requires close examination. The 18th Law Commission in its 207th Report had suggested that a woman’s self-acquired property should be divided equally between her parents and her in-laws.

However, this is not enough and there is no reason why a woman’s property, whether inherited or self-acquired, should not devolve in the same manner as a Hindu male’s property.⁴⁹

Finally, an amendment of the law can be successful only if daughters ask for and get their share in the parental property. At present, women are routinely coerced into relinquishing their shares to maintain ‘peace’ in the family and because they do not want a souring of relationships with their natal family. Other illegal methods are also adopted to deprive daughters of their right to inheritance. It has been reported that in certain villages *patwaris* list only the sons as legal heirs and give legal heir certificates only to them. It has also been pointed out that certain revenue officers also help daughters to relinquish their share by making an appropriate relinquishment deed.⁵⁰

⁴⁷ Bina Aggarwal, *Gender and Legal Rights in Landed Property in India*, Kali for Women, New Delhi, 1999, p. 22-25.

⁴⁸ *Nirmala and Ors. v. Government of NCT of Delhi and Ors.* MANU/DE/2717/2010.

⁴⁹ See *Supra* n. 46, p. 374. Also see Justice Prabha Sridevan, ‘A Law that Thwarts Justice’, *The Hindu*, 26.06.2011.

⁵⁰ This was pointed out in a meeting organised by the UNFPA on 18.5.2012 in Delhi to disseminate some of the findings of this study.

Delhi Land Reform Act Held Subservient to the HSA

The Delhi High Court held that Section 50 of the Delhi Land Reform Act was subservient to the Hindu Succession Act, 1956 and held as under:

“33. Now, the omission of Sub-section (2) of Section 4 of the HSA by virtue of the Amendment Act of 2005 has removed the specific exclusion of the DLR Act from the overriding effect of the HSA which hitherto existed because of the said Sub-section (2). The result is obvious. The protection or shield from obliteration which Sub-section (2) provided having been removed, the provisions of the HSA would have overriding effect even in respect of the provisions of the DLR Act. It is, in fact, not so much a case of implied repeal but one where the protection from repeal/abrogation which hitherto existed has now been removed. The omission of Sub-section (2) of Section 4, by virtue of the amendment of 2005 is very much a conscious act of Parliament. The intention is clear. Parliament did not want this protection given to the DLR Act and other similar laws to continue. The result is that the DLR Act gets relegated to a position of subservience to the HSA to the extent of inconsistency in the provisions of the two Acts.”

- Nirmala and Ors. v. Government of NCT of Delhi and Ors. MANU/DE/2717/2010

Almost routinely, whenever the question of equal property rights for women is raised, there are alarmist objections about violent consequences. Some commentators warn of increased conflict in the family and even point towards a possible rise in the practice of gender biased sex selection. Their reasoning appears to suggest that women should not demand their rights to avoid violence. In fact, evidence from states with progressive inheritance laws show that when women get property rights, they are in a stronger and more independent position to resist violence against themselves and their children.⁵¹

Research on the impact of the 1994 amendments in HSA introduced by the States of Karnataka and Maharashtra, giving daughters the same inheritance rights as their brothers revealed some positive results.⁵² It was found that while gender inequality persists, the likelihood of women inheriting property increased by 22 percentage points. The benefits of equal inheritance rights included a significant increase in women's age at marriage and prolonged education. The link drawn with the number of children and spouse's education also suggested wider positive implications of the reform in terms of improved ability of women to negotiate marriage outcomes and make favourable reproductive decisions. The research also found that the effects of the reform increased over time as awareness of the legislative amendments grew.

Research on women's property ownership also revealed the linkage with reduced incidence of domestic violence. Research conducted by Panda and Agarwal (2005) in Kerala showed that women who own land or a house are at significantly lower risk of physical and psychological violence, both

⁵¹ *Supra* n. 43.

⁵² UN WOMEN, *Progress of the World's Women: In Pursuit of Justice*, New York, 2011, p. 40. Also See: World Bank, *Do Changes in Inheritance Legislation Improve Women's Access to Physical and Human Capital: Evidence from India's Hindu Succession Act*, January 2010.

in the short and long term. A multi-site study conducted by International Centre for Research on Women (ICRW) found similar results in West Bengal.⁵³

Rights of Inheritance under Muslim Law

As is well known, Muslim law is not codified in India. The 1937 Shariat Act explicitly states that Muslim Personal Law would apply to all cases in which the parties were Muslims.

There are two main schools of law governing the Muslims regarding matters of property in India, namely the *Hanafi* law followed by the Sunni Muslims and the *Ithna Ashari* governing the Shia Muslims. Though there are four sub-sects amongst the Sunnis in India, the *Hanafi* Law is applied since most of the Sunnis are *Hanafis*.⁵⁴ The sources of Mohammedan law are the Quran, *Hadis*, *Ijmaa* and *Qiyas*.⁵⁵

As far as women's rights are concerned, under Muslim Personal Law too women do not get an equal share with the men. Both in *Sunni* and *Shia* law a woman is given one-half the share of the man. For instance, if a daughter and a son are alive, the daughter obtains one share and the son two.⁵⁶ Unlike in Hindu law, "no Muslim is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property".⁵⁷ Also, the principle of 'representation' is entirely unknown to this Law governing the Muslims (Sunni Law).⁵⁸

⁵³ International Centre for Research on Women, *Property Ownership and Inheritance Rights of Women for Social Protection: The South Asia Experience, 2006*.

⁵⁴ M. Hidayatullah and Arshad Hidayatullah, *Mulla's Principles of Muslim Law*, LexisNexis Butterworths, New Delhi, 2004, p. 20.

⁵⁵ *Ibid* p. 22.

⁵⁶ *S.A. Halima Bivi Ammal v. S.A. Fatima Bivi and Ors.* AIR 1987 Mad 129 observed as:

"The Koran declares that the male child is entitled to the share of two females. Therefore when a man dies leaving a single child or several children, male or female, no other person is entitled to inherit, and the children take in accordance with the rule that the male takes the double share".

In this case, the following reference was also made: "*Abdool v. Goolam*, ILR (1905) 30 Bom 304 lay down the principle that the right of an heir - apparent or presumptive - comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as "an heir if he survived the ancestor."

⁵⁷ Asaf A. A. Fyze, *Outlines of Muhammadan Law*, Tahir Mehmood (ed.), 292 (Oxford University Press, New Delhi, 2008).

Also see: *Rahummuth Ammat v. Mohammed Mydeen Rowther* (1978) 2 MLJ 499 referred in the case of *Narunnisa v. Shek Abdul Hamid* AIR 1987 Kant 222 :

"No doubt, as has already been pointed out, the bequest to an heir coupled with a bequest to a non-heir has to be reconciled as far as possible and the totality of the instrument cannot on a hypertechnical ground be rejected *in toto*.

If this is the method by which such an instrument has to be understood and interpreted, then it should be held that the bequest to the first defendant who is an heir in this case is not valid, because it is against the personal law, but in so far as the bequest to a non-heir, namely the second defendant is concerned, it would be operative to the extent of a third of the estate."

In *Narunnisa's* case, the case of *Mahaboobi v. Kempaiah* (Second Appeal No. 99/150-51): AIR 1955 Mys 705 was also cited regarding a will by a Muslim person;

"A Muhammadan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. But a bequest of more than the legal third can be validated by the consent of the heirs; and similarly a bequest to an heir may be rendered valid by the consent of the other heirs. The limits of testamentary power exist solely for the benefit of the heirs and they may if they like forego the benefit by giving their consent."

⁵⁸ As held and observed in *Abdul Subhan v. Khyroonibi* ILR 1992 Kar 2823:

"Under Muslim Law, no person has a right in the property by birth. It is known that there is no such thing as 'joint family' among the Muslims. So long as the father is alive, the children do not possess any right in the property. It is only on the death of the father, the children living at that time would inherit. However, if any son dies earlier to the father, then the son's issues would not succeed to the father of the deceased son. Principle of 'representation' is entirely unknown to this Law governing the Muslims (Sunni Law). Right of inheritance arises on the death of the person owning the property and the question of devolution of inheritance rests entirely decided at that point of time when the person through whom the heirs claim dies - death being the sole guide".

Inheritance under *Hanafi* Law

Under *Hanafi* law, the legal heirs are divided into three categories: *Quranic* heirs, mostly females; the agnates, mostly males; and 'distant kindred' who are either women or are connected through a female link. As stated by Fyzee, "The first class, *Quranic* heirs, consists mainly of females with a few exceptions. The reason is that the bulk of the property in the majority of cases is sought to be kept intact for the second class of heirs who are all males. For instance, a man dies leaving a widow and a son. The widow is a *Quranic* heir and she gets one-eighth of the estate while the son, a tribal heir, takes the remaining seven-eighth. This is an illuminating example of how Quran affected Arabian custom."

"In reality the agnetic heirs were the principal heirs before Islam; they continue to remain in Sunni law the principal heirs provided always that the claims of near relations mentioned in the Qur'an are satisfied by giving to each of them a specified portion. The son, father (in certain cases), brother, paternal uncle and nephew are all in this important class, and in a majority of cases the residue forms the bulk of the estate."

Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, Tahir Mahmood (ed.), Oxford University Press, New Delhi, 2008, p. 321.

Muslim Women's Share in Inherited Property

The first principle which the Quran lays down refers to males and females of equal degrees and class. The principle is that the females inherit half the portion of the males. This means that a son inherits twice as much as a full sister, a son's son inherits twice as much as a son's daughter, and so on. This principle is however not universally applicable, as the descendants of the mother, notably the uterine brother and uterine sister inherit equally, as do their descendants.

The Quran gives daughters a specific share. If there are sons, the share of the daughter will depend on the share that the son will get, since the son inherits twice as much as the daughter. If there is a single daughter, her share is one-half; if there are two or more daughters, their share is two-thirds. The share of the wife is one-quarter in the absence of a child or grandchild. Two or more wives share equally in this prescribed share".

Nasreen Fazalbhoy, "Muslim Women and Inheritance", in Zoya Hasan & Ritu Menon (eds.), *In a Minority: Essays on Muslim Women in India*, OUP, New Delhi, 2005, p. 84.

It is fairly well settled that the heirs of a Muslim can claim their shares only in what remains, if at all, after all the statutory liabilities have been met out of the property and the debts and valid legacies and death-bed gifts (if any) have been paid out of the property of the deceased. A person who according to Muslim law is an heir of the deceased remains so and gets his legal due. He or she cannot be excluded either by other heirs and survivors of the deceased or even under a specific direction left in that regard by the deceased himself.⁵⁹

⁵⁹ *Smt. Ashabi v. Smt. Faziyabi and Ors.* AIR 2004 Kant 476.

The *Shia* law, however, besides being slightly different from the *Sunni* law, seeks to give equal rights to both the male and female heirs. Cognates and agnates⁶⁰ are put on an equal footing. “Males and females who are linked to the deceased in equal blood and degree inherit together.”⁶¹

“The *Shia* law, besides being slightly different from the *Sunni* law, seeks to give equal rights to both the male and female heirs.”

As far as customs and practice regarding inheritance law are concerned, there is a considerable divergence from the *Shariat*. The Muslims of Southwest India follow the matrilineal inheritance, especially amongst the *Mapilas* of Kerala, while in the rest of India the rule of patrilineal inheritance is followed where even the customary rights of women are highly restricted.⁶²

The Muslim Personal Law (Shariat) Application Act, 1937 abrogated the customs or usages in favour of the Muslim Personal Law but clearly excluded agricultural land from its purview. Muslim women by and large suffered because of this clause excluding agricultural land. In certain parts of the country such as Tamil Nadu, parts of Karnataka and Andhra Pradesh, however, women were given a share in the agricultural land in the year 1949.⁶³

In most of the northern states such as Delhi, Haryana, Punjab, Himachal Pradesh and Uttar Pradesh, on the other hand, inequitable laws regarding devolution of the property still prevail. Thus, inequality is perpetuated among men and women as agricultural land is the most important form of property.⁶⁴

Some scholars have argued that since under the Quran the wife has absolute rights of maintenance and is further entitled to *mahr*, this in a way compensates for the unequal rights in inherited property. However, a right to get *mahr* in no way compensates the unequal right to inheritance from a father or a husband.

In fact, it has been pointed out that the law on property rights is as subject to change as other provisions of the Shariat, and the Shari’ah as formulated by the early jurist should not be treated as final, and, wherever necessary, should be interpreted or even reinterpreted in the true *Quranic* spirit in view of the changed conditions and new consciousness of women. However, the ground reality is that often women in India do not even get the property that they inherit.

“From 1937, therefore, Muslim women had the right to inherit property according to the Shariat as embodied in the Muslim Personal Law (MPL). Notwithstanding this, there is a general impression that this right is not actually implemented. Legal rights are only one of several factors that enter into the

⁶⁰ An agnate is one’s genetic relative, male or female, exclusively through male ancestors. See: Michael Dean Murphy, *A Kinship Glossary: Symbols, Terms, and Concepts*.

⁶¹ Shaheen Sardar Ali, *Conceptualising Islamic Law, CEDAW, and Women’s Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India, and Pakistan*, UNIFEM South Asia Regional Office, 2006, p. 183.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Supra* n. 43, pp. 36-42.

question of inheritance. Implicated in decisions regarding property distribution within the family are ideas regarding gender, the operation of patrilineal ideologies, notions of the rights and responsibilities of different family members vis-à-vis one another, and a host of other factors that may be of a contingent nature. This has been amply demonstrated in major studies done on women and property among Hindu women (for example, see Basu, 1999; Chowdhury, 1995). It is these attitudes that ultimately determine the effectiveness of legal rights in actually ensuring women's access to property. The present study, which

“The deprivation of inheritance in parental property is carried out through various legal stratagems.”

is focused on Muslim women, shows that similar factors operate in the case of Muslim women despite the fact that Muslim women have had property rights for much longer and despite the fact that property rights for women have religious sanction.”⁶⁵

Thus, women are deprived of their inheritance because of the operation of 'patrilineal ideologies' and other traditional 'notions of the rights and responsibilities of various members of the family' apart from other reasons which stem from discrimination against daughters. The deprivation of inheritance in parental property is carried out through various legal stratagems. Daughters are forced to relinquish their shares to their family members and are thus left without any security or assets in their name.⁶⁶ Ironically, daughters are not given or allowed the right to inherit and because they do not inherit and will be married out of the family, they are unwanted.

Inheritance under Christian Law

The inheritance law related to Christians is embodied in the Indian Succession Act, 1925. The law states that if a Christian dies intestate, his/her property will devolve upon his/her spouse or the kindred of the deceased according to the specified rules.⁶⁷

These rules⁶⁸ state that the property of a male will devolve in the first instance on his widow and his lineal descendants,⁶⁹ and the widow will get one-third of the property while the lineal

⁶⁵ Nasreen Fazalbhoy, 'Muslim women and Inheritance', in Zoya Hasan & Ritu Menon (eds.), *In a Minority: Essays on Muslim Women in India*, OUP, New Delhi, 2005, pp. 69-70.

⁶⁶ *Ibid*, p. 69.

⁶⁷ The Indian Succession Act, 1925, s. 32, reads: "Devolution of such property - The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter".

⁶⁸ The Indian Succession Act, 1925, s. 33, reads: "Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred - Where the intestate has left a widow -
(a) if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained;
(b) save as provided by s. 33A, if he has left no lineal descendants, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are kindred to him, in the order and according to the rules hereinafter contained;
(c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

⁶⁹ N. D. Basu, *Law of Succession*, P. M. Bakshi, ed., Ashoka Law House, New Delhi & Allahabad, 1997, p. 105-06. A "lineal descendant" within the meaning the section (s. 33) is the offspring of a lawful marriage, and not the offspring of a union which is not that of husband and wife. [*Sophia Blin v. Maria David*, 31 Ind. Cas. 542: Bur: L. T. 48: U.B.R. (1919) III 128.]

descendants will get the remaining two-thirds. However, sons and daughters get equal rights in parental property, and so this Act has been seen as a progressive piece of legislation.⁷⁰

Section 33 (b) of the Act deals with a situation where there are no lineal descendants but only persons who are kindred⁷¹ to the deceased. In this situation, the Section stipulates that half the property will go to the widow and the other half will go to the kindred. Thus, the widow of the deceased can in no

“The inheritance law related to Christians stipulates that sons and daughters get equal rights in parental property.”

instance inherit more than one-third of the property if there are lineal descendants and half of the property if there are no lineal descendants but the class of heirs known as ‘kindred’ exist. It is only when a deceased male has no lineal descendants or kindred that the whole of his property can be inherited by the widow.

The rules of distribution where there are no lineal descendants are contained in Sections 42 to 48 of the Act. These rules are patriarchal in nature and state that if the father is alive he shall inherit the share of the kindred⁷² and if he is not then the share will go to his mother, brothers and sisters in equal shares. If the intestate does not have either father or mother, the share of the kindred will be divided equally between his brothers and sisters and the child/children of such of them as may have died before him.⁷³ Even in the absence of the parents or brother or sister, the remoter kindred inherit. For instance, grand-father and grand-mother and in their absence great-grandparents and uncles and aunts and nephews will inherit. Thus, the presence of even remote kindred will deprive the widow of a half share of her husband’s property.

It has also been said that a large section of the Christian community which was governed by customary laws was excluded from the application of this Act.⁷⁴

Inheritance under Parsi Law

The Parsi community in India is governed by its own personal law of inheritance and succession which is contained in Chapter III of the Indian Succession Act, 1925. This law as contained in Section 51⁷⁵ of the Act states that the intestate’s estate will devolve upon his widow and his children

⁷⁰ Flavia Agnes, *Family Law I: Family Law and Constitutional Claims*, OUP, New Delhi, 2010, p. 73.

⁷¹ The Indian Succession Act, 1925, ss. 24-26; Also see ss. 41-48 of the Act. ‘Kindred’ as defined in Black Law’s Dictionary, 6th edn., 1990: a relation or relationship by blood or consanguinity, may be either lineal (ascending or descending) or collateral.

⁷² *Ibid*, s. 42.

⁷³ *Ibid*, s. 47.

⁷⁴ Flavia Agnes, *Family Law I: Family Law and Constitutional Claims*, Oxford University Press, New Delhi, 2010, p. 74-75; See Sanjeeva Rao, *The Indian Succession Act, 1925*, Praffula C. Pant (ed.) Butterworths, New Delhi, 2000, p. 84; See also s. 29 (2) of the Indian Succession Act, 1925.

⁷⁵ The Indian Succession Act, 1925, s. 51, reads: “Division of intestate’s property among widow, widower, children and patents – (1) Subject to the provisions of sub-section (2), the property of which a Parsi dies intestate shall be divided - (a) Where such Parsi dies leaving a widow or widower and children, among the widow or widower, and children so that the widow or widower and each child receive equal shares; (b) Where such Parsi dies leaving children, but no widow or widower, among the children in equal shares. (2) Where a Parsi dies leaving one or both parents in addition to children or widow or widower and children, the property of which such Parsi dies intestate shall be so divided that the parent or each of the parents shall receive a share equal to half the share of each child.”

and they shall all inherit equally. Prior to 1991, the law was discriminatory as far as women were concerned and stipulated that a daughter would only inherit a share which was one-half the share that the son inherited.⁷⁶

Section 51 of the Act also stipulates that where a Parsi dies leaving one or both parents in addition to children and a spouse, the property would devolve in such a manner that the parent or parents each would receive half of what the children receive. Re-marriage by the widow would not affect

“ If a Parsi does not leave any lineal descendants but only a widow, then the widow does not get his entire property but only half of it. ”

her rights under Section 51 of the Act.⁷⁷ However, under Section 54 of the Act if a Parsi does not leave any lineal descendants but only a widow, then the widow does not get his entire property but only half of it. If he or she leaves a spouse and spouses of lineal descendants, the intestate's spouse would receive one-third and the spouse/spouses of the predeceased child/children would receive one-third. The rest of the estate would also be divided equally between them. Section 54 (d) of the Act talks of the residue of the estate and enumerates how this should be divided.

Non-Parsi women who are either a wife or widow of a Parsi cannot inherit but their children can inherit.⁷⁸ Moreover, children of a Parsi woman born to her from a non-Parsi husband are not considered Parsis. Thus, this provision discriminates against Parsi women who marry out of the community.

Recommendations

The study of laws relating to inheritance and land rights shows that women are less than equal under quite a few of the personal laws. The Sub-group⁷⁹ on Economic Empowerment of Women with focus on Land Rights, Property Rights and Inheritance Laws had pointed out that in India women own just 9.3 per cent of the land. This is because even when they have a right on paper to inherit property, this right gets subverted in a variety of ways. Women do not want to be estranged from their natal family because of their vulnerable and insecure position in their marital home. Members of their natal family including brothers are thus able to persuade them or coerce them to relinquish their share in the family property. The right to make a will under Hindu law has become another method of disinheriting women. It is, however, vital that daughters get an equal share of the property as this will make them independent and enable them to survive with greater dignity. Further, if daughters are provided their share in inherited property it will have a direct impact on the practice of dowry. The following measures towards ensuring an equal right to property are therefore recommended.

⁷⁶ *Dinabai v. Nurserwanji R. Mehta* AIR 1919 Sind 4.

⁷⁷ *Jahangir v. Pirozbai* 11 Bom 1.

⁷⁸ *Sir Dinshaw M. Retil v. Sir Jamshedji J. Tata* ILR 1909 33 Bom 509 (PC).

⁷⁹ Government of India, *Report of the sub group on Economic Empowerment of Women under Steering Committee on 'Women's Agency and Child Rights' for the Twelfth Five Year Plan 2007-12*, Planning Commission.

Legal Amendments

- The land laws including the various Land Reform Acts and Tenancy Acts in Uttar Pradesh, Delhi, Haryana, Punjab, Himachal Pradesh and Jammu and Kashmir should be amended to ensure that women inherit agricultural property and tenancy rights equally with their male siblings and sons. The other land laws which make the personal law of the parties applicable should also be secularised to ensure that women inherit equally.
- Customary laws like the Chota Nagpur Tenancy Act, 1908 in Jharkhand and other customary laws applicable in the states of Odisha, Bihar and the north-eastern states should be closely examined and amended to remove the discriminatory provisions regarding inheritance by daughters.
- Any land or property given/allotted by the government under the various laws including rehabilitation schemes should be given in the joint names of the wife and husband. Similarly, sons and daughters must be treated as equals whenever the government allots land to heirs. In the Eleventh Plan there were many suggestions for providing women access to cultivable land, ensuring joint ownership or sole ownership to women of all land distributed by the state including under rehabilitation schemes, facilitating 'group' ownership or leasing, and allotment of homestead lands of 10-15 cents⁸⁰ to landless families within one kilometre of existing habitation with priority to single women. Priority should be given to women, particularly single women, in housing schemes by the government.

“The right to will should be restricted to ensure that daughters cannot be disinherited.”

- The HSA should be amended to ensure that a woman's estate devolves on her parents in the absence of children and husband and on her other relatives in the absence of her parents. Thus, Section 15 of this Act should be amended to state that all property that belongs to a woman should in the first instance devolve upon her children and husband and in the absence of both it should devolve upon her parents. If the parents are not alive, then the property should go to her siblings.
- The right to will should be restricted to ensure that daughters cannot be disinherited. The right to will is curtailed under Muslim personal law to one-third of the property. In some countries governed by civil law in Europe, the right to will away property from the legal heirs is also restricted.
- Relinquishment of inherited land/property by girls in favour of their brothers or other relatives in the natal home should also be subject to restrictions. Further, a relinquishment should be specifically made subject to challenge on certain grounds, including the ground of not receiving adequate consideration.
- Reform in the personal laws of different religious communities should be also initiated since the various personal laws discriminate in different ways between the male members and the female members of the family.

⁸⁰ 1 cent = One-hundredth of an acre

State Action

- The Sub-group on Land and Property Rights and Inheritance had suggested that the Department of Land Resources, Ministry of Rural Development “should launch a campaign to correct revenue records and ensure that women’s land ownership rights are properly recorded by the states with intimation to them.” The Revenue Officers should also ensure that daughters and women are not being coerced into giving up their claim.
- Providing incentives may help in getting property registered in the name of women. This can be done through incentives like charging much less stamp duty if a property is registered in the name of a wife or daughter. For instance, the Department of Registration and Stamps, Rajasthan offers a 50 per cent reduction in the stamp duty for agricultural land if the land is registered in the name of the woman.⁸¹

“The Rajasthan High Court, in a landmark judgment, held that the term ‘son’ should be interpreted as the term ‘issue’ to refer to both sons and daughters.”

- It should also be ensured that during the course of marriage if a husband buys or gets a property in allotment, it should automatically be registered in the names of both the spouses.
- Gender sensitisation of key functionaries like *patwaris* and revenue officers is necessary to ensure that these officers do not act against the interest of women. Along with this, it should be ensured that these officers are aware of the latest developments in law, particularly those which affect women.⁸²
- More women officers should be appointed in revenue administration, particularly at the level of *tehsildars*, *kanungos* and village *patwaris*.⁸³
- The Rajasthan High Court, in a landmark judgement,⁸⁴ held that the term ‘son’ should be interpreted as the term ‘issue’ to refer to both sons and daughters. Positive judgements such as this one which allow equitable distribution/allotment of land should be followed by other State governments in their Government Land Rules.

⁸¹ Gender Responsive budgeting for the Department of Registration and Stamps, 2005-06: <http://www.google.co.in/search?q=rajasthan+agriculture+land+stamp+duty+women+register&sugexp=chrome,mod=17&sourceid=chrome&ie=UTF-8>, last visited on 2.10.2012.

⁸² Capacity building of the Revenue administration is one of the major recommendations of the study on ‘Challenges and Barriers to Women’s Entitlement to Land in India’ (UN Women and Landesa, 2012), which highlights the need for Revenue Officers at all levels of the hierarchy to be sensitised to protect and enhance women’s access to land and to ensure that their actions do not obstruct this access; the capacity building measures suggested in the study include exercises to enhance interaction with women in a gender sensitive manner, initiatives to simplify processes and tools in revenue administration and active dissemination of information related to women’s equal right to land in public spaces and the media.

⁸³ The study ‘Challenges and Barriers to Women’s Entitlement to Land in India’ (UN Women and Landesa, 2012) also recommends increased representation of women at all levels of the Revenue administration and further holds that in some instances, introducing officers dedicated to address women’s rights and entitlements might be an effective way of reaching out to women. The study quotes the example of Odisha where the Women’s Land Rights Facilitation Centres have been created by the Revenue administration to enhance women’s access to land rights.

⁸⁴ *Supra* n. 11.

It is equally important to promote, advocate and communicate as widely as possible the changes in the HSA and other succession and property laws and in fact identify ways in which parents are investing in daughters as much as sons.

The implementation of these recommendations along with suggestions for implementation of laws in other related fields like dowry will go a long way in starting the process of enabling women to get equal rights in property. The upholding of the equal value of both daughters and sons by the State will in turn help to dent the perception of daughters as a burden or as inferior to sons.

Gender Biased Sex Selection and the Law

Sex selection is one of the most overt forms of son preference and gender biased discrimination in India. “The abortion of a female foetus on the ground of being female discriminates against women as a class, in that it is directed against women as a class or group, being based as it is on the low worth being assigned to women”.¹ In a case² challenging the constitutionality of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereafter PCPNDT or ‘the Act’), the Bombay High Court, after recognising that amniocentesis and sonography are being used on a large scale to detect the sex of the foetus, held that this was discriminatory to the female sex and violative of her right to live with dignity.

The law to prohibit sex selection for non-medical reasons and regulate the use of certain diagnostic techniques, the PCPNDT Act, was introduced after a long struggle and campaign by women groups. The 1994 Act was preceded by the Maharashtra PNDT Act in June 1988, by which time it had become clear that pre-natal sex determination tests to eliminate female foetuses had become an easy way

¹ Lawyers Collective, *From the Abnormal to the Normal: Preventing Sex Selective Abortions through the Law*, New Delhi, 2007, p. 2.

² *Vijay Sharma v. Union of India* AIR 2008 Bom 29.

Sex Selection Is Against the Spirit of the Constitution

The Bombay High Court held that sex selection “offends (the) dignity of women. It undermines their importance. It violates woman’s right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection. In our opinion, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14.”

- *Vijay Sharma v. Union of India* AIR 2008 Bom 29, para 25.

of getting rid of daughters.³ The fact that the central legislation came about six years after the state Act showed the lack of political will in addressing this dangerous trend. Further, even though the law had been enacted in 1994, it became effective and “came into force” only on 1 January 1996. This lack of political will has continued till date and has manifested itself in the manner in which the PCPNDT Act has, or rather has not, been implemented and enforced by the Central and State Governments. In some states the Act was not notified till very recently.⁴

In one case,⁵ action could not be initiated under the Act as notification of the Act had negligently not been published in the gazette. This was a case in which the remains of two hundred and fifty “female foetuses” had been recovered from a septic tank in a nursing home in Patiala. Though the government said that it would issue either a fresh notification with retrospective effect or issue a fresh ordinance to validate the earlier notification, the Court held as under:

*[Non-publication] of an important statutory notification in the official gazette adversely reflects upon the official machinery of the State Government charged with implementing an important legislation like the PNDT Act. It is regrettable that for a period of over 12 years non publication of the notification in question never came to the notice of the authorities concerned.*⁶

The 2011 Census of India data has revealed that the child sex ratios (number of girls in the 0-6 age group as compared to 1000 boys) have been steadily declining from 971 in 1981 to 945 in 1991. It further declined to 927 in 2001 and finally to 919 in 2011. This decline has been reported to be largely due to pre-natal sex selection, which has continued unabated since the early seventies.⁷

³ Vibhuti Patel, ‘A Long Battle for the Girl Child’, *Economic and Political Weekly*, Vol. XLVI no. 21, 18.

⁴ Maharashtra, Haryana, etc.

⁵ *Gaurav Goyal v. State of Haryana* Civil Writ Petition No. 15152 of 2007 in the High Court of Punjab and Haryana at Chandigarh as decided on 7.7.2009.

⁶ *Ibid*, 3.

⁷ *Supra* n. 3.

Other reasons which have been held responsible for this decline include female infanticide and neglect of girls.⁸ It has also been noted that if the first child in a family is a girl, sex selection is more likely to ensure that a boy is born.⁹

It has been pointed out that sex selection is being facilitated by a section of doctors and other allied personnel who have a huge monetary interest in perpetuating the practice and who exploit the traditional preference for boys to do so. These medical personnel and others who perpetrate the practice have managed to manipulate and bypass the law by various stratagems. The Orissa

“Sex selection is being facilitated by a section of doctors and other allied personnel who have a huge monetary interest in perpetuating the practice and who exploit the traditional preference for boys to do so.”

High Court stated in a case¹⁰ that though medical technology has been developed to detect genetic and other diseases, “such techniques are misused by Medical Practitioners as a device for determination of the sex of the foetus; and if it is a female one, the same is aborted to prevent the birth of a female child.”¹¹

Some of these stratagems have been quoted in a case as follows:

“If the doctor tells us to come and get the report on Monday, we know it’s a boy. Friday means a girl,” says Sarla, a proud mother of three strapping boys in Karnal’s Chonchda village. Her neighbour’s doctor adopted a slightly different *modus operandi*, signature in red ink to indicate a girl and blue for a boy. “No words are exchanged. It’s an unspoken thing and one doesn’t even have to ask.” she says. “If the doctor doesn’t oblige, some tout does (sic).”¹²

Cultural and socio-economic factors are often cited as reasons for son preference. “A general explanation for son preference is that sons can provide old age support.”¹³ In India, a majority of the old people live with their married sons in the absence of any social welfare benefit and security. Furthermore:

*Sons are also important [for Hindus] because they alone can perform the funeral rituals of the parents. Added to this, most women have very limited opportunities to contribute towards their parents’ welfare. This creates an apparent dichotomy between the value of a girl to her parents and that of a woman to her parents-in-law... Upon marriage the bride leaves her natal home to live with the family of her husband. In this exogamous lineage system women are left out. They become dispensable essentially because they count for very little as individuals.*¹⁴

⁸ Jean Dreze and Amartya Sen, *Hunger and Public Action*, 53 (OUP: New York, 1989).

⁹ Prabhat Jha et al., ‘Trends in selective abortions of girls in India: analysis of nationally representative birth histories from 1990 to 2005 and census data from 1991 to 2011’. *Lancet*. 2011; International Institute for Population Sciences (IIPS) and Macro International. 2007. *National Family Health Survey (NFHS-3)*, 2005–06: India, Mumbai: IIPS.

¹⁰ *Hemantha Rath v. Union of India* AIR 2008 Ori 71.

¹¹ *Ibid*, para 4.

¹² Quoted in *State through District Appropriate Authority-cum-Civil Surgeon, Faridabad v. Dr. Anil Sabhani and Others* in the Court of Shri Jagjit Singh, HCS Sub Divisional Judicial Magistrate, Palwal 295/2 of 2001 as decided on 28.3.2006, para 2.

¹³ T. V. Shekher and Neelambar Hatti, ‘Disappearing Daughters and Intensification of Gender Bias: Evidence from Two Village Studies in South India’, *Sociological Bulletin*, 59(1), Indian Sociological Society, January-April, 2010, 1.

¹⁴ *Supra* n. 13

Other socio-economic factors which fuel son preference include the persisting system of dowry and other marriage practices including the rising costs of marriage almost always borne by the girl's family. These have been discussed in detail in the previous chapter on dowry. Apart from this, the patrilineal system of inheritance,¹⁵ which is largely followed in the practice of all personal laws irrespective of amendments, is another factor in maintaining and promoting son preference as detailed in the chapter on inheritance. Thus the vicious cycle of low value of women and girls,

“The patrilineal system of inheritance, which is largely followed in the practice of all personal laws irrespective of amendments, is another factor in maintaining and promoting son preference.”

as seen in the practices of dowry and inheritance, is manifested in sex selection, which in turn perpetuates son-preference and subordination of women.

