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## FOREWORD

*Wishful thinking is not sound public policy.*

- Bjorn Lomborg

I am extremely glad to learn that the Public Policy Department of Alexis Foundation is publishing a journal titled 'Alexis Journal of Public Policy and Law'. The theme of the inaugural edition of this journal is Public policy & Women Empowerment which is a matter of great significance in the current scenario.

It is a proud moment for all of us at the Alexis Foundation that a high quality research journal has been completed by our team members. I believe this journal will motivate and inspire all our team members to work with more passion and diligence. Here, I would like to appreciate the efforts made by the Editor-in-Chief of the journal in mentoring the research associates to give their best.

I truly believe in the words of Bjorn Lomborg because sound public policy is a result of ever evolving human values like freedom, justice, equality and liberty. These human values are relative to conditions and cannot be treated as absolute in isolation. Therefore, in order to formulate sound public policy we have to understand these values in right perspective.

In the end, I would congratulate the editorial board and contributors for the hard work they have put in to complete this journal.

Aditya Singh  
Chairman and Managing Trustee  
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## SUICIDALITY AMONG SOUTH ASIAN WOMEN: RISK AND PROTECTIVE FACTORS

*Geethpriya Jha*\*

*The term South Asian is used to encompass all individuals whose ethnicity originates from countries found in the Indian subcontinent. Coming to South Asian women, in particular, seems that they are duty bound to withstand and endure a lot of societal pressure. With that being said, family honor or 'izzat' apparently lies with a woman's demure in the marital home. It is her duty to keep family ties intact; despite having marital problems and domestic violence. Such pressure is seen to have triggered many of these women resort to suicide. In this paper the author shall discuss the cause and effects of societal pressure on South Asian women. The author shall also briefly discuss the cultural aspects of suicide and religious beliefs along with interventions to the same. Further, the author shall also look into the risk and protective factors of suicide amongst these women.*

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## I. INTRODUCTION

There are a number of risk and protective factors which can either exacerbate or diminish suicidal behavior among South Asian women. Risk factors include marital violence/domestic violence, problems with in-laws, traditional gender roles and the concept of family honor, or '*izzat*', issues related to immigration, including lack of English proficiency, financial dependency on husband, acculturation and lack of access to services; cultural stigma around addressing mental health issues; racism and discrimination.<sup>1</sup> Protective factors for this population include having children, being in a non-abusive marriage, having a good outlook on life, acquiring coping skills, good communication with parents and having parental attachment, social support, and living in a neighborhood or community with other families of South

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<sup>1</sup> Guraj, G., Issac, K., Subbkrishna, D.K., Ranjani, R., *Risk Factors for Completed Suicides: A Case-Control Study from Bangalore, India*, 11(3) INJURY CONTROL & SAFETY PROMOTION, 183-191(2004). [Hereinafter Guraj, 2004].

Asian descent.<sup>2</sup>

In particular, this paper will explore the issue of domestic violence as it relates to suicidality while also examining and considering many important aspects of South Asian culture. Domestic violence has been shown to be highly prevalent among South Asian population, as well as being a major risk factor for suicide.<sup>3</sup> Therefore, this paper will address culturally competent interventions of domestic as well as other suicidal factors.

## II. RATES OF SUICIDE AMONG SOUTH ASIAN WOMEN

Disproportionately high rates of suicide and attempted suicide have been found among a population of ethnic South Asian women.<sup>4</sup> The term South Asian is a word used to encompass all individuals whose ethnicity originates from countries found in the Indian subcontinent. These countries include India, Pakistan, Bangladesh, Sri Lanka, Bhutan, and Nepal.<sup>5</sup> When looking at South Asian women who are living in the United Kingdom, it has been found that they have nearly double the suicide rate of Caucasian women, and 2.5 times that of South Asian men.<sup>6</sup> Reportedly the group of married South Asian women is highly spotted when looking at completed suicide rates.<sup>7</sup> This is not only true for the United Kingdom, but also for India, Pakistan, and Sri Lanka.

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<sup>2</sup> *Id.*

<sup>3</sup> Anitha, S., *Legislating Gender Inequalities: The Nature and Patterns of Domestic Violence Experienced by South Asian Women With Insecure Immigration Status in the United Kingdom*, 17(10) VIOLENCE AGAINST WOMEN, 1260-1285(2011). [Hereinafter Anitha, 2011].

<sup>4</sup> Hicks, M., & Bhugra, D. *Perceived causes of suicide attempts by U.K. South Asian women*, 73(4)AM. J. OF ORTHOPSYCHIATRY, 455-462 (2003). [Hereinafter Hicks & Bhugra, 2003].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

According to Manoel et. al., approximately 30 per cent of cases of suicide worldwide are committed in India and China.<sup>8</sup> The suicide rate in India alone is equivalent to that of four European countries with the highest number of suicides: Russia, Germany, France, and Ukraine. The suicidal ideation/attempts within the Indian subcontinent—Indians, Pakistanis, Bangladeshis and Sri Lankans are higher among married women than men. The diasporas further enhances the vulnerability of suicidal nature as the woman's resilience and protective factors are weakened with the immigration. According to Ahmed et al., women of South Asian origin in the United Kingdom have higher rates of attempted suicide as compared to other ethnic groups.<sup>9</sup> This study found the attempted suicide rate among younger Asian women to be 2.5 times that of white women and seven times of South Asian men.

### III. SELF-TERMINATION'S OF LIFE: RELIGIOUS VIEW

It is evident that all the prominent religions that exist in Indian subcontinent have an acceptable view on suicide under certain circumstances. In Hinduism, the act of self-sacrifice leading to voluntary termination of one's bodily existence is treated separately and not viewed as suicide. According to Shastras (Hindu scriptures), life termination is sanctioned through one of the following ways: (i) '*sariaranipata*': collapse of body (ii) '*mahaprashthana*': setting on journey (iii) '*prayopavesa*': abstaining from food and awaiting death (iv) '*sanadhi*': eighth and last stage of yoga.

Hinduism recommends the self-termination of life under the following circumstances: (i) when one is unable to perform duties prescribed by the shastras

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<sup>8</sup> Jose Manoel Bertolote, *Alexandra Fleischmann Suicide and Psychiatric Diagnosis: A Worldwide Perspective*, 1(3) WORLD PSYCHIATRY 181-185 (Oct 2002), available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1489848/>

<sup>9</sup> Ahmed, Kamran; Mohan, Rajesh A.; Bhugra, Dinesh, *Self-Harm in South Asian Women: A Literature Review Informed Approach to Assessment and Formulation*, 61(1) AM. J. OF PSYCHOTHERAPY (2007).



(ii) self-sacrifice for the larger good of the society, which includes promises or vows made to oneself or public (iii) when one has been able to achieve spiritual integration and can leave the world without any attachment (iv) when someone has committed sins/he is allowed to commit suicide by throwing oneself in the fire.

In Jainism, a religion that branches out of Hinduism, a planned scheme of fasting and mortification is an approved form of self-termination of life. In Buddhism, it is thought that suffering is an indispensable part of life and necessary for attaining nirvana; however, when suicide is done for greater good, it is considered acceptable. A Buddhist text advocates that “to burn one’s body as an offering is certainly more meritorious than to kindle lamps at shrine”. In Islam suicide is forbidden; however in Indian Islam, under the Hanafi school, purging at an old age is permitted so that one directly goes to God after death. Therefore, many South Asian religions regard suicide as a noble deed when done for greater good.

#### IV. SUICIDE, DOMESTIC VIOLENCE, AND CULTURE

The high prevalence of suicidal behavior among South Asian women can also be explored in light of the cultural expectations of women, especially within the institution of marriage. It has been suggested that the prominent cultural expectation of submission by women to both men and elders has played a significant role in the suicidality of South Asian women.<sup>10</sup> These views have played a large role in the development of certain socio-cultural factors that are associated with the rates of suicide among this population. These socio-cultural factors include family disputes over marriage and lifestyle, unhappy arranged marriages, marital conflict, and in-law disputes.<sup>11</sup> A study by Hicks and Bhugra found that three factors - violence by husband, being trapped in an unhappy marital

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<sup>10</sup> Hicks & Bhugra, 2003

<sup>11</sup> *Id.* Thompson, N., & Bhugra, D. *Rates of deliberate self-harm in Asians: Findings and models*, INT’L REV. OF PSYCHIATRY, 12, 37-43. (2000).

situation and depression - were endorsed most frequently and strongly as causes of suicide attempts among South Asian women.<sup>12</sup>

Domestic violence has been found to be a significant risk factor for suicide among South Asian women.<sup>13</sup> International studies of marital violence among South Asians have found rates of 34% in Pakistan, 47% in Bangladesh, 17% to 40% in India, and 35% to 40% in America.<sup>14</sup> Thus, it appears that domestic violence is a reality for many South Asian women. Marital violence has been found to be a major predictor of anxiety and depression in Pakistani women, and studies have found that such maladies increase one's risk of attempting suicide.<sup>15</sup> When looking at a population of British South Asian women who sought help against domestic violence, it was found that 13% had attempted suicide and 67% had contemplated suicide.<sup>16</sup> It has also been found that when compared to Caucasian women who had attempted suicide, South Asian women who had attempted suicide were more likely to have been assaulted physically or verbally.<sup>17</sup>

There are a number of reasons why domestic violence increases a South Asian women's likelihood of attempting suicide, and these factors revolve around the idea that the escape from the situation is not a possible choice.<sup>18</sup> Divorce is not an option that many South Asian women have; as it is viewed in a highly negative practice. Many South Asian women are socialized into believing that divorce is a

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<sup>12</sup> *Id.*

<sup>13</sup> Anitha, 2011; Hicks & Bhugra, 2003; Dasgupta, S.D. *Charting the Course: An overview of domestic Violence in the South Asian Community in the United States*, 9 (3) J. OF SOCIAL DISTRESS & THE HOMELESS, 173-185, (2000). [Hereinafter Dasgupta, S.D. (2000)]

<sup>14</sup> *Supra* note. 10

<sup>15</sup> Kumar, S., Jayaseelan, L., Suresh, S., & Ahuja, R.C. *Domestic Violence and its Mental Health Correlates in Indian Women*, THE BR. J. OF PSYCHIATRY, 187, 62-67(2005).

<sup>16</sup> *Id.* Hicks & Bhugra, 2003.

<sup>17</sup> Bhugra, D., & Desai, M., *Attempted Suicide in South Asian Women*, ADVANCES IN PSYCHIATRIC TREATMENT, 8, 418-423, (2002).

<sup>18</sup> Gill, A., *Voicing the Silent Fear: South Asian Women's Experiences of Domestic Violence*, 43(5) THE HOWARD J., 465-483(2004). [Hereinafter Gill, 2004]

disgrace to the family.<sup>19</sup> These women, not wanting to bring shame to their family name, therefore, remain in an abusive relationship and endure the violence. The burden of keeping the family together entirely rests on women, as the idea is prominent that even in abusive relationships the women should strive to keep the family intact.<sup>20</sup> This view to keep the family together at all costs continues to remain prominent as a result of the cultural glorification of women's suffering.<sup>21</sup> South Asian societies are more likely to revere women who endure violence for the sake of their family's togetherness.<sup>22</sup> In some cases, the rigid gender hierarchy within marriage leaves suicide as the only option to come out of an abusive relationship. For example, in Sri Lanka, many women attempt to commit suicide in front of their husband or husband's friends and relatives so that they may invoke repentance over the abuse in their husband.

#### V. SITA, AN ICON OF WOMANHOOD AND SUFFERING

Goddess Sita is considered an ideal example for any Hindu wife. In Ramayana, a Hindu mythological book, Goddess Sita endorses wives unquestionable devotion towards their husband as seen in the following lines from Sita in the Ramayana, "*Even if a husband should be poor, and of a disreputable character, he should be ungrudgingly obeyed by the like of me; not say about one who is crowned with qualities, kind, self-controlled, of steady affection, righteous souled and dear as a father or mother*". The above mentioned lines by Goddess Sita demand blind following of her husband even though such person is not worthy of any respect. Such a statement implicitly glorifies the tolerance of abuse in marriage and in some way legitimizes it. Further on, in Ramayana, despite Sita's endless acts of devotion to her husband Rama, she was demanded proves

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<sup>19</sup> *Id.*

<sup>20</sup> Dasgupta, S.D., 2000.

<sup>21</sup> Waters, A.B., *Domestic Dangers: Approaches to Women's Suicide in Contemporary Maharashtra, India*, 5 VIOLENCE AGAINST WOMEN, 525-547 (1999).

<sup>22</sup> Dasgupta, S.D., 2000.

of her chastity because the people of his kingdom had doubted her character. Sita's response to this injustice was to end her life as sati, suicide by jumping into the fire, and to return to the mother goddess. Therefore, Sita sets the ideal example for Hindu women by being a subdued wife, and also demonstrates suicide as the only solution to injustice done in marriage

#### VI. OTHER CULTURAL CHARACTERISTICS OF DOMESTIC VIOLENCE IN SOUTH ASIAN COMMUNITIES

Domestic violence in South Asian families is not only characterized through the physical and verbal abuse by the intimate partner, but also includes abuse by the mother-in-law.<sup>23</sup> Khan and Reza found that one reason why South Asian women committed suicide was because of problems with their mother-in-law.<sup>24</sup> As a result of the dominant construction of 'izzat', a word that means honor in South Asian communities, women have the burden of upholding their family's honor.<sup>25</sup> Thus, a woman's husband's extended family feels that they have the right to police that woman's behavior and prevent any deviation from the enforced norms of their society.<sup>26</sup> This task is usually a responsibility of a female family member who, in most cases, is the mother-in-law. Thus, many South Asian domestic violence victims speak about the emotional abuse and controlling behaviors exercised by their partner's female family members. These female in-laws also make sure to monitor that the woman does not speak out about the abuse she suffers at home, thus they prevent the women from socializing and seeking help.<sup>27</sup>

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<sup>23</sup> *Supra* note. 13

<sup>24</sup> Khan, M.M. & Reza, H. *Attempted suicide in Karachi, Pakistan, Suicide and Life Threatening Behaviour*, 28, 54-60 (1998).

<sup>25</sup> Chew-Graham, C., Bashir, C., Chantler, K., Burman, E., & Batsleer, J., *South Asian Women, Psychological Distress and Self-Harm: Lessons for Primary Care Trusts*, 10(5)HEALTH & SOC. CARE IN THE COMMUNITY, 339-347; See also Anitha, 2011; Chew-Graham; Gill, 2004.

<sup>26</sup> Anitha, 2011.

<sup>27</sup> Anitha, 2011.

In addition to the in-laws role in preventing a woman from leaving a domestic violence relationship, immigration factor is another significant reason as to why South Asian women stay in domestic violence relationships.<sup>28</sup> A study conducted in the United Kingdom found that marriage was seen as one of the few means of settlement in the UK for individuals from South Asia.<sup>29</sup> Women who come to the United Kingdom to join their husband do so on a two year probationary period. If within this period the marriage breaks down then the woman faces deportation to her home country. Thus, it was found that this risk was another reason why South Asian women did not leave their violent husbands. However, in an effort to rectify this situation, a stipulation has been added which states that if a woman is being harmed in her relationship and she can provide relevant proofs, then she is no longer at risk for deportation. However, research shows that women feel they need to secure economic and emotional support before leaving abusive relationships.<sup>30</sup> As recent marriage migrants are unlikely to be financially independent, and also lack English proficiency and thus cannot obtain a job, they rely on their abusive partner, and this is another reason why they refrain from resisting violence.<sup>31</sup>

## VII. INTERVENTIONS FOR SUICIDALITY IN SOUTH ASIAN COMMUNITIES

According to Worchel & Gearing, “working from a culturally competent perspective remains an area of concern in the field of suicidality”.<sup>32</sup> An exploration of the literature shows that there is indeed a gap in the research on interventions

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<sup>28</sup> Burman, E., Chantler, K., & Batsleer, J., *Service Responses to South Asian Women Who Attempt Suicide or Self-harm: Challenges for Service Commissioning and Deliver*, CRITICAL SOC. POL., 22(4), 641-668 (2002). Also see Raj, A. & Silverman, J.G. *Immigrant South Asian Women at Greater Risk for Injury from Intimate Partner Violence*, AM. J. PUB. HEALTH, 93, 435-437 (2003).

