

WOMEN EMPOWERMENT AND DOMESTIC VIOLENCE¹

“Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things and not as a result only of learning to read and write. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over woman which they do not deserve and ought not to have.

Many of our movements stop half way because of the condition of our women.” Mahatma Gandhi

Empowerment is a frame of mind wherein an individual, social class or community has certain liberty to present a voice of dissent in support of its existence recognizing the inalienable human rights, and identifies the capability to make sound judgments, choice or decision independent of any exterior influences, or social dicta that is detrimental or nuanced for one’s personal growth and dignity. Empowerment is to have wider access to resources and knowledge, with considerable independence to make one’s own scheme for self preservation.

Women Empowerment and Indian Legal System: Empowerment as a legal terminology per se, has not been succinctly defined in the definition clauses of any Indian Act or legislation. However, Indian legal system drawing its authority from that of Indian Constitution has inherent tenets in it to empower every section of the Indian Society irrespective of Gender, Caste, Race, Place of birth etc. Therefore, any discrimination solely on these grounds would be declared unconstitutional and any “force of law”, be it in the nature of oral tradition, custom, norms and traditions and practices that existed in the pre-Constitution period or post, and if found to be discriminatory or not in consonance with the provisions of Constitutional Morality, against Public order, then such law, custom or tradition that curtails the Fundamental Rights of another, will be declared unconstitutional.

The liberty guaranteed to the citizens of India under Article 19 of the Indian Constitution comes with Reasonable Restriction in 19 (1) and (2) that freedom of speech and expression needs to be exercised with a sense of responsibility. The 247 Law Commission Report on Hate

¹ Jimsi Tassar, Advocate, Guwahati High Court & New Delhi High Court.

Speech has elaborated upon the Constitutional provision as well 245A of Indian Penal code, 1860:

The law Commission identifying the criteria for Hate Speech in *Shreya Singhal vs Union of India* that struck off the ambiguous provision of 66A of the Information Technology Act, 2002 observed that any expression to qualify as Hate speech need to fulfill certain criteria: i) Extremity of speech ii) incitement iii) status of the author of the speech iv) status of the victim of the speech v) potentiality of the speech vi) context of the speech. Law Commission observed that: Liberty and equality are complementary and not antithetical to each other. The intent of freedom of speech is not to disregard the weaker sections of the society but to give them equal voice. Similarly, the intent of equality is not to suppress this liberty but to balance it with the necessities of a multicultural and plural world, provided such constraint does not unduly infringe on the freedom of expression. Thus, incitement to not only violence but also to discrimination has been recognized as a ground for interfering with freedom of expression.

Supremacy of the Constitutional interpretation of the existing laws in the form of acts or legislation has been observed by the Apex Court in number of judgments, of which the very recent 'Triple Talaq landmark judgment' adjudged upon a bundled writ petitions by one Shayara Bano and others Vs. Union of India, is exemplary in reiterating that any enactment, customs or traditions or any interpretation of religious tenet that is found to be discriminatory will be nullified. It is also to be noted that Article 25 and Article 26 that guarantees the right to practice and profess any religion in India is subjected to certain restrictions of not going against the Public order or the Constitutional Morality. (The Landmark Judgment is discussed in detail in the following paragraphs). Article 141 of the Indian Constitution states: law declared by Supreme Court will be binding on all the subordinate courts within the territory of India. Therefore, the Supreme Court being the highest appellate court of the country has a significant role in determining the precedents as per the interpretation of the Constitution bench.

The Parliament and the State Legislature has significant role in terms of formulating laws subjected to schedule VII, the Centre can make significant laws in the national interest for specific enlisted matters in the State List for certain duration of time.

The Concurrent list that allows State and Centre to legislate any law including amendment of Criminal Procedure code, Civil Procedure Court, Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

Article 249 and Doctrine of Repugnancy: In the matters enumerated in List III of Schedule VII, the Constitution of India allows for the Central Acts to prevail over the State legislation in case there is a repugnancy, to the extent it is void for being repugnant to the Central act.

Women Empowerment through Protective Discrimination: Women Empowerment per se has not been legally defined in the sections of definition clauses of any Statutory Provisions in

India. However, the Constitutional Rights guaranteed to the women, and the provision of Legal rights with the enactment of the laws and Policy guidelines on provisions of Equality and Justice: Social Economical and Political, based on the preamble or the spirit of the Indian Constitution has provided special provisions for the empowerment of women.

Articles 14, 19 and 21 is considered as the 'golden triangle' that exclusively dwells upon Equality, Liberty and Right to life and dignity to all citizens of India regardless of their background, gender, place of birth etc, and the Equality of all in opportunities and access.

However, the Constitution of India acknowledges the fact that certain sections of the Indian Society due to various historical or social reasons of discrimination or isolation due to geographical terrain have adapted the principle of Protective Discrimination.

Dr Rajendra Prasad in the Constituent Assembly while adapting the Indian Constitution remarked: *"...Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. If the people who are elected, are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them... It requires men of strong character, men of vision, men who will not sacrifice the interests of the country, at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance..."*

The vision of Post Independent India of the Constituent Assembly members envisaged an egalitarian Society in India for Justice, in terms of Social, Economic and Political and Equality of Opportunity and Status for all, in a post colonial and Non Alignment Movement era in India. The Protective Discrimination by the Draft Constitution acknowledges historical facts based on cultural and religious practices of diverse communities of India. The Indian society being Patriarchal in value system have been bias against women in terms of Civil and Political Rights, and having an access to Economic rights due to Social and cultural value system that kept women mostly within the walls of the household attaining to traditional roles. The legislation history of Indian Legal system in terms of laws on women is testimonial of the discriminatory practice in the traditional system of Patriarchy.

The Scheduled Tribes are one such geographically isolated community who had no access to Formal Education and other socio-economic benefits, and are considered "backward" and therefore, have been given a special status for their Socio-economic upliftment and integration with the other sections of Indian society through reservation in Educational institute and occupation in public sector.

The Other Backward Class and the Scheduled Caste are those communities who were not ascribed a status within the Varna system, were subjected to social discrimination due to traditional beliefs of twice born or the High castes according to the value system generated by Manusmriti, an ancient Hindu document that prescribed a systematic division of labor and status for the stratification of the communities within the society on the basis of sacred and profane assigning degrees of sanctity to the nature of labor each strata endured in. Dalits or Harijans are ascribed lowest strata due to its pre-destined occupation of manual scavengers; cleaning the human waste.

Similarly, Women and Children are considered to be the “weaker sections of the society” due to biological reasons, or the ever-existent discriminatory practices in a Patriarchal society since time immemorial.

Therefore, a policy of “Protective Discrimination” is an affirmative action adapted to streamline years of discrimination to bring all members or citizens of India into folds of equity and justice as enshrined in the Constitution.

