

Law Alone Cannot: Women's Empowerment in India

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“There is no tool for development more effective than the empowerment of women”¹ (Kofi Annan)

There is no surprise in saying that ‘International Development’ is a multifaceted concept. What was initially understood as pure economic growth has become a more complex theory involving other aspects of a society such as political capability, cross-cultural empowerment, poverty reduction strategies, and the need to take into account human dignity - to cite only a few. However, behind all paths of development, whether in developing or advanced countries, there is always a set of rules framing what is permissible or imperative and what is not, and describing a particular set of rights and duties. Constitutions, civil or penal codes and international treaties are examples of such documents, which show the road to developing a policy or a project. Development itself, as a field of study concerning the global enhancement of life's quality, emerged as the follow up to the Universal Declaration of Human Rights (UNDHR) adopted by the United Nation (UN) in 1948 after the end of the World War II.

The question naturally arises: what can law do to legitimately promote changed social patterns, and how? In other words, to what extent can law sustain and promote social development? As a sociologist I know that such a query cannot be addressed without reference to a specific topic and context. There is no one single society in the world that can be fully compared with another, and to answer such a delicate question one needs to look very deep into the history of a state. My research is formed around a particularly topic, that of gender: an area that developmental programs either focus on or have mainstreamed within other remits. According to the United Nations Development Program, social development cannot progress without concomitant women's empowerment.

Based on this preliminary focus into gender rights, I decided to situate my research in one of the so-called ‘emerging countries’, that is perceived to be progressing from its prior ‘developing’ status. In particular, I selected India as its Constitution is among the longest standing and is considered to be one of the most democratic of any sovereign state today. Section III of the Indian Constitution states clearly the equal right to all

¹ Nigam, S. (2008)Domestic Violence in India: What one should know? A resource book,p.198

genders² and through the years India has increased the number of amendments and provisions affecting women's life conditions. However, women's condition in India is still driven by an underlying stigmatization. This paper analyses two propositions that are conceptually at odds with one another:

The first proposition is that law alone is a weak instrument for enhancing social conditions, and also has serious limits in eradicating social problems. As part of its social function, law outlines conditions, punishes crimes, and states needs which are embedded within individual rights, but legislation by itself does not provide any explanation for its existence, nor does it educate to create awareness and change. As such, law is sometimes perceived as the will of a few over many and is therefore invalid, or it is simply ignored or misunderstood. In this paper, India is used as a case study to draw the inference that cultural conventions continue to profoundly affect human behaviour, and in this context law alone is sometimes an ineffective tool for development.

The second proposition is that law has a utilitarian function to provide and maintain equity and equality among people. And for the purposes of this paper it has a utility in providing and maintaining equity and equality among genders. Without a unified code (such as an Equality or a Sex Discrimination Act) that allows each contender to claim the same quality of rights, it is practically impossible to guarantee and enforce equal treatment of both genders. This is even truer in a country that is as diverse as India.

So, how do we give law its rightful balance, true purpose, and desired effect?

One of the biggest difficulties in India is the presence of various personal laws of different cultures. On one hand, these laws are protected by the Indian Constitution to avoid a top-down legislative approach, which would not be recognised as legitimate by the general population. On the other hand, such varied cultural 'legislation' needs to be harmonised under a general equality law, in order to bring basic norms, rights, duties and obligations into play that would also cover and protect those parts of the population that currently do not have these protections, due to the operation of personal laws.

The paper is set out as follows. In the first section, a framework of international law, human rights law and Indian law is provided in order to contextualise the research.

In sections two and three, an outline of private and public crimes against women in India is provided because of the existence of many offences strictly related to the traditional cultural norms prevalent in Indian society. The criminal law aspect was

² *Constitution of India* Article 14-18, Sec. III

included for two main reasons: first, the crimes, which often lead to death, are more likely to be legitimately protected under existing law. And secondly, there is extensive literature available on India's civil law and its social context, whereas criminality and its attendant socio-cultural issues have yet to be widely researched and discussed.

Indian domestic law and the international agenda

The extent to which the Indian constitution should encompass every cultural personal law under the aegis of a uniform civil code is a matter that still poses many problems for both statute drafters and policy makers. Article 44 of Indian Constitution claims that, “*the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India,*” This in reality is unfeasible for many reasons. India has 28 states, 22 languages and several religions, the major branches of which are Hinduism, Buddhism, Muslims, Christians and Sikhism. During the British period of colonial control, all these cultures and varieties were respected under the principle of *divide et impera*³. Hindu populations were ruled according to the rules of Hindu personal law, Muslims by Islamic personal law, and so on. This policy was maintained by after decolonization.

