

Women's Movement's Engagement with the Law: Existing Contradictions and Emerging Challenges

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A Concept Note

Through over a century long history, the women's movement in India has been engaged with law as an instrument to negotiate women's rights. To a great extent this strategy has been successful in shaping public consciousness and bringing women's issues on to the national agenda. In the post independence era, pressure brought upon successive governments has compelled them to acknowledge inequalities and address these through laws and policies. Using the space made available by the constitutional guarantee, the movement has pushed for amendments in laws in an attempt to bridge the gap between formal and substantive equality and to enable women to exercise their rights. At the same time, it has sought to pressurize the state to formulate policies that have a significant positive impact on women's status. Over the past few years, we have seen how this process has had an impact on law making, particularly in the present context when a slew of changes in existing laws for women as well as new laws are on the anvil.¹

The struggle for rights and justice for women using law as an instrument of change however has not been easy as the social, economic and political structures in which law and the legal system exist, maintain and reinforce inequalities. Further, differentiation between women based on regions as well as religious, class and caste- based hierarchies, and women's location in unequal and oppressive conditions has received less attention than it deserves. Such divisions and inequalities persist despite and in contradiction with constitutional provisions of equality, social justice and secularism. Over and above such inherent contradictions, shifts and changes in the socio-political context have been adding to the complexity of both the debate as well as the struggle for women's rights.

For example in relatively recent times, the growth of fundamentalism and its politicization of the debate on personal laws systematically cramped the space for expanding the debate on crucial aspects of gender justice. And the struggle for women's rights has become increasingly intertwined with the struggle for developing India's secular-democratic polity where men and women from different communities may enjoy the right to adhere to their diverse practices while upholding the rights of women within the framework of the Indian Constitution. Similarly, advancing neo-liberal policies, with its agenda of rollbacks in the labour law regime and introduction of several new areas of vulnerability for women, have compelled the opening of new areas of concern regarding law and social policy, particularly in relation to women workers. In fact, several current features of exploitation, oppression, and forms of violence against women that have acquired new prominence, have brought into

¹ For instance Protection of Domestic Violence Act Amendments made to the Hindu Succession Act, Discussions again being initiated on Sexual Harassment Bill, Sexual Assault Bill, Amendments suggested to Law against dowry by the NCW, Compulsory Registration of Marriage Bill Amendment to Child Marriage Act and several others being discussed and debated.

focus social dimensions and practices (both new and old) that coexist uneasily with constitutional provisions, the laws, and their way of implementation.

Within this broad context, we have gained over twenty years of concrete operational experience of the changes in dowry related laws that followed the anti-dowry movement of the early eighties. Where significant advances have been made in the area of recovery of dowry when breakdown of marriage takes place and in criminal prosecution of dowry deaths, the institution of dowry has patently remained untouched, and in fact spread. This foregrounds the need for review of the flaws in the law and its implementation, as well as the larger social processes that have led to the growth of this institution.

The experience of laws related to violence and crimes against women and their implementation has also been mixed. Generally seen as a 'soft crime,' despite continuous increase in the scale and form of violence inflicted on women both within the domain of family as well as outside it, an ambivalence in the law towards such violence, is reflected in failure to provide any remedy to the victim. Experience reveals that major problems exist with regard to interpretation and implementation of even existing laws. Gross violation of law and procedure, visible at all stages starting from the registering the case to decision in the courts, remain a problem requiring immediate attention. Further, we have seen how sexual violence may stem from class, caste, or community conflicts as reflected in Gujarat in 2002 or in extreme forms by agencies of the state as an act of instilling terror on those seen as 'insurgents, as depicted in Manorama's case. The use of law in support of vested groups and retrogressive ideology was most recently illustrated in Operation Majnu in Meerut, here purportedly with the objective of making cities safer for women. In the background of such experiences, there is obviously need for a more comprehensive and nuanced review of underlying conceptions as well as procedures, forms and methods of implementation of the laws that are brought into operation in cases of and in the name of violence against women.

The issue of women's work and work- place equality gained momentum in the 70s and found reflection in the Equal Remuneration Act which brought equal pay for equal work into the realm of labour law. Since then however, a crisscross of currents unleashed by seismic changes in economic policies and process of development have come to dominate the debate on labour related laws. On the one hand, standard assumptions of existing labour laws and established labour rights are being undercut and threatened, with issues of both equality and humanity in labour practices being increasingly left to determine by the wills of market forces rather than principles of social justice in law. On the other, popular demands for protection of growing unemployment, insecurity of livelihoods and forms of harassment at work place are also forcing themselves into the domain of legal rights and the law. With the roll back in crucial areas of worker's rights in the name of labour law in line with neo-liberal economic reforms is part of former trend, the recently enacted National Rural Employment Guarantee Act and the proposed Bill on the Sexual Harassment are examples of the latter. In context of momentous changes taking place in the world of work and its regulatory mechanisms, the need for the women's movement to reflect on and clarify its perspectives on the issues, premises and direction of changes in labour law has acquired new urgency.

In view of the stress on the institution of the family and increasing domestic violence, the issue of maintenance comes up with greater force. At one level, the maintenance law under CrPC (purportedly to protect women from destitution and 'vagrancy'), still remain inadequate and poorly reinforced. At another level, civil law judgements advancing formal notions of equality now allow husbands to seek alimony from the wives, opening up new arena of

debate. In relation to matters related to inheritance, recent steps to amend the Hindu Succession law (giving daughters equal coparcenary rights as of sons in a Hindu joint family's property) have yet to be appropriately contextualized in the changing socio-economic scenario. For example, women's access (or rather lack of it) to land and their rights and control over it remain fundamental issues to be addressed if we wish to achieve economic advance and change in the social status of women. These all are the areas where there is a need for the movement to draw together its experiences and work out perspectives for future advances.

Among other important new areas that have emerged in recent times are the social effects on women of a range of new technologies that are now being brought. Declining sex ratio is one of the significant fall outs of such unethical, commercial and illegal uses technology that need to be addressed in holistic manner. Affect of growing nexus between commercial forces and technological advancements can be felt through indicators declining sex ratio. Fuelled by politics on population, this has impinged on women's situation in larger socio-political context and has been shaped in a manner when law alone is not adequate to address it.

The above discussion indicates, it is perhaps an appropriate time for us to reflect on how far we have been able to advance women's rights in the sphere of law, to review the effects of past successes and failures in this area and take forward the movement's perspective towards incorporating the emerging areas of concerns. In general, it is still true that in many crucial areas the formal legal system as well as traditional modes of delivery of justice have both failed to address the existing ground realities and women's experiences of discrimination, oppression and exclusion. Advances may be seen or anticipated in the number of new laws that have been and are being enacted in the amendments made to existing laws and in several significant Draft Bills proposed by the present government, which are pending before the Parliament. At the same time, despite such progresses in law making several elements of retrogression can also be seen working their ways into the process involved in conception, applicability and implementation.

It is in such a context that the CWDS proposes to organize a seminar on *Women's Movement's Engagement with the Law: Existing Contradictions and Emerging Challenges* at New Delhi on the 20th and 21st of March, 2006. The seminar will open with presentations on the women's movement's engagement with law, the first dealing with the colonial era, and the second focussing on the post-independence period. In this overview session presentations will also be made focussing on violence against women, and issues related to women's equality and the broad constitutional mandates. This will be followed by a brief session on the anti-dowry movement and experiences of the Dowry Law. Keeping in mind the changing context the consultation will also reflect on situation of women's employment and labour laws, right to property and access to land. In the end it will highlight on emerging issues that need to be understood in the changing paradigm.

Welcome Address: Dr. Vasanthi Raman

On behalf of CWDS, I would like to welcome all for this two day consultation on 'Women's Movement Engagement with the Law'. Actually this is not in the mode of a seminar with papers etc. The idea was that we would have a consultation where people would be able to use this opportunity to reflect over the last many years of the women's movement engagement with the law, what have been the problems, what have been the dilemmas and what is it that we can do to go ahead. The idea is to have a discussion that would throw out significant issues. That is why we have no specific papers as such and we would like that

there be enough time for discussion. This is also an occasion where we would be honouring Professor Lotika Sarkar who has been an inspiration to many students of the law, people who have been engaged with the law and of course women's activists in general. I will hand over the chair to Dr. Kumud Sharma.

Session I Chair: Dr. Kumud Sharma

It is my great privilege to welcome Professor Lotika Sarkar, after a gap of several months to see her amongst us. As Vasanthi has already said this is a seminar with a difference, we are basically trying to capture the legal discourse in the last three decades and how the women's movement has tried to engage with the law, the state and various actors and I don't think there can be better beginning than to honour Professor Lotika Sarkar who has given a lot of her energy, time, ideas and inspiration to Centre for Women's Development Studies. I will request Dr. Vina Mazumdar to honour Professor Lotika Sarkar.

Vina Mazumdar: Honouring Prof. Lotika Sarkar

It's pointless trying to say too many things about Lotikadi to this audience. I can't see a single face here to whom Lotika Sarkar needs an introduction. But a few things drawing in my very personal memories which go back to the days of the Committee on the Status of Women in India, I remember that she came out with a pronouncement which has never been forgotten by any of us who served with her on that committee. She said, we are the first generation beneficiaries of the equality clauses but as we went round the country talking to large number of women we do not found anybody being aware of their rights under the constitution. It was then Lotikadi questioned whom are those rights for? What were we doing all these years? Twenty five years since the constitution came into application and majority of the women in this country are unaware that they have any rights at all let alone rights to equality. It is this agony that she gave expression to that I tried to capture into a sort of a social science jargon much later calling it the crisis of conscience and a crisis of identity. We are the first generation beneficiaries but who do we represent? Nobody but ourselves. So this in my disciplinary language that got translated into the twin crisis of conscience and identity. Third thing that she taught me particularly was that while law itself had to be of necessity hard, it reflects hard logic, but its application did not have to be hard. There are a few of her old students here and are all of us in the CWDS who have worked with her for so many years, know that this hard logician has the heart of an extremely warm hearted person, full of affection. Somebody wrote of Ishwarchandra Vidyasagar that he had the heart of a Bengali grandmother. Unfortunately Lotikadi never decided to become a grandmother but that is the kind of heart she has always displayed.

A great deal of work in her honour have been produced by her students so why is it that we are supposed to be honoring her today. She belongs to us. She has been an inspiration, she has been a mentor, she has been a guide and at times, she was perfectly capable of blowing one up; all the four roles she has played through all these years. The other thing is that both of us are in a generation where we feel that when it is time for us to quit and we should quit with our heads held high and she is quitting. But we are not bidding her farewell. We are just honouring her for having looked after us, for having cared for us and for having nurtured this institution practically from its birth. She is certainly one of the founders of CWDS when she was teaching in the university and as soon as she retired she came and said "*Mein haazir hoon*". Since then she has been with us. So that is all I need to say. She has been very much loved and she will be continued to be loved by all of us who work in this sector.

Dr. Kumud Sharma

Lotikadi has taught for so long in Delhi University and besides lecturing there she has lectured many of us at CWDS so at the moment she doesn't want to say anything. For our 1st session we have four speakers and the first is Aparna Basu so I invite her to make her presentation.

Prof. Aparna Basu: Pre-Independence Era and Law Reform

One can say a lot about the pre-independence era in law reform but as this is specifically on the women's movement engagement, I won't go into the whole question of social reform in the early 19th century. We know that there was extraordinary energy with which the intelligentsia debated questions the social reform concerning women. Issues relating to sati, widow remarriage, child marriage were debated in the early 19th century but mostly by men like Ram Mohan Roy. However, it is from the latter half of the 19th century, that educated Indian women began raising their voices which sometimes echoed the male discourse but often offered trenchant critiques of this discourse.

I will mention two episodes where fierce debate took place and women actively participated. One is by Tarabai Shinde who gave a very incisive analysis in her *Stree-Purush tulana* prompted by a tragic case of a young Brahmin widow Vijayalakshmi who murdered her illegitimate child in 1881. Vijayalakshmi was condemned to hang for this crime by a sessions judge in Surat and the ground on which it was done was moral depravity. Some women including Tarabai took up this case. The sentence was commuted to life imprisonment but later it was reduced to 5 years. But the whole issue produced a furious debate, particularly by male writers who accused Vijayalakshmi of being immoral. Particularly in the Marathi newspapers in Maharashtra, this had considerable prominence. In her essay of 40 pages on *Stree – Purush Tulana*, Tarabai Shinde impressively answered against male charges of female immorality and the double standards that men apply to men and women. It was also a very early critique of patriarchy and of the patriarchal structure of Indian society. She pointed out the inconsistencies of the *shastras* and the disjuncture between the scriptures and reality. It was an indictment of male hypocrisy but equally it was a call to a notion of justice that did not force women to shoulder the burden of morality alone. I mean why only women are accused of immorality.

The second instance was that of Pandita Ramabai Saraswati who chose to expose the contradictions in the *shastras* vis-à-vis upper caste Hindu women. It was also, apart from other things an important intervention in that famous Rukmabai case. Rukmabai was married at the age of eleven to Dadaji Bhikaji and the marriage was never consummated. She refused to go back to him. This case initiated a great deal of debate through newspapers all over India. Most of the men had risen together to denounce this helpless woman, saying she must go back to her husband. She saw the complicity between the supposedly reformatory impulse of the colonial legal system and the reconstituted Indian patriarchy which increased the oppression of women. She argued that the colonial rulers who were supposedly helping the reforms weren't prepared to go beyond a point and there was collusion between the new sorts of patriarchal construction of the Indian intelligentsia. Rukmabai case and the fierce contestations that it engineered marked the beginning of the new phase. In the history of nationalism, it brought to centre stage the question of the consent of women. In drawing to a close a century of male sponsored reform, it also marked a move towards a definite defence of tradition as political strategy placing the burden on women's embodiment of tradition.

This was more clearly articulated in the debate on raising the minimum age of marriage for consensual marrying between men and women. The issue of ban against child marriage was

brought in earlier. Vidyasagar and Keshavchandra Sen were the pioneers in the 19th century. The Native Marriage Act of 1872 which prohibits polygamy was enacted. This was initiated by Keshavchandra Sen and the Brahmos of Bengal which include legal allowance for divorce, no reference to caste, minimum age of marriage for girls to be 14 and boys to be 18. The debate was so fierce and in the end due to the opposition from the Hindu orthodoxy it was opined that this would apply only to Brahmos.

The theatre of action then shifted from Bengal to Maharashtra. Malabari took up the whole case of raising the age of marriage. It was however from the 1920s that women in a bigger way became involved with legal reforms. Women like Tarabai Shinde and Ramabai Saraswati, earlier spoke against child marriage, but not really in a big way till the 1920s, the beginning of the Gandhian freedom movement and also the beginning of the women's organization like the All India Women's Conference, the National Women's Council and so on. The AIWC was established in 1927. During this period the whole issue of child marriage was being discussed and efforts were made since 1922 to raise the age of consent within and outside marriage. The government had sponsored a Bill in 1925 fixing the age as 14 in extra marital cases and 13 in marital cases. This Bill was passed in the legislative assembly. But then the government sought the opinion of all the local governments and administrations to find out how they viewed it. In 1927, the same year that the AIWC was established, Harbilas Sharda introduced a Bill raising the age of consent of girls for 14 and boys to 18 and the arguments were that this was needed to prevent early marriage. At the same time a second Bill was introduced in the legislative assembly called the Children's Protection Bill by Sir Harisingh Gaur who later became first Vice Chancellor of Delhi University. Harbilas Sharda's Bill was referred to a select committee and it was argued that the Bill should apply not only to Hindus but to all communities, thus restraining child marriage.

A committee was formed with NN Joshi as the leader called the Joshi Committee to consider both Harbilas Sharda's Bill as well as HariSingh Gaur's Bill. The other members of the Joshi committee were Rameshwari Nehru and another English lady, I forget her name. The committee invited women from many parts of India to come and testify and to give their views to the Joshi Committee. Many women went and testified before this committee including my grandmother. This is the time when the AIWC became very active. It took up this issue. Originally AIWC was for education but it felt that women's education cannot progress unless the age of marriage was raised. It passed resolutions deploring the effects of child marriage. In fact it argued that the minimum age shouldn't be 14, it should be 16 for girls and they whole heartedly supported Hari Singh Gaur's Bill. In meeting after meeting; resolutions were passed and they elected a small committee to watch and report on the progress of the Bill to coordinate, direct the activities of the various provincial committees. In each province a small committee was formed to put pressure on their local members of Parliament that this Bill should be passed too. An intensive campaign was launched against child marriage and to bring people's views to the attention of the legislators. Suggestions were given for campaigns, propaganda meetings were held, lectures were given, articles were written, posters were put up, petitions, post cards were sent with as many signatures as possible to the local members of Parliament demanding the passage of this Bill. The AIWC send a deputation on the age of consent committee which met in Patna and they came to the conclusion that it would be ineffective to raise the age of consent without also raising the age of marriage. Both these really went together. A deputation representing almost every province waited in different political parties. One deputation met the Viceroy. This deputation consisted of Rameshwari Nehru, Mrs SR Das, Sarladevi Chaudhrani, Begum Hamid Ali, Kamaladevi Chattopadhyay, Margaret Kak. They tried to get across communities

and across provinces from North, South, East, West a women's deputation waited in the Viceroy. A second deputation led by Indira Bhagwat met all the European non official members of the legislative assembly trying to impress upon them the importance of this. They met leaders of different political parties as well as the members of the legislative assembly including Jinnah, Motilal Nehru, Lajpatrai. In fact, they persuaded Jinnah and one other member from the Muslim community (I can't get the name) that this Bill should apply not only to the Hindus but the Muslims; to which Jinnah agreed. They argued that the Bill should apply to all communities; as it was not just an issue that affects only Hindus. A third deputation regarding the Age of Consent consists of Sushma Sen, Kamaladevi Chattopadhyay and so on.

All through 1928-29 the branches of AIWC carried on lobbying and propaganda through the country. Street plays, popular songs, magic lantern shows and other activities were organized trying to show the ill effects of child marriage on health, on education, and the importance to raise the age at marriage. The Bill became law. However, the age of marriage was not fixed at 16 as AIWC wanted for girls but 14. And it was passed by a fairly substantial majority, 77 members voted for it and only 14 against. This shows that the campaign was quite successful. Also, this campaign infused a new energy into the women's movement. This was an issue on which all the women's organization got together and focused on it and fought for it. Of course we know that the effects of it were not what were anticipated. The passing of Bill generated tremendous euphoria and enthusiasm but once it was passed it was found that it didn't really achieve what it had set out to achieve, child marriages still continued. In fact the Census Report of 1931 shows that many more child marriages took place that year. Reason being that before the Bill became an Act and child marriage became illegal, parents rushed to get their children married. So the women's organizations realized that getting a law was not enough. It had to be followed up, implemented and much more work had to be done.

Another major issue which the women's movement took up was the right to divorce and inheritance and control of property. Throughout the 1930s the AIWC formed committees on legal status, undertook studies, talked to lawyers, published pamphlets and said that Hindu law needed to be reformed. The state of Baroda had, meanwhile passed a law of divorce and this was justified by the statement that, if an Indian princely state could do it, why couldn't British India do it also. At the same time a move was initiated by one Dr. Hafiz Abdullah, a member of the legislative assembly. He argued that Muslim personal law should also be amended and not only Hindu personal law. A Bill for preventing polygamous marriages by Radha Subbarayan was also put forward. They wanted amendment in the Special Marriage Act of 1872 suggesting that this should be applicable to all Hindus and not just the Brahmos. They also advocated for equal rights of women in matters of inheritance and control of property. AIWC was of view that they didn't want piecemeal legislation but a comprehensive law which would take care of property, inheritance and divorce. A little pamphlet was produced by a lawyer VV Joshi in Baroda. This pamphlet was widely circulated and the AIWC advocated that a non official committee should be formed with women representatives to look into this whole question. After a great deal of pressure, lobbying and networking the government formed a committee under Sir BN Rao, DN Mitter and VV Joshi from Baroda, but surprisingly no women member was taken in this committee. It was not that women had not wanted their representation but they were not given. However women witnesses were called to give evidence before this BN Rao Committee.

AIWC disputed at this point and argued that they would not collaborate in this effort. But in the meantime, the Quit India Movement 1942 was launched and the dilemma that confronted

the women's movement was that whether in such circumstances, women should cooperate with the government or should they not. Gandhiji was against this. He said these issues concern elite women and that there should be concentration on fighting for freedom. Rajkumari Amrit Kaur also raised similar voice and suggested that women's movement should cooperate in the struggle for freedom. So the Women's Conference and the women's groups continued to appear before, give evidence and as the result of that of course you know. There was much opposition still women fought for it. They wanted a Uniform Civil Code but it came to be just reform of the Hindu code, Hindu law. But because of the opposition of the orthodoxy, it was referred to a select committee and then the whole thing was shelved on the eve of partition and therefore before, I have to speak only till '47, this was not really taken up.

Towards the end I would like to say that because the women were urging that their voices were not being heard, the AIWC submitted that at least women should be nominated to the legislative assembly to speak on behalf of the movement and they accepted the name of Renuka Ray. She went into the legislative assembly with one of the specific tasks to push the reform of Hindu Personal Law. This was the kind of mandate by which the women's movement had put her there and if you look at the debate she spoke very much in support of the Bill.

One last thing I will say is about the labour legislation. Of course I see that you are going to have a panel on that. But the AIWC has addressed the issues of women workers in tea plantations, in jute mills and in the textile mills of Bombay and in the coal mines. These were the four areas in which issues of women workers were taken up but not with the same vigour and enthusiasm with which the issues relating to property, inheritance, divorce, raising the age of child marriage among others were taken up. But, AIWC pushed the issue of women working in the coal mines. About the same time the ILO passed a Convention of 1935 banning women to work underground in coal mines all over the world. Therefore the Government of India had to agree to it but they restored to it only during the second world war. Thus, women were withdrawn however, the owners of the coal mines wanted the women to continue. Emphasis was not so much on improving the condition of women workers, but the ground of women withdrawal was immorality. These women were sexually harassed underground. AIWC said that in case women are prohibited from working underground, then they should be provided with alternative occupation, alternative training and so on, so the family income is not effected. They again allowed it because they wanted more coal and they wanted women to work.

AIWC also asked that facilities like the crèches, playground, adult education facilities, maternity benefit should be provided for women working in the textile mills, government work departments or in the coal mine,. But the Maternity Benefit Act, was not passed till about 1961. Though, the effort for it was started much earlier. Time and again they kept on saying that women must get ante-natal care, post natal care, maternity benefits, maternity hospitals etc.. These were the issues on which the women's movement in the pre-Independence period focused and achieved some success but not as much as they had wanted. Partly because of the government was not very keen to bring any legislation which would challenge traditional religious and male basition. Even after the Sharda Act they ensure that it was not strictly implemented because the whole policy is not to interfere with the personal life, the private life of Hindus or Muslims lest it create anti- British sentiments.

Kirti Singh: Post-Independence Era, Law and Women's Movement

First, I must clarify that the topic that had been earlier allotted to me was post independence era and law reform and not the women's movement aspect. So I am primarily going to concentrate on legislation after independence but at the same time I would of course start with the preface that the women's movement has played a significant role in getting each law that has been passed. Had it not been part of the woman's movement and the initiatives taken by it, these legislations would not have been passed. Also in the post independence period, as we saw in the pre independence era, as constituents of the women's movement fought together to get the legislations enacted, whether it was the dowry law or the rape legislation or more recently the domestic violence legislation. Perhaps, the areas where the women's legislation was not passed, it was because of the lack of prioritization by the women's movement particularly in the area of family laws and laws within marriage. These were areas where the women's movement did not prioritize because they were essentially power piping violence. So in the late 70s we see the women's movement reacting against dowry deaths and rape and this entire period till almost the mid- 80s, though there were of course calls from the women's movement for an uniform civil code, but till the mid 80s the movement was primarily concerned with dealing with issues of violence against women and did not really after the 50s amendment concentrate and prioritize family laws as such.

I would also categorize the trends as I see it. The first category of laws is that recognize certain rights of women, which had hitherto not existed. Hindu reform laws in 50s particularly recognize certain rights within marriage. These were the first laws that were passed after independence. Then there are certain labour legislations of the 60s and the 70s and more recently the Indian Divorce Act reform in 2005 which recognize certain rights of women. So as far as these laws were concerned, it was not that they gave complete and equal rights to women, they gave partial rights to women. Full equality rights were not given to women and that becomes clear in the 50s reform itself because while the All India Democratic Women's Association (AIDWA) had asked for. For instance, in the laws of inheritance, AIDWA had asked for abolishing the *mitakshara* laws. This was not done and the laws that came in the 50s could be characterized, as a member of Parliament at that time said, to be 'mild moderate reforms' because a compromise was made. There were sections within the congress which were against the reforms and there were sections outside the congress like the *Hindu Mahasabha* which was arguing against the reforms on two grounds. One that it was against Hindu *Shashtra* and the Hindu religion and the second was interestingly they promoted a negative right to equality in a sense the ground they took was that how can Hindus alone be targeted since the laws of Muslims were not being changed. Therefore what happened was that we had certain grounds on which divorce could be introduced but they were limited grounds which were again expanded in 1976.

Also, the right to adopt girls was introduced, women's right to self acquire inter-state property was introduced. However the areas of guardianship, equal rights in property, were areas which were left untouched and not legislated upon. Even as far as guardianship rights were concerned women were not thought of as equal guardians nor was it argued. As far as the family laws were concerned, they remained as they were. Recently the Domestic Violence Act has made some inroads. Till now Hindu women had only the rights of residence, at the time of marriage and in case of divorce the right to residence was extremely unclear. Cases after cases we had to file under the Hindu Adoption and Maintenance Act to ask for right to maintenance and to include within the right to residence within the right to maintenance. Until recently when the Indian Divorce Act was amended, the only amendment which actually came about was at the instance of fundamentalists which was a retrogressive amendment and which was the Muslim Women's Protection of Rights on Divorce Act.

Even in the 70s, when the Hindu Marriage Act was amended, apart from liberalization of divorce laws, the central government changed the provision which stated that if two Hindus married they would be continued to be governed by the Hindu Succession Act. This was to accommodate the Hindu business sentiments. What happened to these laws was that till the 80s, major women's organizations asked for a UCC. After the Shah Bano controversy, it became clear that the demand for an UCC was not supported by large sections of Muslim women and the Muslim intelligentsia also apart from fundamentalists. Also it became clear to the women's movement that the issue of the uniform civil code need not necessarily bring about equal laws and therefore the demand for uniform civil code itself is not necessary. For instance, at the same time the BJP was demanding UCC for uniformity. But uniformity per se would not lead to equality. Meanwhile, AIDWA came up with the demand for equal right and equal laws which meant that within each law, within different communities we would demand for equal laws within the community and would start the process of reforms and after this I think, more or less we have seen that reforms in personal laws has actually followed this. We have seen certain changes within each law for instance within the Indian Divorce Act and also certain general laws which would then apply to all Indians regardless and these are mostly areas where no laws existed like the Domestic Violence Act and till more recently there are changes which are sort to be brought about in the Child Marriage Restraint Act and in certain other laws.

I will now come to the second broad trend that I see in post independence law reform and that is the introduction of certain laws which deal with defining and recognizing certain acts of violence against women. For instance, dowry death which was recognized as a different species of offence from murder and it was interesting to know that it was not meant to replace provisions relating to murder i.e. Section 302 of the Indian Penal Code. Because in the cases of dowry death, it is difficult to gather evidences and it is always in private. Also, we have to see the entire move since the early 90s to bring about acute changes in law relating to sexual assault and to change the archaic laws that are there in the Indian Penal Code for instance, the Indian laws relating to penetrative sex: Penetration by other kinds of objects, by bottles, penetrations which usually occur and the instances of child rapes and other rapes are not defined in the law. So demand was made to broaden the definition of rape, to include within the definitions various kinds of sexual assaults including penetrative and non-penetrative. This entails recognizing certain kinds of sexual assault that do exist in the society but which had not been defined, or written into the law. Another fact necessary to look at is the move is to introduce a crime like stalking which threw the experience of the women's movement. For instance, in Sujata Mattoo's case, a girl had been consistently followed and harassed. But the definition of the IPC was not sufficient because it only deal with the phenomenon of eve-teasing. It only deal with one time effort but did not take within its purview the protracted nature of this offence and the different ways in which the sexual harassment can take place outside of the workplace. These were the second kinds of laws that were sought to be brought about.

The dowry prohibition law was introduced in 1961 and was again sought of amended in 1984 and because of its ineffectiveness was reframed in 85 and 86. The much 'abused' section 498 A was introduced but the question that remains to be answered is that it is abused by whom? In a recent research we have found out that it was actually under-used by women but was abused by mostly husbands and their families and yet we have to deal with a lot of criticism of 498A.

The third set would be getting rid of discriminating laws in the statute book for instance, archaic Victorian laws like 377 IPC which targets oral, anal and consensual sex and homosexuality and then laws which labeled Sati as a suicide, laws which were retained in the statutory book. Also provisions like the restitution of conjugal rights and also laws like punishing sex workers for soliciting etc. needs to be looked into. So these are broadly as I see getting rid of the discriminating laws, defining or decivilizing certain kinds of violence against women and giving certain kinds of rights to women. These were the three broad trends that we see and of course a lot needs to be done despite the plethora of laws that people say exist but the fact is that they do not.

The other thing that we would like to say is that the procedure is preceded because of the gender gap, class and caste notions of the judges in interpreting these laws and because of the extreme reluctance of the supreme court, we see even some of the amendments that have come forth have not really been very successful. We have also not been really successful arguing against discriminatory laws in the Supreme Court because the courts like in Geeta Hariharan's case held that these laws are not violative and tried to justify these laws by all kinds of reasoning. Of course in certain areas we have got some good judgments but they are extremely limited in the areas of sexual harassment and under the Muslim women Protection of Rights on Divorce Act.

Flavia Agnes: Overview on Violence Against Women

I think 'Violence against Women' is a theme that is going to recur during the entire two days. Kirti has already touched upon it and there are a lot more sessions coming up which deal with the specific issues of domestic violence, dowry, etc. or women and law in general. Actually when one speaks about violence against women I think we are going around in circles. I don't think there is anyone in this room who doesn't know what is violence against women and what are the laws dealing with it. So one is really at a loss to say what are the new points and what more can be said about these issues. I always wonder why we need to have these sessions all the time and what is the assessment that we take. Whether 5 years ago this is where we were and 5 years later this is the advances or regresses that we make? Unless that happen it is very difficult to speak about that subject. Anyway let me start with a good news.

We have had a good judgment which was delivered in the Sessions Trial Court on Saturday which dealt with case of pedophilia - the Anchorage judgment. We do not know what will happen in the High court but I see this judgment as a significant one. But before the Anchorage case we've had other cases - the Swiss Couple Case and the Freddie Pitt's case in the Goa High Court. Let me just talk about these three cases because it is very fresh in my mind and are highlighted in the papers.

When we are talking about violence, rape, sexual harassment etc.; there is a particular framework within which we speak and even when we are talking about trafficking, it is predominantly gender, the male female relationships, the subordination and violence on women in these relationships. Here you have cases where a rape happens within a city, within an area in communal conflicts where you deal with rape at one level. It could also be trafficking within the country or within the region be it brothel prostitution or women or children trafficked for the purpose of brothel prostitution. And the elements of penetration, violence inflicted, non consensual sex, commercial sex etc exist in these kinds of violence.

Now when we talk of pedophilia we are entering a new domain where it is the first world - third world issue predominantly. Specifically, when we see this in India in these specific cases children who are poor and vulnerable are used for sexual purposes. A common element in all these cases is that foreigners came to India and they used children who are very poor for sexual purpose. Now sexual purpose need not be gender specific. It could be same sex or heterosexual. What is created here is not necessarily penetrative sex, but what is done here is creating images using the camera, the laptop; photographs were generated and were sold in the global market where India becomes a very important destination. I do not know how much it is prevalent in Delhi, but in Bombay, Goa, Kerala, in the beaches it is very dominantly governing the aspects of sex tourism per say.

I will discuss about the commonality of these cases and how these cases were followed up. Freddie Pitts case was followed up consistently by Shiela Barse. An important aspect of this case was that a lot of pornographic material was seized, I think around 3,000 photographs or so. Here children were injected with certain hormones so their genital organs get enlarged. They were pinned to the bed and photographed in these positions. Then these photographs were used for sexual and commercial purposes. A relevant issue in this case is the manner in which a child is supposed to give evidence against a person who has done this under the guise of being an authority and secondly of a benevolent saviour of these poor children. So here for the first time I think the Rules of Evidence were supposedly reconsidered. In these cases when a child was being cross examined, it was said that the child need not be in the same room where the accused is. The child can be behind a screen or behind a glass door. And this is crucial to determine how well a child will be examined in a court of law. These were important aspects of Freddie Pitts case. Freddie Pitts case landed in conviction because of the efforts that people like Shiela Barse put into. For years and years she followed up this case and moved to High Court and then to Supreme Court and went back to Trial Court; finally the case ended in conviction.

In Swiss couple case, the fact was that an elderly couple was coming to India every six months. They used to stay at fixed places. For instance in Bombay it is South Bombay, the Gateway of India, the Colaba area etc where a lot of poor urchin children are there. These children were picked up and were taken to a resort and there they were photographed. It was an alert taxi driver who alerted the child rights groups. The child right group followed up the case and found six girls who were used for this purpose. The couple was found in the beach resort and was arrested. This case again landed in a conviction in the Trial Court in the record time and thereafter the accused moved to the High Court for reduction of sentence. An important issue that came up was that the fine imposed in the lower court was Rs. 5000/-. At the higher court level, the fine was increased to 1 lakh for each of the children and the sentence was reduced to half. The message that the High court was giving in this case was that one can buy justice, that a fine or monetary punishment is correlated to your imprisonment or the sentencing pattern.

Also when we talked about pedophilia in fact there is no law in India, in domestic statutes we don't have a term. This term is not defined in the IPC. People are booked under Section 377 for using children for sexual purposes as in prostitution or trafficking. In fact, the term pedophilia is given by the child rights groups or women's organization that there is a crime called pedophilia. It is a term borrowed from international conventions and Interpol etc. In the Swiss couple case the trial court announced seven year punishment but the High Court reduced it to 3 and a half years. For 3 and a half years the couple was in jail. If the groups didn't act immediately, the couple would have been let off. The matter went to Supreme

Court which immediately admitted the matter, but the accused were released on bail. Their passports may have been seized, but they managed to escape; because there are such porous borders so actually there is no accountability.

In the Anchorage case too, where the judgment came only on Saturday reveals the manner in which children were brutalized sexually and the manner in which criminal justice system deals with such cases. In the Anchorage case, the accused were running a home. They were the British nationals who came to India and set up a home for children. Street children aged 9, 10 or 12 years used to go there for shelter and meals. They used to be at the Gateway of India selling wares or acting as a traffic guide among other things. One boy in fact spoke to a foreigner saying we are sexually abused in the home and in fact that is where some journalists came to the picture. This case happened in 2000-2001. Then 6 children came up and their evidence was recorded and it was videotaped and then somebody moved the High Court by way of a Public Interest Litigation and the Police were directed to act. Till then the Police had not acted at all. In fact the Police refused to act even when there was a complaint. Despite this a special PP was appointed meanwhile accused fled from India. Thereafter one of the accused was arrested in the US and the second was found in Africa, in Tanzania. In Darusalam, he had set up one more homes similarly to exploit children. Finally he was nabbed there and was brought to India in June 2005 and the trial went on for 6 months. However, in this case, out of the 6 children, 4 children backtracked, they turned hostile because there was so much pressure, not only pressure but inducement. The children used to address these accused as father. He was the father figure and there was a manager and this entire racket that was going on. Finally, the judgment has come now where each of the accused has to pay 20,000 pounds which amounts to approximately Rs. 16 lakhs. Out of that the two children who did not turn hostile, are now 16 years old; when they were abused they were 9 or 10, but they withstood the pressure and the courts have given them 5 lakh each. And the rest of the money is for the home.

Now the question is that somewhere there is a problem in our way of looking at sexual offenses. The fear in these cases is that what will happen in the High Court or the Supreme Court because they are definitely going to file an appeal. At each stage there is a space for reduction of sentence and for letting these criminals out on bail. But the offence is very serious. These are third world- first world issues. Innocent children and from the lower strata, or the children who are orphans, beggars, or are in children's home in privately run institutions all are being abused in this manner and the issue is how are we going to respond to such vulnerabilities. These are the cases if we see last 5 years, what has happened in the realm of sexual violence. This is one important area that is surfacing and as women's groups we need to develop strategies to respond to such issues. In most of these cases responses have come more from child rights groups and women's groups have not had a framework in which to discuss these issues. Two important aspects are there. One relates to creating materials and images and creating pornographic material to sell abroad and make money. Here the issue is not of having sex. It is different from the brothel prostitution or the one who used to own the brothel and make money. This has gone up several degrees higher.

Secondly, the sex is non penetrative in most of the cases rather it is of a different nature. Thirdly all of them are booked under section 377, IPC. Now Section 377 again becomes a problem area here. At one level there is a whole issue of the manner in which Police abuse this section to arrest people who are in same sex relationship and it is used as a weapon against them. Thus there is a move to abolish Section 377 from statute books. But on the other hand, every time we see child sexual abuse cases which could not come into the 4

corners of the section 376, we had to use Section 377. This is in cases where father is molesting the daughter, whether uncles, grandfather molesting the children, whether the institutions are molesting the children or the pedophiliac case, all of them fall under section 377. So section 377 has to be contextualized from different angles and we have to have a much more complex understanding of Section 377. Section 377 has to be located within the parameters of Section 376 and unless we have a new Sexual Assault Bill which gives a new definition of sexual violence and sexual assault we cannot see Section 377 merely as a weapon in the hands of Police to abuse people in same sex relationships. This makes the situation very difficult for people like us who in fact are on both sides; advocating for child rights as well as the rights in same sex relationship. So how do we position ourselves? How do we get every player on the board before we think of enacting a statute? The recommendation of abolishing Section 377 itself came in 1993 by the Women's Commission. It is not like Women's Commission had talks with either of the segments. There was no debate. This agenda was not brought on a common platform, but it came as a reform for Section 376. So we really need to take it on board and take these cases and see how they are developing.

I can only tell you cases which have come on the western coast in Goa, in Bombay, I do not know of similar cases which may have come in other states. But this is something in the globalised market, in a globalised world where everything is up for sale and particularly from the third world where we want to sell everything including our female sexuality, including child sexuality, how do we position ourselves in terms of safeguards? What are the safeguards that are needed to be brought into and in particular why India is occupying an important position is because Thailand has enacted stringent laws. Earlier, the location was Thailand, now it is Sri Lanka and Bombay. This is one issue we need to bring it on the table. This is one issue we really need to look into.