Article 14 provides equal treatment and equal opportunity for all the citizens of India without discrimination on any grounds of sex, race, place of birth etc. Having acknowledged the historical deprivation, the equity jurisprudence makes an effort to bring women in equal status of its counterpart by providing special legislation to empower them, through the Indian Constitution.

Legal Rights and Constitutional Rights of Women in India:

The rights available to woman in India can be classified into two categories, namely Constitutional Rights and Legal Rights. The constitutional Rights are those which form Part III as well as forms part of the Indian Constitution. The legal rights are those which are provided through various enactments, legislation and Acts of the parliament and the State Legislature according to the enlisted items in the Scheduled XII of the constitution categorized into Centre, State and Concurrent List.

The rights enshrined in the constitution for women in India are listed below:

1. The state shall not discriminate against any citizen of India on the ground of sex [**Article 15(1)**]
2. The state is empowered to make any special provision for women. In other words, this provision enables the state to make affirmative discrimination in favour of women [**Article 15(3)**].
3. No citizen shall be discriminated against or be ineligible for any employment or office under the state on the ground of sex [**Article 16(2)**].
4. Traffic in human beings and forced labour are prohibited [**Article 23(1)**].
5. The state to secure for men and women equally the right to an adequate means of livelihood [**Article 39(a)**].
6. The state to secure equal pay for equal work for both Indian men and women [**Article 39(d)**].

7. The state is required to ensure that the health and strength of women workers are not abused and that they are not forced by economic necessity to enter avocations unsuited to their strength [**Article 39(e)**].
8. The state shall make provision for securing just and humane conditions of work and maternity relief [**Article 42**].
9. It shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women [**Article 51-A(e)**].
10. One-third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women [**Article 243-D(3)**].
11. One-third of the total number of offices of chairpersons in the Panchayats at each level shall be reserved for women [**Article 243-D(4)**].
12. One-third of the total number of seats to be filled by direct election in every Municipality shall be reserved for women [**Article 243-T(3)**].
13. The offices of chairpersons in the Municipalities shall be reserved for women in such manner as the State Legislature may provide [**Article 243-T(4)**].

Legal Rights to Women:

The legislation for the safeguard for women:

1. Protection of Women from Domestic Violence Act (2005) is a comprehensive legislation to protect women in India from all forms of domestic violence. It also covers women who have been/are in a relationship with the abuser and are subjected to violence of any kind—physical, sexual, mental, verbal or emotional.
2. Immoral Traffic (Prevention) Act (1956) is the premier legislation for prevention of trafficking for commercial sexual exploitation. In other words, it prevents trafficking in women and girls for the purpose of prostitution as an organised means of living.
3. Indecent Representation of Women (Prohibition) Act (1986) prohibits indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner.
4. Commission of Sati (Prevention) Act (1987) provides for the more effective prevention of the commission of sati and its glorification on women.
5. Dowry Prohibition Act (1961) prohibits the giving or taking of dowry at or before or any time after the marriage from women.
1. Maternity Benefit Act (1961) regulates the employment of women in certain establishments for certain period before and after child-birth and provides for maternity benefit and certain other benefits.
2. Medical Termination of Pregnancy Act (1971) provides for the termination of certain pregnancies by registered medical practitioners on humanitarian and medical grounds.
3. Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (1994) prohibits sex selection before or after conception and prevents the misuse of pre-natal diagnostic techniques for sex determination leading to female foeticide.
4. Equal Remuneration Act (1976) provides for payment of equal remuneration to both men and women workers for same work or work of a similar nature. It also prevents discrimination on the ground of sex, against women in recruitment and service conditions.

5. Dissolution of Muslim Marriages Act (1939) grants a Muslim wife the right to seek the dissolution of her marriage.
6. Muslim Women (Protection of Rights on Divorce) Act (1986) protects the rights of Muslim women who have been divorced by or have obtained divorce from their husbands.
7. Family Courts Act (1984) provides for the establishment of Family Courts for speedy settlement of family disputes.
8. Indian Penal Code (1860) contains provisions to protect Indian women from dowry death, rape, kidnapping, cruelty and other offences.
9. Code of Criminal Procedure (1973) has certain safeguards for women like obligation of a person to maintain his wife, arrest of woman by female police and so on.
10. Indian Christian Marriage Act (1872) contain provisions relating to marriage and divorce among the Christian community.
11. Legal Services Authorities Act (1987) provides for free legal services to Indian women.
12. Hindu Marriage Act (1955) introduced monogamy and allowed divorce on certain specified grounds. It provided equal rights to Indian man and woman in respect of marriage and divorce.
13. Hindu Succession Act (1956) recognizes the right of women to inherit parental property equally with men.
14. Minimum Wages Act (1948) does not allow discrimination between male and female workers or different minimum wages for them.
15. Mines Act (1952) and Factories Act (1948) prohibits the employment of women between 7 P.M. to 6 A.M. in mines and factories and provides for their safety and welfare.
16. The following other legislation's also contain certain rights and safeguards for women:
 1. Employees' State Insurance Act (1948)
 2. Plantation Labour Act (1951)
 3. Bonded Labour System (Abolition) Act (1976)
 4. Legal Practitioners (Women) Act (1923)
 5. Indian Succession Act (1925)
 6. Indian Divorce Act (1869)
 7. Parsi Marriage and Divorce Act (1936)
 8. Special Marriage Act (1954)
 9. Foreign Marriage Act (1969)
 10. Indian Evidence Act (1872)
 11. Hindu Adoptions and Maintenance Act (1956).
17. National Commission for Women Act (1990) provided for the establishment of a National Commission for Women to study and monitor all matters relating to the constitutional and legal rights and safeguards of women.
18. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013) provides protection to women from sexual harassment at all workplaces both in public and private sector, whether organized or unorganized.

Supreme Court and Judicial Precedents on Right to Privacy being a Fundamental Right Under Article 21 and its implication on Legal and constitutional rights of Women and girls in India:

In a Landmark Judgment of the Supreme Court on 22.08.17, Right to Privacy has been brought under the ambit of Article 21 by the nine judge constitutional bench, having

adjudged the Writ Petition: Justice KS Puttaswamy VS Union of India, 2012 that recognized and defined the Constitutional Right of Personal liberty of the Woman to make reproductive choices as a part of personal liberty.

The Nine Judge Constitutional bench also reiterated the three bench judgment on the Suchitra Srivastava Vs Chandigarh Administration (2009) that held that Reproductive Rights of a woman include a woman's entitlement to complete a pregnancy term, birth and raise the children and that is a woman's right to privacy, dignity and bodily integrity. Whereas the relevant Act allows the Medical Practitioner to decide for the women infringing upon her right to privacy to make the decision for herself, regardless of the fact if pregnancy was due to Rape, Marital Rape or consented sexual act between adults.

The Medical Termination of Pregnancy Act, 1971 (MTP Act), which governs abortions in India was enacted before the Roe v Wade (1973), a landmark judgment of the US Supreme Court allowing legal abortions if laid down conditions are met.