As socio-economic and cultural reasons propagate son preference and the thinking of daughters as a burden¹⁶, any strategy to end this practice would have to be multi-pronged.¹⁷

That said, the delay in enacting this legislation and the lack of implementation post-enactment has meant easy availability of pre-natal sex-determination tests carried out with impunity. The Bombay High Court has also commented on this and stated that

the law has to be implemented to curb the misuse of modern technology for dishonest and illegal purposes since attitudinal changes are likely to take some time.¹⁸

The Text of PCPNDT Act

The PCPNDT Act is on the whole a comprehensive and strict legislation which regulates the use of diagnostic techniques and limits their use only to cases in which it is necessary to diagnose genetic abnormalities and diseases. Though earlier this Act had only dealt with pre-natal diagnostic techniques, it was amended in 2003 to prohibit pre-conception diagnostic techniques as well.¹⁹ Thus, the Act provides for “the prohibition of sex selection before and after conception, and for regulation of pre-natal diagnostic techniques...and for the prevention of their misuse for sex determination.”²⁰ The scope of the amended Act was spelt out in a High Court judgement²¹ of 2006 in which it was clarified that though prior to 14 February 2004 only determination of sex by ultrasonography and other diagnostic techniques after conception was prohibited, after the amendment, any step taken by a specialist or any other person “to cause or even to allow to be caused selection of sex before or after conception has been made punishable.”²²

¹⁵ *Supra* n. 13, 2.

¹⁶ *Supra* n. 15.

¹⁷ Mary E. John, Ravinder Kaur, Rajni Palriwala and Saraswati Raju, 'Dispensing with Daughters: Technology, Society, Economy in North India', *Economic and Political Weekly*, Vol. XLIV no. 15, April 11, 2009, p. 16.

¹⁸ *Radiological & Imaging Association (State Chapter) v. Union of India and Others* 2012 (114) Bom LR 150.

¹⁹ The PCPNDT Act, 1994, ss. 3A & 6.

²⁰ Preamble of the PCPNDT Act, Act 57 of 1994.

²¹ *Dr. Varsha Gautam v. State of U.P. and Ors.*, Criminal Misc. Writ Petition No. 5086 of 2006 as decided on 26.5.2006.

²² *Supra* n. 21, para 16.

Statutory Authorities under the Act and Their Functions

The Act sets up a number of statutory authorities like the Central Supervisory Board,²³ and the State Supervisory Board,²⁴ which are required to “review and monitor implementation of the Act” and to create public awareness of the Act amongst other functions.²⁵ The State Supervisory Boards are also required to send consolidated reports of the various activities under the Act to the Central government and Central Board. The Central Board is required to meet at least once in six months.²⁶

Both the Central and the State Government have been mandated to appoint Appropriate Authorities²⁷ (AAs) under the Act to carry out certain critical functions like granting, suspending or cancelling registration of a Genetic Clinic or Laboratory or Counselling Centre.²⁸ The power of

“The power of suspension is particularly important as it can be used without issuing any notice to the clinic if the AA thinks “that it is necessary or expedient to do so in the public interest.”

suspension is particularly important as it can be used without issuing any notice to the clinic if the AA thinks “that it is necessary or expedient to do so in the public interest.”²⁹ Apart from this, the AAs are mandated to investigate complaints of breach of the provisions of the Act and the rules and take immediate action. They are supposed to take appropriate legal action against the use of any sex selection techniques and create public awareness against the practice of sex determination and sex pre-selection. To advise and aid the AA, an Advisory Committee is supposed to exist along with every AA.³⁰

The AA, when appointed for a whole State, is supposed to be constituted with an officer of the rank of Joint Director of Health and Family Welfare or above, an eminent member of a women’s organisation, and an officer of the Law Department.³¹

Regulation of Pre-Natal Diagnostic Techniques

Chapter III of the PCPNDT Act, which provides for “Regulation of Pre-Natal Diagnostic Techniques”, consists of three sections viz. Sections 4, 5 and 6. Section 4 contains provisions for regulation of pre-natal diagnostic techniques and lists the abnormalities/diseases for the detection of which

²³ The PCPNDT Act, 1994, ss. 7 & 8.

²⁴ The PCPNDT Act, 1994, s. 16A.

²⁵ The PCPNDT Act, 1994, s. 16; the High Court of Punjab and Haryana in the case of K.L. Sehgal and Sonal Randhawa MANU/DE/1688/2010 stressed upon publicizing the amendments done in 2003 and further amendments if made in the Act, so that public awareness is increased about the minimum standards one should expect in diagnostic clinics.

²⁶ The PCPNDT Act, 1994, s. 9.

²⁷ The PCPNDT Act, 1994, s. 17(1).

²⁸ The PCPNDT Act, 1994, s. 17 (4).

²⁹ The PCPNDT Act, 1994, s. 20 (3).

³⁰ The PCPNDT Act, 1994, s. 17 (5).

³¹ The PCPNDT Act, 1994S, s. 17 (3)(a); see also sub-section (b).

the pre-natal diagnostic techniques can be performed. It also states that only qualified persons can carry out these tests and that the pregnant woman must fulfil certain criteria which necessitate the tests.³²

Section 5 contains provisions for obtaining the written consent of a pregnant woman prior to the use of the diagnostic technique. It also prohibits the communication of the sex of the foetus. Section 6 prohibits the performance of pre-natal diagnostic techniques for the purpose of determining the sex of the foetus and prohibits any person “to cause or allow to be caused” selection of the sex of the foetus.³³

Registration of Clinics and Medical Personnel

Under the PCPNDT Act, registration of all units which conduct diagnostic procedures is mandatory. The PCPNDT Act, therefore, prohibits genetic counselling centres, genetic laboratories and genetic clinics from conducting or associating with or helping in “activities relating to pre-natal diagnostic techniques” and further prohibits any medical person or any other person from conducting or helping in conducting any pre-natal diagnostic techniques “at a place other than a place registered under the Act”.³⁴ It also prohibits sale of any ultrasound machines to persons, laboratories and clinics which are not registered under the PCPNDT Act.³⁵

³² The PCPNDT Act, 1994, s. 4 reads: “Regulation of pre-natal diagnostic techniques – On and from the commencement of this Act,-

(1) no place including a registered Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);

(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of the following abnormalities, namely-

(i) chromosomal abnormalities;

(ii) genetic metabolic diseases;

(iii) haemoglobinopathies;

(iv) sex-linked genetic diseases;

(v) congenital anomalies;

(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely -

(i) age of the pregnant woman is above thirty-five 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 of mental retardation or physical deformities such as spasticity or any other genetic disease;

(v) any other condition as may be specified by the Board

Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of Section 5 or Section 6 unless contrary is proved by the person conducting such ultrasonography;

(4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2);

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both”.

³³ The PCPNDT Act, 1994, s. 5 and s. 6.

³⁴ The PCPNDT Act, 1994, s. 3.

³⁵ The PCPNDT Act, 1994, s. 3B.

Rule 3 (3) (1) of the PCPNDT Rules 1996

“Any person having adequate space and being or employing -

- (a) A Gynaecologist having experience of performing at least 20 procedures in chorionic villi aspirations per vagina or per abdomen, chorionic villi biopsy, amniocentesis, cordocentesis foetoscopy, foetal skin or organ biopsy or foetal blood sampling etc., under supervision of an experienced gynaecologist in these fields, or
- (b) A Sonologist, Imaging Specialist, Radiologist or Registered Medical Practitioner having Post Graduate degree or diploma or six months training or one year in sonography or image scanning, or
- (c) A medical geneticist, may set up a genetic clinic/ultrasound clinic/imaging centre.”

Medical practitioners to be recognised under the Act are also supposed to be registered medical practitioners under the Indian Medical Council Act, 1956. In a case³⁶ involving two petitioners, one a Bachelor of Homeopathic Medicine and one a Bachelor of *Unani* Medicine, who were denied re-registration under the PCPNDT Act, it was held that only medical practitioners who are registered under the 1956 Act can carry out the prescribed tests under the PCPNDT Act. It was also held that the PCPNDT Act prohibits registration of centres that do not have in their employment such registered medical practitioners. Apart from medical practitioners, medical geneticists, gynaecologists and paediatricians are also recognised as being capable of conducting pre-natal diagnostic techniques. The rules under the Act further outline the qualifications that are required for doctors and other qualified personnel to be employed in a unit that carries out diagnostic techniques.

In one case, the Delhi High Court commented on the weak definition of the term “sonologist” in the Act³⁷ and the Rule quoted above and stated that the qualifications prescribed for a sonologist under the PCPNDT Act/Rules should be in tandem with the criteria adopted internationally. The Court held that in the absence of an adequate definition of the word it had no option but to hold that recognised doctors with the prescribed training/experience have to be allowed to register their clinics.³⁸

Section 18³⁹ of the Act provides for mandatory registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics - after the enactment of the PCPNDT Act - in which machines capable of

³⁶ *Anil Kumar Mishra v. State of U.P.* 2011 (4) ADJ 672.

³⁷ The PCPNDT Act, 1994, s. 2(p): “Sonologist or imaging specialist” means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act, 1956 or who possesses a postgraduate qualification in ultrasonography or imaging techniques or radiology.”

³⁸ *Dr. K.L. Sehgal v. Office of District AA; Dr. Sonal Randhawa v. UOI* MANU/DE/1688/2010.

³⁹ The PCPNDT Act, s.18, reads: “Registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics - (1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre, laboratory or clinic is duly registered under the Act.”

being used for sex determination had been previously installed. In a case⁴⁰ in Kerala, the petitioners asked for exemption from the application of the Act. They claimed that the ultrasound machines were being used for purposes other than pre-natal diagnostic tests. The Kerala High Court surprisingly allowed the petition stating that the authorities under the Act would be fully competent to ensure due compliance of the provisions of the Act whether the institution is registered or not and to see that pre-natal diagnosis is not being performed in the petitioner's institution or similar institutions. In other words, the Kerala High Court completely overlooked the fact that non registration of a centre amounted to an offence under the Act and held that registration was a purely technical and procedural matter. It also overlooked the fact that if a centre was not registered it would be very difficult to monitor it at all.

Section 20 of the Act provides for cancellation or suspension of registration after a show cause notice is issued to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and after

“The AA can suspend or cancel a registration without issuing a show cause notice by a reasoned order if it thinks it is necessary or expedient to do so in the public interest.”

hearing the affected party. The AA can also suspend or cancel a registration without issuing a show cause notice by a reasoned order if it thinks it is necessary or expedient to do so in the public interest. The High Court of Bombay has held that if the public authority forms an opinion that pending prosecution a particular activity should be suspended, it cannot be said that there is any error on its part and it is not necessary that when the reasons are required to be given in writing, there ought to be a detailed discussion.⁴¹

As stated above, in Section 3(b) of the Act, the sale of any ultrasound or imaging machine or any other equipment capable of detecting the sex of a foetus to any clinic is prohibited unless the clinic is registered. In a negative case, however, the Court held that a Director of the seller company was not liable as he was not in charge of the conduct of the business of the company.⁴² In another case, a company tried to evade prosecution by amalgamating with another company and getting rid of the officer concerned. The case had been filed against the manufacturing company for installation of an ultrasound machine in a hospital which had not been registered under the Act.⁴³

⁴⁰ *Qualified Private Medical Practitioners and Hospitals Association v. State of Kerala* 2006(4) Kar LJ 81.

⁴¹ *Malpani Infertility Clinic Pvt. Ltd. and Ors. v. AA, PNDT Act and Ors.* AIR 2005 Bom 26.

⁴² *J. Sunderrajan v. Dr. S. G. Dalvi and Anr.* Criminal Writ Petition 6 of 2009 in High Court of Bombay (Goa Bench) decided on 15.04.2009 as referred by Dr. Shalini P. Joshi in *Compilation and Analysis of Case-Laws on Pre-conception and Pre-natal Diagnostics Techniques Prohibition of Sex Selection) Act, 1994*, UNFPA, 2011.

⁴³ *Dr. Sanjeev G. Dalvi, Appropriate Authority of South Goa v. Phillips Medical Systems India Pvt. Ltd., Delhi* as referred in Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 107.

Rules under the Act to Maintain Mandatory Records and Regulate Pre-natal Diagnostic Techniques

The method of keeping a track of the functioning of registered units under the Act is by mandating that they maintain certain records. Under Rule 9(1) of the PCPNDT Rules 1996, a register has to be maintained of all the women who are clients of the clinic. Rule 9(2) stipulates that a record of any counselling in a clinic should be maintained as specified in Form 'D'. Similarly, a genetic laboratory is mandated to maintain a record of "any pre-natal diagnostic procedure/technique/test" as specified in Form 'E'. It has also been made compulsory for all clinics to keep a record of all persons "subjected to any pre-natal diagnostic procedure/technique/test" as per Form 'F'. Apart from these Rules, Rule 17 specifies that all registered clinics⁴⁴ should prominently display in English and

in the relevant local language a sign stating that disclosure of the sex of the foetus is prohibited under the law.

“Rule 17 specifies that all registered clinics should prominently display in English and in the relevant local language a sign stating that disclosure of the sex of the foetus is prohibited under the law.”

The person conducting the tests has to record the reason in writing. A complete record of the tests carried out in a clinic is also mandatory.⁴⁵ As stated above, an invasive pre-natal diagnostic procedure such as amniocentesis can only be carried out with the written consent of the pregnant woman⁴⁶ in the prescribed form.⁴⁷ Section 5(2) of the Act expressly stipulates that no person including the person who conducts the test "shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner."

Furthermore, as stated, the Act prohibits the use of pre-natal diagnostic techniques except for detection of genetic abnormalities and diseases⁴⁸ and states that no pre-natal diagnostic techniques shall be carried out by a person qualified to do so unless the pregnant woman is over thirty-five years of age, or has undergone two or more spontaneous abortions or the pregnant woman/her spouse has a family history of mental retardation or physical deformation, etc. However, when the Act was amended in 2003, Form 'F' was also amended to include 'a representative list of indications for ultrasound'. This list contains 23 reasons for which ultrasound can be used, including:

- Estimation of gestational age (dating)
- Evaluation of foetal presentation and position
- Evaluation of foetal growth parameters, foetal weight and foetal well-being
- Observation of intra-partum events, etc.

⁴⁴ Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic, Ultrasound Clinic and Imaging Centre.

⁴⁵ The PCPNDT Act, 1994, Proviso to s. 4 (3).

⁴⁶ The PCPNDT Act, 1994, s. 5(1) deals with the consent of the pregnant woman being taken by the medical practitioner after explaining to her all known side- and after-effects of such procedure to her; all this should be done in the language she understands. Finally, the medical practitioner is required to provide her with a copy of her written consent.

⁴⁷ Rule 10 of the PCPNDT Rules 1996 states that the written consent would be as per Form 'G'; given with the Rules in a language the person undergoing such procedure understands.

⁴⁸ The PCPNDT Act, 1994, s. 4 (2).

“The use of ultrasound has been allowed to monitor a pregnancy in addition to its use for detection of any genetic abnormality or disease.”

Thus, the use of ultrasound has been allowed to monitor a pregnancy in addition to its use for detection of any genetic abnormality or disease. A study by the Lawyers Collective highlights that ultrasound has now been allowed by the amendments in a large number of situations (23 indications) “not for detecting congenital abnormalities but for monitoring a pregnancy as part of antenatal care.”⁴⁹ This in effect means that in the process of monitoring a pregnancy, ultrasound can be misused. Ways and means of stopping this misuse, which do not compromise the reproductive health rights of women, have to be identified.

Penalties under the Act

Apart from the fact that the AA can suspend or cancel the registration of a clinic under Section 20 of the Act for a “breach of the provisions of the Act or Rules”, Section 22 of the Act punishes persons and organisations who advertise any facilities for pre-natal determination of sex or sex selection before conception with up to three years imprisonment and fine up to Rupees ten thousand. In one case, the Metropolitan Magistrate (MM) punished the accused with rigorous imprisonment for the maximum period of three years and with fine.⁵⁰

The offences and penalties under the act are provided in Section 23⁵¹ of the Act. If a medical personnel or owner of a clinic or an employee in the clinic contravenes any of the provisions of the Act or rules, he/she can be punished with imprisonment up to three years and with fine up to ten thousand and on any subsequent conviction, with imprisonment up to five years and with fine

⁴⁹ *Supra* n. 1, p. 9.

⁵⁰ *Mumbai Municipal Corporation v. Chaya Rajesh Tated and Anr.* C.C No. 10169/MS/2004 decided on 14/08/2009 as referred in Dr. Shalini P. Joshi, *Compilation and Analysis of Case-Laws on Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994* (UNFPA, 2011).

⁵¹ The PCPNDT Act, 1994, Act No. 57 of 1994, s. 23, reads: “Offences and penalties -

(1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

(2) The name of the registered medical practitioner shall be reported by the AA to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

(3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant women for the purposes other than those specified in subsection (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

(4) For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

up to fifty thousand under Section 23(1) of the Act. The provision also states that the name of the registered medical practitioner shall be reported to the State Medical Council concerned for taking necessary action.⁵²

Under Section 23(3) of the Act, a person who “seeks the aid” of any clinic for conducting a sex determination test has also been made punishable with a similar imprisonment of up to three years and fine up to Rupees fifty thousand. A second offence is made punishable with imprisonment up to five years and fine up to Rupees one lakh. Section 24 raises a rebuttable presumption that a woman “was compelled by her husband or other relative”⁵³ to undergo a diagnostic technique for

“The provisions recognise the vulnerable and secondary status of women within the Indian family and the fact that decisions regarding reproduction often vest with the husband and his family.”

sex selection and the previous section exempts a woman who has been compelled to go in for a sex-selection procedure from punishment.⁵⁴ These provisions were designed to protect women who are more often than not compelled and coerced to undergo sex selection. The provisions recognise the vulnerable and secondary status of women within the Indian family and the fact that decisions regarding reproduction often vest with the husband and his family.

In a *suo motu* case,⁵⁵ the High Court of Punjab and Haryana banned the advertisement of sex determination kits. The Court took “cognizance” of a newspaper report published in *Hindustan Times*, Chandigarh on 17 November 2007 under the caption, “Efforts to improve sex ratio in for a huge blow – Sex determination kits enter state” and had issued *suo motu* notice to the states of Punjab, Haryana and Union of India.⁵⁶ The Court asked for an affidavit from the government with regard to the utter disregard for the provisions of the PCPNDT Act, 1994 and PCPNDT Rules 1996 by the popular internet search engine ‘Google’, which provided links to websites like ‘www.GenSelect.com, www.4-gender-selection.com’ that offer sex determination kits for a small fee. Only after the data regarding import of gender testing kits/sex determination kits for the previous three years was gathered and the same did not show import of such kits did the Court subscribe to the State argument that adequate steps were being taken to prevent the sale of such kits.

In an interesting case⁵⁷ the Bombay High Court held that if a husband forces his wife to undergo a pre-natal diagnostic test, he would also be liable for offences like cruelty and criminal intimidation

⁵² The PCPNDT Act, 1994, Act No. 57 of 1994, s. 23(2).

⁵³ The PCPNDT Act, 1994 s. 24.

S. 24. Presumption in the case of conduct of pre-natal diagnostic techniques – Notwithstanding anything contained in the Indian Evidence Act, 1872, the court shall presume unless the contrary is proved that the pregnant woman was compelled by her husband or any other relative, as the case may be, to undergo pre-natal diagnostic technique for the purposes other than those specified in sub-section (2) of Section 4 and such person shall be liable for abetment of offence under sub-section (3) of Section 23 and shall be punishable for the offence specified under that section.

⁵⁴ The PCPNDT Act, 1994, s. 23 (4).

⁵⁵ *Court on Its Own Motion v. State of Punjab and Others* on 31 July, 2009 Civil Writ Petition No.17964 of 2007 on 31.7.2009.

⁵⁶ *Supra* n. 55, 1.

⁵⁷ In *Ajmal Khan S/o Jameel Khan and Ors. v. State of Maharashtra through Police Station Officer and Smt. Afrin Faisal* MANU/MH/0744/2011.

under the Indian Penal Code. This case shows how through progressive reasoning, a court can identify the multiple offences that can be attracted in a case of sex selection. It sets a desirable precedent which should be followed and endorsed by courts across the country. Another court held that even the attempt to commit an offence under the Act is punishable under Section 27⁵⁸ of the Act. In this case, in a sting operation, the doctor had agreed to perform the sex determination test.⁵⁹ This case laid down the important precedent that even an agreement to perform a

“Through progressive reasoning, a court can identify the multiple offences that can be attracted in a case of sex selection.”

diagnostic/medical procedure for sex selection would amount to an attempt to commit the act and is punishable.

The manner in which a crime is punished often shows the seriousness with which it is viewed. Though quite a few judgements have commented on the seriousness of the crime of sex selection, the sentences pronounced by the courts in these cases are often for much shorter periods than the maximum stipulated by the PCPNDT Act.

In one case the Court awarded a two year sentence instead of the maximum three year sentence even though it held that the punishment had to be a deterrent and the crime was a heinous one.⁶⁰ Non-maintenance of Form 'F' attracted a sentence of one year rigorous punishment and fine of Rupees five thousand which the Court considered a serious deterrent.⁶¹

However, in a case of gross violation of several sections of the Act,⁶² the accused was sentenced to rigorous imprisonment for three years and fined Rupees ten thousand. In this case the accused had neither the required training/experience for running the clinic nor had he registered his clinic under the Act. He was also communicating the sex of the foetus in violation of the law and not maintaining any records. No statutory notice was displayed in his clinic.

Certain sections of the IPC also punish persons who cause “miscarriage”⁶³ or do an “act to prevent a child being born alive or cause it to die after birth”.⁶⁴ Since the MTP Act already provides the circumstances under which a medical termination of pregnancy can take place, these sections, which were enacted in 1860, should be deleted. It is pertinent to point out that Section 312 makes a woman culpable if she “causes herself to miscarry”⁶⁵ but not otherwise.

⁵⁸ The PCPNDT Act, 1994, s. 27, reads as: “Offence to be cognizable and non-compoundable - Every Offence under this Act shall be cognizable, non-bailable and non-compoundable.”

⁵⁹ *Dr. Varsha Gautam v. State of U.P.* MANU/UP/0857/2006.

⁶⁰ *State v. Dr. Anil Sabhani and Anr.* CASE NO. 295/2 OF 2001 decided on 28.03.2006.

⁶¹ *Appropriate Authority v. Dr. Prashant Navnitlal Gujrathi Regular Criminal Case No. 5/2006* decided on 27.07.2010 as referred in Dr. Shalini P. Joshi, *Compilation and Analysis of Case-Laws on Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994*. UNFPA, 2011.

⁶² *Dr. V B Yadav, the District AA, Satara v. Dr. Prabhakar Krishnarao Pawar*, Regular Criminal Case No. 266/2005.

⁶³ The Indian Penal Code 1860, ss. 312, 313 and 314.

⁶⁴ The Indian Penal Code 1860, s. 315.

⁶⁵ *Dr. Jacob George v. State of Kerala* 1994 (2) SCALE 563.

Section 28 provides that a complaint can be filed either by the AA or any person authorised by the Central or State Government or AAs. Further, a person, who has given notice to the AA of not less than 15 days of the alleged offence and of his/her intention to make a complaint to the court, can also file a complaint.⁶⁶

Landmark Cases under the Act

Non-implementation of the Act

- The first landmark case to highlight the non-implementation of the PCPNDT Act was the *CEHAT v. UOI*⁶⁷ in which the Supreme Court lamented the fact that the law to prevent the practice of sex selection had not been implemented and that AAs at state and district levels had not been appointed. The CEHAT petition had also pointed out that the Central Supervisory Board was not meeting as stipulated and that no action had been taken against advertisements about facilities for pre-conception determination of sex or pre-natal sex selection. The Court

“The CEHAT petition had pointed out that the Central Supervisory Board was not meeting as stipulated and that no action had been taken against advertisements about facilities for pre-conception determination of sex or pre-natal sex selection.”

observed that it was *“apparent that to a large extent the PNDT Act is not (being) implemented by the Central or the State Governments.”*⁶⁸ It issued detailed directions to the Central and State Governments to hold regular meetings, review and monitor the implementation of the Act and ensure that AAs furnish regular quarterly reports on the registration of clinics and on the action that is taken against non-registered clinics, including the search and seizure operations carried out, and the actions on other complaints received by them. The Supreme Court also directed that all the Advisory Committees set up under the PCPNDT Act should regularly meet to advise the AAs

and ensure that the period between two meetings does not exceed 60 days as stipulated in the PCPNDT Rules. The Court also directed the Central and State Governments, apart from AAs, to create public awareness against the practice of sex selection. The Court issued pointed directions to AAs to carry out a survey of all the clinics and take action against persons and bodies which are operating without a valid registration and to give reports on actions taken by them. The Court pointed out⁶⁹ that it had learnt that AAs were only issuing warnings to unregistered clinics and that this was not proper as the AAs should take criminal action as per Section 23 of the Act. It further clarified that the AAs were not only empowered to take criminal action but were also supposed to search and seize documents, records, objects, etc. according to Section 30 of the Act.

⁶⁶ *Dr. Preetinder Kaur and Ors. v. State of Punjab and Ors.* 2011 CriLJ 876.

⁶⁷ (2003) 8 SCC 398.

⁶⁸ *Supra* n. 67, 2.

⁶⁹ Order dated 19.09.2001.

- Even after this, in a case⁷⁰ in 2008, the Orissa High Court had to reprimand the State Government for not implementing the Act. It ordered the State Government to constitute AAs within a period of six weeks from the date of the order and to take “strict measures to implement the provisions of the said Act.”⁷¹
- A recent Supreme Court ruling (March 2013) has recognised the continued lapses in the implementation of the law and has provided directions for urgent action. Some of these include regular meeting of the boards, monitoring of records by AA, mapping of registered and unregistered machines by the state and courts to dispose pending cases in 6 months.⁷²

Positive and Negative Judgements on Cancellation/Suspension of Registration of Diagnostic Clinics

While some Courts have held that the registration of a unit under the PCPNDT Act can be suspended or cancelled pending an inquiry, others have held that this should not be done.

- In a positive case,⁷³ the Court upheld the suspension of the registration of a clinic for indulging in acts prohibited under the PCPNDT Act. This was despite the fact that the gazette notification

“The Court stated that the action initiated by the AA could not be assailed on the ground that when it was done the gazette notification had not been issued.”

of the PCPNDT Act had not been issued. The Court stated that the action initiated by the AA could not be assailed on the ground that when it was done the gazette notification had not been issued. However in this case, the State Government had issued an ordinance to validate certain acts done by various authorities prior to the gazette notification through the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Haryana Validation Ordinance, 2009 issued on 21 July 2009.⁷⁴

- In another positive judgement, the Punjab and Haryana High Court held that when a mobile clinic is given a license the ultrasound machine in the vehicle cannot be removed from it. In this case the Court upheld the sealing of the clinic⁷⁵ as the ultrasound machine was not in the mobile clinic but in another area.
- In a negative judgement, the order of the AA cancelling the registration of a clinic was quashed on a technical ground that the petitioner had not been given an opportunity to be heard.⁷⁶ In this case the Court also held that since no pre-natal diagnostic technique was carried out

⁷⁰ *Hemanta Rath v. Union of India and Ors.* AIR 2008 Ori 71.

⁷¹ *Supra* n. 70, para 13.

⁷² *Voluntary Health Association of Punjab v. Union of India*, civil writ petition no. 349 of 2006 in the Supreme Court of India as decided on 04.03.2013.

⁷³ *Dr. Mrs. Sudha Samir v. State of Haryana & Ors.* Civil Writ Petition No. 18365 of 2009 in the High Court of Punjab and Haryana at Chandigarh as decided on 03.02.2010.

⁷⁴ *Ibid.*

⁷⁵ *Dr. Manoj Lamba v. State of Haryana and Ors.* MANU/PH/1267/2011.

⁷⁶ *Abhilasha Garg & Anr. v. The AA (PNDT Act) D.C. (East) and Ors.* MANU/DE/2708/2010.

in the clinic and there was only an agreement to terminate a pregnancy of a female foetus, this would not constitute a violation of the Act. The Court further stated that the AA could issue a new show cause notice and give the petitioner not only a proper opportunity to be heard but also a reasonable time to “cure the defect” (that is, to get the clinic registered). It is relevant to mention that no section of the Act states that time to cure the defect should be given to a person/clinic and the judgement is quite clearly erroneous. Also, an agreement to terminate the pregnancy for the reasons of sex selection would clearly amount to an

“ In a negative judgment, Court allowed de-sealing of machines during the pendency of the case even though the AA had suspended the registration of the unit on the grounds of misuse of ultrasound machines.”

attempt to commit the crime and would at least be punishable to that extent.

- In another case⁷⁷, the High Court converted the order of cancellation into one of suspension till the completion of the investigation by the Police. This was a case in which, during a sting operation, the sex of the foetus was communicated to the woman and thus it was a fit case in which cancellation could have been ordered.
- In yet another case⁷⁸, the Court allowed de-sealing of machines during the pendency of the case even though the AA had suspended the registration of the unit on the grounds of misuse of ultrasound machines.
- In a positive judgement, the High Court of Gujarat upheld the suspension of registration of a hospital as the PCPNDT registration of the radiologist who had been working there had been suspended. The clinic had also not intimated changes of personnel employed by it as mandated by the Rules. The petition was dismissed with an exemplary cost of Rupees twenty five thousand.⁷⁹

Positive and Negative Judgements Regarding Maintenance of Records and Procedural Obstacles

A large number of cases under the PCPNDT Act are cases of non compliance with the record keeping requirements under the Act. It has been found that a number of clinics, counselling centres and laboratories do not maintain proper registers and records as per the specified form under the PCPNDT Rules. While in quite a few judgements it has been held that records should be strictly maintained, in other judgements a lenient view has been expressed that record keeping is a procedural matter and non-compliance with this should not be taken to be a gross violation of the Act.

⁷⁷ *Dr. Sunil Fakay v. Government of NCT of Delhi, Directorate of Family Welfare and Ors.* MANU/DE/1397/2011.

⁷⁸ *D.A.A.P.K. Bansal v. K.P. Singh* referred by Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 105-6.

⁷⁹ *Manish Agrawal v. State of Gujarat and Ors.* (2010) 51 GLR 977.

The following judgements have emphasised that maintenance of records and following the rules is mandatory and is of critical importance. Many of these judgements have come after sting operations.

- In a judgement⁸⁰ delivered by the Gujarat High Court, it held that the provisions of the Act and Rules were mandatory and were required to be strictly complied with. In this case nine Form 'F's were not properly filled in and the details of the women undergoing ultrasonography were not filled in properly in the register. The Court also held that the accused were required to appeal to the Appellate Authority under the Act and could not approach the High Court directly.

“The Gujarat High Court held... once any inaccuracy or deficiency is found in maintenance of records, there is a presumption, against the person conducting the ultrasonography, of having violated the Act, which has to be rebutted with cogent evidence by that person and not the AA.”

- A judgement in *Asmita R. Patel v. State of Gujarat and Anr.* also held that the rules regarding maintenance of records are mandatory and are required to be strictly adhered to.⁸¹
- In another positive case⁸² from Gujarat, the High Court held that inaccurate records of ultrasonography would amount to a contravention of Section 5 (which deals with prohibiting the communication of the sex of the foetus and taking the written consent of the pregnant woman) and Section 6 (which prohibits determination of sex) of the Act and the onus would lie on the defaulter to disprove this. The Court held that *“the deficiency or inaccuracy in maintaining the record would ipso facto amount to contravention of Section 5 or 6 and no other allegations regarding the provisions of Section 5 or 6 being attracted are necessary... once any inaccuracy or*

*deficiency is found in maintaining the record, there is a presumption against the person conducting the ultrasonography that there is a contravention of the provisions of Section 5 or 6 of the Act, which has to be rebutted by cogent evidence. Hence, the onus lies upon the said person and not on the authority.”*⁸³

- Another important question was dealt with in the case of *Suo Motu v. State of Gujarat*,⁸⁴ which decided on the issue of non-maintenance of records. Before this case, the Gujarat High Court in the case of *Dr. Manish C. Dave v. State of Gujarat*⁸⁵ had held that the non-maintenance of records

⁸⁰ *Dr. Kalpesh J. Patel v. State of Gujarat and Ors.* MANU/GJ/0994/2011; also see *AA v. H.G. Thakkar Hari X-Rays, Colour, Doppler Sonography and Ors.*, Civil Appeal No. 8269 of 2009 arising out of SLP (C) No. 23358 of 2008, decided by Supreme Court of India.

⁸¹ 2009 (1) GLH 584.

⁸² *Hitesh D. Shah v. State of Gujarat*, Criminal Misc. Application No. 4406 of 2008 decided by the High Court of Gujarat on 19.05.2008.

⁸³ *Supra* n. 81, 6.

⁸⁴ Criminal Reference No. 3 and 4 of 2008 at High Court of Gujarat decided on 30.9.2008; See also *Dr. Shashi Bala w/o Dr. Gurdial Singh, Proprietor M/s Shashi Nursing Home, Una Road, Hoshiarpur v. State of Punjab through District AA-cum-Civil Surgeon, Hoshiarpur* CrI. Misc. No. M- 18278 of 2006 at Punjab and Haryana High Court at Chandigarh, decided on 06.05.2010.

⁸⁵ 2008 (1) GLH 475.

is a procedural lapse. In *Suo Motu v. State of Gujarat* the Court overruled this judgement and further held that improper maintenance of the record also has consequences other than prosecution for deemed violation of Section 5 or 6. It held that “inaccuracy or deficiency” in keeping records can also result in cancellation or suspension of registration of units under Section 20 of the Act,⁸⁶ which provides for cancellation or suspension of registration of the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in case of breach of the provisions of the Act or the Rules.

“A witness turning hostile is an obstacle that arises in quite a few cases. Sometimes important evidence like the original video or CD of the sting operation is not submitted in court.”

However, by the time this judgement was passed, the earlier judgement in the Manish Dave case had already led to the withdrawal of 11 cases. In some other cases, doctors had been let off with a warning that they should keep proper records. Only in a few cases were charge-sheets issued.⁸⁷ In many cases the matter was referred to a larger bench.

Some other negative cases which show the harm that a bad precedent can cause are mentioned below and highlight the lackadaisical manner in which these cases are prosecuted.

A witness turning hostile is an obstacle that arises in quite a few cases. Sometimes important evidence like the original video or CD of the sting operation is not submitted in court. It has been noted in some cases that the AA does not follow the proper procedure and/or collect sufficient evidence. In one case,⁸⁸ instead of suspending the registration of a clinic, the AA cancelled it. This was obviously an inappropriate and hasty decision which should not have been taken at this stage of the case. This kind of precipitous action gave the accused a technical ground to challenge the action of the AA. In another case, the AA did not quote the correct section of the Act while forwarding the complaint.⁸⁹ Delay in proceedings is another obstacle that stops the law from being effective.

⁸⁶ The PCPNDT Act, 1994, s. 20 reads: “Cancellation or suspension of registration -

(1) The AA may suo moto, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

(2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the AA is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

(3) Notwithstanding anything contained in sub-sections (1) and (2), if the AA is of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).”

⁸⁷ Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 173.