As far as dowry and the Domestic Violence Act, I think there are a lot of other people who are going to address it. I feel that somewhere we also need to be self-reflective about these issues. Let me start in 1980 where all violence was linked to dowry and somewhere 498A or 304B was framed within the context of an anti-dowry movement and not in the context of a movement of violence against women or domestic violence and somewhere we had created a social and a legal understanding that dowry is the cause of violence. It has taken us 25 years to have a much more complex analysis of violence within the home which we now call domestic violence which includes natal family as well as marital family and link it to civil injunctions and civil laws. Usually we all know that when a 498A case was filed, abused, misused or underused, every time the husband would come home beat up the woman, throw her out. We've had a series of cases where the husband went to court and got an injunction against the wife that this woman has filed a criminal case against her husband so she should not be allowed to enter the matrimonial home because it is dangerous for the husband and his family to have such a woman in the home. Or else we've had judgements that reported that cruelty for divorce was construed as filing your 498A case or when a woman says that she is going to commit suicide that itself is seen as cruelty on the husband. So the whole interpretation of cruelty under the Section 498-A in fact in most cases boomeranged against the women. And today our situation in the civil courts is that if a woman goes to ask for divorce or any kind of maintenance or protection, all that the husband's lawyer has to say is that she has filed a 498A case and immediately the judges' attitude changes that what sort of a woman was she is. This is common in so-called progressive places like Bombay where the judges are supposed to be progressive. Filing of a case under 498A itself is perceived as a cruelty on the husband. In that sense, Domestic Violence Act may help. It brings remedies

into a civil statute and gives protection to the woman because here the law is not about arresting the husband or punishing him but in a way it is securing civil rights for a woman. Though these injunctions exist in CPC prior to the enactment of the Domestic Violence Act but they were not used or were underused or there is not enough awareness among the women's groups regarding these provisions. Now that the Domestic Violence Act campaign has brought this issue to the forefront, I think it will become easier for the judges and others to understand the protective aspect of the domestic violence situation where civil remedies are needed and women need to be protected.

Amita Dhanda: Constitutional Mandates and Women's Equality

Well, I suppose may be in some way I would just add on to what you were saying. Veenadi as you said that you were all the first generation of beneficiaries of equality, I could possibly say that in some way may be we are the first generation of beneficiaries of your work. When we speak about 'Women's movement Engagement with the Law' we have had three speakers before me who have spoken about the kind of struggle, realization of the struggle because they are central to the women's movement, they can also see the distance that still has to be traveled. I would also in some way want to talk about in terms of the distance that we have traveled. We talk about in terms of how far we have to go but it is also necessary somewhere to celebrate what we have done. It is important because I do not centrally work with the women's movement. I work on gender but not within the movement. My work is much more in the field of disability and I have found that the women's movement's engagement with the law has been an inspiration for people in other fields, working with other vulnerable groups as to how to engage, what to do, what kinds of gains you can make. Other struggles have learnt so much from the women's movement. As we are honouring Lotika Sarkar, I definitely want to say, as we talk in terms of the distance that we need to travel, it is also important for us to talk about what we have got and specifically in terms of constitutional mandate of equality.

I have divided my presentation into three parts. If we look at the entire discourse in the constituent assembly and the matters that went in there, the whole right of equality came in somewhere because we were constructing this new person in independent India. We are constructing a person as a human being, as a complete person, who is not going to be in any way, undercut and undermined by the reason of caste, by the reason of sex, by the reason of race, by place of birth. All these hierarchies had to be kept out and this human citizen under the constitution celebrating the rights that an independent country is going to give was something that informed the constituent assembly in a major way. Unfortunately, though the constituent assembly in its first formulation stated that it will not discriminate on the grounds and specify the whole ranging grounds including sex, it was not debated subsequently in the constituent assembly, it was something, which we as present day lawyers we must acknowledge. The lawyers were browbeating and if we really critically read the assembly debates that comes through because the constitutional advisor has brought in a major substantive change in the text of the law and the whole thing gets dismissed off as verbal and no discussion took place.

Rajkumari Agarwal and a whole range of other woman's groups had objected to the inclusion of all these but it got categorized as only a verbal change and consequently we have had, yes, if it is only on the grounds of sex, race, caste and all, it is impermissible otherwise if it is sex plus something else then it could be okay. All of us who have been following the developments that have happened post constitution and the interpretation that have come in from the courts may recognized what a major difference that has been brought in. And the

objections that have come in from the members themselves are valid objections but were not recognizing forth. The other thing that we had in the assembly was this whole thing on constituting a new identity but we have to recognize the fact that there are a range of people who are way far behind than compensatory, affirmative action measures would be required.

There was also this belief that sameness - difference approach that we keep talking about. We want to be treated same as a man but we have different needs so how are you going to accommodate them and that's where Article 15 (3) came in and we spoke about the special provisions of women and children. But the kinds of case law which emerged there again has been not just because of the association of women and children but because of the general paternalism which is seen towards women.

Secondly, I have looked case laws which came in under the equality provision and issues that came before the courts. One kind of cases in the courts very specifically just looked at the problematic nature of equality. So, they said, okay, if it was a sex plus a property requirement, sex plus an educational requirement then though the impact of the outcome of the process might be discriminatory. Taking a very literal reading of the constitutional text, some of discriminatory legislations were in fact upheld by the court. There was a movement subsequent to that where in people started to see that it was the impact or the outcome of the legislation which started to be given a greater importance. So you have both kinds of interpretations coming in from the court.

Regarding special provisions, we were to look at the equality provisions from a gender perspective then Article 15 (3) has had a crucial significance. Also, interestingly a lot of times, when you had special provisions being brought in by women, it is not been just women very often excepting in the adultery cases, women have not been so much questioning the women courts, as other people questioning as to why are you doing this special provision, why the special reservation for, why is it that a principal of a woman's college has to be a woman why is it that women's institutions have to be headed by women. Why is it that the reservation of the clerk's positions have to be only for women, those kinds of employment reservations or other guarantees have been questioned by people other than women and consequently the courts have also been thrown into a funny situation where if they strike it down such provisions it becomes anti-women and if it upholds the contention of the person who has come to court, then how do you constitute, who is going to be this woman that you are constituting?

And consequently the courts have also essentialised woman, a woman is supposed to be a caring, loving creature. So all the caring tasks of society have been put at the door of the biological woman and consequently a whole range of problems which emerged from there have come in. On the counter side, I find Soumitri Visvanathan's case as one of the most interesting cases where she had gone to the court and said that if I am moving around with a man, how is it that it is your blessed business? Why should there be this provision about punishing for adultery? In earlier cases, it was the man saying that you are not punishing the woman, you are in some way legitimizing immorality. And the court said that we can't doubly victimize her, it is a policy choice. In Soumitri Visvanathan's case it was the woman who came to the court and raised issues about her own sexuality, her agency, her choice. Justice Chandrachud responded and reacted more or less very similarly to the responses which came in earlier.

I am just trying to state and highlight the discourse of equality has come to court in a very interceptive kind of way. Sometime it is the woman asserting equality, sometime it is the other people saying that why is she not following equality. In asking for this special kind of treatment you are asking for a breach of the whole notion of equality. And the necessity for distinguishing these two kinds of cases has not really got appreciation that when you are asking for a certain kind of assertion it is used as an instrument to control the sexuality of a woman. This is a new way of looking at the issue whether the special provision or jurisprudence was the best way of looking at it or not is something that was required to be worried on.

The other was the whole employment reservation issues and I would somewhere say that what is it that the judge or the court should do. It is something that one needs to look at more closely. Kirti had touched on the Daniel Lattifi case or the Muslim Women's protection of rights. I find it an extremely interesting judgment which is somewhere trying to straddle these. You recognize the fact that tradition and custom and the family play important role. If you align the woman on your side and put the tradition and religion on the other side, you again put her in a particularly difficult situation requiring her to choose between the community or her own religion or her own rights and putting a particularly vulnerable section in a very difficult position. The court has just cut through the whole thing and not spoken about that in terms of equality what is it that this woman is entitled to. You have not got into this business of this religion requires it or that religion requires it. Every human being requires a certain basic minimum and that is how you read the equality provision as well the Muslim women's Protection of Rights Act issues. So the whole business of reasonable provision for the women by the time that the event comes- that is the limitation period, you have to make reasonable provision and you have broken out of the paradigm of the monthly maintenance which has to be made. They are thinking only in terms of a monthly maintenance and said that she is entitled to maintenance till *iddat* period. Once the period is over then no monthly maintenance and that is the end of the matter. They have broken out of that and started to speak about reasonable provision much more on the line of providing for some kind of matrimonial property and provision rather than to give out the monthly handouts that you had to give which you will stop at a certain period of time.

I think that it is a judgment that requires close reading which is somewhere also trying to speak about the right of equality as a basic minimum human entitlement which cuts across men and women. A similar sort of thing comes in the second air hostess case. Where the court says that the age of retirement has to be similar for male and female employees but if you are talking in terms of people being eased out in a certain point of time we are very emphatic to say that it is not in the hospitality industry where women have to be well turned out. You equally need smart, well turned out men who have to be in good health to be able to perform that kind of service. And to say that post 55 we have given the women that many more alternatives. That's the way to go about it instead of saying that after 55, you retire. If the women wants choices, if she prefers to have her last four five years on ground duty as she is preparing for her retirement, give her those alternatives rather than to say that no she has to work if the man is working till 58 years of age. The retirement age may be 55 but where she wants to work, diversify the choices, give her more options.

Primarily, I am trying to look at the constitutional mandate on equality in several ways. One was the right to equality in the Indian constitution is the assertion of human beings been seen as ends in themselves as individual units, who would be respected for their contributions and would not be seen as utilities. The fact is that by the range of hierarchies by which undercuts

and prevents society from functioning properly has been the whole range of discrimination debates that we have had and possibly we have had some gains and losses, we have had the construction of that essential whole with which may be a lot of us identify with and a lot of us do not identify with. We are also asserting the women who have arose today will say I will not eat if I would not like to, I would say yes to you if I want to go out with you, I can say also no, and when I say no, I mean no but I also have the capability to say yes . And I think that's extremely important that we speak about both kinds of women and we speak about the equality discourse of both these kinds of women and not lose out any one of them because the one who has the capability of saying yes is going to bring both her sisters and the entire humanity closer to being able to say this.

Discussion:

Veena Mazumdar

Reva Nayyar complains that she and her colleagues worked so hard for the Domestic Violence Act and the informed voices in the women's movement have not recognized their efforts.

Reva Nayyar

We want to know what more do you need from the government in terms of letter of law because we have brought the Act but nobody in the country side know about the Act. I think it is also for the women's movement to take this law to people. People are still unaware of the law. They still use Dowry Act for marriage breakup. According to the new law, a woman can stay in her matrimonial home. I am getting the rules finalized. I have send the copies of draft rules. But the rules are with the law ministry. As soon as they will be finalized they will be tabled. I have told the State governments to keep the rules ready and handy on the table so that they are ready to help women. But till that time, all women's groups and members of NGOs have to help. Women have the right to stay with their children in their houses and she cannot be thrown out. Many times it saves them from dying, in case of extreme violence not only after marriage but even before that. Violence against women began at birth. Look at the birth survival rate, female foeticide, infanticide, and the sex ratios. What is happening? No education for girl child, poor health, girls are getting married early at the age of 10 or 12. All that end with dowry, sexual harassment, a girl may forcibly get HIV/AIDS now. She has no sexual choice within marriage for sex. If your husband is infected you are bound to get it. Prostitution and Trafficking is not far away. But if you are married at 10 or 11 and your husband gives you HIV/AIDS your life is finished. It is violence against women. There is no choice at all. So what we need to do in terms of law? Please guide us. I am there I want to do it. We have done as much as we can do. We have put the Sexual Harassment Bill before the law ministry. It is going to be put up in the Parliament. What can we do in terms of laws? We have enough laws. We don't need any of them. Our Constitution talks about equality, but it has to be interpreted by the courts and as Flavia just said now the courts sometimes keeps silence. So we need specific laws. Otherwise there is no need for a common civil code. Even it was said in the Constitution that Fundamental Rights Chapter should be carried out. You have to bring what you need.

Indu Agnihotri:

Well, less of questions but the idea is to get more out of all our speakers because they have not really said what they wanted to say. One is it that I feel that what Flavia was saying here is a point and yet I have my reservations about it. Besides child rights groups, women's groups have also been engaging with the whole child rights issues, child abuse, pedophilia,

sexual assault, and similar cases. I think in the last 10 to 15 years there has been a lot of debate took place and many of these issues came up in the context of child abuse. In the campaigns in the 90s, specific amendments were suggested vis a vis the law. As far as the whole issue of images etc needs to be addressed, I think many of these things were sought to be put on board but the government attitude has been very lackadaisical. One can say that the government has been unresponsive and irresponsible while dealing with these issues. In fact I think we were all happy when the NCW finally did bring in the issue of the Sexual Assault Bill on board, both Bills one relating to sexual harassment and the other relating to sexual assault. In fact, whole issue of Sexual Assault Bill addresses those very issues and in fact the women's organisations have been pushing for it saying that the existing laws, the definitions within these laws as well as notions and assumptions within laws are both faulty.

I had another point vis-à-vis what Amita just said that the constitution does give a notion of individual rights. Obviously none of us would disagree with it. But I think the tension primarily comes on that point that in fact women's rights have tended to be circumscribed by other constitutional guarantee of community rights which was also in context of partition and communalization of politics when the constitution was being framed .So this whole attempt was made to assure communities that look we are not going to trample upon your rights and not infringe upon your questions of identity. But I think that is where the tensions were coming. Because the government and judges in fact has been hesitant or they have gone overboard because of their own prejudices like we can see in some judgments in Muslim women's rights cases where they tried to make comments which were not required. But I think there is a tension between that community and individual rights which is coming out more in the open as the women's movement is getting much more articulate on this specific instance of denial of justice, denial of equality and continuance of discriminatory practices both within the law and in terms of social aspects.

Lastly I will just say Mrs.Nayar while we are happy that the law has been passed finally but if you are suggesting that we have not been talking about the law, I think we have been talking about it for more than 10 years. It's the government which took 10 years to pass the law. The movement has been talking about the issue of domestic violence all across the country which of course doesn't mean that every woman in India knows about it, just that every woman in India doesn't know about the many other laws that are there. The movement has been lobbying for this law. It is post the 498 A amendments, the experiences that came. The movement has been in fact pushing and debating how to bring in domestic violence within the ambit of civil laws and what are the options that can be provided.

Subhashini Ali:

There are many things that one can say, but I will restrict myself to one or two matters of great concern about which we all should try to do something about. Amita ji ended on a very optimistic note, but I am afraid that I do not share that optimism because what we are also experiencing is tremendous judicial intervention in rolling back many of the rights that have been fought for so many years. We have seen that with 498A, what some judges have tried to do even the age of marriage among other issues. The other thing is also when we talk about the laws and their implementation, actually the implementation machinery is awfully faulty and often it militates against the manner in which justice is being done. For example, from Tamil Nadu we have had a very disturbing piece of news which could have appalling implications all over the country. This relates to provision for dowry prohibition officer under the Dowry law which exist in paper but none of us have ever met any such officer in that particular incarnation. It is someone in the administration who is also been given an added

responsibility. Well, there has been a terrible judgment recently in which a lawyer and his family was accused of dowry harassment and he took the plea that because the dowry prohibition officer had not done the job that he was supposed to do, therefore the judgment of the court was in-fructuous. His plea was upheld by the court and the prosecution as well as hearing was stayed. This is something which can be very terrifying because I don't think anyone here has heard about any dowry prohibition officer actually doing any of the job that they are supposed to do under the law against dowry. FIRs are not being registered in many parts of Tamil Nadu because the cops say that we will be hauled up in court.

So when we talk about the Domestic Violence Bill, I think there is still some chance as far as the final framing of the rules is concerned, to get some of the suggestions on board. Protection officer is envisaged under the law though at least from AIDWA we have always been opposed to this being included at all. This implies adding another layer of bureaucracy which will further lead to complications, corruptions etc. So in the light of what is happening in Tamil Nadu I think we need to rethink our whole acceptance of this provision of this officer which may actually mean that the Domestic Violence Act will not be able to benefit people. This is something which we need to be concerned about.

And finally I would like to say about the question relating to female feticide which is probably one of the biggest areas of violence and now we are actually coming to know that the PNDT Act is the least implemented of all the laws in the country. But what is even more scary is the fact, in a place like Maharashtra, which can be called as one of the most progressive states. There was a sting operation conducted in which a member who was the appropriate authority, was conducting sex determination test revealing the sex of the fetus and then telling the people where they should go for the abortion and charging three thousand rupees because it is risky. AIDWA carried out a very successful sting operation, got him arrested, got a case registered against him and then the case was thrown out because the government of Maharashtra has not issued a notification of the authority and now that they have done it they have not done it with retrospective effect. I mean these laws are being not implemented. Often the enforcement authorities are making sure that the laws are not implemented at all. I think that this is something which should concern us. Actually, the level of prejudice, the stress of patriarchal structure and patriarchal notions are so strong and in this globalized era they are getting stronger. Therefore we need to struggle hard. Whatever laws we have, we have fought so hard to get these laws. And now these are being circumvented or the authorities are making sure that they should not serve the ends of gender justice. We need to find the solution again. And the solution is stopping the NGOs and getting back to the streets.

Response:

Amita Dhanda:

I am not in any way denying the implementation deficits or the kind of subversion that is happening of the laws at a certain points. But the very fact that these kinds of things happen and gets exposed and has to be dealt with is something which is also to be taken on board. One cannot take the strength of the movement on board as a resource. You had a Jessica Lal even happening and it has shaken the whole machinery from up to down. What we are going to do at the end of the day one doesn't know. I am asking to keep a balance in the way we are assessing things. Yes, things are going out wrong but on the counter side there are things which are going right. This is the fundamental point that I am making here.

And on the point that Indu made about individual and community rights, if we look at the text of the constitution, it has given a primacy to the right to equality and at different points of time. We have had different choices that have been made. Political choices, community rights, or the right to religion was given a certain level of deference by the state and consequently the Muslim women's legislation came in primarily as qualifying gesture. We have not been able to reach a consensus on the uniform civil code. The point that I am trying to make is that you are suddenly finding some level of jurisprudential effort where without polarizing the issue we are trying to find a solution. If we don't sort of foreground, we lose it. To some extent I would echo what Flavia was saying, we can not go around in circles, we have to break away and see what is the new way of seeing the same thing - the business of individual and community, the fact of the right to religion and the right to equality. You had any amount of writing which has demonstrated that the constituent assembly or the constitution has not given priority to the right to religion. It definitely gave priority to the right to equality but political choices, and at certain point of time jurisprudential choices did otherwise. With the Muslim Women's Act, we suddenly finding a jurisprudent who is trying to find a third way and if this is being found I think it has to be looked at very carefully and flagged in because that could possibly be an answer.

Flavia Agnes:

Women's issues were taken up and more particularly in family abuse, Ako case, Satish Sharma case, etc where there was abuse of children within the families. I was trying to say is we need to see and debate the progressive position of Section 377 abolition and child right groups using this in a very major way. I was not putting the blame on women's groups that they did not particularly take it. This was particularly about the children within the families etc. but paedophilia in Goa and in Bombay was taken up. Even now the child rights groups, are debating not that women's groups were excluded from the debate at all. But I do not want to go into it due to lack of time I could not say what I wanted to say which I think I will use this time to say now. These are very important aspects, which is another issue that we are grappling with – law, morality and the ethics coming up again and again.

We have had about 4 rapes in a month in Bombay and each of them happened in a non-conventional kind of situation. For example in the Shriram Mill case a woman out on the street at 10'clock in the night, accepting a drink from a guy in a car. In another case a 52 years old woman, most probably a sex worker was raped and her rape was construed as consensus though she has broken her wrist and she has injuries on her body and that's how the issue actually came up because she went to the hospital for the treatment. Then there was the case of a model who had been kidnapped from the bar when she was drinking, was taken away and raped. Then there was the 16 year old girl who went to somebody's house where there were four boys and then she drank something and then she was raped. All over there were questions in the media, everywhere and by the so called progressive page 3 people was that what was she doing? I do not think that we have come away from that issue, every time a rape happens not only the police and the judiciary, but also the people who were supposed to be progressive were saying that what was she doing?...continuously this has been the debate .

So how do issues of law and morality operate? The sex worker, bar dancer debate, I do not know the position of the women here, but the issue is that the girls do sex work but when sex work in itself is not bad. Now you know that you are going to bring out a legislation where soliciting and others is not going to be a crime anymore and that is going to be the case with this 52 year old women also. That she as a sex worker was not going to be arrested, it was the client who was going to be arrested when the Bill comes. But here we have a situation where

sex work has not been made an offence but dancing is an offence and a whole lot of girls are arrested everyday on the pretext that they were in the bars. Though dancing is prohibited you can still work in the bars you can still serve and what's happening is even worse. At the dancing level because now you have to be a companion, you do not have money so you are selling sex for Rs. 50 and Rs. 10 and AIDS groups are shouting hoarse over this issue and we do not have any notice and we have a case where the judgment is awaited and the card that was used here was the women's rights card protecting dignity, constituting values, women should lead dignified lives. At every stage the women's groups in Bombay are split in halves over this debate.

Then there is also a small group of people who also came in very late in the debate saying that woman also has a right. But we have somehow not been able to deal with the issue and in the women's movement itself there is a cloak of morality and respectability and marriage. We accept sex work. And even those who oppose sex work ...what does the man say? Sex work is okay because it is confined to the red light areas. Otherwise our daughters are going to be looked at as bar dancers. The bar dancers are a category. But this is an issue which also should be brought on board in because this is a new and evolving category which has challenged our notions on sexuality, morality and ethics. Arrests are happening where a lot of girls are Bangladeshi. The Bangladeshi bar dancer issue has come about which I do not even want to talk about because the citizenship and the fundamental rights itself is not there and after the judgment in the Assam case the Supreme Court has given a judgment that you do not have the right. The police says that the root of terrorism is Bangladesh. So all these girls are picked up. Arrest happens at the time bomb blast happened in Delhi and the poor Muslim Bangladeshi girls are doomed for life. It is a depressing case. These girls are all inside and are about to be deported and nobody has raised the issue.

Kirti Singh:

I just want to make two points. One is that there are definite issues that we need to take up. One is the issue concerning labour, unorganized labour. We don't have legislation as yet on domestic labour or on unorganized labour on self employed labour. We need to take up issues concerning honour killing and the about how are we going to deal with it. It is a specific crime located in Indian context and I think we have some examples in the legislations that we have made in dealing with specific Indian crimes like dowry. I think we need to look at that. Third, we also have to look at the aggravated forms of rape for instance in Gujarat and see how we are going to deal with communal rapes. So these are some of the issues that are there and which have not been dealt with by our laws and we need to look at that. At the same time, we have to start looking at the implementation of the law - where we have failed, how we have failed, can we do anything? How are we going to deal with the counter blasts that are coming for instance in the dowry case judgment after judgment, it is true, but then should we say that the 498 A is useless, throw it in the dustbin or do we say no, we have to deal with the counter blast, if so how are we going to do it?

Flavia Agnes:

I have to add only one thing about this neutrality issue in rape cases, 498-A cases. My concern is in the child custody cases - the amount of pressure that women have and the manner in which women are bulldozed in the child custody cases. There is again a backlash and at times husbands don't pay any maintenance and women are supposed to give access to the husbands and husbands can do anything. Often the manner in which courts talk down to women, humiliate them. This is horrifying and women often says leave me alone, leave my child alone. But the courts are insensitive about this issue. .

Chair: Indu Agnihotri

I think Indira Jaisingh is well known enough. She has been with the women's movement, with various social movements as well as in movements to use law as an intervention. Through her legal practice also she has intervened and used cases to reinterpret rights and notions of women's rights etc. She is a senior advocate based in Delhi and has been practicing law for more than 30 years. We invite Indira Jaisingh to come and speak.

Indira Jaising: Women and Law

Thank you for giving me this opportunity to say a few words on a subject which is broadly titled such as Women and Law. But I will do my best. It is going to be a little personal because I have had an engagement with the law on behalf of women which goes back 40 years, maybe a little more. I have feelings which are very ambivalent on the whole issue. On the one hand it has been a very challenging and satisfying experience and on the other hand it makes you acutely aware of its limitations. So this in a sentence also says a lot about the women's movement engagement with law because I believe that my experience is not unique to me. Anyone who is situated in this position in which I am situated would have had the same experiences, would have come up with the same kind of balance sheet of the elevating moments and the depressing moments of this whole process.

So what does it tell you about women's engagement with the law? There are different points of view on this subject and I am aware of the stream of thinking within the feminist movement which argues that engagement with the law is not the way forward for the women's movement for various reasons: Because the way the law is conceptualized, the structure of the State, the patriarchal nature of the State and that any engagement with the law at that level is bound to be counterproductive. On the other hand, there are arguments that law is the salvation and the way forward. Why just the women's movement, for any movement! For someone like me who is engaged with the law in different ways, I'll just point out what are the different ways: one is actually litigating concrete disputes and the other is actively lobbying for law reform. These are the two basic and different ways in which we, I have engaged with the law. There is of course a third way and that is working within communities to spread awareness of the law and from that framework building up a kind of expertise or knowledge and that knowledge feeds into your activism and your engagement with the law.

Let me make a few general comments about my conception about the law, why I feel I take the view that it is very necessary to engage with the law and I have several reasons for this. Of course, the one and the most obvious reason is that the law binds us all. But that is like a truism, you and I are all bound by the law. But I think that there is something more interesting. I do not take the view that the law is something which is static. My experience with engagement with the law has taught me that the law is an extremely porous institution. There is no finality to it ever. And it is a very open-ended engagement. It would be quite wrong to say – engage or don't engage because those are not the only two options. And those who pose the issue in this way are getting it wrong. This is what I have realized.

It takes you to the question, how do you define law to begin with? And why do I say it is very porous and an institution which is molded as it is used, as you discourse with it. It is a transformative process for the movement as well as for the law. Therefore that is what makes it worth doing. Because in the process of engagement, the law does not remain what it was and the movement does not remain what it is. So this is why you engage with the law. And how does this happen? How does this come about? What is the mechanism through which

this comes about? – The heart of the judicial process is what we call interpretation. Interpretation is posing different points of view and ultimately taking a decision on it after having taken on board different points of view.

The question then comes, who are the interpreters? That's a major issue. I see this as one of the critical issues of engagement with the law for anybody, be it the women's movement, be it the trade union movement, or anybody if one is focusing on the courts. The critical issues become who are the interpreters? It is there of course that a lot of problems arise, for example, how did these people get into these positions, what is their expertise, what is their orientation, what is their point of view, how much public participation is there in getting to the positions that they are in, and if they don't deliver what kind of sanctions can be taken against them? I personally believe that this set of issues has remained unaddressed particularly from the women's movement. Some of us have made efforts to address these issues within our own situations. I have tried to raise these issues. I haven't really found any linkages, and that leaves me to introspect why is it so, and the only answer that I have been able to come up with is that law, law reform, judicial interpretation has not in our consciousness become a political issue. Because it has not been viewed as political issue, it has never become the subject matter of political debate. And to me it is not enough of an answer to say that don't debate these issues because there are contempt of court laws. The Constitution of India says that the behavior of a judge cannot be discussed in parliament. There are extremely draconian provisions which insulate the decision makers for any of this kind of debate. But the question that I am posing is why is it that we in the women's movement have never seen this as an issue. And why is it that we have never raised these issues? If we are going to entrust an institution with such vital functions, then why is it that there is no absolutely democratic input into the shaping of these institutions? So I would identify this as a major issue.

Let me move on to yet another problem that I have often been asked to talk about or comments have been made. It is remark that we hear all the time – well we have such beautiful laws but they are not implemented. I would like to reflect on the use of this word "implementation". What exactly do we mean when we talk of implementing the law? My own view on this is that this problem is much deeper than a problem of non-implementation at all and the sooner we stop using this kind of formulation, the better. The problem is of colonial origin, and it goes back to the nature of law making and the assumption is that we live in a society where everybody knows their rights and that people will access their own rights, in their own way, according to their own likes. And as I said, it is coming from a colonial framework or is a given and it is not the business of the state to operationalise the law. It is the business of the individual to operationalise the law. You may choose to operationalise it, you may choose not to. And this is where the non-implementation is coming from because the means with which to implement the law is not available in the law. If they are not available in the law, if they are supposed not to be located within individuals, then it is futile to say that the law is not being implemented.

And this leads on to the next point namely, the character and the nature of law making has to change, the mechanisms with which you are going to access justice, has to change. This is very critical. Content of law has to be thought through at the stage of drafting the law, not after it has been drafted out and given to the general public. This means you are not just in the realm of substantive law, you have gone beyond it. Even if we assume that there is a consensus in society on what norms we want the law to reflect, it is not enough. The question is how are these norms going to translate into actual practice? Certainly not in India, I am not

aware of any substantive thought being given to these issues. And that takes you into the whole debate about procedure. What need to be decoded is procedures. I haven't seen any rich debate on the Criminal Procedure Code, the Civil Procedure Code, the Indian Evidence Act – all of which are meant to be tools to operationalise the substantive content of the law. I think we need a debate. In my opinion, the whole controversy over the Jessica Lal case is precisely located over there. Such mechanisms can be built into the law, not that they can't be. Now, what are these mechanisms? Let me link back to the point that I made earlier that the law is a living organism and if the law is a given organism as any living organism needs to be constantly fine tuned to be kept alive. So we need mechanisms which are perpetual, which are built into the law, which are permanent review provisions, which enable us to monitor and evaluate the functioning of the law. There need to be provisions into our laws, which actually set up mechanisms for monitoring and evaluation, say for example, the law on domestic violence. There is no point in having a law on domestic violence unless you are able to find out whether this law is delivering the purpose it is meant to deliver and how would you do that unless you have a built in system in monitoring of how this law works.

And there also you run into problems, how do you monitor the judiciary? What are the mechanisms for monitoring the judiciary? There is the traditional male bastion which has kept away from any form of monitoring, not just monitoring, but even monitoring on its own mandate, namely of delivering justice, that is something that has not been monitored. There is no system by which say a particular judge's judgment can be evaluated. Let me put it this way, there are no evaluation criteria. The only criteria that we have ever seen are criteria such as how many cases a judge dispose off? And I am afraid this is not a number game that we are talking about. Yes, of course it is important that justice is done in a timely manner but there is no point in doing injustice in a timely manner. Therefore we have to spell out the criteria on the basis of which we are going to monitor and evaluate the performance of laws and the persons responsible. So at the stage of drafting these laws, we must ensure that within the framework of the law, there are built in procedures for monitoring and evaluation. And how we do that is one question.

Now the route that we have chosen is the route of setting up Commissions. You have the National Commission for Women, the National Human Rights Commission, the National Scheduled Castes and Scheduled Tribes Commission. One of the mandates of these commissions is monitoring and evaluation of the implementation of rights. Here we need to look at these Commissions more carefully and see if they have delivered on this mandate? And was it necessarily the only way of doing the monitoring and evaluation? I personally believe that they have not delivered on this mandate. And secondly, the provisions of monitoring and evaluation have to be built into the very laws that we are talking about. When we come back to the example of the Domestic Violence Act and say that the effort was to build in monitoring and evaluation within the law. At the stage of drafting, the provisions were dropped, of course there is no way of finding out why it was dropped or whatever, that is the way how laws are made, but to come back to another point about the so called non-implementation of the laws. As I said, for me, the word implementation or non-implementation doesn't have any meaning at all. One has to look at structures. Now when you are again coming back to drafting a law, the question is what kind of structures are you going to build into the law to ensure access to that particular law? And it is there that the whole issue of affirmative action and equality, Article 15 come into the play. And I believe that Article 15 is not something that concerns only substantive law, it concerns procedural law as well.

We have to look into the procedures that are being put in place to make these laws accessible. Now this was the reasoning why we, at the stage of drafting, felt it was very necessary to have a commitment from the State that they will put in place structures which enable access to this law. So if I were to link it with the point that I was making earlier, how does one depart from the colonial form of legislation? I would definitely list them as follows. One, that you ensure access to justice within that very law because you are departing from the assumption of the colonial regime that everybody is presumed to know the law and everybody is meant to actualize the law. If you are going to abandon that strategy, what are the alternate mechanisms you are going to put in place? And what kind of statement does it make about the commitment of the State to remove a particular form of injustice to women? That is the reason we decided that we want to put into the law the question of protection officers. The whole involvement of the NGO movement, in the process of implementing the laws started with issue like bonded labor where committees were set up which had participation from civil society. And since then it has been a trend which has continued. I believe it finds a reflection in the domestic violence law which was drafted in as much as the service providers have been recognized to a certain extent. It is a critical balance, on one hand, no NGO would like to be co-opted into being the implementer of the law of the State, and on the other hand it is a question of legitimizing the contribution that they are making towards the implementation of these laws. The way in which this balance has been attempted in this law is that the NGO continues to do the work it is doing, with no obligation on any NGO to register itself under this law, the only advantage of registering is that the records that you maintain of a complaint being made acquire the legitimacy of a more or less an FIR or a civil equivalent of an FIR. In other words, the authority of an NGO to take on board a complaint of domestic violence is being legitimized. As I said there is no obligation on any NGO to do that.

One more issue as far as the domestic violence law is concerned relates to the social responsibility of medical facilities. As we all know, one of the major problems that we have run into while dealing with violence against women is the hands-off attitude that the medical community takes to the issue of violence, particularly in the record keeping and related things. So an obligation cast upon medical facilities under this law. If a registered service provider takes a woman suffering from domestic violence to a medical facility, there is an obligation cast on them to pay attention that the person deserves without insisting that a police officer makes a medico-legal report. Thus there is a de-legitimizing of the role of the police and introducing in its place the role of NGOs. Then one has to see monitoring, evaluation and budgeting. I believe that the laws of the future must contain these within themselves. In other words, the law made by parliament must contain within it, budget that the State is committing to that particular law. That tradition doesn't exist. I am not aware of any law which does that but I am aware that in 1994 when Clinton introduced the Violence Against Women Act, in the USA, the law itself made a commitment of a certain amount of money charged on the consolidated fund of the State towards the eradication of violence against women which actually got spent in that way. This has never ever happened in any law in India. Of course, there is I think limitations of time, so I would like to stop over here and handle any questions later.

Chair: Indu Agnihotri

We will take a few questions. Indu has raised very fundamental questions – the dissatisfaction that we have both with the law as well as the implementation of the law and she has tried to put it within the larger framework of the process of law making as well as the delivery of justice in this country.

Discussions

Subhasini Ali:

I have just a question for Indu and other people who are legal experts. This question of monitoring of the delivery of the justice system is a very crucial one. From my limited experience of the NCW, I know that inspite of all the statutory powers etc that these commissions have been endowed with no body takes them very seriously. The only one which is taken somewhat seriously is the NHRC, because it has an ex-chief justice as its chairman. So I was wondering if there is something that is well drafted, could be given to the NHRC to talk about the lack of delivery of justice as violation of very basic human rights and if they could then institute some kind of monitoring system. I think no body in India would either have the guts or the prestige to do it but maybe this would be one way. It is a very basic human right, the right to justice and if that is being denied, not only because of economic and other means but simply because the courts are not functioning so maybe that would be one way of doing it. I don't know how much water it will hold, but maybe it is something to think about.

Vina Mazumdar:

I would like to ask you if there is any possibility that you foresee about the decentralization of the justice delivery system. What other things it implies if justice delivery is to go down right to the Panchayat level? I just wanted to convey to you one of our experiences of doing legal literacy among women who were also part of the rural women's organization, the response that came from them, to a short course, was that we are just educating them about their basic rights. This was the pertinent question that they asked when Lotika di was conducting the literacy class. Lotika Sarkar found many of those questions totally unexpected. At the end of the week-long course, the entire group turned round and said, we feel so much stronger now that we know we have all these rights, what we now want you to tell us, what are the responsibilities that come with these rights? That completely plummeted Lotika Sarkar. She said in 37 years of teaching law students, I have never faced these questions. Nobody asked – what are the responsibilities which go with the rights? It is in bringing up this old story to ask for your views about the possibility of decentralization of the justice delivery system in the 21st century. And when you raise the issue that law has not been adequately politically debated, the question I am raising is much of a political one. It also involves the grassroots base women's organisations.

Uma Chakravarty:

I think the point that Indu made in the preliminary comments is very important. Either you engage with the existing law, or you leave it as it is. However inbuilt the contradictions of that processes is, feminist law is a horizon and it is a horizon that we aspire towards. So there may be failures as you proceed but it is very important to function as a horizon and therefore it also becomes political. Because you do not want to abdicate the engagement with what feminist jurisprudential law would look like. That is actually a political issue for all of us. In that sense I think it is extremely important to do this otherwise you leave it abandoned to whatever it is, to failures as well as to customary laws which we will have a session with in the afternoon and that's a disaster. So we are caught in that situation. It is important to say it is porous and moldable and we must try to mould it even as we know that there is a lot of heart break in it.

Indrani Mazumdar:

I agree with several of the things that you have said but I do feel that we should look at some questions a little concretely. For example the question of the monitoring that is involved, the problem that we are facing in relation with the judiciary today, the problem we will face in relation to the monitoring. There has to be a constant process of engaging at every level and protest and just as you said the contempt of laws are draconian, but there has been some resistance and that resistance has to continue. That is the dynamic process. Regarding the question of service providers and the involvement of NGOs we have much to learn from the labour laws as those laws which are specifically in relation to women's rights to equality. We have much to learn from the experience of how labour laws came into existence and the processes and procedures that actually came into. Because usually the experience was that the law followed, it was not that the law proceeded. For women it is a little more difficult. We have some advantages in the fact that we have a Constitution which defines equality, and we also have the disadvantage of that constitutional mandate of equality operating in a social life of inequality. This is a problem that we will continue to face but in labour law, the question of bringing in NGOs is almost being used in order to break the spirit of the trade unions. It should be quite clear in our minds that there is a certain process of not just co-option and this is going to happen even as far as the women's rights are concerned. Imagine what is going to happen when the Sewa Bharati is introduced as a service provider in a monitoring agency as an NGO. It will be a dynamic process, we will sometimes accept, sometimes oppose. I don't think we should introduce it at the level of a hard principle.

Kirti Singh:

I just want to point out that this process of making the laws more amiable to justice and of ensuring access to justice had actually started in the early 80s with the Dowry Prohibition Act, where we not only thought about dowry prohibition, but also radically, both in that law as well as in the rape laws, changed used rules of evidence. For instance, shifting of burden of proof was used to also make the law more accessible. I mean think of different kinds of... rapes for example, aggravated rapes, categories of rape we thought of were particularly in the Indian context. We start adapting our laws since then. You look at the Sexual Assault Bill, you will see that a lot of the provisions of the Bill deal with procedure particularly the Indian Evidence Act, how the cross examination should be conducted, how again shifts the social responsibility, underlines the social responsibility of the medical facility. And also the filing of complaints by NGOs was also first incorporated in the dowry law. But I still agree with Indu to some extent. For example we have not debated the Civil Procedure Code. I would have liked to see the judge becoming a more active member whereby, for instance, in maintenance cases to direct the husband to file documents relating to his income, so shifting again of onuses. I think we need to do more like that to make access better.

Response

Indira Jaising:

I would like to respond to the question raised by Veena di, that is, is there a possibility of decentralization of justice in the near future? Honestly speaking, it is already happening. And the tragedy is that the women's movement has not been able to see it or is missing out on it or is not giving the necessary inputs. The point is that after this government has come to power, there has been some opening up of debate between civil society and the government. And as part of that opening up, one of the demands has been access to justice. But I have not seen any inputs from the women's movement on those demands. As a result unfortunately, the demand has remained ghettoized. The demands of justice as of today are being articulated by judges – that is another tragedy. Not only are these demands not being articulated by the

women's movement but they are not even being articulated by the legal community. And because these demands are being articulated by judges, the solutions which are proposed are within the same framework that exists today but again because of democratic pressure, because of any number of issues which we are not discussing today, the government has been forced to talk about the issue of decentralization of justice and they have been threatening to introduce because at the end of the day what they introduce, we don't know. Maybe laws such as mobile courts, making courts more accessible to people in villages and things like that. I feel that we need to input at this stage. Again to answer your questions, there was a live debate on this issue. And there are reports published which lay out the whole scheme and the framework of the possibility of Panchayats delivering justice. Nothing happened to those reports, they were shelved and there was never any demand that they should be carried forward. One answer could be that it was a different period in history that was the time when you had amazing judges, like DA Desai, Bhagwati, Krishna Iyer – the likes of which you don't see today. This can be one answer to the problem. But yes, there is a real possibility, if ever there was a possibility, it is today. It does exist because these debates are taking place in the Indian body politic. If we don't input into those debates at this stage, then we would have missed the bus.