When India proclaimed its Constitution in 1950, as a result of two years of negotiations, it presented one of the longest and most detailed systems for a contemporary democracy, and is still considered to be a document that is able to guarantee equal rights to all Indians⁴. Section III of the paper presents a Bill of Rights that granted equality regardless of culture, sex and religion. However, according to Article 13, the Bill of Rights are applicable only to matters concerning those laws in force which are “laws passed or made by a legislature or other competent authority”. Thus personal law is outside the ambit of Article 13 as it is not considered a law in force and does not emerge from a legislative process. The source of personal laws is usually attributed to a divine source. Therefore any trial concerning an Indian personal law is considered ineligible to take advantage of section III of the Indian Constitution, and the rights and protections provided therein.

Given this legal lacuna, different judges of lower courts and the Supreme Court have applied the provisions of Section III differently. A brief preview at the case law

³ Rautenbach, C. (1999) Muslim personal Law and the meaning of “Law” in the south African and Indian Constitution

⁴ Beevi, J.M.F. (1998) , Law as an instrument of change in women's status *in* Women human rights religion and violence p.20 ff.

suggests that the interpretation of a “law in force” and “personal law” has not always been consistently resolved by the judicial system. Admittedly, the case of Maneka Gandhi⁵ signalled a shift in Indian law as it gave meaning to the right of equality stated in the Constitution on a matter that had previously belonged to personal law. The woman in that case used the court system to obtain her share in property despite the operation of a traditional personal law that prevented her from claiming the same. The litigant won her case in court and many commentators have seen the verdict as a starting point of due process in India,⁶ and a tacit removal of discriminatory personal laws.

Similarly in 1985, a significant legal issue was resolved in the Saha Bano⁷ case. The plaintiff had argued her rights in a divorce case claiming alimony from her husband. The husband had divorced the wife without paying the statutory entitlement for sustenance, which was permissible under Muslim personal law. When the Supreme Court ruled in favour of the plaintiff, the reaction from Muslim groups in India was negative, and they contended that the Constitution should protect minorities and their culture in order to be truly democratic. This constricted Saha Bano to retract her suit⁸.

However, the following year in the famous case involving Mary Roy⁹, in a process against the Travancore Christian and Cochin Succession Act, the Supreme Court stated that the Christians of Kerala were governed by the Indian Succession Act 1925 and not by any other personal law. In this context no Christians reacted against the decision of the judge¹⁰.

Cases such as the above, with strong family law issues, indicate that a uniform code of personal law may encounter many difficulties in a multicultural country like India. Further, there is a supporting argument that given the variance in its application such a uniform law would be inherently weak.

An interrelated issue is the application of legal proof to cases that are adjudicated according to traditional personal laws. The Indian legal system is based on the British common law system and is bifurcated into civil and criminal jurisdictions. A criminal case involves the state as the first actor that has an investigative role to meet the

⁵ AIR 1978 SC 597

⁶ Beevi, J.M.F. (1998), Law as an instrument of change in women’s status *in* Women human rights religion and violence p.20 ff.

⁷ AIR 1985 SC 945

⁸ Nussbaum, C. (2001) India: implementing sex equality through law & Gulati U. (1998) Violence Against women pp.102-108

⁹ AIR 1986 SC 1011

¹⁰ Gupta S. (1998) Property rights and women, pp. 63-75

requisite proof and to give resolutions. Thus in a criminal case it is important for the proofs to be relevant and of a sufficient degree to meet the “beyond reasonable doubt” burden of proof. As confirmed by the Supreme Court in Kishna Kumari’s case, 1977: “[...] in murder case [...] each link in the circumstantial chain must be established by safely dependable and cogent evidence acceptable to common sense and logic and that the chain must be so complete that there is no escape from the conclusion that the accused and the accused alone had committed the crime in hand[...] Thus if evidence with regard to any link is shaky or unsatisfactory then that link shall stand eliminated and the chain shall break , necessitating a finding of acquittal in favour of the accused¹¹”. Even though this measure is correct in theory, in practice it has led to a number of failed prosecutions and dismissed cases due to lack of evidence, particularly in domestic violence cases.