The MTP Act, lays down conditions for legal abortions in Section 3 and 5 that, it is only a medical practitioner to terminate a pregnancy if they believe in good faith that if the pregnancy continues, it might injure Mental and physical health of either or both the woman and the child.

The conditions laid down are that if the pregnancy is up to 12 weeks, then the expertise and permission of one practitioner for termination of pregnancy is required, and if the pregnancy is between 12-20 weeks, then two medical practitioner is required to give their opinion and if pregnancy is beyond 20 weeks, then the medical practitioner confirms that there is imminent danger to the life of the woman because of the pregnancy, and it needs immediate termination as per Section 5 of the Act.

Various Statistics of Gender Equality and Gender Gap: The World Economic Forum statistics on Gender Gap quantifies the gap on four pillars: economic participation and opportunity, educational attainment, health and survival and political empowerment. India ranks 113 in the Global Gender Gap Index 2011 rankings: comparison with 2010, 2009, 2008, 2007 and 2006. As per the report: India (113), the Islamic Republic of Iran (125), Nepal (126) and Pakistan (133) occupy the last places in the regional rankings. India and Pakistan perform above average on the political empowerment of women, particularly India, but they lag behind in the other three categories. In particular, the persistent health, education and economic participation gaps will be detrimental to India's growth; India is the lowest ranked of the BRIC economies featured in the Index.¹³ As per the Missing Women Report of the Social inequality that outweighs survival of women in Asia and North Africa, there are about 23 million missing Indian women as per the population based on western demographic experience. The reports indicate that the mortality rate of Female is higher due to social inequalities and discriminatory practices of access to nutritional food, access to medical facilities during childhood ingrained in traditional structure seem to

be the prime suspect. In comparison to other states in India, Kerala had a positive gender index due to certain inheritance rights and succession of farmland of women says the report published in British Medical Journal and reported by the Nobel Laureate, Amartya Sen.

Kerala has a traditional Matriarchal system called Marumakkathayam, which literally means inheritance through nephews and niece and was practiced by the Nairs and other royal families. The customary law of inheritance was codified in the Madras Marumakkathayam Act 1932. 'Marumakkathayam' is defined as the system of inheritance in which descent is traced by females, and 'Marumakkathayee' means a person governed by the Marumakkathayam law of inheritance. 'Tarawa' means the group of people forming a joint family with the community of property governed by the Marumakkathayam law of inheritance. The system of inheritance is now abolished by The Joint Family System (Abolition) Act, 1975, by the Kerala State Legislature. Therefore, proposition of Amartya Sen in the report that through Public policies the gender gap can be closed is noteworthy for implementation. However, we also cannot deny the fact that, social customs, traditions and value system has a significant role in creating the gender gap and the needed intervention of legislation plays a crucial role in identifying such discriminatory traditional practices and value systems which is somewhat inherent in the social systems in terms of inheritance, household structure, Marriage and kinship structure and ownership of property and land etc.

<http://www.caravanmagazine.in/vantage/what-end-kerala-matrilineal-society> Kerala tops with pending matrimonial cases in family courts”, The Indian Express (Jan 8, 2017)

Patriarchy: Customs and interpretation of religious texts.

In an institutionalized gender binary structure that exists in Human society since time immemorial, women constitute half of the human population on the earth as against the male population, yet there exists inequities that exist solely on grounds of sex or gender. Equal pay for equal work, non recognition of household labor, Sexual and reproductive roles and rights, marital rape, property and inheritance rights, representation in public office, and so on and so forth. .

As time evolved, private domain: domestic role and labor of women gained lesser importance, and men eventually had the control of the public domain: rules, norms, and culture, religion

that created a value system to control the sexual and reproductive rights of woman, and mostly men became the decision making authority irrespective of any religion.

Patri-local system also known as the virilocal is the type of household or residence, which is based on the male descendants and consists of the husband's family. Married woman are brought into the Joint Household or the husband's place of residence. Patrilocal or Virilocal is practiced in almost every part of the world, with only countable options of Matri local system. Nairs in Kerela, and Todas of Nilgiri in India have Matri-local system of residence.

Patri-lineage is defined as the lineal tracing of the descendants through the Male members or the Paternal lineage as against through the Maternal lineage or Matri-lineage. Patrilineage is signified mostly by the offspring to take the name of the Father and his lineage and trace them through the male descendants. Patri lineage is the social order in almost all over the world, with few exceptions of Matri lineage being practiced like the Khasis in Meghalaya, India.

Patri-local and Patri-lineage system which is the dominant practice, are major indicators for the human society to be qualified as a Patriarchal Society, which has come to be defined as the cultural norm that substantiates the Value system which are more male centric and subjugates the female value system. Though, there does not exist a wide gap in the value system, yet most times women and children are placed in the society as per the convenience of its male members.

Culture: According to Clyde Kluckhohn, Culture is a 'design for living' held by members of a Particular society, since man has no instincts to direct his actions, his behavior must be based on these guidelines which are learned and shared, without which members of society would be unable to communicate and cooperate resulting in confusion and disorder. Therefore, Culture defines the accepted ways of behavior for the members of the society.

Norms and Value system: Norms are specific and appropriate directives for conduct whereas Values are beliefs of what is worthwhile, good and desirable. Therefore, a society to operate in order and stability require shared norms and values. Thus, norms are accompanied by negative and positive sanctions i.e. rewards and punishment and sanctions can be formal in terms of punishments and laws through legal enforcements, or it could be informal in terms of disapproving glances, an embarrassed silence, contemptuous stare or words and glances of approval.

Thus, in a Patriarchal Society, the culture, norms and value systems are considered to be dominated by the male members due to their decision making role and being representatives of the household or the family since time immemorial. Patriarchy systematically subverted through formal and informal sanctions, the dignity and identity of the woman: Sexual and Reproductive rights of the women are determined by the value system of a patriarchal society that is insidious in creating a control system wherein a women seems to have a choice but actually makes the decision solely on what value is placed upon her for being subservient or being able to identify the value system and determining to go beyond it if it is not favorable for her individual identity.

Indian Legal System and Religion: India is considered the birth place of four major religion, and diversity in India in terms of culture and religion has shaped the social structure and value system wherein women have been subjected to patriarchy that has been largely influenced by Religion and the personal codes of religious groups. Article 25 and 26 safeguards the rights of every religion and religious followers, and ascribed the liberty to practice and profess it within the limits of constitutional morality and public order. Therefore, customs and practices of every religion has been safeguarded and is given the status in par with the Part III of the constitution, if it is not interpreted as extra constitutional.