<sup>29</sup> Anitha, 2011.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> WORCHEL, D., GEARING, R., SUICIDE ASSESSMENT AND TREATMENT: EMPIRICAL AND EVIDENCE-BASED PRACTICES., (2010).

for South Asian women. The following section will explore what culturally relevant research is available to guide suicide prevention and intervention among South Asian women facing domestic violence.

Graham et al. convened four focus groups of South Asian women in the United Kingdom to explore the question of how to improve self-harm and suicide services for South Asian women.<sup>33</sup> The focus groups were conducted in English, Urdu, and Punjabi and consisted of women of Pakistani, Bangladeshi, and Indian backgrounds. All the women had a history of self-harm or suicide attempts. These women told the researchers that for many South Asian women, there are so many barriers to services that these women will often not seek help until they are at a point of crisis. These barriers include: the concept of ‘*izzat*’ or family honor, which keeps women closely tied to their families, the acknowledgement of the community grapevine, meaning that a woman’s attempt to get help could easily get back to her family or other members of her community, the presence of language barriers, and the fear of racism or lack of cultural understanding from mental health practitioners. This last point, in particular, is very concerning as research from Burr indicates that mental health professionals often take stereotypes of South Asian communities as facts, resulting in misdiagnosis and inadequate treatment.<sup>34</sup> Mental health practitioners should be aware that when a South Asian woman is seeking services, it may be because her situation is so dire that she has overcome all these barriers to seek treatment. Therefore, suicide prevention strategies for this population should be rapid and require a quick response from professionals.<sup>35</sup>

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<sup>33</sup> Graham, C., Bashir, C., Chantler, K., Burman, E., Batsleer, J. *South Asian Women, Psychological Distress and Self Harm: Lessons for Primary Care Trusts*, 10(5) HEALTH & SOC. CARE IN THE COMMUNITY, 339-347(2002). [Hereinafter Graham et. al. 2002]

<sup>34</sup> Burr, J., *Cultural Stereotypes of Women from South Asian Communities: Mental Health Care Professionals’ Explanations for Patterns of Suicide and Depression*, 55(5) SOC. SCIENCE & MEDICINE, 835-845(2002).

<sup>35</sup> Graham et al., 2002.

The participants in Graham et al. also spoke about the need for further education in the South Asian community about mental health services.<sup>36</sup> They recommended providing advertising for mental health services in a variety of South Asian languages in places where South Asian women naturally gather. They also recommended providing outreaches to South Asian girls in schools. They suggested that mental health organizations could partner with South Asian specialty groups in order to raise awareness and that mental health professionals could come into South Asian communities to do face-to-face promotions of services. Clearly, there is a need for intervention at the community/macro level in order to increase access to suicide/self harm services, and mental health services in general. However, other research indicates that while community-based suicide prevention programs are useful for increasing public consciousness about suicide, they have limited efficacy in actually reducing suicide rates, unless the program is long-term and succeeds in establishing an enduring community-based support network.<sup>37</sup>

The women in the focus groups also acknowledged that their self-harming behaviors or attempts of suicide were often in response to social isolation.<sup>38</sup> In another study from the United Kingdom on the perceived causes of suicide attempts by South Asian women, it was found that feeling trapped and isolated in an unhappy family situation was a major precipitant of suicide attempts.<sup>39</sup> This indicates that group interventions could be particularly helpful for this population. Indeed, the women in the Graham et al. focus groups said that facilitated self-help groups for South Asian women would be helpful to them.<sup>40</sup> However, there are no empirical studies at present that explore whether or not self-help groups would be

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<sup>36</sup> *Id.*

<sup>37</sup> Fountoulakis, K., Gonda, X., Rihmer, Z., *Suicide Prevention Programs through Community Intervention*, 130 J. OF AFFECTIVE DISORDERS, 10-16(2011).

<sup>38</sup> Graham et al., 2002.

<sup>39</sup> Hicks & Bhugra, 2003.

<sup>40</sup> Graham et al. 2002

helpful for South Asian women. A study on youth living in isolated rural communities in the United States found that participation in a lifesavers peer-support suicide prevention program increased knowledge about suicide prevention, positive attitudes about suicide prevention, and self-esteem.<sup>41</sup> General research on adult suicide indicates that social connectedness is a major protective factor against suicide.<sup>42</sup> Clearly, more research is needed to see whether or not creating groups for South Asian women in order to increase support and break social isolation would be effective in reducing self-harm and suicide attempts.

There are few interventions on the individual level specifically designed for South Asian women; however, there are recent developments in the literature which will be responding directly to the needs of this population. In response to rising rates of suicide and self-harm among South Asian women in the United Kingdom, a trial by Husain et al. will examine the efficacy of a culturally adapted manual assisted Problem Solving Therapy (C-MAP).<sup>43</sup> The trial protocol consists of eight sessions of problem solving over three months and will measure whether the treatment results in decreased hopelessness and suicidal ideation in comparison to treatment-as-usual for self harming behaviors. Treatment-as-usual was described as the typical referral process from a primary care physician or ER doctor to outpatient mental health services. The C-MAP treatment consists of a manualized guide, based on the principles of cognitive-behavioral therapy and including evaluation of the self-harm attempt, crisis skills, problem solving skills and cognitive techniques to manage emotions, negative thoughts and relapse. The authors write that this

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<sup>41</sup> Walker, R., Ashby, J., Hoskins, O., Greene, F., *Peer-Support Suicide Prevention in a Non-Metropolitan U.S. Community*, 44(174) *ADOLESCENCE*, (2009).

[Hereinafter Walker et al., 2009].

<sup>42</sup> *Supra* note.30

<sup>43</sup> Husain, N., et. al., *Prevention of self-harm in British South Asian women: study protocol of an exploratory RCT of culturally adapted manual assisted Problem Solving Training (C-MAP)*, 12(159) *TRIALS* (2011). [Hereinafter Hussain et. al. 2011]



manual was chosen because people who self-harm “have poor problem-solving skills which may lead to hopelessness and depression”; so, this manual is meant to boost problem-solving skills in a culturally relevant manner. Husain et al. writes that for the majority of their participants, the precipitant of their self-harming behavior was interpersonal family conflict.<sup>44</sup> Therefore, culturally relevant case scenarios were selected, and sections were added to the manual specifically addressing family conflict. The manual was translated into Urdu, with consideration given to the cultural adaptation of phrases and concepts. The participants choose whether treatment was provided at home or in the hospital. The outcomes of this trial have not yet been published, but it is encouraging to see that efforts are being made to adapt therapeutic interventions to specific cultures.

#### VIII. INTERVENTIONS FOR DOMESTIC VIOLENCE IN SOUTH ASIAN COMMUNITIES

In most of the South Asian communities domestic violence continues to be a challenging problem largely because of the stigma of admitting such information is profound.<sup>45</sup> Not only is it profound but many South Asians who report and end up in court drop domestic violence charges due to divorce, immigration, and housing pressure.<sup>46</sup> According to research done by Yoshihama cases of reported domestic violence were seen in Asian groups, African-American, Whites, Hispanics, American Indians/Native and Alaskan Natives, but not in South Asian groups. The only report made was the prevalence of domestic violence amongst the South Asian community.<sup>47</sup> Although, younger South Asian victims of domestic violence

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<sup>44</sup> *Id.*

<sup>45</sup> Priesser, A. B., *Domestic Violence in South Asian Communities in America*, 5(6) VIOLENCE AGAINST WOMEN, 684-699 (1999). [Hereinafter Priesser, 1999]

<sup>46</sup> *Id.*

<sup>47</sup> Yoshihama, M. & Dabby, C., *Facts & Stats: Domestic Violence in Asian, Native Hawaiian and Pacific Islander Homes*, Asian & Pacific Islander Institute on Domestic violence, A PROJECT OF TIDES CENTRE, (2009). available at: <http://www.apiidv.org/files/Facts.Stats-APIIDV-2012.pdf>

who are born in the United States are more likely to seek services than older immigrant women, cultural differences between the victims and local social service institutions as well as service providers continue to be an issue,<sup>48</sup> which also leads to a large gap of institutional services provided for South Asians.

With that said, there are several advocacy and intervention issues amongst this population. For instance, service providers need to have adequate training and resources to address the multifaceted needs of South Asian clients.<sup>49</sup> When South Asian women seek assistance from advocates or service providers, they are faced with communication problems. For instance, a woman stated her counselor didn't understand she could not report her husband to the police because he had her passport.<sup>50</sup> Another woman explained she was unable to fully seek services due to her cultures' high respect for family life and was embarrassed about telling her family about the abuse.

In mainstream American society domestic violence is seen as a non-issue among South Asians because the population is stereotyped as a trouble-free community and the women will not come forward to make official complaints.<sup>51</sup> Despite this stereotype most South Asians recognize that the extended or joint family may also be a structure in which violence is tacitly sanctioned.<sup>52</sup> In these South Asian communities family structure can be a barrier to a woman seeking outside help, just as it can provide her with stability, safety, and interdependence.<sup>53</sup> Domestic violence within the South Asian community occurs not only between the spouse and woman, but between a woman and her in-laws and the community at

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<sup>48</sup> Priesser, 1999.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

large.<sup>54</sup> According to the Project AWARE survey among 169 South Asian respondents who were married at the time of the survey, 5.7% reported having experienced emotional abuse by in-laws. The proportion of women who reported emotional abuse by in-laws was significantly higher among those reporting partners' violence in their current relationship (15.4%) than those who did not report such violence.<sup>55</sup>

The reason for this may be that certain practices and traditions have legitimized the subordination of women to elders in South Asian cultures.<sup>56</sup> When abused, issues such as obedience to family elders, upholding family honor, fear of losing children and religious practices may influence victims to suffer in silence.<sup>57</sup> It is very important for service providers to understand that cultural and familial ties creates tension and conflict that contributes to the ongoing silence of South Asian victims of domestic violence. In order for intervention strategies to work amongst South Asians the cultural, historical and ethnic contexts must be taken into consideration.<sup>58</sup> According to Das and Kemp stress therapists need to keep in mind the degree of acculturation that the client has undergone in the mainstream culture and the type of ethnic identity the client has developed.<sup>59</sup> These two reasons are the ongoing influences in determining identity, which is why counselors and therapists need to become educated in specific cultural values and the status of women in relation to the community.<sup>60</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Supra* note. 23.

<sup>56</sup> Priesser, 1999.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Das, A. K. & Kemp, S.F. *Between two worlds: Counseling South Asian Americans* 5 J. OF MULTICULTURAL COUNSELING, 19-44 (1997).

<sup>60</sup> *Id.*

Dasgupta and Warriar developed tools, specifically designed for interventions with South Asian clients of particular interest, focusing on cultural understanding of values such as tolerance, discipline of children, dating, marriage and public versus private behavior.<sup>61</sup> For instance, in South Asian cultures there are various devices that work to mitigate the victim's plight such as, the feeling 'others are watching' sways the abuser's behavior.<sup>62</sup> Other times, it is the victim's knowledge that she can go to an older relative or back to her family that helps her cope with the situation.<sup>63</sup> However, we must recognize that most of these intervention methods are founded on interdependence and are compatible with a South Asian woman's understanding of herself.<sup>64</sup> Most South Asian women who settle in America with their husband lose the factors that have helped her to define herself and organize her personal life in her native culture.<sup>65</sup> Friends who replace relatives, the importance of social weight of family members dwindles, and they lose influence on the couple. As a result, the victim of violence becomes more dependent on her husband.

## IX. CONCLUSION AND FURTHER QUESTIONS

Amongst the South Asian community suicide and domestic violence are closely linked. In this population, women who are victims of domestic violence self-harm or attempt suicide due to several barriers that prohibit them from seeking help. These barriers include the concept of family honor, which keeps them closely tied to their families, the fear to seek help because it may easily get back to her family or other members of her community, the lack of cultural understanding from mental health providers and social isolation. In order for interventions to work,

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<sup>61</sup> DASGUPTA, S.D. & WARRIER, S., IN VISIBLE TERMS: DOMESTIC VIOLENCE IN THE ASIAN INDIAN CONTEXT, A HANDBOOK FOR INTERVENTION, (1995).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

mental health practitioners must strip away from the stereotype that this population is passive and issues such as domestic violence do not exist. Instead, practitioners must be culturally competent and understand what an essential role the family and community plays as an integral part in the South Asian community in order to provide effective services.

Chinmay Deshmukh, *Assessing the Impact of Trade Liberalization on Gender Equality: Way Forward Towards Women Empowerment or a Retrograde Step*

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## ASSESSING THE IMPACT OF TRADE LIBERALIZATION ON GENDER EQUALITY: WAY FORWARD TOWARDS WOMEN EMPOWERMENT OR A RETROGRADE STEP

*Chinmay Deshmukh\**

*Even though trade is a fundamental economic phenomenon, it has significant consequences for social, and principally gender, equality. International trade and investment have a substantial influence on labour markets and working conditions, affecting women in particular because of their generally lower skills and weak bargaining power. Contrary to the general assumption that trade policies and agreements are class, race and gender neutral, there exists a strong relation between gender and trade. Trade policies, like any other economic policy, are likely to have gender differentiated effects because of women's and men's different access to, and control over, resources, and because of their different roles in both the market economy and the household. This paper is an attempt to analyze the relationship between women's empowerment and trade liberalization policies. This paper basically examines whether trade liberalization and increasing regional trade agreements can bring changes in the socio-economic conditions of women in India.*

*After charting out the history of trade liberalization in India starting from 1991, this paper attempts to examine the impact of trade liberalization and regional trade agreements on the status of women in India. Variation in pre-liberalization status of women in India and the level of empowerment in post liberalization India allows us to investigate whether women have been benefited from, or bore a disproportionate share of the burden of liberalization. It also highlights the opportunities and challenges that trade liberalization policy and regional trade arrangements in India offer women and recommends certain measures to ensure gender equality through trade liberalization.*

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## I. INTRODUCTION

Promoting gender equality is one of the eight Millennium Development Goals of the United Nations. Equal rights between men and women enshrined as a fundamental human right in the UN Charter, and many international conferences have been held to further that goal.<sup>1</sup> The potential paths to achieving this goal are many. An oft-cited path is to raise global awareness on the issue and to directly campaign for change. Another possibility may be to integrate poorer and less-

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<sup>1</sup>Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti, *Trade and Gender Opportunities and Challenges for Developing Countries*, UN INTER-AGENCY NETWORK ON WOMEN AND GENDER EQUALITY TASK FORCE ON GENDER AND TRADE, (2004), *available at*: [http://unctad.org/en/docs/edm20042\\_en.pdf](http://unctad.org/en/docs/edm20042_en.pdf) [Hereinafter Nguyen & Zampetti].

developed economies into world markets by encouraging trade liberalization. The world trading system has witnessed an increasing number of regional integration initiatives in recent times. The basic premise of such initiatives is to liberalize trade among the members by granting tariff concessions for, or eliminations of selected products.<sup>2</sup>

Trade liberalization is widely seen as a driving force behind economic growth and poverty reduction. Proponents of neoliberal economics suggest that trade liberalization is a driving force for gender equality. They regard free markets as the best mechanism for the narrowing of gender gaps. This is based on the assumption that trade produces growth, and that growth will open up opportunities for better education, more jobs, higher income, more credit and better opportunities for women entrepreneurs.<sup>3</sup>

India embarked on the path of slow and steady liberalization of the economy in the early 1990's. Wide ranging economic reforms were introduced in 1991. In marked contrast to the post-independence developmental strategy of self-reliant economic growth in the current reforms are aimed at making the economy more efficient through increased market orientation. In this restructuring of the economy and its accelerated integration into the world market, women are depicted as winners, in particular women in export manufacturing, information and communication, and services.<sup>4</sup>

Women, as a group, are economically more disadvantaged than men, especially in developing countries, where women constitute the economically poorest segment

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<sup>2</sup> Sejuti Jha, *Utility of Regional Trade Agreements: Experience from India's Regionalism*, ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE WORKING PAPER SERIES, No. 99, (April, 2011), available at: <http://www.unescap.org/tid/artnet/pub/wp9911.pdf> [Hereinafter Jha].