⁸⁸ *Brar Ultrasound Clinic, Sri Ganganagar v. State of Rajasthan and Others* Civil Writ Petition No. 2496/2006 in the High Court of Rajasthan.

⁸⁹ *State of Rajasthan v. Dr. Naini Maiyyar, Coordinator, Pariwaar Sewa Clinic in the Court of Additional Chief Judicial Magistrate*, Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 150.

- In a case⁹⁰ filed in Punjab, the complaint was dismissed as the centre was registered as an ultrasound scan centre and the Court surprisingly held that the details required in Form 'F' did not need to be filled in as per the Rules in such centres.
- In a decoy operation,⁹¹ the sex of the foetus was communicated to the decoy for a payment of Rupees four thousand. The ultrasound machine of the nursing home was sealed and the DAA seized the documents. Records reflected that the decoy's name had not been included in the OPD register and no Form 'F' was filled in her name, though an OPD slip was prepared and "one female child" and "LMP-3 months" were written on it. In other Form 'F's maintained by the nursing home it was found that the pregnant women had been advised MTP and the form 'F's were not properly filled. This case is still pending but the decoy has turned hostile. The case highlights the difficulties in prosecuting some of these cases.
- In another decoy operation⁹² in which the doctor had revealed the sex of the foetus after taking money and the clinic was guilty of not maintaining records, the Gujarat High Court quashed the case and directed release of the ultrasound machines.
- In a decoy operation⁹³ by a TV channel, the AA conducted a search and seizure operation at the centre owned by the accused. During this operation, they suspended the registration of the centre and sealed two ultrasound machines. The Appellate Court in this case closed the prosecution case after just two hearings. The Appellate Court, however, commented that the Magistrate's Court did not fulfil its duty to secure the evidence, which had been relied upon by the complainant

“Delay in finally deciding cases under the PCPNDT Act is a major area of concern.”

before it. This case was pending for three years at the initial stage and the Prosecutor did not produce original records, including the CD of the decoy operation despite being given several opportunities.

- Delay in finally deciding the matter is a major area of concern. The Division Bench of Bombay High Court in *Dr. Suhasini Karanjkar v. Kolhapur Municipal Corporation* also showed its distress over the fact that a number of cases for trial of offences registered under the

Act were pending in courts of the Judicial Magistrate First Class for long periods, sometimes up to six years, and in a few cases as long as eight years. Therefore, it directed that all cases under the Act shall be taken up on top priority basis and these should be tried and decided with utmost priority and preferably within one year. It also asked for fast disposal of criminal cases instituted in the year 2010 and prior thereto.

⁹⁰ *State of Punjab v. Pushpa Maternity Home*, Criminal File No. 34 of 29/11/2005 in the Courts of Mrs. Dimple Walia, CJM, Mansa, Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010.

⁹¹ *State of Haryana v. Dr. Ved Prakash Agarwal Proprietor, Agarwal Nursing Home, Ultrasound & X-ray Clinic*, Kurukshetra, Haryana, Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 156.

⁹² *Dr. Kaushik Babulal Shah v. District AA, Ahmedabad*, Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 149.

⁹³ *Dr. (Mrs. Shashi Mehta) CDMO and AA under the Act v. Dr. Pawandeep Singh Kohli*, Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 153.

Safeguarding the Right to Abortion

An important issue which has arisen in various fora including in courts⁹⁴ is how to safeguard a woman's right to abortion while campaigning and fighting for an end to sex selection, a form of gender biased discrimination. Certain groups and individuals are in favour of banning all abortions, without considering the fact that its only when sex determination takes place, can selective

“An important issue which has arisen in various fora including in courts is how to safeguard a woman's right to abortion while campaigning and fighting for an end to sex selection.”

abortions follow. Such dramatic propositions to curb all abortions are hardly the solution to addressing gender biased sex selection. On the contrary, they deny women their reproductive rights and a rightful access to safe MTP services which are permitted by law in India. The Medical Termination of Pregnancy (MTP) Act allows abortion on several grounds, including failure of contraception.⁹⁵ *“A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the sex of the foetus but because of other circumstances laid down under the MTP Act.”*⁹⁶

Recommendations

The PCPNDT Act has not been fully effective as there has been a lack of will to implement the Act. The draft report of the Sectoral Innovation Council⁹⁷ has reflected on the widespread misuse of diagnostic techniques in violation of the Act and has come to the conclusion that the inspecting mechanism at the national and state levels is either ineffective or dysfunctional. It has further pointed out that there is no regulation on sale and purchase of ultrasound machines which are flooding the urban, rural and even remote areas. While there are around 40,000 registered diagnostic centres, the number of machines has been estimated to be over 1,50,000.⁹⁸ Unregistered centres with ultrasound machines continue to function.

⁹⁴ *Vinod Soni & Anr. V. UOI* 2005 (3) MLJ 1131

A Division Bench of the Bombay High Court in this case upheld the constitutionally validity of the PCPNDT Act and stated that “The right to personal liberty cannot expand by any stretch of imagination to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide... Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself be a right.” (sic)

⁹⁵ *Vijay Sharma v. UOI* AIR 2008 Bom 29.

The Bombay High Court in this case dealt with the MTP Act and observed, “It (MTP Act) seeks to liberalize certain existing provisions relating to termination of pregnancy as a health measure - when there is danger to the life or risk to physical or mental health of the woman, on humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a mentally ill woman, etc. and eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities and diseases. It does not deal with sex selective abortion after conception or sex selection before or after conception.”

⁹⁶ *Supra* n. 95, Para 17.

⁹⁷ Constituted by the Ministry of Women & Child Development vide its Notification No. 6-20/2011-CP, dated 16 February 2012.

⁹⁸ Draft Report of the Sectoral Innovation Council, Constituted by the Ministry of Women & Child Development vide its Notification No. 6-20/2011-CP, dated 16 February 2012, 14.

The report has further pointed out that convictions of medical practitioners who have a huge vested interest in these illegal practices remain low, and even machines that are seized under the Act are mostly released through the court. The strong links between sections of a powerful medical fraternity that make profits through the use of sex-selection technologies and political and administrative elements have also rendered the law ineffective. Necessary records are not being maintained; even F forms are rarely filled, and those that are, often do not contain correct data.⁹⁹ While acknowledging the role played by socio-cultural factors in promoting sex selection, the report upholds the importance of implementation of the PCPNDT Act, emphasising that it

“The strong links between sections of a powerful medical fraternity that make profits through the use of sex-selection technologies and political and administrative elements have also rendered the law ineffective.”

should “provide the critical backdrop”,¹⁰⁰ as a socio-cultural approach alone neglects the criminal nature of sex selection:

[sex selection] is an organised crime committed for money, in which family members of the pregnant women and many of the elite professionals like doctors are active perpetrators. Till such time, the criminality of the act of sex selection is brought into focus [by] implementation of law rather than highlighting the socio-cultural factors, it will not be possible to make any impact on the low sex ratio in pockets of the country.¹⁰¹(sic)

Of the 1,036 ongoing cases, a very small percentage, possibly 10 per cent, relates to charges of communication of sex of the foetus.¹⁰² A majority of the cases are for non-maintenance of records and non-registration of ultrasound machines. Even in cases following widely publicised decoy operations, no action has been taken against the doctors concerned. For over a decade, the Medical Council of India refused to change its rules to include sex selection as a ground to de-license doctors. In Rajasthan when the licenses of 25 or so doctors were suspended in 2006 following a statewide campaign, the Secretary of the Medical Council who was held responsible for the suspension of the licenses by the medical fraternity was removed and the suspensions rescinded. The DM of Hyderabad was physically assaulted by leading members of the Hyderabad Medical Association because of his efforts to implement the law.

Recommendations Pertaining to Implementation of the Act

- The Central and State Governments should ensure that the Supervisory Boards are properly constituted and have regular meetings.
- An adequate number of AAs should be constituted in all the affected districts where the sex ratio has fallen and is skewed. While medical doctors could be involved in Act implementation,

⁹⁹ *Ibid.*

¹⁰⁰ *Supra* n. 96, 16.

¹⁰¹ *Supra* n. 96.

¹⁰² Brinda Karat and Sabu George, ‘Don’t trash this law, the fault lies in non-implementation’, *The Hindu*, 4.2.2012.

they need not be the only AAs. Other officials should also be appointed as AAs to address the conflict of interest.

- State Inspection and Monitoring Committees (SIMCs) should be formed in every state with the objective of covering the entire state, particularly the vulnerable districts which show a skewed child sex ratio.
- The AAs should maintain complete records of all the registered clinics, and the buying and selling of ultrasound machines and other diagnostic tools/machines. AAs should be made fully accountable under the Act.

“Appropriate budgetary allocation should be made to create awareness about the Act and to hold sensitisation programmes for target groups like doctors.”

- The report of the Sectoral Innovation Council had recommended that the compilation and listing of all the ultrasound centres (registered and unregistered) in districts should be carried out by involving the local NGOs with the help of funds from the account of the AA.

It had also suggested that a chairperson or representative from the State Women’s Commission should be appointed in the State AA and the SIMC should help in monitoring.

- Appropriate budgetary allocation should be made to create awareness about the Act and to hold sensitisation programmes for target groups like doctors. Gender sensitisation and legal literacy programmes should also be carried out in districts with adverse child sex ratios.
- Certain provisions in the law should also be revisited to provide immunity for CSOs/NGOs from counter cases. This would ensure that valuable time and resources are not wasted in responding to frivolous and unjustified petitions filed in retaliation by accused parties.
- While there have been some positive and progressive judgements under the Act, there have also been several negative judgements. The latter highlight the need to carry out an intensive programme of gender sensitisation of the judiciary on the social implications of the issue of sex selection and non-implementation of the PCPNDT Act.

Other Laws Which Have a Direct or Indirect Impact on Sex Selection

Apart from the implementation of the PCPNDT Act, other laws which have a direct or indirect impact on sex selection also need to be examined and dealt with as part of a multi-pronged approach to address the socio-economic and cultural factors linked to son preference and sex selection. The report of the Sectoral Innovation Council had emphasised that implementation of the PCPNDT Act must be accompanied by a robust legal system that establishes ‘justiciability’ for women through effective legislation protecting the interests of women throughout their life (as has also been underscored through this study).

Sex selection is not a crime that forms an isolated instance of gender-biased discrimination, it sits in the context of other particular patriarchal practices. The laws pertaining to these also need to be addressed to give full effect to the PCPNDT Act.

Some Specific Recommendations

- To strengthen the economic rights of girls and women and to give them an equal status in the home, it is essential that the inheritance laws in all the different personal laws and in the Land Reform Acts should give equal rights to women. Legal and other measures should be taken to

“Studies have shown that one of the main reasons for the skewed child sex ratio is the intensification of the practice of dowry across castes and communities throughout India.”

ensure that their right to inherited property is not divested by means of a Will or other legal instruments. Apart from this, an equal right to marital property (property which has been acquired by both spouses) should be given to the wife.

- The Dowry Prohibition Act should be implemented and strengthened by making appropriate changes in the law to clearly define dowry and to stop extravagant weddings. Studies have shown that one of the main reasons for the skewed child sex ratio is the intensification of the practice of dowry across castes and communities throughout India.
- Studies¹⁰³ have also shown how coercive tactics and laws to enforce the two-child norm have resulted in sex selection and discrimination against the daughter. Thus, the struggle against coercive laws to enforce the two-child norm is “part of the struggle against illegal sex selection and gender discrimination, and any comprehensive policy must target these faulty population control policies.”¹⁰⁴
- The Right to Education Act should be implemented and government schools should be expanded and improved. Essential facilities that girls require like clean and separate washrooms should be instituted to ensure their health and safety in the school environment.
- A witness protection law and programme is necessary to ensure protection of the ‘decoy’ so that he/she is not pressurised and coerced into turning hostile.
- A centrally sponsored Social Security scheme for old people should be set up, whereby it will become possible for parents belonging to all income groups not look upon their children, particularly only sons, as a means to support in old age.
- Employment opportunities, particularly for women should become an area of high priority for the government to ensure economic independence and empowerment.

¹⁰³ See Chapter V, ‘The Two-child Norm and Its Impact on Son Preference and Daughter Discrimination’.

¹⁰⁴ Brinda Karat and Sabu George, ‘Don’t trash this law, the fault lies in non-implementation’, *The Hindu*, 4.2.2012.

- A law against compulsory marriage and for marriage by choice should be enacted. This law should punish crimes committed in the name of 'honour' and provide protection to young couples who decide to marry and live with each other. This law should hold the police accountable if they do not take immediate steps to provide safety to the couple or if they take any action against the couple.

In conclusion, the recommendations made in the chapters on Dowry, Inheritance Laws, Child Marriage Laws, Laws related to Two-child Norm and the other laws concerning dignity and equality, in this study also form a complement to the effective implementation of the PCPNDT Act if a further decline in child sex ratios is to be arrested.

The Two-Child Norm and Its Impact on Son Preference and Daughter Discrimination

The National Population Policy (NPP) 2000 tries to affirm the “commitment of the government towards voluntary and informed choice and consent of citizens while availing reproductive health services, and continuation of the target free approach in administering family planning services”¹. The short-term objective of the NPP 2000 was “to meet the unmet need for contraception and health infrastructure” and the ultimate objective was “to achieve a stable population consistent with sustainable development by 2045”.² These objectives were sought to be achieved by certain goals, including bringing down infant and maternal mortality rate, promoting late marriage, creating access to information, counselling and making available a variety of contraceptive choices along with attendant services. The NPP is therefore meant to be a gender sensitive document which addresses the reproductive health needs of women and gives centrality to voluntary and informed

¹ Government of India (2000), Ministry of Health and Family Welfare, *National Population Policy 2000*, New Delhi.

² Mohan Rao, ‘India’s Population Policy: A Critique’, *Background Material on The People’s Tribunal on Coercive Policies and Two Child Norm*, 2004, available with Human Rights Law Network, 65, Masjid Road, Jangpura, New Delhi-14, p. 1-2.

choice by empowering women. Contrary to the NPP, state policies tend to enforce a two-child norm thereby violating the NPP in letter and spirit.

In pursuit of a small family goal, certain states have adopted coercive legislations prohibiting persons with more than two children from holding posts in the Panchayats, “urban local bodies, cooperatives and other agriculture produce market committees and also for entry and promotions for employees in public services and to decide the eligibility for government’s welfare programmes and services. Rajasthan and Haryana introduced the legislation in 1993 for Panchayats, Odisha introduced it for Zilla Parishads in 1993 and for village and block level Panchayats in 1994.”³ Andhra

“In pursuit of a small family goal, certain states have adopted coercive legislations prohibiting persons with more than two children from holding posts in the Panchayats.”

Pradesh also enacted a similar law in 1994.⁴ Other states such as Madhya Pradesh, Himachal Pradesh and Maharashtra introduced it in 2000 and 2003, while in Gujarat it was introduced in 2005.

Chhattisgarh was a part of Madhya Pradesh when this law was enacted in 2000 and hence adopted it. However, owing to public pressure and campaigns against the law by certain groups, Madhya Pradesh, Chhattisgarh, Himachal Pradesh and Haryana have struck down the two-child norm for contesting elections to municipal and panchayat bodies.

The two-child norm is a part of the population policies of States such as Uttar Pradesh,⁵ Madhya Pradesh,⁶ Rajasthan⁷ and Maharashtra⁸. These policies further disqualify persons married before the legal age of marriage from government jobs and link financial assistance to Panchayats to family planning performance. The policy of Madhya Pradesh links the provision of rural development schemes, income generating schemes for women, and poverty alleviation programmes as a whole to performance in family planning. Both Rajasthan and Maharashtra make adherence to a two-child norm a service condition for state government employees. Maharashtra had stipulated that the two-child norm would be an eligibility criterion for coverage under a range of schemes for the poor, including access to the Public Distribution System and education in government schools. However, the Maharashtra government had to roll back these criteria after a massive popular protest. A similar policy exists in Andhra Pradesh and further links construction of schools, other public works and funding for other rural development schemes to performance in family planning.⁹

³ Nirmala Buch, ‘Law of Two-Child Norm in Panchayats: Implications, Consequences and Experiences’, *Economic and Political Weekly*, 40(24); 11-17 June 2005. p. 2421.

⁴ Andhra Pradesh Municipal Laws (Second Amendment) Act, 1994 and Andhra Pradesh Panchayat Raj Act, 1994.

⁵ Government of Uttar Pradesh (2000): *Population Policy of Uttar Pradesh*, Department of Health and Family Welfare, Lucknow.

⁶ Government of Madhya Pradesh (2000): *Madhya Pradesh Population Policy*, Department of Health and Family Welfare, Bhopal.

⁷ Government of Rajasthan (1999): *Population Policy of Rajasthan*, Department of Family Welfare, Jaipur.

⁸ Government of Maharashtra (2000): *Maharashtra State Population Policy*, Department of Public Health, Mumbai.

⁹ Government of Andhra Pradesh (1997): *Andhra Pradesh State Population Policy*, Department of Family Welfare, Hyderabad.

The Text of the Acts

The Acts governing elections to Panchayats and Municipal Councils typically restrict the number of children that the elected representative can have to two, with some exemptions. The Maharashtra Act, for instance, states that no person can be a member of a Panchayat or continue as such if she/he has more than two children. It, however, makes an exemption for persons who already have more than two children on the date of commencement of the Act. It also makes a further exemption for those persons who may have a child “within the period of one year from the date of such commencement”.¹⁰

The Andhra Pradesh Act also prescribes similar conditions for contesting the Municipal Council and Panchayat elections.¹¹

“The law rested on the assumption that when parties could have only two children, they would not select the sex of their child in adhering to the norm. This assumption was proved to be wrong.”

The provision was introduced in India for elected leaders at the level of Panchayati Raj Institutions, Zilla Parishads and Nagar Palika assuming that it would set a good example and encourage people to adopt contraceptive measures,¹² the justification being that community members would perceive the elected representatives as “role models”.¹³ The law also rested on the assumption that when parties could have only two children, they would not select the sex of their child in adhering to the norm. This assumption was proved to be wrong.

The two-child norm and the laws and measures to effectuate it have widely been recognised to be against basic human rights and the rights of the most vulnerable and the weaker sections of society, including women.¹⁴ It has also been widely reported by social activists and studies that the two-child norm advances son preference and daughter aversion as most people, if they are forced to have a small family, automatically prefer sons to daughters. In one study it was found that a significant number of respondents resorted to sex selection to adhere to the two-child norm.¹⁵

¹⁰ The Bombay Village Panchayats Act, 1958

“14. (1) No person shall be a member of a panchayat (or) continue as such, who -

(a) xxx

(j-l) has more than two children:

Provided that a person having more than two children on the date of commencement of the Bombay Village Panchayats and the Maharashtra Zila Parishads and Panchayat Samitis (Amendment) Act, 1995 (hereinafter in this clause referred to as “the date of such commencement”) shall not be disqualified under this clause so long as the number of children he had on the date of such commencement does not increase:

Provided further that a child or more than one child born in a single delivery within the period of one year from the date of such commencement shall not be taken into consideration for the purpose of disqualification mentioned in this clause;”

Clause (i-l) was inserted by Mah. 44 of 2000, s. (2)(a).

¹¹ Andhra Pradesh Municipal Laws (Second Amendment) Act, 1994 and Andhra Pradesh Panchayat Raj Act, 1994.

¹² *Supra* n. 3, p. 2422.

¹³ Leela Visaria, Akash Acharya and Francis Raj, ‘Two-Child Norm: Victimising the Vulnerable?’, *Economic and Political Weekly*, 7.1.2006, p. 41.

¹⁴ *Ibid*, p. 47.

¹⁵ *Supra* n. 3.

The two-child norm has affected the women adversely as they ‘face [a] double-edged challenge’. They often do not take decisions regarding family building, “yet they suffered [the] consequences of implementation of the norm directly (as candidates) or indirectly (as spouse of those disqualified).”¹⁶ Another study has pointed out that the two-child norm has been totally ineffective because of non-adherence to the norm as most of those who were supposed to adopt the use of contraceptives did so only after achieving their ideal family size (with at least one son).¹⁷ Some saw the benefits of having a son far outweighing the disadvantages of not being an elected representative.¹⁸ Thus,

“The laws and policies to promote the two-child norm... provided, and continue to provide, an impetus to son preference, perhaps inadvertently.”

the laws and policies to promote the two-child norm, instead of going against cultural and social norms which propagate son preference, provided and continue to provide, an impetus to son preference, perhaps inadvertently.

The introduction of the two-child norm in elections to local bodies also resulted in several court cases. Aspirants to panchayat posts or those already elected were forced to fight prolonged legal battles. The targets of these laws were often those from marginalised communities, including those from the scheduled and backward castes. These and other poor people could ill-afford to fight the lengthy legal battles that were inevitable in these cases.¹⁹ The court proceedings also distracted these representatives from carrying out development work since it is mostly these elected representatives from backward communities, including women, who have been reported to have carried out developmental work such as getting roads built, school buildings constructed and hand pumps installed during their tenure.²⁰

The policy makers not affected by the norm ignored the distinction between informed responsible choice of a small family and the state’s responsibility to facilitate such choice by social development and access to quality health and family welfare services, on the one hand, and the coercion inherent in a norm applied through a law, its limitations and negative impacts, on the other. Thus, the ill-effects of the two-child norm on sex ratio, gender equality, women’s empowerment and its impact as a hazard to the reproductive health of women have been ignored. The norm has also resulted in neglect of the third child, especially a girl (who may have been given in adoption or kept away from the mother to bypass the norm). All this has finally resulted in further eroding the social status of women.²¹

¹⁶ *Ibid*, p. 2428.

¹⁷ Claire B. Cole, ‘Responding to the Two-Child Norm: Barriers and Opportunities in the Campaign to Combat Target-Oriented Population Policies in the Post-ICPD India’, *A Collaborative Study by the Centre for Health and Social Justice and the Community-Oriented Public Health Practice Program at the University of Washington School of Public Health*, May 2009.

¹⁸ *Supra* n. 3.

¹⁹ *Supra* n. 13, p. 2426.

²⁰ *Ibid*; also see *Supra* n. 3.

²¹ *Supra* n. 3, p. 2429.

Court Proceedings and Judgements

In the NHRC Declaration of 2003 it was stated that, "...the propagation of a two-child norm and coercion or manipulation of individual fertility decisions through the use of incentives and disincentives violate the principle of voluntary informed choice and the human rights of the people, particularly the rights of the child".²² It has further been acknowledged that "the violation of basic rights has not worked in the past and is unlikely to work now."²³ Several challenges on the constitutionality of these Acts have also been made in the courts, but the courts have repeatedly refused to see that the laws enforcing the two-child norm violate the principle of

“The laws enforcing the two-child norm violate the principle of voluntary informed choice and are anti-human rights, anti-woman and anti-poor.”

voluntary informed choice and are anti-human rights, anti-woman and anti-poor.

In fact, the states have also explicitly acknowledged in their policy documents that a conducive environment for a small family norm can only be created by ensuring gender equality, empowering women and improving their status through education,²⁴ but the manner of enforcing the two child norm has remained coercive. Some states have, however, been forced to delete the provisions from their respective Panchayati Raj Acts and Zilla Parishad Acts. These states are Madhya Pradesh, Chattisgarh, Haryana and Himachal Pradesh.²⁵

Nirmala Buch's study on the two-child norm in Panchayats has highlighted the various ploys that were used to circumvent the law. This study shows that these strategies go against and adversely affect the girl-child and women. Some of these strategies include cases of prenatal sex determination, desertion of the girl-child, desertion and divorce of the wife, and bigamy. These have also included seeking abortion at an advanced stage of the pregnancy; giving the third child in adoption, particularly if it is a girl; or denying the paternity of the third child by making allegations of adultery against the wife or by stating that the marriage was not valid. Another strategy used was to be admitted to hospital for delivery under a false name. There have also been cases in which a newborn girl child has been left with someone else and has died due to neglect.

²² NHRC, *Declaration: National Colloquium on Population Policies*, January 2003, available at < <http://india.unfpa.org/drive/ColloquiumReport.pdf>>, as viewed on 13.4.2012.

²³ *Supra* n.13.

²⁴ *Ibid*; Also See: Government of India, *Second National Commission on Labour Report*, (Ministry of Labour and Employment: 2002), which states:

"The population policy, particularly the two-child norm has an intimate relationship with the maternity benefits and entitlements issue. There are two schools of thought on this. One school argues that discrimination is practiced once the issue of maternity entitlements is linked to the two-child norm. Examples of the States of Maharashtra and Rajasthan are cited, where women with more than two children are not even allowed to avail of the Public Distribution System. It has also been cited as one of the reasons for the failure of existing maternity entitlement schemes. One example that is cited is that of the Muthulakshmi Reddy Scheme which has benefited only 20 women in the whole State of Tamil Nadu." available at < <http://labour.nic.in/lcomm2/2nlc-pdfs/Chap-9partB.pdf>> as viewed on 15.7.2012.

²⁵ Please see section on "Abolition and Retention of the Two-Child Norm".

Strategies Used to Deny the Existence of a Child

“Representatives have used many strategies to deny the birth of a child, have hidden and misreported children or even tampered with or provided contrary documents. In Rajasthan the study team came across a variety of methods that had been used. In one case the child’s horoscope, details on the ration card and school records were provided as proof, but even this did not work. In another case the ANM’s records had been tampered. In a third case the doctors certified that the child was not of the representative and in a fourth the woman representative tried to hide her child among the other children in her joint family. In one case the OBC sarpanch went for a sex-determination test and then went for an induced abortion of the female foetus to avoid disqualification.

In Haryana the study team came across different strategies to avoid disqualification. The common practice in Gurgaon district was to obtain stay orders from a higher authority. There were also five instances where the disputed children had been given in adoption to near relatives and adoption deeds obtained in some cases.

From interviews with representatives and from key informants it was seen that different methods were adopted to provide evidence in Andhra Pradesh, such as producing certificates – birth certificates as well as sterilisation certificates, including certificates of failed sterilisation. There were also cases of desertion of wives in this state. In Odisha the desire to contest a complaint was less as the people were poorer and could not afford prolonged litigation. However, there were cases where the representative provided documents to prove that the complaint was ill-founded.

In Madhya Pradesh tactics used to avoid disqualification ranged from expressing ignorance about the norm to pushing the date(s) of conception prior to the cut-off date. For this, they used anganwadi/ANM records and ration cards. Some had given their children in adoption to relatives. In one case the couple planned to divorce each other to avoid disqualification.”

– Nirmala Buch, ‘Law of Two-Child Norm in Panchayats: Implications, Consequences and Experiences’, *Economic and Political Weekly*, 40(24); 11-17 June 2005. p. 2421-29

Constitutional Validity of the Laws Enforcing the Two-Child Norm

As stated before, while discussing the Constitutional validity of the laws in pursuance of the two-child norm the Courts have overwhelmingly supported the laws in what they have considered as ‘national interest’. They have refused to see that the coercive methods adopted to promote the two-child norm are in fact in violation of the Constitutional rights guaranteed under the Fundamental Rights Chapter of the Constitution. They have also refused to see that the two-child norm cannot be enforced through such coercive measures.

Some of the cases which demonstrate the manner in which the courts have decided whether the various sections which promulgate the two-child norm are valid are as under:

- In one case,²⁶ the petitioners challenged the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994. The petitioners in this case argued that their right to privacy under Article 21 of the Constitution had been violated as the right to marry and the right to procreate was a part of the right to privacy. The petitioners had also argued that the right to fight an election is a fundamental right. The Court, however, rejected the challenge and held that the: *“Right to privacy or a right to marriage may be a right under Article 21 of the Constitution of India, but such a right is not absolute. It is one thing to say that the person has a right to privacy or right to marriage and consequently right to procreation, but the same would not mean that no restriction as regards the said right can be put for other purposes whatsoever.”*

“The petitioners... argued that their right to privacy under Article 21 of the Constitution had been violated as the right to marry and the right to procreate was a part of the right to privacy... and the right to fight an election is a fundamental right.”

The High Court therefore observed that right to privacy is not an absolute right and termed “population explosion” as *“a matter of great concern. If certain measures are effected for controlling the population explosion, it cannot be said that such law would be unconstitutional.”* It quoted an earlier Rajasthan judgement²⁷ which had stated that *“The disqualification provided in Section 19(c) cannot be said to be against the basic human dignity or against the right to life and personal liberty. The right to be elected is neither a fundamental right nor a Common Law right. It is a statutory right which flows from the statute. A statutory right created under the statute is subject to the limitations provided under a particular statute.”*

- Another negative judgement which set a precedent that was subsequently followed in 39 cases, was the 2003 Supreme Court case, *Javed v. State of Haryana*.²⁸ In this case the Petitioners contended that Sections 175 (1) (q)²⁹ of the Haryana Panchayati Raj Act, 1994 were violative of certain fundamental rights in the Constitution as they violated Articles 14, 21 and 25 of the Constitution including the right to equality, the right to life and the freedom to practice a

²⁶ *Elkapalli Latchaiah and Another v. Govt. of A. P. and others* 2001(5) ALD 679; 2001(5) ALT 410, para 9; Also see *N.P. Ponnuswami v. Returning Officer, Namakkal*, [1952] 1 SCR 218; *Srinivasulu v. Government of Andhra Pradesh and Ors.* 1998 (6) ALD 310; *Are Gangadhar v. Zila Praja Parishad, Karimnagar* 1999 (5) ALD 585; *B.K. Parthasarathi v. Govt. of A.P.* 1999 (5) ALT 715 (DB); *B.K. Parthasarathi v. Govt. of A.P.* 1999 (5) ALT 715 (DB).

²⁷ *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj 250, MANU/RH/0059/1997, para 37.

²⁸ AIR 2003 SC 3057.

²⁹ The Haryana Panchayati Raj Act, 1994, s. 175. (1), reads: “ No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who -
xxx xxx xxx xxx xxx xxx

(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;”

A Negative Judgement of the Supreme Court

In Javed's case the Supreme Court interpreted the National Population Policy, 2000 and held that the two-child norm in the Haryana Panchayati Raj Act, 1994 was not violative of the fundamental rights enshrined in Articles 14 and 21 of the Constitution of India. The Court held that *"the disqualification... on the right to contest an election by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonability. Rather it is a disqualification conceptually devised in national interest."*

The Supreme Court further held, *"one of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. The disqualification enacted by the provision seeks to achieve the objective by creating a disincentive. The classification does not suffer from any arbitrariness. The number of children, viz., two is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny.... The impugned disqualification does have a nexus with the purpose sought to be achieved by the Act. Hence, it is valid."*

It also stated *"A legislation by one of the States cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens simply because the Parliament or the Legislatures of other States have not chosen to enact similar laws. No fault can be found with the State of Haryana having enacted the legislation. It is for others to emulate."*

The Court observed, *"the torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress" and quoted a passage saying, "it is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively; therefore, the population control assumes a central importance for providing social and economic justice to the people of India" and held that the provision could not be said to be violative of Article 21 of the Constitution however wide a meaning one may give to the Article.*

religion, respectively. The petitioner contended that the Sections were arbitrary and against the right to life guaranteed under Article 21 of the Constitution which included the right to privacy and therefore the right to procreate. The petitioner also contended that it was unfair that while other elected representatives to the Parliament and State assemblies did not have to follow the two-child norm, he was forced to follow this norm. He also argued that as a Muslim he was entitled to have as many children as he wanted. Finally, the petitioner contended that the right to fight an election was a Fundamental Right. The Court, however, held that the relevant sections of the Haryana Panchayati Raj Act were not violative of the Constitution and the right to fight an election was not a fundamental right.

Jharmal v. State of Haryana (2001) ILR 2 Punjab and Haryana 277

In *Jharmal v. State of Haryana*, an elected Sarpanch again challenged the constitutionality of the two-child norm provision of the Haryana Act apprehending that he may not be disqualified from his post. The Punjab and Haryana High Court while deciding the case saw it fit to make the following remarks:

“for the poor in the country, procreation appears to be the only recreation. Thus, the (population) growth continues. The numbers continue to multiply. A check is a national imperative. The impugned provision is a small step, the purpose is laudable. The example is worth emulation. It suffers from no legal infirmity”.

Going further than even what the Government envisaged, the Court gave the following advice, *“It may be advisable for the Parliament and the State Legislatures to enact laws imposing similar restrictions even in respect of various other offices. However, till such time as a similar provision is made, it cannot be said that Section 175(1) (q) is unconstitutional.”*

- In yet another case in 2003, the Supreme Court upheld the provision for the two-child norm under the Haryana Panchayati Raj Act, 1994 and reiterated that *“Section 175(1)(q) is a measure in the direction that there should be smaller families. . . . Having a small family is in consonance with the national policy.”*³⁰

Though this judgement and its ill-effects have been widely criticised and the Haryana law itself has been repealed now, the judgement has been followed by various High Courts. For instance, the Chattisgarh High Court upheld this norm under the Chhattisgarh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 in a 2003 case (MANU/CG/0054/2003).

- The Rajasthan High Court held in a case³¹ that the ability of the Sarpanchs, Panchs or Members of a Panchayat Raj Institution to perform their functions is unaffected by the number of children they have. The Court, however, held that population explosion has a definite impact on the State economy and it is with the purpose of controlling the state’s population that this provision was enacted. It erroneously stated that the two-child norm as contained in the impugned provisions implemented the mandate of the Directive Principles of State Policy and therefore the provision did not violate Articles 25 and 26 of the Constitution.
- Prior to the decision in Javed’s Case, the High Court of Punjab and Haryana did not entertain a petition³² for declaring the Section 175 (1)(q) of the Haryana Panchayati Raj Act, 1994 void, stating that the issue had already been decided in earlier decisions of the Punjab and Haryana High Court.³³

³⁰ *Rameshwar Singh v. State of Haryana*, (2003) 8 SCC 396, para 3.

³¹ *Ladu Ram Jat v. C.J. (S.D.) C.J.M. and Ors.* RLW 2003 (2) Raj 993, 2002 (3) WLC 555.

³² *Raj Pal v. State of Haryana & Anr.*, MANU/PH/0198/2002.

³³ *Gurbux Singh v. State of Haryana* 2001 CWP 15540, decided on 16 January 2002.

In this case, the writ petition was dismissed and the disqualification of the petitioner was held proper as he had the fourth child after completion of one year after commencement of the Act.

- Section 16(1)(n) of the Zilla Parishads and Panchayat Samitis Act, Maharashtra 1961 ostensibly provides for the two-child norm in Maharashtra. Another similar provision applicable in Bombay is Section 14(1)(j-1) of the Bombay Village Panchayats Act, 1958. In a case,³⁴ the High Court of Bombay approved the decision in Javed's case and stated that the two-child norm is a matter of policy and is not open to judicial scrutiny.