In India, the personal codes are based on religious text and most religions have codified and legislated it to prevail in parallel to the central Act and Constitutional provisions. For e.g. The Anand Marriage Act, 1909 applies to all the Sikhs, for the marriage ceremony common among all the Sikhs is called Anand. The Arya Marriage validation Act, 1937 validates all Arya Samajist marriage. The Hindu Adoption and Maintenance Act, 1956, The Hindu Marriage Act, 1955, The Hindu Women's right to property Act, 1937, The Hindu Marriage Act, 1955 apply to all Hindus in terms of adoption and maintenance. Likewise, The Muslim Personal Law (Shariat) Application Act, 1937 applies to all Muslims of all sects, The Dissolution of Muslim Marriage Act, 1939, Muslim Women (Protection of Rights on Divorce Rules, 1986 and Muslim Women (Protection of Rights) on Divorce Act, 1986 is to protect the interest of Muslim women married as per the Muslim Law and has been divorced by or has obtained a divorce from their husbands and all matters incidental thereto. Every application by a divorced Muslim woman under section 125 or under section 127 of the Code of Criminal Procedure, 1973 (2 of 1974) pending before a Magistrate on the commencement of this Act, shall on

certain conditions shall be disposed of by Magistrate in accordance with the provisions of this Act. The Indian Christian Marriage act, 1872 applies to Christians of all denominations, The Parsi Marriage and Divorce Act, 1936 to all the Parsis.

Thus, in India, there exists no **Uniformity of the Civil Code**, in relation to the existing Uniform Criminal Code in terms of Indian penal Code 1860.

In Part IV of the Indian Constitution, Directive principle of State Policy has an existing guideline: Article 44-the state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India.

The Law commission of India vide a notification dated 7th October 2016, circulated a questionnaire to start a healthy conversation on the viability of the Uniform Civil code in terms of Family laws of all religions and diversity of customary practices, to address Social Injustice rather than plurality of laws. The commission highlights that Family law reforms, inter-alia has to view women's rights as an end in itself.

The personal codes of various religious denominations were to be relooked and revised to bring uniformity in civil laws and practices. In the year 1976, with the 42nd amendment of the constitution, Indian Parliament inserted "Secular Sovereign Socialist" and also upheld precedence of Directive Principle over Fundamental Right, and introduced a new section to the Fundamental Duties that required citizens "to promote harmony and the spirit of common brotherhood among all the people of India, transcending religious, linguistic and regional or sectional diversities".

Later, after the landmark matters on Minerva Mills Vs Union of India, and Keshava Nanda Bharti Case, the landmark judgment upheld the "basic structure of constitution that cannot be amended" and thus with the 43rd and 44th Amendment, the basic structure of Part III having precedence over part IV of the constitution was reinstated and Article 25: "all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality and health" paved way for "Indian Secularism". India is built on the foundation of diverse and tolerant civilization. Islam is the largest minority religion in India, and Indian Muslims forms the third largest Muslim Population of the world.

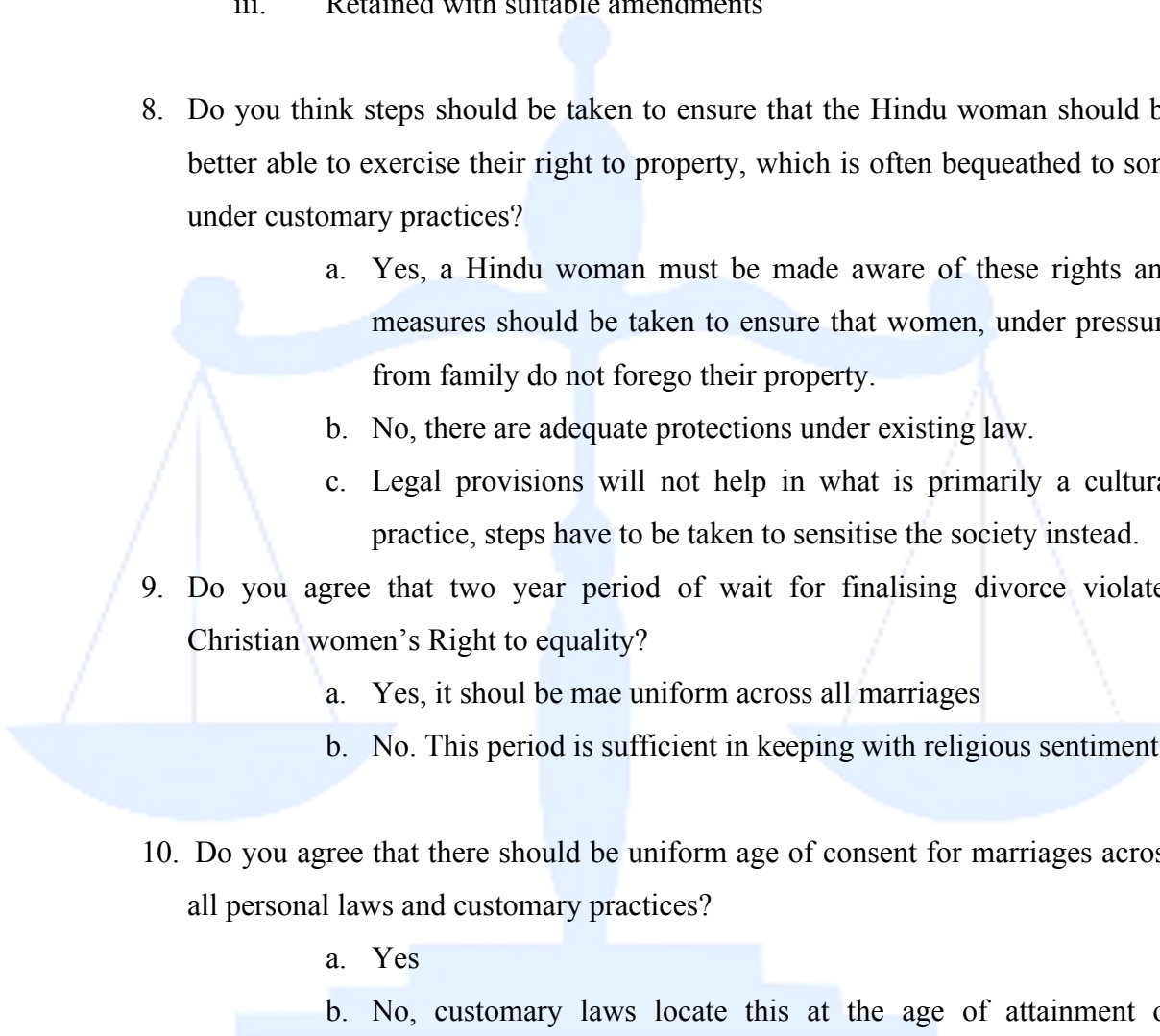
The questionnaire that was circulated for public participation had few pertinent question in regards to the existing codified customary practices, and parallel traditional structure like the WAKF, Khap Panchayat, Karni Sena, Tribal councils etc being the decision making body for

the Community as a whole substantiating the idea of Collective Rights over ruling the Individual Rights in any given circumstances.