I think Uma made her point well. I think the point that was raised about the service providers, is a valid point. It has to be taken on board. But what I was trying to do was not just link it with strands in the women's movement. You mentioned the labor movement that is why I brought up the whole issue of bonded labour. And if you look at patterns of legislation, of course at the end of the day every legislation has to be evaluated, does it deliver, does it not deliver, that is why I said law is a living organism. But if you look at the patterns from the Bonded Labour Act, atrocities on scheduled castes and scheduled tribes, if you look at some of the legislation relating to women, you should be able to draw out the negatives and the positives from these trends and that is why I was linking and telling you some of the kind of possibilities that exist and that went to their making of these suggestions. Maybe there are no one-to-one parallels between the trade union movement and the women's movement. If one can just transpose the experience of the TU movement into law making for the women's movement, one obvious point of difference is that you don't have the kind of form of organization. Your point will of course become relevant when you talk about sexual harassment at work place. I would like to have your input on this – how do you view the supreme court judgment, which says that the NGO representative will now take decisions whom to sack and whom not to sack on the grounds that they have committed an act of sexual harassment – how do you theoretically understand this proposition? It is already the law as far as the Supreme Court is concerned. So it is the whole trend that you have to understand, we are not talking about the labor movement, what the NGOs have done to the labour movement, and whether or not they have displaced the labour movement. Are they also going to displace the function of dismissals? I agree with you that it is a difficult proposition, the tide of history cannot be reversed anymore. You are going to have participation from civil society for implementation of the law. I believe that it is a welcome trend, where to draw the balance is another issue.

As far as Kirti is concerned, I agree, we all have a very political understanding of the 80s and the 90s, and it was a phenomenon of the 80s but it was not pursued to its logical conclusion. And therefore there is not sufficient empirical data, with us on the basis of which we can evaluate whether these trends which were set in motion in the 80s have yielded any results. In the question of shifting the burden of proof, I am not aware of a single study on the question

of rape laws, as to what was the consequence of shifting the burden of proof. Did it work or make a difference or not?

To the question of can we ask the NHRC to democratize the functioning of the judicial system? I think it is a good idea and should be pursued. However, it is yet another political issue, the extent of power that is located in an institution – the feminist movement has not look at carefully. For that matter most movements have not looked at it very carefully. I think it goes back to this whole attitude of looking at law, like you have a leak in the bucket and you call the plumber to fix it. That has been the kind of attitude of the women's movement to the law. What you understand is something very political, that it is ideological input into our daily lives. Without that you won't be able to fix that hole. Therefore my answer to Subhashini would be that the demand has to be articulated as a political demand from the civil society. Then you can either lobby the NHRC or the NCW.

Session II- Anti Dowry Movement and Experiences of Dowry law.

Chair: Dr. Rajni Parliwala

Unfortunately I was not able to be here for the first session but I'm sure there must be some issues related to this which have already come up, so into some extent the discussion will continue not least because of course dealing with dowry and law is of course related to various other themes in terms of gender relations and women's oppression and the law related to that.

Just a couple of remarks to start with, the agitation against dowry took place in the late 70s and early 80s particularly in some urban centres but in other parts also. This agitation was very significant for the women's movement along with the other agitations at that time, against rape for example. It did lay a certain foundation for the revival of the women's movement at that time in the country. However one of the things, which in subsequent years, many of us looking back have felt about that agitation was that whatever may have been the intentions of those who have engaged in the actual movement, the movement did tend to become one which was focused on what one could say the distortions of dowry rather than dowry per say. It emerged first in terms of a reaction to violence, to dowry deaths and burnings which were taking place. And so even though in terms of the charter of demands which say the DVCM or other organizations might have had, there was a focus on the much larger context as well as the much larger questions related to women's oppression. To some extent a sort of social theme that emerged was it is not dowry which is the problem, it is when too much dowry is asked or when people get violent. So that the structure of social relations form which dowry emerges themselves are not a problem, it is when you have a few people who don't know how to behave that the problem emerges. Now the result of this to some extent was, that although in the immediate years after the anti dowry agitation, there seemed to be some sort of, I can't say decline but dowry seemed to go into hiding to some extent. And even while dowry violence continued, at least the women's movement now had weapons to fight with in terms of the changes which had taken place, in terms of 498A as well as the anti dowry law itself.

Of course very soon, two different things emerged which I think brought very clearly out the difference in this. One was that whatever you have in the law is very critical for those who wish to use the law. The notions, the ideas with which judges operate can itself undermine the law. Or even if not undermine the law per say, it can perhaps act in ways which devalue as

well as demean the very struggles which are taking place and put forward then the idea that earlier it was bad men that were creating the problem, now it is bad women who think that they will use in law in their favour. So one issue which emerged from that was in terms of the judges opinion and value which of course is a reflection of the fact that within society as a whole, the actual approach to dowry was one which continue to consider dowry as okay, but continued to tie it up with ideas about gender in terms of women as a burden, in terms of the patrilineal household, the patrilineal family and patrilineal property. So one is that whole area which I assume the papers also might be going into. The other thing which I think has emerged is that post liberalization and globalization with the huge increase in money flows, the huge increase in availability of consumer goods and the increase in inequalities, economic and social inequalities, dowry has now received a huge new fillip. It has now become the marker of community identity, it has become the marker of class status, it has also become the means to try and actually achieve mobility. So one issue which then emerges also is that whereas for a brief period say in the 80s dowry was considered not quite right, now it is again very much in the open as an accepted social practice and back to that one theme that the problem is when too much is demanded. Last thing that I want to say is that I think we also need rethink the way in which we define and talk about dowry.

You know the definition which we had agitated over and we had instituted in law in terms of the idea of what is given at the time of marriage I think has to be expanded to take into account the wedding itself. Because a huge part of what dowry today for us, politically and socially gets justified on the grounds by saying that well its not dowry, we're just having a very nice wedding; we're just giving gifts to everybody else but not to the bride and groom; please don't give us gifts, just make sure that the wedding party is very well entertained. Unless we can think in some way in which this entire phenomenon of the ostentatious marriage and the gifts which are given on a much wider scale than the bride and the groom, how we will take that into our definition because they are critical in the devaluation of women's property rights, they are critical in the devaluation of women's work, they are critical in what happens to the young bride when she goes to her in-laws house. So in brief, I think these three things are in a sense before us which we could discuss and I'll now invite the speakers.

Indrani Mazumdar: Dowry

Some of the issues that I wanted to raise have already been raised in the preceding session. I think what is important I discussing the whole range of laws in relation to dowry. Most important point that comes before us is the force and strength of the movement which brought a whole new generation of laws for women on to the statute. This was as Rajni pointed out as mass mobilization against dowry and the new leadership that emerged in the whole process actually gave birth to what we call the second wave of the women's movement in India. And it was the thrust of the resurgent women's movement that brought about a whole new array of legal instruments which we are today here evaluating, judging, speaking to advance, reformulate and so on.

The reason why I think this fact requires some stress when we are talking in terms of women's movement engagement with law while it did have this force, in the period that follows, the legislation that took place around dowry, women's organizations particularly who had spearheaded this particular movement and who were required to form the core of any such movement, women's organizations to a large extent settle down to working out how these laws could be used. Huge number of counseling centers were established everywhere and these were flooded with complaints because the issues that were involved were real,

close to women's actual life problems and very often they were not in a position to resolve them either for the use of the law or for any other thing.

But the second related to this fact was that in this process the emphasis that had emerged in the legislative agenda of that period, the emphasis that had emerged in the laws themselves which actually shifted the discourse away, from what Rajni has already referred to, as the institutional dowry to dowry related violence and has actually proceeded further beyond that to domestic violence, this is what the broader realm of domestic violence.

There are several views about the anti-dowry movement, those who lived through that movement, and those who actively participated in that movement, many views exist as to what was its nature. One view was that it was the violence that was the central issue; there was the view that it was the dowry demand that was the issue. And I think that it is important that we discuss this because it has implications for how we are going to proceed in the coming years. My own personal view is that yes violence was an issue and yes dowry demand was a major issue but whether it was dowry demand that forced the feeling of resentment and anger amongst women. The fact of the matter is that the anti dowry movement did contain strong feeling amongst women against dowry. The fact that this feeling did not necessarily get reflected in actual marriage practices that followed, it does not mean that the feeling was not there. It was a strong motivating force in that movement it did not get reflected in marriage practices precisely because marriage practices involved a larger social order where the individual voice of the women who actually participated in the movement who gave it support and strength often have to get muted, adjusted in relation to the family and this is why this issue of dowry and the laws related to dowry and laws related to family and domestic violence will always carry this major level of tension of adjustment and fight and principle and negotiations. These are things that are real and will always persist even when we get acceptable principles according to our understanding of principles of equality and other aspects even when we get them accepted in the laws these will remain social processes which will be continue to get reflected in the manner in which the law works itself out.

The anti dowry movement particularly in the early 80s culminated in the movement led by the Dahej Virodhi Chetna Manch within which several women's organizations got together for the first time also had a presence in the Indian parliament which we have at least three major names who are associated with this period – Promila Dandavate, Susheela Gopalan, Geeta Mukherjee, who in parliament gave voice to the demands of the anti dowry movement and which was reflected in the series of laws that came in. Not all of their recommendations were accepted and some of the aspects of still need to be discussed amongst us. Nevertheless what were the amendments that took place under pressure from the movement who were outside as well as the members of the parliament?

First was in order to deal with dowry related violence against women ground breaking provisions were introduced like the section 498 A. It was significant because for the first time it ensured that some action could be taken in cases of domestic violence. Today you go on hearing that 498 A is being misused and so on, but what was happening earlier on? There were no laws, women were getting beaten, getting tortured, and were dying and committing suicide under the pressure. All these things were happening earlier on, that time it was not so easy for them to say, the moment the resistance is there, the moment some action is taken, you are going to face some opposition, and this is the experience of every woman and particularly for those who are embedded, who live embedded lives in the basic traditions and

all that which exist and oppress women. One may disagree. But this is how women actually live. So one was that it criminalized domestic violence and definitely that was an important step. What was criminalized was not only physical but also mental cruelty. This was another major step.

Then for the purposes of investigating the abysmal lack of serious investigation as you know, post mortems were mandated, magisterial enquiry of any woman who died within seven years of marriage was mandated. Along with this you had change in the Indian Evidence Act which has become real subject of controversy where there was some presumption of guilt in these conditions where there was case of torture and harassment and a death took place. There was a presumption that there was the responsibility of the husband or relatives concerned in the matter of the death of the woman under 304 B and it was also used in 498 A. These were ground breaking because who believes the woman who is being tortured within the four walls. Those who torture are social beings, they have good relations with several people. This is a specific nature of harassment and torture which takes place within the families so these were necessary steps and I believe that these should remain with us in future but these are all related to dowry related violence and also extend to non dowry related violence.

What happens to the institution of dowry itself? The CSWI report in 74 had argued that the major problem in the functioning of the Dowry Prohibition Act according to which no cases have been registered and they reported only one case, I think from Kerala, this came in 74, they said that the major flaw according to CSWI was that the dowry was not a cognizable offence and so one of the first demands of the anti dowry movement was that dowry must be made a cognizable offence. It was made a cognizable offence.

Secondly there has been a demand that the definition of dowry should be extended. As today it has been discussed that it should be further extended. Which I agree with but even at that time it was not that just what was given in consideration of marriage but dowry continues as a pressure on the girl's family even after several years after marriage when the children are born and etc .so the definition is extended to include that which is given before and also after the marriage over a longer period. Punishment for giving and taking dowry was increased and finally in 1986 in an attempt to follow through the suggestion that there should be separate machinery to deal with certain cases of dowry the amendment was brought for the appointment of a dowry prohibition officer.

This took place between 1983 and 1986. In the meantime in 1985, the Supreme Court delivered a judgment in Pratibha Rani v Suraj Kumar whereby section 406 which relates to breach of trust could be used for recovery of streedhan. They defined it as streedhan. Of course, we do not define dowry as streedhan but as I said one uses whatever is available and since that time, the women's organizations in Delhi, for example, had gone to meet the police commissioner and said that look this judgment has come, Section 406 should be used for the recovery of the dowry and the police should be instructed of this. Because the experience was that you could do everything else but you could not recover the dowry. So under Section 406, IPC the Police Commissioner Ved Marwah issued the instruction and since then Section 406 became the primary legal instrument by which the dowry is recovered. Under the threat of S 406 and Section 498 A, a lot of dowry is recovered outside the court and outside the thanas, usually with the help of women's organizations. But as Kirti had often pointed out, all these relate to dowry whether recovery and violence related which appears upon breakdown of marriage. When the marriage breaks down, you get your dowry back through Section 406 and the people who have tortured you and harassed you arrested.

Dowry as an institution in an otherwise reasonable set of relationships between people without all these other aspects coming to the fore remained and I have just pointed out it has received new fillip, it has grown. In this process, some of the things that we were discussing even in the earlier days was about the institution of dowry and it actually continued later on also. As you know some individuals who had been involved in the anti dowry movement later on said dowry is equivalent to property and because unequal property inheritance rights exist so therefore dowry should become acceptable. But this has never struck any chord or resonance with the base or the leadership of the women's movement, those who actually are running mass organizations. So it's quite clear that the women's organizations still retain a position against the institution of dowry because dowry is not just the matter of inheritance, its not just a matter of property, it lies at the heart of a whole range of old and new forms of discriminations against women and if there is going to be movement for equality, dignity and rights for women then dowry has to be opposed, this is the general consensus that still remains within women's organizations. It was the over emphasis on the violence aspect of the law and the under emphasis of the actual practicability of the Dowry Prohibition Act, in terms of its prohibitive and the preventive character that has led to this situation where for several years it receded in importance. And the principle flaw, I feel in the Dowry Prohibition Act and why its preventive character and its applicability has been of such a limited nature has been the equation of the giver and taker of dowry and making both liable to punishment.

If the parents or the family of the girl which has to give dowry is going to be punished along with the prospective in-laws or bride groom which girl is going to be able to use this law? No one and that's what has happened. It has not been used and this is a principal flaw in the Dowry Prohibition Act. It is our responsibility that now we should focus on removal of flaws. National Commission for Women has of course recommended the punishment for the giver of dowry should be removed from the law, and this is a consensus. It should now be acted upon.

The second question relates to dowry prohibition officers and their appointments. In most places they were not appointed. Much later in 1995, I remember in Delhi, some ten years after the law had been passed they were not appointed. On 8th of March it was demanded that the dowry prohibition officer be appointed in Delhi. Later on the Supreme Court directive came saying that the state government should be asked to appoint the dowry prohibition officer, following that there was an home ministry circular on this issue and now state governments have been formulating rules on the Dowry Prohibition Act.

In the meantime, what has gone unnoticed is the fact that several state governments have quietly reduced the punishment, under the Dowry Prohibition Act. Uttar Pradesh, Bihar etc many of these states have reduced it from 5 years to 6 months to a year in the process of formulating the Dowry Prohibition Rules through bringing in amendments. It is rather interesting that according to a report, UP accounts for 31% of the dowry harassment cases and it is followed by Bihar which accounts for 15.5% . This is of course the official record, broadly it represents a certain trend, that this is the problem in a particular state to a large extent. The point is that what will happen after the appointment of these dowry prohibition officers, although dowry has been made a cognizable offence, you have ensured so far that by equating the giver and taker of dowry the complainant will not move. Neither you have got an institutional mechanism which will take cognizance of the taking of dowry. You have to have that institutional mechanism, so the dowry prohibition officer appointment was essential.

When you appoint, we have 15 years of experience of the operation of the police in matters of 498 A etc. where precisely because some punishments were being meted out, there was some kind of police force attached to it, now dowry prohibition officer are being appointed in order to prevent the police from taking action. We know how greatly pro women the police is? Anybody who walks in to the *thana* will have this common experience and if you are going to attack the institution of the family, resisting against violence, going outside the domain of family making a complaint, these are values which are not reserved only for the people who do not wear uniform, they are very much part of the police attitude and they are reflected. The experience has been that the tendency of the police has been to watch forcible reconciliation rather than actual implementation of the law. Nevertheless, women are going to *thana* near by.

Now you have the appointment of the dowry prohibition officer at the district level who are unapproachable, unknown, and too busy either collecting revenue or passing files in the social welfare department. When they were appointed, women's organizations started looking at the process at the state government level and intervening and seeing how the whole process is getting put away. And as Subhashini mentioned in the morning about the Madras High Court also Tamil Nadu framed Dowry Prohibition Rules in 1998. At that time it invested dowry prohibition officers with the powers of a police officer. In 2004 Tamilnadu reframed the dowry prohibition rules, superseded the old one and made the dowry prohibition officer only enquiry agents that too stipulating that they must enquire into the genuineness of the complaint by looking at both the parties, adding one more step to the whole process. This comes in 2004, in September 2005, the Madras high court delivers this judgment in a particular case staying the operation of all investigations by the police in dowry prohibition cases. I believe that when we are reviewing our entire experience over this period since the anti dowry movement two things stand out before us. First, the extreme spread of dowry, its escalation its changing character and I also think that if there is a broader mobilization on this question, we can once again put it on the agenda, form where it has preceded precisely because of the over emphasis on violence. For this I believe it is important that when we look at the anti dowry movement of the early 80s, we remember that there was a feeling against dowry. And I believe that if we take this issue even today, we can touch this feeling amongst particularly the young girls who are going to be facing this problem.

The second aspect is in relation to the Dowry Prohibition Act itself, one is the giving and taking of dowry, we must put this issue centrally before ourselves and before the movement, before the government, before the legislatures that the giving of dowry should not be the focus of the punishment and it should be the taking of dowry which should be made punishable. At the same time in relation to the Dowry Prohibition Act itself it is important that we at our differing levels evolve ourselves and to keep alert as to what exactly is happening on this appointment of this dowry prohibition officer and to what exactly the state governments are doing to the dowry prohibition groups.

Shalu Nigam: Interpretation By Courts of Law Against Dowry

I will continue my paper from where Indrani stopped. This paper will deal more with what happens in the courts, what are the kinds of judgements being delivered and how can these impact women in long run. We all know how difficult it is for a woman to continue her struggle in the courts, as a litigant and a victim, a woman faces problems at various levels in the process of justice delivery, i.e. lawyers charge high fee, courts often end up humiliating a

victim etc. and after that if one get a judgement which is anti-women and fails to do justice then the entire purpose of the struggle is lost.

The problems in conceptualization and operationalisation of the law it may also be said that often the process of the interpretation of law is not free from biases. Frequently, emphasis is laid on technicalities in law, and, an exercise of semantics while deciding a case transcend the purpose of law and raises questions about the neutral, impartial and unbiased aspects of justice. Poor investigation, lack of evidences, deliberate (in)action on the part of law enforcement authorities, patriarchal assumptions that operate in social and legal sphere, corruption and apathy are some of the major blocks in delivering justice to dowry victims as been evident by several research work taken earlier. In fact, failure of the criminal justice system has been reflected recently in several cases of violence against women including that of Jessica Lal Murder case.

For this paper, I have picked up judgments from 5 to 6 years and I am highlighting some of the aspects from those judgments which emphasize the court opinion about dowry issues. These cases are cursorily examined to see how the courts have been interpreting laws against dowry, the ideology that operate behind to decide upon the cases and the biases that prevail while adjudicating the cases. It also point out the fact that in spite of protests being made at various forums and discussions about sensitivity of judiciary as also the law enforcement machinery to deal with the cases pertaining to violence against women, the situation continues to be the same. This paper is divided into several parts.

Part 1 looks at some Philosophical and Ideological Aspects Relating to Dowry as reflected in recent Judgements. Here the courts perceived dowry as commercial transaction. While adjudicating upon the case, the court describes the manner in which the element of 'monetary bargain' has entered the 'sacred' institution of marriage. For instance, in *Satvir Singh v. State of Punjab* (1998) it was explained, "From times, immemorial the respectable type of marriage in India has been commemorated by giving away one's daughter or sister at a wedlock with self-dedicated gifts of ornaments, cash or articles one could easily afford to give. In ancient and medieval India, what a parent or guardian volunteered to present to 'the bride' was that he could easily afford, and neither there was any element of constitution for bestowing anything nor the same was considered a condition essential to the marriage. The element of monetary 'bargain' into marriage was not at all present and the main considerations for the marriage were caste, status, the social and economic position of the families and the compatibility of the horoscopes of the bride and the bridegroom. Hindu *Shastras* treated marriage as *Samskara*, a sacrament and the phenomenon of 'dowry' was unknown. This system of dowry originally incepted in the form of giving affectionate gifts at marriages, came to be prevented and replaced by the demands and commercial transactions. Dowry, in its real significance was a voluntarily given gift to a daughter or sister, but today, the meaning and extent of dowry have perfectly changed and it implies the presence of a demand or compulsion, exercised by either side to a marriage against its other counterpart, who has almost no option under the social pressure but to bow down to the demand or compulsion. This commercial transaction of dowry has become a type of bargain between bride's parents and bridegroom's parents". It was further explained "It is an evident fact that the reminiscences of the ages have although paved way to the brilliancy of our ideological progress, yet a degenerated working upon, in many aspects, have created many problems to our social and individual institutions contributing in major proportions against our social and national solidarity. Telling with the above ideology the problem and evil of dowry crept into the institution of marriage. And for insufficiency of dowry, all sorts of indignities from humiliations to mal-treatment, taunts, and

teasing to burning alive are the evil phenomena prevailing in the society with an increasing tendency even in this space age. This is pitiable tragic and pathetic plight of young brides in our society, who start their matrimonial lives with sweet dreams of having their own houses with small kids and loving and caring husbands and leave their own paternal houses with the feeling that in that house they were the '*Amanat*' of the matrimonial families.

In *Pawan Kumar v. State Of Haryana* (1998) it was stated “For more than a century, in spite of tall words of respect for women, there has been an onslaught on their liberties through 'bride burning' and 'dowry deaths'. This has caused anxiety to the legislators, judiciary and law enforcing agencies who have attempted to resurrect them from this social choke. There have been series of legislations in this regard, without much effect. This led to the passing of the Dowry Prohibition Act in 1961. In spite of this, a large number of 'bride burning' and dowry deaths continued. To meet this, stringent measures were brought in the Indian Penal Code and the Evidence Act through amendments. It seems sections of society are still boldly pursuing this chronic action to fulfil their greedy desires. In spite of stringent legislation, such persons are still indulging in these unlawful activities, not because of any shortcomings in law but under the protective principle of criminal jurisprudence of benefit of doubt. Often, innocent persons are also trapped or brought in with ulterior motives. This places an arduous duty on the Court to separate such individuals from the offenders. Hence the courts have to deal such cases with circumvention, sift through the evidence with caution, scrutinise the circumstances with utmost care. The present matter is one such where similar questions have been raised, including questions of interpretation of the stringent law”.

In the similar tone the courts have pointed out the failure of law and the legal system and has called for serious introspection by the profession though it is a different matter that this may not have been done in actual practice. For instance, in *State Of Karnataka v. Venugopal Alias Gopi* (2001) the court held “... This is not the first time that we have come across instances where the acquittal has been facilitated by the Prosecutor and the irony of the situation is that instead of taking corrective action, the State has filed an appeal against acquittal. Where a serious criminal trial is virtually sabotaged internally it is high time that every one in the profession set-up and takes note of what is happening”. It further alleged “Even though, with a degree of regularity acquittals result due to so called lapses and defaults, we see a similar pattern in this game which gives one to grave suspicion and we are therefore not prepared to either condone these instances as mere mistakes. There is no place for such defaults to occur in trials of such seriousness and if this happens, the remedy lies in ensuring that it is never repeated because it has resulted in miscarriage of justice in the grossest form. Where the crucial evidence is with-held by the prosecution either by design or otherwise, an appeal Court is powerless in the face of such a record and mechanically filing an appeal is a totally futile exercise and it is ironical that this has happened despite this Court having repeatedly pointed out that no correctives are forthcoming”. The court warned “The time has now come for us in the profession to do some serious introspection and take a good hard look at our performance and ask ourselves the all pertinent question as to whether this state of affairs is conscionable? Is it not a blot on the justice dispensation system that such atrocities go unpunished sending out the wrong signals to like-minded others? Society will not condone these lapses, the laws have been promulgated to eradicate these atrocities and it is upto every member of the legal profession to responsibly contribute to the implementation process”.

Part 2 of this paper looks at the courts' interpretation of the definition of Dowry. The definition of the term 'dowry' under Section 2 of the Dowry Act shows that 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 after the marriage" would become

"dowry" punishable under the Dowry Act. Property or valuable security so as to constitute 'dowry' within the meaning of the Dowry Act must, therefore, be given or demanded "as consideration for the marriage." Section 4 of the Dowry Act aims at discouraging the very "demand" of "dowry" as a 'consideration for marriage' between the parties thereto and lays down that if any person after the commencement of the Act, "demands" directly or indirectly, from the parents or guardians of a 'bride' or 'bridegroom', as the case may be any 'dowry' he shall be punishable with imprisonment or with fine or within both.

However, in *Reema Aggarwal v. Anupam* (2004) it was held, "Dowry as a quid pro quo for marriage is prohibited and not the giving of traditional presents to the bride or the bridegroom by friends and relatives. Thus, voluntary presents given at or before or after the marriage to the bride or the bridegroom, as the case may be, of a traditional nature, which are given not as a consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression 'dowry' made punishable under the Dowry Act". In *State v. Udayakumar* it was held that "to make it an offence under Section 4 of the Dowry Prohibition Act, dowry should have been given or agreed to be given at or before or after the marriage in connection with the marriage. Since the marriage was not an arranged marriage but a love marriage, there is no possibility of giving dowry or agreed to be given in connection with the marriage. Absolutely, there is no evidence in respect of charges under Section 4 of the Dowry Prohibition Act".

In Part 3, the paper looks at the manner in which judiciary construes the role of women as wives in Dowry cases. The judicial construction of 'wife' and 'wifeness' is often driven by the ideological assumption of an ideal woman who is pessimist, self-sacrificing and obedient. The courts often have upheld the stereotypical images of wifeness. For instance, while abdicating the responsibility of husband from causing the suicide of his wife the Supreme Court in *Ramesh Kumar v. State of Chattisgarh* (2001) remarked, "Presumably because of disinclination on the part of the accused to drop the deceased at her sister's residence the deceased felt disappointed, frustrated and depressed. She was overtaken by a feeling of shortcomings which she attributed to herself. She was overcome by a forceful feeling generating within her that in the assessment of her husband she did not deserve to be his life-partner. The accused Ramesh may or must have told the deceased that she was free to go anywhere she liked. May be that was in a fit of anger as contrary to his wish and immediate convenience the deceased was emphatic on being dropped at her sister's residence to see her. Presumably the accused may have said some such thing - you are free to do whatever you wish and go wherever you like. The deceased being a pious Hindu wife felt that having being given in marriage by her parents to her husband, she had no other place to go excepting the house of her husband and if the husband had "freed" her she thought impulsively that the only thing which she could do was to kill herself, die peacefully and thus free herself according to her understanding of the husband's wish. Can this be called an abetment of suicide? Unfortunately, the Trial Court mis-spelt out the meaning of the expression attributed by the deceased to her husband as suggesting that the accused had made her free to commit suicide. Making the deceased free - to go wherever she liked and to do whatever she wished, does not and cannot mean even by stretching that the accused had made the deceased free "to commit suicide" as held by the Trial Court and upheld by the High Court". In this case the acquittal has been made on number of presumptions made by the Court!

Often, the courts have used the argument of the cause of state of mind of the wives in favour of accused. In *Shanmughavelu v. State* (2004) the High court of Madras opined “there is no dispute that the P.W.1 (complainant wife) and the accused (husband) are separated. Because of separation it is quiet natural that P.W. 1 has developed resentment. This is all moreso when the accused is said to be living with another woman”. Further in *State v. Udayakuma* (2004) the court observed “her date of birth being 15-5-1974 she was only minor in 1990s. On this aspect, the learned counsel for revisioner petitioner has drawn attention of the court to the Section 3(4)(a) of the Medical termination of Pregnancy Act and contended that no pregnancy of a minor or lunatic can be terminated expecting the consent of a guardian. It is further contended that consent of A1 (the husband against who the charge was made for forcible miscarriage) would clearly shows that there was no forcible abortion”. The court while acquitting the husband from the charge of forcible abortion relied on the consent given by husband and overlooks the fact that when the charge was levelled against him how can he be held as a guardian to give his consent? Further, the court remarked “On account of various disputes between the parties and their separation, it is quiet natural that P.W. 1 would have developed psychological hatred towards her husband A1. There is every possibility of improved versions and the evidence of P.W.1 is to be viewed carefully”.

Part 4 of the paper looks at the concept of dowry deaths while elaborating upon the concept of ‘Dowry Demand’ under Section 304 B, IPC. In *Shyamlal v. State of Haryana* (1997) it was found from the evidence on record that the deceased was treated with cruelty in connection with dowry and was sent back to parents house but was taken back to the matrimonial home about 10-15 days before her death. The inquest report states, “The death may be due to frustrations developed in married life”. The same report further reported “on the basis of enquiry conducted, the *panchayatdars* have unanimously decided that Vanitha out of sheer frustration experienced by her in her married life, would have committed suicide. This totally rules out that deceased being subjected to any cruelty or harassment for or in connection with the demand for dowry”. The apex court held that accused cannot be convicted under Section 304 B IPC and convicted him under Section 498-A IPC only. The Court in this case held that it is imperative for the prosecution to prove that soon before the death the wife was subjected to cruelty or harassment for or in connection with demand for dowry and if on facts there was no such proof a conviction under Section 304-B of IPC cannot be sustained.

In *Dinesh Seth v. State* (2003) it was alleged that the deceased wife was maltreated as she was not well educated and was not fluent in English, she was taunted for her dark complexion and also for not bringing sufficient dowry. She was found dead within two years of her marriage. A case was registered against the husband and in-laws under Section 498-A/304B/306/34 IPC. The session court concluded that the deceased committed suicide because of torture and harassment by appellants and convicted them with the sentence to undergo RI for seven years each. However, the high court acquitted the accused from the charges under Section 304 B IPC. The court opined “In order to make out offence under Section 304 B, IPC one of the essential ingredient required to be proved is that the deceased was treated with cruelty soon before her death for, or, in connection with dowry. In the present case there is evidence of harassment caused to Rama (the deceased wife)... but there is no convincing evidence to suggest that cruelty was for or in connection with the dowry soon before her death”. It further held that “since one of the essential ingredients of Section 304 B IPC remains unproved in this case, the accused cannot be convicted under Section 304 B, IPC”.

A plain reading of these judgments leads to several questions pertaining to the manner in which law against dowry is interpreted by the courts. These are a few judgements which have

been taken for the purpose of writing this paper, but there are a large number of others which needs to be looked into. These judgements raise issues relating to sensitivity of the judiciary and the patriarchal biases that operate to undermine the interest of women. For an individual woman fighting for justice may involve a never-ending battle against the system that is full of bias, complex and harsh. But for the women's movement it is important to understand these biases and to contest against these in their day to day struggle even if it involves contempt charges being leveled against those who battle as has been seen earlier in several other cases.

Discussion:

Vina Mujumdar:

Mine is related to the extent to which the bureaucracy today including even those who were appointed as dowry prohibition officers are really fully aware of the laws that they are supposed to enforce. I am referring to couple of successive reports that came out in two issues of Outlook, about the campaigns being initiated by the District Magistrate for enforcement of the PNDT Act. One was in Haryana and the other is in Uttar Pradesh. These two DMs tried to carry out a very active campaign trying to talk to people and convince them that getting rid of their daughter before birth was a sort of a criminal act and they should not engage in this. Now both the articles reported that in the discussions, the defence put up by members of the family, invariably the issue of dowry as one of the major reasons why daughters were unwelcome came up. But neither of the reports said that the District Magistrate concerned took the trouble to inform people with whom they were campaigning that there is a law in the statute books called the Dowry Prohibition Act. Now this is what I wanted to raise. It also reflects on what needs to be done to improve the bureaucracy's command and knowledge of the laws.

Kirti Singh:

When Indrani said that the anti-dowry movement contained a strong feeling against dowry, I just want to add to this that this is reflected both in the debates on the Dowry Prohibition Act as well as in the select committee report in front of whom various women's organizations deposed. I also want to say that it was at that time really that organizations asked for a law for full property rights and equal property rights for women and the Dahej Vorodhi Chetna Manch Memorandum contains this and it was specifically asked for this. So it was not as if the feelings against dowry did not exist and it was clear by these kinds of things. However, when it comes to implementation of Dowry Prohibition Act, I think there are certain other problems with it. People used 406 more because it is effective. It was cognizable and you could imprison the person under it. There was arrest which under the Dowry Prohibition Act was not there because under this Act unlike 498A and 406, you cannot arrest without warrant. This is something that was put in the Dowry Prohibition Act. Also, perhaps, the giver being equated with the taker was actually wrong. But at the same time the person who actually applied or a made a complaint to the Police cannot be proceeded against even as per the Dowry Prohibition Act and there were certain other very good amendments that had come about. But the major problem was actually that it allowed presents and gifts to be given under it because it said that gifts which were of a customary nature and according to one's status and earning these could be given. So that was something that was allowed under that law.

Secondly, because 406 itself was effective in recovering streedhan and dowry, though it was only a judgment on streedhan that women's organizations kept on using it and women kept on using it. And the Police automatically also kept on using it. Because they are also rather unread and they couldn't be bothered to go and read up a whole 10 section statute. As far as the judgments were concerned, I just want to add that apart from these appalling judgments

there are others under 498A in which when we look at the cases under 498A for the last few years, you will notice that there is hardly any case in which the act of domestic violence has been punished. It is only the case of actual suicides that the Section is used against the husband and he is punished by a punishment up to 3 years instead of say abetment to suicide which would be a longer time or a murder. So in cases which are clubbed together with murder and section 498A is often put as an extra charge that the person gets punished.

The second is the definition of what constituted cruelty which is quite clearly defined according to me in 498A. But the courts have gone to lengths to read down the definition. And they have said that unless, not only as far as evidentially requirements are concerned, those are a third set of problems which occurred but the courts have actually gone to say that if there was no suicide so why are we talking of 498A and they have completely and deliberately overlooked that part of the Section which says that even an attempt which is likely to cause suicide or likely to give grave harm or injure the mind of a person is also punishable. Then there are ridiculous judgments that mere giving and taking of presents cannot constitute dowry harassment. So there have been a series of cases under 498A which have defined cruelty in the grossest form and they have tried to actually undo the law as it had existed apart from using it as Flavia had said earlier, they have said that because the women has used 498A, she has treated the man cruelly, instead of the other way around and so on.

Pratiksha Baxi:

When we look at the dowry judgments, often one comes across description of the Marriage Bill whether it has been an arranged marriage or choice marriage and I have always been curious to know whether that effects the construction of who a good wife is or influences the outcome of the case and whether we need to highlight the vulnerability of women who are in choice marriages through dowry.

Subhashini Ali:

Actually there is a dilemma that also I'd like to share and that is I think that dowry is central to our movement because it's something that really strikes at the root of equality. It is based much on the unequal relationship between a man and a woman. Dowry and the expenses occurred at the time of a girl's marriage are an indication to the fact that because inequality exists, to equalize this is the price that has to be paid. Though this is a central issue, my problem is that how do we actually address this because we've seen, we've fought for the laws and of course the laws are turning out to be inadequate because laws deal with certain specific acts but when it is a whole gamut of so many dimensions then is it really possible to come up with a law which address all it various dimensions, I think this is one problem.

Secondly, I'd like to say is connection that Vinadi has made is very important between sex selective abortions, the increase of that and the prevalence of dowry. But I think we have to see it more than that when Rajni said today ostentatious marriages are becoming the norm, they are just becoming so widespread. Of course we all know that in many parts of the country, in many communities where they have not known of such a thing as having to give something to the bridegroom or his family, this has now become prevalent. Even banjaras are now practicing female infanticide because they also have to incur expenditure on dowry. I think we also need to see this in relationship with the reach of market, the new kind of market, which in a way reinforce inequality between men and women so that expensive marriages are taking place and a lot of buying at the time of weddings happen. I am saying this because in a place like Kanpur where there were textile mills, when I went to find out in

a very stray way about what are people doing when they lose their jobs, most of them are involved in the industry that is marriage. Marriage is a huge industry today, from bands, to caterers, to dress designers, tailors, tent houses. It is huge and if we see the importance of the market forces in dictating the kind of marriages that people just accept unquestioningly as the norm. You listen to poor people say well this is what we have to do. If we don't do this, our daughters are just not going to get married. So the whole role that the market is playing today in (1) dictating to families as to what marriage expenses just have to be and in (2) just making sure that the gender inequalities are reinforced through all kinds of advertisements. So far when we were talking of advertisements, we are objecting to advertisements if they are obscene or if they portray women in a certain light. But actually it is much more than that. For instance there are many advertisement which display where the boy's family is coming to see the girl which in itself is objectionable but because of her fan is not of a particular kind, the girl is rejected, or if the walls are not painted, or is if she is dark, then she has to use a particular kind of cream.

So I think that our intervention on this whole question of dowry has to go much beyond than just thinking that it is the law that is inadequate. You cannot have adequate laws on such a multi-dimensional issue like this. Indrani talked about the Dowry Prohibition Officer. I was finding out in UP, who is the Dowry Prohibition Officer and in fact the Dowry Prohibition Officer themselves didn't know that they were Dowry Prohibition Officers. Because it is like Anganwadi worker who is also the census enumerator, she is also doing pulse polio, she is also distributing condoms. So as a particular person in the administration, he is wearing too many hats that he doesn't even know the various hats he has been endowed with also in addition. So to have some kind of notion that they are going to help us in this battle or ensure justice, I think that's totally misplaced and now I'm really coming to the conclusion that the less people one has to deal with to get justice, the better it is because all these layers just mean postponing any kind of delivery of justice. What I'm trying to say is that I think that concentrating only on perfecting a law to deal with something as multidimensional as dowry which is so central in many ways to so many aspects of our society I mean the whole caste question comes into it. That caste because it restricts bridegroom searching to such a limited area then again increases the expenses incurred by the girl's family etc. So I think that where Indrani started from is something we have to go back to which is the question of movement. Unless we can once again; we don't repeat a movement obviously; make this something more than a subject of academic interest but something which is a mass movement which encompasses inequality, encompasses what is happening with sex selection feticide, it encompasses rituals which promote son selection. I mean look at television, it is just full of son preference rituals. That can only be done by a movement, by struggles, by campaigns which are not just confined to rooms. So I think this question of regenerating strong, united movement on this issue is also something that we need to pay much more attention to than what we've been doing in the last few years.

