



## **INNOVATIVE APPROACHES TO ETHNICITY IN DOMESTIC VIOLENCE**

Tarun Kumar Kaushik\*

Violence against women is an extreme manifestation of gender inequality in society and a serious violation of fundamental human rights. The United Nations Declaration on the Elimination of Violence against Women defines it as any act of gender-based violence (GBV) that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of acts such as coercion or arbitrary deprivation of liberty, whether occurring in public or private life (United Nations 1993). Intimate partner violence (IPV) against women is the most common type of violence against women. It takes place within couples, and the perpetrators are almost exclusively men who are or have been in an intimate relationship with the woman.<sup>1</sup>

Several issues regarding domestic violence intervention arose in these discussions with longtime activists, service providers and advocates in the domestic violence movement. Work within communities has led intentionally or not towards alternative “ways of thinking” and “ways of doing.” Are these “innovations,” “alternatives,” the natural responses of grassroots approaches perhaps akin to an earlier phase of the movement of the U.S. anti-violence movement, or hybrid responses resulting from necessary accommodations between different contradictory systems? Distinctions between intervention versus prevention, individual and community, survivor and abuser blur and overlap. As we know, domestic violence touches us on all levels in many complex ways.

### **1. Economic rights of women**

The concept of rights particularly in the realm of economic and social rights has been markedly absent from the Indian Governments activities and approaches to gender equality. There is a lack of efforts to secure for women basic economic rights in the family, in relation to property, income and shelter, the pre-requisites of women's right to dignity and a measure of autonomy. Assets that have been created, out of public resources for poor households have been largely granted to male heads, while the responsibility for and social costs of child care, household maintenance and survival-oriented productive tasks are laid on women's shoulders. The Government of India largely considers the household to be the basic unit or structure in development assistance, despite evidence to show that intra-household inequalities take a great toll on women and girl children, inhibiting their access to basic rights in development such as good health, education, freedom of movement and right to autonomy. However, there are indications that in some policy areas and programmers, the Government has been willing to invest in processes that empower women and emphasize their rights.<sup>2</sup>

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\* Research Scholar, Department of Law, Meerut College, Meerut.

<sup>1</sup> Preventing and addressing intimate partner violence against migrant and ethnic minority women: the role of the health sector Policy by WHO (2013)p.1

<sup>2</sup> Justice J.N. Bhatt, *Judge Gujarat High Court in his article "Gender Equality : Turmoil or Triumph?"* AIR 1998 Journal Section Slat p. 82, 83.



## **2. Sexual harassment**

In *Vishaka v. State of Rajasthan*,<sup>3</sup> the Supreme Court defined 'sexual harassment' to include such unwelcome sexually determined behaviour (whether directly or by implication) as:

- i) Physical contact and advances;
- ii) a demand or request for sexual favours;
- iii) sexually coloured remarks ;
- iv) showing pornography;
- v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

In cases involving violation of human rights, the Courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. To hold that since the respondent had not "actually molested" X and that he had only "tried to molest" her and had "not managed" to make physical contact with her, the punishment of removal from service was not justified, was erroneous.

The statement of a female subordinate before the Enquiry Officer as well as in her complaint unambiguously conveyed in no uncertain terms as to what her complaint was. The entire episode reveals that the respondent had harassed, pestered and subjected that female, by a conduct which is against moral sanctions and which did not withstand the test of decency and modesty and which projected unwelcome sexual advances. Such an action on the part of the respondent would be squarely covered by the term "sexual harassment".<sup>4</sup>

## **3. Violation of fundamental rights of gender equality**

Each incident of sexual harassment, at the place of work, results in violation of the fundamental right of "Gender Equality" and the "Right to Life and Liberty". It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19 (1) (g) to practice any profession or to carry out any occupation, trade and business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class of action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the Legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 of the Constitution are brought before the Apex Court for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.<sup>5</sup>

<sup>3</sup> AIR 1997 SC 3011

<sup>4</sup> *Apparel Export Promotion Council v. A.K.Chopra*, AIR 1999 SC 625.

<sup>5</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.



#### **4. Enforcement of basic rights of gender equality**

In *Nilabati Behera v. State of Orissa*,<sup>6</sup> A provision in the ICCPR was referred to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right' as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, the Apex Court laid down the guidelines and norms for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by the Apex Court under Article 14 of the Constitution.<sup>7</sup>

#### **5. Steps towards affirmative discrimination in favour of women**

The principles of gender equality and gender equity have been basic to Indian thinking. The 19th and early 20th centuries saw a succession of women's movements first around social issues and later around the freedom struggle itself. The Constitution of India adopted in 1950 not only grants equality of women, but also empowers the State to adopt measures of affirmative discrimination in favour of women.<sup>8</sup>

Protective discrimination envisaged in Article 16 (4) and 16 (4-A) is the armour to establish the equilibrium between equality in law and equality in results as a fact to the disadvantaged. The principal of reservation in promotion provides equality in results.<sup>9</sup>

#### **6. Protection of personal liberty under Article 21**

The object of Article 21 of the Constitution is to prevent encroachment in the personal liberty of citizens by the Executive save in accordance with law and in conformity with the provisions thereof and in accordance with the procedure established by law. Before a person is deprived of his personal liberty by the Executive, the provisions of law must be strictly followed and must not be deviated from to the disadvantage of the person affected. The right to live with human dignity is a fundamental right of every citizen for pursuit of happiness and excellence.<sup>10</sup> Constitution with the power to provide for the "general welfare".<sup>11</sup> In *Metro Broadcasting*

<sup>6</sup> AIR 1993 SC 1960.