Cases of Disqualification of Elected Representatives

Some of the most bitterly contested cases are those in which disqualification of an elected representative is sought on the ground that the candidate has violated the two-child norm as

“Some of the most bitterly contested cases are those in which disqualification of an elected representative is sought on the ground that the candidate has violated the two-child norm as stipulated in the Act.”

stipulated in the Act. One of the most common grounds is that the third child was born after the date allowed in the Act. Most of the relevant Statutes allow a person to contest the election if the third child (last child) is born within one year from the date of commencement of the Act. The courts have narrowly construed the provisions of the various Acts and have held that if the third child was not born before the relevant date, the election would be held invalid.³⁵ In cases³⁶ dealing with Municipal Boards, the courts have upheld suspensions of members of the boards on the ground that these members have had more than two children after the relevant date.

- In one particularly harsh verdict,³⁷ the Bombay High Court rejected the plea of an elected representative that despite his best efforts a third child had been born. In this case the representative and his wife had no intention of producing a child and the wife had undergone a tubectomy to prevent future pregnancies. However, their plea for exemption from the rule was rejected by the Bombay High Court.

If twins are born before the stipulated date, the courts have normally not disqualified the elected representatives.

³⁴ *Dyaneshwar Patiram v. The Divisional Commissioner, Nagpur* MANU/MH/0174/2012.

³⁵ In *Ashok Kumar Bhavsangbhai Chaudhary v. The Director of Municipalities and Ors.* MANU/GJ/7442/2007 filed under Section 11(1)(h), Gujarat Municipalities Act, 1963 the candidate had his third child after filing the nomination and asked for non-application of two-child norm in his case. The Court did not allow his petition and held that "...if on 4.8.2005 a person has more than two children, he shall not be disqualified as long as the number of children he has on that date does not increase."

³⁶ *Prabhu Dayal Saini v. State of Rajasthan and Ors.* 2002(2)WLC427 in this case the Chairman of the Municipal Board was suspended under s. 26 (xiv) of the Rajasthan Municipalities Act, 1959 (now Section 24 (xvii) of the Rajasthan Municipalities Act, 2009). Also see *Smt. Saroj Chotia v. State of Rajasthan and Ors.* AIR 1998 Raj 28 in which the suspension and enquiry of the petitioner was upheld.

³⁷ *Baliram Vitthal Deokate v. Nabhiladas Narayan Bhagat and Ors.* 2008 (5) BomCR 83 under the Section 16(1)(n) of the Zila Parishads and Panchayat Samitis Act, Maharashtra 1961.

- In Andhra Pradesh, the Government has further discretion to exempt a person even if he/she has a third child beyond the allowed date. The proviso to Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 states that “the Government may direct that the disqualification in this Section shall not apply in respect of a person for reasons to be recorded in writing.” In one case³⁸ in which the petitioner took a plea that the third child was actually not his child, the petition was dismissed by the High Court after allowing “the petitioner to approach the Government for exemption.”
- In quite a few cases, the Gujarat High Court has upheld the disqualification of a member of a local body even if the third child who is born after the relevant date dies.³⁹ In a case⁴⁰ in the Gujarat High Court, a petitioner came up with a novel argument. He argued that since the provision providing

“The provisions associated with the two-child norm are often used to settle scores and political rivalries and have little to do with increasing awareness about family planning.”

for the two-child norm allows a third child to be born within a year of the commencement of the Act, the word ‘born’ should be widely interpreted to include “within its sweep the point of time when a foetus is conceived as that would be the point when one can term that a child is born.” The Court, however, dismissed his appeal.

- The provisions associated with the two-child norm are often used to settle scores and political rivalries and have little to do with increasing awareness about family planning. Furthermore, in a number of instances, influential candidates have managed to manipulate the law in their favour.
- In an interesting case,⁴¹ the petitioner who had married thrice and had two children each from first two marriages but none from the third marriage was disqualified. The last child had been born after the lapse of one year from the commencement of the Act. The petitioner claimed that as he did not have a child from the third wife he should not be disqualified.

The courts have allowed disqualification even if the third child is given in adoption by stating that the objective of the law is to stop the fast growth of population and this would be defeated if giving children away in adoption was allowed. Often it is the girl child who is given in adoption;⁴² pointing

³⁸ *Guntamukkala Venkata Ramana Murthy v. The Mandala Parishad Development Officer-cum-Mandal Returning (Election) Officer and Ors.* 2009(3) ALD 613; 2009(4) ALT 6.

³⁹ *Mulchandbhai Jethabhai Parmar v. DDO and Ors.* 2010GLH(2)58.

⁴⁰ *Vishnubhai Joitaram Rathod v. State of Gujarat* AIR 2009 Guj 190. See: Section 30(1)(m) of The Gujarat Panchayats Act, 1993:

30(1) No person shall be a member of a panchayat or continue as such who:

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(m) has more than two children:

Provided that a person having more than two children on the date of commencement of the Gujarat Local Authorities Laws (Amendment) Act, 2005 (hereinafter in this clause referred to as ‘the date of such commencement’) shall not be disqualified under this clause so long as the number of children he had on the date of such commencement does not increase:

Provided further that a child or more than one child born in a single delivery within the period of one year from the date of such commencement shall not be taken into consideration for the purpose of disqualification under this clause.

⁴¹ *Ram Niwas v. State of Rajasthan* RLW 2005 (4) Raj 2295; 2005 (4) WLC 134.

⁴² *Dhan Raj Meena v. State of Rajasthan and Ors.* RLW 2008 (2) Raj 1758.

to the skewed impact of the two-child norm largely on girls. The Punjab and Haryana High Court in a case⁴³ made the following observation:

“A plain reading of Section 175(1)(q) makes it obvious that the intention of the legislation is to provide simply that no one who has more than two living children shall be a Sarpanch or a Panch of a Gram Panchayat or a member of the Panchayat Samiti or Zila Parishad or continue as such. The legislation does not permit any exception to this rule especially when such an exception could have been carved out because the legislature was aware in 1994 that provision for adoption exists in the Hindu Adoption and Maintenance Act, 1956. It appears to us that it was for that reason that the expression more than two living children has been used, which would include even the child given in adoption. Moreover, at the back of the provision is public policy namely to arrest the fast growth of population in this country.”

Judgements with a Positive Viewpoint

In some cases,⁴⁴ however, the courts have criticised the hounding of some elected representatives by influential members in the area who use multiple proceedings and approach different courts to

“The courts have criticised the hounding of some elected representatives by influential members in the area who use multiple proceedings and approach different courts to somehow get the election declared null and void.”

somehow get the election declared null and void. In one case,⁴⁵ the Panchayat Secretary had wrongly assumed jurisdiction and disqualified a husband and wife who had become an Up-Sarpanch and Ward Member, respectively. The Court expressed shock and imposed a cost of Rupees five thousand on the Secretary to be given to the village Zila Parishad High School. In another case,⁴⁶ the High Court held that a case regarding disqualification can only be adjudicated by a Judicial Authority and not by a Sarpanch. In this case, the election of a woman Panch had been challenged on the ground that her third child was born after one year of the commencement of the Act.

In some cases the principles of natural justice were not followed and therefore the disqualification was held to be improper. In one case⁴⁷ the enquiry had not been conducted, and in another⁴⁸ the opportunity to be heard was not given to the candidate disqualified for the violation of the two-child norm.

⁴³ *Jagat Singh v. State of Haryana* MANU/PH/0124/2002, para 10.

⁴⁴ *B. Kantha Reddy v. Mandal Development Officer-cum-Additional District Election Authority, Manopad Mandal and Ors.* 2005(5) ALD 742.

⁴⁵ *Katikireddy Narasimha Rao and Anr. v. District Panchayat Officer and Ors.* AIR2009AP137. The Court elaborated upon Section 22 of the Act and observed that “disqualification can stand attached to an elected representative, only as a result of adjudication by the District Court” and the proceedings can be instituted either by the person who disputes the allegation as to the disqualification, or those who make such allegations.

⁴⁶ *State of Rajasthan and Ors. v. Bhanwari Devi* 1997 (2) WLC 473.

⁴⁷ *Ahalya Mangaraj v. State of Orissa and Ors.* MANU/OR/0204/2006.

⁴⁸ *Smt. Pramila Pradhan v. State of Orissa and Anr.* 2005 (I) OLR 411.

In another interesting case,⁴⁹ the High Court of Andhra Pradesh allowed a woman to retain her seat though she had given birth to twins. The Court also made a distinction between a criminal case and a case under the Panchayat Raj Act and said that “*the disqualification that is attached to an individual on account of his or her having more than two children cannot be compared to the one which arises out of the conviction in a criminal case.*” It also remarked that cases under the Andhra Act should be carefully and cautiously decided as they have a radical life-long effect on the couple. In this case the woman had three children on the date of the filing of nomination as she had given birth to twins in her second delivery which was after the ‘allowed’ date.

In *Ramakanta Dolai v. Bipin Bihari Hial*,⁵⁰ the Orissa High Court held that the election of a candidate could not be declared void as no documents had been produced by the petitioner to prove that the elected representative had a child after the cut-off date. In Odisha, as in other states, the cut-off date is one year after the two-child norm provision had been inserted in the Act. In this case the Court believed the assertion of the father of the girl child that she was born before the cut-off date.

“The courts have also rightly held that the burden of proof lies with the person who files the case for disqualification and until this burden is discharged to the satisfaction of the court, no person can be disqualified.”

In a positive case⁵¹ concerning the birth of the third child after the relevant date, the Andhra Pradesh High Court allowed the appeal of the elected representative and set aside the disqualification. In this case the petitioner who had filed the disqualification petition had attached two documents regarding the birth of the child. Though both these documents gave the date of birth after the stipulated one year, the documents contradicted each other and gave different dates of birth. The Court refused to believe either of the two documents which were a letter from the school and an entry in the Register of Births and Deaths. The Court gave the benefit of doubt to the elected ward member. In this and some other cases⁵² the courts have also rightly held that the burden of proof lies with the person who files the case for disqualification and until this burden is discharged to the satisfaction of the court, no person can be disqualified.

However, in another case⁵³ the Orissa High Court held that it is the elected representative who should prove that the child was born within one year of the commencement of the Act if he/she wants to take benefit of the clause which provides exemption from disqualification. This judgement therefore gives an undue advantage to the person who challenges the election. As a negative fallout, the elected representative could not provide a document and was held to be disqualified.⁵⁴

⁴⁹ *Balaga Savithamma v. Nalla Satyanarayana and Ors.* 2009(2)ALD193.

⁵⁰ MANU/OR/0525/2005.

⁵¹ *Punnu Sujatha v. Smt. Musham Sakkubai and Ors.* 2009(3)ALD628.

⁵² *Golla Jayamma and Ors. v. District Collector and Ors.* MANU/AP/0826/2008; *R. Jagadeeshwar v. P. Goutham Goud and Ors.* 2004 (1) ALD 18; also see *Banda Mahender Goud v. State of Andhra Pradesh and Ors.* MANU/AP/0686/2008 where the third child was born within one year of the commencement of the Act.

⁵³ *Malaya Kumar Mohanta v. Collector, Mayurbhanj and Ors.* AIR1999 Ori 5.

⁵⁴ *Sanjukta Behera v. Rangalata Dalei and Ors.* 102(2006)CLT108.

What comes out starkly through these several cases is the enormous amount of time that elected representatives spend in court after the introduction of the two-child norm in various Acts. As stated earlier, candidates/representatives who are poor and belong to marginalised

“Cases take a long time to get decided and in the meanwhile development work in the area suffers.”

communities often cannot even afford to fight these battles. Cases take a long time to get decided and in the meanwhile development work in the area suffers. The courts have upheld the laws enforcing the two-child norm even though they violate the right to privacy and other constitutional rights. They have mistakenly held that the laws further the National Population Policy, 2000. In their eagerness to uphold these laws, the courts have strictly applied the legal provisions related to the two-child norm and have disqualified a candidate even if a child who was born after the cut-off date has died or if a child is born to a woman who

has undergone tubectomy. The courts have also failed to realise that in a society steeped in son preference such laws have inevitably led to increased discrimination and violence against girls and women. This comes out quite clearly in cases where children – often girls – have been given in adoption to evade the two-child norm.

Current Status of the Two-Child Norm Provision in Different State Acts

The States which have abolished the two-child norm are:

- Haryana in which the provision of Section 175(1)(q) of the Haryana Panchayati Raj Act, 1994 has been abolished by notification dated 26.10.2006.⁵⁵ It was being felt that “the two-child norm resulted in social evils such as giving children for adoption, forced abortion and non-registration of births.” Further, it adversely affected “women empowerment, especially in case of Dalits and weaker sections of the society.”⁵⁶
- Himachal Pradesh has also abolished the two-child norm for electing members to its local bodies.⁵⁷
- The Madhya Pradesh Government also decided to do away with this norm on 22 November 2005.⁵⁸
- The Chhattisgarh Government has also allowed parents who have more than two children to contest the Municipality elections. The two-child norm for the Panchayat elections was

⁵⁵ See: <http://secharyana.gov.in/html/act4.htm#175> last visited on 23.04.2012. The two-child norm in the Act was omitted with retrospective effect from 1 January 2005, applicable on pending cases as well.

⁵⁶ See: <http://www.financialexpress.com/news/2child-norm-in-haryana-abolished/171858/> last visited on 23.04.2012.

⁵⁷ Approved introduction of the H. P. Municipal Corporation (Amendment) Bill, 2006, in the ensuing Vidhan Sabha Session for replacing the H. P. Municipal Corporation (Amendment) Ordinance, 2006, so promulgated to carry out necessary amendment in the H. P. Municipal Corporation Act, 1994, with regard to deletion of the two-child condition in the Municipal Corporation elections.

⁵⁸ See: <http://www.mpinfo.org/mpinfonew/english/cd/221105.asp> visited on 23.04.2012.

abolished⁵⁹ a year before this decision came into force.⁶⁰ However, since it was not repealed with retrospective effect, the Court upheld the disqualification of the elected representatives in pending cases.⁶¹

The States which still retain laws to enforce the two-child norm are Gujarat, Odisha, Maharashtra, Rajasthan and Andhra Pradesh.

Recommendations

Various studies, including case studies, have shown that enforcement of the two-child norm through legislation has not worked. It is well recognised that only if measures to reduce poverty, mortality at infancy and other ages, as well as improvements in education, quality of health and reproductive health services are implemented, would people voluntarily opt for smaller families. The National Commission on Labour⁶² also points out that reducing deaths during childbirth and

reducing infant mortality are important for people to choose to have small families.

“Apart from targeting the poor and vulnerable, the two-child norm has further exacerbated discrimination against girls and women.”

Apart from targeting the poor and vulnerable, the two-child norm has further exacerbated discrimination against girls and women. It has been said that “the Government should have taken into account the social reality of son preference and not imposed the norm on those who have had only daughters, further discriminating against the born/ unborn girls and their mothers”,⁶³ as such measures may promote discrimination against additional daughters in families with two daughters.

Though various schemes linked to the two-child norm have not been reviewed as a part of this study, it is obvious that such measures are counterproductive and disempower poor women while depriving them of benefits which they are legitimately entitled to. It has been noted that though various state policies talk about a target free approach in family planning, when the policy translates into programme implementation, it has negative implications on the idea of informed choice and individual decision making and results in violation of human dignity, especially of women.⁶⁴

⁵⁹ Omitted by the Chhattisgarh Panchayat Raj (Amendment) Act, 2008 effective 23.05.2008.

⁶⁰ See: <http://www.chhattisgarhtopnews.com/inner.asp?aa=479>.

⁶¹ The High Court of Chhattisgarh held in *Laxman Prasad Jangde v. State of Chhattisgarh & 3 Ors.* 2009(1)MPJR-CG20 the petitioner as disqualified as on day when he was elected as Sarpanch, as Section 36(1)(m) of the Chhattisgarh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 clearly provides that no person should be eligible to be an office-bearer of Panchayat who has more than two living children one of whom was born on after 26th day of January, 2001. Also see: *Mahendra Budek v. State of Chhattisgarh and Ors.* 2009(4)MPHT10(CG).

⁶² Government of India, *Second National Commission on Labour Report*, Ministry of Labour and Employment, 2002.

⁶³ *Supra* n. 13, p. 46.

⁶⁴ *Ibid*, p. 47.

However, perhaps in their zeal to further control population growth, most courts have upheld the two-child norm and have refused to see the consequences. The courts have also failed to note the fact that these laws enforcing the two-child norm have led and will inevitably lead to sex selection in a society with a strong son preference. It is pertinent to point out that some states in which these laws and schemes linked to a two child norm exist are also the states with skewed child sex ratios.

Some of the recommendations thus are:

- All provisions in laws governing elections to Panchayat and Municipal Corporations in Gujarat, Odisha, Maharashtra, Rajasthan and Andhra Pradesh which disqualify a person from contesting elections if he/she has more than two children should be deleted, recognising that these states also have some of the worst child sex ratios.
- All schemes that are centrally or state funded should be examined, and the parts which link benefits to the two-child norm should be amended to eliminate the eligibility condition related to the number of children. It has rightly been stated that a “two-child norm” condition for welfare measures deprives the very sections for whom these schemes are meant. The disincentives are also anti-women since women in our country do not enjoy the freedom to decide how many children they would like to bear.⁶⁵
- Several judgements on the two-child norm show that the courts mistakenly believe that the two-child norm is an integral part of the National Population Policy and therefore must be upheld. The judgements also show that the courts are not aware that one of the most dangerous consequences of coercive population policies is gender biased sex selection. It is therefore imperative that some method of consultation with the judiciary is devised to ensure that courts are regularly appraised about certain key policies of the state and about the discussions and social science research around them. Perhaps this initiative can be considered a part of capacity building programmes undertaken by the National and State Judicial Academies.

⁶⁵ *Ibid.*

Child Marriage, Forced Marriage and Denial of Choice in Marriage

Child Marriage/Forced Marriage

Child marriage is another form of discrimination with far more severe implications for girls than boys. Statistics show that child marriages are still prevalent in India, though the median age at marriage is rising.¹ They further show that girls get married much earlier than boys and that girls living in rural areas are twice as likely to get married before attaining adulthood than girls living in urban areas.² The National Family Health Survey (NFHS) III reported a significant six year difference in the median age at marriage between men and women with the median age at marriage for women aged between 20-49 years recorded as 17.2 years, and the median age at marriage for men between the same ages as 23.4 years.³

¹ International Institute for Population Sciences (IIPS) and Macro International, 2007. National Family Health Survey (NFHS-III), 2005-06: India: Mumbai: IIPS.

² *Ibid.*

³ *Ibid.*

Though a recent annual health survey indicates that the mean age at marriage is now above 18 years in the eight least developed states and the incidence of child marriage is reducing,⁴ a 2011 UNICEF report records that “the majority of Indian women marry as adolescents” and that “30 per cent of girls aged 15–19 are currently married or in union, compared to only 5 per cent of boys of the same age. Also, three in five women aged 20–49 were married as adolescents, compared to one in five men.”⁵ The report further notes that “while the prevalence of child marriage among urban girls is around 29 per cent, it is 56 per cent for their rural counterparts.”

In India, the percentage of women in the age group of 20-24 years who were married before attaining the minimum legal marriageable age of 18 is 43 per cent.⁶ There are eight major states where more than half of the women are reported to have married before age 18; these are Bihar, Rajasthan, Jharkhand, Uttar Pradesh, West Bengal, Madhya Pradesh, Andhra Pradesh and Karnataka.⁷ It has also been observed that while the percentage of girls married before 15 years of age had dropped significantly, the incidence of girls married between 15 and 18 years of age has increased. This does not indicate any significant change in the social norms and customs.⁸

Consequences of Child Marriage

Child marriage has rightly been called a human rights violation and abuse. It is also well known that though child marriages adversely affect both young boys and girls, its effect on girls is far more

“Though child marriages adversely affect both young boys and girls, its effect on girls is far more severe as they have to disproportionately bear the consequences of early marriage.”

severe as they have to disproportionately bear the consequences of early marriage.

“Child marriage violates the rights of the girl child to be free from all forms of discrimination, inhuman and degrading treatment, and slavery... Child marriage violates a panoply of interconnected rights, including the right to equality on grounds of sex and age, the right to marry and found a family, the right to life, the right to the highest attainable standard of health, the right to education and development and the right to be free from slavery...”⁹

⁴ Annual Health Survey 2010-11 as reported in *Times of India*, dated 16.7.2012.

⁵ UNICEF, *The State of the World's Children, Adolescence: An Age of Opportunity*, New Delhi, February 2011, available at <www.unicef.org/sowc2011>, as viewed on 25.6.2012, p. 23.

⁶ UNICEF, *The Situation of children in India, A Profile*, New Delhi, May, 2011, Data for the years 1992-93, 1998-99 and 2005-06 from NFHS and data for the year 2007-08 from DLHS 3.

⁷ International Institute for Population Sciences (IIPS), 2010. District Level Household and Facility Survey (DLHS-3), 2007-08. *Also see:*

Worst performing and best performing states in respect of women age 20-24 who married before age 18, 2007-08

Worst Three States	Bihar 68.2%	Rajasthan 57.6%	Jharkhand 55.7%
Best Three States	Himachal Pradesh 9.1%	Kerala and Punjab 15.5%	Goa 19.1%

⁸ *Supra* n. 6, p. 32.

⁹ UNICEF, *Child Marriage and The Law Legislative Reform Initiative - Paper series*, Gender Right and Civic Engagement Section, Division of Policy and Practice, New York, 2007.

The right to 'free and full' consent to a marriage is recognised in the Universal Declaration of Human Rights. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) mentions the right to protection from child marriage, and calls for legislation to specify a minimum legal age of marriage.¹⁰ In a petition filed in the Supreme Court,¹¹ it has been prayed that child marriage should be declared void as it is usually forced marriage and no full and informed consent can be given by a person under 18 years of age.

Given the fact that most Indian girls get dislocated from their natal home at the time of marriage and there is transference of residence of the girl from her home to her husband's house, child

“Child marriage is often akin to child abuse because for many girls it is the beginning of frequent and unprotected sexual activity which can have serious health consequences.”

marriage results in several adverse consequences. NFHS III had also reported that the average period of '*gauna*'¹² has been reduced to one and a half years. Child marriage is often, therefore, akin to child abuse because for many girls it is the beginning of frequent and unprotected sexual activity which can have serious health consequences like anaemia, maternal mortality and morbidity, infant mortality and morbidity and at times result in diseases like HIV/AIDS. Young girls are more prone to domestic violence and have limited social and community networks. Thus, for girls, child marriage poses additional serious risk associated with early sexual life and child bearing. There is a significant

difference in the chance of survival of a child born to a mother who gave birth before reaching the age of 20 years as compared to the child who is born to a mother who gives birth between 20 and 29 years of age.¹³ The rights of young girls like right to education and a right to all-round development are violated by child marriage.¹⁴

Factors Contributing to Child Marriage

The phenomenon of child marriage can be attributed to a variety of reasons. Chief amongst these reasons are poverty and culture, tradition and values based on patriarchal norms. For instance, the custom of hosting child marriages in large numbers on the occasion of *Akshay Tritiya* is common in states like Rajasthan, Madhya Pradesh and Uttar Pradesh.

It is important to note that the rights mentioned in the paragraph are guaranteed in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery.

¹⁰ *Supra* n. 6, p. 31.

¹¹ Writ Petition (Cr.) 81/2006 in the Supreme Court of India.

¹² The term '*gauna*' describes the ceremony that takes place when a girl is sent to her husband for co-habitation. It was and still is customary in many parts of India to marry the girl and not allow her to leave her paternal family at least until menarche and often later. See: Kirti Singh, 'Law, Violence and the Girl Child', *Health and Human Rights Journal*, Vol. 5, No. 2, Harvard School of Public Health, p. 27.

¹³ *Supra* n. 6, p. 31.

¹⁴ *Supra* n. 2.

Patriarchal Customary Norms Ignore the Adverse Effects of Child Marriage

These norms ignore that

"(i)n actuality, child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty... Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves, married girls and child mothers face constrained decision-making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity... Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18."

UNICEF, Early Marriage A Harmful Traditional Practice: A Statistical Exploration, New York, April 2005, p.1

Dowry is another crucial factor which weighs more heavily on poorer families. The general demand for younger brides acts as an incentive for these families to marry off their daughters as early as possible, as dowry increases with the age and education level of the girl. Poor families also tend to marry off girls at the same time to reduce the burden of high wedding expenses. The traditional patriarchal perception of girls as somebody else's property leads to girls being considered as a burden to be got rid of as soon as possible.

Large sections of our society think of a girl as a liability and not an individual in her own right who can contribute productively to the family. Even when the contribution from girls may be considered, the prevalent view that the daughter belongs to another family and that the benefits accruing from investment in her education and well-being flow primarily to her in-laws' family, while she remains a liability for her parents' family, works as a strong motivation for early marriage.

Further, in a society which puts a high premium on 'virginity' and 'chastity', girls are married off as soon as possible to control their sexual and reproductive behaviour and conduct.¹⁵ Social and religious norms linking the virginity and chastity of girls to the honour and status of family endorse the practice of early marriage. Ancient texts like the Manusmriti, which state that the father or brother who has not married his daughter or sister who has attained puberty, will go to hell, are sometimes quoted to justify child marriage.

Son preference also plays an important role in promoting early marriages for girls. Son preference, manifested through gender-biased sex selection, has led to a dearth of brides in some districts of states like Punjab and Haryana. This has made bride trafficking a lucrative and expanding trade where families pay a price for procuring brides. Thus, a number of young girls hailing from the

¹⁵ Law Commission of India, 205th Report on a Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws, 2008.

poverty-ridden villages of Assam, West Bengal, Jharkhand, Bihar and Odisha are sold to families desperate to acquire a bride in the villages of Punjab and Haryana, ironically to produce a male heir. As reported, most 'purchased brides' are exploited, denied basic rights, and eventually abandoned, especially if they fail to produce the much longed for male heir.

The confluence of multiple factors such as dowry, perception of girls belonging to their marital homes, the premium on young brides and values and norms related to chastity not only lead to child marriage but are also deeply interconnected to the inherent value of girls and the manifestation of their unwantedness in the form of sex selection.

The Law against Child Marriage

Child Marriage Restraint Act

The first law to abolish, or rather restrain, child marriage was the Child Marriage Restraint Act, 1929 (hereafter CMRA). This Act was passed as a result of sustained pressure from social reform groups

“The Child Marriage Restraint Act, 1929 was passed as a result of sustained pressure from social reform groups and individuals who felt strongly about the issue.”

and individuals who felt strongly about the issue. The minimum age of marriage under this Act was 14 years. At the same time, the minimum age at which a girl could give consent to sexual intercourse was increased to 14 years in the Indian Penal Code.¹⁶ This meant that any act of sexual intercourse with a girl below this age would amount to rape, regardless of whether she consented to the act or not. However, for a married girl, the age below which she could not give consent was 13.¹⁷ The Penal Code stated that sexual intercourse with a wife would not amount to rape if the wife was above 13 years of age. Prior to this, when the Penal Code had been enacted in 1860 and later in 1891, the age at which consent could be given to sexual intercourse and the age above which marital rape was not considered rape was 10 and 12, respectively.

The CMRA was again amended in 1940 and the minimum age of marriage for girls was increased to 15 years. Meanwhile, the age at which she could give consent for sexual intercourse was raised to 16 years. As before, this maintained the paradox between rape and marital rape as the age beyond which marital rape was not considered a crime remained at the minimum age of marriage, that is, 15 years. In 1978, the minimum age of marriage for girls was raised to 18 years and this remains unchanged till date. Recent legislation has now fixed the age of sexual consent at 18¹⁸, though the marital exception clause continues to apply to a wife above 15 years of age.

One of the main reasons why the CMRA has not been effective is that child marriage has not been made invalid and void under the Act. The courts have also held that a child marriage is not void or

¹⁶ The Indian Penal Code, 1806, s. 375(5).

¹⁷ The Indian Penal Code, 1806, Exception to s. 375.

¹⁸ The Criminal Law (Amendment) Act, 2013.

invalid as per law. Beginning with the earliest case that came up in 1885, to a recent judgement of 2006, the pronouncements of various High Courts and the Supreme Court¹⁹ have upheld the validity of such marriages. Thus, a judgement of the Delhi High Court reiterated that marriages solemnised in contravention of the age prescribed under Section 5 (iii) of the Hindu Marriage Act, 1965 are neither void nor voidable.²⁰ The Court held that the law was based on public policy and the legislature was conscious of the fact that if marriages performed in contravention of the age restriction are made void and voidable, it could lead to serious consequences and exploitation of women. In this case a young girl of 16 had 'eloped' with a young man. The Court was obviously concerned that this marriage by choice should be protected. However, in doing so the judges made

“The Court held that... if marriages performed in contravention of the age restriction are made void and voidable, it could lead to serious consequences and exploitation of women.”

sweeping statements about the validity of child marriage instead of taking a nuanced view about the ages at which they thought child marriage should be allowed in certain cases and cases in which it would amount to child abuse and would contravene various articles of the Constitution of India.²¹ The view that child marriages are valid was upheld in many other judgements. This situation continues till date even though the CMRA has been extensively overhauled and renamed as The Prohibition of Child Marriage Act, 2006.

Thus, the marriage of a one-year-old girl or that of an 11- or 12- or 13-year-old is valid as per the law of the land. The CMRA only restrains a marriage of minors and that is its objective, but it does not prohibit the marriage rendering it illegal or invalid.²² The Supreme Court has held that the marriage of a minor contravenes various laws and the factum of marriage in itself would be an offence under various laws, but that such marriage would not be invalid, illegal or null and void.²³ In this case, the Court allowed a 13-year-old girl to go with her husband though it noted that sexual intercourse with a 13-year-old was a crime under the Penal Code.

The only consequence of child marriage under the CMRA was that if a case was brought before the court, certain persons became liable to be punished with simple imprisonment up to three months and with fines. A male above 21 years who had married a child,²⁴ a person who had solemnised

¹⁹ *Durga Bai v. Kedarmal Sharma*, 1980 (Vol. VI) HLR 166; *Shankerappa v. Sushilbhai*, AIR 1984 Kar 112; *Smt. Laila Gupta v. Laxmi Narayan and Ors.* 1978 SCC (3) 258; *Rabindra Prasad v. Sita Dass*, AIR 1986 Pat 128; *William Rebello v. Angelo Vaz*, AIR 1996 Bom 204; *Neetu Singh v. State & Ors.*, 1999 (1) vol. 39 HLR 466; *Ravi Kumar v. State & Anr.*, MANU/DE/1497/2005.

²⁰ *Manish Singh v. State Govt. of NCT and Ors.*, 2006 (1) HLR 303.

²¹ See, however, *Court on its own motion (Lajja Devi) v. State* W.P. (Cri.) No. 338/2008 in the Delhi High Court (Full Bench), as decided on 27.7.2012. In this case, a full bench of the Delhi High Court held that sex with a wife below 15 years of age would amount to rape under the Indian Penal Code.

²² *Parasram and Ors. v. Smt. Naraini Devi and Ors.* 1972 AIR 1972 All 357.

²³ *Ibid*; *Smt. Lila Gupta v. Laxmi Narain and Ors.* AIR 1978 SC 1351.

²⁴ The Child Marriage Restraint Act, 1929, s. 4, reads as: "Punishment for male adult above twenty one years of age marrying a child - Whoever, being a male above twenty-one years of the age, contracts a child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine. [subs. by Act 41 of 1949, sec. 4, for "simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both".

a marriage,²⁵ a parent or guardian who had promoted or permitted the marriage or negligently failed to prevent such a marriage²⁶ were all made punishable under the CMRA. However, no woman could be punished under the Act.²⁷

“The courts have been reluctant to find adults guilty under the Act... (and) have given extremely light punishments and let off the accused with small fines.”

Despite these provisions, the courts have been reluctant to find adults guilty under the Act. It has been held, for instance, that a guest escorting the bride and reminding others to raise a customary chorus cannot be punished under the Act.²⁸ Negotiations and preparation for the marriage have also not been held as punishable.²⁹ Section 5 of the Act, which makes the person who conducts, directs, or performs the marriage liable, has been very narrowly construed by the courts. It has also been held by the courts that for a person to be punished under the Act, it must be proved that the marriage has been duly performed in accordance with all the religious rites applicable to the form of marriage.³⁰ This kind of reasoning allows an accused party to raise the plea that the marriage has not been performed in accordance with applicable ceremonies. Though there have been some positive judgements under the Act saying that deterrent punishment should be awarded, courts have given extremely light punishments and let off the accused with small fines.³¹

The Act was criticised on a number of counts. A section³² in the Act that allowed for injunctions to stop child marriages was considered faulty, as hearing the opposite party was mandatory before

²⁵ The Child Marriage restraint Act, 1929, s. 5, reads as: "Punishment for solemnizing a child marriage: Whoever performs, conducts or directs any child marriage shall be punishable with [simple imprisonment which may extend to three months and shall also be liable to fine], unless he proves that he had reason to believe that the marriage was not a child marriage".

²⁶ The Child Marriage restraint Act, 1929, s. 6, reads as: "Punishment for parent or guardian concerned in a child marriage: (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with [simple imprisonment which may extend to three months and shall also be liable to fine]:" Provide that no woman shall be punishable with imprisonment
(2) For purposes of this section, it shall be presumed, unless and until the contrary is proved that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

²⁷ *Ibid.*

²⁸ *Emperor v. Fulabhai Bhulabhai Joshi* AIR 1940 Bom 363.

²⁹ *Sheikh Haidar Sheikh Rahimmo Attar Musalman v. Syed Issa Syed Bahiman Musalman & Ors.* AIR 1938 Nagpur 235.

³⁰ *Khushalchand Janki Prasad v. Shankar Pandey Gaya Prasad* AIR 1963 MP 126.

³¹ *Mt. Jalsi Kuar & others v. Emperor* AIR 1933 Patna 471, *Kondepudi Sriramamurthi v. State of Andhra Pradesh and another* AIR 1960 AP 302. This and the subsequent paragraph has been taken from Kirti Singh and Diviya Kapur, *Law, Violence and the Girl Child, Health and Human Rights*, Vol. 5, No. 2, 8 published by The Centre For Health and Human Rights, Harvard School of Public Health, 2001, available at <[http:// www.hhrjournal.org%2Farchives%2F4065363.pdf](http://www.hhrjournal.org%2Farchives%2F4065363.pdf).
banned.pdf>, as viewed on 24.5.2012.