<sup>3</sup> Christa Wichterich, *Trade? – A Driving Force for Jobs and Women's Empowerment? Focus on China and India*, FES BRIEFING PAPER 7, (May 2009), available at: <http://library.fes.de/pdf-files/iez/global/06389.pdf> [Hereinafter Wichterich].

<sup>4</sup> Wichterich, *supra* note 4.



with estimates ranging anywhere between 60 to 70 percent.<sup>5</sup> Studies estimates that over 70 percent of world's poor are women. However, gender still has not been considered a relevant category of analysis in international trade and is largely ignored at the theoretical, empirical and policy design of international trade.<sup>6</sup>

Against this backdrop, questions arise as to how the costs and benefits of trade can be evenly distributed by gender, and whether trade rules and policies deepen, or, on the contrary, reduce existing gender inequalities. There is, therefore, a need to assess the impact of trade on gender equality in order to assist countries in designing appropriate strategies and policies to support the objective of gender equality in the context of an open multilateral trading system.<sup>7</sup>

## II. THE STORY OF TRADE LIBERALIZATION IN INDIA

Trade liberalization, loosely defined as a move towards freer trade through the reduction of tariff and other barriers, is generally perceived as the major driving force behind globalization. Rapidly increasing flows of goods and services across national borders have been the most visible aspect of the increasing integration of the global economy in recent decades.<sup>8</sup> This integration into the world economy has proven to be a powerful means for countries to promote economic growth, development, and poverty reduction. It has raised living standards around the world. Most developing countries have shared in this prosperity; in some, incomes

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<sup>5</sup> Shahid Ahmed, *Trade Openness and Gender Empowerment: An Assessment*, Draft Report prepared under UNCTAD- Govt. of India- DFID Project 'Strategies and Preparedness for Trade and Globalisation in India', (2008), available at: [http://s3.amazonaws.com/zanran\\_storage/www.unctadindia.org/ContentPages/53048370.pdf](http://s3.amazonaws.com/zanran_storage/www.unctadindia.org/ContentPages/53048370.pdf).

<sup>6</sup> Wichterich, *supra* note 4.

<sup>7</sup> Nguyen & Zampetti, *Supra* note 1.

<sup>8</sup> Eddy Lee, *Trade Liberalization and Employment*, DESA WORKING PAPER No. 5, (Oct. 2005), available at: [http://www.un.org/esa/desa/papers/2005/wp5\\_2005.pdf](http://www.un.org/esa/desa/papers/2005/wp5_2005.pdf) [Hereinafter Lee].

have risen dramatically, including India, Vietnam, and Uganda, which also experienced faster growth and more poverty reduction.<sup>9</sup> As a group, developing countries have become much more important in world trade. Many developing countries have substantially increased their exports of manufactures and services relative to traditional commodity exports: manufactures have risen to 80 percent of developing country exports.<sup>10</sup>

India too, after following the policy of self-reliance for more than four decades, was compelled by the balance of payment crisis, and initiated wide ranging economic reforms in 1991. India's post-independence development strategy was one of national self-sufficiency, and stressed the importance of government regulation of the economy. Cerra et al. characterized it as "both inward looking and highly interventionist, consisting of import protection, complex industrial licensing requirements, and pervasive government intervention in financial intermediation and substantial public ownership of heavy industry."<sup>11</sup> In particular, India's trade regime was amongst the most restrictive in Asia, with high nominal tariffs and non-tariff barriers, including a complex import licensing system, an "actual user" policy that restricted imports by intermediaries, restrictions of certain exports and imports to the public sector ("canalization"), phased manufacturing programs that mandated progressive import substitution, and government purchase preferences for domestic producers.<sup>12</sup>

The 1991 reforms covered macro-economic stabilization programmes addressing

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<sup>9</sup>David Dollar, *Globalization, Inequality, and Poverty since 1980*, WORLD BANK, (2001), [ftp://www.econ.bgu.ac.il/Courses/Globalization\\_and\\_Development/Notes/Globalization-inequality-and-poverty.pdf](ftp://www.econ.bgu.ac.il/Courses/Globalization_and_Development/Notes/Globalization-inequality-and-poverty.pdf).

<sup>10</sup>IMF, *Global Trade Liberalization and the Developing Countries*, (Nov. 2001), <http://www.imf.org/external/np/exr/ib/2001/110801.htm>.

<sup>11</sup> Cerra, Valerie & Sweta Saxena, *What Caused the 1991 Currency Crisis in India?*, INTERNATIONAL MONETARY FUND, IMF WP/00/157 (October 2000).

<sup>12</sup> Petia Topalova, *Trade Liberalization, Poverty And Inequality: Evidence From Indian Districts*, NBER WORKING PAPER SERIES, Working Paper 11614, (Sept. 2005), *available at:* [http://www.nber.org/papers/w11614.pdf?new\\_window=1](http://www.nber.org/papers/w11614.pdf?new_window=1).

fiscal and current account imbalances and exchange rate regimes. These reforms also sought to evolve an industrial and trade policy framework to promote efficiency, reduce the bias in favour of excessive capital intensity and encourage an employment oriented industrialization. Reforms in industrial policies provided the direction of reforms in other areas such as trade and finance. Industrial reforms sought primarily to remove licensing requirements, which posed significant barriers to entry, and prevented the manufacturing sector from taking advantage of economies of scale.<sup>13</sup>

Simultaneously, trade policy liberalization sought to create an environment to provide a stimulus to export and reduce the degree of regulation and licensing control of foreign trade. This was achieved by progressively dismantling the complex system of import licensing, phased reduction in customs duty and the gradual removal of quantitative restrictions on imports.

In the past two decades of trade liberalization India has taken binding obligations at bilateral and multilateral levels. Multilaterally, as a result of the Uruguay Round of Trade Negotiations, India bound its customs duty on two third of the industrial products. At the bilateral level, India gradually allowed zero duty imports on substantially all trade from Sri Lanka, Singapore, SAFTA, ASEAN, Korea, Japan and Malaysia.<sup>14</sup> Since the RTAs came into force India's trade, both exports and imports, has increased with most of its RTA partners, as indicated by the official trade statistics.<sup>15</sup> In order to intensify trade liberalization, give a massive push to exports and generate employment, in 2000 a new export-oriented policy was launched. This involved the establishment of Special Economic Zones as a kind of

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<sup>13</sup> Rashmi Banga & Abhijit Das, *Twenty Years of India's Liberalization: Experiences and Lessons*, UNITED NATIONS PUBLICATION (2012), available at: [http://unctad.org/en/PublicationsLibrary/osg2012d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/osg2012d1_en.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> Jha, *supra* note 3.

extraterritorial space with regard to domestic regulation, tariffs, duties and trade operations. Following the model of SEZs in China, the aim is to enhance domestic investment, attract foreign investment and promote export production as an engine for economic growth.<sup>16</sup>

The central strategy is to secure a greater share of the global market in industry, trade and services through increased productivity. A growing number of global corporations are now established in India. They offer new employment opportunities for the emerging middle classes, which is said to have expanded as a result of the globalization of the economy.<sup>17</sup>

However, [trade liberalization]...has also been one of the most contentious aspects of globalization. The primary criticism levelled against international trade agreements from a gender perspective is that the measurement of international trade in terms of a net economic benefit and market-based criteria has largely ignored societal imbalances, which in turn results in long-term trade inefficiencies. This criticism is supported by the fact that Article XX of the General Agreement on Tariff and Trade (GATT), which allows for the reconciliation of trade and non-trade related norms in the trade context, is silent on the issue of women's rights. Trade agreements have also been criticized for reducing the policy space afforded to national initiatives in general, and the same may well apply to the empowerment of women and their participation in formal economic activities.<sup>18</sup>

Critics of trade liberalization have also blamed it for a host of other ills, such as rising unemployment and wage inequality in the advanced countries; increased exploitation of workers in developing countries and a “race to the bottom” with respect to employment conditions and labour standards; the de-industrialization

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<sup>16</sup> Wichterich, *supra* note 4.

<sup>17</sup> Ganguly-Scrase & Vandenbroek, *supra* note 5.

<sup>18</sup> Sheila Kiratu & Suryapratim Roy, Beyond Barriers: The Gender Implications of Trade Liberalization in Southern Africa, IISD, (2010), *available at*: [http://www.iisd.org/tkn/pdf/beyond\\_barriers\\_gender\\_south\\_africa.pdf](http://www.iisd.org/tkn/pdf/beyond_barriers_gender_south_africa.pdf).

and marginalization of low-income countries; increasing poverty and global inequality, and degradation of the environment. These views have spread in spite of the fact that the benefits of freer trade, in terms of improved allocation of resources and consequent gains in productive efficiency and economic growth, are a basic tenet of mainstream economic analysis.<sup>19</sup>

Keynesian economists such as Nobel laureate Joseph Stiglitz and Dani Rodrik, as well as feminist economists, question the alleged effects of the current trade liberalization agenda on poverty elimination, fair distribution and gender equity. They highlight the growing inequality and social disparity as the adverse outcomes of an economy that is obsessed with constant growth and subordinates social concerns to competitiveness. Feminists stress that competitive advantage often comes at a heavy price, in the form of discrimination against women and gender gaps.<sup>20</sup>

Wealth of research available shows that trade policies, like any other economic policy, involves and affect men and women differently.<sup>21</sup> This gender differential is informed by and based on the gender division of labour (both in the market and the household), women's and men's different access to and control over resources such as assets, rights and time, and also cultural ascriptions of gender stereotypes and norms.

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<sup>19</sup> Lee, *supra* note 11.

<sup>20</sup> Stephanie Seguino, *Gender Inequality and Economic Growth: A Cross-country Analysis*, in *WORLD DEVELOPMENT* 1211–30 (2000).

<sup>21</sup> See Marzia Fontana, *The Gender Effects of Trade Liberalisation in Developing Countries: A Review of the Literature*, (Oct., 2003), available at: [http://www.ciedur.org.uy/adm/archivos/publicacion\\_200.pdf](http://www.ciedur.org.uy/adm/archivos/publicacion_200.pdf); Sheila Kiratu & Suryapratim Roy, *Beyond Barriers: The Gender Implications of Trade Liberalization in Southern Africa*, IISD, (2010); Ernesto Aguayo-Télez, *The Impact of Trade Liberalization Policies and FDI on Gender Inequalities: A Literature Review*, *WORLD BANK*, (2012); Chinhui Juhn et al., *Trade Liberalization and Gender Inequality*, 103(3) *AM. ECON. REV.: PAPERS PROCEEDINGS* 269–273 (2013).

### III. GENDER IMPLICATIONS OF ECONOMIC REFORMS IN INDIA

#### A. *How Trade Affects Women?*

Theoretically, the neo-classical view is that trade will open the economy to greater competition and therefore allocate labour to its most productive use, so as to minimize costs. Gender discrimination, and resulting wage differentials, are economically costly insofar as it leads to an allocation of resources that do not maximize output. This would suggest that trade liberalization, and increased competition, would provoke a decrease in the gender differential in wages.

Another view, based on the Heckscher-Ohlin model, points to the factor-price equalization effect of trade. Countries abundant in unskilled labour tend to specialize in unskilled labour-intensive exports. Demand for lower-skilled labour will therefore rise. The wages of unskilled labour will thus increase relative to skilled labour. This effect also points to a narrowing of the gender wage gap in developing countries opening of trade, since women are often employed in lower-wage, lower-skilled jobs than men. Women's participation in the global economy and national labour force can serve to interrogate and modify gender relations and ideologies.<sup>22</sup> Trade liberalization has enabled women in many countries to realize their earning potential in the labour market and to achieve economic independence. Income generated from the employment opportunities in the growing export sectors has also led to greater empowerment of female labour. The increased demand for casual or contract workers to cope with market fluctuations in the post liberalization period has led to a rise in the number of informal sector workers, of which a substantial number are women. Beyond job creation, evidence shows that trade liberalization has heightened women's autonomy and resulted in

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<sup>22</sup>Ganguly-Scrase & Vandenbroek, *supra* note 5.

benefits for future generations through investments in human capital.<sup>23</sup>

However, the effects of trade liberalization and economic globalization on women, in particular, so far have been mixed. For example, while in a large number of cases, trade in general has improved women's empowerment and livelihood, in some other cases, the benefits accrued by women from trade liberalization have been marginal, relatively lower than those accrued by men. Worse, in some other cases, trade liberalization has also exacerbated gender inequalities and women's economic and social status.<sup>24</sup> However, for many women, more integrated markets have resulted in an improvement in their economic and social status. They include the millions of women workers newly absorbed into the global production system for whom wage employment has brought higher incomes. Wage employment has also given some women greater economic independence and more control over household resources, and has often raised their social status.<sup>25</sup> Though not in itself biased against a particular gender, or “gendered”, trade may have gendered impacts on societies due to the existence of gendered social structures. Thus, while trade may not be the source of gender disparities, it may act as a “magnifying glass” and worsen existing disparities. On the other hand, trade may also open new opportunities for women and men regardless of gender. Trade policies, like any other economic policy, are likely to have gender differentiated effects because of women's and men's different access to, and control over, resources, and because of

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<sup>23</sup>Jeni Klugman & Elisa Gamberoni, *Gender and Trade: A fresh look at the evidence*, INTERNATIONAL TRADE FORUM MAGAZINE, (July 1, 2012), available at: <http://www.tradeforum.org/Gender-and-trade-A-fresh-look-at-the-evidence/>.

<sup>24</sup>UNCTAD, *Mainstreaming Gender in Trade Policy: Considering women in the design and implementation of trade policy*, Geneva: UNCTAD (2009), available at: [http://unctad.org/en/Docs/ciem2d2\\_en.pdf](http://unctad.org/en/Docs/ciem2d2_en.pdf).

<sup>25</sup> Veena Jha & Shahid Ahmed, *Export Orientation of the Economy and Women's Empowerment: Empirical Evidence from India*, paper presented at Workshop on Gender in Global and Regional Trade Policy: Contrasting Views and New Research, (Apr. 2006), available at: [http://www2.warwick.ac.uk/fac/soc/csgr/events/workshops/2006ws/gender\\_and\\_trade/veenajha\\_revised.pdf](http://www2.warwick.ac.uk/fac/soc/csgr/events/workshops/2006ws/gender_and_trade/veenajha_revised.pdf).

their different roles in both the market economy and the household.<sup>26</sup> Because of socio-cultural structures and their traditional role as homemakers, women suffer a disproportionate share of the harmful consequences of liberalization and are less able than men to take advantage of the benefits.