Tenzing:

I just wanted to make one point on the definition of dowry. When you define dowry under the Act, gifts which are customary in nature, is excluded. So later, during or after marriage when demands are made, even during child birth or during any kind of religious ceremony and after that if a case is filed for demand of dowry, often, the cases are interpreted in such a way that this particular kind of demand does not fall under definition of dowry because it would fall under definition of gifts etc. What I think need to be done is to place emphasis on the demand element rather than distinguishing whether a particular element falls under customary gifts. Under the Indian Evidence Act, prompt investigation is of much importance keeping in mind

the circumstances under which these instances occur. Often before the police arrives at the scene of the crime most of the evidence is gone. Even the body is moved in a different position. Frequently, there is hardly any trace left for the police to fall back on at the time of building of the case. I think that a lot of emphasis needs to be made on the two sections which are in the Indian Evidence Act. More detailed rules, compulsory postmortem etc. need to be emphasized.

Surinder Jaitley:

I have two observations to make. One is taking a cue from Vinadi, what is bureaucracy doing if they are doing anything at all?. In Navashar district of Punjab, the female foeticide ratio is so high and the sex ratio is so adverse that some of the districts are showing 500-700 women per thousand men. There is one deputy commissioner who has come out with the idea who says that all the women who are in their second or third month of pregnancy must register with government hospitals and they will be monitored by telephone throughout their pregnancy period so that they can keep a tab on them and they know the big brother is watching. One thing is that only these women are covered if at all are those that go to government hospitals. We have sufficient evidence to show that female feticide is more evident among upper sections of society than among those who would go to government hospitals. The other point one can observe here that if there is a well meaning bureaucrat around then they can generate awareness among people that if you do something of this kind, a doctor, a private or public practitioner can be punished. This is one way of looking at it that probably that section of the population should be more motivated to go and look into this kind of message.

My second observation is about dowry. Sociologically speaking, law is at its own place. But look at why people are prepared to go to long distance to give dowry because they want to enhance the status of their girls also. In a marriage of choice may be the boy and girl have the same level of education, working together or meeting in groups where everyone is of the same status. But when there is an arranged marriage, family invariably looks for boy with lower education, with more settled profession, with house or maybe with other connections so you see they are prepared to pay the price for buying the status for their girl. Now as marriages by choice increase, we hope there will be decrease in dowry. But unfortunately what we observe around is that even women in the medical profession, professional women when they marry by choice, at the end of the day, the boys expect that the minimum required from them is a flat or a car or something. So how do you overcome the similarity between arranged marriage and marriage by choice?

Flavia Agnes:

I am really uncomfortable with the debate that is surfacing where everything is attributed to dowry. One level we start of saying that dowry is different from violence and yet our demands, our perspective and our laws reflect somewhere that dowry and violence go together, where dowry and violence do not go together at all times. So what the second paper Shalu's paper talked about where violence has occurred, reason could be dowry or no dowry and half the time violence gets mitigated because the link of dowry is not there. And I think it is a very serious issue that we have not adequately addressed because we have dowry death, if it is dowry related suicide or not dowry related suicide, but the woman has died and there has been violence and that somewhere gets mitigated because the fact of dowry has been so highlighted by the movement and we are not able to discuss violence in criminal law. Now today we have a Domestic Violence Act in the civil side; so that is why it gets reduced to

498A. So murder becomes suicide, suicide becomes, violence, cruelty etc.; cruelty does not become anything at all. That is one side of the problem.

The other side is that the dowry aspect which is not related to violence at all. So there is a sociological aspect which Subhashini and others tried to say, there is an aspect of dowry which is culturally related which reflects the subordinate status of women. But instead of talking about the subordinate status of women, we are putting everything into the dowry debate, declining sex ratio, female feticide to choice marriages, everything we are putting into a dowry debate which I think is problematic. So what is dowry; what is giving and taking of dowry; should it be there; should it be gifts; should it not be gifts; I think somewhere that discussion has to be separate or we have to have a very general status of women debate in which all this become a part of it. Lack of property rights, then giving gifts, status, a whole lot of things and violence as a separate issue. At least in the women's movement we should discuss violence as violence and not violence as dowry related. Because even the state and the bureaucrats discuss it as dowry related deaths and no dowry related deaths, dowry related suicide and non dowry related suicides. What do you mean by this kind of categorization because they don't come at all because all others come under Section 302 murder whether it is alcoholism or whatever. But when a woman is burned, it comes under 304B. And then you have 7 years and all other calamities get woven in by which these cases get thrown out because of this. So I wish we can discuss these issues separately and not under one bag.

Rajni Palriwala:

I think somehow you have missed the tenor of the discussion because I think what was being argued over here was not that dowry is the cause of everything but that dowry is such a difficult problem to deal with because it's tied with multifaceted aspects of women's oppression. So how do you then tackle dowry given that it is a problem. You tackle dowry from one angle because women's oppression and the unequal context for women remain, it will appear somewhere else. We can continue to discuss this, whether dowry has taken over the women's movement but I presume in our session on dowry we would need to focus on dowry and there are sessions to focus on the other issues. Now the problem which is very true that very often organizations have found that the police or the bureaucracy or whoever are only prepared to deal with violence if it is put into categories they accept and women have then realizing that have also focused on that issue. But yes, the issue of violence and domestic violence is much wider and I think the other issue which is coming up today is that we cannot deal with dowry just as an issue of violence. I think I'll give to the speakers and I'd like to make a few more points with the prerogative of the chair if there is time.

Shalu Nigam:

As far as 498A cases are concerned. We definitely need to look at 498A cases and obviously there will be all kind of philosophical and other arguments there. As far as this question on choice marriages is concerned, I have one case here which talks about choice marriage. This is 2004 judgment. I'll just read the judgment in short. In this case the accused husband was working as a police constable and the complainant wife was his neighbor residing in the same village. The prosecution case was that after the love marriage was performed, the husband's brother instigated the husband for demanding jewelry, cash and other items which her parents could not afford and therefore she was ill treated while she was 3 months pregnant. When she was taken to hospital, she was given sedative after which she had abortion. The lower court convicted the husband for dowry harassment and demand for dowry under Dowry Prohibition Act. The High Court held that demand for dowry made by the husband after 3 years of happy married life, could not be said a demand for dowry relating to marriage. And they say that to

make it an offence under section 4 of Dowry Prohibition Act, dowry should have been given, or agreed to be given at or before the marriage in connection with the marriage. As the marriage was not an arranged marriage, there is no possibility of giving dowry or agreed to be given in connection with the marriage. This is how the court has interpreted the question of choice marriage and the harassment within that. And of course we should look at the whole definition of dowry whether the gifts should be included.

Indrani Mujumdar:

There are several things I want to say in response to the discussion, I don't know whether I'll be able to cover all of them. The first thing is the question of violence and dowry. Yes of course violence is a separate issue existing separate from dowry and I think it's a wrong charge against the women's movement to say that they have always mixed it up, it has never been the case. In fact the women's organizations have been continuously arguing that 498A should not be viewed only in relation to dowry cases. It defines violence, it defines cruelty and it defines these in a particular way. And this has been the main thrust of the day to day activity of the women's organizations.

The second thing that must be recognized is the importance of dowry as a social institution and the fact of its escalation, the fact of its spread, this was something that was an important question that came up in the women's movement and has opened the ground for a reinterrogation of the women's question in India. What is happening in the path of development that is being followed? These are questions which are equally important to the questions related to violence. Inequality is not only a matter of violence. In fact if we look at the 80s and the 90s, it is violence, naturally because it is a major phenomenon but nevertheless it is violence that has superseded all the other agendas and that I think is a mistake even in terms of engagement with law. I agree with Subhashini that law is not the only instrument but law is an instrument and should be a site of struggle for social transformation. It is not for nothing that the Anti-Dowry Movement opened up an entire arena which included laws related to violence. Yes they have to be advanced but it did open up. You must understand the importance of the issue in terms of the movement and in terms of the depth of its social character and I don't want to repeat several other points about how it lies at the heart of this thing. But I do think that one point in relation to what Pratiksha raised, the question of love marriage, I don't know how it comes up in the courts but let us be a little clear, love in any society carries with it everything else and we all of us know of cases where dowry and love go together. Many of us thought in the initial years that love marriage would be the answer to dowry but that's not the case. And that's why we must understand, when we reinterrogated the process of development and what was its impact on women's lives and women's status, these are questions that must remain with us today, even today. Dowry is also a method of primitive accumulation of capital in a society where social and economic crisis has become rampant. At the same time because of dowry several families who become open to participation in a movement against this pressure which is being exerted on their lives. When you are thinking of social transformation, it is of a society.

So therefore these are important issues and should remain on the agenda. But why only violence, why not labour. Labour is one thing where I would say that the women's movement is yet to make it's complete presence felt and these are the questions that will come before us. Today we were discussing dowry. Yes the law for prohibition of dowry should remain an instrument, should remain a site, how are we going to engage with this law, how are we going to use it in our struggle against dowry. It cannot be the only instrument but it should remain one instrument.

Rajni Palriwala:

Just quickly to highlight what seemed to me some of the major issues that have come up not necessarily in any order of priority but one issue that is very clearly there is the whole question of definition of dowry. I think the necessity to ensure that this separation that is made between gifts and dowry and gifts and the wedding itself has to be dissolved. We have to remember in this that the high status which parents look for is not for the daughter but for themselves. I think that has to be very clear that the ostentatious wedding gives them status, gives the girl nothing. So one is in any case the definition of dowry.

The other issue that has come up is the separation of dowry givers and dowry takers, the question of separating them even though Kirti has said that the complainant cannot be sued, I think that still that process that separation needs to be there. The other issue is the whole implementation process in which as we've seen there are various aspects. There is the question of the bureaucracy, the Dowry Prohibition Officers, the Police, and the judiciary. Implementation process I'm also meaning also in terms of taking these cases to court, also in terms of using the law on this issue. Another issue which I think is important is an extensive study one has been engaged in states and now in 5 states on sex ratio, there is a clear link between sex ratio and dowry. Dowry is not the only reason why people go in for the elimination of the female fetus but it is a critical issue.

Another issue which is coming up when we talk about the police, the judiciary, the courts etc. is this whole question of not just what sort of law but do we have the possibility of any sort of adequate law. I think what Indrani said at the start is important because it has not to do just with the question of dowry. It is that when we are talking about women's equality, when we are talking about gender oppression, we are talking about a huge macrostructure as well as intimate relations through which this oppression and this inequality gets constantly perpetuated and even if we move forward in changing that, personal relations in everyday life are going to muddy your legal practice, however effective a legislation you have. That does not mean that we can give up on the legislation because the legislation has various other effects; to mobilize opinion, it gives a weapon in the hands of those who do want to fight it etc. Of course that whole construct of marriage and femininity which is at the core in our society today of what is women's oppression and what is women's inequality will remain and we cannot fight it just through law. And I think that comes to me as also a critical issue that the women's movement has to actually be more direct in its confrontation with this normal marriage contract which is practiced in our society. Contract I'm not meaning in the legal sense but in the social sense of the contract. Because as it has been pointed out, the love marriage also partakes in that same contract in terms of women's inequality, women's rights, property, work, the whole gamut of it. So in a sense I think if we are going to socially through a movement tackle dowry, we have to be prepared take on this issue very directly which might invite all sorts of allegations against us.

Session II – Violence Against Women**Chair – Dr. Sayeda Hameed**

Friends, certainly its wonderful and a great honour to be here especially as we grapple with the approach paper to the Eleventh Plan. For me this is a very important occasion because I don't get a chance to meet many of my friends not because of any lack of will but just how life has been for all of us. I'm also very tuned into this session particularly because my new book, which is on violence which, has got just one advance copy and in case I make the

concluding remarks I can read a paragraph. It is based on eight important cases as a member of the NCW turned into faction. All the cases you are familiar with because they all hit the main news media but they faded from public memory. So I am very interested to see what I have been working for the last year and a half has culminated into a book and what comes out of this session. I just want to leave it at that. May I first ask Dr. Svati Joshi to begin with her intervention.

Dr. Svati Joshi – Sexual Violence and its Relation to Communal Violence

I am going to talk about sexual violence in Gujarat. This is of course a familiar knowledge. We all know about it but I think that we need to remind ourselves about what happened in Gujarat because we haven't come to grips with the magnitude and the nature of sexual violence that was committed in Gujarat and we need to understand, to conceptualise to formulate the whole area of what really constitutes this kind of sexual violence if we really want to work out some kind of a legal redressal in place. Connections between communalism and sexual violence have been made. Kirti talked about the personal laws in the morning and we all know how they have reinforced the interface between patriarchal violence and communalism in a big way, how they have been politicised by various communities. There have been instances, women, we know, are the most vulnerable victims of communal violence of their own community. Sati, widow immolation is one of the most striking illustrations. We know how this kind of violence gets sanctions from religion and tradition in all these cases. Sexual violence has been used in larger situations of conflicts between countries, between larger communities. We all know what happened during partition when women of both communities were raped, abducted and killed. There seems to be some kind of an ideology working here that the body of the woman is the territory of the enemy. One must either possess it, conquer it or destroy it. This kind of notion also has sanctions from the family and the larger community. Partition also witnessed very gruesome killing of women by the men of all the communities. We know, how they were killed before leaving their home by their own men because they wanted to protect their honour, so to speak, and not let them be abducted or raped by the other community.

In recent times, communal violence has been used not so much as a symbolic act but as a very important and effective tool of destabilising communities. Kashmir is one such example we know about. Over ten thousand women have been sexually assaulted since the army cracked down in Kashmir and their harassment and torture has become a routine thing. There is another thing that we need to keep in mind when we look at what happened in Gujarat. That is there has been a new configuration which has emerged in the last quarter of a century which is the coming together of the neo-liberal policies of the government and the rise of the rightist forces which have worked in tandem. In fact, each has reinforced the other. This has also led to a kind of a reconstitution of a woman's identity. Media television, we all know have facilitated a kind of a communal identity of women and more and more women now see themselves as having a communal identity. What has happened in fact is that their communal identity has elided over their gender identity. This has led to a very unfortunate consequence, which is that women are divided from women. This was something that one saw in Gujarat in a big way. How Hindu women were actively engaged in communal and sexual violence against Muslim women? So, we have to also bear that in mind when we look at this violence. What has happened in Gujarat, therefore, I think, needs to be seen in the larger context of liberalisation, the growing fundamentalism and patriarchal violence coming all together to reconstitute an entirely different notion of sexual violence. Of course, we all know what we saw in Gujarat is something that we have never heard of, never seen, never encountered in history anywhere else. The political motive was very clear of this violence, which was the

destruction of an entire community and in this context what happened in Gujarat has been compared to what happened in the former Yugoslavia and in Rwanda where sexual violence and rape were used to eliminate the community. It was used as a weapon of ethnic cleansing. This is something that has happened also in Gujarat, but I think what has happened here is still quite unparalleled in several ways.

The first noticeable thing in this violence was the mass nature of sexual violence. Women were killed in full public view. They were first stripped, raped and then killed. This was done in public places and was witnessed by the members of their own community, their own family members as well as the Hindu community including Hindu women. This is the context within which one has to see this violence. The second point is that since the public, or the members of the Hindu community witnessed this violence, rather jubilantly at times, goes to show that there was large social sanction to this violence. It is very important that this was not a violence which not protested or objected to by Hindu women. The silent and jubilant witnessing of sexual assault on Muslim women by the Hindus including women also proves that there was a large social sanction to it.

What distinguishes Gujarat violence from other incidents is that the Muslim women continue to live in an atmosphere of hostility. It is still a reality, it is still something with which the Muslim have to live, with a sense of fear and insecurity. So when we talk about legal redressal, we have to keep in mind how we are going to ensure that these women can ever regain a sense of confidence and security. This is something, I think, we haven't seen happen earlier. The nature of the violence committed against women in Gujarat also has certain aspects. One was that it was mass violence. Groups of women were killed along with men. In Naroda Patia for instance 98 persons were killed and at least half of them were women. Similarly in place after place you see that entire families were killed. If men were not around women and children were killed, either burnt alive or butchered. I think, this sent a very clear message that this was not just an ordinary clash between men of the two communities but a significantly visible number of women in public being humiliated and killed made it clear that it was a very organised and comprehensive attack for the destruction of an entire community.

There is a pattern behind this. Women were similarly sought out, stripped, raped and killed so that no evidence was left. The motive was not only destruction but also to ensure that the future of the community was endangered since one form of violence was the mutilation of their sexual and reproductive organs. This kind of public sexual violence also instils fear in the minds of the people of that community from which they have never gone back. Rehabilitation has become almost absolutely impossible in all these cases. The complicity of the State we all know about. The police refused to file FIRs, they refused to name the accused, and they wound up cases without investigating them. The judiciary also failed because the public prosecutors were largely members of the VHP or the RSS, and they acted as defence lawyers. The ministers, Narendra Modi himself, played a very active role by making provocative calls regarding the proliferation of the community. There was a very clear collaboration and collusion between the State, the law enforcing machinery, the judiciary, and a large section of civil society behind this violence. This raises a lot of questions regarding the implementation and the adequacy of the existing laws.

Inadequacy of the rape law has been debated by women's groups and one has talked about the need to expand it to include other forms of violence. Other laws on violence, as Kirti pointed out, are very archaic and do not recognise this as a serious crime. Most important, I

think, is that we don't have legislation that looks at violence in genocidal or conflict situations, especially when it is used as a strategy to destroy a community. We have to put it in this larger context. There are international norms, conventions and laws which recognise this kind of sexual violence in relationship to genocide and conflict situation and seen it as constituting a crime against humanity. Immediate measures have been suggested like protection of witnesses.

The failure of the judiciary system in Gujarat, as made evident by Zahira's case, either the judiciary works in tandem with the State or when it dares to give a statement in opposition to the State, the State buys off the victims and makes a mockery of the whole system of justice. Witness protection and transfer of cases have been argued for. At least the major cases should be transferred outside. There should be appointment of public prosecutors and lawyers who are independent and don't have affiliation with any of the right wing groups. But this again is not enough. I think, the State has a political motive in treating these cases as isolated cases and I think one should be very wary of that because these have to be seen in the larger context, the hostile environment in which they live, as in Zahira's case, is going to make a mockery of this kind of justice. It's a great challenge for all of us. In the case of Gujarat we have to go beyond the law. Individual punishment of the guilty is not really our ultimate objective, because it is not going to change the ground reality for most of the victims. We have to go beyond the law and see the final solutions in economic reasons as well and also protect the victim's right to work because unless this is done they cannot be integrated into the mainstream with confidence and security. We need to look at mechanisms, which would look into all these various questions.

Dr. Pratiksha Baxi - The Testimony of the Child Witness in an Indian Courtroom

I am also going to talk about Gujarat today but in a context not of the kind Svati has mentioned but in routine criminal trials of rape. I'm going to look at a specific case study of a child who gave testimony to rape in a courtroom to indicate what kind of legal language during testimony to rape by a child. We know that in statutory rape cases it is presumed that children do not have the capacity to consent. Rape is conceptualised as an adult crime. That's the first kind of argument that the child must learn to gaze upon her body as an adult body, yet she must testify in the courtroom in childlike categories. Statutory rape was also frequently referred to as technical rape by lawyers and judges in the court, which indicates the belief that while under age consensual sex is disallowed in law, it is possible in nature. Therefore, the very childhood of the under age child witness is under attack by the defence lawyer. It is these two kinds of things that I'm trying to demonstrate through the case study here.

I bring to you a story recounted to me by a middle aged Muslim woman named Hasina Ben whose ten year daughter Noornissa was raped by her husband. I'd done field-work in a trial court in Ahmedabad between '96 to '98 and this is where she met me and the additional prosecutor whom I call Mr. Hirabai. I've obviously changed all the names here. Hasina Ben lived in a slum below one of the seven bridges in Ahmedabad and earned her living by washing clothes in well-off Muslim households in the neighbourhood. One evening in 1995, her husband brought some friends over, they have something to drink and the husband takes this child who was all of ten years at that time and rapes her. The mother frantically looked for her daughter. He walks her back at midnight and then the mother decides to turn her husband over to the police.

Two years later, after this incident happened the case came up for hearing in the trial court. Hasinaben the mother, was the first prosecution witness to testify in this trial. In court the defence treated Hasinaben's testimony with suspicion, evoking the normative discourse of "good" women versus "bad" women to prove that she manipulated her daughter to speak a lie. The mother and daughter were seen as collaborators in the conspiracy against the accused. Noornissa was all of twelve years old when she testified. She was prepared for the testimony by the prosecutor's woman junior. The prosecutor leaves the room, he asks his junior to prepare her and he sees preparation to be distinct from tutoring. Tutoring is disallowed in law. I'll just quote a brief excerpt from the preparation.

Binaben, who's the assistant to the prosecutor: Then what did he do? He made you lie down. Noor says he made me lie down and he climbed on top of me. Binaben says, then he put *nakha*, his *peshab karne ki jagah*, place of urination into my place of urination. You will say this wont you? She is silent. What did his place of urination look like? She's silent. Binaben: For how much time did he keep doing like this? Noor was silent. She says a lot so Noor replies a lot.

The attempt to subscribe this lesson in legal language communicates the importance of using specific words as evidence. It emphasises sequential recounting, it localises injury and specifies naming. The description of the act of penetration described above, *peshab karne ki jagah*, is the rigid designator by which children are taught to describe the act of rape in words that are accepted by the court as the child's way of narrating what happened to her. This assumes that the child is not capable of speaking adult words and if the child is found to be speaking adult words she is disbelieved. The other question was whether the child witness was competent to testify. So there were initial questions about where she went to school, what her parents name was and where she lived. Again I quote a segment from the examination.

She's been found to be competent to testify. The examination and chief begins where the prosecutor asks her: Do you know why you are in court today? For what have you come here? She says for rape, to testify to rape. The prosecutor says: Who was raped? She says "I was" and her voice drops. The prosecutor says: At that time who all were at your home? She says, "my mother and my brother". She says "my *ammi*", so the judge turns to the lawyer and says: "*Ammi*? What is *ammi*?" The prosecutor says in Muslim communities mummy is *ammi*. She says *abba* said get some *bidi*. The judge says *abba*? Do you know Gujarati? She says yes, so the judge says a few words come in *abba*, *pappa* and then he again asks her do you understand Gujarati full? She says yes. The prosecutor says to the judge, after many days a Hindi speaking witness has come.

In determining competency to testify the child witness must understand the function of stereotype in law, reflected in the manner in which Noors responses are translated from *abba* to *pita*, *ammi* to *mummy*. Her testimony that she studied in a Gujarati medium school and that she spoke Gujarati is disregarded. The function of the vernacular as a stereotype rests in the idea that the Gujarati Muslim is alien to Gujarati culture and the vernacular becomes a site for intense identity politics. This must be seen in the context of the Hindutva discourse of *asmita*, an ideology that seeks to articulate collective identity on Hindutva notions of cultural pride. Thereby, she must, in court, demonstrate her ability to use words, which are divorced from her everyday life.

I now turn to the cross-examination. The cross-examination spills over two days lasting for four hours. The first thirty minutes of the cross-examination Noor is questioned over the fact of her paternity and the relationship between her parents. Did she recognise her father? Where had she met him for the first time? so on and so forth. Briefly, the defence lawyer after going on and on about this says to her your father told you that Jamaal Bhai is your father, *abba*, people told you that, mother told you that. But how did you know that he really is your father? The second kind of excerpt is a questioning around the relationship of the father. The step-father used to apparently beat the mother. The defence lawyer tries to establish the fact that there was discord between the parents and Noor is forced into a situation to say that there was no discord between her parents because otherwise she would be seen as a collaborator in the lie. I'm not going to quote this but it just goes on and on. At certain stages the defence lawyer was extremely aggressive.

Competency to testify then also meant that Noor understand that she was being told she was an illegitimate child, her mother was immoral and that she was lying. Competency also means in law whether a child can understand a question. Second competency meant the ability to understand the questions normatively. Here she was called to testify to her mother's relationship with her natural father, and she, in denying any discord between her mother and her step-father, grasps that the dissolution of kinship and the violence that preceded this disillusion. She must bear the burdens of the secrets of an adult mother. Then the child is constructed as a non-adult. Childhood is in dispute, as I've said, as far as the defence is concerned. The defence line of questioning was structured as if an adult was being cross-examined. At certain times the prosecutor would remind the court that this is a child witness, at other times it was not in the interest of the prosecutor to remind the court that this was a child witness. We'll look at what were the moments at which the court forgets that a child witness occupies the stand.

She was asked what was the time when she was being raped, was it evening or night. When she said it was night, the defence asked her again if she knew what time it was. She testifies that she did not know how to read time. Even though the prosecutor reminded the court that she did not know how to read the time, the defence kept returning to this line of questioning. I Quote:

Defence lawyer: When he lay you down then a lot of time passed?

She is quiet.

Defence Lawyer: Speak up, how much time?

Noor: A lot of time.

Defence lawyer: How much time a lot of time?

She is quiet.

Judge: How much time passed? 5 minutes, 10 minutes, 30 minutes?

Defence lawyer: How much time?

She is quiet.

Defence lawyer: How much time?

She is quiet.

Judge: When he lay you down, climbed on you, moved for how much time?

Noor: Six hours.

(Then everyone starts laughing)

Defence lawyer: Six hours? Do you know the meaning of this? From morning to evening in school it is six hours, when you return home in the evening.

Prosecutor: do you think she understands what's the meaning of minutes? How it should be clear? You are wasting time.

Judge: A twelve year old should know. Make her understand *yaar*.

Defence lawyer: I know before you told me I explained the meaning of six hours. I will explain. Do you know how much time?

Noor: I do not know.

Judge dictates for the transcript: This is how much time I cannot tell.

By the next question Noor looked as if she's going to burst out in tears at any moment.

Here time is constituted in a mimetic relation to the act of rape. The court is not concerned with the subjectivity of the rape survivor, or the experience of rape as unending, where time freezes. Six hours expresses the experience of violence when the question of duration neither can be captured in everyday categories of temporality, nor does it fade away quickly. The value she ascribes to the duration of the violence is met with ridicule and annoyance. That she cannot tell the duration of time is the only way in which she can testify to the way time freezes and her testimony meets the limits of legal evidentiary standards. Ultimately she had to testify that she did not know how much time. At this moment the prosecutor decides now he must intervene. So he asks the judge, can we give this child water. The judge looks very doubtful. He says it has not happened till today that we have given witness water in the stand unless they are old or sick. The prosecutor says, no we can give so lets give her water, likewise, for the stool. She was standing at 46 degrees for two hours in the stand and the prosecutor at some point asked for a stool and again the judge says that this is not part of courtroom procedure. A stool is negotiated. At some point she is asked to stand because they feel she is not answering properly because she is sitting.

The second last question is how the law constructs the child-adult. While the way time is cited is not treated as evidence of childhood, the way injury is cited must retain the suggestion of an innocent childhood. In the chief examination, we saw, how as a child witness, Noor had to name graphically the violence. Whether there was penetration, etc. The following excerpts demonstrate how the defence constructs Noor as a child-adult.

Defence: When he climbed on top of you, he put his urine, *peshab*, into your urine then did you cry out?

Judge to Noor: He is asking that you screamed before or after inserting.

She says after putting.

The defence abbreviated the phrase *peshab ki jagah*, to *peshab*, which means urine, thus emphasising the "dirtiness" of the act.

Defence lawyer then says look here you were lying down, then what did he do? How much did he do, i.e. penetrate, that you do not know. How much did he put his place of urination, half or full?

She says full.

Defence lawyer: How did you see? You were saying that you were lying down. Then how did you come to know?

She says blood came out.

Defence lawyer then says how do you know that he had penetrated?

She is quiet initially and then she says because he penetrated me that's why.

Then defence lawyer says, when he inserted you screamed, then he lay upon you, after that you kept you kept lying and did not scream for a second time? Did you cry at that time? And goes on and after a point the prosecutor objects and says that the line of questioning should be different for children than from adults. But the defence lawyer carries on and he says when he climbed on top of you he inserted his place of urination into your place of urination was his head moving or was he moving fully? She said he was moving fully.

The prosecutor at this time leaned across to me to say that Noor was answering very well and this would surely result in a conviction. But her mother felt differently. After the testimony she walked out of the courtroom in silent anger and she said does one ask children questions like this, would these bastards ask questions like this to their own daughters or wives? So for her legal normativity by the end of the trial seems illegitimate. We see what kind of injury the court inflicts on children in order to get a conviction. This case does get a conviction the guy gets convicted for 10 years.

The other point which I briefly want to point out is that what the defence lawyer kept doing was by asking whether she was fully penetrated or whether the penetration was half is that he is using the medico-legal category of partial penetration as an experiential category, as if a clinical category can reside in somebody's experience. Courtroom speech then becomes an object that is animated with the dual capacity to both injure and excite. It injury for the process of giving testimony, displaces childhood. This is the effect of not naming child sexual abuse. The story of children occupying a juridical field that deprives them of the capacity to make truthful claims as child survivors.

I want to conclude with a few words from Noornissa. Noornissa did not speak to about what happened yet signalled the manner in which legal discourse had inscribed itself upon her subjectivity. This was conveyed to me in a conversation, which took place in between the testimony over two days. We were waiting outside the courtroom for the cross-examination to resume on the second day of the testimony. During this time her mother had consented to a taped interview. Noor had been listening to us when she shyly said to me that she wanted to wear my watch. When I gave it to her she wore it upside down. I taught her how to wear the watch so that she could learn how to read time. Her mother protested that she will insist on keeping it, don't give it to her. Noor said I do not know how to read time. Her mother scolds her and says why have you worn the watch if you cannot read the time. I insisted that Noor continue to wear the watch and began to teach her. She was called in for the cross-examination subsequently. Noor recognises the emphasis in the courtroom upon time and perhaps already anticipated the implicit blame that would accrue to her for not being able to read time. For the cross-examination constituted her now as a child and then as a child adult. The displacement of the anxiety about her trial and her internalisation of blame are concentrated on her watch. Her words are frozen yet she indicates the effects of the testimony by finding relationship of words to an object, perhaps one that point to her voice. As she left the court that day Noor shyly said to me that the pen I gave her as a gift at her request would be a *nishani*, an object that would remind her of me. She knew we would not meet again despite Hasinaben's promise to take me home. Noor and I were, in those brief hours, related to each other in remembrance through objects, a pen and a watch. A complex relationship of words and objects that marked a present that was born in her knowledge that there was no future that could follow that moment.

Dr. Sayeda Hameed

After listening to these two presentations and most of the people here, colleagues and friends who have been witnesses to what happened in Gujarat, many of us who have also been witness in the kind of cases of child abuse that Pratiksha talked about, I feel that it is almost too difficult to say anything. I feel that Svati has given a snapshot of the violence against women that occurred during the Gujarat carnage, because of paucity of time, but very strongly and as part of a team which went to examine what happened to women and how the violence was perpetrated against the Muslim women. Each and every word of hers in my

mind brings images that one feels one has put behind but not really. I still remember when I was in Ahmedabad during those days one of my colleagues brought a bunch of photographs and said would you like to look at them. There were some 60-70 images that that froze in the mind. It brought to my mind the image of this young girl who had been continuously raped for four years by her father, and that is the story of Bela in my book. I want to make just two points briefly. The situation has been well portrayed by the two speakers. Then there are national machineries that we are all very well aware of. Vinadi was the one who was instrumental in their even coming into existence, of which I was a member, of which Subhashini was a member and how the national machineries have dealt with this and now in my capacity as a planner what can we do. We have been pegged at various points in this whole process and I think that is where we should be looking for some solutions for those remedies for some conclusions that I imagine will arise at the end of the day. I want to read just two little paragraphs from my book.

‘Five years have passed since I completed my term in 2000. When I think back I am struck by how much was packed into 36 months, how much pain and violence, how I swing between hope and frustration, despair and determination. Even as I write this I realise my tenure was strangely like a prison term. Outside the prison lay a world in which I had lived fifty carefree oblivious years. That world receded before my eyes as I dove into this New World, an internal one visible only to me. The eight stories in this collection are about women I met in this other world, about their fight and a little bit about mine. Whenever I recall their time my screen brings up faces of hundreds of women each one pleading for my attention, demanding that I tell her story. Tell her story, why? To plead her case? To deliver justice? Both? Yes, both. But during my three years as member was I able to deliver justice to the women who appeared at my door? Did any state functionary click to attention at my call? I can count on the fingers of one hand the cases, which came to a successful conclusion. Yet I continue to seek justice for the rest of them and for many others. Their stories need to be told so they are not lost in the official records of the State. So that they are heard by a people’s bench, so they are not erased from public memory. My first protagonist is 18 year old Maimoon, a beautiful young woman from the Mewat region of Haryana, now the district of Noo. I saw Maimoon for the first time when she and her husband Idris nervously entered our office. Maimoon had been raped by a village gang, slit from neck to navel and left for dead. But that was not the reason she came to us, this part of the story we heard only after our probing and persuasion. Surprisingly they were not complaining about the beating and torture inflicted by their *biradri* because they dared to love and marry of their own will, but about something else. It did not strike me till much later that women accept violence as a part of their daily lives simply by virtue of being female, mothers, sisters, wives and daughters. All the women whose lives inform my stories displayed enormous pain tolerance. This is just my reaction to these two presentations that have been very strong. I have about ten minutes now, open for discussion and hope because I will not be speaking again that we get some very focussed suggestions that can be actually worked into planning because ultimately it has to become budgets, has to become allocations, has to become resources.

Vina Mazumdar

My intervention is basically in response to Svati’s presentation and, to the appeal made by Sayeda. What can she put into the next plan? I was a member of a team sent by the national women’s organisations, to Gujrat to Ahmedabad and Surat back in the 90’s. Not during the recent episode but the earlier one. During that episode in both the cities women who had been affected by the riots, the victims raised one issue, common to again both the cities. They established a link between the models of urban development that the State government had

chosen, which effectively separated one community from another and this meant, whenever communal tensions rose riots became inevitable. I remember Muslim women telling us “*hamain hamare harijan pados se alag kar diya*” (we were separated from the people of our community), so that when we were attacked they couldn’t even come to our rescue. This was in Bapu Nagar. They kept on talking about “*yeh society wale ne kiya*” (the society people did this). I couldn’t understand what they meant by society till one of them dragged me to a big board, which was one of the housing societies. It is the group housing scheme that was introduced somewhere around, I think it was the ninth plan Sayeda, but this is some thing that you have to find out when was it and from what source did this urban development model arise. Because when you look at Delhi today will find that the communities that have become neighbourhoods, they are linked to some ministry or other, or some *sarkari* (government) organisation or other. And its all based on a sort of funding scheme. A group of people decide to build houses, they form a group, they raise a part of the money themselves and they get the rest from the banks and the houses come up. If you go down Vikas Marg, you will find vihar after vihar, Swasthya Vihar, Yojana Vihar, every body who built houses there came from the planning commission. They may not be today’s residents but that’s how these Vihars came into being. I do not know which international agency sold this model to the Planning Commission. Such a model in Ahmedabad, and Surat context had very successfully segregated communities from each other, and that’s why when riots took place, “*hamare pados wale hamare liye kuchh kar nahin paye. Unko to alag kar diya gaya*” (our neighbours were separated from us so they couldn’t do anything to help us). That’s all I wanted to say, that there is a connection and the source of that connection is what we, for lack of any other word, we call globalisation, the marketisation of society, the marketisation of community relationship, the marketisation of culture.

Hasina

All of us have been with different teams to Gujarat or wherever there have been communal tensions. We know about the kind of experiences we had. We know how the police machinery worked against a particular community and how fascism was practised against the minority community. But I want to raise a question associated with the issue of communal violence and its relation with the sexual violence and that is wherever there has been sexual violence against women, in whichever community, the women became increasingly insecure within their own community itself. In this context if we look at Gujarat different types of sexual violence took place and often which have made the women available for their own communities. The ways in which violence against women was practised at home, within the community, all this has resulted in the suppression of several issues of the women. This is an issue we need to look at. Secondly, wherever there have been instances of sexual violence the issues of the women in this context, their voice is oppressed. For instance, if we look at the demonstrations against the Prophet cartoons. A lot of people had come out in opposition to Bush in several demonstrations that took place, such as in Bombay. But the whole issue was dominated by the one demonstration that took place against the Prophet cartoons. So we need to take into considerations the fact that whenever there are communal tensions, in our fight against fascism we tend to forget the fundamentalism growing within the minority communities, the violence against women, the way their issues are sidelined. For example, many of us went in the anti-Bush demonstration but we were not able to bring out our existence beyond the issue of the Prophet cartoons. We may have several questions about the cartoons, whether they are wrong or right, but our voice is what we stand against and that gets lost somewhere because we get engaged with the questions of the minority community, whether it be Muslim fundamentalism or any other fundamentalism. I feel that in situations of

communal violence, the issues of violence on women within the community concerned, the questions of rights of women within those communities, are not brought out.

Kirti

I think, in a situation, for instance, like Gujarat, when the law and order completely breaks down, obviously we have to think of a different machinery to try these cases. Some of the suggestions Svati has made. I think we need to look at setting up special tribunals, which will have special prosecutors, of the choice of the victims and which will be investigated by a different team than the State police. I think these are the sort of suggestions one can perhaps make tentatively, and then of course look at international tribunals, see how they have functioned, what are the procedures etc. that they have adopted to deal with genocide. As far as Pratiksha's presentation is concerned, I think it will be useful if she look at the Sexual Assault Bill that we have framed and see whether the provisions made for child evidence are adequate, because though we talk about putting a screen, letting the child's evidence be recorded before and then putting the questions to her through a judge, but we need to look at that. We also need to look at expert evidence when it's a child sexual assault case because a child cannot talk the language and so on. This Bill has already gone to the Government so if we want to add on some provisions we'll have to do so now.

Jarjum

Listening to these presentations and every time cases of crime against women are discussed you feel like going out into the streets and kill people. That is the kind of violent reaction emotionally these stories evoke. When Sayeda ji said how do we translate for you as planners, I have a suggestion. One, from our experiences dealing with murder cases and rape cases, especially in my state where we don't have the executive and judiciary separated. It is the executives who are also trying to run the courts but they hardly have time, since they have other responsibilities. Most of the cases are pending, even the fast track courts which have, of late working, the criminal lawyers. I am quite cynical about the Indian judiciary. It is not justice oriented. It is more for engaging the lawyers as professionals to earn their bread and butter. Many friends who are lawyers they say you have all these misconceptions about us. I say, just give me one example where you have delivered justice to the victim. They don't. They say it is case of professional ethics. I say, lawyers are the most unethical tribe of professionals. When it is rape or murder it says it is a crime against the State, and the State has no machinery, or it is not equipped to handle these cases. Most of the time the public prosecutor is either missing or he would have may be loosened up the case so much that the defence lawyer had a field day. When it comes to money matters, financial support for the public prosecutor or the Government lawyers, there is not enough. They say, "*hum ko to bahut kam paisa milta hai*" (we get very little money). The criminal lawyer, or the defence council is paid so much. Many a time we also have this misgiving that government lawyer might be taking money from the other party also. So in the planning, at least budgetary allocation wise can we make interventions. When it comes to separation of executive and judiciary, especially in a State like ours, where we as women are saying that we want to know our tribal customs better, maybe get it codified, because every woman would at least know what is her right. Now we also have a new generation of lawyers coming up. Many a times when it comes to crime against women the cases are pushed back the council but in the council again, who's rich who's powerful that kind of a debate is also there. Another thing that comes from what Pratiksha presented and what we also have been dealing with when we are talking about young rape victims. Maybe individual sensitisation programme by the government cannot work but as part of the education syllabus in the law faculties can it be made mandatory. Until and unless a student of law is not sensitive to this kind of sensibilities

of young people or women, they cannot be given a certificate. It is a kind of thinking aloud when Sayeda said what can planners do. In terms of budget allocations for government lawyers, support, separation of the executive and the judiciary, and also emphasising a sensitive syllabus for lawyers who come up. I come from Arunachal Pradesh. I have been working with the women's organisation called the Arunachal Pradesh Women's Welfare Society for the last years. The organisation is in its 27th year. Right now I have also been given the responsibility to be the first chairperson of the Arunachal Pradesh State Commission for Women.