³² The Child Marriage Restraint Act, 1929, s.12, reads: "Power to issue injunction prohibiting marriage in contravention of this Act-

(1) Notwithstanding anything to the contrary contained in this Act the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in Sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

an injunction³³ could be granted. This procedure defeated the purpose of the provision, especially since the complaint could be filed just prior to the marriage. The Act was also criticised on the

“The National Human Rights Commission had recommended that the offences under the Act be made non-bailable and that authorities at the village level should be given the power to prevent child marriage.”

grounds that it did not level punitive fines and did not punish persons other than the few adults listed in the Act who may have actively encouraged the marriage to take place and participated in it.³⁴ The National Human Rights Commission had recommended that the offences under the Act be made non-bailable and that authorities at the village level should be given the power to prevent child marriage. The Act also did not provide any remedy for girls who were trafficked in the name of marriage.³⁵

Prohibition of Child Marriage Act, 2006

The CMRA was completely overhauled in 2006 as the Government recognised that, “Child Marriage is a persisting harmful traditional practice rampant in many parts of the country.”³⁶ The Government further proclaimed in its new National Plan of Action that complete abolition of child marriage was one of its 12 key national priorities.³⁷ Prior to this, a bill labelled “Prevention of Child Marriage Bill, 2004” had been prepared by the Government and referred to a Parliamentary Standing Committee.³⁸ Apart from various other suggestions, this committee had recommended making all marriages below the age of 18 void and had further suggested that the minimum age for marriage for both boys and girls should be 18. However, the new Prohibition of Child Marriage Act, 2006 (hereafter PCMA) did not include these recommendations.

The new PCMA included the following major changes:

- Section 3 of PCMA states that “child marriages shall be voidable at the option of the contracting party who was a child at the time of the marriage.” It allows for a petition to be filed to declare

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader, and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this Section disobeys, such injunction shall be punished with imprisonment or either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both. Provided that no woman shall be punishable with imprisonment”.

³³ “A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury”; See Blacks Law Dictionary, 6th Edition, 1990, p. 784. An injunction is thus a command by the court to a person to stop the performance of a certain act or actions.

³⁴ *State v. Jamnabai Manji Keshavji* AIR 1940 Bom 363.

³⁵ *Supra* n. 30, p. 19.

³⁶ Government of India, *Ministry of Women and Child Development Sub Group Report on Child Protection in the Eleventh Five Year Plan (2007-12)*, p. 24, available at < <http://wcd.nic.in/wgchilprotection.pdf>>, as viewed on 22.7.2012.

³⁷ Government of India, *Ministry of Women and Child Development, National Plan of Action for Children 2005*.

³⁸ *Supra* n. 6, p. 38.

the marriage void till two years after the child attains majority. Thus, though a child marriage has not been made void *ab initio*, the girl or the boy have been given the option to get it declared void if they so wish. Otherwise, the marriage will remain valid. However, since a girl is supposed to attain majority at the age of 18 and a boy at the age of 21, a girl can file a petition till she attains 20 years of age whereas a boy can file a petition till he attains 23 years of age. This, in itself, is unjust. Further, given the fact that the girl is the more vulnerable party, it is doubtful whether she will be able to exercise her option of getting out of even a violent marriage or whether her parents are likely to listen to her even if she wanted to get out of one. If a girl is a minor, her parents are supposed to file a petition on her behalf. Also, the difference in the legal age between boys and girls actually further increases the vulnerability of girls.

- The fact that the PCMA stipulates a different minimum age at marriage for girls and for boys is discriminatory and unjust. As stated above, while a girl is considered a major at 18, a boy is not considered one till he is 21. The Committee on the Status of Women under CEDAW has criticised the fact that certain countries have different ages of marriage for boys and girls as follows:

“The fact that the PCMA stipulates a different minimum age at marriage for girls and for boys is discriminatory and unjust.”

“Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman’s right freely to choose her partner.”³⁹

- The Act allows for maintenance and residence for the girl till her remarriage from the male contracting party or his parents.⁴⁰
- It further allows for appropriate orders for custody and visitation and maintenance for any child born from the marriage. The principle to be followed by the courts in granting these reliefs is the welfare and best interest of the child.⁴¹
- All the punishments for contracting a child marriage have been enhanced. The punishment for a male over 18 years of age who marries a minor girl has been enhanced to rigorous imprisonment of up to two years or with a fine up to Rupees one lakh or both.⁴²
- A similar punishment is prescribed for anyone who performs, conducts, directs or abets any child marriage. The earlier CMRA only punished the person who had performed, directed or conducted a child marriage, but now the Act punishes even a person who abets the marriage.⁴³

³⁹ CEDAW.

⁴⁰ *The PCMA, 2006, s. 4.*

⁴¹ *The PCMA, 2006, s. 5.*

⁴² *The PCMA, 2006, s. 9.*

⁴³ *The PCMA, 2006, s. 10.*

- The Act also punishes anyone who is in “charge” of a child, including a guardian or a member of an organisation who promotes the child’s marriage or permits it to be solemnized or “negligently fails to prevent the marriage, including attending or participating in this marriage”. This section seems to punish all those who are in *de facto* control of a child and promote the child’s marriage whether they are guardians of the child or not. No woman can, however, be punished with imprisonment. The Act also makes all offences cognizable and non-bailable.⁴⁴
- The Act further allows for injunctions to prohibit child marriages, including *ex parte* interim injunctions in cases of urgency. It states that any child marriage solemnized in contravention of an injunction order will be void.⁴⁵
- Section 12 of the PCMA makes certain marriages of a minor void if the minor “is taken or enticed out of the keeping of the lawful guardian” or “compelled by force” or “induced by deceitful means” to go anywhere or if the child is “sold for the purpose of marriage” or married after being trafficked.⁴⁶

Challenges

The Act lays emphasis on the prevention of child marriages by providing for the appointment of Child Marriage Prohibition Officers (CMPOs) by the State Governments and empowers them to prevent and prosecute solemnization of child marriages and to create awareness on the issue. The CMPOs can be invested with such powers of a police officer as the State Government may decide. However, though the Act requires states and Union Territories to appoint CMPOs and frame rules for

“The Act gives the District Magistrate powers to stop and prevent solemnization of mass child marriages by employing appropriate measures and minimum police force.”

implementation, only 10 states had framed rules till 2011.⁴⁷ Very few CMPOs have been appointed till date and without the required financial allocations these Officers are not likely to get appointed.

The Act gives the District Magistrate powers to stop and prevent solemnization of mass child marriages by employing appropriate measures and minimum police force, in addition to giving her/him all the powers of the CMPO.⁴⁸ Even then this sort of serious action is seldom resorted to and child marriages continue to be conducted in plain sight of the administration on auspicious occasions like *Akha Teej* and *Akshay Tritiya*.

Even under the new PCMA, very few cases have been registered. The conviction rate is also rather low as can be seen from the table on the next page, which captures the NCRB statistics for the last five years. Thus, despite the fact that many more child marriages have obviously taken place during these years, including mass marriages, no action against these marriages has been initiated by the police.

⁴⁴ The PCMA, 2006, s. 11.

⁴⁵ The PCMA, 2006, s. 13.

⁴⁶ The PCMA, 2006, s. 12.

⁴⁷ *Supra* n. 6, p. 31.

⁴⁸ PCMA, 2006, s. 16.

CASES UNDER PCMA

Year	Number of Cases under Investigation (including pending cases)	Conviction Rate (%)
2011	146	35.3
2010	111	14.8
2009	48	28.6
2008	148	25.3
2007	133	34.4

Source: National Crime Records Bureau⁴⁹

Under the CMRA, very few prosecutions took place.⁵⁰ Of the few that took place, many were dismissed on technical grounds, defeating the very purpose of the legislation. The NCRB figures also show that the number of cases that are being filed have no correlation with the large number of child marriages that are taking place.

Moreover, even the new Act does not invalidate child marriages and therefore does nothing to stop the various kinds of human rights violations which inevitably take place when a child is married and particularly when a girl child is married. It has been argued that invalidating all child marriages may result in girls losing rights that accrue from marriage and so may not be desired by the girls themselves. However, the rights that would accrue to a girl whose marriage has been declared void if the boy or she so wants⁵¹ can easily be incorporated under the Act to accrue to a girl whose marriage is made void *ab initio*. It has also been argued that the social stigma that the girl would suffer if her marriage is declared void would be considerable. However, health and human rights reasons make it absolutely necessary that marriages below at least a certain age, for instance, 16 years, should be invalidated. As stated before, child marriage not only stunts emotional and mental growth but is fraught with physically dangerous consequences for the girl child.

As stated earlier, Section 3⁵² of the Act allows a wife to get her child marriage declared void till the age of 20 (that is, till two years after she ceases to be a child at 18). However, the groom is allowed to file a petition to get the child marriage declared void till the age of 23 (that is, till two years after he ceases to be a child at 21). This is a discriminatory provision on the face of it and should be amended. Further, a woman should be allowed to repudiate a child marriage till she is 25 years old as she is the more vulnerable party in the marriage.

⁴⁹ As per National Crime Records Bureau, available at <ncrb.nic.in>, last visited on 16.7.2012.

⁵⁰ See UNICEF, 'Early Marriage Child Spouses', *Innocenti Digest*, Florence, Italy, 2001, available at <<http://www.unicef-irc.org/publications/pdf/digest7e.pdf>>, as viewed on 27.7.2012. Also see AIR Manual 6th Edition, Volume 4 (Nagpur, W. W. Chitaley, 1989). The manual lists only a hundred and twenty cases.

⁵¹ The PCMA, 2006, s. 3.

⁵² The PCMA, 2006, s. 3, reads: "(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

The Law Commission on Child Marriage

“An increasing number of studies have highlighted the extremely harmful and traumatic effects of child marriage. Child marriage below a certain age is blatant child abuse. The Indian Penal code considers any sexual intercourse with a minor wife below 15 years of age rape. The case of Phulmonee which galvanised public opinion against child marriage in the last century, and for raising the age of consent, was a case in which a girl aged 11 years died of hemorrhage from a rupture of vagina caused by her husband who had forced sex on her. However, even the present law on child marriage does not address a situation like Phulmonee’s. There is no provision in the law to stop a child bride from living with her husband and from being sexually abused apart from other forms of abuse. The Child Marriage Act, in fact lays the foundation for such an abuse by not invalidating child marriage. Research has further shown how the child bride is more liable to suffer from pregnancy related problems and how high both maternal and infant mortality is in the case of child marriages. Apart from this, child marriage deprives all girl children of their basic fundamental human rights to develop in a natural, healthy environment. It deprives girls of their right to education and to physical and mental and psychological development. It isolates girls from their environment and infringes on their fundamental right to liberty, speech, movement. To ignore the well-known adverse effects of child marriage vis-à-vis the girl child would be to ignore the manner in which the child bride experiences life and would amount to a denial of the fact that girls are human beings and have certain fundamental rights, including the right to life. The adverse health consequences and the violence faced by the girl child below a certain age are factors which outweigh certain ‘social’ considerations in not invalidating the marriage.”

Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws,
205th Report of the Law Commission of India, 2007.

Another issue which has repeatedly arisen is the age below which a marriage should be declared void. While some have argued that all marriages of children below 18 years should be declared void, others have pointed out that consensual sex between 16 and 18 is common and while ordinarily no marriage should take place before the parties are much older, in certain cases a relaxed age of marriage should be allowed and this should be 16. It has also been seen that in a number of cases young persons of different castes or religions or from the same *gotra* who have entered into relationships and perhaps eloped have been targeted and harassed in various ways.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.”

In a number of countries, a relaxed age of marriage is recognised.⁵³ In the United Kingdom, the age below which a marriage is void is 16 years. The Law Commission of India has recommended that all marriages below the age of 16 be declared void, while marriages between the ages of 16 and 18 should be made voidable at the option of the parties. This would save some marriages which are entered into by young persons by choice.

“The Law Commission of India has recommended that all marriages below the age of 16 be declared void, while marriages between the ages of 16 and 18 should be made voidable at the option of the parties.”

In India, a majority of marriages that take place are still arranged marriages within the same caste and religion. The consent of the girl to the marriage is not an important issue, though increasingly some form of consent of the parties is being taken by the families, particularly of older brides and grooms in urban areas.⁵⁴ However, in child marriages, particularly below a certain age, the question of consent is irrelevant.

A small revolution is taking place in both our rural and urban areas. As stated above, quite a few cases of young boys and girls who like each other and want to get married are getting reported.⁵⁵

In most of these cases, the boys and girls belong to different castes and classes and different religions. Some of these runaway marriages occur when the girl may not yet be a major. Parents, almost always of the girl, are inevitably against these marriages by choice and file a case of kidnapping against the boy and ask for the production of the girl in court and for her custody. Some courts have held that a marriage of a girl of 16 or 17 is not void and she cannot be forced to either go to her parents or be kept in a “protective home” against her wish.⁵⁶

In a case⁵⁷ in which a charge of kidnapping had been levelled against a boy with whom a minor girl had eloped, the Supreme Court in a positive judgement held that no charge of kidnapping can be made out if a minor girl had voluntarily gone with the accused. The Court clarified the law on kidnapping and held “*where a minor girl... had a capacity to know what she was doing and had voluntarily joined the accused, then in such case it could not be said that the accused had taken her away from the protection of her lawful guardian within the meaning of Section 361 of the Code.*”

In another case⁵⁸ also, the Bombay High Court similarly held that “*to make out an offence of kidnapping, it has to be established that a girl below 18 years of age was kidnapped or taken out from*

⁵³ In Australia and New Zealand a person can get married over 16 but only with the Court’s permission and parental approval.

⁵⁴ Kirti Singh, *Separated and Divorced Women in India: Economic Rights and Entitlements* (forthcoming: SAGE Publications, New Delhi, 2012).

⁵⁵ Through the Newspaper and other media, by NGOs and others working in the area.

⁵⁶ *Ravi Kumar v. State and Anr.* Manu/DE/0980/2010 124(2005) Delhi Law Times 1(DB); *Anurag Kashyap @ Deepu v. State and Ors.* MANU/DE/0980/2010 (In this case an case of Kidnapping had been registered against Madhuri’s (the girl) husband even though she had gone away with him of her own free will), *G. Saravanan v. The Commissioner of Police, The Inspector of Police and P. Chandrasekar* Manu/TN/2649/2011 (this case involved an 18-year-old bride who was forcibly separated from her husband by her father).

⁵⁷ *S. Varadarajan v. State of Madras* 1965 SCR (1) 243 BENCH: Mudholkar, J.R. Subba Rao, K. Hidayatullah.

⁵⁸ *The State of Maharashtra v. Surendra Kumar Mevalal Mehesh* 1998CriLJ3768 (Bombay HC (DB)).

the lawful guardianship. Section 361 IPC provides that in order to constitute an offence of kidnapping, there should be taking away or enticement. In the instant case, there was neither taking away nor enticement."

However, though the law laid down by the Supreme Court is a precedent and has to be followed by other courts and by the police, several cases of kidnapping and abduction continue to be filed

“ Though the law laid down by the Supreme Court is a precedent... several cases of kidnapping and abduction continue to be filed by the girl’s family against couples who have eloped. ”

by the girl’s family against couples who have eloped. In several negative judgements, the courts have sent the girl either to her parents or kept her in a shelter home.⁵⁹

In one case, a 17-year-old girl had eloped with her neighbour and the couple had a registered marriage. The girl’s family, however, told the couple that they would like to formally marry them and on that pretext brought the girl back to her natal home. Realising that the girl’s family had no intention of allowing the girl to live with him, the young man filed a petition in the High Court and claimed that the girl had been illegally detained by her

parents and therefore prayed that she be produced in court and allowed to stay with him. The Court, however, refused to do this stating as under:

“Having control and supervision of an aged girl by her parents will not amount to illegal custody warranting the issue of a writ by this Court. Parents will naturally be interested in the welfare of their children and unless there are extraordinary circumstances, normally they will be the proper persons to take decisions concerning the career and future of their children. Parents will be entitled to have control over the children, especially if they are daughters, to protect them from the vagaries of adolescence.”

Such judgements reflect the patriarchal and stereotypical notions that some sections of the judiciary still retain vis-à-vis women and girls. This case demonstrates how the judiciary can normalise and uphold a discriminatory and unjust norm which denies girls independence/autonomy or freedom of choice and projects them as dependent and subservient human beings. The judgement perpetuates the notion that girls need to be controlled and ‘protected’ from their own actions and are not capable of making the right decisions. The case underscores the need for sensitising the judiciary on being responsive to the needs and concerns of adolescents while upholding their right to freedom of thought and expression.

Thus, while some courts have held that a young girl and boy should have the right to choose their partners even if they are still minors, others have taken a very strict and conservative view. The courts which have been liberal have, however, made uncritical and sweeping statements

⁵⁹ *Amninder Kaur and Anr. v. State of Punjab* 2010 CriLJ 1154. In this particular case, the girl and boy had approached the Court for Protection as they apprehended danger from the girl’s parents and relatives as they had got married against their wishes.

about the Indian law allowing child marriage.⁶⁰ They have not seen the issue from a human rights perspective and applied a nuanced understanding to allow a relaxed age of marriage in cases in which both parties are young. A distinction should have been made between such cases and other cases of child marriages of girls who are still children and therefore vulnerable to sexual and other forms of violence and abuse.

Conclusions and Recommendations Related to Child Marriage

An appraisal of the law related to child marriage shows that a number of amendments are required in PCMA. Amendments are also required in the section of the Indian Penal Code which defines rape and states that “sexual intercourse of a man with his own wife is not rape” if she is above 15 years.

The following recommendations are made to address child marriage and protect the interests of girls:

- Under the Prohibition of Child Marriage Act, 2006 there must be a provision for holding a child marriage automatically invalid if the age of the girl or the boy is below 16 years. However, all the sections which allow a girl to ask for maintenance till her remarriage in the PCMA should be made applicable to marriages which are void *ab initio*.⁶¹ Similarly, provisions which relate to the custody and legitimacy of children born to a couple who were involved in a child marriage should be made applicable to void marriages also.
- The minimum age for marriage for a boy and girl should be the same.
- The marital rape exception clause which states that “sexual intercourse by a man with his own wife, the wife being not under fifteen years of age is not rape” that has been retained in the Criminal Law (Amendment) Act, 2013 should be deleted from Section 375 of the IPC.

“The marital rape exception clause should be deleted from Section 375 of the IPC.”

Implementation

- The PCMA should be implemented by appointment of as many CMPOs as are necessary, particularly in the sensitive districts of the country in which mass child marriages and other child marriages are carried out. These officers should maintain a complete list of all child marriages that have taken place in the area and should give an annual report to the respective state governments about the actions that he/she has initiated to prevent and stop child marriages, including creating awareness about the PCMA.
- A complete survey of child marriages should be carried out in all the sensitive districts of the country.

⁶⁰ *Manish Singh v. State Govt. of NCT and Ors.* AIR 2006 Del 37; *Ravi Kumar v. State* 2005 VIII AD (DEL) 256.

⁶¹ From the beginning; See Black Law's Dictionary, 6th edn, 1990, p. 784.

- Further, qualitative research on the adverse effects of child marriage is necessary in India as till date very few such studies exist. Equally important are studies that can provide an insight into factors to prevent child marriage and bring about attitudinal change among parents and families.
- Awareness about the issue of child marriage and its consequences, particularly for the girl child, should be created through the media and other means.

“Gender sensitisation of the police and the judiciary through extensive and regular in-house training is necessary.”

- Gender sensitisation of the police and the judiciary through extensive and regular in-house training is necessary. The police have often refused to act in cases of child marriage as they feel that child marriage is valid and justifiable. Several judgements also reveal that the judges are not sufficiently briefed on the issue and are not aware of the research that exists on the subject.

Denial of Choice in Marriage and Crimes in the Name of ‘Honour’

As seen in a number of cases of marriage by choice in the past few years, the opposition by the girl’s family, sometimes with other members of the extended family and sometimes in collusion with the *khap panchayats*⁶² is assuming more and more brutal forms. These forms include intimidation, harassment and physical assault, and in some cases murder of the girl, the boy and on quite a few occasions of other members of the boy’s family. Crimes in the name of honour are a form of gender-based violence⁶³ and are committed to stop the daughter from deciding who she wants to live with or marry or have a relationship with. While there may be situations in which a boy’s family also objects to the marriage, the son is not treated with the violence and intimidation that the daughter is as he is perhaps granted more autonomy and liberty to decide on issues. Also, in almost all reported cases,⁶⁴ the boy’s family has accepted the union, and in a number of them, has provided a home and protection to the couple.

As seen in the past few years, community based or *khap panchayats* particularly in Haryana and western Uttar Pradesh are increasingly participating in trying to stop marriages by choice and in punishing those who get married in opposition to the customary norms of marriage. These

⁶² “*Khap* is an old system of social administration followed mainly in the north-western states of Haryana, Rajasthan and Uttar Pradesh. Not to be mistaken for elected gram panchayats, these are extra-constitutional bodies that began as clannish organisations in the tribal era but have literally transformed into kangaroo courts. In Haryana’s villages, they run a largely retrogressive and parallel law-enforcement agency.” See *Panchayats turn into kangaroo courts*, Rohit Mullick and Neelam Raaj, Times of India, 9.9.2007.

⁶³ Gender-based violence is a form of discrimination that seriously inhibits women’s inability to enjoy rights and freedoms on a basis of equality with men, identifying those rights and freedoms which are compromised by such violence. Violence against women is defined as violence that is directed against a woman because she is a woman or that affects women disproportionately. As mentioned in CEDAW General Recommendation 9, UN Doc. A/47/38 (Eleventh session, 1993), para 6 & 7.

⁶⁴ *Prasadh Kumar v. Ravindran II* (1992) DMC 162; COL. (SG) *S.S. More v. Union of India (UOI) and Ors.* W.P. (C) 5342/2011 in the High Court of Delhi at New Delhi as decided on: 02.08.2011.

Control of Sexuality

"Frameworks of 'Honour' and its corollary 'shame' operate to control, direct and regulate women's sexuality and freedom of movement by male members of the family... 'Regulation' of such behaviour may in extreme cases involve horrific direct violence – including 'honour killing', perhaps the most overt example of the brutal control of female sexuality – as well as indirect subtle control exercised through threats of force or the withdrawal of family benefits and security. In these case contexts, the rights of women (and girls) to control their own lives, to liberty and freedom of expression, association, movement and bodily integrity mean very little."

Radhika Coomaraswamy, *Violence against women and 'crimes of honour'*, In: *Honour: Crimes, paradigms and violence against women*, edited by Lynn Welchman and Sara Hossain, Zed Books Ltd., London, 2005.

brutal interventions by such extra-judicial bodies indicate how feudal and patriarchal institutions can be used to reassert and reinstate authority and control over women. One study⁶⁵ points out that due to the paucity of women of marriageable age in Haryana because of gender-biased sex selection, the communities especially "Jats wish to maintain a tight control over the women available in their marriage pools". The study indicates that if an outsider wants to marry a woman belonging to the Jat community, the khap panchayats, by issuing diktats to punish such marriages, seek to preserve each *gotra's* legitimate pool of girls of marriageable age. Thus, experts have linked crimes in the name of 'honour' to sex selection and perceive such crimes as a possible consequence of it.

Organisations working with the victims of crimes and killings in the name of 'honour' have underscored the inadequacy of our criminal laws to deal with this phenomenon. Reported cases have also shown that the right to choose or not to choose a partner in marriage is a right which is not respected by large sections of the Indian society, including the police. In fact, if a young woman wants to marry a man of her choice, particularly if he belongs to a lower caste, a different religion or the same *gotra*, this is strongly opposed by her family members who physically try to stop her. Such cases have been reported from various parts of the country both in rural and urban settings. The right to choose a partner in marriage is a fundamental right which flows from the right to privacy, life and liberty and the right to bodily integrity.⁶⁶ However, the "tragic reality is that today thousands of young women and men are being harassed and murdered because they dared to exercise their constitutional right to marry".⁶⁷ Though most marriage laws lay down consent of the principal parties as an essential requirement to marry,⁶⁸ this is often ignored and the right exists only on paper.

⁶⁵ Ravinder Kaur, "Khap Panchayat, Sex Ratio and Female Agency", *Economic and Political Weekly*, Vol. XLV, No. 23, 5.6.2010.

⁶⁶ The Constitution of India, 1950, Article 21, reads: "Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law".

⁶⁷ Vina Mazumdar, In a Convention on Honour Killing organised by AIDWA, New Delhi, 2010.

⁶⁸ S. 5 of the Hindu Marriage Act, 1955, s. 4(b) of the Special Marriage Act, 1954 etc.

Young Couples Seek Protection from the Courts

The Punjab and Haryana High Court routinely deals with young couples who have 'eloped' due to parental objection to their marriage and in one case observed as under:

"All the petitioners before me have stated that they have performed love marriage. In vacations, two benches are hearing urgent matters. Out of 50 matters, about 18 matters pertain to marriage. Scene is no different on other days when the court is functioning and deciding the cases regularly. It is a fact that from the last 4-5 years, this court is flooded with the petitions where married couples come and seek protection... Couples hiding themselves in corridors of the Court, chased by relations accompanied by musclemen armed with weapons is not the answer which they seek by performing marriage. Society has to insulate these couples. When the arrears of cases are mounting, the High Court is flooded with the petitions where number of Judges of this Court have to answer the right of life and liberty to the newly married couples. State is a mute spectator."

Ashok Kumar v. State 2008 (3) RCR (Criminal) 391.

Several cases are filed each year by young couples who are being hounded by the relatives of the girl and other community members. The Punjab and Haryana High Court in a case⁶⁹ noted the increasing number of such cases and issued notice to the State asking it to evolve a mechanism to deal with them.

It has always been the girl's family which has strongly opposed the marriage by choice and has used a variety of violent means to stop the marriage or break the relationship which, normally the girl's father or brothers say is against the family's "izzat" or "honour". Honour is generally seen as residing in women.

Cases, particularly from Haryana and some other parts of the country, have also highlighted the extra-judicial role played by the caste or khap panchayats to stop these marriages or to brutally punish the errant girl, boy and the boy's family. In some cases, the khap panchayats have intervened and meted out all sorts of brutal and harsh punishments even when the girl's family has not been keen to do so. These khap panchayats are not only imbued with a deeply feudal and patriarchal mindset which seeks to control the body and sexuality of a girl, but they have also sought to make capital from this issue for narrow electoral gains and to build a vote bank on the basis of caste.

Several cases, including the Babli and Manoj case,⁷⁰ in the past three years and earlier, have highlighted the various kinds of harassment and barbaric treatment meted out to the girl and the boy and normally the boy's family. Sometimes the extent of the harassment and humiliation is such

⁶⁹ *Ashok Kumar v. State* 2008 (3) RCR (Criminal) 391 (Punjab and Haryana HC); Also see *Khushnuma and Anr. v. State of U.P. and Ors.* 2003 5 AWC4446.

⁷⁰ Criminal revision No.2173 of 2010 in the High Court of Punjab and Haryana at Chandigarh, as decided on 11.3.2011.

Punished for Falling in Love – A Case from Haryana

Two young Dalits from Talav village in the notorious Jhajjar District, Rohtas Kumar and Surinder, related their experience of brutal inhumanity. In July 2002, two Jat sisters from their village ran away with a Dalit boy. The older sister was in love with him and the younger one knew that her parents would beat her to death when they come to know of them...

Attacks on Dalit families in the village began and on 11th July, a married girl who belonged to the boy's family was threatened so much that she committed suicide. Many Dalits ran away from the village and the womenfolk were forced to sleep on their rooftops. When the police came to enquire into the suicide, the girl's father-in-law told them that she had been threatened with rape. The police shouted at him and registered a case of Dowry harassment against him and his family.

On 12th July, a village Panchayat met and summoned Rohtas and Surinder. They were accused of telling lies and bringing a bad name to the village. Rohtas was abused and humiliated and forced to apologise abjectly. He had to leave the village. The Dalits could no longer use the well or graze their animals. They were refused milk and all provisions. They were not allowed to buy even vegetables from the village shops. Then on 22nd July, a Panchayat of three villages was called and Rohtas was forced to appear. Here he had to pay a fine of Rupees two thousand and was beaten five times with a shoe. At this point, Rohtas broke down saying, "What could I do? If I wanted to live, I had to undergo the humiliation."

On 19th July, the two girls were caught and produced before the magistrate. The boy was sent to jail. In spite of the fact that both the girls said that they had gone of their own volition and they did not want to return to their home, they were sent with their parents. Within 24 hours both were dead – one had been given poisoned milk and the other was strangled. A case of suicide was registered.

See: AIDWA, In the Name of 'Honour': *Let Us Love and Live*, 2010, Page 11.

that, unable to bear the agony, members of the boy's family and/or their associates have committed suicide as in a case reported from Haryana.⁷¹ Punishments by the khap panchayats have included social and economic boycott of the boy's family and relatives, asking the girl and the boy and his family to leave the village, levelling fines on the boy's family, relatives and those who support them, confiscating the property of the boy's family, and repeatedly harassing and humiliating the girl and the boy and the boy's family and associates. At times, other girls who belong to the boy's family or caste have been targeted and assaulted; and sometimes not only have the boy and the girl been asked to separate, but they have also been declared as brother and sister.

⁷¹ AIDWA, *In the name of Honour: Let us Love and Live*, 2010, p. 11.

Challenges

Many of the punishments that are meted out by the khap panchayats are not per se recognised as crimes in the Indian Penal Code. For instance, the offence of criminal intimidation is punishable only with imprisonment up to two years or with fines. This punishment is not sufficient for an accused who may have intimidated a couple to leave their village or home. The offence also does not take into consideration what the consequences of the intimidation might be. There are also no laws which punish the illegal and often barbaric collective actions of khap or community

“Many of the punishments that are meted out by the khap panchayats are not per se recognised as crimes in the Indian Penal Code.”

panchayats or other caste or religious associations. The eulogising of the actions of the khap panchayat against the young couple or the boy's family is also not seen to be punishable under the law.

In most of the cases of crimes and killings in the name of 'honour', the police have acted as agents of the girl's family and, instead of registering cases against the panchayat and the girl's family and the other accused, have filed wrong cases of kidnapping and abduction against the boy. Sometimes this has resulted in long periods of imprisonment for the boy. The murders of young girls by members of their families have also been deliberately and wrongly registered as suicides.

Instead of dealing with the entire issue in a comprehensive manner, the government has circulated a bill which only seeks to introduce killing in the name of 'honour' as a kind of murder. The bill also seeks to make all members of a caste panchayat punishable if any *fatwa* is issued by the panchayat. This is wrong as members who are not present at the time the decision to kill is taken cannot be held liable for murder. The bill, however, rightly seeks to do away with a one-month waiting period before a marriage can be registered under the Special Marriage Act.

The All India Democratic Women's Association (AIDWA),⁷² along with some other women's organisations, has demanded that a comprehensive standalone legislation be enacted to deal with the issue of crime and killing in the name of 'honour' and 'tradition' and has submitted a bill to the government which also reasserts the fundamental right of all young people to marry a person of their choice. The National Commission of Women has also adopted this Bill with certain changes.⁷³ It is relevant to mention that at the time the issue of killing in the name of 'honour' was being debated in the Rajya Sabha, 15 Members of Parliament from different parties had argued for a standalone law on this issue.⁷⁴

⁷² AIDWA demands law on 'honour' killing, *The Hindu*, New Delhi, 10.5.2011.

⁷³ See www.ncw.nic.in.

⁷⁴ Rajya Sabha Debates, 28.7.2009.

Recently, the Law Commission has also circulated a paper⁷⁵ which tries to deal with crimes in the name of honour. However, the Law Commission's suggestion for a legislative framework on "Unlawful interference of caste panchayat with marriages in the name of honour" does not deal with the entire issue but only seeks to make members of the khap panchayats and those who participate in the meetings liable for criminal intimidation. The Law Commission has, however, increased the punishment for the crime of criminal intimidation. The Law Commission's suggestions do not apply when the khap panchayats or similar community based bodies are not involved in the crimes; and thus, the Law Commission does not make the family members of the girl or relatives/friends of these family members culpable even if they commit crimes similar

“The courts... have in quite a few judgments adhered to a conservative, patriarchal way of thinking about how a woman should behave at various stages of her life.”

to the ones committed by the khap panchayat members. Further, the suggestions of the Law Commission apply only to cases in which the boy and the girl are married and not if they are living together. The suggestions of the Law Commission therefore appear to be conservative and unwilling to challenge such crimes by individuals and/or families.

Apart from the police, the courts too have in quite a few judgements adhered to a conservative, patriarchal way of thinking about how a woman should behave at various stages of her life. In a shockingly retrograde judgement, the Allahabad High Court remanded a woman aged 37 years to a Protective Home when she left her marital home and started living with another person.⁷⁶ The judgement was suggestive of moral policing. The fact that the woman was an adult and had the constitutional rights of freedom and liberty under several Articles of the chapter on Fundamental Rights, and the right to choose her place of residence and live with whomever she felt like living with, totally escaped the judges.

Conclusions and Recommendations Related to Crimes in the Name of 'Honour'

The study of cases of crimes and killing in the name of 'honour' reveals the gendered nature of such crimes. There is a need to have an inclusive definition of the various kinds of harassment that the young couple are subjected to; and actions like punishing the erring couple and the groom's family through imposition of fines, extradition of the couple and the boy's family, social and economic boycott, pronouncing the couple as brother and sister should be spelt out as crimes. As killing in the name of 'honour' is not separately categorised from the offence of murder,

⁷⁵ Law Commission of India, *Consultation Paper on Unlawful interference of Caste Panchayat etc. with marriages in the name of honour: A suggested legislative framework*; available at <<http://lawcommissionofindia.nic.in/reports/cp-Honour%20Killing.pdf>>, as viewed on 27.07.2012.

⁷⁶ *Kusum Devi v. State of U.P. and Ors.* 2010(1) ACR 624.

“The Supreme Court has... directed that the District Magistrate and the Superintendent of Police be held accountable if they fail to prevent crimes in the name of ‘honour.’”

no accurate statistics regarding these killings exist. Some Supreme Court judgements⁷⁷ have passed directions to the police and administration to implement the law of the land in cases of killings of this nature and some courts have tried to protect these couples by providing them police protection, but this is not enough. The Supreme Court has even directed that the District Magistrate and the Superintendent of Police be held accountable if they fail to prevent these crimes. However, crimes and killings in the name of ‘honour’ seem to be increasing as is evident from the regular reports of these crimes in the media. It is therefore necessary to adopt the following measures and introduce a comprehensive law to deal with the various aspects of the crime.