The gender-differentiated effects of trade liberalization are felt at the macro level, meso and micro levels, and are the result of differences between women and men in their access to assets, human capital, labour markets and labour earnings. At the macro level, gender gaps in market participation may narrow, if sectors that expand through trade liberalization are more female intensive than the sectors that shrink. The inverse holds true. At the meso level, public provision of important social services that favour women might be undermined if loss of government revenue through reductions in tariffs leads to cuts in such services. Finally, at the micro level, trade liberalization may extend or reduce female control over household spending, depending on whether trade liberalization creates or destroys sources of independent income for women.<sup>27</sup>

i. Potential Effects of Trade Liberalization on Women<sup>28</sup>

The following table summarizes the potential effects that trade liberalization has on the status of women:

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<sup>26</sup>Marzia Fontana, *The Gender Effects of Trade Liberalisation in Developing Countries: A Review of the Literature*, (Oct. 2003), available at: [http://www.ciedur.org.uy/adm/archivos/publicacion\\_200.pdf](http://www.ciedur.org.uy/adm/archivos/publicacion_200.pdf).

<sup>27</sup>*Id.*

<sup>28</sup>*Trade Liberalization, Gender and Development: What are the Issues and How Can We Think about Them?* Presented by Organisation of American States at Second Ministerial Meeting, Washington D.C. (April, 2004), [www.oas.org/cim/REMIM%20II/CIM-REMIMII-doc.4.ing.doc](http://www.oas.org/cim/REMIM%20II/CIM-REMIMII-doc.4.ing.doc).



<i>Issues</i>	<i>Potential Positive Effects</i>	<i>Potential Negative Effects</i>
<i>1. Employment</i>	<p>Increase in quantity of jobs available</p> <p>New alternatives to existing employment</p> <p>Greater quality in terms of income and work conditions with development of new industries</p> <p>Opening of new markets for goods and crafts, in particular traditional crafts</p>	<p>Poor quality of opportunities due to growing competition</p> <p>Insecurity of employment</p> <p>Increase in part-time work, home based work, day-laboring and piece-based remuneration</p> <p>Loss of traditional sector of activities and of business because of foreign competition</p>
<i>2. Public Service Availability</i>	<p>More efficient and more adapted services in response to women's specific demands.</p>	<p>Decrease in service availability in some areas because not deemed profitable.</p> <p>Increase in the cost of services and medicines.</p>
<i>3. Price effects</i>	<p>Growing availability of cheaper foodstuff and goods.</p>	<p>As local production is displaced, gradually rising price of goods and greater sensitivity to fluctuating exchange rates.</p>
<i>4. Wage gap</i>	<p>Unclear whether trade liberalization can have any effect on the wage gap</p>	<p>Competitive pressure may drive wages down as firms seek to minimize costs</p>

B. *Impact of Trade Liberalization on the Status of Women: Problems in India*

Public discourses since the nineteenth century has centered on two opposing categorization: labour force participation of poor women and widows and the employment of upper class women in high status professions. While the former could be tolerated because it was an absolute necessity, the latter was not only desirable, but also a moral obligation, a sense of public duty. For the rest, women's entry into the workforce signaled a loss of respectability. This was not only for the women themselves, but it also meant a loss of familial status. Throughout the past five decades empowerment through employment has been the general developmentalist agenda of the post-colonial state irrespective of the ideologies of various political parties. Nowadays, although developmentalism has been replaced by neo-liberalism, empowerment of women is a critical component of the rhetoric of the latter.<sup>29</sup> Opening up the economy to global influences has offered some critical challenges to the notions of female dependency.

Trade expansion over the last forty years has brought about an increase in labor-intensive exports in India. Employers in these industries have predominantly hired women, and the growth of exports such as textiles and clothing, shoes, jewellery, and electronics has almost always been accompanied by a significant increase in female wage employment in the formal sector. Increase in female wage employment have given women greater access to income, and have changed their position in society. Numerous studies point to the change in women's status and bargaining power within the household as well as obtaining greater control over household resources.<sup>30</sup>

But the impact has not always been positive, a large amount of literature which examined the impact of trade liberalization on wage structure in both developed

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<sup>29</sup>Ganguly-Scrase & Vandebroek, *supra* note 5.

<sup>30</sup>Jane Korinek, *Trade and Gender: Issues and Interactions*, OECD TRADE POLICY WORKING PAPER No. 24, (2005) <http://www.oecd.org/tad/35770606.pdf>.

and developing economies concluded with surprising findings.<sup>31</sup> Contrary to the Heckscher-Ohlin model which predicts that wage inequality should rise in skilled labour abundant (developed) economies but fall in less skilled labour abundant (developing) economies, most researchers have found that trade liberalization increased wage inequality in both developed and developing economies.<sup>32</sup>

In India, women's work in the vast informal and tiny sector is often insecure, temporary or part-time, with little protection and few fringe benefits. Female employment has long been concentrated in the 'informal' sector, and gender segregation has cut across both the 'formal' and 'informal' sectors. Deregulation of labour markets, fragmentation of production processes, de-industrialization and new areas of export specialization have all generated increased demand for low-paid, 'flexible' female labour. Women's labour is thus increasingly integrated into global production, but in a fragmented form with contradictory consequences. In a country such as India, which was never gender-friendly, unbridled competition has meant a rise in the relative degree of neglect of women's health and nutrition.<sup>33</sup>

The sudden growth of export-based activities has not been accompanied by corresponding improvements in the infrastructure. There are problems related to accommodation, water, sanitary facilities, medical care etc. Many women workers have been forced to stay at distant locations. Hence women like all other employees may not be experiencing improved standard of life though income level

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<sup>31</sup> For example, Hanson and Harrison (1999) found the skilled/unskilled wage gap grew in Mexico during the 1980s. Robbins (1996) and Wood (1997) showed that inequality also grew in Hong Kong, Argentina, Chile, Colombia, Costa Rica, Uruguay and Mexico. Similarly, Das (2002), found increasing income inequality in Mexico and Chile.

<sup>32</sup> Aguayo-Tellez et al., *supra* note 2.

<sup>33</sup> National Productivity Council, *Impact of Trade and Globalisation on Gender in India*, Prepared under UNCTAD- Govt. of India- DFID Project 'Strategies and Preparedness for Trade and Globalisation in India', available at: [http://s3.amazonaws.com/zanran\\_storage/www.unctadindia.org/ContentPages/53048362.pdf](http://s3.amazonaws.com/zanran_storage/www.unctadindia.org/ContentPages/53048362.pdf) [Hereinafter National Productivity Council].

have increased.<sup>34</sup>

While women represent 48% of the total population of India, they constitute only 31% of the employment market.<sup>35</sup> Women workers constitute a very low segment of total employment in the organized sector. Only 4.06% of the women are employed in the organized sector while the remaining 95.93% are employed in the unorganized sector.<sup>36</sup> Women's employment is the highest in the traditional low wage activities like Agriculture, Forestry and Fishing. The occupational distribution of the female workforce indicates the gender segregation of tasks and the underlying reality of low levels of education and skill formation among the female workers, which confines them mostly to low paid, unskilled jobs compared to their male counterparts.<sup>37</sup>

For most Indian women, urbanization and the pattern of industrial development did not mean expanding opportunities for employment. Agriculture still accounts for the largest chunk of women workers. Work participation of women in India has remained low, though what is normally expected is an increase in the rate especially in urban areas where the impacts of globalization are more pronounced. The share of women in total employment has shown a stagnating trend both in rural and urban areas where it has remained at around 29 per cent and 17 per cent respectively with a marginal decline during the period of liberalization and export oriented growth. Unlike many other countries, India presents a regressive picture in terms of participation of women in paid employment. The process of feminization, with export-oriented manufacturing industries at the margin, has not been large enough to counteract other forces, which contribute to the downward

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<sup>34</sup> *Id.*

<sup>35</sup> Nisha Srivastava & Ravi Srivastava, *Women, work, and employment outcomes in rural India*, XLV (28), *Economic and Political Weekly*, (July 10, 2010).

<sup>36</sup> *Id.*

<sup>37</sup> National Productivity Council, *supra* note 35.

pressure on women's work participation rates.<sup>38</sup>

As globalization induces plantations to become capital-intensive and chemical-intensive, women bear the disproportionate costs of both displacement and health hazards. Though women carry the heavier work burden on production, they get lower remuneration because of gender discrimination. When increased global trade leads to dumping of agricultural products, in many cases this leads to a drop in farm product prices. Women are hit the hardest because their incomes go down further.

An attempt has been made to capture the impact of trade and globalization on the daily earning of the workers and empowerment of the female workers through an econometric estimation. It was found that workers in the Horticulture, Dairy and Textile industry benefited in recent times. In the remaining sectors the wage rate has not improved much. One major finding of the econometric exercise is that female workers earn less than male workers irrespective of industry, region or location.<sup>39</sup>

#### IV. WHAT POLICY MEASURES COULD BE ADOPTED?

A gender-sensitive approach to trade involves a vision of trade as an essential component of efforts to eradicate poverty and promote sustainable, people-centered development. This implies that in order to effectively mainstream gender, the current debate on the possible positive or negative effects of trade liberalization on gender equality, and vice-versa, must be understood within a broad context and framed in relation to overall development objectives, such as those defined by the Millennium Development Goals.

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<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

### A. *Creating Gender Sensitive Trade Policy*

Gender sensitive trade policy can be used as an important tool in the hands of policymakers to enhance gender equity in terms of work participation rate and returns to labor, directly in tradable sectors and indirectly in other sectors of the economy. It may also target to lower the vulnerabilities created in tradable sectors for women. In order to pursue a gender sensitive trade policy, one of the first requirements is to identify the treatable sectors which may directly and indirectly generate higher women employment in the economy. In this context, UNCTAD-Commerce Ministry, Government of India-DFID project on “Strategies and Preparedness for Trade and Globalization in India” which is an aid for trade initiative of UK government seeks to gender sensitize the Indian trade policy.<sup>40</sup>

### B. *Need for increased Scientific Research Efforts to Understand the Gender-Differentiated Impacts of Trade Liberalization*

There is an urgent need to alter the widely held notion of gender neutrality of trade effects. To this end, there is need to produce evidences based on scientific approaches. Moreover, the existing research and upcoming research in this field must be communicated in intelligible format to policy makers. The most important challenges, in this regard, are the absence of gender disaggregated data, absence of incentive in the economic research, lack of skills and expertise to analyse the gender dimensions of international trade and lack of well informed stakeholders, specifically in unorganized and informal sector. If gender disaggregated data is

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<sup>40</sup>Rashmi Banga, *Gender Sensitisation of Trade Policy in India*, (March,2009), available at: [http://www.intracen.org/uploadedFiles/intracenorg/Content/About\\_ITC/Where\\_are\\_we\\_working/Multi-country\\_programmes/Women\\_and\\_trade/Gender%20sensitisation%20of%20trade%20policy%20in%20India.pdf](http://www.intracen.org/uploadedFiles/intracenorg/Content/About_ITC/Where_are_we_working/Multi-country_programmes/Women_and_trade/Gender%20sensitisation%20of%20trade%20policy%20in%20India.pdf).

available and gender elasticities are estimated, it can also be utilized effectively to examine overall impact of international trade from gender perspective.<sup>41</sup>

*C. Increased Focus on Education and Skills*

Generally women are not imparted good education in most of the families as a part of traditional practices. Girls are married off at an early age, though a law prohibiting child marriage exists in India. Women are not entitled to equal family property rights across most of the states. Women's education and skill accumulation are the most important factors determining the impact of trade on women's employment and the gender wage gap. As long as women remain less qualified than men, they are likely to remain in lower paying, less secure jobs, even if better-paying jobs become available through trade expansion. Education and skills, especially IT skills, can provide greater employment opportunities to women and enhance their power to negotiate wages and other work conditions.<sup>42</sup>

*D. Conservation of Environment*

Degradation and destruction of coastal habitats and pollution, overexploitation of Fisheries resources and salinization of groundwater are common in the coastal belt of India. Given that the burden of gathering water and fuel wood is often on the shoulders of women, the tasks associated with daily survival are becoming increasingly onerous and time consuming. As several coastal villages, in India lack toilets and sanitation facilities, the problems faced by women as a result of decline in tree cover are enormous. Thus, environmental protection becomes an equally important task.

*E. Ensuring Women's Access and control over Key Assets*

Due to the unequal access to these economic and financial resources, the commercialisation and mechanisation of export sectors in developing economies

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<sup>41</sup> Ahmed, *supra* note 7.

<sup>42</sup>*Id.*

have often resulted in 'masculinisation' of the sector. Unless women gain broader access to credit, land, and information, they will be segregated to low-return sectors and their capacity to penetrate male-dominated exporting sectors will be constrained.<sup>43</sup>

#### F. *Protection Against Cultural biases and gender norms*

A strong political will and support from the upper strata of national governments and the international community for gender mainstreaming is an essential requirement. Further, women's equal participation at all decision-making levels must be promoted e.g. Trade unions, trade and industry associations, trade and finance ministries, and the WTO. Linkages of experts in the area of gender and trade should be established where they are missing, and intensified where they are already in place, including the development of collaborations between national and international organizations and civil society.

#### G. *Ensuring Secure Working Conditions and Arrangements*

In almost all countries, women are overrepresented in part-time work, temporary labor, particularly in manufacturing and agricultural sectors. Although the part-time nature of this work may be considered better for women due to their reproductive responsibilities, it often subjects women to job insecurity and lack of benefits, and women generally remain as low wage earners in a pool of unskilled workers.<sup>44</sup> While these sectors offer more employment opportunities to women than men, women are concentrated in the low-skilled jobs, with minimal job security and lower wages. Thus better working conditions must be ensured for women. Laws in

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<sup>43</sup> Elissaios Papyrakis et al., *Gender and Trade: A Review of Theory and Evidence*, (2009), <http://www.uea.ac.uk/documents/439774/542576/WP17.pdf/0be76ed8-132c-4b10-bfab-face52888d7c>.

<sup>44</sup>Kate Higgins, *Gender and Free Trade Agreements: Best Practices and Policy Guidance*, (Oct., 2012), available at: <http://www.nsi-ins.ca/wp-content/uploads/2012/11/2012-Gender-and-Free-Trade-Agreements-Best-Practice-and-Policy-Guides.pdf>.



this regard need to be drafted taking into consideration the special needs of women workers.

## V. CONCLUSION

Women empowerment and trade have multidimensional linkages. As gender inequalities are multidimensional, even women who may gain in one dimension, such as employment, may lose in another, such as leisure time. On the one hand, paid employment can potentially give them greater control over income and increase their status and bargaining power within households or communities. Further, increased control over income is likely to increase women's own well-being and that of their children. At the same time, women become incorporated into the paid workforce as 'inferior' sellers of labour, reflecting both inter-class disadvantage vis-à-vis capital and intra-class disadvantage vis-à-vis male workers.

But we can't ignore that the process of globalization and trade liberalization is no longer a reserved route which influences only those that participate in trade. The impact of globalization reaches every sector and unit of the societies irrespective of their level of contribution in the process. This has imposed the obligation to formulate trade policies incorporating apprehensions of all affected. Women empowerment is one area which has, so far, remained out of the orbit of trade policy formulation in many countries, especially developing countries.

One of the main tasks faced by trade policy makers is to guarantee gender equity in the sharing of gains of trade. Therefore, it is essential to measure the effect of trade on gender employment and remunerations in different sectors; ascertain the sectors where gender disparity is high which would imply that any growth of trade in that sector will further intensify gender inequality; ascertain the sectors which provide a possibility for improving gender equality; and consequently formulate sector-specific policies.

Badapbiang T. Dkhar, *Protecting India's Women: The Need for Criminalization of Marital Rape and the Criminal Amendment Act, 2013*

1(1) ALEXIS J. PUB. POL'Y. & L. 38(2014).