The questionnaire circulated by Law Commission on 07.10.2016 contained 16 questions seeking remarks and opinions from the public and stakeholders to provide opinions on the question of law and the existing practice of certain communities like Polygamy etc. The questionnaire sought for opinions if customs should be codified and if the prevailing customs substantiate Gender Equality.

The questions were as follows:

1. Are you aware that Article 44 of the Indian Constitution that the state shall endeavor to secure for its citizens a Uniform civil Code for all its citizens in India?
2. The Various religious denominations are governed by personal Laws and Customary Practices in India on matters of family Law, should the UCC include all or some of the subjects?
 - i. Marriage
 - ii. Divorce
 - iii. Adoption
 - iv. Guardianship and Child Custody
 - v. Maintenance
 - vi. Successions and
 - vii. Inheritance
3. Do you agree that existing personal laws and customary Practices need codification and would benefit the people?
4. Will Uniform Civil Code or codification of personal law and customary practices ensure Gender Equality?
5. Should the Uniform Civil Code be optional?
6. Should the following practices be banned and regulated?
 - i. Polygamy (Banned/Regulated)
 - ii. Polyandry (Banned/Regulated)
 - iii. Similar practices like *Maitri –Karaar* (friendship deed) et all Banned/regulated.

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7. Should the practice of Triple Talaq be :
- i. Abolished in Toto?
 - ii. Retained the Custom
 - iii. Retained with suitable amendments
8. Do you think steps should be taken to ensure that the Hindu woman should be better able to exercise their right to property, which is often bequeathed to sons under customary practices?
- a. Yes, a Hindu woman must be made aware of these rights and measures should be taken to ensure that women, under pressure from family do not forego their property.
 - b. No, there are adequate protections under existing law.
 - c. Legal provisions will not help in what is primarily a cultural practice, steps have to be taken to sensitise the society instead.
9. Do you agree that two year period of wait for finalising divorce violates Christian women's Right to equality?
- a. Yes, it should be made uniform across all marriages
 - b. No. This period is sufficient in keeping with religious sentiments.
10. Do you agree that there should be uniform age of consent for marriages across all personal laws and customary practices?
- a. Yes
 - b. No, customary laws locate this at the age of attainment of puberty.
 - c. The prevailing system of recognizing 'voidable marriage is sufficient.
11. Do you agree that all religious denominations should have the common grounds for Divorce?
- a. Yes
 - b. No, cultural difference must be preserved.
 - c. No, but there should be same grounds of divorce for both men and women within Personal law.

12. Would Uniform Civil Code aid in addressing the problem of denial of maintenance or insufficient maintenance to Women upon Divorce?

- a. Yes
- b. No

Give Reasons:.....

13. How can compulsory registration of Marriage be implemented better?

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14. What measure should we take to protect couples who enter into inter-religious an inter-caste marriages?

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15. Would Uniform Civil Code infringe upon the Individual's Right to Religion?

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16. What measures should be taken to sensitize the society towards a common code or codification of personal law?

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The Uniform Civil Code envisages bringing social justice in terms of bridging the gender gap by identifying the traditional value systems that relegates woman into a Social Class undermining democratic principles, Constitutional Morality and equity jurisprudence that yearns to strike a balance between Individual and Collective Rights. For Example: The practice of Honor Killing is based on the traditional structure of Collective rights wherein the community and its honor is paramount, and makes the decision for the individual through a fixed traditional system for operation in relation to marriage, reproductive rights, sexual rights, inheritance etc. Any aberration from the established norm and value system would invite punishment in terms of ostracism, retribution or death. The Supreme Court has denounced the traditional structure of Khap Panchayat and its practice of harassment and honor killing as shameful and barbaric on 16.01.2018. The practice and glorification of Johar and Sati, an act of self immolation or suicide of the women folk attributing them the high strata and respect in the society for conceding to the collective rights and collective honor as against individual choice or rights is one striking example of how the Traditional value system is influenced by Patriarchal norms.

<https://www.ndtv.com/india-news/attacks-by-khap-panchayats-over-inter-caste-marriage-absolutely-illegal-supreme-court-1800546>

<http://lawcommissionofindia.nic.in/reports/Report268.pdf>

Sati/ Johar: In Rajasthan, the traditional practice of Sati was abolished through the State legislation after a young 18 year old named Roop Kunwar committed Sati on the pyre of her husband in the year 1987 causing uproar in the media and attracting numerous international attention and studies.

A relativist culture study stated that: “In India, feminists are generally opposed to sati, but they have drawn the censure of intellectuals like Ashis Nandy for setting up "a new form of internal colonialism" – the feminists are westernized, Anglophone city-folk rubbishing the India of the villages and small towns as backward and barbarous. The study was conducted looking at the practice of Sati from the Indian religious and Cultural Phenomenon, Western Ideology that looked at it as “backward”, and from the perspective of the Feminists in India.

In India, Section 309 of the Indian Penal Code that is abetment of suicide was not enough for deterrence of such heinous practice, and a separate legislation was enacted: the Commission of Sati (prevention) Act, 1987 Rajasthan Sati Prevention Act, 1987, Tamil Nadu Sati Regulation, 1830. The temples and religious places were banned from glorification of this traditional practice due to its gross violation of the Constitutional Morality and violation of Human Rights.

Triple Talaq:

The Supreme Court Landmark verdict on Triple Talaq was pronounced on a bundled writ petitions filed in the years 2015-17, under Section 32 in the Supreme Court, by petitioners: Shayara Bano, Aafreen Rehman, Gulshan Parveen, Ishrat Jahan and Atiya Sabri and a suo moto writ in re: Muslim Women’s Quest for Equality Vs. Jamiat Ulma- I-Hind.

The petitions were filed on grounds of muslim married woman being victimized by the customary practice of talaq- e- bidaat, which is a unilateral divorce attained with utterance of the word, “talaq” three times by the husband in the presence of two male witnesses, alleged to have been conducted in the absence of the wives and intimation made through electronic mediums like sms, emails, skype.

The Petitioner submitted that Section 2 of the Muslim Personal Law (Shariat) is unconstitutional for it upholds talaq-e-biddat, and is not ordained by versus of the Holy Quran.

The Respondent husband for the writ petition of Shyara Bano submitted that the petition stands no ground for the pronouncement of ‘talaq’ was in accordance with the existing and valid procedure for dissolution of marriage under the hanafi sect of the Sunni Muslim, and in consonance with the Sharia or Muslim personal law.

The Apex court engaged in five days of deliberation in the full court house, heard the pleas and submission of the petitions and noted the opinions of the legal luminaries and senior lawyers like Ram Jethmalani, who called this customary practice as ‘abhorrent’ and ‘unconstitutional’.