<sup>7</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011 .

<sup>8</sup> Justice J.N. Bhatt, *Judge Gujarat High Court in his article "Gender Equality : Turmoil or Triumph?"* AIR 1998 ) Journal Section 81 at p 81,

<sup>9</sup> *Jagdish Lal v. State of Haryana*, AIR 1997 SC 2366.

<sup>10</sup> *Vinod Narain v. State of U.P.*, 1996 Cri LJ 1309 .

<sup>11</sup> *H. Earl Fullilove v. Philip M. Klutznick*, (1980) 65 L Ed 2d 902.



*Fullilove (Metro Broadcasting Inc.) v. Federal Communications Commission*<sup>12</sup> the above view was reiterated and it was observed that, 'benign race conscious measure mandated by the Congress even if these measures are not 'remedial' in the sense of being designated to compensate victims of past-governmental or social discrimination are constitutionally permissible to the extent that they serve important Government objectives within the power of Congress and are substantially related to achievement of those objectives'.<sup>13</sup>

### **7. Marriage personal liberty, procreation of children**

What more important personal right could there be in a citizen than that to determine in marriage his attitude and resolve his mode of life concerning the procreation of children? Whist personal rights are not set out specifically, it is scarcely to be doubted that in our society the right to privacy is universally recognised and accepted with possibly the rarest of exceptions and the matter of marital relationship must rank as one of the most important of matters in the realm of privacy.<sup>14</sup>

One of the primary ends of marriage is the "procreation of children". In an English case *White v. White*<sup>15</sup> where a husband insisted on a particular sexual practice, which practice would ensure that the wife could not get pregnancy, the Court held that it amounts to cruelty on his part, as the wife was very anxious to have a child. According to ancient Hindu Law a girl can choose her husband three years after she attains marriageable age. Before 1978 the Hindu Marriage Act, 1955 contained a provision for guardianship in marriage. The right to arrange for the marriage of a minor girl was given to the father, then to mother *etc.* In the year 1978 this provision was removed from the Act and minimum age of marriage is raised to 15 years for girl and 21 years for boy.<sup>183</sup> In *Lila Gupta v. Lakshmi Narain*,<sup>16</sup> the Supreme Court of India held that breach of minimum age condition does not render the marriage void. The Child Marriage Restraint Act, 1929 also does not invalidate the marriage which violates the minimum age provision but punishes the persons responsible for such violation. Therefore, a girl minor or major possesses equal right to marriage and ultimately thereby to conceive a child. In olden days the age of discretion was considered to be the age of valid marriage. In an important English case *Gillick*, 1985, relating to consent of a minor, the House of Lords by majority judgment held that the parental right terminates when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully anything it proposed to do, But it is a question of fact whether a child has achieved sufficient understanding and intelligence.<sup>17</sup> Until the child achieves the capacity to consent, the parental right to make the decision continues save only in exceptional circumstances. Under English Law the opinion of parents or natural guardians in the matter of abortion is irrelevant when the minor was capable of understanding the implications of her

<sup>12</sup> (1990) 58 LW 5063.

<sup>13</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p389.

<sup>14</sup> *Ranisharan Autyanuprasi v. L of India*, AIR 1989 SC 549

<sup>15</sup> (1948) 2 All ER 141.

<sup>16</sup> AIR 1978 SC 1351.

<sup>17</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p390.



opinion. So, if a girl whether minor or major with sufficient understanding desires to marry there is no impediment on her choice. The consummation of marriage naturally may lead to pregnancy. The State at this point of time cannot interfere and compel a girl (woman) not to conceive. The Family Planning Laws are only advisory but not mandatory. Even the Indian Penal Code permitted cohabitation by a husband with his wife when she is below 16 years of age.<sup>18</sup> Women got an absolute freedom and discretion under law whether to conceive or not. But when once exercised this option to conceive, termination of foetus is an offence under the Indian Penal Code, Section 312. The Medical Termination of Pregnancy Act, 1971 exactly at this stage interferes and allows a woman to go voluntarily for abortion. When the woman is major her decision is final under M.T.P. Act. But the problem arises when she is a minor. Under the M.T.P. Act, a minor girl cannot approach a doctor for abortion on her own. The consent of parent or guardian or husband is required. The United States Supreme Court in the year 1976 in *Danforth Planned Parenthood of Central Missouri Re*,<sup>19</sup> held that States might nor constitutionally require a married woman to have her husband's consent to abortion nor might they impose a blanket parental consent requirement for unmarried minors. The Court quoted the normal delivery of six years old child in Mima, Peru, few years ago. The Court further observed that teenage mothers given proper care had the least complications in child birth.<sup>20</sup>