Shruti Pandey

I am a courtroom lawyer practising in the Supreme Court and the High Court here. I work in an organisation called Human Rights Law network. I want to congratulate Pratiksha on the very moving case study and I think that such case studies would go a long way in sensitising our judges. I wish they had the advantage of such a case study when they were considering Saakshi. Even after the law comes in, as Kirti mentioned, it will definitely help but I think we will still need to sensitise our judges and the public prosecutor on how to conduct the trial. I also want to say that the Indian courts are not doing too badly compared to the other countries. I tried to look at how trials were conducted in other countries, and I think we'll have to just move on, don't be cynical, just take it on and do it on a continuous basis. I just want to mention about the witness protection. I thought that it was great that we were talking about witness protection and everything was building a right climate towards Jessica and Zahira Sheikh, but I was personally disturbed by the sentence that came from the Supreme Court on Zahira, because I have closely been in touch with the lawyers who were defending Zahira and who were involved in the turns and twists of the case. But at the end of it, when the court actually clamps down, I was there when the enquiry was held, and it was very frustrating to see, and every body could see that she was obviously lying. But at the end of it, punishing her with the sentence, is somewhere, I feel, court has failed at the end of it to understand what went into the psyche of that woman who kept on turning her testimonies. The Supreme Court has got inherent powers. But I don't understand how they could pass this sentence without a trial. The enquiry was for a totally different purpose and to use the findings of that enquiry to pass a sentence on Zahira, I feel is something that we should look at.

Svati Joshi

To take up the last question first, of course I agree with you entirely. There was no time to talk about it but I did mention that Zahira's case makes it very clear the role the State in the whole thing. If you are not with the State or the judgement goes against the State, the State buys off the victim either intimidates, or puts pressure or bribes, whatever kind of way the State has got the victim on its side. So blaming Zahira for it is absolutely wrong, she remains a victim. The fact that she changed her statement so many times shows the kind of pressures that work, from the State and from the local leaders. One has to have a kind of tribunal on the lines of which have been created in Bosnia and former Yugoslavia, and I think that that is something that's necessary. I think that there should also be an enactment of a law on prevention and punishment of genocide because this kind of legislation is needed also to protect democracy from falling into a fascist state. If you don't have a law which looks at situations of this kind then soon we may turn into a majoritarian state. These of course are important things that need to be created. About ghettoisation, has been happening for the last 20 years in Gujrat and each succeeding communal riot further divides them. Now in Ahmedabad, there are societies which are far away from the city itself and they are known as 'little Pakistans'. This time the word that was very commonly used was the 'border'.

Wherever there was a Muslim residential area there was always a ‘border’ that was used. This has happened and I don’t know whether it is some international agency which is behind it but the State is very much behind it. They are pushing the Muslims out of the city...

Vina Mazumdar

Its not only Gujrat.

Svati Joshi

Yes, it is possible everywhere else. Violence within the community is a very important thing and we’ve seen it in Gujrat. Marriages took place in the camps because they wanted to marry off their girls. They were very insecure and now they are regretting it because what they have suffered from their own, Muslim, men. I think this issue cannot be skirted at all or ignored. But the question here is, and that is what I started by saying that the real issues get sidelined or get overtaken by this other identities, these communal identities, which are created. Women’s issues as such, domestic violence or patriarchal violence take a back seat. We have to focus on these larger questions.

Pratiksha Baxi

Actually I don’t have much to say. I’ll look at your comments and I will look at the proposed law. I think the challenge before us is to look at how an amendment to the Rape Law addresses courtroom talk. I’m not sure how.

Sayeeda Hameed

Thank you so much. Vinadi I would be so grateful to this point you have made, Svati has also emphasised it and I’ve also seen India-Pakistan borders in Vadodara. I agree with you its happening in Vihars and so on. If you could give me one paragraph on it I would be so grateful because this is very doable. In urban development every day we are meeting on the national urban rural renewal mission.

Post Tea-Session II Violence Against Women

Chair- Kumkum Sangari

This session is on domestic violence and before we begin the session I’d like to preface it a bit with what we’ve been talking about in the earlier session because in some way I think there is logic to looking at domestic violence immediately after the two papers which have gone before this. The case of Noor is, in fact, a case of a form of family violence. I would say that maybe one should stop compartmentalising violence in the way we do. I know the gut instinct of every feminist is to say that there is a continuum of violence against women, but I think it is time we theorise this gut instinct to see actual relationships between different kinds of violence. What is the nature of this continuum? In some senses, what is the nature of the legal language that Pratiksha talked so eloquently about, with other forms of misogynistic social expression. The legal language doesn’t emerge in a vacuum. It might have models in legality and therefore have certain autonomy as a discourse but it is actually predicted on an understanding of a child as someone who is open to abuse from anywhere whether it is within the household or from the court. I also think that the notion of the adult-child that you brought out so nicely again has its counterparts in terms of what happens with the sexuality of post-puberty girls. How it is viewed? What happens, for instance, in early marriages, which people call child marriages. In fact child marriages also presume a child-adult as the subject of that bond. The other point here is to think about the kind of communal violence that Svati talked about as actually an expansion into the public domain of violence which are carried

out with impunity within the household. For instance, when you think of sex selective abortion, which is really routinised. Gujrat is now getting higher and higher in the red areas. The kind of link between violence against ones own women and violence against other women, I think, is much sharper than we recognise. If we recognise that it actually breaks down the apparent distinction between the Hindu, the Muslim, the Christian, the Sikh, the Jain and so on and so forth, and brings them into another kind of structure, a deeply repetitive patriarchal structure. Having said that I would like to request Asmita of the Lawyer's Collective to read out her paper on domestic violence. Her co-author on this paper is Tenzing, also from the Lawyer's Collective.

Asmita- Domestic Violence

I have a confession to make, I don't have a paper. What I'll try to do today is present to you the Bill as it exists, a little bit about the campaign, which resulted in the formulation of the Bill and finally what needs to be done thereafter. Perhaps that can be discussed. The history of the drafting goes back to 94, when the NCW had proposed a Bill on domestic violence. The Lawyer's Collective came up with the first draft in 1998 then we did a consultation around the country and tried to reflect to the maximum possible extent the concerns of the women's organisations working with the women who faced domestic violence. That was the basis of the Bill. The NDA government accepted the need for a Bill and tabled a Bill in 2001, which unfortunately was incredibly inadequate. I won't go into the details of what had happened because a lot of you were involved in the process and have been involved in the consultative processes thereafter. The promulgation of Domestic Violence Law was included in the Common Minimum Programme and that was also because of a very extensive pressure lobby by different women's organisations. AIDWA was of course very much part of it. The UPA government accepted the draft that we had prepared after all these consultations. It wasn't the perfect draft but it was not fully accepted. I will not go into the details of the law because I'm sure all of you are aware of it. What I will do is circulate the Act and the proposed rules tomorrow, so that you can look at it. Today I'll just go through some of the important provisions, which need to be acted upon.

The first question that we were asked at the time of having those consultations was why do you need law like this? You have Section 498A. You have other kinds of relief, why a separate law on domestic violence? A lot of it was part of our experience of providing legal aid and the experiences of other women's rights organisations who supported women facing domestic violence. If you used criminal law then the first thing the man would do is throw her out of the house. So a lot of women did not take action under criminal law because that would be the consequence they would face. Another trend that had been happening is that filing a complaint under 498A often resulted in it being used as a ground for divorce on a petition, which was filed by a man. So she was in effect penalised for filing a complaint under Section 498A.

The second thing is that a lot of women did not want to see their husbands in jail. However they wanted the violence to stop. Criminal law did not provide any relief to the woman and that is also not the object of Criminal Law. The object of Criminal Law is to penalise offenders. You can't expect a criminal law to provide the necessary support a woman needs. What else could a woman do? She could get a divorce under grounds of cruelty under the civil law. This again, is a contested issue and also a lot of women did not want a divorce, they wanted to continue in the relationship but a violence free relationship. If this was the conundrum in which we were, what is the way out of it. It would be to have a law that would

be directed towards providing her with reliefs. That is why there was a need for a civil law on domestic violence and the law was drafted trying to address this need.

The first characteristic of the law would be that it is a civil law, which is directed towards providing reliefs. Previously under the Indian law women had no right to reside, either in the matrimonial home or in the natal home. That is probably the reason why it was so easy for a man to throw her out of the house as soon as she filed a criminal complaint. A lot of times the natal family was not there to give her the kind of support that she required. If we really look at what this law is trying to do other than be it being a civil law, it recognises the right of the woman to live in a violence free home. If deconstruct that that would be that one, that she should not be subjected to violence and two that she has the right to reside. The entire Act enforces these two rights. When I speak about the right to reside I know there are a lot of lawyers here who will point out the decisions of the Supreme Court which have said that women have the right to reside under common law. But to have an Act makes it a stronger right. So what would a law like this have or what should it have to make it effective. One would be a clear definition of violence, which reflects a woman's experience of violence. So it cannot be only physical violence but other forms of violence as well such as verbal, emotional and economic. A lot of times women are denied food or money for household expenses. Third thing is sexual violence. We see from the previous discussions how important it is.

Firstly the law has to have a proper definition of violence and the second thing that it has to have is the right which enables her to get orders if she is faced with violence. That is why the law looks at the provisions of certain protective orders, such as protection orders, residence orders, monetary relief orders, custody orders and compensation orders, under the Act, which will help her. Another important aspect of the Act is that is to deal with an emergency situation. It does not create a right, which is permanent. Violence would be a manifestation of the unequal relationships within the home. What this law tries to do is give this woman facing violence temporary relief so that she has some space to decide on what course of action she will have to take. Whether she wants to remain in the marriage, whether she wants to go out of the marriage. The break that she gets with these reliefs gives her that little bit of time to make her decision in a peaceful home. This law does not significantly impact on any other personal laws that are in existence. It applies across religion and it does not make any changes to the existing personal laws. This would be the kind of framework within which the law is placed.

The next thing is about implementation of laws. Another very common argument, which everybody espouses, is that India has many laws and very good laws but none of them are getting implemented. To quote Ms. Jaisingh, "non- implementation of laws is built into the law itself". So if you do not have a proper mechanism which is instituted under the Act or provided for under the Act, the law will not be activated. You need to have certain officials or mechanisms, which will help towards the activation of the law. To that extent what does the Act do so. It recognises two functionaries. One is the Protection Officer and the second is the service provider. I know there has been a lot of critique about the Protection Officer. A lot of you do provide support to women in domestic violence situations what you will find is that a woman does not need only legal aid when she faces domestic violence. There is a whole range of other help that she requires. What would be the role of a good law? It would be that she has the option of accessing all these supports which are available, but to ensure this kind of multi-agency responses takes place, you need a person to co-ordinate those responses. That would be one of the primary roles of the Protection Officers. To maintain a register of the

service providers so that when a woman who is facing violence comes to her she will be able say okay if you want shelter these are the various options or actually assist her in getting those shelter facilities or the medical facilities or the psychiatric facilities, whatever she may require. That would be the first role. Second role would be access to courts. Everyone knows that legal aid is something, which is very difficult in this country. The protection officer acts as a liaison between the woman who requires reliefs under the Act and the court. He will help her draft her application. He will help her get legal aid. He will help her with the implementation of orders when court directs. This would be the role of the protection officer. This would be the key element for the implementation of the Act. However, if the woman is empowered enough and if she does not need the help of the Protection Officer, there is nothing under the Act which debars her from going directly to the court. The Protection Officer is entirely to assist the woman in getting the reliefs under the Act.

The next thing is the Service Provider. A lot of discussion in the consultation on the status of the Service Providers and their exact roles took place whether you wanted the Service Providers to be duty bound under the Act. To this there was a very strong opposition because the people who did attend the conferences said that why should the State abdicate its responsibilities? It is the State's responsibility to provide these kinds of support structures. The NGOs can help in whatever they are doing but you can't expect the NGOs to take on the entire burden. However, we cannot deny the fact that the NGOs have been playing a big role in providing support to women. This law, therefore, provides a limited recognition to the work of the NGO, it prevents any kind of malafide legal action being taken against the NGO. The third thing it does is to give a certain level of authenticity to the records maintained by the NGOs. These are the three ways in which Service Providers have been provided for under the Act. What this Act and rules do is that they ask for the registration of the NGO and for that registration you have to enter your name in the books of the authority under the Act. The authority under the Act would be the protection officers. How would that impact upon the other Service Providers who do not wish to register under the Act. To our understanding there would be no impact. The only thing is that under the Act you will be vested with certain rights, which you will not get in you do not registered. For instance, like a Service Provider under the Act can record a direct domestic incident report. A Domestic Incident Report is similar to an FIR except that this is a civil law and therefore the format is different. These kinds of things a Service Provider, not registered under the Act will not be able to do, but will be nothing stopping the Service Provider from taking the complainant to the Protection Officer and getting the Domestic Incident Report registered there. So they can always take the woman to the relevant authorities and get the procedures in action.

The other important thing about this law is that while this is a civil law there is a crossover with the Criminal laws. The crossover happens when there is a breach of the order. The court gives an order, say a protection order or a stop violence order, or a residence order which prevents the woman from being thrown out of her own house. If this order is breached, then it becomes a criminal offence, a cognisable and non-bailable offence, and accordingly the procedure will be set in motion.

The other thing is that this Act requires monitoring and I think the opportunity that this Act gives is that it allows for the collection and compilation of violence figures. When we went to the Parliament and were trying to get the Parliamentarians to support it we had to rely on statistics. The problem is that the only statistics that are properly recorded are the NCRB statistics, those are crime statistics only of reported cases so you have no idea about how much violence is actually going on. Even if there is an NGO study or other organisations

have done it, it is not at a national level. So you'll have different studies which are state specific, region specific, but to have this kind of compilation happening at a national level will always be a . We had put in some suggestions for the appointment of rapporteurs, national and state level Rapporteurs for collecting this kind of information and looking at how the implementation of the Act takes place. But unfortunately that suggestion was not taken by the Government and those positions were completely deleted. This perhaps is some thing we need to think about. We already have the NCW so perhaps they could monitor the implementation of the Act.

This is very briefly about the Act. If there are any questions we can deal with that now and what I can then talk about are the rules, the headings under which the rules are being framed and where the suggestions should be, for the rules, to be in a manner that will actually implement the Act and be in the spirit of the Act.

Discussion

Sabu Geroge

What is the effort to take it to J & K (Jammu & Kashmir)?

Asmita

We've put in a recommendation to have it in J & K.

Surinder Jaitley

The Act is very inclusive, I must say. It has take care of the situation when it takes place, the after math and rehabilitating the woman. My single worry is that who is going to fund this. The member of the Planning Commission has gone. You could have asked her. The second thing is the outreach. Even if you appoint this officer, who will be taking care of providing information about the service providers, how to access the courts, prepare petitions and all that, how are you going to reach the five and a half-lakh villages? Don't have a road, don't have any communication channel. And more than that, most of you will be knowing the customs in the villages, it's a very common practice. Domestic violence is not something that is unusual. I'm reminded of the scene in that movie called '*Ek Chaddar Maili See*', you may have read the book or seen the movie. When this woman is being beaten up and all the neighbours are looking over the boundary wall, she says "*kya dekh rahe ho, main akeli to nahin to pit ti hoon, tum sab bhi to pit te ho*" (what are you looking at? I am not the only one who gets beaten up. All of you get beaten up too). This is the kind of impression or the acceptance which women have of violence, being a woman, being a wife, *yeh to hai meri takdeer mein, pitna, aur kuchch zyada shor karegi to* (it is in my destiny to be beaten up, if I make too much noise then) what this will do is provide a very easy way, as in U.P., to send her to her parents home. Unless the husband goes himself the girl's parents do not send her back. It is a matter of prestige. *Unko lena aayega inlaws ke ghar mein se thabh usko bhejenge* (when someone will come from the in-laws house to take her, then alone we will send her). So, there are so many women who are in the bracket of deserted women. They are neither divorced nor married but they continue to stay in the parent's family. Not only that earlier in the villages there was some kind of a support system which the natal family provided. Now even they are hesitant. They want her to go back and they wait for year after year for either the husband or the in-laws to come and take her away. I'm a little puzzled as to how you are going to first of all to familiarise these women that there is a provision for them and secondly, to take recourse to that measure, because what is the support system for them for daily livelihood? You can stay in a rescue home or a shelter home for a certain period of time.

Unless there is a provision to train them, to make them independent. I've seen this in Canada, but then they are a smaller population and they are able to do it. I only studied the Punjabi immigrant women and I found that they emerged very strong after they had the courage to complain, come out, get trained and get placement. But then you see, it is taken care of from beginning to end. Unless you take care from beginning to end you are going to leave the women in lurch. Neither this side nor that.

Asmita

I'll just try and address some of the points that you have raised. First of all who will fund it? What we had done when we had proposed the draft law, we had included a provision saying that funds will be allocated but again that got removed. The second thing is how will protection officers reach the villages? That would also depend on the appointment of the protection officers. At what level will you appoint Protection Officers, what will be the jurisdiction of one Protection Officer? Another thing is that the Protection Officer works under the supervision of the court. That is a very important. The way we are trying to look at the Protection Officer is also to create infrastructure, which is akin to public prosecutor, because the importance of the Protection Officer is that they are the liaison between the woman who is facing domestic violence and the courts. As far as the awareness of domestic violence, I think we cannot place too much reliance on the law alone. There has to be social awareness building up if this law is to be a success. The law cannot function in a vacuum. Second, it is heartening to note that the creation of awareness has been included under the Act and has been taken up by the Central Government and the State Governments and they have a certain obligation that says that they have to create awareness, under the Act. Have protocols, which will help in the implementation of the Act in the most gender sensitive manner. As far as the rehabilitation of women is concerned, this is also something which has been raised a number of times in different consultations. At the end of the day when we are talking of relief, be it monetary relief or compensatory relief from the husband. And this law is not only limited to matrimonial relationships you are also looking at other domestic relationships. But at the end of the day you are looking at it from the male perpetrator who is there in the domestic relationship. Every practising lawyer knows how difficult it is to seek monetary relief or the Section 125 orders that are there. What we had hoped for and we had suggested it at the time of the drafting was to link this Act with poverty alleviation schemes of the Government so that for that moment the Government pays that compensation to the woman and she is not put in an adverse situation. Later the State can recover this money from the perpetrator or the respondent. But again that was a suggestion which wasn't taken up.

I'll briefly go through the rules because I think that is something that needs to be taken up for further campaign. As far as the rules are concerned we were told to give our recommendation of what a draft would look like and we did send one to the NCW. We've got the NCW draft and I shall make copies of both of them and circulate it tomorrow. We are disappointed to see that a lot of the provisions that we had added in our draft are missing from the NCW draft. We would hope that it is brought back in some way. Under the Act it is very clear that the central Government has to formulate the rules. There is no question of the State Governments formulating the rules. However, the appointments have to be done by the State government. But rules being a form of delegated legislation we cannot go beyond the Act. It has to operationalise different provisions of the Act. We can't create new rights under the rules. Instead of going through every rule and the point of difference between the Lawyer's Collective proposed draft and the NCW draft, I'll just try to categorise certain issues and open that up for discussion.

The first thing that the rules would provide for is the Protection Officer. Here, the four things that will be important to look at. First, is what would be eligibility of the Protection Officer, the method of appointing the Protection Officer, the tenure and the jurisdiction of the Protection Officer and finally the function of the Protection Officer. As far as eligibility is concerned there should be a certain minimum qualification that a protection officer should have. The second thing is, and this something that keeps coming up, in every meeting and consultation they tell us “how are you going to make sure that these Protection Officers are not themselves biased or act contrary to the interests of woman?” So the need is for their sensitisation, and having a reference to sensitisation under the rules becomes incredibly important. And also perhaps a need for training is important. But we can link it up with the Act, which obligates the Central Government to provide training, awareness and sensitisation to the different functionaries of the Act and the public at large.

The second thing is the appointment of the Protection Officers. At the time of drafting and also the way the rules have been framed right now, there could be three methods of appointment. One would be creating a separate cadre completely, of fulltime officers who will only work towards the implementation of the Act. But unfortunately this is perhaps not a very practical solution because it becomes a State subject, then which department is going to fund these people, would it be the Personnel Department, would it be the DWCD on any other department? What they told us was that if you ask for a separate cadre you can forget about it, it is going to take years. What are the other alternatives then? One would be voluntary deputation, which is something we strongly advocate for. Perhaps, if we look at the way the NCW rules are framed, nomination of Protection Officers is one of the methods that have been suggested. We think nomination is not a very good way because we’ve all seen the experience of the Dowry Protection Officers who did not get appointed at all. Whereas deputation is something that we want to do and we also want to emphasise on voluntary deputation. If you look at the way the Lawyer’s Collective draft is framed, there is an entire listing of the different departments from where the Protection Officer can be drawn. To quote some of them, Women and Child Department, Education, Sports, Social Welfare, Law and Justice, Empowerment of SC and Socially Economically Backward Communities, basically departments who work on social issues. We’ve also given the provision for teachers, police officers, public prosecutors, to be appointed as Protection Officers. Finally, we’ve also allowed for the appointment of NGOs’ persons to the position of Protection Officers. These would be the three pools from which you can draw the Protection Officer. Unfortunately, the way the NCW has framed it, this has been left completely to the discretion of the State Governments. I’m really not sure how that’s going to work. The second thing is that they’ve taken out the references to the public prosecutor, police, etc. but they have retained the appointment of NGO members to the position of Protection Officers.

The second thing in our method of appointment is that it should be a voluntary posting. People should apply for the position. Otherwise it becomes a punishment posting and then the spirit with which the Act should be implemented will not get done. These would be the different options for appointing Protection Officers, which you would perhaps want to discuss and see. I am advocating for voluntary deputation, but then the other options also exist.

There has to be a certain minimum tenure for which a protection officer should be appointed. It helps for the continuity of the case. I don’t think I need to emphasise this point. Regarding jurisdiction, the Protection Officer should be affiliated to the court and have the lowest rung of an independent magistrate. It is up to the State to decide whether or not they want more.

Now we go into the functions of the Protection Officer. What we've tried to do is divide it into two. Very broadly, there would be functions under the Act which would be to ensure that violence is prevented, to ensure that the woman knows about the support services and help her access those support services, be it shelter homes, medical facilities, legal homes, whatever it is, and also to liaison between different authorities so that she gets the kind of support she requires. Prevention and support would be the roles under the Act. We've also tried to put in some amount of rules about emergency orders. Initially we said that if the Protection Officer gets a telephonic complaint they can forward it to the magistrate and then magistrate should be able to pass an order via the telephone. But that hasn't been agreed to. But at least the Protection Officer can get telephonic complaints, consult the police and help the woman and get the Direct Incident Report registered at the site with the help of the police. These would be the functions under the Act. However, there was also the need for court directed functions. That was one thing that had come up repeatedly during the consultations, which was how much power will you give the Protection Officer because domestic violence happens within the home. Can a Protection Officer walk into your home if he gets a complaint like that and perhaps to verify if this is happening or not should the protection officers be given such expansive powers? While we think it is important that the Protection Officer should have perhaps the power to visit homes we have done that subject to court orders being received. Home visit is possible provided that the court directs it. There are certain functions of the Protection Officer, which get activated pursuant of court orders and some, which flow from the Act and would be helping in the implementation of the orders, like for visitation etc.

The second thing is the registration of the Service Provider. What kind of eligibility criteria will you set for Service Providers to be registered under the Act? Should there be some basic space or facilities requirement, which can be prescribed under the Act, and unless they meet it they would not be allowed to register? Or should it be just a simple thing that suppose you are a medical facility then you have to abide by the standards which have been set under your professional association, what the IMA says you have to make sure that at least those prescriptions are being adhered to.

I'll just raise two more issues. One is, when we had provided the drafting of the Act we had made very sure that counselling, which will not be there. If there is counselling there would be counselling to the respondent to stop domestic violence and not counselling to the victim as well. But unfortunately not only did they include counselling to both the respondent and the aggrieved person jointly, but also, if you look at section 15 they say that the court can take assistance from a person engaged in promoting family welfare. We did not agree with those provisions at all. But the point is those provisions are there, whether we like it or not. That is why what we've tried to do is that within the rules have comprehensive prescriptions so that counselling is not misused or used to coerce settlement as is perhaps the case with a lot of CAW cells. The appointment of counsellors should be in a manner that they are not related to either of the parties. There must be a very clear statement that counselling is not for the purpose of reconciliation, unfortunately the NCW says the opposite, it is for the purposes of stopping the violence and getting an undertaking from the respondent that the violence shall not continue. If there is any settlement that can be entered into it should be made only at the option of the aggrieved person. If settlement is reached then the counsellor will have to record the terms of the settlement, give it to the court and the court will have to verify that that settlement was arrived at without fraud or coercion. If there is no settlement then you carry on with the case as it was. Then the counselling sections in the rules are incredibly

detailed because we just want to avoid any kind of pressure or coercion on the woman. Finally, the rules will also try and provide formats for making applications, formats for making Direct Incident Reports, formats for giving the information to the woman of the rights under the Act, of the kind of protection orders that she gets. These would also be provided under the rules.

Kirti

I see some problems, which are going to crop up. First of all I must say that this Act is by far the most outstanding piece of legislation that has been passed in recent times. I think that getting this Act is a great victory for the women's movement and I want to say that before I start off on some of the problems that can arise with the functioning of the Act. There are some conceptual issues which will also arise because a couple of things have happened with this Act. One is that though the right of residence has been defined for the first time it has been defined in situations of violence. Whereas actually the right of residence does not flow from a situation of violence within the family but is actually a part and flows from the act of living together or the act of marriage. So it is a bit unfortunate that the right of residence has only been defined in situations of violence. But having said so, probably women access, need the right of residence most in situations of violence. In AIDWA to begin with, we had asked for a separation of the right of residence from asking for other protective orders. We had said that the right of residence should be put down as a separate law and be spelled out in which situations it can be accessed rather than putting it with this law. But when we realised towards the end of it if we want the right of residence this is the best way of doing it because it is getting accepted by the Government so we decided to go along with it. But this is a problem that's there in thinking of the right of residence. So now we have the right of residence in this law which is applicable to all Indians and under the Hindu Adoption and Maintenance Act and that is only applicable to Hindu women and that actually clearly spells out that a woman, but again only if a man is cruel, only if a man is so on and so forth. That separation of the right of residence from violence within the family does not exist in our law and we still have to work towards it in some sense.

The second is that now that we've got counselling under the Act and Protection Officers under the Act, we'll have to be very careful how we frame the rules. Because of our experience in Tamilnadu we know how all investigations can be stopped for instance by the court because there is actually one section which says that the court should look at the domestic incident report before proceeding with the case. We'll have to make it clear in the rules that when a woman comes, a) that the court should proceed whether there is a Domestic Incident Report by the Protection Officer or not b) if there is no Protection Officer, nevertheless the court can appoint somebody else to make the Domestic Incident Report and to assist the woman if necessary and otherwise it should proceed with the case it self and see that the affidavit of the woman to declaring certain state of affairs exists in her house should be enough for her to get interim orders. What is our problem in the court? The problem is that the court never believes the woman. When she comes to the court and says this is happening they will say that no we have to issue a notice first to get the story of the other side. How can we believe you? But if she is saying on affidavit that this particular situation exists and she needs protection orders from him beating her again or she wants him to be ousted from her matrimonial home or put in another section of the matrimonial home then the court should be able to give certain interim orders. We have cases from various courts in the High Court, where if they have wanted to give the interim reliefs at the first instance. Of course the woman is liable for perjury if she has lied in her affidavit. So it's not as if the court should take an affidavit lightly and I think this should be put in. In fact my major worry with the Act

is how the court is going to deal with this. Because once you go to the court and if the court delays giving of relief then the entire effect of the Act will go. I know there are sections of the Act which say that notice should only be given for three days and that the whole case should be finished within three months but at the same time putting the entire burden on the Protection Officer to even serve notice can be quite counterproductive. Of course others will talk about whether we will be able to appoint sufficient number of Protection Officers and how the Protection Officers will be and that's a problem. Their bias and the access to Protection Officers is going to present a huge problem.

The other thing that often occurs in courts and which we would like to guard against is how the counselling goes. Now that counselling has been accepted within the Act, I think firstly, the rules should state clearly that counselling can be done only after interim orders are given to the woman, that it is only after she gets an order of protection, an order of interim maintenance or child support, and only after she gets custody that you can send her in for counselling. Otherwise, what happens normally is that the woman is outside without custody, without any money and she is sent into counselling and obviously you know which way she is going to go because she just can't live without anything. So I think perhaps we can try to remedy these problems in the rules. I also wanted to just add something to the reasons why this Act was necessary. I think, this Act was also necessary because under section 498A, apart from what you stated that it was being used against women, I think the criminal law had limited scope and it could only result in punishment to husbands. It wasn't helping women, it may have got their dowry back but at the same time she needed other reliefs which she couldn't get under 498A and it was necessary for us to have these reliefs under a civil law because the criminal law has its own limitations. Also under 498A even when they gave bail they wouldn't put any conditions on the bail.

Flavia Agnes

I endorse the apprehensions what Kirti expressed, but I would like to add a few more in terms of the conceptual clarity of the Act. First and foremost let me start, I'm sorry for doing this, on a slightly cynical note. We've been engaging with the law for a long time and every time a new law comes we are full of hope, this is it, this is the ultimate and after this it is going to be liberation for women. So when we got 498A we felt very good. Then we got another Act, which has now gone into oblivion, an Act called Family Courts Act. It was said in the Report of the Committee on Status of Women in India that there should be Family Courts. Now my problem with the Domestic Violence Act is that somewhere it negates the gains of whatever and wherever it was made under the Family Courts Act. Because there are no Family Courts in Delhi so it does not come in the mind of the drafters and the major NGOs in Delhi, sorry to be saying this, but in certain states like Maharashtra there were certain gains made with the Family Courts Act. Why I am saying this in particular and this was again and again brought to the notice of the Lawyers Collective, don't eliminate it completely because already you have set up a machinery there and now here we see that Family Courts is not even mentioned in the Domestic Violence Act. Why am I saying that? Because wherever the Family Courts have been set up the jurisdiction under Section 125 CrPC has been transferred from the Magistrate's court to the Family Courts Act. The problem also came with the Muslim Women's Act. The Muslim Women's jurisdiction is in the Magistrate court. Supposing a Family Court is there and a Muslim woman files for maintenance under section 125 and husband says I have divorced her then she is forced to file under MWA. MWA jurisdiction is not with the Family Courts so she goes back to the Magistrates court from where she was supposed to be liberated and brought here. Every judgement that came on including Daniel Lattiffi did not take heed of this problem. Now here again we have the same problem. For

divorce or other things we come to Family Courts, for maintenance under section 125 we come to Family Courts but for this Act we go to magistrate's court. At that time we had discussed there would be alternate or concurrent jurisdiction but that's not there. Again why I am saying this is because Family Court is supposed to have a machinery of counsellors. Now, only in Maharashtra there is counselling worth its name or at least counsellors are paid by the state exchequer. Everywhere else counsellors are appointed either for three months as in Tamilnadu or in Andhra Pradesh that doesn't have a counsellor or in West Bengal where counsellors were appointed and never been changed at all. Here we are having so many intermediaries. Counselling is one thing, Protection Officer's another and Service Providers, these are three different mechanisms. We could not cope with one mechanism of simply Family Courts and Family Court Settings. Same judge is dealing with Andhra Pradesh bomb blast case as well as cases coming to the Family Court. For two days a judge is handling a bomb blast case and the other two days the same judge is sitting in the Family Courts. We are not aware of the situation. Just because I have done this Family Court study I can tell you. Lok Adalat and Family Court both the institutions are involved in the similar thing i.e. Reconciliation. The major focus of these formal institutions is welfare of the family. We asked for the Family Courts Act precisely to safeguard the interests of women. I remember Lotikadi's comments in those times when she remarked, "how has this welfare of the family crept into it?" The Family Court Act says that those who are committed to the welfare of the family should be appointed as judges and counsellors. This is what we've got. How do you think something different is going to happen here? I think this is going to be the problem. May not be for major cities like Delhi, Bombay but as we filter down to the districts this kind of ideology is bound to be creeping in. Section 125 again was amended in 2001 to say that all interim orders should be passed within six months. Now tell me, even in Delhi or Bombay, even it doesn't come for filing reply in six months so how do you think it will, of course it looks very good in a conference room sitting here or in a conference but reduced into ground level court litigation complexes how when you say this should happen that should happen, that report should come. Dowry Prohibition officers exist only in papers. PNDT Act officers are supposed to be there, authorities are supposed to be there not there, but suddenly we are feeling good that this is going to happen. I hope for the best that this is going to happen in the near future. It is not going to happen in the states which are cash strapped. There is no money, including in Maharashtra. Extra allocation is not going to happen and the Act will not come into effect because resources are not there. We used to have orders under CPC, section 39 interim injunction of Special Reliefs Act and we used to get orders in a day or two days or three days, now we will not get because all the courts will evade their responsibility. They'll say first go to the authority, first get the report and only then you go ahead with this. So according to me all these problems are going to surface. I see no answers. Drafting Bill on paper is one thing and I feel really happy that young people like you are involved in the process and it is nice that we are going to have something but having been the movement for 25 years I'm not as optimistic about the outcome of it.

I have another problem which has never been surfaced strongly, which is the right of the non-married partner. Non-married partner, cohabiting as we have said, could be a second wife or it could be an extra marital affair of a man. Now with that we have at one level a compulsory registration of marriage, as said in a recent Supreme Court judgement. But according to me compulsory registration provisions becomes redundant if this Act comes to force because why should I register my marriage if I get my rights without registering the marriage. I don't have to be the first wife. Of course I get my rights of residence, maintenance and protection order I don't need more. Minimum that much I get or I'll get under Section 125 also for my child, illegitimate child. In that sense, monogamy under the Hindu marriage and these kinds

of bastions that we had created or the pedestal on which we had located ourselves that this is a monogamous marriage and this marriage should have this kind of proof. If there was no second wife under the section 50 of the Indian Evidence Act we would be having the presumption of the marriage. As far as I think, the presumption of marriage or the registration of marriage becomes secondary under this Act. I'm not asking for divorce. I am very happy because I have two or three second wives cases that I am handling. As soon as this Act comes into force at least some way I can protect those women's rights. Otherwise they would have been thrown out of the court, interim order we've got, still status quo maintain and we are waiting for the Act to come into place. But if it was first wife, second wife and one house is there or the man is not capable of providing two different shelters how do we deal with this. I think this is one issue that is going to come of Hindu marriage and it monogamy and somewhere I think, this cohabiting term has not spelt out is there a hierarchy. First wife and second wife, marriage partner and non-marriage partner, how are we going to deal with this because we know that Hindu marriages are not monogamous on ground. They might be monogamous on paper. According to me these are major problems that I foresee.

Kumkum Sangari

I was also thinking about the Service Provider issue. Very seriously because our experience of service providers in the form of NGOs in the women's movement has largely been that of NGOs that are either offshoots of the movement or involved in the movement or they support the movement. But we know that with neo-liberalism, NGOisation is rapidly taking a different shape on the one hand. We know for instance, USAID money is replacing European donors and is sweeping Pakistan, Sri Lanka, and has made very serious inroads in places like Rajasthan, Madhya Pradesh and so on. And that this is really based on an appropriation of women's issues. So this massive funding is now coming in to monitor illegal Bangladeshi migrants under the guise of working on trafficking. This money is coming in to fight sex selective abortion and I think it might take very peculiar shapes in terms of women's rights to abortion in the long run. We need to think about this. The second is that the Hindu Right wing has actually moved a hydra of NGOs. It takes so many different shapes. When we think about these rules its not a question of the state absolving itself of its responsibility by passing it on to the NGOs, which is only one tiny part of the story. But I think, we really need to think about what are the options for co-option and rechanneling of women's issues into other directions in the long run and how are we going to make rules? Which I think lawyers are better able to conceive than I am. In order to foresee this and actually find ways of preventing what might be a very ghastly scenario.

Subhashini Ali

I just have one small point to make and which is about what Flavia said about this Family Courts. Every state has got a very different experience of family court. Whereas Kerela people say it has helped them a lot, Bombay you seem to think they are a good idea but at least in Uttar Pradesh we've got the most ghastly experience of Family Courts. First of all the bench is kept vacant for years because nobody wants to become a family court judge. Then those who do become they also have the most horrendous kinds of attitudes to the whole question of gender justice. In that sense its good that every thing that concerns a woman's rights especially in the family is not all dumped at the doorstep of the Family Court. There is an alternative place like this law envisages and I think that is something that we should welcome, because as it is the courts are not functioning. They have got a huge backlog of cases and most of them are headless most of the times because nobody wants to be there. I think, that while we are on the subject of this, maybe, you've done a study of Family Courts that's correct, but since most of us here had demanded the Family Court I think its time we

revisit this phenomenon and see what it really has done in terms of delivery of justice. I think in that sense from our experience we are happy that this envisages another place where the woman can go with her case and not back to the family court because that's not delivering in many places.

Secondly, many of the things have already been included in the Act. We can't get rid of certain things but I think now is the time when we really have to be very intelligent and very quick so that some of the dangers we are foreseeing we can minimise to the best extent possible. I think certainly I would reiterate this question of the process of justice not having to wait for this mythical agency that is being provided, the Protection Officer. The Protection Officer, he or she may not exist, he or she may not be in the mood to do anything, so therefore the process should not be dependant. That is something that we should all put as much strength as we have at our disposal to ensure. Otherwise we are going to be in big trouble with this Act. The most positive thing of course is that it does consider domestic violence within the family as a crime. In addition to that something that is now coming out of all these laws that we are talking about, and I think we should now take up seriously is again, this whole business that the premise that the Government and other agencies start off from is that the marriage is a holy institution which must be protected at all costs, and at all costs usually means at the cost of the woman and her peace of mind etc. This whole emphasis on reconciliation and arbitration which is coming there in every law at every point which is what Family Court judges are also emphasising, which is what these counsellors emphasise. I think that from the women' movement there should be a very concerted attack on this whole question of arbitration reconciliation and a demand that a crime should be treated as a crime. Reconciliation is one of the factors that is responsible for total denial of justice to women in these situations of violence. NCW also comes out with that thing. In that consultation the whole thing was where will the woman go what will she do? If somehow it can be patched up if somehow it can be saved its got to be saved. I think that whole notion is something that we have to fight against much more. Than we have been able to do seeing the results.

Indu Agnihotri

I'd just like to say one thing. This morning when Reva Nayyar was here she was talking about the Bill and saying that we should propagate it more. I think, maybe what we could do is consider adopting a resolution here in this conference where we write to the Government giving certain very specific suggestions about the rules that have come, the discussion that has come here, highlighting both the positive points, the apprehensions and laying down certain basics in terms of what we want within the rules and what we do not want within the rules. I think it might be useful if we could do that, if Asmita, since she has been talking about the rules, Kirti, Flavia, if she is here also. Maybe this could be brought in tomorrow morning so that we can actually write to the Ministry which is or course scouting around for some appreciation but we also give them a direction saying pleas do this now because there is no point if you pass the Act but are tardy on the rules.