This anomaly has created more frustration and dilemmas in India’s traditional societies. Looking at the factual reality of crime, it is clear that women are disproportionately targetted as victims of violent crime, compared to men. This situation is further exacerbated by prevailing social stigmas where women are considered weaker than men. Even though various domestic violence and criminal laws have been implemented and enforced by various jurisdictions, the social position of women who are victims of violent crime in India remains weakened due to the contemporaneous application of traditional personal law and statutory evidence law. In many trials of violent crimes, discriminatory issues such as a woman’s marital status are still admitted as permissible evidence, usually brought in defence by the perpetrator. Married women are usually favoured as victims, as the socially accepted role of a woman in India has to be the one of a wife first and a mother second¹².

International Law and India

Women have for a long time been marginalised in almost every culture and context without being protected by any system of law. Law was originally intended as an instrument to enhance our social state, has its foundations on the western philosophy of the Enlightenment. Locke, as well as Rousseau, on the base of Aristotle’s natural law, argued that it was natural for a wife to be in subjection to her husband. Hence, she

¹¹ Devi, L. (1998) Crime atrocities and violence against women and related laws and justice, p.156

¹² Nussbaum, C. (2001) India: implementing sex equality through law

cannot be seen as a naturally free and equal person.¹³ Similarly in the South Eastern Indian tradition, the law of Manu ruled: “*as daughter women should obey their fathers, as wives obey their husband, and as widows obey their sons*”¹⁴.

This millenary social pattern was eventually challenged during the last century, when the Universal Declaration on Human Rights (UDHR) stated, mainly in Article 2 and 7 that every individual, without any exception, has to be considered equally before the law¹⁵. Thereafter all countries that ratified UDHR have committed themselves to solving women’s inferior conditions, seen as a social pathology, through the use of law.

The UDHR, designed in 1948, might be seen as the first step towards an equal world. It was conceived as a bridge between international law, the will of few over many, and the rights of the world population as a whole. Proclaimed within the United Nations (UN) context this document was couched in universal terms. Every right remains vague in its article to aid its acceptance by every culture. The UDHR remains unconstraining, and behind it many conventions were drafted and signed by states as internationally binding documents. Among those was one with respect to the rights of women, largely encouraged by the women’s movements of the 1970s.

To date, the most important international document in gender-based violence is the Convention on the Elimination of all Discriminations Against Women (CEDAW), presented in 1979 by the UN. It was admitted that “extensive discrimination against women continues to exist¹⁶” and a first definition of what should be considered as discrimination was given in Article 1 as “*any distinction, exclusion or restriction made on the basis of sex[...]in the political, economic, social, cultural, civil or any other field*”. However, according to some, it was only in 1993 with the Declaration on the Elimination of Violence Against Women (DEVAW) that specific forms of female violence became recognized by the international community¹⁷. In this declaration gender abuse is defined as: “*any act of gender-based violence that result in, or, is likely to result in physical, sexual or psychological harm or suffering to woman including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or in private life*”¹⁸.

¹³ Beevi, J.M.F. (1998), Law as an instrument of change in women’s status in Women human rights religion and violence p.20 ff.

¹⁴ Gulati U. (1998) Violence Against women, in Women human rights religion and violence, p.103

¹⁵ The Universal Declaration on Human Rights (10 December 1948) resolution 217 A (III)

¹⁶ Preamble, in CEDAW (1980)

¹⁷ see, J. Mishra (2000), Woman and Human rights

¹⁸ Article 1, The United Nations General assembly, declaration on the eliminations of violence against women,

Before DEVAW, most governments were inclined to consider violence as a private and domestic problem to be resolved at the state level. With resolution 1994/45 of 4 March 1994, the UN decided to appoint the Special Reporter on violence against women with three main tasks: to collect information, to recommend measures, and to work closely with other reporters¹⁹. Whether or not the turning point on the delicate issue of women rights was CEDAW or DEVAW, more than 50 countries ratified CEDAW after 1993, and the Republic of India was among them. Moreover, CEDAW remains the only global legal convention on women's rights that has now assumed status in international customary law.

India and International Law

India's ratification of CEDAW was not unequivocal, and came with declarations and reservations. Interestingly the government of the Republic of India declared that it would not guarantee the respect of those articles that asked for interference in affairs of community. As a result, Article 5 (a) which stated that: "*States Parties shall take all appropriate measures: to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women*"; and Article 16(1), which asked for equal rights for men and women at marriage, were accepted with reserve²⁰. Similarly with regards to Article 16(2), which eliminates any legal effect of child marriage, India declared that "*though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy*"²¹. Finally India stated that it does not consider itself bound by Article 29(1) which allowed state parties, whether involved in a dispute concerning the interpretation or application of the Convention, to refer to the International Court of Justice if necessary.