## PROTECTING INDIA'S WOMEN: THE NEED FOR CRIMINALIZATION OF MARITAL RAPE AND THE CRIMINAL AMENDMENT ACT, 2013

*Badapbiang T. Dkhar\**

*Forceful sexual intrusion by a husband against his lawful wife is called marital or spousal rape. In India there are no specific criminal laws governing marital rape; blinded by the exemption clause under Section 376 of the Indian Penal Code (IPC), it is still one among many countries that still allow husbands to rape their wives with little consequence or none. The lacunae in Indian criminal law and the implied consent theory about marriage have subjected married women to heinous acts against them. It is often seen that such crimes are left unheard due to social stigmatisation and lack of legal protection. Thus, in this article I shall be addressing the need for the criminalisation of marital rape with respect to India's Penal Code. I shall be looking into the socio-legal aspects of the same and the past legislations and recommendations made by the Indian Government. It has been more than 30 years since the Law Commission made a report to include the criminalisation of marital rape; yet, the Criminal Amendment Act, 2013 avoided the topic once again. If the recent Criminal Amendment can increase the degree of punishment against gang-rape, harassment and the like then why are we still holding back? It is clear that rape is rape why should wives be deprived of state protection.*

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## I. INTRODUCTION

In recent times India has been brought to lime light as a country that is unsafe for women. To our dismay this could not be truer as we have recently witnessed the most gruesome crime against a young psychotherapy student in Delhi.<sup>1</sup> She was brutally gang raped on a bus till the point where she had to be hospitalised and eventually died due to critical injuries. This terrible crime more commonly known

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<sup>1</sup>*Delhi gang rape: All four accused sentenced to death*, THE HINDU, Sep. 14, 2013, available at: <http://www.thehindu.com/news/national/delhi-gangrape-all-four-accused-sentenced-to-death/article5123772.ece>.

as the 'Delhi gang rape case' brought a huge public uproar with the demand for more stringent laws with respect to the punishment of sexual offenders. The repercussions of such public opinion have moulded public policy leading to the amendment of India's criminal law by way of the Criminal Amendment Act, 2013 (hereinafter Act of 2013) dubbed as 'India's anti-rape law.' Though a lot of positive changes have been made in the said Act; India is still one among many countries that does not criminalise spousal rape.

With much disappointment it must be stated that the crimes against women have increased by 7.1 percent since 2010.<sup>2</sup> The number of rape incidences that were recorded in 2011 was 24,206 indicating a rise of 9 percent from the previous year.<sup>3</sup> Figures show that majority of the victims of rape were girls under the age of 14 , while 19 percent were teens between the ages of 14 and 18.<sup>4</sup> Disturbingly, in almost 94.2 percent of cases offenders were known to the victims, those involved were family members, relatives, and neighbours.<sup>5</sup>

To make the matter worse the exemption clause under Section 375 of the Indian Penal Code, 1860 (hereinafter IPC) shields marital rape. This section is clearly a lacuna in law as it states that sexual intercourse of a man with his wife not being under the age of sixteen is not rape. Much discontentment is also seen with the recent Act of 2013 which has failed to address the issue of spousal rape.

In this paper the author shall be discussing the optimistic amendments made under the new Act of 2013 and the legal problems that arise with marital rape. Part I of this article presents a historical overview of marital rape; Part II deals with a brief description of the status of rape victims in Indian society and the social attitudes

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<sup>2</sup> National Crime Record Bureau Statistics, <http://ncrb.gov.in/> (last visited on Sept. 16, 2013)

<sup>3</sup> Sudha G Tilak, *Crimes against women increase in India*, ALJAZEERA, Mar. 11, 2013, available at: <http://www.aljazeera.com/indepth/features/2012/12/2012122991735307545.html>

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

towards it; Part III presents a brief discussion on India's legislative reforms on rape law;; Part IV deals with the problems in prosecuting marital rape such as the implied consent theory of marriage and the exemptions under statute. Thus, the main focus of this paper is on criminal law amendments and the need to protect women against the licence to rape post marriage.

## II. MARITAL RAPE IN INDIA

Marriage is considered to be a sacrosanct institution between husband and wife. However; this 'sacred bond' often veils sexual cruelty and other forms of brutality in the household. Marital rape is one such brutality which is not a consensual act but a violent act of perversion done by a husband against his legal wife.

Amongst all crimes against women, marital rape seems to be one of the most under reported crimes in the country with little statistics available.<sup>6</sup> The reason behind this might be the lack of awareness and the exemption under IPC Section 375. Traditional societies such as ours, often attach rape with being unclean and hence the fear of stigmatisation by victims is quite common. Furthermore, it is often seen that Indian society celebrates the birth of a male child while the girl child is seen to be burdensome thus, she is suppressed. The strict rod of patriarchy dictates that men will be men to dominate over woman kind, and she a dutiful wife fulfilling her husband's every wish.

In a study done by the International Institute of Population Sciences (IIPS), Mumbai, it was reported that 26 per cent of women in Pune, 23 per cent in Bhubaneswar and 16 per cent in Jaipur often have sex with husbands against their desire.<sup>7</sup>

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<sup>6</sup> *Infra* note 45.

<sup>7</sup> Mihika Basu, *Marital rape is an ugly reality*, THE INDIAN EXPRESS, Apr. 30 2013, available at: <http://www.indianexpress.com/news/marital-rape-is-an-ugly-reality/1109618/>.

The study further revealed that drinking has been one of the major causes of non-consensual sex in marriage. S K Singh, who headed the research, said:

*“This is marital rape. Overall, 2 per cent of women in Bhubaneswar and 6 per cent in Jaipur and Pune said their last sexual intercourse had some component of alcohol. The use of alcohol was three times higher in slum areas as compared to non-slum areas in cities. Twelve per cent of women in Pune slums, 5 per cent in Bhubaneswar and 9 per cent in Jaipur slums reported use of alcohol during their last intercourse.”*

Clearly these statistics indicate that women are victimised and sexual intrusion in marriage does exist; thus, women require a better state protection. Furthermore, in a report given by The Times of India, Tarun Goomber, a criminal lawyer indicated that most Indian women avoid sharing details of sexual abuse by their husbands.<sup>8</sup> He stated that:

*“Most women restrict their complaints to mental and physical harassment. Very few come forward to share cases of marital rape. Also, even if they do, there is no law that can book a husband for rape if the wife's age is more than 15 years.”*

Such is caused by societal prejudice against women and cultural beliefs which are often narrow. The blame game happens and women are stained with shame and become outcasts if rape is reported. Women are not sexual slaves; they all deserve to be treated with respect and dignity regardless of sex. These kinds of social attitudes lead to dual victimisation. Such attitude should be replaced with compassion and rehabilitation opportunities should be provided to the traumatised victims. Most importantly, society needs to be educated and social awareness should be the focus to ward off such prejudiced attitudes.

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<sup>8</sup> Naziya Alvi Rahman, *Stir against marital rape: Yes, it happens*, THE TIMES OF INDIA, Feb. 14, 2013, available at: [http://articles.timesofindia.indiatimes.com/2013-02-14/delhi/37099318\\_1\\_girl-child-sexual-assault-rashmi](http://articles.timesofindia.indiatimes.com/2013-02-14/delhi/37099318_1_girl-child-sexual-assault-rashmi).

<sup>9</sup> *Id.*

### III. A BLAST FROM THE PAST

Intolerant attitudes towards women can also be traced down in history when women were treated as chattel. The word rape is derived from the Latin word '*rapio*' which means 'to snatch'<sup>10</sup>. It literally means a forcible seizure and this element has become the characteristic feature of the offence.<sup>11</sup> Narrowly defined, it is the ravishment of a woman without her consent by force, fear or fraud or the carnal knowledge of a woman by force against her will.<sup>12</sup> From the words used to describe violation of women such as snatch and seizure, one can infer that the treatment of women was like that of property.

In ancient India, sexual offences were considered to be one of the most heinous crimes against a woman which were punishable by law. As per Hindu Law, they were divided into two classes the first being rape or *Sabasa* and the second, adultery or *Stri Sangraha*.<sup>13</sup> The code of Manu prescribes corporal punishment for such crimes against women.<sup>14</sup> In British India, Thomas Macaulay took his seat as Law Member on the Supreme Council under the charter of 1833<sup>15</sup>, where he took on the task to frame provisions for India's modern anti rape law. He included sections 359 and 360 in the IPC as offences of rape against women to which the punishment for such crimes were specified therein, however marital rape was not defined in the said statute. Moving on to the history of marital rape exemption, it can be traced back to seventeenth century England in C.J., Sir Matthew Hale's

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<sup>10</sup> VANDANA, SEXUAL VIOLENCE AGAINST WOMEN 67 (2009).

<sup>11</sup> *Id.* at 68.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 94.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 95 As cited in SIR EDMUND C. COX, POLICE AND CRIME IN INDIA 9 (1976).

book *Historia Placitorum Coronae*<sup>16</sup> which has received much criticism, as it states that:

*“But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”*<sup>17</sup>

Sir Matthew Hale offers no citation to support this statement; briefly examining this point it is observed that husbands may not be charged with the rape of their wives, as per the “cautionary rule” of matrimonial consent.<sup>18</sup> The Cautionary rule is a rule of practice to assist judges with analysing evidence. It requires judicial officers to exercise caution before adopting the evidence of certain witnesses on the ground that the evidence of such witnesses is inherently and potentially unreliable.<sup>19</sup> To the present day this rule remains an integral element of rape trials in many Anglo-Saxon jurisdictions.<sup>20</sup> However; the doctrine of marital rape was for the first time discussed in the appellate court of England in *R v. Clarence*<sup>21</sup>, though the defendant was not charged with rape the case became a precedent for a wife to protect herself from non-consensual sex as opposed to Sir Hale’s biased statement.

Furthermore, in England the first attempt to prosecute a husband for marital rape was in the case of *R v Clarke*<sup>22</sup> where the court held that consent had been revoked due to non-cohabitation. It was the first of a number of cases in which the courts found reasons not to apply the exemption made by Lord Hale. Nevertheless, it took more than a hundred years for England to criminalize marital rape since the *Clarence* case was examined.

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<sup>16</sup> MATTHEW HALE, *THE HISTORY OF THE PLEA OF THE CROWN* (1778).

<sup>17</sup> G. Geiss, *Lord Hale, Witches and Rape*, 5(1) BRIT. J. L. & SOC’Y (1978) [Hereinafter Geiss].

<sup>18</sup> *Id.*

<sup>19</sup> Nikki Naylor, *Chapter Eleven: The Survival of the Cautionary Rule*, *Women’s Legal Centre*, available at: <http://www.ghjru.uct.ac.za/sexual-offence-bill/Cautionary-Rule.pdf>

<sup>20</sup> *Supra* note 15.

<sup>21</sup> *R v. Clarence*, (1888) 22 Q.B.D 23.

<sup>22</sup> *R v. Clarke* (1949) 2 All ER 448.



In 1991 by a unanimous decision given by the Appellate Committee of the House of Lords, marital rape exemption was abolished in a decision in *R v R*<sup>23</sup>. Here, Lord Keith of Kinkel stated that the lower court's contortions of marital rape exemption were illogical, it was held, that "the fiction of implied consent has no useful purpose to serve today in the law of rape"<sup>24</sup> and that the marital rights exemption was a 'common law fiction'<sup>25</sup>, Consequently R's appeal was dismissed, and he was convicted for committing the crime. Thence the beginning of the criminalisation of marital rape in Common Law England.

Most common law countries such as Australia, South Africa and Canada have also followed suit and abolished marital rape law exemption. Australia legislatively removed marital rape immunity in all jurisdictions from 1976.<sup>26</sup> Australian Law Section 73(4) of the Criminal Law Consolidation Act, 1935 provides that 'No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.' Furthermore, this common law exemption of spousal rape was also repealed in Canada in 1983.<sup>27</sup> South Africa has explicitly removed ancient common law belief of spousal rape. Section 5 of the Prevention of Family Violence Act 1993 states 'Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.'<sup>28</sup>

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<sup>23</sup> *R v. R* (1992) 1 A.C. 599, House of Lords.

<sup>24</sup> Geiss, *Supra* note 15 at 617.

<sup>25</sup> Geiss, *Supra* note 15 at 623.

<sup>26</sup> Oxford University, *The Reform of India's Sexual Violence Laws*, Jan. 2013, available at: [http://denning.law.ox.ac.uk/news/events\\_files/2013.1\\_-\\_Submissions\\_on\\_Indian\\_Sexual\\_Violence\\_Laws.pdf](http://denning.law.ox.ac.uk/news/events_files/2013.1_-_Submissions_on_Indian_Sexual_Violence_Laws.pdf) (last visited Oct. 14, 2013).

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 4.

#### IV. INDIA'S LEGAL POSITION ON MARITAL RAPE

##### *A. Marital Rape exemption under Section 375*

As a result of deep cultural norms and patriarchal values, domestic violence is viewed as a private family matter that should be settled within the home without any need for external intervention.<sup>29</sup> Therefore the burden lies on the women as she is being bound by such social norms. Section 498<sup>30</sup> of the IPC is an available remedy against violence and cruelty within marriages; however, these were limited in approach and did not address the immediate relief and support.<sup>31</sup>

Adding to the problem, victimised women in India wishing to challenge sexual abuse by their husbands are being denied state protection, due to the general marital rape exemption under Section 375 of the IPC. Here only two groups of women are covered under this statute, those below the age of fifteen and those separated from their husbands. Thus, marital rape is not a criminal offence under the Penal Code. Punishment for the rape of a girl below twelve may be imprisonment for ten years or more, while the rape of a girl under fifteen years carries a lesser sentence if the rapist is married to the victim.<sup>32</sup> When a man has

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<sup>29</sup> LAWYERS COLLECTIVE, *STAYING ALIVE: ON THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 3 (2005)* (hereinafter *STAYING ALIVE*).

<sup>30</sup> IPC § 498A- Whoever being the husband of the relative of the husband of a woman , subjects such women to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

<sup>31</sup> *STAYING ALIVE*, *Supra* note 29 at 4.

<sup>32</sup> IPC § 376 states the punishment for rape.—(1) 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.

carnal intercourse with a woman against her will or without her consent the offence of rape is said to be committed.<sup>33</sup> Therefore, hiding rape behind the veil of marriage is a flawed exemption to rape; after all intercourse without consent is rape irrespective of being married or not.

*B. Law Commission Reports*

The Law Commission in its 42nd Report advocated the inclusion of sexual intercourse by a man with his minor wife as a criminal offence but the Joint Committee that reviewed the proposal dismissed the recommendation. The Committee argued that a husband could not be found guilty of raping his wife whatever be her age. Sex seems to be the part and parcel of a marriage. In 1983 section 376-A was added in the IPC criminalizing the rape of a judicially separated wife by her husband.<sup>34</sup> However, this legislation does not abolish marital rape and seemingly grants a husband to rape his legal wife as the exception under Section 375 still remains.<sup>35</sup>

The 172<sup>nd</sup> Law Commission Report looked at the case of *Sakshi v. Union of India and Others*<sup>36</sup> in order to set certain recommendations for rape laws. Sakshi, an organization involved in issues of women and children filed a writ petition to the Supreme Court asking for guidelines concerning the definition of rape in the IPC along with the inclusion of marital rape. The Supreme Court observed that the 156<sup>th</sup> Report of the Law Commission did not look into the precise issues raised in the writ petition. Thus, in August 1999 the Honourable Court directed the Law Commission to deal with these issues afresh. After detailed consultations and

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<sup>33</sup> DAULAT RAM PREM, CROSS EXAMINATION: ARGUMENTS & INSTRUCTIVE TRIALS, 525 (8<sup>th</sup> ed. 2001).