The Supreme Court in the landmark judgment declared the practice of ‘triple talaq’ as unconstitutional, arbitrary, and unreasonable violating Article 14 and 21 of the Constitution. The observation of the top court was pronounced through five judges bench, with a ratio of 3:2 in a 395 paged verdict of the bench, comprised of then Chief Justice Khehar and Justice S.A. Abdul Naseer forming the minority, and backed the practice of Talaq-e-biddat on grounds of it being a constituent of personal law and conferred it stature in par with part III of the Indian Constitution. Chief Justice Khehar suggested for stay of six months on the practice until Muslim personal law is amended or legislated. Justice Naseer reiterated on the practice being constituent with personal law for more than 14000 years.

The majority group of Justices Kurian Joseph, Rohinton F. Nariman, and Uday U.Lalit denounced the practice for being unconstitutional, irrespective of its existence as personal law for years as per the Sharia Act. As per the petition, talaq- e-biddat is not ordained by the Quran and specific verses of Quran were interpreted by the top court within the purview of the constitutional provision reinstating the sanctity of the religious faith of the Indian Muslim minority.

The Central Government in its submission clarified that, the contention is not about majority versus minority religious community of India, but is solely a constitutional matter.

The legal paradigms upon which the bench dwelled upon for interpretation and observation:

1. Would the apex court with its judgment trample upon the freedom of conscience, free profession, practice and propagation of religion of any citizen of India?

The Top court observed that Sura LXV of the Quran do not approve of breaking down of matrimony, suggesting observation of prescribed period or iddat in all conditions. Verse 35 in Sura IV of the Quran recommends arbitration for reconciliation and resolving matrimonial discord before talaq.

Justice Joseph opined that, “interpretation of verses of the Holy Quran clearly attributes sanctity and permanence to matrimony and only in extremely unavoidable circumstances, talaq may be permissible. But an attempt for reconciliation and if it succeeds, then revocation is the Quranic essential steps before talaq attains finality. In triple talaq this door is closed, hence triple talaq is against the basic tenets of Holy Quran and consequently, it violates Shariat”. Therefore, provisions of Shariat cannot be interpreted independently but only by drawing inferences from the Holy Quran.

2. If Muslim Personal Law (Shariat) Application of Act regulating talaq, is within the purview of Article 13?

The minority group observed that it is the Dissolution of Muslim Marriage Act, 1939 provides for the grounds and procedure for dissolution of marriage just as Hindu Marriage Act 1955. Regardless if Shariat governs talaq, the provision has not laid down any procedure of talaq.

As per Section 2 of the Shariat Act: application of personal laws to Muslims-notwithstanding any custom or usage to the contrary, in all questions (save questions to agricultural land) regarding intestate succession, special property of females, including the personal property inherited or obtained under contract or gift or any other provisions of personal law, marriage, dissolution of marriage, including talaq, ıla, zahar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, dower, guardianship, gifts, trust and trust properties and wakfs (other than charities and charitable institutions, and charitable and religious endowments) the rule of decision in cases where the parties are muslims shall be Muslim personal Law (Shariat) [Sic].

CJI Khehar opined that Shariat Act is not the regulating legislation for talaq. Justice Nariman observed it regulates talaq. However, Justice Kurian Joseph agreeing with extrapolations of both opined that any legislation, be it plenary or subordinate, Constitutional Democracy of India cannot conceive a legislation that is arbitrary.

3. Writ Petition filed under Article 32, for infringement upon Article 14 of the Indian Constitution, brought under the anvil of Article 13:

The Top court observed that Shariat Act 1937 is a pre- constitutional legislation and has the “force of law” falling squarely under Article 13 (3) (b). Therefore, it would be brought within the ambit of Article 13 (1) of the Indian Constitution, irrespective of the irregularities of procedures of talaq not being laid down in Shariat, it still qualifies to be enforced by the husband as mentioned in the petition of the respondent husband.

Talaq-e-biddat as mentioned in the petition is unilateral, unequivocal and arbitrary. Therefore, it is unconstitutional and infringes upon equal status conferred upon all citizens by the Indian Constitution.

Justice Joseph, concurring to observations made in Justice Nariman's judgment, said, "What is held to be bad in the Holy Quran cannot be good in Shariat, and in that sense, what is bad in theology is bad in law as well".

4. Article 25(1) subject to public order, morality and health, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.

The apex court took into account repercussions of uttering 'talaq' thrice, for its nature being instantaneous and irrevocable.

Justice Nariman upholding the Quran and interpreting the relevant verses made his observation of matrimony being sanctified, and talaq not being encouraged unless only necessary and after efforts are made for reconciliation. Therefore, dissolution of marriage in an instant upon the whims of the husband, and no ground for its revocability would create dysfunctional family and cause issues on the psychological health on the children, and therefore, talaq is subjected to constitutional morality and health.

Finally, the order of the Court on 22.08.17 was undersigned by the Constitutional bench setting aside talaq-e- biddat, after different opinions were recorded, making it a historic event in terms of constitutional interpretation of a customary practice of Muslim personal law on grounds of being beyond the ordained sanction of Quran, unequal in terms of gender jurisprudence and against constitutional morality.

Analysis of Muslim Women Protection of Marriage, Bill 2017: Triple Talaq has been nullified by the Supreme Court calling it Unconstitutional, Unequivocal, and beyond Constitutional Morality for its nature being instantaneous and for not being ordained by the interpretation of the Quran. Article 141 of the Indian Constitution: Any laws made by the Indian Supreme Court are binding on all the subordinate court in India. The practice of Triple Talaq is nullified, binding on all the lower courts.

The Muslim Women Protection of Marriage Bill, 2017 has been tabled by the ministry of Law and Justice and the minister spoke on the fact that Supreme Court has directed the formulation of such a bill in the Parliament during the winter session. The Parliament can suo motu make any legislation on the enumerated items of the Schedule VII or not, if there is such requirement.

The Bill has been stalled in the Rajya Sabha, for reconsideration on numerous grounds.

Observation:

1. The Bill is tabled for Protection of Muslim Women in a marriage, which is a civil matter and falls under Muslim Personal Code.
2. The Practice of Triple Talaq is nullified and declared ultra vires of Indian Constitution.
3. The Bill is for protection of Muslim women from their Muslim husband or from the practice of Triple Talaq?
4. The Bill does not address any specific provision for protection of Muslim women upon her husband being incarcerated for up to three years.
5. Penalization for up to three years for uttering a type of divorce that existed for 14000 years due to patriarchal interpretation of the Holy Quran and now nullified, seems misplaced, though the intent is for deterrence of such practice.
6. Non Bailable and Cognizable attracting three years of imprisonment; it makes Muslim Men vulnerable in the context of being subjected to arrest in the complaint of any person without making any provision for protection of Muslim Women who is most times dependent on her husband for livelihood.
7. The Bill seems more like a legislation going against the Muslim men than protecting the Muslim women who are victimized due to such practice.