Legal Measures

- A comprehensive standalone law must be enacted to deal with killings and crimes in the name of ‘honour’ as suggested by the National Commission for Women and groups like the All India Democratic Women’s Association.
- The law should reiterate the right of all persons to freely choose a partner in a marriage or relationship and state that this right is a part of the Constitutional right to life and privacy.
- This law should provide for punishment of all those who kill or harass a young couple to stop them from getting married or exercising their right to choose their partner.
- The law should further provide complainants with protection from being charged with false cases of kidnapping and abduction.
- The law should provide for the establishment of safe homes where the couple can seek refuge. Some such homes are already in existence in Haryana.
- Publically glorifying any harassment and killing in the name of ‘honour’ or ‘izzat’ by the khap or community panchayats should be made punishable.
- Adults seeking to get married should be allowed to do so immediately. Presently, the civil law of marriage in India, the Special Marriage Act, prescribes a one-month waiting period after a party gives a notice to the appropriate authority that he/she wants to get married.

State Action

- All police stations, particularly in areas where killing or crime in the name of ‘honour’ exists, should be given exhaustive directions about the manner in which these cases should be handled.

⁷⁷ *Lata Singh v. State of Uttar Pradesh and Anr.*, (2006) 5 SCC 475; *Arumugam Somai v. State of Tamil Nadu* AIR 2011 SC 1859.

- If the police do not lodge a complaint or file a false complaint of kidnapping or abduction, they should be held accountable and immediately suspended from their posts. Further, the penal law should be amended to punish the police if they do not register a case or if they have deliberately not acted in time to prevent a killing or crime.
- Gender sensitisation of the police and the judiciary is a necessary requirement in these cases.
- A survey of the number of ‘honour’ killings and crimes should be carried out and data should be collected about the extent and nature of these crimes to create a deeper understanding among the administrators, police and the judiciary about the kinds of preventive and remedial actions required.

Other Critical Laws Which Impact Son Preference

The previous chapters have examined laws that overtly or covertly fuel son preference and daughter discrimination. Inheritance laws, in so far as they retain the patrilineal form of inheritance, privilege a son over a daughter. Dowry has been highlighted as the main reason why daughters are unwanted and discriminated against. The adverse effects of child marriage on a girl, including the manner in which they deprive her of her fundamental freedoms and the right to education and all round development, increase her dependency and unwantedness. Inadequacies in these laws relating to inheritance, dowry and child marriage and their lack of implementation are factors which contribute towards and reinforce son preference. The lack of a law to address crimes and killing in the name of 'honour' does not only mean that the culprits go unpunished but also that the girl is deprived of her basic right to liberty, to choose her partner and to retain her bodily integrity.

In this chapter, we look at other areas of discrimination and violence which are caused by, and further perpetrate, son preference. The neglect of daughters and the privilege given to sons over daughters in terms of nutrition, health and education are examined. The laws relating to sexual assault and harassment are also examined to see whether they provide a safe and enabling environment for

girls/women. These laws are necessary to ensure that a girl/woman can move around freely and work in a safe and secure place and thus be independent and self-sufficient. The lack of laws in the area of marital property is also examined.

As the girl child grows up, she faces violence, including sexual violence, and discrimination both within the home and outside. Within the home, even as a small child she faces deliberate neglect, both in terms of nutrition and healthcare. Though a majority of children in India suffer from a lack of nutrition,¹ a son in the family is privileged over a daughter.² Healthcare is also more readily given to a son than a daughter.³ The finding of the Census 2011 of a child sex ratio of 919 girls per thousand boys for the population aged 0-6 years also shows that apart from sex selection in favour of boys, the deliberate neglect of girls is also a reason for the skewed child sex

“As the girl child grows up, she faces violence, including sexual violence, and discrimination both within the home and outside.”

ratio. Further, though a large proportion of the Indian population continues to have little or no education, this proportion is much higher for women than men. Only 14 per cent women and 24 per cent men aged 6 years and above, have completed 10 or more years of education.⁴ Girls also face economic and cultural pressures to drop out of school. Adolescent girls face a greater risk than adolescent boys of nutritional problems such as anaemia. Underweight prevalence among adolescent girls aged 15–19 years is 47 per cent in India, the world’s highest.

In addition, over half of girls (56%) aged 15–19 years are anaemic. This has serious implications since many young women marry before the age of 20 and being anaemic or underweight increases the risks during pregnancy, resulting in maternal mortality.⁵

An interesting 2007 study on child abuse by the Government⁶ defines girl child neglect as “the failure to provide for the all round development of the girl child including health, nutrition, education, shelter, protection and emotional development.” The study looked at the lack of attention given to girls as compared to boys, the amount of food given to a girl in the family, the amount of work that she was expected to do and other forms of gender discrimination. The findings of the study were as under:

- A majority of the girls (70.57%) reported neglect of one form or the other by family members.
- Almost half the girls (48.4%) said that they sometimes wished they were a boy. This perhaps indicated “the overall gender discrimination” they faced.

¹ International Institute for Population Sciences (IIPS) and Macro International, *National Family Health Survey (NFHS-3), 2005-06, India* Vol. I, 270 (IIPS: Mumbai, 2007). See: <http://www.nfhsindia.org/NFHS-3%20Data/VOL-1/India_volume_I_corrected_17oct08.pdf> as viewed on 26.07.2012. Also see the UN World Food Programme’s Global Hunger Index of 119 countries in which India ranks 94.

² *Ibid*, p. 269.

³ *Ibid*, pp. 276, 235-37, 242.

⁴ *Ibid*, p. 270.

⁵ United Nations Children’s Fund, *Adolescence: An Age of Opportunity*, SOWC Report 2011, New York, 2011, p. 23.

⁶ Government of India, Ministry of Women and Child Development, *Study on Child Abuse: India 2007*, p. 114-16.

- A majority of the girls (70.38%) reported doing more household work like cleaning/dusting of the house and drawing of water compared to their brothers.
- Almost 49 per cent of the girls reported that they had to take care of their younger siblings.
- The overall percentage of girls who reported getting less food than their brothers was 27.33 per cent. In the states of Uttar Pradesh, Gujarat and Bihar, however, the reported percentages were 69.04 per cent, 67.83 per cent and 65.63 per cent, respectively.

The study further observes that the girls reported getting less attention than their brothers; that brothers dominated while playing and that they often teased their sisters but the parents did not listen to their daughters or take their side. Girls also reported not being appreciated and being scolded by parents for no ostensible reason.

All these forms of discrimination are in direct violation of the Provision Rights in the Convention on the Rights of the Child (hereafter CRC) which call for programmes in child health, nutrition and education. The CRC also outlines Protective Rights which all children are supposed to have. These rights protect the child against abuse and exploitation through labour, trafficking, etc. (Article 34 of the Convention). Since India is a state party to the CRC, it has undertaken to put in place measures to combat crime against children and ensure that offences against them are punishable under the law. Though some measures have been taken, much more needs to be done.

The problem is the absence of a legal framework which can address the deliberate and systemic neglect that the girl child is subjected to during her early childhood and adolescence within the home. While a child subjected to violence can technically approach the court under the Domestic Violence Act and a child who has been abandoned is supposed to be taken care of by

Persistent Neglect of the Girl Child

“Every year, 12 million girls are born – three million of whom do not survive to see their 15th birthday. About one-third of these deaths occur in the first year of life and it is estimated that every sixth female death is directly due to gender discrimination.”

Girls – born and unborn – are increasingly unsafe almost everywhere, except in some tribal and south-west coastal areas.

“Girl children who escape foeticide, infanticide, or neo-natal denial are still in the 0-6 high-risk frame for early disposal. She is less fed, less encouraged to explore the world, more likely to be handed jobs to do, given less health care and medical attention, socialised not to ask. ... Out-patient data from hospitals in northern cities shows lower admissions of girl children, and girls in more serious condition than boys when brought for treatment.”

- Indian Alliance for Child Rights, CRC Review Note #1: *India's Girl Child: Crisis of 'Early Disposal' (Declining Juvenile Sex Ratio – 0 to 6 years)*

the Child Welfare Committee under the Juvenile Justice Act, 2000, this is not enough. For small children, some sort of monitoring by an appropriate social welfare/child welfare authority is required. Further, a girl who feels that she is being deliberately neglected should be able to approach such an authority for help.

Apart from Provision Rights and Protective Rights, the CRC also talks of Participatory Rights. These rights, particularly Articles 3, 5 and 12, detail children's right to express their views freely and to be heard in all matters affecting them. Article 12 specifically entitles children to be actors in their own lives, to participate in the decisions affecting them, to challenge the abuses committed against them and to actively protect these rights. Articles 12–17 of the CRC guarantee children the right to freedom of expression, to receive and impart information, to freedom of religion, to freedom of association and the right to privacy.

However, if one examines the various laws relating to the girl child, her rights to freely express her views and to make decisions about her life are not given priority. Most decisions regarding a girl's life are taken by her family while she lives with them or her husband/in-laws after her marriage. Participatory rights still need to be seriously thought of and engrafted into the law.

Rape and Sexual Assault

A safe and enabling environment for girls and women both in the home and in public places is necessary to ensure that they are not subjected to violence and further discrimination.

“A safe and enabling environment for girls and women both in the home and in public places is necessary to ensure that they are not subjected to violence and further discrimination.”

The recent Protection of Children from Sexual Offences Act, 2012 (hereafter POCSO) passed by the Parliament seeks to punish penetrative and non-penetrative sexual assault and aggravated forms of both these types of sexual assaults if they are committed in situations of custody or by a policeman, public servant or by a member of the child's family or a guardian, in a communal situation or by a group of persons. However, a child is defined as a person under 18 years of age and the legislation therefore does not take into account consensual sexual activity between two young persons. If, for instance, a boy and a girl both 16 years of age engage in consensual sexual activity, a case of penetrative and

non-penetrative sexual assault can be filed against the boy. Thus, the law targets all consensual sexual activity between young persons without taking into account that such activity is common. Since several false cases of kidnapping and rape are routinely filed to stop young persons from having a relationship with a person of their choice, this law will obviously facilitate the filing of such petitions against young boys who have been in a consensual relationship with a young girl. The recent amendments to the Rape Law in the IPC also define the age of consent as 18 years despite opposition to this by women's groups and others.

Women's organisations and groups⁷ had demanded that the age below which sexual assault should be considered a crime, regardless of consent, should be 16. Women's organisations had also demanded that consensual sexual activity between two young persons should not be considered sexual assault if the boy is not more than five years older than the girl.

POCSO addresses the issue of sexual assault and offences against children. Recently the laws pertaining to sexual assault against adult women were also changed after the brutal gang rape of a 23 year old woman on 16 December 2012 in Delhi. Widespread protests throughout the country followed this gruesome incident in which the woman was brutally assaulted after the rape and left to die on the roadside. This incident and the protests also highlighted the fact that women were extremely unsafe in cities like Delhi and that the police had hitherto not paid enough attention to issues concerning women's safety and security. The government, which had ignored the demands by women's organisations and groups for over 20 years for amendments to sexual assaults and rape

“ The law has been also amended to include the recognition of new forms of violence like stalking, voyeurism, and disrobing a woman in public. ”

laws and drafts presented to them on these laws by these groups,⁸ set up the Verma Committee to look into issues relating to “speedier justice and enhanced punishment in cases of aggravated sexual assault”.⁹ The Verma Committee however examined the entire gamut of laws relating to sexual assaults and rapes and some other forms of violence and their implementation and suggested various changes. Like the earlier suggestions of the women's organisations, these included changes in the definition of rape, molestation and sexual harassment (popularly known as ‘eve teasing’) and addition

of certain new crimes like stalking, stripping a woman in public and voyeurism. The government which had earlier introduced a bill on some of these changes¹⁰ passed a law¹¹ widening the definition of rape to include oral and anal rape and rape by insertion of objects and parts of the body into the vagina and anus. The law has been also amended to include the recognition of new forms of violence like stalking, voyeurism, and disrobing a woman in public. Certain new categories of aggravated rape have also been introduced which include rape by the armed and para military forces, rape during communal and sectarian violence and rape by persons in positions of control or dominance. Consent has also been defined in the law for the first time to mean an unequivocal voluntary agreement to the sexual intercourse and it has been specifically mentioned that if a woman does not physically resist the act, this fact alone will not be sufficient to establish the absence of rape. In other words, if a woman remains passive this alone will not imply consent to the sexual intercourse in question. A wide definition of trafficking has also been inserted in the IPC.

⁷ AIDWA and five other organisations in a letter to the Law Minister dated 8.1.2010.

⁸ *Ibid.* Other letters have been presented to successive governments and law ministers and are available with the AIDWA office.

⁹ Notification by the Ministry of Home Affairs, Gazette of India, Extraordinary, Part II Section 3 Sub-Section (ii), New Delhi, 24.12.2012

¹⁰ Criminal Law Amendment Bill, 2012 (Bill No. 130 of 2012).

¹¹ The Criminal Law (Amendment) Act, 2013 (No. 13 of 2013) published in the Gazette of India on the 2nd of April 2013.

However, some major lacunae still remain. While the definition of molestation has been changed to touching with “sexual intent” for children under POCSO, this definition has not been changed for adults. The problem with this is that not only do older women continue to be subject to an older patriarchal Penal Code which was formulated in 1860, but even younger women over 18 are subject to this ancient law. The only change that the Government has made is enhancing the punishment to a minimum period of one year and a maximum period of 5 years.¹²

A fairly recent incident¹³ of a girl being molested by a gang of men outside a bar in Guwahati underscores the need to completely amend the provisions of the IPC regarding molestation.¹⁴ At present, molestation has been defined in the IPC as sexual assault on a woman by a man “intending to outrage or knowing it to be likely that he will thereby outrage her modesty”. It has been widely accepted that the words “intending to outrage the modesty” are totally irrelevant and unnecessary

“The National Crime Records Bureau statistics have shown that rape accounts for around 10.6 per cent of the total number of crimes against women... 54.7 per cent in the age group 18-30 years.”

in the present context and sexually assaulting a woman is by itself enough to attract punishment. Apart from this, aggravated forms of non-penetrative sexual assault should also be inserted to include all the categories mentioned under aggravated forms of rape. Thus molestation by a policeman, by a gang, sexual assault with hurt/grievous hurt, by a guardian, by members of the armed and paramilitary forces and sexual assault during communal and sectarian clashes, sexual assault on a disabled woman, etc. should be included as aggravated forms of the offence.¹⁵ This has been done under POCSO but for some reason has been left out from the amendments to the IPC.

The National Crime Records Bureau (NCRB) statistics have shown that rape accounts for around 10.6 per cent of the total number of crimes against women. What is alarming is that girls under 14 constituted 10.6 per cent of the victims, teenage girls between 14 and 18 years of age constituted 19 per cent of victims while 54.7 per cent were young women in the age-group 18-30 years. The offenders were known to the victims in 94 per cent of the cases.¹⁶ The number of molestation cases reported in 2011 was 42,968, while there were 8,570 cases of sexual harassment (widely known as ‘eve teasing’). Crimes against women have in fact been escalating by 9.2 per cent every year on an average.¹⁷ Sexual assault within the home is also quite pervasive, and can involve sexual assault, including rape and molestation, over a period of time.

¹² *Ibid*, Clause 6.

¹³ Bindu Shajan Perappadan, ‘Guwahati Incident Sparks Nationwide Outrage’, *The Hindu*, New Delhi, 14.7. 2012.

¹⁴ Definition of molestation under s. 354, IPC: “Whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty...”

¹⁵ The Indian Penal Code 1806, s. 376.

¹⁶ NCRB, Crime in India 2011. See: <<http://ncrb.nic.in>>

¹⁷ *Ibid*.

The definition for sexual harassment in Section 509 of the IPC also requires change. At present, a person is liable to be punished if he “intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman.” A person can also be punished if he “intrudes upon the privacy” of a woman.

However, marital rape is still not recognised under the law.¹⁸ Even though this is in violation of the fundamental rights of a woman to equality under Articles 14 and 15 and the right to life and to live with dignity and without violence within and outside the home under Article 21 of the Indian Constitution. Further, the new law also distinguishes between rape of any woman and a separated wife and actually prescribes a lesser punishment for forcing sexual intercourse on a separated wife, making it punishable with 2 to 7 years’ imprisonment. Though changes have been made in the law to allow physically and mentally ‘disabled’ women to give evidence with the assistance of an interpreter and through videography, further procedural changes are needed to make the law more sensitive to women while they are being interrogated or giving evidence in court.¹⁹

Systems Failure and Police Reforms

What is of grave concern in cases of crimes against girls/women is, however, that the culprit is able to commit the crime with impunity. In several incidents of molestation and sexual assault like the

“What is of grave concern in cases of crimes against girls/women is that the culprit is able to commit the crime with impunity.”

ones in Guwahati and Mangalore, there has been a systems failure in responding to the assault in terms of the police not reaching in time to stop the incident or being mere bystanders. There have also been incidents where the police has failed to apprehend the culprits while placating statements are made by the authorities. In a number of instances derogatory statements have been given by the authorities and certain members of the society, particularly those in positions of power, regarding the victim’s manner of dressing and her character.

This encourages elements who do not believe in the equal rights of women and endorses patriarchal mindsets that condone horrific and violent attacks on women. In the Mangalore incident, a misogynist fundamentalist organisation was responsible for the unprovoked planned attack on girls who dared to dress as they wished or acted as any man would ordinarily act.²⁰ The same organisation was also responsible for the 2009 attack on girls in a pub in the same city.²¹

¹⁸ Government of India, Sub-group on Legal Framework for Women under the Working Group on Women’s Empowerment, 12th Five-Year Plan.

¹⁹ Kirti Singh and Diviya Kapur, ‘Law, Violence and the Girl Child’, *Health and Human Rights*, Vol. 5 No. 2, Harvard School of Public Health, p. 9.

²⁰ Jaideep Shenoy, *Moral policing: Mob attacks birthday party in Mangalore, many girls among injured*, Times News Network, 28.7.2012, available at <http://articles.timesofindia.indiatimes.com/2012-07-28/mangalore/32906280_1_revelers-activists-incident>, as viewed on 30.7.2012.

²¹ Times of India, ‘Girls assaulted at Mangalore pub’, Times News Network, 26.1.2009, available at <http://articles.timesofindia.indiatimes.com/2009-01-26/mangalore/28039529_1_mangalore-pub-activists-sri-rama-sena>

It is of great importance therefore that radical changes are brought about in the police force to make them accountable and more efficient. A suggestion which has been incorporated in the law by the recent amendments allows for public 'servants' to be punished if they knowingly disobey any direction of the law relating to the manner in which an investigation should be conducted or fail to register a complaint of sexual assault.²² This section should be used to ensure that police do not act with impunity. Further, though certain standing orders for police

“A suggestion which has been incorporated in the law by the recent amendments allows for public 'servants' to be punished if they knowingly disobey any direction of the law relating to the manner in which an investigation should be conducted or fail to register a complaint of sexual assault.”

investigation in cases related to sexual assault exist in certain places in the country, model standing orders should be framed detailing the procedure and manner of investigation by the police in cases of all kinds of sexual assaults so that the negligence with which these cases are investigated can be dealt with.

Police reforms have been suggested for a long time by the Police Commissions and the Supreme Court to make the police more independent and efficient. In Prakash Singh's case,²³ the Supreme Court had directed the central government to carry out extensive police reforms to stop political/Executive interference in police work and to ensure their independence. The judgement had directed

the constitution of a State Security Commission in every state to ensure that the state government does not exercise influence or pressure on the state police. This judgement further laid down rules for selection of the DGP and IG of police and other officers and a minimum tenure for all of them. It had directed that there should be a separation between the investigating police and the police who would look after law and order, as this would ensure speedier investigation and better expertise. The Court had also directed that a police Complaints Authority headed by a District Judge should be set up in every district to look into complaints against police officials up to the rank of DSP while grievances against police officers of higher ranks would be examined by a state level Complaints Authority headed by a retired judge of the High Court or the Supreme Court. The heads of both these Authorities had to be chosen from a panel of names proposed by the Chief Justice of the State or Chief Justice of India respectively. However, the directions of the

²² The Indian Penal Code, s.166A, reads as: "Whoever, being a public servant, -
(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or
(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation,
(c) fails to record any information given to him under sub-section (l) of section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under Section 326A, section 326B, Section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine."

²³ *Prakash Singh v. Union of India*, (2009) 17 SCC 329.

Supreme Court have not been followed nor has the model Police Act drafted by the National Police Commission replaced the Police Act of 1861.²⁴

The Verma Committee report had recommended certain changes in the Representation of People's Act to ensure that those who had been charged with sexual assault and other offences by the court were not allowed to stand for election. However, the government did not make these amendments. Another suggestion which was not acted upon by the government was a change in the Armed Forces Special Powers Act dispensing with the present requirement of prior government sanction to prosecute any member of the armed forces for the offence of sexual assault and rape in an area where the Act is in force. The Committee had also suggested that a new Section should be added to the IPC which defined and punished the offence of breach of

“The government has inserted a new Section 376A in the IPC by which death penalty can be given if during rape an injury is caused to the woman which results in death or in a ‘persistent vegetative state.’”

command responsibility.²⁵ This meant that if a person in command, control or supervision of the Police or Armed Forces failed to exercise control over persons under his command or control and as a result of this these persons committed rape or sexual assault, the person in command would be guilty of breach of command responsibility. The failure to exercise control would be in a situation in which the person in command knew or should have known that sexual assault was likely to take place or if the person in command did not take necessary and reasonable measures to prevent the offences.

During the protests after the December 2012 gang rape, a demand was raised by sections of protestors and by some political parties that rapists, particularly those involved in gang rapes, should be punished with death. The Verma Committee had not agreed with giving a rapist the death penalty after observing that most of the women's groups were against this and that 'death penalty would be a regressive step in the field of sentencing and reformation.'²⁶ The report also noted that death penalty had never served as a deterrent and was against the basic tenets of humanity. In India the incidence of murder had actually declined though hardly any death sentences had been carried out over the past few years.²⁷ However, the government has inserted a new Section 376A in the IPC by which death penalty can be given if during rape an injury is caused to the woman which results in death or in a 'persistent vegetative state'. The death penalty can also be awarded if the rapist is a serial offender.²⁸

²⁴ This paragraph is from the Submission to the Justice Verma Committee dated 4.1.2013, by 9 women's organizations in New Delhi.

²⁵ Report of the Committee on Amendments to Criminal Laws, 23.1.2013, chaired by Late Justice J.S.Verma, Justice Leila Seth and Gopal Subramaniam, Appendix A, Chapter I, 16.

²⁶ *Ibid*, p. 245.

²⁷ *Ibid*, p. 250.

²⁸ Indian Penal Code, 1806, s. 376A and s. 376E.

Sexual Harassment at the Workplace

To ensure that a woman can work at her place of employment without any impediment, it is again necessary to provide a healthy and safe environment at work. Cases of sexual harassment violate the right of a woman to work. While criminal law punishes sexual harassment in Section 506 of the IPC, the law governing sexual harassment at the workplace and its civil consequences had, till recently, been laid down in the Vishaka²⁹ judgement of the Supreme Court of India. This judgement had specified that a Complaints Committee should be set up in every government or private institution to hear cases of sexual harassment of women employees. In the years since

“Women’s organisations and activists have had to repeatedly intervene to ensure that institutions set up sexual harassment Complaints Committees; and even till date these committees have not been set up in a number of organisations and institutions.”

the Vishaka judgement, women’s organisations and activists have had to repeatedly intervene to ensure that institutions set up sexual harassment Complaints Committees; and even till date these committees have not been set up in a number of organisations and institutions.

The Sexual Harassment Of Women At Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereafter the Anti Sexual Harassment Act) came into force in April 2013. The Act is a fairly comprehensive measure and has been passed to protect the fundamental rights of women to equality and to live with dignity which sexual harassment violates. It also emphasises the right of women to practice any profession or to carry on any occupation,

trade or business which includes a right to a safe environment. Thus, the Act is supposed to provide an enabling environment for women, which will be equitable, safe and secure in every respect.

The Act defines sexual harassment on the lines of the Vishaka judgement and envisages a Complaints Committee in every establishment or place of work for those working in the public and private, organised and unorganised sectors, and includes domestic workers who had earlier not been included in the 2010 Bill.³⁰ The Act mandates all employers of a workplace to constitute an Internal Complaints Committee in which the presiding officer has to be a senior woman employee and at least half of the other members of the Committee have to be women. One of the members has to be from an NGO or an association “committed to the cause of women or a person familiar with the issues relating to sexual harassment”.³¹ The Act specifies that in every district, a Local Complaints Committee should be constituted to receive complaints from establishments where an Internal Complaints Committee has not been setup or if the complaint is against the employer.

²⁹ *Vishaka v. State of Rajasthan* AIR 1997 SC 3011.

³⁰ *Times of India*, ‘Cabinet Okays Sexual Harassment at Workplace Bill’, Times News Network, 11.05.2012, available at <http://articles.timesofindia.indiatimes.com/2012-05-11/india/31668111_1_workplace-bill-molestation-and-eve-teasing-vishaka-vs-state> as viewed on 31.07.2012.

³¹ S. 4 of the Act.

However, the Act contains certain sections which can go against a woman. It contains a section which penalises ‘malicious’ complaints and complaints which the complainant knows are false.³² This section authorises the Internal Complaints Committee or the Local Complaints Committee to recommend to the employer that action be taken against the woman ‘in accordance with... service rules’ or ‘in such manner as may be prescribed’. Women’s groups and organisations have pointed out that this provision is against the Vishaka judgement which clearly states that no action should be taken against a woman for making a complaint. The purpose of a civil law to deal with cases of sexual

“The purpose of a civil law to deal with cases of sexual harassment is to provide a conducive atmosphere in which women victims can lodge a complaint, as women employees are usually hesitant to lodge a complaint for fear of reprisal.”

harassment is to provide a conducive atmosphere in which women victims can lodge a complaint, as women employees are usually hesitant to lodge a complaint for fear of reprisal.

The experience of women’s groups dealing with such cases and as members of Complaints Committees has also brought to light how accusations of false complaints are routinely made against women victims. Though mere inability to substantiate the complaint or provide adequate proof has not been made punishable, this may not be a sufficient safeguard for a woman victim. The fact

that she can be proceeded against will hang like a Damocles’ sword over her head. It is also highly improper for the Complaints Committee to be given the power to recommend action against a woman employee for lodging a malicious complaint. The Select Committee set up to examine the bill on sexual harassment had pointed out that the major opposition to the Bill was on this clause and had further observed that sexual harassment usually occurs in private, no witnesses normally exist. It had also pointed out that the fear of being proceeded against would prevent an employee from making a complaint. In any case, a person who feels that a malicious complaint has been made against him can always take recourse to the criminal or civil law related to filing of a false case and defamation.

Apart from this, the Act contains certain other clauses which have been objected to. For instance, the Act has given the Complaints Committees the power to recommend mandatory conciliation. Some organisations have pointed out that conciliation should only take place if a complainant asks for it, as experience has shown that often women are coerced and persuaded to agree to a compromise on unfavourable terms. The definition of unorganised sector also needs amendment as the Act states that “unorganised sector in relation to a workplace means an enterprise owned by individuals...” where the number of workers employed is less than 10. It has been pointed out that there may be more than 10 workers employed in this sector. It is also not clear whether the definition includes agricultural workers.

³² S. 14 of the Act.

Women's groups had also demanded that all recommendations regarding punishment made by the Complaints Committees to the employers/District Officers must be accepted and implemented and no additional inquiries should be initiated. However the Act is unclear on this.

It is important to implement the Act which has been passed to make the workplace safe so that women are able to join the workforce and continue working without the fear of violence or harassment. This will allow women to become self-reliant and not be seen as dependents and will ultimately also counter the perception of liability associated with them.

Right to Marital Property

Discrimination against daughters does not end with their marriage. Even after marriage a girl often remains economically dependent, as she is primarily expected to take care of the children and look after the home. If she is separated, she often has no place to go to and/or not enough money to survive. She also has no social security and therefore is often forced to return to her natal home, where she is not welcome, further adding to the perception of being a 'burden'. A study of 405 separated and divorced women has revealed that an overwhelming majority, that is, 71.4 per cent returned to their natal homes on separation. The study also revealed that 85.6 per cent of those who had children had to look after these children after separation. Another finding of the study was that only 18.5 per cent of the women asked for divorce. This reiterates

“The right to maintenance does not provide women from any community adequate financial support to be able to live in a manner similar to the manner in which they lived during the subsistence of marriage.”

the assertion by many groups working with separated women that in India very few women ask for divorce because of financial and social insecurity.³³

Under all Indian laws, a wife's entitlements on separation/divorce are extremely limited. Basically, the only legal right that an Indian woman has is a right to maintenance from her spouse, irrespective of the personal law that governs her community. Under the recent Domestic Violence Act, women can claim monetary relief in situations of violence and they also have a right to residence. However, in reality, the right to maintenance does not provide women from

any community adequate financial support to be able to live in a manner similar to the manner in which they lived during the subsistence of marriage. Courts take years to award maintenance and routinely award dismal amounts which are not even remotely sufficient for the woman and her children to survive. As a matter of fact, obtaining maintenance usually requires further rounds of litigation that women generally cannot afford. The procedure for enforcing maintenance awards is extremely lengthy and tedious and needs strengthening. The woman has a right to her *stridhana*³⁴

³³ Kirti Singh, *Separated and Divorced Women in India, Economic Rights and Entitlements*, SAGE Publications India Pvt Ltd, New Delhi, 2013.

³⁴ Gifts given specifically to a Hindu woman at the time of her marriage or later.

and can ask for return of dowry, but this involves engaging with the police and following up with lengthy and expensive proceedings in the court.

Women's economic position is adverse as neither Indian law nor Government policy views their work within the home as productive work having economic value. Time Use studies by the Central Statistical Organisation provide evidence of the enormous amount of time spent by women in carrying out household activities. Yet, the non-recognition of household work and 'care' work reinforces gender discrimination and inequality.

In India, we are governed by the Separation of Property Regime. A husband is the owner of his property and the wife is the owner of her property. Typically, assets acquired during marriage, such as a house or other property, are bought in the husband's name. Thus, if an Indian woman is separated from or deserted by her husband even years after marriage, she is left asset-less. Most separated or deserted women and their children are forced to live with their natal family, including parents and brothers and are financially dependent on them. Often, they are not welcome even there. Despite the fact that India has ratified the Convention to Eliminate all forms of Discrimination Against Women (CEDAW), the law does not recognise a woman as an equal partner in marriage.

“Neither Indian law nor policy recognises the wife as an equal partner in the marriage and unless women get an equal right to marital property, women's financial situation post-divorce would worsen.”

Several countries have given legal recognition to the work done by women in building up, maintaining and managing the household and practice a "Community of Property" regime. This ensures that women have equal rights in the property acquired by the couple if the marriage breaks down.³⁵

In 2010 the central government introduced the Marriage Laws Amendment Bill (introduced as an amendment to the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954) primarily to make divorce easier by the inclusion of a new criterion. All that needed to be proved under this new criterion

was that the marriage had irretrievably broken down and this could be done if the parties had been living separately for three years. Women's organisations and groups, however, opposed the Bill on the ground that making divorce easier in the Indian context would adversely affect the interests of women and children who have extremely limited rights on separation and divorce. The organisations pointed out that neither Indian law nor policy recognises the wife as an equal partner in the marriage and that unless women get an equal right to marital property, women's financial situation post-divorce would worsen.³⁶ They demanded that the government should first give women an equal right in all the assets and property that are acquired after marriage and only then should it further liberalise the divorce laws. The government re-introduced the Bill in the

³⁵ Kirti Singh, *Separated and Divorced Women in India: Economic Rights and Entitlements*, SAGE Publications Pvt Ltd, New Delhi, 2013.

³⁶ Kirti Singh, 'Towards Achieving Equal Rights in Marriage', *Economic and Political Weekly*, Vol. XLVII No. 24, 16.6.2012.

Rajya Sabha in April 2012 which stated that in cases of divorce on the grounds of irretrievable breakdown of marriage the court may order the husband to pay to the wife *“as financial support such gross sum or share in the movable or immovable property towards settlement of property rights in respect of the property acquired during the subsistence of the marriage, as the court may deem it to be just and equitable...”*

Women’s groups protested against this clause as well, saying that it left the entire matter of division of property and the quantum that wives should get to the discretion of the court and this was unacceptable, as women should get an equal share in the marital property. It was pointed out that courts had quite often been less than fair in awarding relief to women, and past experience showed that normally small sums of money had been awarded in petitions for maintenance.³⁷ Also, the clause allowing for division of marital property applied only to petitions for divorce on the grounds of irretrievable breakdown of marriage and not to petitions for divorce on the other available grounds and this was again unfair to women.

Thereafter, the government circulated further amendments which again gave the discretion to the court and stated that it **may** order that the husband shall give to the wife and the children *“an equal share of residential property and pay such gross sum or share of movable property towards settlement of her claim, as the court may deem (it) to be just and equitable...”*

“The implications of liberalising divorce laws are clearly different for women as compared to men.”

This meant that, provided the court agreed, an equal share in the ‘residential property’ would be given to the women and children, whom they clubbed together. The term ‘residential property’ was interpreted by some to mean not only the home which had been acquired by the parties but also a home which may have been inherited by the husband or gifted to him. However, in a departure from the clause introduced in April 2012, the government was now unwilling to give a share to the woman in any other immovable property like land, commercial property, or other houses that the parties may have acquired during the subsistence of marriage. Critics of the Bill expressed the view that the limitation on marital property that could be divided was in response to protests from members of some parties in the Parliament against women getting a share in land and commercial properties. The circulated amendments further left the division of moveable assets (cash and fixed deposits in banks, household goods, vehicles, etc) to the discretion of the court. From multiple iterations on this bill, it appeared that some concessions were being made in the interest of women to facilitate the passing of the bill on irretrievable breakdown of marriage to realise the ultimate objective of liberalising divorce laws.

The implications of liberalising divorce laws are clearly different for women as compared to men. It is pertinent to point out that in the 2010 Bill and the April 2012 amendments, the government had also

³⁷ ‘Marriage law amendment Bill discriminatory: AIDWA’, *The Hindu*, New Delhi, 1.5.2012.

sought to introduce an amendment to make it easier for couples to get divorce by mutual consent. Normally, a petition for divorce on this ground can be filed under the Hindu Marriage Act and Special Marriage Act after a couple has lived separately for at least one year, and then they have to wait for another six months before the divorce is finalised through a second petition. During this period either party can change her/his mind; and some women petitioners have done so because they were not satisfied with the monetary settlement or other terms regarding custody. The government introduced a clause which allowed either party to a divorce petition to ask for waiver of this six-month waiting period. Women's groups protested against this and suggested that the six-month period should be waived only if both the parties agree. This demand has now been considered. This points to the need to understand the relative adverse impact of certain legal changes on women as compared to men. Economic vulnerability and lack of access to and ownership of assets such as a house and savings is often an overriding concern and a deciding factor for women in making decisions such as a divorce.