<sup>34</sup> LAW COMMISSION OF INDIA, 42ND REPORT, INDIAN PENAL CODE, ¶. 16.115, at 277 (1977). § 376A was added based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 along with the 42<sup>nd</sup> Law Commission Report.

<sup>35</sup> *Id.*

<sup>36</sup> *Sakshi v. Union of India and Others* 2004 (5) SCC 518.

reviews with the organization, the Law Commission released its 172<sup>nd</sup> Report on the Review of Rape Laws in 2000. The Report proposed that the definition of “*sexual assault*” could be adopted in place of the existing definition of rape in Section 375 IPC as “*it is wide, comprehensive and acceptable*”.<sup>37</sup> It also suggested that Section 376 should be modified and that a new section namely Section 376E should be added with the title ‘unlawful sexual conduct’. The explanation to proviso (2) of Section 375 of IPC should be deleted and the age of wife as explained in the aforementioned section should be raised from ‘fifteen’ to ‘sixteen’. It also anticipated that there was a need to amend Section 509 of the IPC by providing harsher punishment where the offence set out is committed with sexual intent.

Additionally, the Justice Verma Committee Report also recommended that the exception allowing marital rape should be removed. It also included that marriage or an intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.<sup>38</sup> Thus, so far we have seen that all these recommendations echo one common goal of erasing spousal rape.

### C. *Protection of Women from Domestic Violence Act, 2005*

After years of discussion, the Protection of Women from Domestic Violence Act 2005 (hereinafter PWDVA) came into force in 2006. Here, the Act offers a civil remedy for crimes against women including marital rape; it also provides protection against other forms of sexual perversions and domestic violence.<sup>39</sup> The

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<sup>37</sup> Law Commission of India 172<sup>nd</sup> Report on the Review of Rape Laws, 2000 *available at*: <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited Aug 16, 2013).

<sup>38</sup> Report of the Committee on Amendments to Criminal Law, Jan. 23, 2013 *available at*: <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf> (last visited Oct. 14, 2013).

<sup>39</sup> Peter Foster, *India Outlaws Wife-Beating and Marital Rape*, THE TELEGRAPH, Oct. 27, 2006 *available at*: <http://www.telegraph.co.uk/news/worldnews/1532567/India-outlaws-wife-beating-and-marital-rape.html>.

PWDVA provides protection against sexual violence in a live-in-relationship or marriage given that it is life threatening and can be grievously hurtful.<sup>40</sup> However, it is quite unsatisfactory as violence against women should be seen as a criminal offence rather than just a civil wrong. Considering marital rape as a criminal offence punishable by law would act as a prevention of such acts in future.

One must however acknowledge the fact that the Legislature in India has tried to make the punishment for sexual offenders more stringent, this is seen in the Criminal Amendment Act, 2013. Recently, those who were involved in the 'Delhi gang rape case', the Court declared, were to be punished with a death sentence on September, 2013.<sup>41</sup> The Indian civil community saw this as justice served which is believed to be a clear example of deterrence.

#### *D. Criminal (Amendment) Act, 2013*

Nevertheless, the recent Criminal Amendment Act of 2013 satisfies some of the requirements that were previously proposed in the Law Commission 172<sup>nd</sup> Report of 2000. Section 375 has given a clearer and more expansive meaning of rape under subsection (a) which now includes penetration of penis in the mouth, urethra or anus of a woman which is against her will.<sup>42</sup> Furthermore, it has also incorporated the age of consent from 16 to 18 years. The punishment for rape under section 376 has become more stringent with the addition of Sections 376A, 376B, 376C and 376D. Wherein, Section 376A relates to intercourse with a husband during separation without the consent of his wife. The punishment for

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<sup>40</sup> Lawyers Collective Women's Rights Initiative, *Ending Domestic Violence Through Non-Violence: A Manual for PWDVA Protection Officers*, , at 3, available at: <http://www.lawyerscollective.org/files/Soft%20copy-PO%20Manual.pdf>.

<sup>41</sup> *Delhi gang-rape case: Death sentence for all four convicts*, THE TIMES OF INDIA, Sept. 13, 2013, available at: [http://articles.timesofindia.indiatimes.com/2013-09-13/india/42039872\\_1\\_advocate-v-k-anand-four-convicts-delhi-high-court](http://articles.timesofindia.indiatimes.com/2013-09-13/india/42039872_1_advocate-v-k-anand-four-convicts-delhi-high-court).

<sup>42</sup> The Criminal (Amendment) Act, 2013.

the same may extend up to two years. Further, Section 376B punishes a public servant, Section 376C is punishment against the Superintendent of a jail and Section 376D punishes the management or staff of a hospital. In these cases punishment will be given to those who take advantage of the victim's position. Accordingly such sexual intercourse, not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.<sup>43</sup>

Rape under the new law outlines life imprisonment as the maximum sentence. It also sets down the death penalty for repeat offenders and those whose victims are left in a 'vegetative state'. Gang rape has been recognised as an offence, while sexual harassment has been redefined to include unwelcome advances with sexual overtures and showing pornography without consent.<sup>44</sup> In addition, police and hospital authorities would be imprisoned up to two years if they fail to register a complaint or treat a victim. Stalking and voyeurism has been addressed as crime with punishments up to seven years.

Even though there are many positive reforms with respect to criminal amendment Act of 2013, it still has its shortcomings. One of which is the non inclusion of marital rape. Many NGO's and women activists have criticised this non inclusion. For instance, Sudha Sundararaman, General Secretary, All India Democratic Women's Association in a newspaper report had said, "The Criminal Law (Amendment) Ordinance has been undertaken hastily. When the Government is trying to improve the overall legal system, it should not have done an arbitrary

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<sup>43</sup> § 376B, § 376 C and § 376 D, IPC.

<sup>44</sup> Maitreyee, *President signs new anti-rape bill: Are all women safe now?*, ONE INDIA NEWS, Apr. 3, 2013 available at: <http://news.oneindia.in/2013/04/03/new-strong-anti-rape-bill-are-all-women-safe-now-1185281.html>

pick-up of issues. The definition of sexual violence has been widened with the inclusion of acid attacks and stalking. But why leave out rape within marriage?”<sup>45</sup>

It is rather disappointing that the Criminal Amendment has still not addressed marital rape after years of discussion and recommendations. The various criminal law reports and the recommendations given by the Justice Verma Committee in January 2013 have all fallen to deaf ears. Legislature needs to wake up and realise that the punishment of marital rape is of equal importance to protect women. In the latter part of this paper I shall be analysing some of the possible reasons why marital rape has not yet been made a criminal offence.

## V. ANALYSING MARITAL RAPE PROSECUTION

### A. *Implied Consent Theory of Marriage*

Most likely, some of the reasons why marital rape has not been criminalised might have its roots in the consent theory of marriage. The contract theory of marriage in Sir Matthew Hale’s *Historia Placitorum Coronae* establishes the notion that “By their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>46</sup> This 1736 year old doctrine therefore provides that in marriage the husband has the licence to rape his wife giving him absolute immunity against the commission of a wrongful act. This was a practise in common law jurisprudence until it was made illegal in England in 1991. If we still follow Hale’s doctrine then it would be a contradiction to the Indian Constitution. It would also go against the spirit of International Humanitarian Law which emphasizes on the right to protect human life and dignity. Thus, consent to

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<sup>45</sup> Aslesha Kadian, *It’s time we recognise marital rape for the crime it is*, THE HINDU BUSINESS LINE, Mar. 13, 2013, available at: <http://www.thehindubusinessline.com/on-campus/its-time-we-recognise-marital-rape-for-the-crime-it-is/article4505339.ece> [Hereinafter Kadian].

<sup>46</sup> Hale, *Supra* note 15.

marriage does not mean consent to rape and torture within that particular marriage.

### B. *Privacy Principle*

One of the most compelling rationale behind the marital rape exemption is fostering marital harmony and intimacy by protecting the privacy of the marital relationship.<sup>47</sup> Marriage in India is a private family affair that should be allowed its space without any state interference as it would disturb the reconciliation process between husband and wife. The complaints of marital rape will break the very thread that binds husband and wife and the big Indian family together. The rationale behind this is definitely misleading by stating that all marriages are true to the ideal conception of the harmonious and intimate nature of marital relations.<sup>48</sup> Most commonly it is also seen that there is a constant fear in a woman's mind due to social stigmatisation and family ties. The saas-bahu relationship and family within the house of the in-laws is one major cause for gagging such abuse. In India the wife generally lives in the in-laws household and often she is made to keep silent on such family matters.

However, it is a fact that the state has no interest in preserving a deteriorated marriage and marital rape is one of the strongest signs of such deterioration. The justice system is at its place to serve and protect victims of such heinous crimes encouraging forced cohabitation with a sexual predator would be a contradiction of its very establishment. Once again the privacy principle is another example of faulty assumption for not criminalising marital rape.

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<sup>47</sup>Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) HARV. L. REV., 1268 (April, 1986). See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding that the Constitution implicitly protects the right to marital privacy).

<sup>48</sup> *Id.*



### C. *Evidentiary Difficulties*

“Prove rape by my husband, for God’s sake,” Anne Tebedo argued; while she voted against a 1988 bill to make forced sexual intercourse in marriage a crime (rape) in her state. She strongly emphasised the critical dangers of newly introduced legislation as according to her, if a woman is having problems, she might abuse it. All of a sudden she gets tired of him and she yells ‘Rape!’<sup>49</sup>

Evidentiary problems make marital rape difficult to prove due to exemptions in law. This view is rooted in the belief that vindictive wives may take the upper hand and threaten their husbands with fabricated rape claims to avenge upon personal wrongs, this is a clear reflection of discriminatory attitude towards women. Yet in cases of rape by strangers such beliefs do not come into the picture, there is no rigid rule that there must be corroboration of evidence of the prosecutrix in rape cases as seen in *Bhoginbhai Hirijbhai v. State of Gujarat*.<sup>50</sup> Then why should it be any different in spousal rape? Rape is one of the most under reported crimes, women in general and wives in particular are afraid to file legitimate complaints of rape due to the social stigma associated it. Our culture tends to crucify such women thus feeding into a secondary form of victimization through public humiliation and by the judicial system in the prosecution process. The evidentiary argument against marital rape would be a red herring meant to distract from the actual facts of the case. Marital rape is the same as any forceful sexual intrusion by a man against a woman, thus such an evidentiary rationale is irrelevant.

### D. *Failure to Amend Exemptions of Rape under Statute*

Nowhere in our Constitution can we find reference for the differential treatment between married and unmarried women. It should also be articulated that since the

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<sup>49</sup> D. RUSSEL, RAPE IN MARRIAGE, NEW YORK, MACMILLAN (1982).

<sup>50</sup> *Bhoginbhai Hirijbhai v. State of Gujarat* AIR 1983 SC 753.

very inception of the Indian Penal Code in 1860, India, much like that of other legal systems, regard rape as a crime as stated in IPC Section 375, but much to our disappointment marital rape is an exception to this section, it states that:

*“Sexual intercourse by a man with his wife, the wife not being under sixteen years of age is not rape.”<sup>51</sup>*

This exception is in clear contradiction to Article 21 of the Indian Constitution which is a fundamental right protecting life and personal liberty, and which also entails the right to ‘live with human dignity free from exploitation’ as interpreted in the case of *Olga Tellis*.<sup>52</sup>

With no definite mention of marital rape in the Indian Penal Code and with an exception like this, it makes it very difficult to prosecute a husband raping his wife as there are no established laws in this regard.

#### *E. Protection of Life and Personal Liberty under Article 21*

Article 21 is a fundamental right under the Constitution of India; it enshrines the protection of life and personal liberty of a person. In the case of *Suchita Srivastava v. Chandigarh Administration*<sup>53</sup> an orphan woman aged 19-20 who was suffering from mild mental retardation was found pregnant and was asked to abort the child as per the provisions of the Medical Termination of Pregnancy act, 1971.<sup>54</sup> The Supreme Court in this case held that:

*“There is no doubt that a woman’s right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from*

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<sup>51</sup> CHAP. XVI § 375, The Indian Penal Code 1860.

<sup>52</sup> *Olga Tellis and others v. Bombay Municipal Corporation and others*, AIR1986SC180.

<sup>53</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

<sup>54</sup> M.P JAIN, INDIAN CONSTITUTIONAL LAW 1191 (6<sup>th</sup> ed. 2010).

*procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."*

In *Madhukar Narayan Mardikar*<sup>55</sup> the Supreme Court protected the right to privacy of a prostitute. The Court held that even a woman of easy virtue is entitled to her right as and when she likes.<sup>56</sup> Thus, by way of interpretation the Supreme Court recognises that a person has a choice and right over his or her own body under Article 21. If un-married women have a right to their bodily safety then why are Indian wives left behind from the protection against such sexual exploitation? The exemption under IPC section 376 is, thus, clearly erroneous and in contradiction to the Constitution of India under Article 21.

#### *F. International Obligation and Women's Protection*

India has become a party to the Convention on the Elimination of All forms of Discrimination Against Women (hereinafter CEDAW) on the 30<sup>th</sup> of July 1980 and ratified it on the 9<sup>th</sup> of July, 1993.<sup>57</sup> Herein, the Indian Government as with all signatories to the CEDAW declared that "violence against women constitutes a violation of basic human rights and is an obstacle to the achievement of the objectives of equality, development and peace."<sup>58</sup> In addition, the CEDAW also stated that "Violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivat-

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<sup>55</sup> *Maharashtra v. Madhukar Narayan Mardikar*, AIR 1999 SC 495.

<sup>56</sup> Jain, *Supra* note 54 at 1237.

<sup>57</sup> United Nations Treaty Collection, Chapter IV Human Rights, Convention on the Elimination of All forms of Discrimination Against Women, (Dec. 18, 1979), *available at*: [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-8&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en).

<sup>58</sup> Women and Violence, *available at*: <http://www.un.org/rights/dpi1772e.htm>.

-ion of liberty, whether occurring in public or in private life.”<sup>59</sup> Article 5 of the CEDAW requires that all member states should modify cultural practices of sexual prejudice and stereotypes.

Indian legal jurists have also taken notice of CEDAW under Chapter 2 of the Justice Verma Report. The Chapter talks about ‘Gender Justice and India’s Obligations under International Conventions.’<sup>60</sup> The Report under the said chapter paid emphasis on the recommendations made by the CEDAW in February 2007. CEDAW 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.’<sup>61</sup> As a member country, India is required to follow the provisions by CEDAW and amend its marital rape exemption under the IPC. However, it is saddening to know that till date the issues of marital rape find no mention in the Indian criminal laws.

## VI. CONCLUSION

Presently the exemption clause under section 375 is seen as a panacea for problems of investigating and prosecuting spousal rape. Though the recent Criminal Amendment Act, 2013 is a deterrent for crime against women yet it aborted the issue of marital rape. The Indian Parliament made a tragic flaw by not addressing the issue under Sections 375 and 376 thus, sacrificing the anti-rape security of married women.

It is clear that marital rape is a human rights violation and not just a crime of passion. Under India's international obligations, the government is required to take action to eliminate marital rape. Most common law countries like Canada, Australia

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<sup>59</sup> Art. 1, UN Declaration on the Elimination of Violence against Women A/RES/48/104 85th plenary meeting Dec 20, 1993.

<sup>60</sup> *Supra* note 34.