Recommendation:

1. The Bill is to elaborately define the practice of Triple Talaq.
2. Provisions for maintenance, and safeguards for the children.
3. The Punishment should not be up to three years but lesser and with huge fine.
4. The Bill should make the offence compoundable, non cognizable with compulsory fine.
5. Few examples of Amendment to the Indian Penal Code and enactment of a separate legislation upon the Personal code of Religious communities:
 - a) Dowry: (i) Section 304B of Indian Penal Code was added which made dowry death a specific offence punishable with a minimum sentence of imprisonment of seven years and maximum imprisonment of life.
(ii) Dowry Prohibition Act 1961: The enactment succinctly defines Dowry and attracts punishment of up to five years for such practice.
 - b) Sati: (i) Section 306 of the Indian Penal Code defines *abetment of suicide* as “If any person commits suicide, whoever abets the commission of such suicide, shall be punishable with such imprisonment

of either description of a term which may extend to 10 years, and shall also be liable to fine.

(ii) Bengal regulation on Sati attracts criminal prosecution

(iii) Sati Regulation Act attracts Criminal prosecution

- c) Polygny: Polygyny or Polygamy is a marriage practice of having more than one spouse, which is a part of the personal code of Muslim as well as certain tribal communities. Under Section 494 of Indian Penal Code: Bigamy is a non cognizable offence, bailable and compoundable with permission of court. It attracts up to seven years of imprisonment and with fine or both.

Therefore, a balance needs to be struck looking into the quantum of punishment and the nature of the crime and the objective of the enactment is to be substantiated, is what I am postulating, in the interest of justice.

Sexual rights of Women in a Marriage:

Bertrand Russel, a nobel laureate in Literature for the year 1950, in his book, Marriage and Morals (1929) deplored the conditions of married women. He commented, "Marriage is for woman the commonest mode of livelihood, and the total amount of undesired sex endured by women in a marriage is probably greater in marriage than in prostitution".

The property to be withheld in a female was her virginity; this was the commodity (Bergen, 2016). A woman was (and still is in many cultures across the globe) first the property of her father, then, upon marriage, the property of her husband (Bergen, 2016). A man could not be prosecuted for raping his own wife because she was his possession (Schelong, 1994).

If another man raped someone's wife, this was essentially stealing property (a women's sexuality) (Bergen, 2016). In English customs, "bride capture" (a man claiming a woman through rape) was thought to be stealing a father's property by raping his daughter.

Rape laws were created to "...protect the property interests men had in their women, not to protect women themselves" (Schelong, 1994). This concept of women as property permeates current marital rape ideology and laws throughout the globe.

India is one of the first 48 countries that voted for adaption of Universal Declaration of Human Rights in favor of United Nations General Assembly on 10th December 1948.

Article 247 of the Fourth Geneva Convention: "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.

In December 1993, the United Nations High Commissioner for Human Rights published the *Declaration on the Elimination of Violence Against Women*. This establishes marital rape as a human rights violation.

The importance of the right to self sexual determination of women is increasingly being recognized as crucial to women's rights.

High Commissioner for Human Rights Navi Pillay stated that:

"Violations of women's human rights are often linked to their sexuality and reproductive role. In many countries, married women may not refuse to have sexual relations with their husbands, and often have no say in whether they use contraception. Ensuring that women have full autonomy over their bodies is the first crucial step towards achieving substantive equality between women and men. Personal issues—such as when, how and with whom they choose to have sex, and when, how and with whom they choose to have children—are at the heart of living a life in dignity."

As per the reports of the UN Women, by April 2011, at least 52 States had explicitly outlawed marital rape in their criminal code and the list.

Bhutan defined under Article 199 which reads: "A defendant shall be guilty of marital rape, if the defendant engages in sexual intercourse with one's own spouse without consent or against the will of the other spouse"

However, there are few countries that still need to outlaw Marital Rape and bring it under Criminal Prosecution or

Ethiopia Article 620 - Rape: Whoever compels a woman to submit to sexual intercourse *outside wedlock*, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance, is punishable with rigorous imprisonment from five years to fifteen years".

South Sudan law states in Article 247: "Sexual intercourse by a married couple is not rape, within the meaning of this section".

Domestic Violence in India: Domestic Violence is well defined in Protection of women in Domestic Violence Act, 2005. Physical, Mental, Economic Violence is clearly elaborated in the Act under the relevant sections. However, there exists no specific provision for "Sexual violence" in Domestic Violence Laws. Physical abuse and mental abuse does not address Sexual abuse or Sexual assault. The PWDVA, 2005 pronounces civil remedy and does not attract criminal Prosecution.

498A IPC: "Cruelty" is ambiguous and open to several interpretations without being specific on sexual abuse and harassment. Therefore, there are numerous litigation pending under 498A IPC, for cruelty has no definite expression and is open for interpretation on grounds of physical, mental and all sorts of inhuman behavior. Thereby, it is considered to have

developed into a notorious section wherein women are considered to be misusing the provision due to its ambiguity in defining cruelty. Thus, due to vagueness of the relevant provision, the degree of cruelty and the quantum of punishment or compensation is not well defined causing unnecessary delay in the proceeding. Besides, the provision is often read with relative provisions leading to unusual and complicated trial which are required to substantiate “Cruelty”.

Status of Marital Rape in India: The UN Committee on the Elimination of Discrimination against Women in February 2007 has recommended that the country should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape

As per the reports, about 1/3rd men in eight states have admitted to have used force upon their spouse to have sexual intercourse.

The Reports by National Health and Family Welfare confirms that Sexual Violence and Physical violence are present in the Marriage. Women in different age groups, Residence of Urban and Rural, Marital Status, Location ie. Central, East, North East, South, West.

Age group of 30-49 experience Physical or Sexual violence in 41.1 %; 40-49 is 39.0%, 25-29 is 39.9%, 20-24 is 33.2%, 18-19 is 23.8% and Age group of 15-17 is 21.6 %.

The reports states about 40.1 % of Married woman have endured Sexual and Physical Violence. Rajasthan scored the highest in the North zone for Physical and sexual violence with 44.6%. Madhya Pradesh in Central zone with 46.8%, Bihar in East had 55.6%, Tripura in North east with 44.7%, Maharashtra in the West with 29.2% and Tamil Nadu in South with 38.7%. Bihar tops the chart with overall average percentage of India in terms of Sexual and physical violence being 35.4%

Page no 504, Table No. 15.6 Experience of Different form of Violence:[http://rchiips.org/nfhs/NFHS-3%20Data/VOL-1/Chapter%2015%20-%20Domestic%20Violence%20\(468K\).pdf](http://rchiips.org/nfhs/NFHS-3%20Data/VOL-1/Chapter%2015%20-%20Domestic%20Violence%20(468K).pdf)

Justice Verma Committee Report:

Marital rape victims have to take recourse to the Protection of Women from Domestic Violence Act, 2005 or 498A IPC. The act outlaws marital rape but only a civil remedy for the offence and is not a Criminal offence attracting Criminal prosecution.