Overt Forms of Discrimination in Family Laws

Certain overt forms of discrimination against girls and women continue to exist in the various personal laws of the country. One such example is provided under Section 6 of the Hindu Minority

“Various rules and regulations by the government do not recognise the mother as a natural guardian who can act alone in the ‘best interest’ of the child.”

and Guardianship Act which states that the father shall be the natural guardian of a child. The only exception to this rule is a clause which states that ordinarily the custody of children below the age of five years will be with the mother. Though this provision of law was challenged in the Supreme Court, the Court did not strike it down as unconstitutional but merely held that the mother should be considered the legal guardian in the absence of the father due to any reason whatsoever.³⁸

Under the Muslim personal law also the mother is not considered an equal guardian of her child. Though courts have, through progressive judgements, normally allowed mothers to keep the custody of their young children by invoking the rule of the ‘best interest’ of the child, this is not enough. Some courts have given negative judgements, and various rules and regulations by the government do not recognise the mother as a natural guardian who can act alone in the ‘best interest’ of the child.

Under the Hindu Adoption and Maintenance Act, 1956, the wife did not have the right to adopt on her own without the consent of the husband. Recently, the Act was amended to give equal rights of adoption to married women.³⁹ However, if a couple has a child of one sex, they can only adopt a child of another sex. Under Muslim personal law, as interpreted by the courts in India, adoption is not allowed. Other communities like Christians and Parsis also cannot adopt a child, as no secular

³⁸ *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

³⁹ The Personal Laws (Amendment) Act, 2010, No. 30 of 2010.

A Blatantly Discriminatory Provision

A decree in the Family Law of Usage and Customs of 'Gentile Hindus' of Goa provides as under:
Article 2: "The marriage, solemnised between Gentile Hindus, according to their religious rite, produces all the civil effects which the laws of the country acknowledge to the Catholic and civil marriages."

Article 3: "However, the marriage contracted by a male Gentile Hindu by simultaneous polygamy shall not produce civil effects; except in the following cases only:

- (1) Absolute absence of issues by the wife of the previous marriage until she attains the age of 25 years;
- (2) Absolute absence of male issue, the previous wife having completed 30 years of age; and being of lower age, ten years having elapsed from the last pregnancy;
- (3) Separation on any legal grounds when proceeding from the wife, and there being no male issue;
- (4) Xxx"

- Decree dated the 18.11.1969, M.S. Usgaocar, Senior Advocate,
Usage and Customs of Gentile Hindus of Goa, Vol.1, Vela Associates, 3rd edn., 2004, p. 155.

law of adoption exists. In other words, no codified law for adoption exists for religious communities other than Hindus. Till 2001, persons from these communities only had a right to become guardians under the Guardianship and Wards Act, 1890 but the courts could not appoint guardians when a father was living.⁴⁰ The Guardianship and Wards Act has been amended to stop courts from appointing guardians if a mother is alive. Guardianship did not and still does not provide all the rights provided by adoption like the right to inheritance. However, with the enactment of the Juvenile Justice Act (JJA) in 2000, every person – regardless of his/her religion – who is otherwise eligible, can now adopt an orphan child. This process has also been facilitated by guidelines issued by the Central Adoption Resource Agency (CARA) established by the government. Thus, though the rigour of these personal laws has been somewhat diluted by recent amendments in the Juvenile Justice Act, a secular law of adoption is necessary so that adoption can freely take place⁴¹ under this Act.

In the laws applicable to Hindus in Goa, a provision which is blatantly discriminatory regarding recognition of polygamous marriages exists on paper. This provision states that though normally

⁴⁰ *Ibid.*

⁴¹ The Juvenile Justice (Care and Protection of Children) Amendment Act, 2000.

See: In Re: Adoption of Payal @ Sharinee Vinay Pathak and his wife Sonika Sahay @ Pathak 2010 (1) BomCR 434, 2009 (111) BomLR 3816.

"The later Act of 2000 carves out special provisions for dealing with the rehabilitation and integration of juveniles in conflict with law and children in need of special care and protection. Adoption of surrendered, abandoned and orphaned children is the mission of the law. That mission has to be achieved by allowing the adoption of children within the subclass, irrespective of the number of living biological children of the same gender. To that extent there is an exception to the embargo under Clauses (i) and (ii) of Section 11 of the Act of 1956. The embargo is to that extent lifted."

polygamous marriages “shall not produce civil effects” vis-à-vis the second marriage, if the previous wife does not have any children till the age of 25 or if she does not have a male child till the age of 30, the later marriage will be recognised. The provision also states that if a separation is initiated by the wife and there is no male child, the later marriage will be recognised.

Recommendations

Some laws which are necessary to give autonomy and independence to a girl or a woman and enable her to live a life of dignity and free from violence have been examined in this chapter. The introduction of certain laws giving a woman her due share from her spouse or partner; giving her an opportunity to work in an environment which is not hostile and which protects her from sexual harassment; punishing perpetrators of sexual violence and getting rid of certain provisions which do not recognise her as an equal human being will go a long way in improving her status as a daughter.

I. Introduction of Laws and Amendments to Existing Laws

1. A legal framework needs to be put in place to address the deliberate and systemic neglect that the girl child is subjected to during her early childhood and adolescence within the home. For small children, monitoring by an appropriate child welfare authority is required.
2. A girl’s right to freely express her views and to make decisions about her life is not given priority, and most decisions regarding her life are taken by her family while she lives with them and by her husband/in-laws after her marriage. Participatory rights need to be seriously thought of and engrafted into the various laws and regulations under which decisions regarding the child are taken.
3. The Right to Education Act, 2009 should be enforced properly so that girls can attend school. Steps should be taken to increase accessibility of the schools for children, particularly girls. The student-teacher ratio as stipulated in the law should be provided. Apart from this, the school should provide a safe and secure environment for the girl child. Proper toilet facilities should also be provided, especially for girls, as the lack of these is often a reason for non-attendance.
4. Though certain far reaching amendments in the laws related to Rape and Sexual Assault in the IPC have recently been made the following changes still need to be made:
 - Sexual assault (molestation) should be redefined under Section 354 as unlawful touch with a sexual purpose or intent.
 - Non-penetrative sexual assault under Section 354 of the IPC should also contain provisions for aggravated forms of the crime like the provisions for aggravated penetrative sexual assault.

- Marital rape should be considered an offence. The Age of Consent should be lowered to 16.
 - The procedural laws should be changed to make them more women-friendly. This can be done by allowing the testimony of a complainant to be recorded without confronting her with the accused. During *in camera* proceedings, the complainant should be allowed to have a person of her choice beside her to give her emotional support. Support persons should also be available at crises centres as has been recommended by the Working Group on Women's Agency and Empowerment for the 12th Five-Year Plan.⁴² When a woman complains of rape, she should immediately be provided with medical assistance and counselling. A time period should be set for recording her complaint and for ensuring that she makes a statement before the Magistrate as quickly as possible.
5. Legal provisions related to employment:
- While an Act to address sexual harassment has recently been passed, certain provisions which can stop women from making a complaint should be changed. One such provision is that which seeks to punish a woman for making a 'malicious' or false complaint. This should be deleted. Decisions of the Complaints Committees envisaged under the Anti Sexual Harassment Act should be made binding under the law. The provision under the Act which allows the Committee to mandate conciliation proceedings should be altered to ensure that conciliation can only be an option if the woman wants it.
 - Discrimination contained in the terms of employment for men and women should be removed on an immediate basis. For example, discrimination in the clause related to coverage of medical expenses of parents of male employees but not female employees should be removed.
6. A comprehensive "Right to Marital Property Act" applicable to all communities should be enacted. This should treat a husband and wife as equal partners and should provide that when a couple separates, the moveable and immoveable assets and property that they have acquired during the period that they have lived together will be equally shared between them after a proper evaluation of the property under directions of the court. The law should specifically state that the wife can ask for her share at the time of separation and will not have to wait till the divorce takes place. Under the Civil Code in Goa for instance, a wife is entitled to a half share of their marital property but she can only get the share on divorce and this normally takes years. The result is that the wife has to give in to an inequitable settlement.
7. The laws relating to maintenance for women and children must be strengthened to ensure that they receive an adequate amount of maintenance which will be sufficient for them to live in a lifestyle which is similar to the one they were used to in the marital home. Special laws for

⁴² Ministry of Women and Child Development, Government of India, *12th Five-Year Plan Report of the Working Group on Women's Agency and Empowerment*, MWCD, New Delhi, 2011. See: http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wcd/wgrep_women.pdf last visited on 31.07.2012.

disclosure of income of the husbands and shifting of onus of proof in these cases will have to be considered. Ways and means to lessen the discretion of the Judiciary in these matters must be thought of, as women and children have invariably been awarded very low maintenance amounts by a large number of courts.

- The Government has to enact a law to enforce and recover maintenance amounts. Apart from this, a fund will have to be created from which maintenance can be immediately given to the wife and children. In several countries, separate enforcement agencies have been created to recover maintenance amounts. It is the duty of the State to see that women and children are not left to fend for themselves in these cases.
 - Entitlements from the State should be made essential for deserted/separated/divorced women and children in cases where there is no property or where no maintenance can be granted because of poverty and/or other reasons.
 - A fund should be created to pay the maintenance awarded by the court, particularly to poor litigants.
8. All the personal laws should be reviewed to make mothers equal guardians of their children and to recognise that since normally it is primarily the mother who looks after the children, she should be listed as the first guardian.

Similarly, all the regulations and rules should be reviewed to ensure that the mother's signature as a guardian of her children is accepted in all offices, institutions, etc.

9. A secular law of adoption should be enacted. This law should apply to all the communities in India, if possible, and should be based on the criterion of the 'best interest' of the child. It is pertinent to point out that in the 1970s such a law had been introduced in Parliament on two occasions, but it lapsed as all the communities did not agree to a common law of adoption.⁴³
10. The Goa decree related to recognition of "simultaneous polygamy" should be deleted, particularly given its blatant promotion of son preference.

II. Implementation of Laws

Apart from this, the implementation or rather the lack of implementation of the law underscores the urgent necessity not only to reform the law but also to ensure that the police acts in cases of crimes against women both in the home and outside. This can be done by using Section 166A which makes the police accountable by punishing them for refusing to register an FIR⁴⁴ or not acting in time. Model Standard Operating Procedures should be immediately put in place so that the Police

⁴³ Kirti Singh, "Women's Rights and the Reform of Personal Laws," in Gyan Pandey (ed.) *Hindus and Others: The Question of Identity in India Today*, 177 (Delhi: Penguin, 1993).

⁴⁴ First Information Report, which the police is supposed to register before starting their investigation in a cognizable offence. A cognizable offence is an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule mentioned of the Code of Criminal Procedure, 1973 and any other law where it empowers the police to do so, arrest without warrant.

get clear directions on how to proceed with the investigation in cases of sexual assault. If the Police don't follow these procedures immediate action under Section 166A and under their Service Rules should be initiated. In the long term, extensive police reforms as suggested by the Supreme Court in Prakash Singh's case should be implemented.⁴⁵ An improved system for easy filing of FIRs has to be evolved.

III. Social Security Schemes

In India, no social security scheme exists even for the most vulnerable and marginalised groups of people, including separated, divorced and single women. Some states have a few schemes for giving pension and other help to these women, but the amounts given under these schemes are inadequate even for survival. Apart from this, the reach of these schemes is extremely limited. Along with strengthening of social security measures, there is a need to examine the various government policies and their impact on separated and divorced women.

IV. Establishment of Crisis Centres

One-stop Crisis Centres should be established under a centrally sponsored scheme for victims of violence in each district of the country. These Centres will provide shelter, police help, legal help, medical and counselling services to victims and complainants. A pilot initiative on these lines recently instituted by the Ministry of Women and Child Development needs close and effective monitoring for future systematic expansion throughout the country.

V. Setting Up of Helplines

An all-India helpline for women in distress should be set up and the efficiency of the present helpline for children should be assessed and improved upon.

⁴⁵ *Prakash Singh v. Union of India* (2006) 8 SCC 1.

Observations and Recommendations

Background

Son preference is manifested in both traditional and contemporary practices such as sex selection, infanticide, and discrimination against girls in providing them nutrition, health care and education. The decline of CSR to 919 (Census data 2011) is an indication of both pre-birth and post-birth discrimination against girls. Despite the enactment of the PCPNDT Act, there has been a lack of implementation and sex selection appears to continue unabated. The other manifestations of son preference and daughter discrimination are evident in the differential treatment and neglect of girls. Daughters are often burdened with housework and in looking after younger siblings while they are themselves children and ought to be in school like their brothers. They are subjected to child marriage at a much younger age than boys and most often, they do not have the right to choose their partners in marriage or otherwise. Their subordinate status in society means that dowry is expected to be given to get them married. Marriage is perceived to be almost compulsory for girls and takes priority over girls being independent and gainfully employed. Daughters are not given an inheritance even though there may be laws which give them equal rights. The discrimination continues after marriage when, as wives, they have very limited rights in their marital home. If they are separated or have been deserted they only have a right to ask for maintenance but have no

right to the assets in the marital home. This lack of rights reflects the status of women as unequal partners in the home. Their contribution to building up and maintaining the home and taking care of children and the elderly is not recognised and valued.

This discrimination against daughters contrasts sharply with the preferential treatment of sons which is not only evident in the provision of care but is also deeply entrenched in patriarchal customs and traditions. Amongst large sections of Hindus, only a son can light the funeral pyre and offer prayers to ancestors; the son is seen as someone who continues to be a part of the family while the daughter becomes a part of another family due to the tradition of patrilocal marriages; and 'kanyadaan' is seen as a necessary spiritual obligation. Another socio-economic factor often cited as a reason for son preference is the perceived necessity of a son to provide security in old age, as a majority of the elderly in India live with their married sons in the absence of any social

“While the reasons for son preference and discrimination against daughters are deeply entrenched customs and a patriarchal mindset, these customs and mindsets are getting further reinforced by larger political and economic forces.”

welfare benefit and security.² A patrilineal form of inheritance, where the inheritance is through the common male ancestor is present to varying extents in personal laws and so sons inherit more than daughters.

While the reasons for son preference and discrimination against daughters are deeply entrenched customs and a patriarchal mindset, these customs and mindsets are getting further reinforced by larger political and economic forces. The present economic policies, including globalisation, have resulted in increasing disparity between the rich and the poor. Economic reforms in pursuit of higher 'growth' have also meant a drastic cut in subsidies and less money being spent

on the social sector. Thus the universal Public Distribution System (PDS) has been dismantled and a targeted approach adopted restricting public distribution to Below Poverty Line households.³ This approach has failed and has been severely criticized on a number of grounds including the very definition of the poverty line which is seen as faulty and unrealistic. If there is scarcity of food for the poor how can the girl child be fed adequately? Again, when the spending on sectors such as health, nutrition and education is much lower than is required, how can we expect to improve, for instance, the accessibility, quality and infrastructure of health services or increase the number of schools, improve the quality of education in schools and ensure the well-being of children, including girls? These micro-economic realities clearly influence the status of girls and women and require attention

¹ Judiciary Dictionary by Aiyar defines 'Kanyadaan' as follows:

"Kanyadanam: The gift of a bride to a bride-groom by her parent or guardian. It also denotes any present given during marriage to the bride" as referred in *Ramlal Agarwal v. Shanta Devi and Others I* (2000) DMC 640.

² TV Shekher & Neelambar Hatti, 'Disappearing Daughters and Intensification of Gender Bias: Evidence from Two Village Studies in South India', *Sociological Bulletin*, 59(1), Indian Sociological Society, January-April, 2010.

³ In India, for the year 2009-2010, the Poverty Line for rural areas and urban areas is Rs. 672.8 per month and Rs. 859.6 per month respectively. Available at: http://planningcommission.nic.in/news/press_pov1903.pdf as viewed on 10 August 2012.

if discrimination against girls is to be addressed. Hence, demands that subsidies should not be cut and that budget allocation for the food, health and education sectors be increased become necessary if the position of women and girls is to improve. Non-fulfilment of these demands goes against the Convention on the Rights of the Child which India has ratified thus undertaking to provide 'Provision Rights' to all children.

Vote bank politics and the politics of aligning with conservative forces who have consistently upheld patriarchal, feudal values has also meant that addressing discrimination and violence against women may not get priority, completely undermining the democratic and equal rights guaranteed to women under the Indian Constitution. Thus, while crimes in the name of 'honour' may be condemned by the Government and political elite, there is little action on addressing the issue, pointing perhaps to the need to appease certain communities and thus protect political interests.

“Vote bank politics and the politics of aligning with conservative forces who have consistently upheld patriarchal, feudal values has also meant that addressing discrimination and violence against women may not get priority.”

This study on laws related to son preference and daughter discrimination highlights the myriad ways in which discrimination is endorsed – through the law, or in spite of it or due to absence of law. Court judgements, both positive and negative, provide a snapshot of the extent to which gender biased socio-cultural norms and attitudes influence the purpose and implementation of laws. For instance, a Supreme Court judgement⁴ of 1986 equated marriage with a 'transplant' and the bride with a 'tender plant', and while providing a positive judgement in favour of women was patronizing and paternalistic in reinforcing gendered values and norms. This positive judgement was given in a dowry murder case

in which the accused husband and his relatives were sentenced to life imprisonment for killing the bride but the judges saw nothing wrong with a system which treats a daughter like an object. This judgement has been followed by other similar judgements, and a Law Commission report⁵ on dowry also referred to the judgement appreciatively. In some other cases dealing with harassment for dowry and dowry death too, the judges have spoken approvingly of the fact that the girl's family kept on insisting that she should stay in her in-laws' house even though this eventually led to her getting killed.⁶ Several cases of dowry harassment and murder or suicide show that young girls have tolerated ill treatment and torture because they felt that they should not or could not return to their natal home and/or their parents insisted that they stay in their marital home.⁷ No judge has commented on this, except to speak appreciatively of the attitude of the deceased and her parents. Thus, judicial interpretation, however well intentioned, can become a way of reinforcing traditional beliefs and a source of mixed messages to society.

⁴ *State of Delhi Administration v. Laxman* AIR 1986 SC 250.

⁵ Law Commission of India, 202th Report on Proposal to Amend Section 304-B of Indian Penal Code, 2007 Government of India, p. 207.

⁶ *Nandyala Venkataramana v. State of Andhra Pradesh* (2010) 13 SCC 653.

⁷ *Bachni Devi and Anr. v. State of Haryana* (2011) 4 SCC 427.

In fact, laws mirror the discrimination faced by girls and women in a variety of ways. Some laws overtly discriminate against daughters while others do so covertly. Even laws which have been passed to address son preference and daughter discrimination can, because of non-implementation or because of inherent inadequacies and loopholes, advance son preference and daughter discrimination. Certain practices which are associated with son preference or certain forms of discrimination against daughters still remain to be addressed by laws.

Positive and Negative Judicial Interpretation and Its Impact on Discrimination

Judicial interpretation plays an extremely important role in addressing discrimination and violence against girls and women. Since judgements of the High Court and the Supreme Court set precedents which are followed by courts all over India, some positive judgements have advanced the law while negative judgements, particularly of the Supreme Court, have reinforced

“Judicial interpretation plays an extremely important role in addressing discrimination and violence against girls and women.”

discrimination against women. For instance, a positive judgement of the Supreme Court in the *Pratibha Rani* case⁸ held that a criminal case for breach of trust under Sections 405 and 406 of the IPC could be filed by women whose *stridhana* had not been returned by their husbands and in-laws to whom they had ‘entrusted’ it for safe keeping. In other words, the court held that not returning the *stridhana* was a serious non-bailable and cognizable offence punishable with up to three years of imprisonment. This resulted in thousands of cases being filed under Sections 405/406 every year for return of *stridhana*.

Another positive judgement of the Rajasthan High Court in the *Jani Bai* case⁹ paved the way for other High Courts and lower courts to interpret the word ‘son’ as meaning ‘issue’ in a gender neutral form. The judgement reasoned that:

“It is well settled that the distribution of State largesse cannot be made in violation of right to equality. The State must ensure that it gives equal opportunity to persons equally eligible for obtaining the State largesse on equal terms to avoid infringement of the right to equality guaranteed under the Constitution. Viewed from this angle too, it is obvious that in allotment of the surplus Government land under these Rules, the State cannot confine the grant only to the male issue of the temporary cultivation lease holder denying the same to the female issue who is otherwise equally eligible and similarly placed as the male issue for getting allotment of the land under these Rules. This aspect also justifies the application of the ordinary rule of construction contained in Section 14 of the Rajasthan General Clauses Act, according to which the word importing masculine gender must be taken to include females also. The result is that the word ‘son’ in these provisions must be read as ‘issue’ to include females also.”

⁸ *Pratibha Rani v. Suraj Kumar* (1985) 2 SCC 370.

⁹ *Jani Bai v. State of Rajasthan and Others* AIR 1989 Raj 115.

On the other hand, a restrictive and negative judgement of the Supreme Court in the *Ran Singh* case¹⁰ has meant that dowry items given after marriage will not amount to dowry if they are given on festivals, ceremonies and other occasions. Similarly, judgements which award a paltry sum for maintenance to women undermine the importance of the work that women do in the house and their contribution to the building up of the household in addition to looking after and caring for children and elders in the family.

A recent regressive judgement of the Supreme Court¹¹ in a kidnapping and murder case of a 7 year old boy affirmed a death sentence on various grounds including the ground that the child was the only male child of his parents. Stating that the section for kidnapping for ransom also allows for a death sentence, the Court held that the manner in which the kidnapping and murder was carried out revealed a brutal mindset and that there were several aggravating circumstances in the case meriting the death sentence. The judges held that kidnapping the male child was to induce fear in the minds of the parents. The judgement further reasoned that killing the sole male

“The decision reflects the extent to which a patriarchal mindset, including son preference, can influence judicial reasoning.”

child had grave repercussions for the parents and their agony was “unfathomable” as he would have “carried further the family lineage” and “is (was) expected to see them through their old age”. Though the execution of the death sentence in this case has presently been stayed,¹² the decision reflects the extent to which a patriarchal mindset, including son preference, can influence judicial reasoning. By speaking approvingly of the traditional roles to be performed by boys the judgement promotes son preference and unfortunately sets a dangerous precedent.

In another case¹³ the Supreme Court commuted the death sentence awarded to a brother for mercilessly hacking and killing his sister’s husband and his entire family, including a thirteen year old child. The fact that his Brahmin sister had married a person of a lower caste whom she had chosen was seen as a mitigating factor to lessen the sentence of death awarded to her brother. The Court sympathetically observed the brother must have suffered insults because of his sister’s behaviour and that “he became a victim of his wrong but genuine caste considerations”, and that this social reality must be considered. The Court therefore justified the traditional norms which led to the violence and the killing. Though a review petition¹⁴ was filed against the judgement by a woman’s organisation pointing out that no commutation of a sentence can be given on the basis of illegal and unconstitutional beliefs and practices, the review was dismissed.

¹⁰ *Ran Singh and Another v. State of Haryana and Another* (2008) 4 SCC 70; Also see *Appasaheb v. State of Maharashtra* (2007) 9 SCC 721.

¹¹ *Sunder @ Sundarajan v. State by Inspector of Police*, Criminal Appeal Nos. 300- 301 of 2011.

¹² *Sunder @ Sundarajan v. State by Inspector of Police*, Writ Petition (Crl.) No(s). 39 of 2013.

¹³ *Dilip Premnarayan Tiwari and Anr v. State of Maharashtra*, MANU/SC/1884/2009.

¹⁴ R.P. (CRL.) D.NO. 6592/2010 in Criminal Appeal No(s). 1026 of 2008.

Under the PCPNDT Act, while some courts have passed positive judgements that the registration of a unit under the Act can be suspended or cancelled pending an inquiry for violation of Rules, others have held that this should not be done. Courts¹⁵ have also allowed de-sealing of ultrasound machines during the pendency of cases even though it was found that the machines were being misused. A large number of cases under the PCPNDT Act are cases of non-compliance with the record-keeping requirements under the Act. It has been found that a number of clinics, counselling centres and laboratories do not maintain proper registers and records as specified under the PCPNDT rules. While in quite a few judgements it has been held that records should be strictly maintained, in other judgements, a lenient view has been taken, expressing that record keeping is a procedural matter and non-compliance should not be taken to be a gross violation of the Act.

“A set of principles and guidelines on the basis of which maintenance should be awarded becomes necessary if the courts do not exercise their discretion properly.”

In some cases of ‘bride burning/wife burning’ in which dying declarations have been recorded, the wife has refused to implicate her husband and his family in the first instance and has only implicated them in her second or third dying declaration when she realised that she would not survive.¹⁶ While some judgements recognise this social reality others do not and say that the woman is not a credible witness and cannot be believed as she has given contradictory statements.

Judicial reform and gender sensitisation of the judiciary is therefore imperative. Some amendments which have been suggested in the study, like an amendment in the definition of dowry, are necessary because of the use of the negative and restrictive definition of the term in the judgements of the Supreme Court. Similarly, a set of principles and guidelines on the basis of which maintenance should be awarded becomes necessary if the courts do not exercise their discretion properly.

Laws Impacting Son Preference: The How and Why

This study adopts a milestones approach in analysing laws related to son preference and daughter discrimination by focusing on the impact of these laws on girls and women at different stages of their life and sets out some critical areas of intervention. These areas are critical precisely because laws in these areas can have the greatest impact on the practice of son preference. This study is not focused on sex selection alone which it sees as one of the manifestations of son preference/daughter aversion.

¹⁵ For instance, see: *D.A.A.P.K. Bansal v. K. P. Singh* referred by Public Health Foundation India, *Implementation of the PCPNDT Act in India: Perspectives and Challenges*, April 2010, p. 105-6.

¹⁶ Kirti Singh, *Law, Violence and Women in India*, pp. 44-46, UNICEF/UNIFEM, India, 1999.

The ages between 0 and 6 years have been identified as the period during which girls suffer from the most stark forms of discrimination and violence. Following pre-birth discrimination, a girl's struggle to survive begins soon after birth. Though a large proportion of the Indian population continues to have little or no education, this proportion is much higher for females than males. Girls also face economic and cultural pressures to drop out of school. Adolescent girls also face a greater risk of problems associated with nutritional deficiency than adolescent boys, including anaemia and underweight. Underweight prevalence among adolescent girls aged 15–19 in India is 47 per cent, the world's highest. In addition, over half of the girls aged 15–19 (56%) are anaemic. This has serious implications, since many young women marry before age 20 and being anaemic or underweight increases their risks during pregnancy resulting in maternal mortality.¹⁷

“The ages between 0 and 6 years have been identified as the period during which girls suffer from the most stark forms of discrimination and violence.”

An interesting 2007 study on child abuse by the Government¹⁸ defines girl child neglect as “the failure to provide for the all round development of girls including health, nutrition, education, shelter, protection and emotional development.” The study looked at the lack of attention given to girls as compared to boys, the amount of food given to a girl in the family, the amount of work that she was expected to do and other forms of gender discrimination. The study reported that 70.57 per cent of girls faced neglect of one form or the other by family members while 70.38 per cent reported doing more household work, like cleaning/dusting of the house, and drawing of water compared to their brothers. Almost 49 per cent of the girls reported that they had to take care of their younger siblings while 27.33 per cent reported getting less food than their brothers. In the states of Uttar Pradesh, Gujarat and Bihar the percentages reported were 69.04, 67.83 and 65.63 respectively. The study further observes that the girls reported getting less attention than their brothers; that brothers dominated while playing; that brothers often teased their sisters but the parents did not listen to their daughters or take their side. Girls also reported not being appreciated and being scolded by parents for no ostensible reason. All these forms of discrimination point to violation of the Provision Rights in the CRC which calls for programmes in child health, nutrition and education.

This present study of laws therefore comes to the conclusion that in order to reduce the influence of son preference and prevent the discrimination faced by girls, the first set of laws that need to be implemented, amended or enacted are:

- Laws relating to sex selection, including the PCPNDT Act and certain provisions of the Indian Penal Code, 1860.
- Laws passed in pursuance of the two-child norm to curb population as these exacerbate unwantedness of daughters and have led to neglect and abandonment of the girl child.

¹⁷ United Nations Children's Fund, *Adolescence: An Age of Opportunity*, SOWC Report 2011, New York, 2011, p.23.

¹⁸ Government of India, Ministry of Women and Child Development, *Study on Child Abuse: India 2007*, 2007 p.114-116.

- Laws/policies aimed at addressing neglect of the girl child.
- The Right to Education Act, 2009.

A second set of actions need to address the discrimination and violence faced by girls/women in different walks of life. The CRC mandates that all children should be protected against abuse and exploitation (Article 34 of the Convention). India, as a state party to the Convention, had undertaken to put in place measures to combat crime against children and ensure that offences against them are punishable under the law. However, though some measures have been taken, much more needs to

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be done to break the cycle of discrimination and violence that the girl faces throughout her life. A safe and enabling environment for girls and women, both in the home and in public places, is necessary to ensure that they are not subjected to violence and further discrimination contributing to the perception that they are a ‘liability’.

This study has, therefore, looked at legislations which address discrimination and aim to punish those who commit violence against them. These legislations include inheritance laws which have been passed to give equal rights to daughters and special laws, some of which provide criminal and civil remedies. Special laws that have an impact on the perception of girls as a liability include laws like the Dowry Prohibition Act, 1961 and the Prohibition of Child Marriage Act, 2006. As stated earlier, these special laws, like any criminal law, punish those who violate them with imprisonment and fine and also provide for certain civil remedies like getting a marriage annulled in certain situations under PCMA.

The second set of laws which have therefore been examined are:

- The Dowry Prohibition Act, 1961 and Section 498A (cruelty), 304B (dowry death) and 306 (abetment to suicide) of the IPC, 1860
- The Prohibition of Child Marriage Act, 2006
- The Hindu Succession Act, 1956; the Indian Succession Act, 1925 and the Muslim personal law relating to inheritance
- Land Reform and Tenancy Laws
- Laws relating to Sexual Assault
- The absence of laws in certain areas has also been highlighted such as laws to address crimes and killings in the name of ‘honour’, laws to give equal rights in marital property to women and a secular law for adoption.

Recommendations

The recommendations below point to specific laws that need urgent attention. Some of these, like those pertaining to dowry and child marriage, not only contain provisions that need amendment but also suffer from poor implementation. On the other hand, there are laws such as those that pertain to inheritance or succession which require changes in related laws (such as those concerning tenancy) to be effective. Finally, the recommendations point to critical gaps and the absence of laws such as those concerning women's ownership of marital property which impact on the status of women and girls.

Thus, the recommendations have been organised into five sections highlighting the action required to improve the efficacy of key laws in dealing with discrimination. The five sections are:

- I. Laws requiring strengthened implementation
- II. Removal of discriminatory legal provisions
- III. Critical laws requiring amendment
- IV. Managing the interconnectedness of laws (amending other laws related to key laws dealing with discrimination)
- V. Addressing gaps: Formulating new laws

I. Laws Requiring Strengthened Implementation

1. Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

The study notes that, since its inception, the PCPNDT Act, meant to address gender biased sex selection, has not been effectively implemented or enforced by either the Central or State Governments. In some states the Act did not get notified till very recently.¹⁹ In one case²⁰ of violation, action could not be initiated as notification of the Act had negligently not been published in the gazette. This was a case in which the remains of two hundred and fifty female foetuses had been recovered from a septic tank in a nursing home in Patiala. Medical personnel and others who perpetrate this practice have managed to manipulate and bypass the law through various strategies. The Orissa High Court commented on the lack of implementation of the Act and passed directions against the State Government²¹ and the Bombay High Court emphasized the need to focus on implementation of the Act, stating that the law has to be implemented to curb the misuse of modern technology for dishonest and illegal purposes since attitudinal changes are likely to take some time.²²

¹⁹ Maharashtra, Haryana, etc.

²⁰ *Gaurav Goyal v. State of Haryana* Civil Writ Petition No.15152 of 2007 in the High Court of Punjab and Haryana at Chandigarh as decided on 7.7.2009.

²¹ *Hemantha Ratha v. Union of India* AIR 2008 Ori 71.

²² *Radiological & Imaging Association (State Chapter) v. Union of India and Others* 2012 (114) Bom. LR 150.

The Supreme Court pointed out in the CEHAT case²³ that the various authorities, including the Central Supervisory Board, were not even meeting as stipulated and that blatant violations of the Act like advertisements about facilities for pre-conception determination of sex or pre-natal sex selection were not being prosecuted by the Appropriate Authorities (AAs). In some cases in which action was being taken, the AAs were lenient with the offenders. For instance, instead of taking criminal action²⁴ under the Act, the AAs were only issuing warnings to unregistered clinics. This case underscored the fact that AAs were not only empowered to take criminal action but were supposed to search and seize documents, records and objects, etc. according to Section 30 of the Act. In quite a few cases which have been reviewed it has been found that some AAs are also lax about gathering and presenting evidence in court and sometimes allow cases to linger for years.

“Appropriate budgetary allocation should be made to implement the PCPNDT Act and create awareness about it.”

The Act therefore urgently needs to be implemented and the Central and State Governments should ensure that the AAs perform the functions assigned to them under the Act and their functioning should be monitored. A regular mechanism for capacity building of AAs and other Act implementers needs to be put in place – especially skills in collecting evidence, filing of cases and conducting inspections, decoy and search and seizure operations. The study has highlighted the need to evolve a system of registration and record keeping of ultrasound machines being sold. Apart from this, appropriate budgetary allocation should be made to implement the Act and create awareness about it. Some of these pointers have also been recently underscored in the Supreme Court judgement on a PIL filed regarding non-implementation of the Act across the country.²⁵

2. Dowry Prohibition Act, 1961 and Sections 304B, 306 and 498A of the Indian Penal Code, 1860

Dowry-related crimes continue to increase at an alarming rate in India and currently account for 42 per cent of all crimes against women. As outlined earlier in the chapter on dowry, dowry has often been cited as a reason why couples do not want to give birth to a female child.²⁶ Dowry is routinely given by the girl's side to the prospective bridegroom and his family and has increasingly become a huge burden on parents. As is well known, the girl is largely valued according to the dowry she has brought or is likely to bring in the future. If she has not brought or cannot bring 'sufficient' dowry she is ill-treated, abused mentally and physically and, in a surprisingly large number of cases, killed or driven to suicide. Thus dowry not only fuels daughter aversion at the time of birth, but also leads to harassment, abuse and extreme forms of violence against the bride.