<sup>61</sup> Kadian, *Supra* note 45.

and South Africa have already amended and abolished the marital rape exemption in their legal texts. Indian Parliament must officially repeal section 375 of the IPC and remove it from the sphere of judicial interpretation and discretion. In addition, section 376E should be added to describe the punishment specifically for marital rape as recommended under the 172<sup>nd</sup> Law Report. Repealing section 375 will aid in enlightening the Indian population that marital rape will not be tolerated by the government. In addition, rape in marriage and during separation should be treated as one and the same. Therefore, we need a completely different section regarding marital rape so as to avoid future complexities and ambiguities in the prosecution process. The punishment and explanation of marital rape as a criminal offence has been missed out in this year's Criminal Amendment Act, however it is never too late to improve the law.

Most importantly awareness spreading and capacity building is the need of the hour because many Indian women are still unaware of their legal rights and where they can reach out. Societal stigmatisation and the belief that women are subservient to men should cease and women need to be empowered. Such beliefs endanger the life of both urban and rural women, rape is rape and marriage is not an excuse for such a heinous act of violence. The first step in order to empower and educate women to stand up against such inhumane acts would be to abolish the existing marital rape exemption. We have had words piled on words now it's time to act.

Theilin Phanbuh, *Political participation of 'Hynniewtrep' Women in the 'Dorbar Shnong' of Meghalaya*  
1(1) ALEXIS J. PUB. POL'Y & L. 58 (2014)

POLITICAL PARTICIPATION OF 'HYNNEWWTREP' WOMEN IN THE  
'DORBAR SHNONG' OF MEGHALAYA

*Theilin Phanbuh\**

*This brief comment discusses my thoughts on women empowerment and what it means for a progressive nation like India. I start by addressing the wisdom of our forefathers in their inclusion of the right to equality under the Constitution of India, 1950. Further, I have briefly discussed the role of women in 'Khasi' or 'Hynniewtrep' society and the right to freedom that is given to them. At the same time I have also addressed the arbitrariness of the non inclusion of women in traditional institutions like the village durbars in Meghalaya and 'panchayats' in other parts of India. I have tried to show the importance of women leadership at the grassroots for empowering women. In conclusion I have emphasized that it is the society's mindset that needs to change in order to truly empower women.*

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## I. INTRODUCTION

Human development is one of the main attributes of a growing and developing nation. It is crucial that both men and women work together to bring about progress in the society and the country as a whole. Thus, the role of a woman is equally as important to that of a man. With that being said it was not that long ago when women were only seen in the domestic arena and were not given the right to vote, let alone participate in politics. It was a gradual transition in the history of mankind that women were given equal opportunities as seen in modern India today. Once India was emancipated from British rule, our forefathers founded the Constitution of India in 1950. It was based on the principles of equity and non-discrimination, giving equal rights and opportunities to all of its citizens irrespective of caste, creed, sex or religion. The enactment of such liberal laws paved the way for Indian women to foster leadership in the field education, health, social work, politics, administration and the like.

India, after independence saw a number of women in leadership positions. Mrs. Indira Gandhi was such an example when she became India's first female Prime Minister in 1966. It is no longer uncommon to see more women in Parliament taking the yoke of authority. Power and authority is no longer just a "Man's Job".

Women these days are seen in various leadership positions in both national and state politics. Some examples are Smt. Meira Kumar (first woman Speaker to the Lok Sabha), Agatha Sangma (Member of Parliament Tura Constituency in Meghalaya), Jaiitha (Chief Minister of Tamil Nadu), Sonia Gandhi (Chairman of the Indian National Congress) and Smt. Sushma Swaraj to name a few. These women have reached such heights because of their education and confidence. This is also because of the foresight of our forefathers that enshrined the right to equality under the Constitution of India.<sup>1</sup>

In this article, I would be emphasising on the leadership role of women in society right from the grassroots'. I shall be looking into the history of the seat of power of women in Meghalaya referring to 'Khasi' women in particular. I would also reflect on the overall importance of women participation in every aspect of a developing nation.

## II. NEED FOR WOMEN PARTICIPATION AT THE GRASSROOTS

It was during India's freedom movement that Mahatma Gandhi encouraged women to come out of their huts to join the freedom struggle. He said that "no country is free where women population are tied to the kitchen". Mahatma Gandhi's main focus was on India's grassroots, the rural poor and the destitute. He wanted to enable them to move out of their vicious poverty and dependence into a state of self reliance and sustainable development. In doing so he centred his attention around village industries where both men and women participated together. The spinning of the cotton wheel was seen as a symbol of self-reliance and 'sawaraj'. Even today we see Gandhian philosophy being followed in our national policy. Wherein, former Prime Minister Indira Gandhi strove to eradicate

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<sup>1</sup> Article 14, The Indian Constitution, 1950.



poverty in her '*garibi hatao*' campaign. The Government in recent times have launched other programmes with the intention to benefit rural poor like Panchayati cooperative etc. However these programmes failed to benefit the rural poor. This was due to factors such as lack of awareness of women's rights, illiteracy and education. These factors are some of the main obstacles in all spheres of human development.

Delhi may be India's capital and Mumbai the centre of India's finance but the heart of India lies in the villages. The grassroots is the backbone of the Indian economy where tonnes of food and raw materials are derived from. Women in these villages are one of the most important pillars of society. With this being said, if we do not educate them, we are losing out on a large demographic of able workers in the country. Thus, the development of a nation also requires the education, health and economic self reliance of women especially in villages.

Women have impacted every sphere of life be it in the society as a community leader, amongst family members, a professional, as an educator or mother to her children. Every strong structure requires a strong foundation. Women are the base and foundation of society. She is her child's first teacher and friend hence, she can shape one of the nation's future leaders. Therefore, at present it is very essential that women at the grassroots level be made literate and trained in leadership and advocacy so that she can pass these skills to her children as well.

At present after almost sixty five years of India Independence rapid strides have been made in many fields. The Women's Reservation Bill is one such effort to increase women participation in Parliament. Nevertheless, it is yet to be passed by the Lok Sabha. Till date we have not been able to see many women leading traditional institutions like the '*Hynniewtrep Durbars*'.

### III. SOCIAL CHANGE AND WOMEN IN INDIGENOUS POLITICAL INSTITUTIONS IN MEGHALAYA

When the Government of India declared year 2001 as the year of women empowerment,<sup>2</sup> women all over the country welcomed it with great enthusiasm. The declarations seem to indicate the seriousness of the government to involve more women in the process of social and economic developments. However; women are still facing problems of gender discrimination, oppression and exploitation. They still suffer from widespread social and economic problems such as illiteracy, poverty, malnutrition, maternal and infant mortality, social customs, and neglect of the girl child, child marriages, female foeticide and other problems which hinder the progress of women. Therefore if we want to empower women, we must stress firmly on their socio-economic development and also make them conscious of their rights. So when they are aware of their rights they will be able to fight back and make more significant changes in the society.

For instance the 'Khasi's' or 'Hynniewtrep' people are an indigenous community found in the state of Meghalaya. This community along with the 'Garo' community follow a matrilineal system as opposed to a patriarchal system. David Roy<sup>3</sup> describes Meghalaya's matrilineal heritage by saying that 'a man is the defender of the woman, but the woman is the keeper of his trust'.<sup>4</sup> Thus, in the 'Hynniewtrep' community both men and women have specific roles to play. Women take care of the household economy and are custodians to property while men take care of the defence and administration of the tribe. In the 'Hynniewtrep' society a woman is put

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<sup>2</sup> National Policy For The Empowerment of Women (2001), *available at:* <http://www.wcd.nic.in/empwomen.htm> (last visited March 5, 2014).

<sup>3</sup> David Roy is a well known Khasi author and scholar. He has written several books and papers on Khasi heritage and culture.

<sup>4</sup> About Meghalaya, The Official Portal of the Government of Meghalaya, <http://meghalaya.gov.in:8080/megportal/stateprofile>, (last visited March 4, 2014).

on a high pedestal as she is the life giver and care taker. Thus, the clan lineage is followed from the woman's side of the family.

Though, '*Hynnientrep*' women are empowered in terms of freedom to work and to live as they please, they are deprived of taking up administrative leadership in the '*Khasi*' Parliament or '*Dorbar Hima*'. Only adult men are allowed to be members of this elite traditional institution, for years women have been voicing the arbitrariness of this tradition. However, the times are changing and '*Hynnientrep*' women today also participate and are elected as part of the '*Dorbar Shnong*' which is similar to the village '*Panchayat*'.

Empowerment through law is no doubt very essential, but law by itself can bring little change if other conditions do not change. Such changes are brought about by intrinsic mutation of human mind. Social change comes about when a large body of minds think alike and take steps to translate the thoughts into action. Therefore for that matter it is important that women should be in the policy decision making body. It is at this level that women will be able to take a decision concerning women's problems, because it can be understood better through a woman's eyes. Therefore in this context we need women who can build up and preserve an independent opinion. We need educated women who can connect and give better perspective to illiterate and young women in society.

#### IV. POLITICAL LEADERSHIP OF WOMEN IN MEGHALAYA AT PRESENT

As seen in traditional institutions, politics and administrations were considered the prerogatives of men as far as Meghalaya is concerned. At the village level the '*Dorbar*' or village council is traditionally headed by the headman. Thus, this level of administration is completely under the domain of men. As mentioned earlier women are restricted from attending durbars, unless specifically called for specific purposes when the services of women are required. While women have a say in

household matters, all major areas of decision making are dominated by men. Although some years back, some durbars located in the city of Shillong welcomed women representatives in the executive body of the village council. This has raised the status of 'Khasi' women in the administration field. By inducting women in the 'Dorbar Shnong' we will be able to handle more problems faced by society.

Nevertheless, women in politics are not a recent development in Meghalaya. In 1935 prior to independence, the then governor of Assam created a reserve seat in the Shillong assembly constituency of Assam. In the election held in 1937 two candidates Smt. Mavus Dunn Lyndogh and Smt. Berlina Diengdoh contested the seat.<sup>5</sup> The former won the seat and became minister in the Muhammas Sadulla ministry from 1939 to 1941 and again from 1942 to 1945.<sup>6</sup> She was the first lady from the North East and the second in India to hold the office of a minister.

The next phase was the participation of women of Meghalaya in the Lok Sabha Election. Mrs. Bonily Khongman won the seat in the first general election held in 1952. For the first time, we saw a 'Khasi' woman at the Lok Sabha entering parliament as the first lady M.P. from the Assam region. She also had the privilege of leading an Indian delegation to the United Nations in 1957.

With the creation of Meghalaya in 1972, more women from 'Khasi' and 'Garo' Hills had been entering the fray of national politics. Miss Percilina Marak became the first MLA in the Meghalaya Legislative Assembly. The number of women members have also increased with time. So far we have seen women MLA's such as Marian D. Shira, Maysalin War, Roshan Warjri, Deborah Marak, Irene Lyndogh and Jopsimon Phanbuh. Further at present we have Ms. Ampareen Lyndogh and four other women MLA's at the Meghalaya Legislature. Perhaps once the

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<sup>5</sup> Women Empowerment in Meghalaya, Meghalaya Human Development Report (2008), *available at*: <http://megplanning.gov.in/MHDR/8.pdf> (last visited March 5, 2013).

<sup>6</sup> *Id.*

Reservation Women's Bill is put in place we will see many more educated, far sighted women entering politics.

## V. CONCLUSION

In conclusion I would like to emphasize that empowerment of women will be more meaningful only if we first achieve some basic objectives. These basic tenets of women empowerment would be to create awareness regarding social evils, control population, build health infrastructure for maternal care and most importantly to spread literacy. The media can also play an important role in bringing awareness to the public, on health and other women issues. We cannot achieve these goals by laws alone we need the society to become liberal and accept women as a contributing factor towards the country's progress. It is the mother who is a child's care giver, friend and most importantly a teacher. She is the one who can shape the nation's future. Let the invisible hands of the mother who have shaped the destiny of the nation be heard. It is time that these hands are given due recognition.

Aphune K. Kezo, *Implications of Protection of Women in India under the Sexual Harassment of Women at Workplace Act, 2013*

1(1) ALEXIS J. PUB. POL'Y & L. 66 (2014)

## IMPLICATIONS OF PROTECTION OF WOMEN IN INDIA UNDER THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE ACT, 2013

*Aphune K. Kezo\**

*Before the year 2013, women at the workplace were protected by general provisions criminalising sexual assault under the Indian Penal Code and the guidelines under Vishakha v. State of Rajasthan. The push for gender equality at workplace was prompted through series of violations between the year 2012 and 2013. The 2013 Criminal Law Amendment Act, came into being with women's protection as the primary focus. Law-makers were urged to fill the vacuum pertaining to transgressions at workplace through the formulation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter 'the Act'). The objective of this paper is to analyse the applicability and the scope of the Act towards protection of women.*

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## I. INTRODUCTION: INCEPTION OF THE LAW

India recognised the need for gender equality when it signed the Convention on the Elimination of all form of Discrimination against Women (hereinafter ‘CEDAW’), 1979 on July 30, 1980 and ratified it on July 9, 1993. It was only in the Vishakha Judgment<sup>1</sup> that the Supreme Court had for the first time relied on CEDAW and laid down ‘the Guidelines’. This made it mandatory for all organisations, in both public and private sectors, to provide a sympathetic and reformatory mechanism to enforce the right to gender equality at workplace.<sup>2</sup> However, in *Medha Kotwal Lele v. Union of India*<sup>3</sup> the Supreme Court recognised that the Vishakha Guidelines were not implemented.

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<sup>1</sup> Vishakha v. State of Rajasthan, AIR 7 SC 1993.

<sup>2</sup> Veena Gopalakrishnan & Vikram Shroff, *India’s New Law on Prohibition of Sexual Harassment at the Work Place*, The Chamber’s J., 31(March 2014). [hereinafter Veena Gopalakrishnan & Vikram Shroff]

<sup>3</sup>Medha Kotwal Lele v. Union of India, (2013)1 SCC 297.

The draft of the Protection of Women against Sexual Harassment at Workplace Bill was first introduced and approved by the Union Cabinet in 2007.<sup>4</sup> For a period of two years, the Bill had been amended and re-introduced in the Lok Sabha between 2010 and 2012.<sup>5</sup> The Lok Sabha finally passed the Bill on September 3, 2013. The Rajya Sabha followed suit, passing the Bill on February 26, 2013. The Bill then got the President's assent on April 23, 2013 and published in the Gazette of India as Act no. 14 of 2013. The final Act and Rules came through notification by the Ministry of Women and Child Development on December 9, 2013.<sup>6</sup>

## II. SIGNIFICANT FEATURES OF THE ACT

### A. *The Definition Clause*

The Act defines the term "sexual harassment"<sup>7</sup> as inclusive of any one or more of the following:-

- a. Physical contact and advances; or
- b. A demand or request for sexual favours; or
- c. Making sexually coloured remarks; or
- d. Showing pornography; or
- e. Any unwelcome physical, verbal or non-verbal conduct of sexual nature.

Some circumstances *may* be treated as sexual harassment at workplace if it includes the following<sup>8</sup>:-

- a. promise to preferential treatment; or
- b. threat of detrimental treatment; or

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<sup>4</sup> Veena Gopalakrishnan & Vikram Shroff, *Supra* Note 2 at 32.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> § 2 (n), Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 [hereinafter 'the Act of 2013'].

<sup>8</sup> § 3 (2), the Act of 2013.



- c. threat about her present or future employment status; or
- d. interferences with her work or creating an intimidating or offensive or hostile work environment for her; or
- e. humiliating treatment likely to affect her health and safety.

By virtue of Section 3 (2), these circumstances can contribute significantly as evidence pointing to sexual harassment.