The concerns that India articulated regarding Articles 5 and 16 are highly indicative of the underlying problem facing the country in the domain of women rights. India's declaration on Article 5, in particular, is useful as a starting point in this paper to investigate whether social conditions are influenced by law? Or whether on the contrary, law is challenged by social traditions. Indian statistics show a huge rise in the

¹⁹ See, J. Mishra (2000), Woman and Human rights

²⁰ see, CEDAW, state parties: India.

²¹ *ibidem*

number of violent acts perpetuated against women: rapes increased by 20% in 5 years (from 16,075 in 2001 to 19,348 in 2006) and dowry deaths by 11% (from 6851 to 7618); similar figures are reported for many other crimes related to women²² and, looking at the causes of these, many offences appear to be the result of particular traditional social practices and customs. Thus, the past and present condition of women in India shows the constant conflict that exists between law and cultural traditions.

Crimes Within Four Walls: From the Rituals to the Wrongs

There are three particular crimes against women in India that are statistically shown to occur within the family context: Sati, where the victim is a widow; Dowry-death or harassment, where the victim is the bride-wife; and domestic violence, where victims are females.

In this section a brief analysis of these three crimes is provided along with specific examples that demonstrate the strengths and limits of law in this regard. What emerges from the analysis is the contradictory proposition that if on the one hand law has tried to implement measures to control such crimes, on the other hand its efficiency has been confined to matters of [].

Sati

Sati is an old practice in which a widow follows her husband's dead body by burning herself in the funeral pyre. The legend tells that Sati, the daughter of the first Brahmin Daksa, once decided to marry the evil god Shiva, and her father opposed her will. However Sati escaped from home and went on living with Shiva. Unhappy with this decision, Daksa organised an important ceremony to offer sacrifices to the gods. Every god was celebrated but Shiva. Thus, Sati went to the ceremony and offered herself in sacrifice, deciding to consign herself to the flames. Ever since Sati means "virtuous wife" and amongst Hindus, a female widow is strongly encouraged to commit Sati²³.

This practice was banned by William Bentinck in 1829. His law has been generally respected, and Sati has not increased over the past decades. However, in 1987 a case of

²² Provide by the National Healthy Family Survey in 2006, in Nigam, S. (2008) *Domestic Violence in India: What One Should Know? A Resource Book*, p. 125

²³ Lakshmi A. (2003) *The liminal body: The language of Pain and Symbolism around Sati*, pp.81-97

Sati was registered in Rajasthan at Deorala village. A 17 year old girl decided to burn on the funeral of her husband. Following this event, women movements asked for a strong central law to avoid this practice and deter its worship²⁴. Therefore in 1987 the *Commission of Sati (prevention) Act* was promulgated.

In this document Sati is forbidden and punished without considering whether it is the widow's choice to burn herself²⁵ and the issue of consent is irrelevant. Moreover, in order to eradicate the practice completely, Article 5 states that there will be "punishment for glorification of sati (from others people, as a public can be)" and Article 7 grants the "power to remove certain temples or other structures (to encourage Sati)" related to the veneration of it. In this sense, the Sati Act is the sole piece of legislation aimed at looking beyond the simple crime and trying to address its context and traditions. Despite these measures, the Supreme Court in 2004 acquitted eleven people previously convicted with the charge of the Sati incident in Rajasthan in 1987, on the basis of a lack of evidence²⁶.

Dowry-crimes & Dowry-death

The dowry custom is a very old Indian tradition. It was introduced by Hinduism and has extended to all minorities. Even if nowadays some groups, like Muslims, are among those who consider it wrong, it has been and still is largely diffused across diverse Indian cultures. Dowries are presents that family and friends of the bride give to the bridegroom to celebrate the marriage. It is composed of the *Kanyadhan*, the gift of the virgin bride; the *Varadakshina*, a gift from the bride's father; and the *Stridah*, gifts given by relatives and friends²⁷. Initially it was nothing but some simple presents, but after some time it became the only way for women, who were deprived from any property rights, to inherit some goods. Additionally, in presence of rich dowries women were allowed to marry men of higher status. On the other hand, the husbands and their in-law may see dowries as a simple form of enrichment. In fact even women in the husbands' family would accept that they can potentially benefit from dowry by acquiring some clothes or jewels²⁸.