Flavia Agnes

I just want to make a correction, I did not say Family Courts are working well.

Kumkum Sangari

It's a very cheerful note. I think we are as a movement alive and growing only if we really constantly revise our own at the moment most heartfelt passions. I wonder if you want to respond to these suggestions briefly and quickly?

Asmita

I absolutely agree with the fact that this law gives the right to residence at the time of violence and that's not the way it should be. We should have a law on community of matrimonial property, but that only deals with matrimonial property, what about other forms of natal property, which is something that you raised. As far as the counselling is concerned there is a provision in the rule which allows for the order of counselling to be passed only after interim orders are passed. The second thing is that there is a reference to the Direct Incident Report and that is problematic. Perhaps we can look up guidelines or have the rules say it is not necessary or in the absence, and those are things which have been included for shelter homes and things like that. I'm sure we can include it for the court. Also I'd just like to read out section 26 of the Act. "Any relief under this Act may also be sought in any legal proceedings before a civil court, family court criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of the Act". This would mean that this concern that you have raised, there is a certain provision in the law which might help, because it says that you can add claims under this Act to existing proceedings.

Flavia Agnes

The officers have to be attached to this court as well as that court

Asmita

I'll just get to that point because that was the next point you raised. As far as this Act is concerned, why the magistrate was chosen was because we felt that the relief under criminal law is far more expeditious than relief under civil law. That is why the question of magistrate has been introduced. But these proceedings can be gone on with any other thing.

Flavia Agnes

Should we then put maintenance back in the magistrate's courts?

Asmita

It's under the family court. I don't think I need to get into that point because right now we are talking about this Act and not Section 125. The only point that I'm trying to emphasise upon is that this Act is not necessarily only to be proceeded on under the magistrate's court. If there are proceedings in any other court then it can be added to.

The other thing is that you speak about too many officers being there. That was the point that I have been trying to make continuously that the Officers the Service Providers are only to facilitate and to support the woman. The entire process can be bypassed. We have greater hopes of implementation of this Act.

The right of the non- married partner, as you said that Hindu Marriage Act says something but reality says something so it is already there. It is happening. The point that this Act makes it that it doesn't matter, even if you are in an extra-marital relationship you cannot have domestic violence there, that's all that it is trying to say over here. Second of all as far as the residence order is concerned the residence right is only vis-à-vis the shared household. So if you can't show shared household you will not get a right to residence. That is a positive thing.

As far as concern relating to growing fundamentalism in NGOs and their Hinduisation, I think that's the point that I was trying to make. You have to specify on the eligibility criterion of the NGO and say very categorically that these kinds of NGOs cannot register. Also, I use

the term NGO to denote what a Service Provider should be but you can also have government facilities aims, etc. to register under the Act as Service Providers so they are duty bound.

As far as the Protection Officer is concerned, there are a lot of things. First of I'd like to emphasise that they can be bypassed and we should have rules allowing for that to happen. One good thing about the Act is that it allows for the accountability of the Protection Officers. You cannot have a Protection Officer say I don't feel like helping you today. The will be subjected to legal action.

KumKum Sangari

If these Rules could be circulated then a Resolution could be drafted. A slot may be put tomorrow to separately discuss the recommendation.

Day 2: 21st March, 2006

Session III: Women's' Employment and Labor law: Dialogue between Trade Unions and Women's Organisations

Chair: Indu Agnihotri

We are now going into a session where we are trying to bridge some of the gaps. We are saying that rather than the labour movement going on its own track and the women's movement on its own, maybe the issues that have been coming need to be discussed together. I think we can see this more as a kind of a round table discussion. Renana is here with us who is working with SEVA. Amarjit Kaur has been both in the women's movement and in the TU movement. Subhashini is also crisscrossing between the TU activity and the women's organization work. And Hemlata works with the CITU. Bulu has been with the YWCA but also involved with Forces looking at child rights issues. So we will just go down the list.

Renana Jhabvala

I would like to focus the discussion on the women workers. I think the first duty of a trade unionist, is to organize. That is not actually the universally accepted position, because in the TU movement, there are different ways of thinking about what the TU movement should be doing. And when you talk about organizing women workers, you are basically talking about bringing women's solidarity, giving them a voice and building up struggles around their issues as identified by them. If we talk about women workers and organizing them, the issue is what is women's work? Most of women's work is in the informal sector. What we need to be doing is identifying the issues that they face as women workers. Of course many of us have been doing that. For example the issue of home based workers and the non-recognition of them as workers, people who sell on streets, the issue of small farmers, women farmers, issue of waste collectors, issue of construction workers, many who are women. The issues change. In the last 10 years, for example the issues of agricultural workers, construction workers have changed dramatically with very heavy mechanization coming in. So I think we as trade unionists have to be very alert as to what is the present issue.

The second thing that I want to talk about and which is the topic for this session is labour law. I think the most important thing that we see now is the decline of labor law. In the sense that in most states, most labour laws are not implemented. There is an attack on labour laws to dilute them, to get rid of them. The Contract Labor Act is practically non-existent. Almost everything is on contract. I think the most important thing that one can say about labour law is the very small space that it is now occupying. One reason of course is the changing balance

of power between workers and employers. Another reason of course is that labour laws address what some writers have called the “industrial man” i.e. the full time male worker in an industrial establishment with an employer-employee relationship. With the disappearing of the industrial man and the industries, the significance of the labour laws is continuously declining. So the question is what do we do with the labour laws? The labour laws came with a great deal of struggle. From the women’s workers point of view, there are a few suggestions I want to make about labour laws of now.

First, is that there are certain labour laws that need to be rescued means that there is very little political will to enforce labour laws whatsoever. If we take the stand – enforce all labour laws, we will feel righteous but we will never win. I think there are certain labour laws around which we need to rally. First talk about women workers in the informal sector, I think, the Minimum Wages Act is one law that workers feel the strongest about. Women in the informal sector are getting 35, 40, 25 rupees a day and everybody is happy. You do need a certain minimum and there is a very strong ideological attack on minimum wages. The ideology of course being that if you enforce minimum wages, then you will have less employment. There are also arguments that it is not true. This is the attack on minimum wages and it has been continuously eroded. So I want to put it in recommendation that our political view behind one or two Acts, the laws like Minimum Wages Act which touches the majority. The second thing is that we need new laws for workers. Specifically I am saying this because we have so many labour laws, lets us implement them, why do we want to get new ones? But the labour laws we have don’t necessarily affect a lot of our worker population. One Act that has been talking about is what was called the Umbrella Legislation for Unorganized Workers. Unfortunately there is strong political will not to get that passed. Nevertheless, that is the whole area of social protection for workers on one hand and certain minimum labor conditions on the other. The important thing I think around the social protection law is that we need to be sure that it doesn’t hinge on the employer-employee relationship as all labor law does. Because experience is that when you got to try to prove the employer-employee relationship, you spend all your time only proving the relationship. You never enforce law. We need to cover those as defined as “workers” not as employees. Another thing is that along with the minimum wage, we need to be thinking about a minimum income because the minimum wages, a) applies only to employees and that is very clear, only when you are an employee, you do need an employer-employee relationship if you are applying the Minimum Wages Act.

Secondly, the Minimum Wages can only ensure a minimum for the day that you work. People really need a minimum income. So if we are thinking of new laws, then what is the law which will ensure some kind of minimum income for everyone who works? Yet another new direction that I think is important is policies and laws that promote organizing. I think we really need to think of new forms of organizing, both in the TUs and elsewhere. The old form of TU organizing where you had an industry and an employer – we have seen what has been happening, the declining membership and the declining results. Going back to what I was saying, the issues have changed. New forms of organizing need to be around these kinds of issues. Example is the issue of street vendors. There are no employers but there are very strong forces against them so then one has to organize, bargain, struggle and deal with those forces. The other thing is that the TUs are not the only form of organizing. We need different forms of organization and it is not right to dismiss and say that all NGOs and have nothing to do with workers. There are many types of member based organization, including cooperative, mandals and self help groups – all of which are forms of organizing which have been

attracting workers unlike TUs. And if organizing is the most important thing that we need to be doing then we need to be looking at these forms and promoting them also.

The other thing about organizing and TUs is that we were really are in a new era where the corporate sector has expanded itself into almost every sphere of life and we have judgment after judgment even for the labor issue which is very people unfriendly. Especially the small self-employed are facing an almost unprecedented attack. And similarly the other forms of organizing like the cooperatives are also facing an unprecedented attack. I want to give a few examples about what has been happening in the cities recently. With the corporate sector becoming global, we are going into a rapid urbanization which is called urban infrastructure. And in that context, the livelihoods of all small workers, small businesses, street vendors, is being rapidly shut down. Two types of judgments we are getting. One is that all businesses in residential areas should be shut down. And in the slum areas in the studies that we have done shows that at least 1/3 rd of houses are used as work places. We just got a Supreme Court judgment, Bombay has had a judgment before that and so have other cities, which is that get rid of all the street vendors – pavements are for people to work on, you don't need any livelihood there. Last year we have seen three public suicides of street vendors on the streets. I think that is a measure of the desperation. As far as the cooperative sector goes, I think all read about Kurien and now Amrita is fighting with him, but the issue is that the Amul is one cooperative and the NDDB is the one national cooperative that we have always been holding up as a model and that there are forces that want to get rid of the cooperative movement. And our own experiences in the Sewa cooperative bank that we are continuously kept small on purpose by the laws, by the Reserve Bank of India, for example, they refuse to give branches to the cooperative banks no matter how successful, whereas the private banks can have thousand branches. Another thing that has just happened is that they have put taxes on cooperatives equivalent to the private sector.

Lastly, the labor movement can no longer be thinking about employees in big businesses or employees in the industrial set up or in the employer-employee relationship. We do need to be looking at what is happening to the small business and those who are self employed.

Amarjeet Kaur

Whenever we went for laws and the law itself was used against women, be in the labour movement or be the women in general, there was always a sort of back lash saying that why do you ask for laws? I will just give you an example, when we got a law on Maternity Benefit, so many of our women from textile industry were thrown out because now the *malik* will have to pay for that period. But we didn't agree with the arguments as to why we should have taken the Maternity Benefit Act because it is bringing problem. Similarly when we had the Equal Remuneration Act after so many years of independence in 76-78, again women had to suffer in informal sector. Certain studies were made when the women lost their jobs in certain areas. Then we were being told why are you insisting for laws which go against women? The laws don't go against women but actually it is the implementation, monitoring, the lawmaking, difficulty in structures, procedures and the political will of the society as well as how the bureaucracy works and the law implementers look at it.

My first comment is we need laws, struggles and reforms. We have to push and work at every level. This engagement with law, especially for women in the TU movement, and the women's' movement at large, is becoming more important because of the whole process of globalization, liberalization and privatization. The discourse in our country pushed for labour reforms, and when we asked for labour reforms, we were not listened to. The first labour

commission gave recommendations which have not been implemented in India. Our demand for labour reforms were ignored and the 2nd labour commission was set up at a time with terms of reference by saying that because of changing economic scenario, there is need for labour reforms. Reforms were proposed not to favour labour but to suit the conditions which are being created by these market forces. Some of those Renana was trying to list though by examples. That is the kind of situation which is emerging now. Our engagement in law is becoming more critical. Because a reversal process is taking place – whatever gains were made in the 60s and 70s by the labour movement and whatever gains we could get from the judiciary – that kind of judicial activism is totally different from what exists today. Today's judicial activism is about curbing whatever we had. The Contract Labour Act is a typical case. The definition of industry as defined by the law is under attack. The case is pending before the Supreme Court. The judgment that we earlier had from Karnataka is supposed to be reversed. The judgment on the Contract Act has been reversed by another judgment by Supreme Court without changing the law or removing it from parliament enactment. Judgment after judgment is coming which is reversing the whole process – whatever were the gains.

Similarly the whole idea of export promotion zones and the special economic zones. In writing they are saying tax holiday, in writing they are not saying TU holiday also. But in practice they are promising that there won't be any TUs and already we know there are no TUs in the EPZs and the special economic zones. All the efforts which we and the other TUs have made, have come up with stiff opposition and these are the areas where 80% of the work force is women. Majority of them are unmarried. And a vast majority of them are migrant women from different states. So it is important for us to debate more on law- what kind of laws we want. I will not agree that the organized TU movement in this country was not engaging itself into organizing the unorganized or informal sector and new forms or new methods were not being used, all that is happening. We know that in most of the formal sectors also, almost 40-50-60 % places, it is not a regular worker. It is contract worker, casual worker, daily wager, outsourced work. Even government departments are outsourcing. Unions can't survive unless those contract workers are also organized by the unions. These debates and discussions are already happening. This is a serious agenda before the TUs and they are doing it. Another area where we have to definitely discuss about is the definition of worker. We know that domestic worker is not considered to be a worker in the definition. But how to ensure their rights? Similarly mushrooming of private schools that have come up like shops, they are not schools by my definition. All those teachers are getting 800-1000-1200 rupees, they are not in the worker's definition because universities and schools etc are not considered as industry. How could we see to it that they could be covered under various benefits? What will happen to all these so called *Shiksha Karmis* or *Shiksha mitras*? Either *Sarva Shiksha Abhiyan* or different *Abhiyans* which state governments are doing or the central government. How should we include income or wages of those workers? Vast majority of the work force are being put into the lower level, who are being paid much less than the stipulated wage declared by any state. How should we include income or wages of these workers? So there are areas where we will have to engage into new kind of law making for coverage of all these people. Home based sector workers, whatever activities we do at home for earning, there is already an ILO convention, but no ratification has taken place in India. We know how difficult it was to get it. I fully agree that it has to be a political process and to push the things, one has to have political debates also. This home based workers thing we wouldn't have got Indian government supporting it if at that particular juncture, for a short period a new government came and we caught hold of the new minister who could be somehow manipulated and he went and voted in favor of this. Otherwise every government

was opposing it. I think the sardarji was there at that time – he had just taken charge and two ministries were under him just one day and after two days the delegation went to him – unions and all and somewhere we went and supported. But we have not got it ratified and there is a problem as far as that is concerned. This whole issue of the kind of law which we will have – this unorganized sector – they have prepared something – there were changes which have not been accepted, it is supposed to come – how we do it. And we must also debate on the Rural Employment Guarantee Act – what are going to do about it? Looking at the Act and its implementation processes and seeing to it that the women benefit out of it is essential. Women headed households in the rural area – those are the houses that should be taken up. Who is the interpreter, who is the lawmaker if we look at it in this whole scenario of socio-economic changes which are taking place, the state is abdicating its responsibility. The role of the state in making of law and implementation has to be asserted again and again. We can not allow the state to run away and that has been happening since the new economic policies being pursued in our country.

Subhashini Ali

I think this is a really very crucial dialogue because it has only been initiated today. I think this is something that has to be carried forward – the dialogue between the TUs and the women's movement and why because as we have all in the women's movement been saying since the last 15 or 20 years, since 1991, that the processes of globalization impact most adversely on women – women in all sections of society. I think sometimes what happens is that if women's studies take up important path breaking studies but I wonder this good work being done by women's studies is not read by any one else other than women. I think it should become more factored into everything else. The discussions that we have been having in the women's movement, about the adverse impacts of globalization, definitely when we talk about women workers, and of course with as expanded the definition of the term as is possible. I think the way in which the forces of globalization are exploiting the women who are working is certainly not computed. I don't think it is really becoming as important part of strategizing against globalization as it should. If we look at it, there are so many ways, for example, the areas where the state is withdrawing – those responsibilities are being thrown on the already broken backs of women and those women called “just housewives” or just that women who are mothers are now also being given more and more responsibility as far as taking care of unhealthy members of the family etc. etc. If you take the institution relating to the aanganwadi worker, it is huge amounts of work that the government agencies and the government departments should be doing. Every time they find a new thing, they just put it on to this aanganwadi worker with everything from AIDS to condoms to census enumeration, as well as looking after the women and children in the village and etc. etc. etc. So this whole maximization of the exploitation of women who are driven to desperation – what globalization is doing to them in other spheres, the way it is being utilized for the maximization also of international corporate profit – I think it is not something that has been adequately addressed either by us in the women's movement or those in the TU movement and this is something that would be the subject of further dialogue between the TU and the women's movement. We can certainly say we have not taken up the issues of the women workers to the extent that we should have but that's not the end of the matter.

I think that there are so many things that have to be taken up and addressed and fought and struggled against in different and more new and effective ways but that can happen if this is something that is accepted by all of us. Part of it is what Renana and Amarjeet talked about – the way in which labour law is being totally flouted in this country – the way in which anybody can say that it is coming in the way of the FDI coming into the country etc. Because

actually labour laws are the most flouted of all laws. For most categories of women who are working there, it is actually no law at all. But in addition to that, I think that these whole sectors that are being opened up we have really come to understand that the kind of work is being done by women because no men will work normally in such low wages or no wages at all in such terrible and unprotected conditions. Therefore how certain other things that we don't always think about working women also increase this vulnerability situation of women to work for anything that they are being given. For example when we talk about this whole dowry problem and the marriage expenses of women, not that just all the young nurses from Kerala who are working all over Indian and private nursing homes are doing it to earn their dowries. Places in Tamil Nadu are actually seeing a kind of slave labour of women.

In Tirupur there are factories where women are kept for three years, they are not allowed to go out of that place, if somebody in the family dies and some death certificate is produced, then they are allowed to go for the *shardh* ceremony. TUs can't enter that whole arena – for a whole gamut of reasons. And the women – they are young girls who are working there because at the end of those three years they will get 30 or 40 thousand rupees which they feel will then enable them to get married. The department stores in Tamil Nadu are also doing this and its very interesting – the owner of the departmental store will get young girls belonging to his caste with whom he has still got caste relations to come and work in the same way – 12 hours at a time and they are kept in a kind of a room and they are also paid in the end of 2-3 years which goes towards marriage expenses and dowry.

You spoke about the special export zones and I think much attention has to be paid to what is actually happening there and the conditions of work there. Two things I would like to end with. One is Renana talked about hawkers and the section of women who are in retail trade, I would also like to say that this whole entry of FDI into retail trade and corporatization of retail trade is something that we should think about literally seriously – which wipe out the millions of self-employed women and finally, the question of night work. Night work for women was a big plank of the TU movement that they were opposed to it but then the government got round it in this sector, to start with telephone and then all range of other units, now we have come to a situation where most of us or many of us compromised and said if we don't accept it then women will not get jobs in the new kind of vocational areas that are opening up. We said you have to have safeguards, but we are seeing that there are no safeguards and protection. A horrific incident in Bangalore is being reported but we don't even know what this license to night work for women has actually meant in terms of harassment and assault and forms of increased violence.

This is the convergence when we talk about violence, dowry and other issues which have been central to women's movements – we also have to see what these issues are doing to women and who are working for the kind of pittance that we can't even imagine in the most horrendous of circumstances. Therefore I think the most important thing what we are initiating is an initiation of something that has to become a much more serious dialogue between various sections of the women's movement and the TUs. It is very good that Amarjeet and Hemlata are here but this also has to be done in a much more intense way with all sections of leadership in the TU and women's movement. And I think this absolute necessity of how essential it is to organize women who are bearing the largest burden of exploitation of the globalized era – how essential it is to draw them into the struggle against it for it to be successful – I think that point needs to be given much more real recognition which then leads to more attention paid to organization struggle etc. etc. these are some of the points that are needed to carry this whole what we have done today forward.

Veena Mazumdar

Just add one more category to the kind of work coming to the anganwadi worker, they are going to be given this additional responsibilities under Asha launched recently by the Government of India.

Hemlata

I agree with Subhashini that we have a good beginning for a dialogue between the TUs and the women's organizations. I think it is important because as she also said the process of globalization – they are attacking the working class and women's workers are the worst affected because of this. I think by cooperating between the women's organizations and TUs because more and more women are entering the work particularly in the informal sector. Around 96% of the women workers are in the informal sector, by cooperating, the TU movement can also be strengthened and the women's organizations also and together, they can work to reverse these policies.

About the laws – the laws most of them, particularly, pertaining to the working class and the women workers – whether it is the Equal Remuneration Act or the Maternity Benefit Act, they came into being only after a lot of struggle. So I think for the enactment also, the movement has to be built up and there should be struggles. Even now we see that most of the Acts are not implemented. These also apply to the organized sector. In our country, the organized sector is about 7% or so. 93% are in informal sector. So now the campaign is going on that the labor laws are an impediment for employment – I think it is not correct because as it is they are applied only to a small percentage of the workforce. Even in the organized sector, the informal work relations are increasing as Amarjeet has already told. Even in the public sector, around 50% of the work force are in coal and steel, in such big industries also, by contractor workers, casual workers, daily waged workers, and even the government also is resorting to such practices, particularly when it comes to women. There is an ideological attack against the stringent labour laws system in our country, I think, counterpoising the workers and the unemployed. There is pressure that because the labour laws are not implemented then we will get employment so a type of ideological attack is also there. I think this is also one of the dangers which has to be faced. Whatever the labour laws are there, they are also to be amended and changed like Subhashini mentioned about night shift work and giving permission for exemption. Recently, in the special economic zones, a law has been passed. It could be prevented that labour laws could be exempted, but we are giving permission to the state level already in several states, there is no inspection and the labor commissioners also are not allowed into the special economic zones. Even otherwise also, in many state governments have given orders that there will be no inspections. Now from the highest level there is campaign that there are a lot of inspectors, around 30 who go around each factory but there is no inspection. Accidents are taking place because of the lack of inspections. So the implementation process also is not proper. Last point is that, it is not that trade unions are not organizing the informal sector, it is our experience also, the membership of the TUs are also increasing particularly in India and because most of them are organizing in the informal sector. In CITU around 50% of the membership is from the informal sector. In the states like Karnataka, Himachal Pradesh, 50% of the membership is of women. In some other states it is more than 40%. TUs can be the genuine representatives because they are accountable to the workers, they are membership based organizations. In the changed circumstances, they can plan different strategies, like cooperating and other forms of strategies to increase their membership and organize the informal sector because the problem is that whenever there is an organization, the workers will be terminated. Such type of danger

is also there, so this is the situation in which we have to work and the women's organizations and the TUs can work together to protect the interests of the women workers.

Bulu Sarin

The child at Forces is in a very unique position because it is related to the TU and the women's movement. There are 19 archaic laws that talk about the survival and protection of children. We need to look at them also how they are impacting the child of today. Importantly when we talk about the child, the mother comes into the picture. And with the mother, comes the whole aspect of maternity entitlements which Forces has been engaged with. I would say it has not reached any conclusion as such because Maternity Benefits Law means just a law on paper, not benefiting women in the organized or the unorganized sectors. Because large number of women who are in the unorganized sector, there is a list of 122 occupations that are there, almost 100 of them are carried out by women. The maternity benefits and any other welfare activity are not talked about for women in those laws. So something about women's movement and TUs coming together specifically about ensuring maternity entitlements would be one point – we have been talking about it but it has not come to any conclusion.

Second is the whole aspect of protection of children, the laws related to that and the various Acts that cover child protection and crèche facility. The mines, factories, plantation Acts and all that they are not literally followed. Another aspect of law that is not followed is the PCPNDT which is again directly linked to the declining sex ratio. So these are three areas that we need to look at. From Forces side you can say definitely the crèches that need to be there are not there, the timings of the crèches do not match with the working mothers timings. The age at which the children should be coming to crèches is not specified because children over the age of three are coming to crèches, what about the children under the age of three? The training of crèche workers is important because when in the case of aanganwadi workers, we know that she is also supposed to be giving training to Aasha, we talk of the ICDS wherein we talk about the aanganwadi worker not considered a regular worker at the same time she is not given any kind of training. There was a study that was carried out and we observed that the training was for one day – so how much can she learn in one day? Again coming to this access to mothers to the crèches – because there are not as many crèches compared to the number of children that are there – how are these numbers going to be allocated? Someone talked about allocation of money for implementing laws, and this is a very important aspect we need to look at where the child is concerned. The care and protection of the child cannot be ensured unless enough money is allocated. Then again issue arises about the number of crèches and ICDS centers. The recent commitment of the CMP was that there would be universalisation of the ICDS. But we are seeing that children in the far flung hamlets and non-revenue paying villages are not covered by it. These are aspects that we need to bring up and work together with the women's movement because we know TUs are there to support us, the women's movement have not taken that kind of lead I would say so. As Subhashini said, we may continue from this, this is just a starting point. Maybe the laws that pertain to children can be looked at. I can list the 19 laws and I think lawyers here definitely know those 19 laws. They are enacted in 1880s or 1890s which govern the children of India today.

Discussions

Surinder Jaitley:

There are two points which I have to make. Firstly the studies made by the women's studies are not getting into the policy formulation or the law making process. There is a lot of appreciation for the results gained from these studies. Twenty five years back before the food

processing industry was recognized as an industry, at the brainstorming session, the then minister of food processing, called a meeting of the captains of industry, women studies, the TUs and others and they discussed the issue and said it is going to be a big thing for India for four reasons – for improving the nutritional status of people, for increasing employment, for earning, for increasing foreign exchange etc. etc. Now it is a known fact all over the country, that in the food processing industry, 90% of the workers are women. They have been doing it in the traditional set-ups and also in the modernized industry. When we pointed out, that we sent the written questionnaire to 30 units to tell us the number of women workers they have, all of them said that they don't have any woman workers. And when we physically visited these units, including the prestigious Kissan and Northlands and others, we found halls full of women, 200-300 women in one hall performing all kinds of operations whether they were technical in their terms like cooking and preserving in the bottles or tins or in the cutting or the peeling which is called the unskilled labor. Having pointed this out and being assured that they will not exclude these women from the industry when technology comes and they asked how can this be done? The suggestion was given that you have to upgrade their skills. They are already engaging in all these processes, if there is any other machinery entering, you can upgrade their skills – it was very benignly said that it would be done. I have never heard any TU talking on behalf of these women. They continue to work in the industry, in the informal sector and no benefit is there for a crèche, restroom or any other facility. I did the study in Delhi, Nainital and Banaras. We had the opportunity to pose these problems in front of the minister at that time before the formation of that ministry, but it doesn't get into any kind of result. I don't know how these studies can get into the process of law making and the process of providing benefits to the women in the informal sector. The second point that I want to make is that while the law is changeable, we should redefine things also. The women headed households are where there is no earning member, there are a large sections of women who are the heads of the households even when the men are earning but they are in another city for example, we did a study of 400 *malis* in Delhi in the public gardens and they come from three districts in UP and this is Jaunpur and Pratapgarh and women have not seen a paisa from these men – firstly because they earn very little and there is nothing to send home, secondly they don't go home because they are not able to carry, when they go home they carry things like some hair oil, some powder or something like that. And the women are looking after the families themselves, earning a pittance – 1 rupee 25 paisa in 1982. And they say even this is paid sometimes in kind in coarse rice or something like that. In the village some people were sitting when the women were flaunting at their face – ask them, what do they give us, and we are working in a multiple tasks in order to feed our families. A women headed household should be defined as where the man is absent for a certain number of years. For example if he is not there for five years, if he is not providing any income, then it is a women headed household.

Sujata Madhok:

On the basis of my experience of TU work in the newspaper industry I can say we have experienced so much reversal. In 1955 we had because of TU activism, the Working Journalist Act. In the last 10-15 years, suddenly newspapers began to put journalists on contract. It was initially a 5 year contract. It started at the top with editors and resident editors. And the unions are not really concerned. Now in big papers you have young people coming in at 5000 rupees a month on a one year contract, maybe two, not renewable very often. The problem is, the minute somebody goes on contract, they are out of the Working Journalists Act. They escape all its provisions. Also when you sign a contract, the first thing it says is that you will not be the member of a TU. So our membership, at least the Delhi union of journalist has shrunk and similarly, all plant unions in each newspaper, membership

has shrunk and journalists are increasingly out of TUs. Of course we have been saying people should be members and we say if you cannot be a member of the plant union, maybe you can be the member of the Delhi union of journalists. Basically people are afraid so they are on contract. Thus there is this kind of reversal that has happened and similarly there has been a shrinking of the entire work force due to mechanization, new technologies and clear links with globalization. In the Hindustan Times in 2003 a company called Henderson come and bought 20% of the stake with the FDI permission. And within a year and a half, you get 362 workers laid off. They have been out there struggling since October last year. So there is a very clear trend happening right through the industry and honestly in our traditional, old-fashioned TU groups, we don't know how to combat it. At the same time, the industry is booming. And you are getting this rich management layer which you did have in this industry, you didn't have MBAs, you didn't have any such thing. TOI has multiple editions; accounting can be done in one centre and all the different accounting departments can close down. Whether it is the shop floor, whether it is right at the plant level, the blue collar worker is almost gone because of technology changing. The best of them are being pulled out; the young and the smart one to be photo types who are basically key punch operators. We see it right through the industry and as I said in our old fashioned style of TU working, we don't know how to combat it very effectively. There is resistance and struggle, people like HT, Patriot workers are struggling, nevertheless unless links exist with the larger TU movement and with other movements, I don't see great chances of success. And also I don't see enough young leadership, whether from the middle class or even working class.

Haseena: (translated from Hindi)

In the informal sector, the women workers are not allowed time off in between work and this is a big problem. They need to go to the bathroom, to rest during pregnancy or during periods and the second thing is that the Maharashtra government by closing dance bars and arresting any woman who performs has come down heavily upon union activities. So the question is how can we counteract all this?

Chair: Indu Agnihorti

All the issues are very relevant but I am afraid we don't have time.

Round Table Discussion on Maintenance, Inheritance and Property

Chair: Jyotsna Chatterjee

Friends, I am quite concerned and disturbed by the session that we have just completed. In fact I was quite nervous, having been a part of the women's movement, and then finding a practicing lawyer saying that there are limitations in the law. She also said that we haven't properly engaged with the law in the women's movement. Now the session that we have before us now is on maintenance, inheritance and property. You cannot look at maintenance, inheritance and property unless you begin to think in terms of the personal laws. You all know that each religious community has its own personal laws and unless you relate the question of maintenance, inheritance and property with the question of the existing personal laws, it is very difficult to think in terms of addressing the issue of maintenance, inheritance and property. I notice that the person who is going to speak on Mary Roy's case has not been able to come and I am reminded about the kind of problems that we had when Mary Roy was trying to struggle to change the Travencore and Cochin Succession Act. Several of us who were considering changes in the Christian Personal law at that time, have been contacted and we realized that in one part of India that is Kerala, there was a Travencore Succession Act and a Cochin Succession Act which would not allow a Syrian Christian woman from

benefiting from the property of her father under the Indian Succession Act which is governing other Christians living in India. Mary Roy had to go through a lot of struggle and finally she was able to convince the court and I think it was Indira Jaising did the case for her. Finally Mary Roy was able to establish the fact that her daughter has right to the property of her father. In each case, when you look at the Hindu, Christian and the Muslim personal law, in fact I found some sort of material also on the proposed Sikh personal law which finally did not come into being. We are divided and for the women's movement, to take it forward it was very difficult. Initially we thought perhaps if we had a uniform civil code, it may become a possibility, that we will be able to give some kind of justice to women in the context of inheritance, maintenance and property rights. Of course we had to change our campaign from struggling for a uniform civil code to let each community try to make changes in their own personal laws. What we find today is that the Christians have made some headway by changing their law on divorce and the related question of maintenance. In Hindu there was a move I think three years ago, for a women's right to coparcenary property but to what extent that would be of help has still not been investigated into. Had a lawyer been here it would have been useful but I am not very sure because there is a lot of discussion on that issue of coparcenary property etc. It was passed but we do not know its impact now. In fact Indira Jaising at one point said that to only think in terms of changing rights of inheritance to Hindu women is not doing justice nor is it possible to think in terms of giving equal justice to all women in that context. And she is arguing again and again for all women having a common law. Today we have with us an area of concern that we have hardly touched in the women's movement. And I would like us to begin with that and that is a presentation by Jarjum Ete on the customary laws of the North East. I am not sure whether she is covering all the states in the NE or Arunachal Pradesh. So let us begin with Jarjum and look into an area in which the women's movement has hardly made any kind of entry. Perhaps that is an area that we need to look at as we plan our programmes for the future.

Jarjum Ete: Customary Laws

Friends, when I was coming down for this workshop, previously I was engaged with two young lawyers, activists also working with our group and my skepticism about the delivery of justice in the Indian legal system and how it is inaccessible to the poor and particularly victimized women – they were laughing at me – “m'am, you have no confidence in the judiciary and yet you are going down for the workshop on legal reforms! This is the kind of dichotomy that presently I am walking through as a tribal woman and also an activist who has optimism and hope in the movement, particularly in the achievement of the movement of the women. In the beginning of course, prior to mid-nineties we also in the hinterlands on the north east, especially among the tribal women we used to say that that the Indian women's movement does not address our issues. But since 1994 the pre Beijing conferences and consultations that we have been having and getting linked upto and ever since 1999, the Hyderabad conference of the IAWS, where the concerns of the tribal women were raised and since then much water has flown down and I personally don't say it anymore that the women's movement in Indian has not engaged in the concerns of North East, not fully but maybe I will not say that the movement has not given us the opportunity, maybe it is some kinds of constraints geographically or maybe ideologically or politically or maybe because we still have much to learn from the movement, their lives are also different, also the tribal mentality. As a tribal person I also believe in the collectivity of our rights and existence and also the whole ethnic issue of identity politics and especially when it comes to property, especially in terms of natural resource – the land and how we look at territory as collective resource base. Women's aspiration for individual rights is subsumed within the collective movement and assertions and especially now if I am going to talk about Manipur, of course, I

am not an expert on the other states, not even in my own state I don't claim to be an expert but as a spokesperson of the women who have yet to voice their opinion, especially in my state and of course since I am also heading a group called the Indigenous Women's Resource Centre which came up after the Shukla commission report as part of UNIFEM effort.

I have also got to know how women in different states of North East, especially the tribal women look at themselves within the customary set-ups – the traditional councils and their own practices or laws. We know that the state of Mizoram had codified the customary laws and it again it has been reviewed but unfortunately, the women didn't have much say. Even in the review process despite the fact is that they have a women commission and the MHIP is supposed to be a big women's movement in the state of Mizoram. Even today despite the fact that Mizoram is the second highest literate state in the whole country, the women's voices from Mizoram is yet to be heard outside the state. Last year, it was for the first time, that the university of Mizoram had interaction on human rights issues and they say this is the first time that the state is opening up.

In Nagaland again the village councils, some of them, have given land rights to the women. But how much, is still not disclosed. In Arunachal, in 1994, the state came up with the Arunachal Pradesh Bill for the protection of customary laws and social practices and thanks to many of you who had helped in the mobilization and the President's assent was withheld and it was sent back to the state for a review in January 1997 and it is still gathering dust somewhere. And in 2001 again a Land Management Records Act was legislated, rules are yet to be framed fortunately for us. Unfortunately for us again, the 2001 Land Management Records Act said this was for the economic development of the state whereby the state was planning to frame some rules by which investors would be welcome to get inside the state and invest in terms of infrastructure development and things like that, maybe some hydal projects. It also said that the land management would be as per the customary laws which again kind of pushes out all the women. As per the 2001 census, there are supposed to be 1003 women per 1000 men in the state but more than 50% women are outside as far as the laws are concerned.

Sometime in the mid 90s, I was also invited by the journal Seminar to write on the uniform civil code, how tribal women look at it and now Jyotsna ji also said about how the women's movement is re-looking at the whole issue of the uniform civil code, how personal laws are been given some opportunity to evolve better, more pro-women or at least egalitarian laws. I come from the state of Arunachal where it is the only place despite customary laws, councils still in existence, we also have the post 73rd amendment Panchayat in place. Now we have more than 3183 women in various categories of Panchayat leadership. And this is coexisting with the traditional councils and the modern set-up of Panchayat structures which is of course an alien structure. Whenever we talk about all these laws, we ask do we need Indian laws in place or should we continue and the women say – we know our own water, how deep it is, how shallow it is. We have never seen the ocean or the sea and we know how to swim in our own rivers. So the women seem to be more comfortable to deal with customs and that way in a very traditional, patriarchal, patrilineal and patrilocal set-up in Arunachal. When we talk about maintenance or inheritance and property rights, maintenance for government employees when there is a divorce, some women do get maintenance support but for the non government service holders, it is upto the men – if they want to give it, they give it, otherwise you cant take it. Many a times, councils are very insensitive.

I would like to give some examples. In women's organizations we have dealt with some cases. Inheritance, because, post marital, the woman has to move out into the patrilocal kind of system, so people who have moveable properties do give it but from the parental, natal family. Property rights especially for daughters who have married to men outside the Arunchali society do not exist. Even in matrilineal Meghalaya, where we think Meghalaya women inherit the property, it is the youngest daughter who inherits the family property but again the control and management of that property is in the hands of her maternal uncle who again would have moved to his marital home. Even in my community and own family in Arunachal, I have seen a case where a married daughter was given access to landed resources. But it is in terms of livelihood, subsistence and sustenance, not in terms of ownership or transfer of control of the land. Finally when the third generation people who have access to these resource and wanted to sell the land because they had grown some plantation cannot do so without selling the land. No one is going to buy the plantation without having control over the land. The family had to buy it back, it was my family, my husband had to buy it back and give them the money for the plantation. That kind of access should be given but kind of assistance for subsistence, no control or no ownership, no transfer that way.

In one particular case of divorce, it said that the father can give at his will – financial support for the daughter's education and maintenance but it didn't make it binding on the father or the husband to ensure the maintenance for the wife and the daughter. And it said if a man wants to divorce a woman, he has to pay a penalty of 20,000. On the basis of these council decisions, we did a mobilization and we said – are you up for 20,000? And the women now have got into the traditional councils and in late February they went into the council meeting in a big number and said that if you are not going to take care of this in the council meeting, we are going to take it to the commission. They have something to fall back on, they are challenging and the councilors are also saying we will give you the space for negotiating. So something seems to be moving. In many tribes for the first time, there has been path breaking participation of women in the council. They are not authorized decision makers, but when it came to their inheritance and maintenance, they went in groups in support of the victim and say we also want to have our voice heard. So for the first time, in one of the tribes called the Adis, in Apercian district of Arunachal, in Imphal sometime back last year, a young wife, who is a graduate and husband is a government employee, she said nothing doing I have spent seven years with you and it is not my fault that we don't have a baby. You never went with me for medical check-up. And this is no reason why you should divorce me and on this ground, the wife said I claim my stake on your property. And both had some landed property and one of the plot of land was given to the wife and because without any valid ground this man was seeking divorce, his family had to part with the traditional family land. This is a landmark village council judgment. This was for the first time that the women participated. This was in Yingkiong the district headquarters of Apercian district.

Unfortunately in cases of government servants again, they are still continuing with the practice of polygamy, some officers have deleted the name of the wife in the service book records which disinherits her. So now from the commission and lobbying with the chief secretary, also the governor who is very proactive, also the justice of the high court bench of Gauhati, in Itanagar – they have given us a positive note but we are yet to get a note from the high court. We are demanding for the application of the civil services conduct rule in toto, which so far has been challenged by the men – who have been practicing bigamy and polygamy. In these cases we see that women even don't have access to whatever small benefits she is supposed to get as the spouse of a government servant. And in cases where

there is no male child, the councils are very insensitive to the women's needs and male child adoption which is usually a traditional practice also have shown that all widows when a husband dies cannot adopt. In one case a man left a will that if my adopted son doesn't take care of the mother's need he won't have access to the resources. The council ruled otherwise. Even the will of a dead man has been rolled back.