- Justice Verma Committee: Marriage or any other intimate relationship between a man and a woman is “not a valid” defence against sexual crimes like rape.

- European Commission of Human Rights in C.R. versus UK: A rapist remains a rapist regardless of his relationship with the victim
- 1/3rd of men in 8 Indian States admitted that they have forced sexual act on their wife
- CEDAW committee emphasized the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.

Many who are against claims of Marital Rape makes following claims:

- Breakdown of Marriage as a “sacred” Institution
- 498A IPC is an existing law on cruelty in Marriage.
- Domestic Violence Act includes physical & Mental Violence
- Apprehension of abuse of such laws against husbands
- Marriages in India are mostly arranged by families or without understanding of sexuality. Thus, any act by husband for intimacy might be misconstrued as Rape.
- Marriage is evident of an irrevocable consent for life, so no question of consent for sexual intercourse between husband and wife.
- Medical Evidences cannot be established in a case of Marital Rape

<http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

Rape: Section 375 of the Indian Penal code considers the forced sex in marriages as a crime only when the wife is below the age of 15 years.

Under Section 375 of Indian Penal Code: A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following description –

- Against her Will
- Without her Consent
- With her Consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- With her consent, when, at the time of giving such consent, by reason of unsoundedness of mind or intoxication or the administration by him personally

or through another of any stupefying or understand the nature and consequences of that to which she gives consent.

- With or without her, when she is under sixteen years of age. Explanation- Penetration is sufficient to constitute the sexual intercourse necessary for the offence of Rape.

EXCEPTION: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age.

Under Section 376 Punishments for Rape:

[376. Punishment for rape.—

Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

Whoever,—

(a) being a police officer commits rape—

(i) Within the limits of the police station to which he is appointed; or

(ii) In the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) On a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g)Gang Rape

Overlapping laws of Domestic Violence Act and Criminal Procedure Code:

125 CRPC and interim maintenance under Domestic Violence Act, 2005:

In an order dated 10.01.2018, Supreme court issued a notice in a Special Leave Petition against an impugned order of the Bombay High Court, wherein a wife has filed two petitions under 125 CRPC for maintenance, and interim application for maintenance under proceeding for Domestic Violence Act 2005. The husband approached the Bombay High Court that had observed: *“There remains absolutely no scope as to the confusion between the parties as to which order is to be obeyed. It follows that, as both the orders are passed by two different Forums in two different proceedings, both the orders are binding on the Petitioner-husband and Respondent-wife and they have to comply with both the orders, unless they are varied or set aside.”*...The appellate court stayed the t. operation of the Bombay High Court, subject to the husband continue to make the payment of interim maintenance under Domestic Violence Act

Feminism and Women Empowerment: Feminism as a theory, an ideology, political social movement and a source for empowerment has to be deliberated and treaded upon with much caution, so as not to cause rather a pernicious effect detrimental to the notion of Equality. Feminism could be a double edged sword that could be adversarial to the cause of the women and humanity in general, if not well defined and especially if misunderstood. Feminism has been considered as one of the most influential and widespread social political theory, that is riding the third wave of its existence for the last two centuries, and have managed to bring forth empowerment in the western world.

In India, the feminist movement was initiated mostly by Men who were social reformers like Raja Ram Mohan Roy, Dayanand Saraswati, Swami Vivekananda and many more examples. Besides, the Constituent Assembly was also a contribution of the Indian men, and also women.

The idea of Protective Discrimination, and most striking example of such special provisions would be 33% reservation of seats for Women in Panchayat as per the 73rd Amendment in the part IX of the Indian Constitution, in Article 243D which has provision for Local Government, and constitutes the three tier system of local governance. The parallel governance of Traditional bodies like Khap Panchayat, that are extremely patriarchal and male dominated is the bedrock of some inhumane practices of Honor Killing and penalization of Gang Rape to a woman who decides to marry outside the caste. There is no direct observation that women representation would help bring gender justice. However, the Indian Constitution sure empowers them with reservation.

The Women's Reservation Bill [The Constitution -108th Amendment Bill] is one of the longest pending legislations in the Indian Parliament. The Bill seeks to reserve 33.33 per cent seats in the Lower House of Indian Parliament and in the State Legislative Assemblies for women, in accordance with the 73rd and 74th Constitutional Amendments which reserved the same percentage of seats for women in rural and urban local bodies respectively. The Bill has been introduced in the Indian Parliament several times since its initial launch in 1996, but however the status of the bill remains undecided primarily due to lack of political consensus.

Observation and Recommendation: The idea of reservation in upper and lower house has been debatable for reasons like: a) Political Class or Family would dominate the Positions b) Symbolic Women representation would not be altering the substantial structures like Patriarchal Institutions c) Women will be subjected to the male members of her family like husband, brother or father and thus, her representation as a woman would not necessarily make any difference in feminist jurisprudence. Therefore, the Bill is sometimes considered to have overt patronizing tone for women without having any substantial goals, unless the women are already empowered and aware of their rights, could they possibly be able to represent the women in the parliament.

Conclusion: If true empowerment of women were to mean anything, it is necessary that law, as well as public policy, must be capable of engaging substantially with women's rights, opportunities, acquisition of skills, the ability to generate self-confidence and insist on total equality in relationships, both with society and the State. It is the inability of women to claim equality in society which has led to a slant against women as a consequence of which there has been a latent bias against women in the prosecution of crimes including its prevention. – Justice Verma Committee Report

My Recommendation in regards to Domestic Violence and Women Empowerment: Though there exists Protective Discrimination and numerous Family Law and family courts, looking into Family law, and to mitigate the violence generated in intimate relationships, yet there does not explicitly exist a Law specifically for Women or the Girl and their individual and collective rights per se. So, there is no such specific Laws on a Woman and her rights per se, rather most legislations revolve around a woman's role as a wife, a mother, a daughter, a employee or employer etc.

Most Legislation in India for women is in the nature of protectionist, compensatory, or penalization for commoditization of women reflecting the victimhood status of the women. The Protective Discrimination clearly points out that there exists societal and cultural bias against women, and it has been existent since time immemorial. The Indian Society and the Legal system strive hard to balance the Traditional Principles and the Rule of Law, which is supposed to be a modern Institution.

Therefore, my effort is to highlight the root of such nuances amidst hyperbole notions of ‘feminist is taking over the world’ or the ‘women are the future’ and all these extreme ideologies do not remain in consonance with the Equity principle, for Protective Discrimination is not to put Women above Men rather in par with Men in all fields for the women to positively contribute to the humankind and the society. Empowerment of women in domestic life is not to make her go against her husband or in laws but not to suffer as subservient member and be an equal member in decision making, with her rights over her own body for reproduction as well her sexuality, wherein it is not her duty but a choice to make, and that is possible when the laws leaves no conditions or exceptions for Rape.