²⁴ Sangari K. & Vaid S. (1981) Sati in Modern India: a report, pp.1284-1288,

²⁵ Article 2(c)ii, The Commission of Sati Prevention act, (N. 3 of 1988)

²⁶ Lakshmi A. (2003) The liminal body: The language of Pain and Symbolism around Sati, pp.81-97

²⁷ Srinivasan, P. & Lee, G.R. (2004) The Dowry system in northern India: women's attitude and social change

²⁸ Mishra, J. (2000), Woman and Human rights. Cap 2

All these intricate relations and long-standing stories are the social grounds for why the system of dowries was, for a long period, wholly accepted by the Indian society. With the advent of modernisation and its accompanying increase in acquisitive tendencies, the dowry system began to have particular criminal consequences, and as such it started to be rejected by some cultures.

The amount of the dowry has sometimes been considered as the very first reason for a man to be discontented by his woman. In a society with prevailing patriarchal socio-cultural norms such as India, there still remain practices, attitudes and behaviour that subjugate women's status and rights to a man's. For example, if a dowry payment is not worth enough, the husband and/or his in-law may start to harass the wife until she is murdered or she decides to commit suicide.

Therefore the government of India took legislative preventative measures in 1961 by enacting the *Dowry Prohibition Act* in order to erase this social problem. However statistics show that dowry deaths have increased over the last five years, instead of diminishing²⁹.

One reason for this could be that the Dowry Prohibition Act only addresses the problem from its material cause, which is the lack of inheritance rights for women, but does not look further: “[...]dowry as a social problem was sought to be tackled by the conferment of improved property right on women by the *Hindu Succession Act 1956*”³⁰. Even though this initiative could be considered logical, it neither affects nor changes the initial causes of Dowry-death, which stem from deep rooted negative socio-cultural norms, such as the conception of a woman being under a man's will and power.

Therefore, in a case like *Arup Hazra vs Smt Manashi Hazra*³¹, the wife was found guilty as she “*refused to cook food and serve meals to the husband and any members of his family, and used to move out of home without permission*”. The wife Smt Hazra said that her husband was harassing her because her family refused to submit Rs. 50,000 as a dowry. To escape violence Smt Hazra moved out from home. With this explanation the court eventually acquitted her, but her husband was not found guilty of any offence. The case was heard under the court's civil jurisdiction, and ended with both parties being granted permission to file for divorce.

Dowry deaths are generally the result of a wife being burnt, as explained in section 304(B) of the India Penal Code (IPC)“*Where the death of a woman is caused by any*

²⁹ See note 6 above and also discussion in section [x]

³⁰ The Dowry prohibition act (Act. No. 28 of 1961)

³¹ AIR 2009 CAL.135

burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage [...]”. The ‘advantage’ of burning is that it virtually destroys the evidence of murder along with the victim, and can easily be made to look like an accident. This is made more likely by the fact that kerosene stoves are quite commonly used in Indian homes, and it is normal to store fuel in reserve³².

In the *Kisnha Kumary* case, a full trial was required in order to recognize that her death was a case of dowry murder. Mr. Kumary started to harass his wife because there was no television and refrigerator included in the dowry. After a while the young bride was found dead in her kitchen, and her husband and in-law tried to argue that it was an accident. Even though medical evidence showed that she died as a result of asphyxia, leading to the inference that her death was necessarily caused by someone else. At first appeal the husband was acquitted for lack of evidence. However, in a second trial the Supreme Court held that there was enough evidence to try the husband, who was eventually found guilty at the end of the trial³³.

The success of the *Kumary* case is not unequivocal and the Supreme Court of India has often resolved trials in an ambiguous way. For the sake of brevity I have not reported all cases that were used in the analysis. In almost half the cases, the Supreme Court recognizes the woman as a victim, and in the other half it does not. This is often the case in Dowry-crimes than in dowries-death, as in the second type of cases the evidence (because of fire) is more difficult to collate and support a prosecution. In these circumstances when a man is found guilty, he is almost always set free.