²³ (2003) 8 SCC 398.

²⁴ Order dated 19.09.2001; s. 23 PCPNDT Act, 1994.

²⁵ *Voluntary Health Association of Punjab v. Union of India & Others*, writ petition (civil) No. 349 of 2006.

²⁶ Census of India, 2001.

Important and far reaching changes were made in the Dowry Prohibition Act (DPA) in 1981, 1983 and 1986. In addition, the offences of 'Cruelty' to women and 'Dowry death' were introduced in the IPC and certain important changes made in the Evidence Act.²⁷ However, due to the lack of implementation of the law, its effectiveness remains poor, despite the fact that after these changes were introduced, a large number of cases started getting filed under all these provisions.

Role of the Police

Police inaction and bias in cases of dowry have resulted in a low conviction rate and allowed dowry takers to function with impunity as stated earlier.²⁸ In many instances, the police do not even register an FIR²⁹ as they are bound to do in law. They do not investigate the cases properly, they routinely fail to gather important evidence, and they do not take statements of victims and other witnesses in time even if they are not consciously subverting a case. During the eighties, there were a significant number of cases in which the courts, while welcoming the dowry provisions, had criticised the law and order machinery, particularly the police, for failing to implement the law. Thus, apart from the fact that courts are beset with their own problems like delay and gender bias, most of these cases are not being prosecuted properly and not enough proof is being tendered before courts.

Setting Guidelines

A set of guidelines should be issued to the police detailing standard operating procedures so that they are forced to treat all complaints related to dowry as serious and carry out the investigation

“A set of guidelines should be issued to the police detailing standard operating procedures so that they are forced to treat all complaints related to dowry as serious and carry out the investigation properly and efficiently.”

properly and efficiently. These procedures should specify the time within which the police should respond to a complaint, the evidence they should collect, the action that they should take to recover the dowry and the measures they should take to protect the woman from harm and danger. If a woman has been subjected to physical violence and 'cruelty' she should be sent promptly for medical examination. In cases of mental torture she should be referred to a psychologist and sent for counselling. Cases of dowry harassment, retention of dowry/*stridhana*, and dowry death should be tried by a fast-track court and within a specified time period.

A suggestion that had been made repeatedly by women's organisations, that police personnel who deliberately do not act or subvert the process of justice should be held accountable and punished under the law,

²⁷ Sections 113A and 114B.

²⁸ See Chapter II: Dowry - A Cause for Sex Selection or a Result of Son Preference?

²⁹ A First Information Report is a document which the police are mandated to prepare according to the Criminal Procedure Code, 1973 the moment they receive information about a cognizable offence.

has finally been accepted. Recently the IPC has been amended to provide for punishment with imprisonment up to two years for a public official who does not follow a direction of the law or fails to register a case.

Dowry Prohibition Officers

Although the government introduced changes in the dowry law it did not work towards implementing it by taking preventive measures. The appointment of a sufficient number of Dowry Prohibition Officer (DPOs), who are responsible for implementing the various provisions of the DPA under the law, would have been a major step in the right direction. The DPOs have also been given powers under the Act to collect evidence against people who take dowry.³⁰ In a 2005 case in

“The DPOs should have independent charge so that they can concentrate on fulfilling their functions as described under the Act.”

the Supreme Court³¹ it was pointed out that even though the Court had insisted on the appointment of DPOs and framing of rules for their functioning, most of these officers did not have independent charge in the concerned district and often held two positions. In this writ petition, directions were also asked from the Court to ensure that marriages were registered, along with a list of presents received. This would help to identify dowry takers, apart from ensuring that women could more easily retrieve their dowry.

It is therefore critical that the DPA be implemented by appointment of DPOs at the district level in every state. These officers should have independent charge so that they can concentrate on fulfilling their functions as described under the Act.

3. Prohibition of Child Marriage Act, 2006

Child Marriage Prohibition Officers

Under this Act, Child Marriage Prohibition Officers (CMPOs) were meant to be appointed to prevent child marriages by taking suitable action; to collect evidence for the effective prosecution of persons; to advise and counsel residents of a particular locality not to promote, aid or allow child marriages. Very few CMPOs have been appointed and even those who have been appointed do not seem to be performing their duties under the Act.

The PCMA should thus be implemented by appointing as many CMPOs as are necessary, particularly in the sensitive districts of the country where child marriages, including mass child marriages, take place. These officers should maintain a comprehensive list of all child marriages that have taken place in the area and should give an annual report to the concerned state governments about the action initiated to prevent and stop child marriages, including creating awareness about the PCMA.

³⁰ The Dowry Prohibition Act, 1961, s. 8B.

³¹ In Re: *Enforcement and Implementation of Dowry Prohibition Act, 1961*, AIR 2005 SC 2375.

Issuing Standard Instructions

Although the District Magistrate has additional powers to stop or prevent child marriages and can use appropriate force, this is not done and even mass child marriages are conducted in plain sight of the administration on occasions such as *Akha Teej*. A set of instructions needs to be standardised especially to deal with anticipated situations.

4. The Right of Children to Free and Compulsory Education Act, 2009

Addressing Gender Barriers

As elaborated in earlier chapters, the Right to Education Act, 2009 (RTE) makes education a fundamental right of every child between the ages of 6 and 14. However, the Act is not being implemented as even today a sizeable percentage of children do not get enrolled in schools or

“It is only by addressing factors that contribute to the vulnerability of girls that discriminatory perceptions can be changed.”

do not study for the stipulated period. This is particularly true for girls. It is therefore necessary to implement this Act by ensuring that adequate budgetary allocation is made for education in the Five Year Plans.

Steps should be taken to address barriers such as lack of safe transportation and toilet facilities as these are often the reason for non-attendance. Apart from this, the school should provide a safe and secure environment for girls. It is only by addressing factors that contribute to the vulnerability of girls that discriminatory perceptions can be changed. And these actions are necessary at every step of a girl's life so that girls are not looked upon as a 'liability' either now or in future.

II. Removal of Discriminatory Legal Provisions

The Two-Child Norm

Certain Acts governing elections to Panchayats and Municipal Councils typically restrict the number of children that an elected representative can have to two, with some exemptions. The two-child norm and the laws and measures to effectuate this norm have widely been recognised to be against basic human rights and the rights of the most vulnerable and the weaker sections of society, including women.³² It has also been widely reported by social activists and studies that the two-child norm advances son preference and daughter aversion as most people, if they are forced to have a small family, automatically prefer sons to daughters. In one study it was found that a significant number of respondents resorted to sex selection to adhere to the two-child norm.³³ Though some states

³² Leela Visaria, Akash Acharya and Francis Raj, 'Two-Child Norm: Victimising the Vulnerable?', *Economic and Political Weekly*, Vol. 41, 7.1.2006.

³³ Nirmala Buch, 'Law of Two-Child Norm in Panchayats: Implications, Consequences and Experiences', *Economic and Political Weekly*, 40(24); 11-17 June 2005. p. 2421-2429.

like Haryana, Himachal Pradesh, Madhya Pradesh and Chhattisgarh have deleted the provisions enforcing the two-child norm in elections to local bodies, other states still have them.

It is therefore recommended that all the provisions in the laws which aim to promote the two-child norm by disqualifying a person from contesting elections if they have more than two children should be deleted. These provisions are in existence in some laws in Gujarat, Maharashtra, Odisha, Andhra Pradesh and Rajasthan.³⁴

Welfare Schemes with Two-Child Norm

The criteria to avail benefits under certain welfare schemes are linked to the two-child norm. Studies have noted that some policies link financial assistance for Panchayats to their performance on family planning goals. The Population Policy of Madhya Pradesh links the provision of rural development schemes, income generating schemes for women, and poverty alleviation programmes as a whole, to performance in family planning. Both Rajasthan and Maharashtra

“All schemes that are centrally or state funded should be examined and the parts which link benefits to the two-child norm should be deleted.”

make “adherence to a two child norm” a service condition for state government employees.³⁵ A similar policy exists in Andhra Pradesh, linking construction of schools, other public works and funding for rural development schemes to achievement of family planning goals.³⁶

Most critically, the cash incentive schemes for promotion of the girl child need to be reviewed as some of these schemes limit the benefits of the scheme up to two girl children leading to ambiguity in understanding the intent of the scheme. Further, some of the schemes also provide incentives at the time of marriage and support marriage expenses. This is obviously counter-productive to the purpose of preventing discrimination as it further fuels the perception that daughters are a liability.

All schemes that are centrally or state funded should be examined and the parts which link benefits to the two-child norm or provide incentives that reinforce gender stereotypes and patriarchal norms should be deleted. When son preference is almost the norm, such schemes are likely to meet their eligibility criteria only by indirectly promoting daughter aversion. It has rightly been stated that making the “two-child norm” a condition for accessing welfare measures deprives the very sections of society for whom the measures are meant.

³⁴ The laws are Section 30(1)(m) of the Gujarat Panchayats Act, 1993 and Gujarat Municipalities Act, 1963 applicable at district body level; the s. 33 (1)(w) of the Orissa Zilla Parishad Act, 1991, applicable at the district body level; and s. 25 (1)(v) Orissa Gram Panchayat Act, 1964; Section 16(1)(n) of the Zilla Parishads and Panchayat Samitis Act, Maharashtra 1961 and Section 14 (1)(j-1) Bombay Village Panchayats Act, 1958; Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 and lastly Rajasthan Municipalities Act, 1959.

³⁵ Maharashtra, had stipulated that the two child norm would be an eligibility criterion for coverage under a range of schemes for the poor, including access to the Public Distribution System and education in government schools but has now withdrawn these after massive protests.

³⁶ Government of Andhra Pradesh, Andhra Pradesh State Population Policy, Department of Family Welfare, Hyderabad, 1997.

3. The Goa Law on Polygamy

In the law pertaining to Hindus in Goa, a provision which is blatantly discriminatory to girls exists on paper according recognition to polygamous marriages in the pursuit of a male child. This provision states that though normally polygamous marriages “shall not produce civil effects” vis-à-vis the second marriage, the later marriage will have civil effects if the first wife does not have any children till the age of twenty five or if she does not have a male child till the age of thirty years. The provision also states that if a separation is initiated by the wife and there is no male child, the later marriage will be recognised. These provisos to Articles 2 and 3 in the Goa Decree titled, “Family Law of Usage and Customs of ‘Gentile Hindus’ of Goa”, related to recognition of “simultaneous polygamy”, as well as the legal endorsement of the need for sons, should be deleted with immediate effect.

III. Critical Laws Requiring Amendment

1. Land Reform and Tenancy Laws

Certain land laws have provisions that are not in line with succession laws and therefore tend to discriminate against women. These provisions need to be replaced by provisions which give equal

“Land laws which make the personal law of the parties applicable should be amended to state that women as widows and daughters will inherit equally.”

rights to women. The land laws, including the various Land Reform Acts and Tenancy Acts in Uttar Pradesh, Delhi, Haryana, Punjab, Himachal Pradesh and Jammu and Kashmir should be amended to ensure that women inherit agricultural property and tenancy rights equally with their male siblings. The other land laws which make the personal law of the parties applicable should also be amended to state that women as widows and daughters will inherit equally.³⁷

Customary laws, like the Chota Nagpur Tenancy Act, 1908 in Jharkhand and other customary laws applicable in the states of Odisha, Bihar and the north-eastern states should be closely examined and amended to remove the discriminatory provisions regarding inheritance by daughters.

³⁷ The land laws which discriminate against women are:

- i. Sections 48, 50, 51, 52 and 53, Delhi Land Reforms Act, 1950, which discriminate against daughters.
- ii. Section 171 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, does not allow daughters to inherit if sons are alive.
- iii. Section 59 of The Punjab Tenancy Act, 1887 amended up to 1969 states quite categorically that, women cannot claim succession to tenancy if a male heir is alive. The widow's right is recognised only after all male heirs.
- iv. Section 3(4) of the Punjab Land Reforms Act, 1972 defines the ‘family’ in relation to a person as the person, the wife or husband, as the case may be of such person or his or her minor children other than a married minor daughter.
- v. The Punjab Tenancy Act, 1887, Pepsu Tenancy Agricultural Land Act, 1956, the Punjab Occupancy Act, 1952 are also applicable in the State of Haryana.
- vi. Jammu and Kashmir land reform laws also discriminate against daughters.
- vii. Section 45 of the Himachal Pradesh Tenancy and Land Reform Act, 1972 gives inheritance to male lineal descendants in the male line of descent. It holds, “When a tenant in any land dies, the right shall devolve – (a) on his male lineal descendants, if any, in the male line of descent; and (b) failing such descendants, on his widow.....”

Some laws, regarding grant of land by the government, also contain discriminatory provisions such as the provisions relating to allotment of land under the Rajasthan Colonisation (Allotment and Sale of Government Land in the Rajasthan Canal Colony Area) Rules, 1975 which state that only an adult 'son' would be eligible for allotment of land. Though the Rajasthan High Court has held that the word 'son' should also be interpreted as meaning 'issue' in a gender neutral form, this and similar provisions should be amended after examination of all the relevant land allotment laws.

2. PCPNDT Act and Related Provisions

While the main problem with the PCPNDT Act is its implementation, certain provisions also need to be amended. The case law under the PCPNDT Act shows that sometimes the AAs are deliberately negligent in performing their functions.³⁸ For instance, in one case the AA did not produce the

“It is necessary to make the AAs accountable if they deliberately do not perform the functions assigned to them.”

evidence in spite of being repeatedly asked to do so by the Court. It is therefore necessary to make the AAs accountable if they deliberately do not perform the functions assigned to them. An amendment to the Act should be considered so that the AA can be held accountable under Section 25 for dereliction of duty.

The PCPNDT Act only exempts a pregnant woman from punishment when she is compelled to undergo diagnostic techniques or sex selection. This is not enough as several case studies have highlighted the fact that women who undergo sex selection are frequently under familial pressure to do so, which may be covert in most cases. Similarly, women may not make the decision to undergo sex selection and therefore punishment with imprisonment in case of women requires reconsideration. Further, under the IPC, there are archaic provisions like Sections 312 and 315 which punish a woman for undergoing an abortion. These provisions are not in tandem with the provisions under the MTP Act which governs all abortions and therefore need to be amended to adhere to the provisions made under the MTP Act.

Under the 2003 amendments to the PCPNDT Act, ultrasound has been allowed in Form F for a number of reasons – 23 in all. These need to be re-examined, particularly as there are two views on this matter. On the one hand, it has been said that ultrasound scans have become a normal part of ante-natal care and this should be recognised. A counter-argument is that the number of ultrasound tests being routinely carried out on pregnant women is unnecessary. Both views need scrutiny by competent authorities within the government to come to a satisfactory conclusion, which is then reflected in the PCPNDT Act.

³⁸ Maharashtra Judicial Academy and UNFPA, 2012, *Compilation and analysis of case-laws on PCPNDT Act*.

3. Dowry Prohibition Act, 1961

Though implementation of the Act continues to be a huge problem, certain amendments in the DPA and related laws in the IPC will make it more effective.

Definition of Dowry

Dowry has been defined in Section 2 of the DPA as any “property or valuable security given or agreed to be given, either directly or indirectly, by one party to the marriage to the other party

“ The definition of ‘dowry’ (in the DPA) should be amended by dropping the words ‘in connection with marriage.’ ”

to the marriage.....at or before or any time after the marriage in connection with the marriage “. The words “in connection with the marriage” have been subject to negative interpretations even by the Supreme Court which has held that if it is alleged that dowry has been given, it must be shown that the giving of items has “some connection with the marriage of the parties and the correlation between the giving and taking of property or valuable security with the marriage of the parties is essential.” These interpretations have

led to acquittals in cases under this Act, and under Section 304B IPC and Section 306 IPC, the provisions for dowry murder and abetment to suicide respectively, to which the definition of dowry in the DPA is applicable. The definition of ‘dowry’ should therefore be amended by dropping the words ‘in connection with marriage.’

Presents and Marriage Costs

Another problem with the DPA is that it exempts presents given to the bride and the bridegroom at the time of marriage from being considered as dowry in Section 3(2) and further specifies that the presents should be entered in a list. A proviso to this Section however, states that presents which are exempted should be “of a customary nature” and their value should not be “excessive having regard to the financial status of the person by whom, or on whose behalf such presents are given”. Though it is true that some presents might have to be exempted, the definition is vague as there is no ceiling on the value of presents that can be given. The Joint Select Committee of Parliament on Dowry in 1982 had suggested that a definite ceiling be put in terms of a percentage of the income of the giver. Ostentatious marriages have become the norm and this norm is being emulated even by those in the middle and working classes. Pointing to another reason for unwantedness of daughters, case studies³⁹ on dowry report that in many cases, people who cannot afford to give dowry and incur a huge wedding expenditure are borrowing heavily to do so. It is therefore necessary that a ceiling should also be put on wedding expenditure.

Dowry Death

In the definition of ‘dowry death’ the presumption that the accused has caused the death only arises if harassment has taken place soon before the death. The problem here is that the word ‘soon’ can

³⁹ For instance: Kirti Singh, *Separated and Divorced Women in India: Economic Rights and Entitlements* (forthcoming) SAGE Publications, New Delhi, 2012.

and has been interpreted differently in different cases. If harassment for dowry has not occurred immediately before the death it can and has been held that the Section does not apply. Women's groups and others have pointed out that this is unjust and the word 'soon' should be deleted from the section on dowry death.

Preventive Action

The Act does not provide for preventive action. In other words, no person can approach a court and ask the court to issue an order of injunction to stop the giving or taking of dowry in a marriage. This provision should be added.

Giver and Taker of Dowry

Under the DPA, the giver of dowry is equated with the taker of dowry and is punished to the same extent. While a large number of women's organisations/groups have suggested that it should be presumed that the giver gives under pressure and compulsion, hence no punishment should be given, others have suggested that a lesser punishment should be given to the giver. This matter needs urgent consideration along with other gaps in the law and its implementation if the complete disregard shown with respect to this law is to be squarely addressed.

4. Inheritance Laws

Though the Hindu Succession Act was extensively amended in 2005 it still retains certain elements of the old Hindu law. The HSA has given equal rights to women, namely the wife and the daughters,

“The Hindu Succession Act has given equal rights to women... daughters inherit both self-acquired and ancestral property on an equal basis with sons.”

in self-acquired property. Though it has retained the *mitakshara* coparcenary law, it has made daughters equal coparceners with the sons after the 2005 amendment. Thus, daughters inherit both self-acquired and ancestral property on an equal basis with sons.

Daughters can now also ask for partition and get their share of the property. However, Hindus have a right to make a will specifying how they want to dispose of their property. This clause can be and is used to disinherit daughters. Various stratagems are employed to make a daughter give up her right to property. Often girls and women are made to sign relinquishment deeds in favour of their brothers or other male members of their natal family.

Further, Section 15 of the HSA which deals with the rules of succession of female Hindus stipulates that the woman's property, in the absence of her husband and children, will devolve upon the heirs of the husband and only in their absence, on the woman's own parents. The HSA should be amended to ensure that women's estates devolve on their parents in the absence of their children and husband and on their other relatives in the absence of their parents. The right to will should be restricted to ensure that daughters cannot be disinherited.

Amongst Muslims, daughters normally inherit only half of what the sons inherit. The non-Parsi widow of a Parsi man cannot inherit property. Further, children of a Parsi woman are not considered Parsis if she has married a non-Parsi, thus limiting their right to inheritance. Reform in the personal laws of different religious communities should be also initiated to give equal rights to daughters and women.

5. Prohibition of Child Marriage Act, 2006

Make Child Marriage Invalid

As noted in this study, child marriage is not invalid even if it is performed in infancy or at any point in time before the girl reaches age 18. The Act stipulates that child marriage is prohibited by

“Under the PCMA, child marriage below a certain age should be made invalid.”

the law but only prescribes punishment for the person who performs the marriage and those who are responsible for it, “promote” it, “permit” it to take place or “negligently fail to prevent” it. The 2006 amendments to the law increased the quantum of punishment that could be awarded but still did not make the marriage void *ab initio*. These amendments also allow either party to approach the court to get their marriage declared void if they want. However, since the girl is culturally and socially more vulnerable, it is doubtful whether

she will be able to exercise her option of getting out of even a violent marriage or whether her parents are likely to listen to her request. Thus, it is recommended that under the PCMA, child marriage below a certain age should be made invalid. This has also been suggested by the Law Commission of India in its 205th Report which is on the PCMA.

Minimum Age

Under the Act, the minimum age for marriage for a boy is 21 years whereas for a girl it is 18. The reasons for this distinction are unclear. It is suggested that the minimum age for marriage for both the girl and the boy should be the same.

Child Marriage, Age of Consent and Rape

Section 375 of the IPC states that sexual intercourse with a girl below the age of 18 (as per the recent amendments) will amount to rape. However, this Section also includes a clause that states that sexual intercourse with a wife is not rape if the wife is above 15 years of age. Thus, though the Penal Code states that sexual intercourse with a wife below 15 is rape, the marriage may still be considered valid if either party fails to make a complaint about the marriage. The PCMA provisions are not in consonance with human rights and seem to ignore all the evidence of the inevitable abuse and discrimination that a child bride faces. Further, the marital rape exception which states that “sexual intercourse by a man with his own wife, the wife being not under fifteen years of age is not rape” should be deleted from Section 375 of the IPC.

IV. Managing the Interconnectedness of Laws: Other Complementary Laws Requiring Amendments to Address Discrimination

1. Hindu Adoption and Maintenance Act, 1956

Recently the Hindu Adoption and Maintenance Act, 1956 was amended to give equal rights of adoption to married women. The Guardianship and Wards Act was also amended to stop courts from appointing guardians if the mother was alive. Earlier, the courts could not appoint guardians only if

“The mother should be made a natural guardian of her child under all the personal laws.”

the father was alive. However, Hindu women have still not been made equal guardians of their children as, under the Hindu Minority and Guardianship Act, the father has been named as the natural guardian of a child. This should be changed and the mother should be made a natural guardian of her child under all the personal laws. Similarly, all the regulations and rules should be reviewed to ensure that the mother's signature as a guardian of her children is accepted in all offices, institutions etc.

It is further recommended that a secular law of adoption be enacted. This law should apply to all the communities in India if possible and should be based on the criterion of the 'best interest' of the child. It is pertinent to point out that in the 1970s such a law had been introduced in Parliament on two occasions but lapsed as all the communities did not agree to it.

2. Laws on Maintenance

There is an urgent need to bring about reforms in the substantive and procedural laws to ensure that separated women and children get an adequate amount of maintenance and that the amount awarded is actually handed over to the woman. A fund should be created to pay the maintenance awarded by the court, particularly to poor litigants.

This study recommends that since poor women may not get adequate maintenance entitlements, the State should be made responsible for deserted/separated/divorced women and children in cases in which there is no property or in cases in which no maintenance can be granted because of poverty and/or other reasons.

3. Laws on Sexual Assault

The laws related to Sexual Assault in the IPC have recently been overhauled⁴⁰ and thus some long standing demands of the Women's movement have been met. The laws related to sexual offences against children were changed in 2012. However, certain lacunae still remain in the laws related to sexual assault. These relate to marital rape not being recognised as rape and the raising of the

⁴⁰ The Criminal Law (Amendment) Act, 2013.

age of consent to 18. It is not recognised that marital rape is contrary to the provisions of the Indian Constitution which considers all women as equal human beings who have a right to live with dignity and free from violence within and outside marriage. Similarly, raising of the age of consent to 18 from 16 would result in criminalising consensual sexual activities between adolescents and punishing a young man with imprisonment which could be for life.⁴¹ It is thus necessary to include marital rape within the offence of rape and to decriminalise consensual sexual activity at least between young persons under certain conditions as mentioned in the chapter on laws relating to sexual assault.

V. Addressing Absence of Laws: Laws That Need to be Formulated

This study came to the conclusion that it is necessary to enact certain laws, the absence of which allow discrimination and inequality to exist and the unwantedness of girls to continue.

1. Matrimonial Property Rights

“Legislation should ensure that all assets that have been acquired by the husband and wife, regardless of whose name they are in, are divided equally between them if a separation or divorce occurs.”

Since there is still no community of property law in India between a husband and a wife and the non-financial and financial contributions of a woman to a household are not recognized, there is urgent need to enact a standalone comprehensive legislation in this area. Such a legislation should ensure that all assets that have been acquired by the husband and wife, regardless of whose name they are in, are divided equally between them if a separation or divorce occurs. This law should be applicable to women across all communities as there is no law in any community except in the State of Goa which addresses this issue. A woman should also be entitled to access the court and ask for division of property as soon as a separation takes place and should not have to wait till a divorce comes through. While considering their circumstances, women and children should be normally allotted the house when the division takes place.

2. Harassment at the Workplace

The Vishakha judgement by the Supreme Court laid down certain mandatory guidelines to deal with sexual harassment at the workplace. These guidelines defined sexual harassment and stipulated that all establishments and institutions, whether public or private, should institute Complaints Committees to deal with sexual harassment till the Government enacted a law. Recently the Parliament passed the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, which is meant to deal with sexual harassment at the workplace. While the law is fairly comprehensive, it can be counter-productive for the woman if the section which seeks to punish

⁴¹ S.4 of the Protection of Children from Sexual Offences Act, 2012 and Clause sixthly of Section 375 IPC.

a woman for making a malicious complaint is not deleted. This is not only against the Vishakha guidelines but will also stop women from making complaints, fearing possible allegations against them. The law also does not provide a proper definition of unorganised labour and is liable to be misinterpreted.

3. Crimes in the Name of 'Honour'

Crimes and killings in the name of 'honour' have increased during the past few years. In a number of cases of marriage by choice in both rural and urban areas, and particularly in some North Indian states, the opposition by the girl's family is assuming more and more brutal forms. Sometimes this brutality happens along with members of the extended family and sometimes in collusion with the *khap* panchayats. Coercion includes intimidation, harassment and physical assault, and in some cases murder – of the girl, the boy and on quite a few occasions, of other members of the boy's family. As noted earlier, crimes in the name of 'honour' are a form of gender based violence and are

“The law should punish all those who kill or harass a young couple and stop them from getting married or exercising their right to choose their partner.”

committed to stop the daughter from deciding who she wants to live with or marry or have a relationship with. If a girl chooses to exercise this right, in many instances, the entire law and order machinery also conspires against her. This study refers to instances where false cases of kidnapping and abduction are routinely filed against a boy who is involved with or gets married to a girl who does not belong to his caste or community. Often in such cases, the police, instead of helping the couple, tend to act on the instructions of the girl's parents or relatives, reflecting the relatively stronger hold of social norms as compared to that of the law.

It has therefore become necessary to reassert an individual's right to choose a partner in marriage or a relationship and to punish those who commit acts of violence against individuals exercising this choice through a comprehensive, standalone legislation. The law should punish all those who kill or harass a young couple and stop them from getting married or exercising their right to choose their partner. It should provide the couple protection from being charged with false cases of kidnapping and abduction. Safe homes should be provided where they can seek refuge. Any wrong action by the police should be made punishable and they should be held accountable. Publicly glorifying any harassment and killing in the name of 'honour' or '*Izzat*' should be made punishable.

4. An Anti-Discrimination Law

This study does not specifically explore the possibility of an anti-discrimination law to tackle all forms of discrimination against girls and women. However, an examination of the existing statutes shows that without an explicit legal framework spelling out substantive equality rights for women to guide the framing of various specific anti-discrimination laws, inadequate, faulty and sometimes

anti-women provisions continue to form and become a part of these laws. As stated in the introduction to this study, the Constitution of India has an explicit equality clause in Article 14 and forbids discrimination on certain grounds including the ground of sex in Article 15, apart from allowing special provisions for women and children in this Article. Yet, this is not enough. Firstly, the Constitutional provisions are broad and not detailed enough and secondly, though the Constitution holds the State accountable for violations of fundamental rights this does not apply to violations of these rights by non-state actors.

It has been suggested that laws and policies for girls and for women should be guided by a more explicit legal framework which spells out both substantive and procedural rights for women in

“Laws and policies for girls and for women should be guided by a(n)... explicit legal framework which spells out both substantive and procedural rights for women in different fields and in greater detail and is applicable to both the State and private actors.”

different fields and in greater detail and is applicable to both the State and private actors. Such a law can be based on CEDAW and some CRC provisions. Of course, the ways and means by which this law can be enforced and the areas which it should cover will have to be worked out in detail.⁴² The Verma Committee Report made two important suggestions in this regard. It pointed out that “international conventions which are consistent with fundamental rights and in harmony with its spirit, must actually be read into the provisions of the fundamental rights because they actually impart clarity and perhaps more vigour to the content of the Article”. In the Vishakha case the Supreme Court had actually done that.

Secondly, the Verma Committee Report has drawn up a Bill of Rights which outlines and details the right to equality, the right to life and other rights.⁴³ In the part on ‘Right to Life, Security and Bodily Integrity’, the Bill states that every woman shall be entitled to respect for her life and the integrity and the security of her person. This part prohibits all forms of violence against women in public or private and further gives the right to all women “to express and experience complete sexual autonomy including with respect to her relationships and choice of partner”. This can be used, if enacted, to criminalise marital rape and as an argument for a law to punish crimes in the name of ‘honour’. Another part of the Bill of Rights on ‘Equality and Non-discrimination’ details the grounds on which women cannot be discriminated against and states that they cannot be prevented from inheriting family property or from access to land rights. This part also reiterates the right of every woman to marry any person of her choice and further, be regarded

⁴² A number of countries have passed various reformatory anti discrimination laws. For instance, Australia enacted the Sex Discrimination Act, 1984, amended in 2012, that prohibits discrimination on the ground of sex, marital status, pregnancy and family responsibilities. Spain passed the law on equality in 2007 that promotes women’s participation in the political sphere and in the workplace.

⁴³ The five parts suggested in Appendix III of the Verma Committee Report are the Right to Life, Security, and Bodily Integrity; Democratic and Civil Rights; Equality and Non – Discrimination; Right to Secure Spaces; Special Protection.

as an equal partner in the marriage. In addition, it states that every woman shall have the right to free education until the undergraduate level and that every woman, particularly the girl child, must be protected from abuse including sexual harassment in schools. It states that all women shall have the right to nutritious and adequate food and access to clean drinking water. It further states that every woman shall have the right to reproductive and sexual health. In the section on 'Right to Secure Spaces' the Bill calls for women to have the right to equal access to housing/shelter and to acceptable living conditions in a healthy environment. It also states that women should have access to public transport facilities without fear of the risk of violation of their dignity in any form including teasing, molestation and stalking.

This Bill of Rights thus contains several important clauses that need urgent attention. It should be seriously examined by the Government and Parliament and a law enacted with these clauses making it enforceable.

Supportive Measures

Laws will have the intended impact in addressing discrimination when they operate in a supportive policy and programme environment. It is only when complemented by required supportive measures that the macro and micro aspects of gender discrimination can be addressed. Some of these supportive measures that can ensure a comprehensive response to tackling discrimination are outlined below.

Appropriate Infrastructure for Implementation of Laws and Access to Justice

The Working Group on Women's Agency and Empowerment for the 12th Five Year Plan had stated that an appropriate infrastructure for implementation of laws and access to justice should be put in place since "Victims and survivors of violence need services and support from the police and health and legal aid providers and a shelter for at least a short term stay. These also need to be followed up by longer term health, legal, educational and economic support." Apart from this, the implementation or rather the lack of implementation of the law underscores the urgent necessity not only to reform the law but also to ensure that the police acts in cases of crimes against women both in the home and outside. In the short term this can be done by making the police accountable and punishing them for refusing to register an FIR or acting in time or supporting the criminals in any way. In the long term, extensive police reforms as suggested by the Supreme Court and the Law Commission should be instituted. An improved and people-friendly system for easy filing of FIRs has to be evolved.

Awareness about Laws and Rights

There is an urgent necessity to create greater awareness about laws and rights. This can be done through the National Legal Services Authority (Legal Aid Clinics) Scheme 2010, which envisages setting up of legal aid clinics in every village with para-legal workers and lawyers.

Gender Sensitisation of Key Actors

As has been repeatedly suggested, gender sensitisation of key actors like the police and judiciary should be strengthened and mainstreamed through induction and in-service training programmes.

Institutional System for Monitoring and Evaluation

To foster accountability and due diligence, an institutional system for annual monitoring and evaluation of legislation dealing with violence against women and gender discrimination should be put in place by the government and an annual report put out in the public domain.

Shelter and Short Stay Homes

Shelter and short stay homes for needy women and victims of violence should be set up in each block. These shelters should provide much better quality of service than they do at present and should have easy access to medical and legal support services.

Budgetary Allocations

Appropriate budgetary allocations must be made to implement laws concerning women and girls. Their rights and entitlements from the State should be prioritised.

One-Stop Crisis Centres

A one-stop crisis centre should be instituted in each block along with an all India helpline for women (an initiative presently being piloted by the Ministry of Women and Child Development which needs speedy and effective implementation and expansion). This crisis centre should help victims of violence by providing police help, legal help, medical and counselling services under one roof and be able to link them to an appropriate shelter home.

Women Working with the Police and the Judiciary

The number of women working with the police and the judiciary remains extremely low. This number needs to be increased through appropriate affirmative measures such as quotas if necessary.

Collect and Disseminate Reliable Data

It is of utmost importance that reliable data be collected regarding the prevalence and causes of various forms of violence and discrimination against girls and women and disseminated at decentralised levels. Similarly, it should be possible to track police response to crimes so that, as for other issues, public pressure can play a critical role in strengthening the law and order machinery.

Overall, this study, based on a review of laws, underscores the need to connect the dots if the practice of son preference and its manifestation, discrimination against daughters, is to be addressed. Clearly, it is not only about implementing the PCPNDT Act but also the various laws that can indeed play a central role in moulding the process of social change to eventually eliminate discrimination against girls. While attitudes and perceptions need to change to accept daughters equally as sons, this change can be accelerated if it is brought about in a supportive legal and policy environment. The recommendations from this review essentially point to such steps that can indeed remove the legal bottlenecks which inadvertently, or owing to inaction, tend to promote discrimination or keep it intact. The lack of implementation of laws, their faulty or at times discriminatory provisions or the absence of certain laws, in fact, accentuate the factors that make girls unwanted, be it laws related to inheritance, dowry, harassment or child marriage. Taking action to enhance the social value of girls would therefore mean taking the first few steps to remove the legal bottlenecks highlighted in this review.



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