In the case of the Naga tribes of Arunachal, many young widows, especially after the Naga militancy affected the districts of Terapi and Changla, in one single contemporary group, 13 young widows are there, and they have not been able to remarry because if they do they will have no access to the joint property left, the marital property – they are still using it, they have not remarried and if they remarry they will also lose the custody of the children. So normally it is seen that they have users' limited rights over the husband's property, joint marital property, not total control. Wherever we have had interactions, women have been sensitized and they are taking it up now. In Arunachal what we are seeing is that the customary practices or the laws have to be evolved within the parameters of the Indian constitutional framework and also for the sheer fact that the Government of India is a signatory to the CEDAW and also the UN Human Rights Declaration. We also should be allowed to evolve as tribal women with all these rights in proper place. We are now negotiating with the state. And of course in Arunachal we are yet to see the separation of the executive and the judiciary which we are lobbying for and we hope it will happen.

Chair: Jyotsna Chatterjee

Thank you very much for raising these concerns, especially about the women in the north east. So you are saying that you are very happy that the women's movement has become conscious of the problems of women in the NE, I think there are many concerns there which we have not seriously considered. Perhaps working with the women's movement which is developing there, we may be able to forge out a programme of common concern for justice for the NE women because what Jarjum told us frightens us at points of time. We could ask Jarjum for questions for 5 minutes and then move on to the next speaker.

Discussions

Subhashini Ali:

This is just a very specific question and pertains to the proposed Tribal Land Rights Bill that is pending in parliament and as we all know the select committee on that were taking different kinds of suggestions, amendments etc. Now there is a very specific section which deals with the permanent land rights going to be conferred upon tribal families, now in view of some of the things that you have said, and also what we may know correctly or incorrectly about the land rights that exists actually amongst tribals, I think this is a section that has to be really looked at very carefully by people who know what it is all about. Because we are all deposing before this committee, AIDWA and many other organizations are also going because we are very keen that the Bill gets passed as soon as possible. But we are thinking more about cut-off year etc. this is in the public sphere, anybody or everybody who wants to depose can write to the chairman and it has to be done very, very fast, by the end of March no more new depositions will be accepted. So my suggestion is that the chairperson of the women's commission should immediately have a look if she hasn't done already at this Bill. Because we don't want in our eagerness to have it passed which will militate against the rights of tribal women. In the AIDWA submission we have said that all those aspects in which tribal customary law which are anti women and deprive them of inheritance rights should not be accepted once this Bill becomes law. The tribal women should have equal rights of inheritance and of possession of land. But I don't know whether that one submission

is enough or something else needs to be done. Since this Bill is probably going to be enacted very soon, people who are going to directly be affected by it may submit their views.

Svati Joshi:

Close to what Subhashini has said, there is a move on to apply the amended version of the Hindu Succession Act which gives rights to women in various capacities. NE is outside that scope and there is a move on to include the NE within the purview. I wonder if the women's movement would take up that issue that guarantees a large number of rights to women.

Zarina Bhatt:

This really reopens the question of how do we integrate communities in the national scene – what are the parameters of the Tribal Bill that you are talking about, which is going to be the model, on what basis, how are they going to decide. I think we need to have more discussion, this is really the larger question that relates to minorities, to tribal women – how are we going to integrate? And on what basis, what are the guidelines – are the guidelines going to be the Hindu personal code or the Hindu law that has been worked out? To my mind, for all these the basis should be the human rights. A lawyer was saying that the Constitution gives priority to rights over religion and community also I would like to put because they have so many variations, so many customary laws and we know that most of them are not pro-women. Patriarchy has been the dominant norm. Customary laws and practices are also the same. This is a discussion that we need to have. Are all council members men or women are also included?

Vasanthi:

Actually it is not so much a question but sharing information. There has been a big move by many financial institutions in the NE to go in for major development projects in the area – there have been closed discussions, only some NGOs and some people working have been able to get some of the information whereby the whole ecological patterns of the region are going to be affected. Alongwith that, the social relations in the region are going to get seriously affected.

Uma Chakravarty:

I think we need to factor in is that the mode of development will precipitate changes in the protection of tribal land. The tribal land alienation has been changed in Chattisgarh and Jharkhand.... here we are trying to get women the right, the whole tribal communities are going to lose their rights through the way in which the corporate world will come and exploit it.

Jarjum Ete:

In fact is very unfortunate that representatives of the NE sitting in Delhi are misrepresenting quite a few of our opinions. Like what north easterners speak in Delhi is not always the popular sentiment of the people there. Recently I saw the most respected north-easterner in Delhi, in one of the e-networks saying that the inland permit of AP should be lifted whereas we believe in opening up because it is one mechanism that has protected my state. And it needs to be continued. Secondly, I was also told that the same gentleman in one of the forums has also said shamanisms practiced by the Arunachali society should be stopped because it is unscientific. Which religion is scientific? It basically depends on faiths, and beliefs and people. Recently also he has been going around doing these seminars in the NE on additional infrastructure development, but the activists are questioning who is talking about additional, let's talk about basic first.

This is coming to Vasanthi's intervention. There is going to be an IFI consultation at Shillong on April 1-3 and I hope to be there. My role is that of a government representative on the commission and also an activist. We are concerned about the ecological impacts of development wherein which the financial institutions, government institutions, everybody is jumping into the NE. As activist we had foreseen it 10-15 years back. The people are still not prepared to tackle it, this is the most unfortunate bit. And from the Naga, Assam movements and the other agitations of ethnic related assertions but development related movements are not happening.

And also about the draft Tribal Land Rights Bill and the Forest People's Bill, activists about 8-9 of us from the NE had submitted a memorandum to the minister, who is also looking after the Doona and the tribal affairs ministry, almost one and a half years back to give us an opportunity to debate on these draft bills in the NE which he hasn't done. It is also very difficult for us to follow up on many things simultaneously. And it is with sadness at heart that I have to own up that I have not been able to make depositions. In fact the time given to us is so short that we can only react, proactive inputs have not been there.

About the compositions of tribal councils, traditional councils, they are basically male dominated. But now, in the new set-up of councils we are demanding space for women and in some districts we are amazed to see that there are about 56 women in the district who have been assigned responsibility as council decision makers. Whether or not they are indecisive or not effective, is a different issue, at least they are cosmetically there. About the Land Rights Bill, in fact there are the two parallel things happening, the Forest Rights Bill moved by the MOEF and one moved by the MOTA. Prioritization of issues is a big question. My point is that when it comes to women's rights to properties, in 1989, the first time the Arunachali women together as a collective raised the issue of property rights. Even at that point of time, my question was with all these rights what the various responsibilities that we are willing to take on? The debate is still ongoing. If it is about the application of the Hindu Succession Act in the NE states, I really don't know, because most of the state except maybe some bit of Tripura, Assam, Arunachal Pradesh and Manipur – most of them are Christian states with Christian population. How would they take it? So far as my own agitation and understanding of the Hindutva agenda and its implication on the on the collective, Christians, tribals is concerned, there should be debate, a prior informed kind of discussion among people if they have to accept it. Of course even the uniform civil code is acceptable to me, as an individual, but I identify myself as a tribal woman, is it not going to bring up the whole debate of minority-majority understanding and consensus. So these kinds of notions, maybe taken up and discussed by the women's movement. My appeal to the collective here to all of you is that – its not that one Jarjum coming in as representative of the tribal woman, I really cannot be the representative, I am just making use of the space given, the opportunity that is coming my way. I also have been associated with the National Alliance of Women since 95, ever since the Beijing conference was over and it came into being and the NAWO has been asking me to build the tribal women's network in NE and even in that little bit of place called the NE region, the women's movement has failed because you cannot divide the NE region into tribal and non-tribal people. So even as a tribal woman from the NE, I have not been able to take it to the NAWO forum. All of you, especially the seven sisters representative here, I appeal to you that as a tribal women, as a secretary of the NAWO, I feel that we in the women's movement have to collaborate on issues like this and focus. It is not necessary that in one single organization everyone should be like minded. In fact the most adorable thing about the women's movement is the acceptance of its plurality unlike the democracy of India.

Chair: Jyotsna Chatterjee

Thank you very much Jarjum for reminding us that we still have a responsibility.

Hasina: Local Customary Justice: (translated from Hindi)

We know how local structures or groups have formed at different points of time in the areas they operate in. In 92-93 after the Bombay riots, in 2002 after the riots in Gujarat or in any place that has seen communal violence, has given rise to local groups who have taken it as their responsibility to end the tensions in that area. With time, the structure, the issue and work methods of these groups changed. An example is the Mohalla Committee which after the Bombay riots did a lot of work after its formation and till the elections in 95, it was talking about the issue of peace and justice but with the *Shiv Sena*, *Mahila Agadhi*, Congress, *Janata Dal* and other parties during the election time, its structures changed with their influence. The methods of political party working and ideologies began to reflect in the work of the Committee. It was dangerous because we have come for peace and justice which changes identity with the time. It was sad because we started from somewhere and after 3-4 years ended up in a way that was not acceptable. After 95-96, we find that these *Mohalla* Committees have come to be known by many different names – like *Jamat-e-Ulema*, *Ulemma* Council, many Islamic institutes and many others. Those working for the Hindu community or other communities began to have religious identities. So these new structures that came up started taking decisions at the public and political level and played a major role. Now they have started to rule the areas they are operating in, they lay the codes of what dress the women should wear, what kind of education should there be, what choices should be made available to women – this is not only in Bombay but in other states too. As these identities got stronger – like how “good” we as Muslims should look or how “good” we as women should look, these identities or groups started repressing those groups who posed a challenge to these false identities. So there are two things – how they got all the strength and support to carry on and how they tried to stifle progressive voices.

The biggest mistake is that the way the secular or human rights groups engage and the way the *Mohalla* Committees engage with the communities don't have much of difference because all work as service providers. So it difficult to identify what we are calling as fundamentalism. Are we talking and working with gender perspective? This has become very less. This is the experience of many networks like the Muslim women's Rights Network in Bombay etc. The second thing is how did communities start identifying as to which issues are right? Like we hear of Sania Mirza, Imrana, Gudia being talked about in the media. We say that marriages should be free of ostentatiousness, but these groups never talk about banning dowry. So there is no involvement and where there is, many significant changes have been made possible in the institution of marriage. We all have our various experiences and critique, but if anybody tries to tell us that we should live in a particular way and this or that should be your identity, your life then it is a very dangerous thing. It is dangerous for single women, widow women, those groups working against patriarchy, individual women who challenge male dominance in society – local activists have been very affected by these other types of groups. It has become all the more difficult because as I said that the way of operating of the secular groups and others don't have much difference. The challenges posed by fundamentalism are not being dealt with adequately. Two years ago, the Jamat-e-Islami had held a National Human Rights Convention where a lot of our secular friends went and received awards from them. So it is very difficult for me to go to these Conventions organized by these fundamentalists groups who stifle women's voices which I call as fundamental ones and share award and platforms with them. This is a dangerous trend.

Whether it be Gujarat or the 92 riots, we can easily point a finger towards the dominant fascism of the land but the agents of minority fundamentalist groups are not been taken to books as much. We must address this issue.

The other issue is that the local groups which have emerged are being looked upon as statutory bodies like *Jamat-e-Ulma*. The statements that these groups issue about women etc. is taken like a Supreme Court judgment. Everybody debates about these statements made but we don't speak out against these bodies as an entity. For example, we all were very concerned about the Imrana case at the same time were happy about the so called Modern Nikhanama thinking that it gives rights to women but the reality is that it only represses women and the Muslim community as a whole. These bodies are not questioned but we support them in the sense that we have not come in open. The women's movement has not raised its voice against these so called "statutory bodies" openly. We put all our energies into fighting fascists like the BJP and don't fight minority fundamentalism with the same energy. There is not much of difference between the two. Both are taking decisions on behalf of women as a group like should a woman get married or not, how should she get married, the man who rapes should he be the husband or not – such things are happening everywhere. It is not at the local level customary practices and panchayat decisions are happening everywhere. This is not done in every community but happens only in Muslim community. When in non-Muslim communities such decisions are given, it is not the national voice. Many people were against the case in Haryana in which the man and woman were declared to be brother-sister when their horoscopes matched, NHRC intervened but in Gudiya's case the NHRC did not intervene. Even in the Imrana case, the national government did not intervene, saying that it is the matter of the state. This is a dangerous trend. These groups are not talking about justice. What happened in Gujarat and Bombay, in that many local groups from the same community did support but in the long term there is no engagement. I feel our understanding is somewhere incomplete about fundamentalism. Like Indu said that the present government is a sensitive one, which wants to bring in may changes in the laws pertaining to women, but it is quiet and does not want to lose its vote bank. All political parties indulge in vote bank politics with the Muslim minority. This should be stopped.

Chair: Jyotsna Chatterjee

We all know about the various groups that are being formed, locally and in various slums and small villages and the kind of control they are having on the lives of Muslim women. We are aware of it but the extent of the problem, thank you for informing us about it. Let us listen to the other presentation that we have.

Local Customary Justice: Sabiha Hussain

I will begin from where Hasina has left. She has raised a very important point that we do not question fundamentalism within the community and when we do it is very subdued. Why this is so? Outside fundamentalism is being openly questioned. Also I would like to say that I do not agree with Jarjum that the women's movement did not take up the problem of Muslim women. It did and it is my personal feeling that from the mid 80s this movement got divided for several reasons. My paper is related to the issue of questioning fundamentalism within the community especially related to the recent move of the All India Muslim Personal Law Board, giving emphasis in its Model Nikhanama on the establishing of the Shariat Court and the various plea they gave for it.

I have empirical data with me which is collected first from 1993-2000, again from 2004-2005. I will present my findings and the experiences of the women who went to *Darul Qaza*

expecting that there will be quick decisions, less expenses and the decisions would be according to the *Quranic* injunctions. I am going to share some of the case study. I would like to put some facts about Shariat court operating in district level and one central *Shariat* court which covers almost all district of Bihar, some districts of Orissa, West Bengal and Jharkhand. An interview with the *Nayak Quazi* in Central *Imayat-e-Sharia*, Phulwari Sharif which was established in 1921 was also taken to highlight the claim of the courts in giving justice to women and existing reality. First of all I would like to site some of the objectives of *Imayat-e-Sharia* and show my objection to these objectives. No. 1 objective of central *Shariat* court, which is operating in Phulwari Sharif says, “it ensures application of Islamic laws as far as possible, particularly laws relating to marriage, divorce, inheritance, *Khullah* etc. in their original Islamic form. No. 2, “establish the Islamic system of life on the lines laid down by the Prophet so that Muslims may live within the framework of Islamic laws, safeguard and to look after Muslim interests and rights, unite all Muslims strictly on the basis of the *Qualma* even if they adhere to different schools of law.” In the first objective, the word “original Islamic law” is incorrect as the Indian Muslims are not governed by the Islamic law but by the Shariat Act of 1937 which is not the original Islamic law as far as the matrimonial and inheritance rights are concerned. For example the pronouncement and validity of triple talaq in one go is certainly not the Islamic way of pronouncing talaq.

Secondly the 1937 Act related inheritance, in which it excluded a critical form of property, i.e. agricultural land and women’s entitlements to it. For example, in Tamil Nadu, Karnataka and Andhra Pradesh, included women’s entitlement to this property right in 1949, Kerala followed by 1963. But in many other states for example, Delhi, Haryana, Himachal Pradesh, Punjab, UP, J&K still it is not applicable, particularly in UP with 1/6th of India’s population, Muslim women’s land rights are still subject to the UP Zamindari Abolition Act of 1950. This was the objective of the central *Shariat* Court and there are 24 objectives of *Darul Qaza* to which AIMPLB is advocating through Model Nikahnama. There are 24 objectives, I have selected some of the objectives which are directly related to rights of women especially in matter of marriage and divorce. These are settling claims for separation. Why I am citing these objectives is because the experience of women were completely against this. The judgments which were made, I have mentioned the notifications, I will read the copy of the notification also.

First objective is the settling claims for separation on the grounds of non-payment of maintenance and other violations of women’s rights. Second, settling claims for separation on the grounds of non-compliance of the order of *Darul Qaza* for the maintenance of the wife, settling claims for *Khulla*, settling claims for *Haq-e-Haznat*, the right of mother to rear children, settling claims for *meher*, alimony and maintenance, settling claims for return of articles given in *jahez*, settling disputes relating to the protection of the interests of minors, confirmation of the validity of the *nikah* and certificate of marriage and the last one is authorization of *nikah*. If we look at the cases settled at the central *Shariat* court, that is *Fasq-e-nikha/Khullaha*, from 1994 to 2000, at Phulwari Sharif, Patna, which covers 3 states including Jharkhand, we find that despite the total number of cases of divorce that is 1004, only 94 women’s demand for *meher* and dowry was met. Out of the 94 cases, 36 women got their *meher*, 11 women got their dowry back after issuing several notices to the husband by the court. This is data of central Shariat court. Let me come to my findings.

This is case study, experience of 20 divorced women who approached to the Shariat court at *Darul Qaza* or Central Shariat Court. Out of 20 women who were divorced or sought *Khulla* or *Fasq*, 11 were from Ashraf family and 9 were from non-Ashraf family. Three women were

illiterate, 9 were secondary educated and 8 of them were graduates, and later completed either teacher's training or master's degree with the help of their parents and joint teaching. Four of them sought *Khullha* by district shariat court i.e. *Darul Qaza*, 10 of them sought *Fasq-e-nikah* by Central *Shariat* court at Patna and 6 of them were divorced by their husbands in one sitting without any witness. Six of them were divorced because they did not bring enough dowry or the demands were not met after 10 years of their marriage. Third reason was being not upto the expectations of their husbands, i.e. beauty and education. The women who went to *shariat* court, 6 of them were victims of physical torture due to their good looks which created suspicion about their character. High education, not asking *jahez* from their parents and asserting themselves for their social and reproductive rights within the Islamic formwork. Four women who took *Khulla* were also victimized by their husbands and in-laws despite their best effort to adjust.

Now I would like to point out that there is a decline from 94 to 2004-05 in the cases which went to central Shariat court. During 93-94, the total cases of *Fasq* was 239 which came to 203 in 1995-96 and again there is a decrease 200 from 97-98 and 182 in 98-99. In 2004, data from district *Darul Qaza*, Muzaffarpur, *Fasq* was 22 which became 17 in 2005. The women who sought *Khullah* on the terms laid by the husband for not giving *meher* and maintenance, I would like to read a copy of judgment of *Darul Qaza*, dated 9 safar, 20 hijri – this is a Urdu calendar. Complaint Waheeda Khan, daughter of Md. Shoaib has condoned her *meher* maintainance for *iddat* and all her claims of matrimonial rights and defendant Mr. Aarzoo, son of Mr. Akhtar Hussain has no responsibility against his wife, now the complaint is no longer wife of defendant, completing her *iddat*, she is free to remarry, defendant owes no responsibility of her *meher* maintenance and maintenance for *iddat* period.

The women who were divorced by their husbands didn't get their *jehez*, even for *iddat* period, only two of them got their *meher* back, since there was no *nikhanama*, no witness at the time of pronouncement of divorce, they were deprived of their matrimonial rights. They did approach to *Darul Qaza* but, but in the absence of any proof witness of their marriage and divorce, and moreover in the absence of their husband on dates fixed by the courts for the hearing of the cases, the case was dismissed. Hence I feel that it is high time that AIMPLB, the so called custodian of the community, must give attention to formulating, *nikhanama* and the conditions suggested by the women's organisation who have been working on the *Nikhanama* for nearly 10 years. The women who went to Shariat court for their *Fasq-e-nikah*, despite their repeated appeal to the jury to get back their *meher*, maintenance, and *jahez*, none of them got it. The final judgment was give which took almost 3 years. The AIMPLB says quick justice! For one and a half years, the case was with district *Darul Qaza*, then when the *Quazis* found it complicated and the husbands didn't turn up for all the 6 dates, it was transferred to central *shariat* court which was almost 200 kms from the place of these women, despite filing several petitions by the women for *meher* maintenance, the court was unable to pressurize husbands to give their rights.

Where the custody of the child is concerned, in 18 cases, neither the husband claimed the child nor give any maintenance for bringing up the minors – the sole responsibility of the women and the child lied with the girls' parents, some of them who were retired persons or had petty business. Interestingly none of these women remarried, all men got married after divorce with handsome dowry. Six of the divorced women were working and looking after their children, rest of them were dependent on their parents.

While talking to women who sought *Fasq*, they stated that they are under the impression that the proceedings of seeking divorce, settling maintenance *meher*, and other matrimonial liabilities would be less time consuming, less expensive and above all the judgment would be more in line with the *Quaranic* prescriptions. Their expectations were wrong, they stated that the way the *maulana* ask questions and pressurize only the women to adjust was one sided. In 90% of the cases, women said that they could not explain or express their problems to the *Quazi*, as they had no female members who could understand their problems and the *Quazi* was not convinced with the grievances the women had, particularly related to physical abuse and mark they had on their body. Further, absence of other parties on the said dates, non-persual tendency of court to get maintenance and recovery of *meher* and dowry were an added disadvantage of going to these courts. Women added that particularly, whose children were minor, that on every hearing they had to take two witnesses who were present at the time of their marriage, alongwith their father or brother. Further they pointed out that *shariat* court does not have any machinery or force to implement their decision. In any case even if the decision is taken by the *shariat* court, one has to pursue the case to the civil court, hence it is better to go directly to the civil court instead of going to the *shariat* court. After the final judgment despite *Quazi's* notice for returning *meher*, maintenance, for *iddat* period and maintenance of the children in case of minor or who opted to live with their mother or husband, nothing was received by these women till date. My study was 99-2000. When approached the *Quazi*, he showed his helplessness saying that since he did not have force or agency to recover *meher*, maintenance and for this they will have to go to the civil court. Hence my argument is how far is the claim of the AIMPLB's to give more and quick justice to women is justified? Why has AIMPLB started propagating for these courts when these courts already exist in India for so long? By advocating for these rights, are they not depriving women of their constitutional rights and further marginalizing women in matter of seeking justice from secular courts? How far is the judgment given by these courts going to help women? Why should disputes related only to divorce be dealt in these courts? To my mind, there could be two probable reasons for this, maintaining and strengthening of community identity and secondly to counter the growing feeling of insecurity.

Chair: Jyotsna Chatterjee

So we have two perspectives to the same problem: grassroots groups and existing law.

Discussions

Zarina Bhatti:

Who is going to decide what is Islamic and what is not? The women's movement is not a theological movement. We should judge the law according to the constitutional principles.

Shubhashini Ali:

If I am supposedly a Hindu and if I go to some international meeting and speak for Hindu women, I think that is ridiculous. Similarly if we have a few Muslim women, tribal women, I don't think we should give anybody the right to speak on behalf of the community. There are so many shades of opinion. I mean we say that there is no such thing as Muslim feminism if you see what is coming now in the name of Islamic feminists or Muslim feminists, many of us would throw up our hands and say let's take sanyas from any kind of women's movement. So I think we have to be much more nuanced and we have to accept that the way I look at something or you look at something is not necessarily the way that other people look at it. Ok we can be horrified but if we did a similar study, of what civil courts and family courts and their decisions – they would be no better, maybe much worse, which is the reason why many people are going to these Panchayats or *Darul Qaza*. Let us not find fault in these judgments,

the moment we do that we will be accepting the demand of something like the AIMPLB – give some kind of judicial powers because then if we summon somebody, he or she will have to come. These are very big traps and I think we should not fall into it. The other thing is certainly we should say where there is a question of gender injustice. We at least in the women's movement should only look at it as that, not let other things color other considerations and thinking. Then we have to see what really happens when you do it. Jagmati is sitting her brought that brother-sister from Haryana to the NHRC, many people went to meet Imrana, I am also one of them. I also know that Imrana was not willing to come before the NHRC. And Imrana's matter is also negotiated with the help of some of these people that we don't want to give any recognition to because the truth of it is that they enjoy more legitimacy within the community that Imrana belonged to than I do. So when a suggestion or an appeal that I made to some of these people in these boards for whom it is very easy for us to sit and hear and say they don't have any legitimacy, why we bothering about them, but we know that if *Kal be Sadiq* says something in Lucknow in the *Shia* community is going to make more of an impact – that is unfortunate but it is true, similarly if some of those people could be maneuvered around to come to Imrana's help in that horrible situation in which she was, that help and that maneuvering that they were able to give was in fact in her life more meaningful than what I or Indu or Jagmati or anybody of us could have done. What I am trying to say is that the reality of the kind of social problems and pressures that people are in – I think we have to also be much more sensitive to that and the real issue is I think what she ended on – bringing more and more women, organizing more and more women – Muslims, adivasis, Dalits unless more of them become organized, a part of the women's movement and have links to the women's' movement and also throw up their own leaders and their own spokespersons. I don't think that there are any short cuts. These are really very difficult battles that we have to all engage in. something that we have to do is to help in organizing more and more of these women and bring them into the movement.

Sabiha Hussain: (translated from Hindi)

Zarina ji, I would like to address your question – it is not that the Muslim women's organizations or the women's movement gives any validity to the AIMPLB – it is not a valid or statutory body, it is a body formed in 1972, it is not that we are accepting it. The main purpose of my case study was to say why have we given the body so much of credence – particularly when they are not representing the Muslim women community appropriately. The Muslim Women's Rights Network has been working since 1999, and they are questioning these bodies like the AIMPLB, they want to reinterpret these statements and not listen to the *mullaha* and *maulvi* anymore.

Hasina: (translated from Hindi)

It would have been ideal if we all speak the same way only as a woman but we need to understand and identify the community related problems as women. But this is not so. We do tend to put our experiences as a woman coming from a particular community with a certain kind of experience affected in a certain kind of way. I think the need is to talk about gender just laws and create mass movements. I also think that we cannot look at each problem “as a woman” we also have to look at the backgrounds different people come from. So in the women's movement, it is necessary to identify problems specific to particular backgrounds that the woman comes from. If you look at Urdu media, it is seen that there is an effort to create a parallel system – to have people who only work for the Muslim community, only take decisions for them etc. and this is seen in the *nikhanama* which says that in the event of a dispute between the man and the woman, they will go to the *Darul Qaza* and will not go any

where else. We need to identify that women from different communities need different attention.

Svati Joshi:

I just think that if we say that we should have a communal identity, we are falling into the trap of fascism. I think we should really be concerned about this – that is what they want – they want us to privilege our communal identities and divide Muslim women from Hindu women. Are we really going to accept it? There is a serious danger here.

Chair: Jyotsna Chatterjee

I think that is a matter of debate and we need to go deeper into the understanding. What has come out as a common factor in these three presentations is the fact that all three participants have informed us a little more about their specific problems that we need to address as women and not as women's movement. The second thing that they have told us is that while there is an existing women's movement, there is a need to mobilize women from within their community and link up with the women's movement existing at the moment. The third thing was more empowerment for their groups within their own community. I know that the question of having their own identity has become an extremely important factor they need to address it themselves in the context of the secular country.

Session IV Emerging Area: Sex Selective Practices – Law, Values and Ethics

Chair: Dr. Jyotsna Chatterjee

This is an issue of great importance to us. Something which we need to discuss even before we start to discuss about women and women's rights. The session is on sex selective practices – law , value and ethics.

Ms. Suneeta Sheel: Sex Selective Practices – Law, Values and Ethics

There are a lot of people who are updated on what's happening on the PNDA Act and the entire PIL that was filed in 2000 and the kind of things that has been happening during last 3 to 4 years. Well, my mandate today is really trying to focus on the health sector and the medical professionals and then trying to bring the issues around, ethics and there are two levels of ethics in it. There is something like the ethics of abortion itself and it is a hard of challenge in for the entire women's movement not only in India but globally because it is a complex issue and people are on the continuum. If you look at the issues of abortion, there are a lot of contradictions. When it comes to something like the fetuses which could be challenged physically and mentally we are saying it should be women's right to say no. Its one thing to understand the intellectual debate around this and try to see how the woman's movement have tried to reconcile with these various positions but when people are working at the grass roots level it is difficult to bring this back to really make this impact and not to sound that there are contradictions and that has been hard for many of us who have been involved in research but also the advocacy at the ground.

My focus would be on the medical profession and the ethics at the two levels. I would try to divide the entire presentation into three parts and I am going to talk about the abortion legislation because it had something to do with the way the PNDA Act has been formulated. Why it was an independent Act and what has been the position of the women's movement around that and why two different legislations are in place? To some extent I would focus on the genesis of both the legislations and as the entire topic of this conversation is women's movement's engagement with law, I will try to see how women's movement has tried to play

a critical or instrumental role in bringing the PNDT Act and will try to see the kind of relationship between law values that ethics, what it has and how would you really look at the medical profession in this entire context.

If you look at the last 10 to 15 years focus of the women's health movement in India also, a lot of good work has happened on contraception and it is sometimes very frustrating to see what the legal activism has fazed to the women's health movement. I feel disillusioned by legal reform. We put in so much energy and little impact was felt on the ground. One finds it frustrating, and I can give here two clear examples, one is the contraceptive debate in India which is very enriching also you need to look at one example of the PIL that was filed against the Norplant. And after fifteen years if you look at the verdict and the hearing, one really tends to question what did we gain? At the end of 10 or 15 years of having the case filed in the Supreme Court, what gains we had, perhaps we have stopped getting into the family welfare programs of the state which is a very important thing but at the same time one can really become skeptical about legal activism.

Let me first read the abortion legislation which was passed in 1971, and was implemented in 1972. The MTP in India was considered to be one of the most progressive and fairly liberal Act. Through this Act women in India have access to abortion on request. There are two salient features of this legislation. First time in the world it allowed abortion for the reasons of failure of contraception although the explanation for this is little disappointing because it specifies the failure of contraception in the case of married women and that brings the regressive and the little bit of orthodox perspective in that. The second was that it doesn't need for a basic signature for seeking abortion and I think these two are considered as most progressive, salient features of the legislation and as far as my knowledge goes, the only legislation which could be considered better is perhaps in South Africa for the very logical reasons that the entire legal system in South Africa is much more empowering. The legal reform and the legal system in South Africa is pro-people and there is hope that you can get justice in the court of law.

The critique of this legislation is that it tends to over-medicalise this entire process of abortion – the entire decision making for the indications of the abortion is entirely in the hands of medical doctors. And in that sense from the women's movement's perspective, if you want to say that the abortion legislation in most of the other countries perhaps give us some kind of a larger control in their hands, its perhaps is not the case in Indian context because for the final decision, the authority lies with the medical profession and that's in one sense is a handicap. As I said earlier that the failure of contraception applies in the case of married women and the unconventional pregnancies. Who interprets the legislation and in what kind of context the legislations are being interpreted? I think at this point in time whether for fortunate reasons or unfortunate reasons, the MTP Act is being interpreted extremely liberally and I would like to underscore the point here is the entire commercialization of the health sector and the commercialization of the abortion services that is taking place. The data of the last 10 years and the 12 years indicates that the medical professions have build their empires just by doing the abortion cares service provisions and that in a way is a flip side of these legislations. So one doesn't really know whether to feel happy about this situation because women do get an abortion whether unsafe or safe, affordable or unaffordable is the question to be asked. Also the quality of care needs to be looked into.

The other issue that I would like to focus is that in what context and in what circumstances the legislation has come in. I was extremely surprised to know that such a seemingly liberal legislation came to us almost on silver platter. Women's movement in India didn't really have to struggle to get such a liberal Act in place. When it came it was 72, by then there were four plans or the four five year plan had gone, in 51 we had the family welfare program which has different kinds of titles over that period of time and there was a clear indication and a lot of data which indicates that the state had brought this legislation in to complement the family welfare program which was obsessed with the population control. I think that the political reality of the abortion legislation in India and we need to take note of the fact because the kind of liberal interpretation that the medical providers at this point of time are doing, we really do not know what really happens few years down the line depending upon what kind of context we will be confronted with. And that's some thing which perhaps might become liable in the coming time just because so much power has been given to the medical profession.

The additional feature is that by 1860 the IPC decriminalize abortion and that is British legacy. At the same time women somehow had started getting access to abortion care for whatever reasons. I want to highlight that a lot of commercialization has taken place during last 30-35 years since the legislation has come in. When we look into the PNDT Act I would like to highlight the point that why the women's groups were very particular to keep the MTP Act untouched and go for the new legislation. This was the strength of the women's movement of that time to have the kind of having foresee the problems in it. And that was a very good move.

Just in the last session someone mentioned about the *hukumnamah* been taken out in *Amritsar Akaal Takht*. The other point that is constantly been made is that the women's reality and the women's life in anywhere in this world is so complex, one can't really focus on just one issue and work on it in isolation so some of the points that are being made are that why people are going for sex selection and what's happening in the development sector and what's happening because of globalization and the commercialization of the health care sector and how that relates to the dowry issue. I think it is a complex gamut in which one has to really look at the entire activism and the PNDT. What triggered the PNDT legislation was one has to go back in the early 80s and see the story began from the AIIMS in Delhi where there was clinical trial was taking place and the people who were going for the amniocentesis test were interviewed and it was the fall out of that work which came out with a disheartening kind of data which says that seven out of eight people agreed to seek sex of the foetus even in the advanced stage of pregnancy.

In Punjab, which started advertising and it was the Bhandari center where sex selection could be offered at the clinic and within no time, it spread to other states including Maharashtra. People could get the amniocentesis done, which was the only available test during that time. For the last 10- 15 years, as you move forward and with the advances in the technology, we have reached not only to the ultrasonography for detecting the sex but also the pre conception selection is also very important, and that was one of the concerns when the PIL was filed in 2000.

Most of the activism around PNDT was contextualised in a larger context and a lot of analysis had gone in to it. A forum was floated in Bombay. The salient feature of this activism was it went outside the women's group and women's health movement and a lot of other progressive mass base people's organizations, groups and people were associated with

the movement. I do not know whether it is called the disillusionment with the movement, but people had got in to the development sector and started their own NGOs. And in a way that's how they muster the support of these people who were in the NGOs at that point of time. I thought it was a very positive way to broaden the base and place more people on board. So you would see a lot of people's organizations along with the women's health organizations and the women group and NGOs involved in it. They formed the forum called the Forum Against the Sex Selection and the Sex Determination. There are two areas, one is the entire activism at that point of time and that groups were so conscious about the fact that would the premises on which the Act would be formulated. They were also aware of the contradictions and the losses perhaps while formulating this Act. The law was complex so how it should be used? They were very concerned about the four points here and were not happy with the inclusion of these things in the legislations. One was that there was punishment to women who sought the sex selection, second, the entire private sector for which the licensing was happening for these tests which is completely unregulated. The third point was that there was prohibition for lay people to access the judiciary. Fourth, it doesn't allow people to access the judiciary directly that was another constraint with the legislation. There was almost a non answerability of the government machinery if they do not do their job and these were the major flaws which were noticed right at this point of time by the people who had played a critical role in formulating the Act. There was no in-built mechanism for monitoring participation of civil society.

Sex selection was considered as the human rights violation. It was considered as discrimination and therefore an additional form of oppression against women. Medical fraternity had played a key role in popularising techniques for sex selection and identification at that point of time. There were other constraints which were expressed that whether we should give that kind of an importance to the state and having the state to regulate so many things. It is almost the parallel where we are saying that the technology is being used or looked at as a solution to everything. We look at the law as solution for everything and overlooked at its inadequacies. So there are sometimes tendencies to look at the limitations.

Broader questions were being asked about the whole ethics of the development of the technology. What kind of technology should be invented? What kind of resource allocation should be done and where are these resources coming from? They are basically the public expenses which are being expanded on the technology which are perhaps meant for the upper middle class. If you look at the justice principle and once again there is question in mind that for whom is this science being developed and for what purpose, so the very philosophy of the basic science was being questioned and I would say that it was something for the younger generation to feel happy that these points were taken note of and were not ignored. At the same time it was been expressed that there was a need to move on. And I think that's how they could also come to the stage where they could formulate a law.

Lastly, we will look at the entire characteristics of health sector. Why were things going wrong in the health sector? And why the seemingly progressive legislation did not really served its purpose? One has to see the dominance of the private sector in the Indian context which is entirely unregulated even today. Conceptualisation of development is regressive pushed by the 1st world countries and forced commercialization of health sector. We need to question the development model we are moving towards. We have to understand the characteristics of the health sector to understand why things are not working despite seemingly progressive legislation.

If one looks at the microscenario and powering balance between the providers and the clients or the patients, then it is perpetually imbalanced. It is regardless of who the patients were and it was regardless of socio-political context, this is true both in western context or even in our context. The doctors generally come from the elite class. If one looks at the profile of the medical profession and the characteristics of the entire health care sector one has to then see why things are going wrong. Nobody questions about the medical professionals, medical education, fee and so on.

Vina Majumdar:

This debate is incomplete without the discussion on the issue of politics of population control. Population control laws and policies are something that have haunted this debate right from the beginning. Section 4 of the MTPA, failure of contraception was the entry of politics of population control into the health sector. Krishna Menon also told the committee on the status of women that we had told the government that the medical profession was already facing tremendous ethical challenges under commercialization. If you introduce this clause the future of medical ethics will be extremely dim. That warning was ignored. The other clarification about how the population control lobby, where it originates, who funds it, where the inspirations come from, I think I can't do better than direct all of your attention to the three volumes written by Dr. Mohan Rao which traces the whole history of the politics of population control since its inception. Finally, when it comes to the PNDT Act, Sabu can tell you that the equipment is produced by GE. Loans are given to the young doctors out of medical college are provided by GE capital. Is it necessary to provide further explanation as to where the funding is coming from? Again the politics of population control itself has thrown up institutions like GE and others.

Dr. Puneet Bedi:

The problem really started because the population programme was ever failing and thankfully that is because we still have a reasonably demographic structure in our country because we didn't go the China way and that is mostly because of the very active family planning association. In fact I've often said that foeticide should be given to them because within two years nobody will hear of foeticide in this country. Whatever they started they messed it up. In the international funding agencies that Vinadi talked about there was a lot of pressure to do something about son preference both in China and in India and in China the state provided free first CBS and then ultrasound and then abortion services as an extension of the one child policy. We also did know the fact that great technology was developed in All India Institute to ensure a son and ensure that daughters are not born. It was probably because of some activists in late 70s it was stopped around 80s but by then medical entrepreneurs had discovered this gold mine. In China the state kept doing it right up to last year and they keep doing it but at least they have declared it as illegal. But the private medical I think she told them that professor Menon mentioned that there will be an ethical dilemma. There is a bit of confusion about the use of English language, ethical dilemma is a very euphemistic term, it is a very nice term for an organized medical mafia. There is no ethical dilemma. Those who are doing it they are not in dilemma at all. They are very clear it is unethical, it is illegal. But they are doing it for a reason. Like for example the guy who is selling *charas* behind Jama Masjid, there is no ethical dilemma in his mind. He needs money and he is selling it. He knows it is illegal, he knows it's harmful etc. it has nothing to do with him. To me it is very clear that it is an organized mafia, the demand was created. Of course we are fond of blaming the tradition for everything in this country. But traditionally the Malayali Nairs, in North East where infanticide and many kind of discrimination against women we assume it does not really happen. And if you blame dowry, there are parts of the country where there was never any

dowry in fact there was a bride price even those parts its been extended. We can trace an ultrasound machine in heavily medicalised societies like Kerala and Punjab there are of course too many machines and hence girls are disappearing in less medicalised societies like Rajasthan and Orissa we can actually trace, one machine comes within a year girls disappear from that town and within two years from the peripheral taluks and then eventually two more machines come because doctors discover this is a gold mine etc. At least I look at it as completely demand driven marketing. When GE finance gives a machine, they also see that you have money to pay in cash. So it's a huge racket. You can discuss it for centuries, I hope there are some girls left to discuss it with.