Finally the dowry system has led to another social pathology which is known as the gender based infanticide, which occurs when a woman is pregnant with a female child and she decides to abort it as the rationale is that: “*Better (to spend) 500 rupees now on the test in order to save 50,000 rupees in the future on a daughter’s dowry*”.³⁴

Domestic Violence

Due to its high prevalence, domestic violence is probably the most difficult crime to avoid in India. Both Sati and Dowries deaths lead to a murder, and therefore are becoming more and more broadly condemned by people. Whereas 41% of women considered that husbands were justified in hitting their wives if they disrespected them

³² Srinivasan, P. & Lee, G.R. (2004) *The Dowry system in northern India: women’s attitude and social change*

³³ Case fully reported in Devi, L. (1998) *Crime atrocities and violence against women and related laws and justice*, pp.148-176

³⁴ Mishra, J. (2000), *Woman and Human rights* p. 85

or their in-laws³⁵. Moreover, it is difficult to evaluate the amount of domestic violence cases that occur, as many remain unreported. Many women are not in fact aware of their rights, or ignore the law and tolerate violence³⁶. However, India's Constitution not only guarantees equality, but also stipulates that the state can make special laws and provisions for women, children and other marginalised groups³⁷. Moreover, in IPC S. 498-A, the cruelty of an husband to his wife is seen as: "*Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the woman [...] or Harassment of the woman where such harassment is with a view to coercing her or any person related to her*"³⁸. Even though this description is quite comprehensive, domestic violence is not easily denounced.

Nevertheless some cases that are resolved under the law are more focused on resolving civil entanglements, rather than seeking to achieve justice. In *Bhagat v Mrs. Baghat*³⁹, Mr. Baghat accused her wife of being "an earring wife" since she was not satisfying him. He asked for a divorce without the obligation to pay any alimony. The respondent explained that she was continually physically harassed. The court acquitted Mrs Baghat and refused the plaintiff's complaints: "*This plea does not appear legally convincing to us as it was baseless*"⁴⁰, ruled the court, but the case remained circumscribed to a divorce settlement. No process was started against the cruelty of the husband towards his wife. Another interesting case was that of *Vidya Verma vs Dr Shiv Narain Verma*⁴¹, in which the Supreme Court observed that the detention of a woman by a private person is not remediable under Article 21,⁴² which exists as a right against the state only and not against an individual.

In 2005 the government of India took a stronger stance with the promulgation of the Protection of Women Against Domestic Violence Act (PWADV), which had the effect of closing several lacunae of Indian jurisprudence. A few noteworthy features were as follows. First, a broader description of domestic violence was given, which encompassed further economic and verbal abuses⁴³. Second, some proposals for facilitating women's reactions were included. Among them, a family court organ was

³⁵ Nigam, S. (2008) Domestic Violence in India: What one should know? A resource book pp.122-229

³⁶ Mukherjee C., Rustagi P. & Krishnaji N. (2001), Crimes against women in India: Analysis of official Statistics, pp. 4070-4080

³⁷ Sec. III Constitution of India, in particular articles: 14, 15, 16, 21, 38, 39 and 46

³⁸ Indian Penal Code, section 498A: (a) & (b)

³⁹ AIR 2005 Ori 5

⁴⁰ AIR 2005 Ori 7

⁴¹ AIR 1956 SC 198

⁴² Article 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law." The Indian Constitution

⁴³ The Protection of Women from Domestic Violence act (2005), section 5,(chapter 5)

created which allowed women to bypass all the long procedures of normal court and to profit from a juridical actor acting on their their behalf. However, the Family Court Act is still not implemented in all the states of India⁴⁴.

Crimes In Public Domain: From Stigmatisation To Wrongs

In the public context, women are victims of trafficking linked to prostitution and/or rape. The review of this criminal dimension is succinct, and is done mostly using examples to illustrate the serious inefficacy of law when there are pervading negative socio-cultural norms that shape behaviour and perpetuating attitudes that women are an inferior gender.

Trafficking and Prostitution

There are three main categories of prostitutes in India. Call girls, that work the streets; dancing girls, that are under their agent's control; and Devadasis or other forms of religious prostitution. These are mainly widows or abandoned women that decide to offer their services for religion, being asked to prostitute themselves and offer revenue to the god⁴⁵. In the dowry system, even prostitution is a practice that permits a man to extract economic advantages from women. It is not unusual for a husband to sell his wife into prostitution. While this is clearly not the normal practice, the majority of women that enter into prostitution are initially victims of their husbands: they were either sold or abandoned⁴⁶. In addition other relatives, even fathers, might force a woman to become a prostitute and bring back money for the family. Moreover, when a woman tries to escape from trafficking, and empowers herself through common jobs, employers do not treat them as equals to men, paying them less or asking for sexual service: “ *I have tried many other kind of work [...] there I had to do hard work and give free sexual services to my employer*”⁴⁷.