According to the Act, an “aggrieved woman”<sup>9</sup> entitled to seek redress is a woman of any age, whether employed or not, who claims to have been subjected to any act of sexual harassment. It is a comprehensive term that includes not only the women employees, but any woman subjected to workplace harassment. Another important term is “Employee”<sup>10</sup> defined under the Act, which includes any person employed on regular, temporary, *ad hoc* or daily wage basis, either through an agent or contractor, with or without the knowledge of the principle employer, whether for remuneration or voluntary basis. The persons, thus, included under the term employee, may be a co-worker, a contract worker, probationer, trainee, apprentice or any other such names.

The term “workplace”<sup>11</sup> has been defined to include not only the usual place of employment but any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.

#### B. *Complaints Mechanism*

The Act specifies that all employers of a workplace having more than 10 (ten) employees must set up an Internal Complaints Committee (ICC) to investigate allegations of sexual harassment. At the District level, the Government is required

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<sup>9</sup> § 2 (a), the Act of 2013.

<sup>10</sup> § 2(f), the Act of 2013.

<sup>11</sup> § 2 (o), the Act of 2013.

to set up a Local Complaints Committee (LCC) to investigate complaints against an employer where the Internal Complaints Committee has not been constituted.

The ICC is to be constituted by a Presiding Officer, not less than two members, an External member from an NGO or association committed to women's rights. The Presiding Officer must be a woman employed at a senior level at the workplace and the two members are chosen amongst employees and must preferably have legal knowledge or experience in social work. The Presiding Officer and other members of the ICC can hold office as members for not more than three years.

The procedure of making a complaint requires that the aggrieved woman must submit six copies of the written complaint, along with the supporting documents, with the names and addresses of the witness to the ICC or LCC within three months from the date of the last incident. The law makes provisions for third parties to file the complaint on behalf of the woman, in situation where the employee is unable to make the complaint on account of physical capacity, mental capacity or death.

Upon receipt of the complaint, one copy of the complaint must be sent to the respondent within seven days. The respondent should then file his reply with his list of documents, names and addresses of witnesses within ten working days. The inquiry must be completed within 90 days from receipt of the complaint. The inquiry report must then be issued within ten days from completion of the inquiry. The employer is then directed to act on the recommendations of the committee within 60 days from the receipt of the inquiry report. The respondent may appeal within ninety days from the date of the recommendations.

### *C. Penalties and compensation*

The remedies provided by the ICC or LCC may be one of the following as interim relief:-

- a) Transfer of the aggrieved woman or respondent to any other workplace;
- b) Grant of leave to the Aggrieved Woman up to a period of three months (such leave is in addition to the paid leave that the Aggrieved Woman is entitled to under other applicable laws); and
- c) Restraining the respondent from reporting on the work performance of the Aggrieved Woman or writing confidential reports and assigning the same to another person.

Penalties imposed on the non-compliance of the Act may consist of compensation of Rs. 50,000 in first instance. In the cases of repeated violations, punishments may include cancellation of an employer's license or registration to do business, provided by the Government. Punishments prescribed under the service rules of the organisations can also be applied. If an organisation does not have service rules, it may resort to disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, carrying out community service or deducting the wages of the respondent payable as compensation to the aggrieved woman.

#### *D. Duties of the Employer*

The Act provides additional duties to the employer in order to ensure protection against sexual harassment. These include<sup>12</sup>:-

- a) To provide a safe working environment, which includes safety from other persons;
- b) To display, at any conspicuous place in the workplace, the penal consequences of sexual harassment and the order constituting the Internal Committee under the Act;

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<sup>12</sup> §19, the Act of 2013.

- c) To promulgate policies, organize workshops and awareness programs at regular intervals for informing employees of the provisions of the Act, and to conduct orientation programs for the members of the Internal Committee in the manner prescribed by the Rules;
- d) To provide necessary facilities to the Internal Committee for dealing with complaints and conducting inquiries;
- e) To assist in securing the attendance of the respondent and other witnesses before the Internal Committee;
- f) To make all relevant information available to the Internal Committee in relation to a complaint under the Act;
- g) To provide assistance to the Aggrieved Woman if she chooses to file a complaint in relation to the offense under the IPC or any other law;
- h) To initiate action under the IPC or any other law against the respondent, or if the Aggrieved Woman so desires, in cases where the respondent is not an Employee, in the Workplace at which the incident of sexual harassment took place;
- i) To treat Sexual Harassment as misconduct under the service rules and initiate action for the same; and
- j) To monitor the timely submission of reports by the Internal Committee.

### III. ANALYSIS

The law has confronted many platforms at which a woman may be subjected to sexual harassment. The usage of the term “unwelcome” advances can be ambiguous enough to be construed to mean that determination sexual harassment should be based on consent. This consent basis determination has been removed by the Criminal Law Amendment Act, 2013 that as widened the scope of what “consent” means. The law on protection of women’s rights must not deal with the

violation in the view of evaluation of the woman's dignity and morality.

There must also be an unbiased constituting body of members within the ICC and LCC. Having the organisation's own employees to constitute as members of the ICC makes room for impartiality in the investigation process. The organisation must then make sure to have members whose personal interests will not come into conflict with the deliberation of the complaint by ensuring an impartial body empathetic to women's rights.

i. The Act is not Gender Neutral

As is apparent from the title of the Act, the Act extends its protection solely to women. Only an 'aggrieved woman' may make a complaint of sexual harassment at the workplace under the provisions of this Act. Therefore men may not avail of the grievance redressal mechanism created by this Act in case they suffer instances of sexual harassment. This argument was presented to the Parliamentary Standing Committee on Human Resource Development by various men's organizations and groups<sup>13</sup> before the Bill was passed. The main concerns raised were that it is incorrect to presume that only women can be victims of sexual harassment, that gender should not be given precedence over human rights, that employees should be under a duty to provide a safe working environment to all employees and that there was no data to claim that sexual harassment is faced only by women.<sup>14</sup> It was further pointed out that sexual harassment laws in a number of countries such as Denmark, U.K., Italy, Ireland, Finland, Germany, Portugal, Spain, and the Netherlands are gender neutral.<sup>15</sup>

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<sup>13</sup>THE DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, 239<sup>TH</sup> REPORT ON THE PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT AT WORKPLACE BILL,2010 at ¶ 3.2 (2011).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 3.3.

These arguments were ultimately rejected, the Committee's justification being that 'while there may be incidents of men facing sexual harassment at the workplace, nobody can deny the fact that given the traditional power equation in our society, it is women who face the disproportionately larger brunt of this scourge.'<sup>16</sup> It was suggested that there is a need to conduct surveys/studies with regard to sexual harassment of men and women at the workplace.<sup>17</sup> Alternatively, it was suggested that employers can be mandated to report cases of male sexual harassment in their annual report.

These arguments are not convincing. There is research that shows that men may be the victims of sexual harassment even if the most predominant form of harassment is men harassing women.<sup>18</sup> Though there is a need to carry out studies on sexual harassment of men in India,<sup>19</sup> there have been reports of such incidents in India.<sup>20</sup> Therefore, even if the number of female victims of sexual harassment is far larger than the number of male victims, depriving the male victims of grievance redressal merely because they are numerically fewer in number is unjustified. With regard to the suggestion regarding research on sexual harassment of men, such a recommendation is valid, but to base a decision on whether or not men should be protected under sexual harassment laws merely on the numerical incidence of harassment, which such research would reveal is not justified. And as for the recommendation that employers be mandated to include instances of male sexual harassment in their Annual reports, it would be absurd to encourage men to report these incidents but not give them any relief. Understandably, this suggestion was

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 3.5.

<sup>18</sup> VICTORIA PRUIN DEFRANCISCO, CATHERINE HELEN PALCZEWSKI, COMMUNICATING GENDER DIVERSITY: A CRITICAL APPROACH, 211 (2007).

<sup>19</sup> *Supra* note 13 at ¶ 3.5.

<sup>20</sup> Kritika Kapoor, *Men too are Victims of Sexual Harassment*, THE TIMES OF INDIA, SEP. 15, 2012, <http://timesofindia.indiatimes.com/life-style/relationships/man-woman/Men-too-are-victims-of-sexual-harassment/articleshow/16336627.cms>

not incorporated in the Act as it now exists. The law should be amended, and made gender neutral like the sexual harassment laws that exist in various countries such as the United States, the United Kingdom, the European Union countries and Pakistan.

ii. Possibility of Bias in the Internal Complaints Committee

A majority of the members of the Internal Complaints Committee as per the act are supposed to be from amongst the employees within the workplace. This leads to a very high possibility of bias in the Committee, especially if either party holds a high-rank in the workforce. With an in-house dispute resolution process, it is highly possible that the complainant is dissuaded from complaining, in order to preserve the image of the organization. It is also possible that professional interests of the members of the Internal Complaints Committee would compromise the fairness of the Committee's decision. The case of *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University*<sup>21</sup> is an example of the situation that could result because of bias in the ICC. As observed in the judgment in this case, the ICC members themselves put the defense of the respondents to the aggrieved woman, the respondents were not compelled to enter the witness box, one of the ICC members was a probationer who could be dismissed by the management at any time, there was a lack of cooperation between the ICC members and the report submitted by the majority was prepared without undertaking the exercise of joint deliberations. The Court observed that these were all 'grave errors sufficient to give rise to a reasonable apprehension in the mind of any aggrieved woman and to cast doubt on independence of the ICC.'<sup>22</sup>

The Justice Verma Committee, in its analysis of the Sexual Harassment Bill was of the view that structure mandating the setting up of an Internal Complaints

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<sup>21</sup>Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University, W.P No.s 3349, 3450 and 3451 of 2013.

<sup>22</sup> *Id.*

Committee was counter-productive to the ends sought to be met' because 'the in-house dealing of all grievances would dissuade women from filing complaints and may promote a culture of suppression of legitimate complaints in order to avoid the concerned establishment falling into disrepute.'<sup>23</sup> The Committee had recommended that it would be better to set up an Employment Tribunal to receive and adjudicate all complaints.<sup>24</sup> The proposed tribunal was to comprise of two retired judges, eminent sociologists and one social activist.<sup>25</sup> The disadvantages of such a system would be that it lacks the accessibility and convenience the present system provides for by providing for a forum to address grievances at each workplace. The result of creating a single tribunal to deal with all complaints for a particular region would be possible overburdening of the tribunal with cases, which would mean that obtaining relief in each individual case would be a long drawn out process as it is with civil trials. An alternative solution to the problem could be to increase the number of external members on the ICC from just one, as is the case in the present law. This would increase the objectivity in the inquiry process because under the present system; a single external member could easily be overruled.

### iii. Punishment for Employer for certain offences under the Act

Under the Act, the punishment prescribed for the employer for failure to constitute an ICC, failure to take action according to the recommendations of the ICC, failure to submit an annual report and contravention of any provisions of the Act is a fine of up to fifty thousand rupees, and in case of second conviction, twice the first punishment or withdrawal of business license or registration. Punishing the employer with withdrawal of business license would indeed have a powerful

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<sup>23</sup>REPORT OF THE JUSTICE VERMA COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 131 (2013).

<sup>24</sup> *Id.* at 130.

<sup>25</sup> *Id.* at 131.



deterrent effect, however it would also impact innocent parties such as lower ranking workers in the workforce. A number of stakeholders had expressed this concern before the Parliamentary Standing Committee arguing that; this would result in closure of the business which would affect employees and vendors dependent on the operations of the workplace inspite of their not committing any uncalled for action.<sup>26</sup> For this reason, the Committee had recommended that the Ministry modify the provision in such a way so as to penalize the employer in a way that does not affect innocent lives.<sup>27</sup> However this modification was not made. The Act should therefore be amended so as to prevent innocent parties from being affected. It is also recommended that the maximum fine be increased as a sum of fifty thousand rupees may not be a significant enough deterrent for a number of employers who have extremely deep pockets.

#### iv. Absence of an Anti-Retaliation Provision

When a complaint is filed by an aggrieved woman against a high ranking person at the workplace, there is always the possibility of her being threatened into withdrawing the complaint or subjected to detrimental treatment in her employment. The present Act does not contain a provision penalizing such conduct. Therefore, an anti-retaliation provision should be inserted in the Act, making it an offence to intimidate or threaten or subject to detrimental treatment the employment of any person who is in the process of making a complaint, or has already made a complaint under the Act.<sup>28</sup> Similar provisions exist in Australia, Canada, the European Union, the United Kingdom and the United States of

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<sup>26</sup> Supra note 13 at ¶ 25.2.

<sup>27</sup> *Id.* at ¶ 25.4.

<sup>28</sup> Oxford Pro Bono Publico, *Submission to the Committee on Human Resource Development, Rajya Sabha*, 13 (Feb. 2011).

America.<sup>29</sup> A suggestion to this effect was one of the recommendations of Oxford Pro Bono Publico's submission to the Committee on Human Resource Development in 2011.

v. Duties of the District Officer

As per the present Act, the duties of the District Officer are limited to monitoring the timely submission of reports and to take measures as may be necessary for engaging non-governmental organizations for creation of awareness on sexual harassment and the rights of women.<sup>30</sup> Some of the duties of the employer as per the Act<sup>31</sup> should be extended to the District Officer as well. The reason for this is the unorganized sector forms about 86% of the workforce<sup>32</sup> and it is this population that the LCC will cater to. For the LCC to effectively benefit this section of the population it is necessary that the LCC is also required under the law to organize workshops and awareness programs, to publicize the order constituting the LCC and to provide assistance to the aggrieved woman if she chooses to file a complaint under the Indian Penal Code.

A large percentage of the unorganized sector consists of persons who are uneducated and may not be aware of the very existence of the LCC. It would be unrealistic for the employer alone in the unorganized sector to take the aforementioned responsibilities because many of them could be possibly unaware of the law themselves. Also, the Act does not contain any provision to ensure the accountability of such employers. The only solution to enable the LCC's effectiveness would be to allocate these crucial responsibilities to the LCC.

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<sup>29</sup> § 94, The Sex Discrimination Act, 1984, see also §.14.1 of the Canadian Human Rights Act, Article 7 of the Council Directive 2002/73/EC, S.27 of the Equality Act, 2010, S 2000(e)-3(a) of the U.S. Code.

<sup>30</sup> § 20, the Act of 2013.

<sup>31</sup> § 19, the Act of 2013.

<sup>32</sup> NATIONAL COMMISSION FOR ENTERPRISES IN THE UNORGANIZED SECTOR, REPORT ON CONDITIONS OF WORK AND PROMOTION OF LIVELIHOODS IN THE UNORGANIZED SECTOR, .21 (2007).

#### IV. CONCLUSION

By categorically prohibiting sexual harassment and attempting to provide a convenient grievance redressal mechanism for aggrieved women, the Act marks an important step in the right direction and is a significant addition to the endeavours being made to empower women in India. It is significant because sexual harassment at the workplace largely goes unreported and there exists a culture of trivialization of such acts despite the immense negative impact they have on a person's personal and professional life. By providing women the right to seek relief for these acts and creating facilities for the same, the Act seeks to encourage women to speak up when they suffer sexual harassment and undo the culture of trivialization. It is therefore a commendable effort at making workplace safer for women this would in turn aid workforce productivity and economic development.

The issue related to gender neutrality needs to be addressed so that workplace can be safer for all employees irrespective of gender. Some other important concerns such as the possibility of bias in the Internal Complaints Committee must be examined in detail if the Act is to achieve what it is meant for. The legislation has only been in force for a short while and more issues might develop at the implementation stage. Also, the Act is an addition to existing criminal laws and labour laws and how it will co-exist in this network of laws will also be better understood as the law is applied over time. This is why it is very important that the working of the Act is periodically reviewed and studied in detail so that the necessary amendments are made so as to best serve the purposes of the intended beneficiaries of the Act. It is only then that gender equality would be achieved at the workplace.