Leena Prasad (Action Aid):

I wanted a clarification from Sunita. I'm not sure when she said domestic violence law, did you mean to say it is very complicated and you didn't understand it. The domestic violence law has been drafted in the most participatory manner.

Kalpana Dasgupta:

One clarification is there any provision to penalize the family of the woman or is the woman only being penalized?

Sabu George:

In the PNDDT law drafted in 1994, doctors had a major role in the drafting of the law. Doctors were absolutely determined to keep the culpability of women there. In the amendments in 2002 we tried very hard to remove it but one of the law secretaries was caught by the doctors and finally the ministry had to compromise. By and large it was diluted. So if you have a good lawyer, get the culpability shifted but it is ambiguous so depending upon what the proceedings in courts are? I'm talking about the culpability of women per say. Those who are assisting in it are culpable.

Kalpana Dasgupta:

I think the clarification requires who else are culpable along with the mothers?

Sabu George:

The family is culpable.

Leena Prasad:

In a law there is a presumption that if a woman go for sex selection it is husband and the family who all pressurize her to go for it.

Sunita Sheel:

Going back to DV, I just want to make a very clear statement not to critique the process. I know few of my colleagues have been very closely involved with the DV work. My point was that the entire legal language could be daunting for the people who are not by training or otherwise adequately exposed to the legal language. That's the constraint I expressed at the individual level.

Vina Mazumdar:

I don't think this session should conclude without a reference to what is happening to the girl child globally. It is not in India, nor in South Asia, but the United Nations Populations Division Data which is available on the internet for 50 years from 1950 onwards makes it very clear that the girl child is disappearing. You can even date that disappearance from the

time that these technologies became available and it is a global issue. It has nothing to do with the culture of son preference which is supposed to be typically Indian or South Asian and I would plead all of you to use the internet to look at this data. If you have difficulty making sense because the figures are very big get in touch with Savitri Ray who is analyzing this data country by country, continent by continent. She will give it to you in the form that all of you are familiar, sex ratio by age and see what is happening all over the world.

Subhashini Ali:

I want to say something to what Vinadi is saying and I'm not even daring to look in her direction and that is I don't think that we should just dismiss the whole thing of son preference so categorically because I think it is also not correct to assume son preference will exist only in some feudal, backward society. I think we should also be looking at the strengthening of patriarchy, patriarchal thought by capitalism and how that is also responsible for this phenomenon.

Jyotsana Chatterjee

I think you are all aware of the fact that the two child norm is being questioned in the context of female foeticide.

Last session: In Search for Justice: Confronting 'Traditions'

Chair: Dr. Prem Chaudhary

Jagmati is an activist from Haryana and an AIDWA leader. I would request her to begin her presentation.

Jagmati: Honour Killing and Role of Caste Panchayats (Translated from Hindi)

The title of my presentation is honour killings and caste panchayats in Haryana. This is about the experiences and the work that we are doing for the past 15 years in Haryana under AIDWA on the issue of honour killing and caste panchayats. My presentation is on the basis of that experience along with a small survey that we had conducted on the victims of honour killing to know their socio- economic background, feelings, aspirations etc.

Firstly, we start with looking at who are these boys and girls are who marry of their choice and who get killed by their families through the *gotra panchayats* of villages. Who are they? We found that those girls who get killed generally come from poor or lower middle class backgrounds, with some education. Because of this education girls have some vision of a better life. They have been better students in the schools in their villages and in colleges. These girls can think independently. The boys whom they agreed to marry are those who are trust worthy, with responsible characters. Even if they aren't very well off. On a comparative level the girls wish to choose someone who is trustworthy. However, it is not as if all young people in colleges have option to go for choice marriages. They often have relationships but when it comes to marriage, the girl is betrayed. The boy buckles under family pressure or societal pressure. Yet, there are girls and boys who are ready to honour their relationship with marriage and also to pay the cost for it. They know very well what could happen to them, their families and the future generations. In spite of that these youth risk their lives for the relationship they've made and in that way are very true characters.

However the media especially the print media's way of reporting these incidents is shameful. I think we would have to intervene a little in this level. It is usually reported as lovers escape or lovers caught. Choice marriage is a more democratic form of marriage. Because there are

no dowry considerations; no family to family relations; nor caste to caste in fact individual gets related to individual. Choice is in the individual's control and so is the individual's freedom. Thus these marriages are more democratic and have more potential of fulfilling the requirements of the institution of marriage. The question then is why do these killings occur? Why do such boys and girls get killed? They are the martyrs of democratic choice of marriage. If we try to analyse the traditional form of the institution of marriage in Haryana, then a few important points emerge. Firstly, inter-caste marriages are not allowed. Prospective brides or grooms are sought within the same caste leaving out the first three *gotras* and the neighbouring villages. If one analyses these community codes which govern traditional marriages today, then it seems that they maintain the status quo of caste system and patriarchal system.

Actually in choice marriages there are seeds of egalitarian society and this threatens the status quoist people. If you imagine in a village a girl gets married to a *dalit* boy and after marriage, takes her property rights with her. This is the model and basis of any egalitarian society. And this is what the people to whom the social structure of today suits are scared of. The social change that choice marriages can bring is what actually scares them.

We went to the heads of the panchayats in the Sonia Rampal case and the Darshana and Ashish case. They told us very clearly that women had property rights and that threatened them. And they had to make sure that they did not exercise them.

If we move on to why there is violence and who is responsible for this violence, who are these people who actually kill these boys and girls? Often their own families are involved, their relatives, people from their *gotra* community. But the whole arrangement is led by *Khap panchayats* and caste panchayats. They work under their leadership. Quite definitely, there is one section of people among those who give leadership to this who are very well acquainted with this danger. However there are others who get involved because they get carried away by emotions when these things are carried out in the name of honour, tradition, brotherhood to garner social support. Actually such people have nothing to do with the violence but because there is an agreement and support inside the village these things get thrown in.

It is not as if the people who are an integral part of that section of the panchayats who give leadership to honour killings are uneducated simpletons villagers. These people use modern techniques for farming and daily living. These are the people who take the benefits of the caste system and patriarchal system to maintain social and economic hegemony and also are the opponents of the citizenship rights and control of sexuality of women and dalits. Dalits or women are never part of these panchayats. They don't think women are capable of taking the responsibility of decision making. That is why they are not members of these institutions. It is not as if the composition and form of the *Khap panchayats* is the same all over Haryana. There is diversity in their form and composition across regions. There are areas where couples are from the same village. However these are villages where there are many *gotras* within the same villages. It is not as if one '*Khap*' dominates the whole village. It is important to understand the character of these *khap panchayats* if we want to intervene in it.

We feel that the reason why these are perceived to be so powerful; that they cannot be defeated is that the state machinery lacks the will power to intervene and establish the rule of law. This is because ultimately the people who are in key positions in the state machinery are from these very segments of society who socially and economically dominate society; they

are their own children. We met the Chief Minister of the state to ask him to intervene in the Darshana Ashish case and he said that this was a social issue; society will take care of it. So we said that even you are part of society and since you have power, you can intervene. But they will not intervene because of vote politics.

Actually these Chief Ministers and ministers go to the *Khap panchayats* and wear *pagadis*. Actually it is cut off from people oriented politics. So they collect their votes and operate through the heads of these panchayats. So the anti-people politics and *khap panchayat* leadership has a symbiotic relationship. They complement each other and it is also important to recognize this. We who work at the grassroots level have seen that the the root of communal reaction and fascist powers this that we see in the top level of politics has its base in these *khap panchayats*. These are uncontrollable. They are inefficient in their work. These things do not recognize individuals as human beings but only in under caste. Because if their rights as citizens are established, then their validity will become irrelevant. In these panchayats the main intention is to exercise control especially over women, dalits and the poor; these should not go out of control. And it is by this that they are sure of their social hegemony. The character, process of work, their composition of these *khap panchayat* is what I have tried to present. Our experience also tells us this that if on the right issues and from the right angle, recognizing their character, an intervention is made, then these *khap panchayats* are not as powerful as they appear from the top. Ultimately these are kidnapping thieves; those that kidnap citizens' rights. They steal and hide. They are afraid of the media, of their crime being brought to light and then they say that who can dare to speak against us.

Women are not allowed in these *khap panchayats*. But when we read about this in the newspapers, two of us women reached the panchayats. We said that we wanted to participate in the panchayats and they said, that how can women in *khap panchayats*, how can you come here. So we said that we will sit here, because these issues are related to women and we work with women and we can think about these issues and we can talk. We will sit here or else you will have to throw us out of here, we will not go out ourselves. When they saw that we were determined not to leave they let us sit.

When their discussion got over, then we said that we would also like to speak, they said this is impossible. When we spoke, we discussed with them that there is dowry, infanticide, unemployment but you are never active on these issues, but when someone gets married of their own choice, then you get so active. Women are being bought at a price every day from different parts, do you know about their caste. You save rapists and kill lovers. What kind of justice is this? Where will these things take you? We put these issues truthfully and in a straightforward manner before them. But no one dared to say what are you saying? Because actually a large section of the society their interests are not served in the process of working of these panchayats, and in the issues are picked up. Ultimately the working of these panchayats goes against the majority of people. But on nobody speaks from a perspective of majority. Actually there is a need to do that there. When it is reported that the whole village was involved, it is not the whole village but it is the selfish people's inactivity and willpower that is thrust upon the majority. It is a constructed will. Women, dalit and the poor do not participate in this. They are not active because they have no voice but because they are not allowed to participate.

We say that this section of society, of women and dalits and poor who are exploited daily, a realignment from village to village against them is very possible. If we intervene with a unique view point. If employees go to a better union then they will also join. We have tried to

challenge these people and we have been successful to the extent where cases were not filed against such killings and people went scot free, we have tried that whenever such killings happen, they try to hide it and we try to bring it to light. They say that it is the question of tradition and brotherhood and we say that it is a question of democracy and citizen's rights. They threaten people and make them participate in their activities while we explain to them where they would benefit from it and include them. We have now reached the situation that whenever there is a killing a case is registered. But the dilemma is that when a case is filed, no one is ready to testify as a witness. Even the Police say that there is no law which addresses community violence, which can give a definite punishment. We also demand a law for this because the witnesses do not come forward. The onus should shift on the accused to prove that he did not commit the crime.

We have been able to come so far but we face a problem when it comes to the government administration and its machinery. They unfortunately betray the constitution and citizen's rights on this. Instead of protecting the law and rights, they protect the culprits. They never came forward to protect citizen's rights. This is where we face problems. Even the agencies meant for protection of human rights such as the NHRC, NCW, in such cases, for example when the boy has been killed and the girl can still be saved, we in the field need that agencies such as the NHRC, NCW intervene in a very strong way so that our alliance moves forward. But unfortunately there, things get delayed a lot. A lot of times the case itself is not formed and even if it is, due to the delay the others take control of the situation. Because they usually operate there at local level.

We feel that if after such marriages, the couple has to live honorably then a law should be made to ban these anti-constitutional *fatwas* of these caste panchayats. We've initiated this in the Haryana High Court and we will also see this at different levels. Those people who participate in these anti constitutional and anti citizen decisions of the elected panchayats should be removed from their post in the panchayat. There are a lot of other officials who have taken oaths to safeguard the constitution, but who participate in these decisions. There should also be some action against them. This issue is a very widespread issue and only a small portion of it is shown by the media. We feel that a judicial inquiry of the deaths of all young boys and girls between the ages of 12-28 years in villages should be compulsory. Just as we had made it compulsory in the dowry law that there should be an inquiry in the case of the death of a woman within 7 years of marriage, similarly it should also be the case here. There are many honour killings in these instances of deaths of young people which are projected as suicides, they are actually honor killings. Post mortem of these cases is not done, however, it should be made compulsory in these cases.

These backward villages are the centers of anti constitutional centres. There is a need in addition to laws to introduce a movement to bring awareness. If you have to combat these anti constitutional institutions then while intellectual intervention is a very important activity, if adequate support is not given to fight this at the grass roots level then they cannot be uprooted from the top. There should be an ongoing movement at the village level for the people to realise their rights as citizens and human beings. We feel that young people from colleges and universities should be made to be involved in such work. Young people today will be able to rise up if they get involved in such issues of social transformation. All the young people we interviewed in connection with these killings said that these killings should not happen. You stop talking to them and throw them out of the village but do not kill them.

Actually the honour and tradition of the village from the pro people angle is when the women of the village can walk with honour; an atmosphere where they can talk to others freely; where citizens' rights are established. These traditions of honour and brotherhood that are established in traditional societies these have to be turned upside down. The concept of honour, tradition and brotherhood needs to be redefined. There are those people who get influenced by the selfish section and act in accordance with it.

If this phenomenon is not stemmed, it is cause for great concern because there are various dimensions to this. If these panchayats are not controlled, they have now reached a level where they take bribes. They will issue a fatwa against four people and will go and tell the person that if you want to get saved, pay 5000.

Another problem is that the Civil Marriage Act is not friendly to young people who want to have choice marriages; it discourages them. There is need to reform this law. People also are unaware about it. Why shouldn't information about it be disseminated among young men and women? But this is kept hidden because of which young people who want to have choice marriages are exploited economically and psychologically. Even if they do decide to run away from home, somebody will tell them that if you want to get married in the temple the fee is Rs.11, 000. If they want to have a registered marriage, lawyers take heavy fees from them. So even at this level they are exploited.

Police nab the girls who elope and make them change their statement in cases that are registered that they were raped and kidnapped. Recently, a boy came out of prison because the girl was forced to change her statement and then one after the other there were 7 murders in reaction. Violence is increasing. We need to look at this in detail.

Shashank Shekhar Sinha: Witch Hunting Or Women Hunting – Social And Gender Dimension Of Witch Hunting In Jharkhand

I thank the CWDS for giving me the opportunity of presenting and sharing my findings with an enlightened audience perhaps. The issue I feel is a serious but has received relatively less prominence in relation to the mainstream women's movement and its relation to the question of law. What I say is this the crime which is happening all the time in around ten states – Bihar, Jharkhand, Chattisgarh, Madhya Pradesh, the entire central Indian belt you have Gujarat, Maharashtra, Andhra Pradesh, Assam and still there is only one Act which is prevalent in parts of Bihar and Jharkhand, the only two states which have a law in place. I will go on to the elements of a law or an Act in place but there are no rules which have been made to give effect to the provisions of the Act. Just to present a whole indication in the last decade which is around 1991 to 2000, according to the registered cases one estimate is that 536 women killed in the name of witch hunting. But according to the Jharkhand social welfare department, which is a very conservative estimate, in the rural Jharkhand 5 cases of witch hunting happened every month. But that is not to take into account the figures which are in the interiors because they are never reported.

And then the thing which intrigues me most is that why in tribal societies or in *adivasi* societies, most violence is related to women or most violence in general ultimately takes the form of witch hunting. It could be done in a simple mass murder or simple killing. And this is what prompted me to take up this matter and go into the research of this topic basically. So my objectives in this paper would be rooted more in an academic discourse so I will try and

highlight the basic elements and try and take up the other elements in the question, answer session.

- a. To highlight the multiple dimensions and the social complexities behind this crime.
- b. To also point out the intricate connections between gender, patriarchy, and the colonial and post colonial intrusions in Chota Nagpur between the six districts that are: Chota Nagpur what is present Jharkhand now, in the colonial times Chota Nagpur did not include Santhal Parganas, the districts that I take are Singhbhum, Dhanbad , Ranchi, Hazaribagh, Palamou, and Santhal Parganas. Santhal parganas was not there as a separate districts, normally in all studies it has been clubbed together with Chota Nagpur. This is what presently constitutes the Jharkhand, the tribal Jharkhand what is to say.
- c. Situate and contextualize the different analytical models which have also come up borrowing elements from the European models and analyze the temporal and spatial contexts. I am glad that these things are being highlighted in the media. I happened to see a film in National Geographic channel. The overall topic relates to witch trials in India and it did highlight some of the elements of witch hunting but I still do not feel very convinced by the film. The dominant ways of looking at this crime is to relate it with land rights. It is true in post colonial context and also with colonial context, I will be saying that. It had a massive connotation. It had a massive connection with the land rights i.e women and land rights who were those women and who had land rights.

In the tribal society, I must only say that there were only two kinds of women have land rights. One is an unmarried daughter or a single woman or the widows. And that too is basically they are of two sides, one is right to share of produce, basically for all unmarried daughters which they can carry to their husbands home .And second is only meant for the widows is only life interest in land or a maintenance . Basically what happens is that when a woman becomes a widow, property is passed on to her, as a life interest and not as ownership. Ownership only goes to the male line. No women can own a piece of land in tribal societies. So the widows have a life interest in land which means right to manage the land as long as she is alive. If she is marries then she loses that right. If she dies then she loses that right and the land would pass on to the nearest male agnate.

And second is the degenerate form of life interest which is basically right to maintenance in the form that life interest has now been degenerated in the form of right to maintenance in the form of as long as she is alive, she would be given a part of the produce of the land in order to keep her alive and to let her survive. Its not that there is only land rights, otherwise how do we rationalize or justify witch hunts in the plantations and the mines. Also there are many other factors. There are problems of barrenness, cattle epidemics or human epidemics, sickness, there are many other things which are there in the land rights. My basic argument is therefore though they are considerably rooted in the gender and social tensions in the *adivasi* and the social society and they get legitimacy from the *adivasi* moral economy and cosmology and religion and folklore. The gender and social tensions in the *adivasi* societies derive legitimacy from the *adivasi* moral economy and the folklore, the religion as well and in part the facts generating from colonialism and post colonial development regime also added new dimensions to the constructions of witches and the witch hunting, so this is what I will be arguing upon basically. Now let me just draw some elements of the *adivasi* moral economy and religion so as to help us to situate the topic. For *adivasis*, the world is full of as many disembodied spirits as a tree is full of trees. So any thing that happen either an illness, or an epidemic or a death or unnatural catastrophe it is basically attributable to two factors. One is that it is the wrath of some spirit or two, a witch or a sorcerer is at work.

The central element in the *adivasi* religion is therefore to seek an alliance with the helpful deities and socially and psychologically beneficial deities against the harmful deities. And therefore there is a difference between a white magic and a black magic, the practitioners of white magic are known as *ojhas*, *matias*, *jan gurus* etc and the practitioners of black magic are known as *dian* or a sorcerer. There is again a gender component here. The practitioners of white magic are known as *ojhas* who are mostly males. There are a very few female *ojhas*. There is a notion of territoriality which is also attached to witch hunting. For example, the witch may be from amongst the tribe, from amongst a lineage in the same village. E.g. a witch in one village if thrown out from the village may not be considered a witch from some other village. She is generally accepted as a servant in some other village. And a notion of affinity, affinal familiar relations also associated within the tribe problems and within the lineage problems, also associated with this evil. According to the *adivasi* believes witch craft is not some thing which is in born but is an acquired art. Witches learn this craft and there are several sources which basically talk about witch craft being taught, training of *dians*. There are several sources in the colonial and the post colonial times which talk about the training of the *dians*. And it is said that the mother-in-law pass it on to the daughters-in-laws that the seed may live on.

Low literacy rates, extreme backwardness of the region have led to the internalization and the naturalization of these beliefs over a period of time. And that these things also derive social legitimacy from the fact, that you know the social positioning of witch hunting is also important .its the barrenness, it is the epidemics, you can rationalize it in terms of unhappy spirits or witches at work. I will try and relate these elements of *adivasi* moral economy to the social and gender tensions prevalent in *adivasi* society as well.

In many anthropological studies, what you see is that it is a tendency to see there is a fear against women which is attributed to two factors, one is the ability to reproduce and the second is the menstrual blood. Therefore there is a fear of women's sexuality. In Europe there is a model which talks about misogyny, about witch hunts were a part of deep rooted misogyny. There were attempts to tune down women's sexuality.

In the Indian context as well we have so many cultural, cross cultural connotations. I do not say that it is part of the deep rooted misogyny. I try to highlight the fact that there is an element of fear and suspicion of women's sexuality in *adivasi* societies and this happens across *adivasi* society. Amongst the *bhils* of Rajasthan, folklore says that there is a potential witch in every women undergarment. Amongst the Malda districts, West Bengal, it is said that since women have superiority in matters of *mantras* and incantations, therefore we are likely to win over the *bongas* (spirits) Their nature being destructive, they are prone to bring about destruction in the society .Amongst the Warlis of Western India, it is believed that no women can take up *bhagat* because once you take up *bhagat* you start misusing the powers to the detriment of the society and Troisy also talks about in this context in the Jharkhand. They say that the dangerous potentiality of the women to seduce the evil spirits and red vengeance on their enemies is what is behind the witch crafts basically. So what does one reflect and how do these make relevance?

In fact the language of construction of witches also keeps the female dominant. They are known more as *dians* and *churails* rather than as *bisahars* who are the male witches. If you go by the *Santhal* theory of witch craft, it ascribes it to the treacherous nature of women. The *santhals* were fed up with women, so they said that we are constantly being abused all the

time so let's go to our supreme diety *marang guru* and asked to teach them about how to control the women. The legend says that *marang guru* agrees to teach them and said that I will teach you witch craft but you will have to out of your own blood make a mark on my sal leaves. Sal is the plants. The women were following them in the forests they got to know about the exact game plan. The next day women served drinks and good food to men. And they got themselves dressed as males and went to the forest to the Supreme Being, and said that we have come here, we will make the blood marks, so please teach us. Then *marang guru* taught them the art of witch craft and they came back and again started abusing the men to get up and go to the fields. So the men went to the *marang guru*. But *marang guru* replied but I gave you the witch craft. Having realized that he made the women experts in the art of witch finding, he made the men *ojhas*. Thus there is an element of gender tension involved into it.

What makes the witches very powerful? The *adivasis* say that the evil spirits are at times more powerful than the beneficial spirits. What the women do is that they seduce the *bongas*; they have intercourse with the *bongas*. So they can hurt in two ways. One is directly themselves or by setting the *bongas* or the spirits. Taking these things into account, what you see, is that in all *adivasi* rituals women are absent. They are not allowed to go to the sacred grove, to the places of ancestral worship. The rituals are basically or the family gods are passed on to the son from the father resulting in an exclusion of women. Women are not allowed to climb the trees because the nearness of their sex might pollute the *bongas* as well. The *bongas* are residing on the trees. They are not allowed to go to the cremation grounds, barred from eating the flesh of the animals offered as sacrifice to the spirits.

Some people also do *Shamanism* and witch craft but in the colonial context there is not so much of evidence. There may be prior to that because the elements talks about that women being the guardian and had good knowledge of herbs and the dance. In the Jharkhand context also there is no original mandarin word for the healer. The word *ojha* is an Indo-aryan in its origin. So they say that the healing part was taken care by them. One function which women still perform is that of mid- wives. Though this might be true in some sense but there is not much of an evidence of organised presentation of woman's shamans and in order to reduce their access to healing.

Witch craft was one of those with limited available responses for women while negotiating patriarchal forces. They represented moments of protests. I see it as an act of subversion. There are identifications and deals which talk about the *ojhas*, they are also very discriminatory. There are very discriminatory methods to find about witch craft. How do the *ojhas* define and how do the *ojhas* collect information about the potential witches in contexts? What did the colonial rule do? Colonial rule had a massive impact in Chota Nagpur whether the land legislation or the forest legislation or the set up of industries. They not only reduce the access to land and forests but bring intrusions in the Chota Nagpur plateau. Amongst the *bikhus* that's a non tribal people they were also penetrating into the region.

The two things which I want to highlight in the colonial context is the land crisis and the agricultural crisis. In context of land crisis, women were the soft targets, there is an attempt to snatch women's rights. It is a conflict between women's residual rights to land and men's absolute right to ownership. So in the late 19th century and the earlier 20th century a lot of widows who have access to land are being hunted down. Women's access to forests was denied. *Adivasis* have been depended on the traditional medicines also. When the access to the forests is reduced they are trying to take records to the *ojhism*, exorcism and identify a

few individuals. All these socio economic disorders as identified as the work of witches. In a case in Orissa, during a cattle epidemic haunted they beat up all the women and forced them to carry dead bullocks to the field. In Jharkhand when there was cholera and they were not able to find out what it was, women were called at one place, they were beaten up and were made to swallow human excreta. It is believed that with the human excreta the spirits do not go to the polluted. This continued in the post colonial period. The dominant methods of witch hunting were fine, expulsion from villages or women were killed. But what you see in the colonial times is the monetization of the witch tribes as well. So the women were being fined and repeatedly fined.

In the post colonial context, what is happening is that there is a range of victims, women marrying the *bikhus* or the non tribals, women who are trying to deviate from the accepted norms also try come in the range. There is an envy factor. There is an element that the non tribals are also using it as an element, they are trying to instill fear. I am pointing the attention to the prevalent, exploitative arrangement.

Discussion:

Janaki: (translated)

In every village in Bihar there is *Ojha*, *Dayin* and *Chudail*. From our childhood we have been listening to this. But these from Bihar, have not got as much publicity as those in Jharkhand. Even in Santhal pargans it has not been highlighted.

Shashank:

I have analysed the witch hunt so if anybody is interested, there is a law in 1999, Bihar government enacted a law.

Kumkum Sangari:

Shashank you are saying that there are lots of social and other tensions; one gets the sense that ritual amongst the *adivasis* has been stabilized once and for all. The notion of the sacred, the notion of the ritual as and when it was invented has remained the same. And I have some difficulty there because if this ritual is being embedded within a new set of social and gender tensions then surely it's not the same. So one can't have a sort of static sacred and moral economy on the one hand and a turbulent contemporary economy on the other. I think they are both turbulent.

Jagmati my question to you is that you said that these *khapanchayats* are foundationally entrenched in society and beside the state machinery, the economic structure from below is also perpetuating it. What is the way to change economic structures?

Uma Chakravati:

My question to Jagmati is since when did the fines start, after the fatwa was issued? Because there is a dialogue between North India and Pakistan and this point had come up that in Pakistan, fines were there for some time now and it had got commercialized. The big *zamindars* institute these panchayats and then ask money through such means. If the issue does not get settled, then they kill them. So the question is when did these fines start? Secondly, those cases that have been registered and have moved forward, what kind of judgments have come out from them. From the courts what is the response.

Vina Mazumdar:

I saw a film on the *Dain* made by a Bengali filmmaker just a fortnight back in Kolkata and in that the area is pretty close to the area you referred to. But there is clear that the absence of health services in that region and this is at the root of the increase in the persecution of the *dains*. The greater dependence on the *Ojhas* lead to the rivalry and therefore the *Ojhas* may declare a woman as a *dain* saying that she is responsible. These are indicators of mal-development.

Jagmati:

About the decentralization of economic structures that you talked about given the present situation, I feel that land reforms should be initiated for the landless, the law should be implemented and property rights for women should be advocated for. Till now, there in the law and practically the women in Haryana don't have property rights. If they are economically independent then they will get a solid foundation to exercise their rights. We give priority to the property rights related cases that we get. Despite great obstacles we do what we can and give such cases priority. However as of now there are few women who aspire to take their property rights.

As regards the fine Umadi, 5-6 months earlier we got a case where we got the report for the first time that the panchayat took Rs.5000 bribe from them in Bhiwani. In other cases, too many complaints of this have not come to us. In cases that were filed in through our organization. There was a father who had killed his two daughters and pleaded guilty. He was punished. He was from a very poor family. However in most of the cases police goes unwillingly to the village and that too because of our persuasion. They often sympathize with the offenders. Often there is no judgment because there is no evidence and no witnesses. Also circumstantial evidence is not given as much importance and that is a weak area.

Shashank:

In response to Dr. Sangari's question, I never intended to suggest a static nature of rituals. My idea was to underline the construction of rituals and belief systems is to deliberately keep it as a male preserve. Females have never been an identity. The moment a woman is seen practicing those rituals she is seen as a witch and the therefore she is persecuted. Thus it is the construction of rituals that I was talking about. That there are some rituals that involve the deities, they are constructed as being male preserve and the moment a women is seen going into that preserve, she is identified as a witch and persecuted.

As to Vinadi's question it is not just about medical facilities alone, it is about underdevelopment, lack of infrastructure, lack of education, poverty. I did a case study which said that in Singbhaum, in the last 10 years there have been 84 cases of witch hunting. This is also a region, Ranchi, Palamu and other poor backward regions which have been identified by the Planning Commission and Government of India as the most poverty stricken region. These things all add up. Witch hunt gives a rational justification to identify the social and ideological underpinnings that it has to essentially take the form it forms a safe cover to all kinds of killings. So in colonial times, when they could not find access to herbs, what they would do is they collect the women together and the ordeals if I were to talk about them, there were many ordeals. To give you an example, branches of Sal tree were taken with names of women on all of them. The moment any branch withered the fastest was the evidence of a witch or in case of Bhils what they would hang you to the branch of a tree and rock you. If you fall down and there are injuries all over your body, then you are not taken as a witch. If someone unfortunately escapes unhurt, then that is taken as an evidence of a witch. Or they thrust chilli grains in your eyes, if there are no tears you are not a witch, if there are

tears, you are a witch or they would put you in a gunny bag and throw you in a river, if you don't die, then you are taken as a witch.

Surinder Jaitley:

I suspect that these women had access to certain special knowledge. Because if you go to the hills, villages, it is the women who have maximum knowledge about herbs, household ingredients, spices and things. They are able to cure the diseases around that the *ojhas* or the other practitioners feel threatened and that is why they are declared as witches. So it is not merely the evil aspect of it, but it is the professional rivalry in that sense.

Shashank:

In my presentation, I had just briefly referred to that. There is one of those analytical model based on a European model which talks about the role of church trained physicians to reduce women's role in healing. When you apply this model to Chotanagpur what you see is that women had access to herbs and plants. There is no original *mundari* word for a healer. The word *ojha* is an Indo Aryan word. Also it is said that women in one of their *mantras* name *kamru bhagat* who is a medicine man. Also still in some cases in Chotanagpur it is still said that women had better access to directions to forests, to nature. So basically they are the traditional guiders. In villages, women would lead the herd it is the ritual thing now. But when you talk about the colonial context as well women's access to things like herbs and all has definitely made her vulnerable. But there is no major evidence of an organised killing of women. You have evidence not only from Jharkhand but Chattisgarh, Dangs in western part of India.

Prem Chaudhary:

I want to ask if there is any movement against this and I recall Madhu Kishwar's case, has that spurred any investigation into this phenomenon?

Shashank:

The people who are generally going to take these cases are the general *adivasi* movements or the women's movements. When you talk of *adivasi* movements, these are big *adivasi* movements that are known to all the history students and others. When you talk of the famous Santhal uprising or you talk of the disturbances that took place against the backdrop of 1857, all the rural disturbances in Chotanagpur, or you talk about the famous *Birsa Munda* uprising, now these are taken as the high points of *adivasi* resistance. What surprise you is that these were also moments which were related to high points of persecution of witches. During these moments, the *adivasis* would make a collective effort to cleanse the society of all evils because law and order is suspended so there is nobody to watch you. So during these movements which are supposed to be movements of *adivasi* resistance against colonialism and capitalist intrusion as well which were marked by huge persecution of witches. In the post colonial context there are evidences of resistance. There are women that are fighting court cases. Referring to Madhu Kishwar's case, Madhu has herself said in an article that she did not do a very good thing by taking up the case because she was here and the lady Makibui was there and ultimately she died, she eloped and then disappeared. She did file a court case but then that was something that was not taken very kindly. But yes there is evidence of resistance in the sense that there was the formation of Jharkhand Mahila Mukti Samiti in 1987 and in their subsequent conferences, they are taking up events related to this, matters relating to land and witch hunting.

There is another *adivasi* movement which is a Hinduisation movement and the dominant ideology was that since we have fallen from grace, if we were to come back to a position of glory, we were to imitate all those things that were good for us, so the *Tana Bhagat* movement that you have talked about actually did attack witch hunting and also Christian movements, although Christian movements have not been so strong. Also one of the reasons of *adivasis* adopting Christianity was to get freedom from witchcraft.

Prem Chaudhary:

I shall withhold my comments and just say that AIDWA is doing very good work in Haryana and whatever awareness has come in Haryana has been because of AIDWA. When there was a lot of repression, saying there must be divorce, you had moved to court and then strictures were passed against the panchayat and the panchayat withdrew. It is being said that if pressure was put on the panchayats by courts or police, they do become fearful. That is why I say that if the government was to take its functions seriously, that is, if it wants to implement its own laws, if it doesn't want to be a privy to subversion of its own laws then it must act immediately as soon as it finds out that this is a problem area. But it doesn't. It allows the panchayat to take over. Only when the situation is out of control do they intervene and by then the situation is out of hand. And only when institutions like AIDWA intervene does something drastic happen. I must say that things are controllable if there is political will and if the government is serious about effecting its own laws.

Indu:

I just like to add that there have been cases of witch hunting from Bihar and Jharkhand of so called witch hunting and expelling them from villages etc which have come to the AIDWA units in these states which are not very strong units. The manner of taking them up is slightly different as Jagmati was saying by deconstructing the concept of witch hunting. Attempts were made to try to see what was the ground reality in each case was rather than falling into the trap of putting it only as witch hunting and then countering it at that level. The whole concept of honour is being deconstructed to see what is the conflict and how it is emerging, which are the forces supporting it, which are the forces opposing it? I remember way back in the 80s, the Bihar unit gave those clippings and then followed up some of those cases and I remember around 88-89 some of those were published. But the manner of taking up was I must admit, not to see it as witch hunting per se but to see what was actually the conflict in each case and then moving on it. That was the experience I remember from the late 80s and early 90s and not continuing to construction as witch hunting.

Finally, I would like to thank all the participants who made this two days conference successful. There was a lot of pressure to postpone it but we thought we would just go ahead and hold it but there were lot of limitations in terms of time, availability of resource persons etc. It is important that as many of us have seen strong linkages between new laws passed and to have old laws implemented, to look for opening in the existing situation when none exist and struggle for women's equality. And many of us were not from legal discipline familiarize ourselves with many debates as sheer day to day activity in the movement. Women's movement has always benefited from this very strong link with committed lawyers who have made their service available. When we talk about women's studies we must recognize the fact that all these lawyers despite all the pressures have continued to interact and continue to actively intervene with and on the behalf of the women's movement. When we started with this consultation Vinadi was talking about it, this is what we want to cherish in terms of teaching, learning, in terms of professional commitment, activism that this links need to be maintained and strengthened otherwise what happens is that law may take its own course and

movement may take another course. This benefit of interaction which has strengthen and which has given us the long history of 25-30 years of active interaction in the contemporary period but also in the course of nationalist movement and the imperialist struggle we find that women brought in all their professional training be it medicine, be it law. So whatever concerns were they were addressed. Some of the luminaries of freedom struggle were competent professionals and they keep it up and that legacy of the movement needs to put before people. We know the limitations and drawbacks in movement. But only way forward is strengthening those links and it is important that we take this forward with some of the young lawyers, some young women who may not be studying law but are from social science background. Otherwise the connection we have been able to draw upon and experiences may be put aside in some way and we may all become specialist in our own fields and our own research areas. I think the richness movement has gained from this combination and pooling in of resources and commitment and ideological debates which was clear on many issues that there is a need to debate and need to clarify and coming to the point to say that legal interventions are possible despite our differences. We need to put in procedure in place, we need to pressurize state particularly at this point of time. There is a cynical approach saying that there is too much of law. I think that needs to be changed. We need more space today when state in anyway is wanting to step back when state is abdicating many of its roles and responsibilities, this may not be a good strategy for the movement. I think this seminar and discussion have opened several issues and outlined the need for further debates, discussions, interactions and interventions. There is a much more need for debate and further dialogue on the issue. Many of the issues get left out because it was not possible within two days to discuss all these but on behalf of CWDS we thank everyone who participated.

Uma Chakravarti:

One of the issues that needs to be discussed and has not been dealt here is that of sexual violence in relation to Communal Violence Bill. If CWDS could organize a separate discussion on this issue it will be helpful.

Indu:

Kirti has focused a bit on this issue and in Svati's presentation too this issue has come out. But we can put it before CWDS faculty. Thanks to all of you for participating in this seminar.

**Women's Movement's Engagement with the Law:
Existing Contradictions and Emerging Challenges
20-21 March 2006
Conference Room No. 2,
India International Centre, 40 Max Mueller Marg
Lodi Estate, New Delhi 110003**

Programme

20 March 2006		
9.00 a.m – 9.20 a.m.	Registration	
9.25 a.m.-9.30 a.m.	Welcome and Opening Remarks	Dr. Vasanthi Raman
	Honouring Prof. Lotika Sarkar	Dr. Vina Mazumdar
9.30 a.m – 11.00 a.m.	Session - Overview	
	Chair	Dr. Kumud Sharma
	Pre-Independence Era and Law Reform	Dr. Aparna Basu
	Post-Independence Era, Law and Women's Movement	Ms. Kirti Singh
	Overview and Violence Against Women	Dr. Flavia Agnes
	Constitutional Mandates and Women's Equality	Prof. Amita Dhanda
	Women and Law	Ms. Indira Jaisingh
11 a.m. – 11.30 a.m.	Tea Break	
11.30 a.m. – 1.30 p.m	Session I	
	Anti-Dowry Movement and Experiences of Dowry Law	
	Chair	Dr. Rajni Palriwala
		Ms. Indrani Mazumdar Shalu Nigam
1.30 p.m. – 2.30 p.m.	Lunch Break	
2.30 p.m. – 3.30 p.m.	Session II	
	Violence Against Women	
	Chair	Dr. Syeda Hamid
	Sexual Violence and Its Relation to Communal Violence	Dr. Svati Joshi
	Rape Laws	Dr. Pratiksha Baxi
3.30 p.m. – 3.45 p.m.	Tea Break	
	Session II (Continued)	
	Chair	Dr. Kumkum Sangari
3.45p.m.-5.00 p.m.	Domestic Violence	Lawyers Collective
21 March 2006		
9.30 a.m. – 11.15 a.m.		
	Chair	Dr. Indu Agnihotri

	Women and Law	Ms. Indira Jaisingh
	Session III Dialouge Between Trade Unions and Women's organisations	
	Panelist	Ms. Renana (SEWA)
	“	Ms. Amarjeet Kaur
	“	Ms. Subhashini Ali
	Discussants	Ms. Hemlata
	“	Ms. Bulu Sarin
11.15 a.m. – 11.30 a.m.	Tea Break	
11.30 a.m. – 1.30 p.m.	Round Table Discussion on Maintenance, inheritance and Property	
	Chair	Ms. Jyotsna Chatterjee
	Customary Laws	Dr. Jarjum Ete
	Local/Customary Justice	Awaz-e-Niswan
	Shariat Courts	Dr. Sabiha Hussain
1.30 p.m. – 2.30 p.m.	Lunch Break	
2.30 p.m. – 3.30 p.m.	Session IV : Emerging Areas	
	Chair	Dr. Jyotsana Chatterjee
	Sex Selective Practices – Law, Values and Ethics	Ms. Sunita Sheel (CSER)
3.30 p.m. – 3.45 p.m.	Tea Break	
	Session IV (continued)	
3.45 p.m. – 5.00. p.m.	In Search for Justice: Confronting 'Traditions'	
	Chair	Dr. Prem Choudhary
	Honour Killing and Role of Caste Panchayats	Ms. Jagmati
	Witch Hunting	Mr. Shashank Shekhar Sinha
5.00 p.m. – 5.30 p.m.	Concluding Session	Dr. Indu Agnihotri