Therefore, when the Immoral Traffic Prevention Act (ITPA) was proclaimed in 1986, greater attention was given not to the prostitution *per se* but to the trafficking of women which is strongly forbidden. Commercial sex, according to S. 7 of the Act, remains punishable only in a public space or within a distance of 200 yards from a

⁴⁴ Nigam, S. (2008) Domestic Violence in India: What one should know? A resource book pp.122-229

⁴⁵ Devi, L. (1998) Crime atrocities and violence against women and related laws and justice pp.117-122

⁴⁶ Jacob, E. Abraham S. et al. (2006) A community health programme in rural Tamil Nadu, India: the need for gender justice for women, pp. 101-108

⁴⁷ Jajasuree A. K. (2004), Searching for Justice for body and self coercive environment: Sex work in Kerala, India p.59

public space⁴⁸. The idea was to concentrate the efforts of law into the capture of the traffickers. However, police mainly act in public spaces, so two main problems occurred: first, because sex workers are socially seen as sinners, the police, no matter what the act or submitted statements, often go after prostitutes instead of their agents. Second, even when police are willing to stop traffickers, they only have to stay away from public spaces in order to escape any investigation⁴⁹. A further limitation is also placed under S. 15 (2) of the Act, where police officers are asked to look for at least two inhabitants (one has to be a woman) to witness the offence before proceeding to any arrest. This requirement effectively diminishes the operation of the Act, as sexual crimes are usually conducted in private behind closed doors.

Rapes

In the IPC under S.375 a man is assumed to commit a rape if he obliges a woman to have sex with him or he convinces her to have sex by force or with dishonesty. Not surprisingly, an exception is considered: “*Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape*”⁵⁰ and to this there is no clarification whether the husband can be punished if he uses force on his wife.

Despite S.375 it is quite rare that a female victim of a rape contacts authorities in order to seek justice. There are two main reasons for this victim silence. Firstly, women that are most vulnerable to be raped are the ones that live under trafficker control. Therefore they are a category of extremely weak women that do not believe in the law’s ability to win justice⁵¹ for them. Second, it is generally admitted that a girl, if raped, might have done something to attract her offender/s. As a result, the victim may be more frightened than trustful of the law.

In 2002 two pertinent examples of this attitude were reported. A young woman of 15 years old was assaulted in Mumbai. The crime happened in the middle of the road and nobody did anything to stop it. When the newspapers reported the incident the headline was “rape” but was alongside an image of girls dressed provocatively⁵². The implicit consequence of such news was that the raped girl attracted her offenders and as

⁴⁸ The Immoral Traffic prevention Act, 1956

⁴⁹ Devi, L. (1998) Crime atrocities and violence against women and related laws and justice pp.117-122

⁵⁰ Exception in, IPC S. 375

⁵¹ Jajasree A. K. (2004) Searching for Justice for body and self coercive environment: Sex work in Kerala, India, p 61

⁵² Dewey S. (2009) “Dear Dr. Kothari...” sexuality, violence against women, and the parallel public sphere in India pp.124-137

such, it was ‘normal’ that nobody intervened. Thus, women are considered complicit in the crime of rape when they had no say whatsoever in attracting their perpetrators.

In another case, known as the “train rape”, some friends of the victim were asked to state their opinion and replied saying that the girl was wearing a mini-skirt and going out alone, both of which counted as mitigating behaviour. One even added that ‘she was in mad rush one morning to get to her college and there was no space on the ladies (compartment) so she thought “*oh, I’ll just ride in the men’s. It will only take fifteen minutes” you can imagine what happened, na?*’⁵³. This illustrates why women, generally, do not feel confident in reporting their troubles. The established judicial institutions and the pervading norms and attitudes of society are against them.

Implications & Conclusions

Presently, India is home to a grim reality in which more than twenty women per day are still burnt by their husbands because of social customs⁵⁴, irrespective of the legal statutes enacted to eradicate dowry-death. Yet India, legally speaking, has answered to gender-based crimes with different provisions intended to apply at both the domestic level as well as in the public context.

In a small but important way, the existence of these laws has brought a rise in consciousness of women, who were and are empowered to refer to state authority to have their rights enforced. But from a global perspective, a large gap still remains for addressing social conditions that permit negative socio-cultural norms and traditions to overpower law.

Considering domestic legislation enacted to prevent gender crimes, three main criticisms remain. First, the majority of laws were proposed by policy makers who were men without input from women. Second, legality often fails to consider the social context in which it must apply. Third, not all individuals have learned that they can access the legal system. In the case of India these three weaknesses are starkly evident, and explain why law has not been able to enforce women’s rights and improve their status in society.

Further, the lack of women holding high powered positions is a significant gap in empowering measures and leadership skills at the grassroots level. Although the Indian

⁵³ Ibidem, p.136

⁵⁴ See note n 6

president today is a woman, and prior to her time some women like Indhira Gandhi have held important offices in India's history, generally females are withheld from political and jurisdictional authority⁵⁵. While in 2010 a law was passed to guarantee at least 33% of the state's offices to women⁵⁶, this can be seen as only the beginning of a possible change. The quota system has been sporadically enforced, and often the women given those seats are proxies for men who hold the real decision-making powers behind the scenes. In the context of this paper, this deficit becomes problematic when girls do not see any value in reporting violence to authorities because they do not trust those in power. However, the creation of the National Commission for Women (NCW) in 1990 is laudable and definitely a step in the right direction. The NCW has started to play an important role in being able to bridge the gap between de jure law and de facto practice. As an example, in 1992 Smt. Bhanwari Devi⁵⁷, a woman who was working against child marriage, was raped several times. She could not seek justice at the local police because it was under the influence of the culprits. She referred her complaint to the NCW that investigated it and referred it to the prosecutorial authorities. As in this case, the Commission has been a solution for women struggling for their rights in other cases⁵⁸, but more results would be obtained even without the benefit of legislation. In Brazil, for example, a certain police station has been specifically designated to deal with women's issues. These police stations are organized exclusively by women⁵⁹ and deal with women issues, such as domestic violence.

The second issue pertains to creating laws with a deeper awareness of the context within which they will operate. The problem of considering social background goes along with the problem of thinking about how many people are truly educated regarding their rights. India has proven to be a traditional society in which the female gender is often considered inferior. Laws in the cases analysed, except Sati cases, does not challenge negative socio-cultural norms and traditions and mostly stays out of personal laws' domain. Moreover, rules are triggered with to punish crimes instead of operating to to eradicate the problem⁶⁰. There are no laws against stigmatisation and the only possibility of having such a law was contained in Article 5 of CEDAW, refused by the Indian government. As an aside, offences like dowries death or the trafficking of

⁵⁵ Beevi, J.M.F.(1998) Law as an instrument of change in women's status pp. 20-

⁵⁶ See new in Carvalho, N. (2010) A law for tomorrow's Indian women

⁵⁷ Mishra, J. (2000), Woman and Human rights. Cap.5

⁵⁸ See more example on *ibidem* or through NCW web site: <http://ncw.nic.in>

⁵⁹ Mishra, J. (2000), Woman and Human rights. Cap. 3

⁶⁰ Singh, R. (1998), Gender justice and human rights: a fragile myth, in Women human rights religion and violence pp.48-62

women are strongly linked with poverty and this is an element that has not been taken into account by any act⁶¹ to date.

Finally, there is no specific attention to teaching women how to claim for their rights. In certain cases, the situation operates in reverse. Women who are victims of domestic violence should compile the FIR⁶² or the DIR⁶³ document in order to contest their case, but many of them cannot write, as education is not equally implemented among males and females. It would have been more effective if, before enforcing any law, some social programs could be implemented for developing women's empowerment in basic areas such as education and awareness. As an example, in 1990 the government of Burkina Faso used a powerful advertising campaign on the unhealthy practice of the traditional practice 'female genital mutilation' (FGM). In 2000, as a result., the number of girls that were excised decreased from 100% to 10 %, while in some villages the practice of GFM was fully erased⁶⁴.

In conclusion, as Beevi stated: "The point is that all this legal support has not made any significant difference. The reasons for this serious dichotomy prevalent in practice and theory is India's long and self sustaining tradition of oppressing women"⁶⁵. It is already recognised worldwide that human rights, to be truly so called, cannot be forcibly transferred into states and communities. Every person and state should be allowed first to understand and accept human rights as part of their values and culture. This shift should not be handled solely under the legal system at the national or international level. At the same time, without laws to enforce social achievements, no effort would have the requisite durability and legitimacy required for good practices to steep into social behaviour. The recommended course should arguably be that of social programs and law proceeding hand in hand, lending one another unique strengths and synergies in their operation and effectiveness.

⁶¹ Mukherjee C., Rustagi P. & Krishnaji N. (2001), Crimes against women in India: Analysis of official Statistics, pp. 4070-4080

⁶² Family incident report, to fill up according to the IPC S.498.

⁶³ Domestic incident report, to fill up according to the PWADV act

⁶⁴ Mishra, J. (2000), Woman and Human rights. Cap. 3

⁶⁵ Beevi J.M.F.(1998) Law as an instrument of change in women's status p. 39

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