### **8. Right to conceive**

Woman by nature possess a right to have a child. She should not be deprived of such a natural right just by a statute. A woman having become pregnant, it is her fundamental right to have a child. She cannot be forced to abort the child. The Constitution of India under Article 21 guaranteed personal liberty which may include the liberty of conceiving a child and giving birth to it. At the same time under various provisions of other laws woman is given ample liberty and discretion in matters like procreation, abortion and sterilisation.<sup>21</sup> The United Nations Declaration on the Right of the Child made on November 20, 1959, has formulated and given 10 principles in that behalf. A child of tender years shall not, save in exceptional circumstances, be separated from his/her mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.<sup>22</sup>

### **9. Abortion of foetus is illegal and a crime**

The American Supreme Court for the first time in *Roe v. Wade*,<sup>23</sup> recognised woman's right to terminate her pregnancy. The Court found this right to be rooted in the constitutional right to privacy. In brief, the Supreme Court of America held that a woman's right to terminate her pregnancy is such that the State may not prohibit abortion if until the foetus reaches viability.

<sup>18</sup> Section 375, Exception, Indian Penal Code, 1860.

<sup>19</sup> 49 L. Ed 2d 788.

<sup>20</sup> *G. Krishnan v. G. Rajan alias Madipu Rajan*. (1994) 1 LW (Cri) 16 (Mad).

<sup>21</sup> AIR 1996 Journal Section p. 136.

<sup>22</sup> *Gaurav Jain v. Union of India*, AIR 1997 SC 3021 at 3037.

<sup>23</sup> 410 US 113 (1973).



But in a later case *Webster v. Reproductive*<sup>24</sup> the Supreme Court of America reversed its earlier judgment and upheld a Missouri Statute which declared that "the life of each human being begins at conception", and that "unborn children have protectable interest in life, health and well-being." The Court maintained that State can pass any regulation of abortion on the ground—One is to preserve and protect, the health of pregnant woman. The other is to protect the potential human life embodied in the foetus. Prior to Webster, the foetus had no "protectable interest" until it had reached viability. Thus the American Supreme Court recognised the right of foetus" to grow and born. A critical question is "does the abortion of a foetus amounts to taking the life of a human being"? There is no satisfactory answer to the question, when does the life comes into being? The recent judgments in the West which deal with legal protection of human life before birth disclosed that abortion of a foetus is illegal and criminal because it amounts to taking of life of an unborn child. Thus it restrained the girl of abortion.<sup>25</sup>

### **10. Child has the inherent right to life**

Article 6 postulates that State Parties recognise that every child has the inherent right to life which is already granted by Article 21 of the Constitution of India which had been interpreted expeditious by the Court to make the right to life meaningful, socially, culturally, economically, even to the deprived segments of the society with dignity of person and in pursuit of happiness. Article 6 (2) enjoins to ensure development of the child and Article 7 (2) postulates that the State shall ensure implementation of these rights in accordance with the law and their obligations. Article 9 (3) envisages that the State shall respect the right of the child who is separated from her parents to maintain personal relations and contact with her parents on regular basis. Article 14 (2) provides that the State shall respect the rights and duties of the parents, and when applicable legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Article 17 (2)(e) enjoins the State to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her will being bearing in mind the provisions of Articles 13 and 18. Article 18 (1) provides that the State shall use their efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents and State have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. Sub-para (2) postulates that for promoting the rights set forth in the Convention, parents, legal guardian or the State in the performance of their child rearing responsibilities, shall ensure the development of institutions, facilities and services for the care of children.<sup>26</sup>

### **11. Child in a womb equal to a person in existence**

In an English case *R. v. Tait*,<sup>27</sup> the Court of Appeal quashed the conviction of a burglar on the ground that "threat to kill a foetus" is not an offence directed against the "another person." The foetus in uterus was not in the ordinary sense' another person distinct from its mother. In

<sup>24</sup> 492 US 490 (1989).

<sup>25</sup> AIR 1996 Journal Section 136 p. 138

<sup>26</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p392.

<sup>27</sup> (1989)3 WLR 891.



another case *R. v. Sullivan*,<sup>28</sup> midwives who attended the delivery of a foetus that failed to survive birth were charged with the offence of criminal negligence of causing death to another person (foetus). The conviction by the Trial Court was set aside, by British Columbia Court of Appeal on the ground that a foetus that was not living on complete removal from its mother's body was not a "person" but the Court substituted a verdict of guilty of criminal negligence causing bodily harm to another person, namely the pregnant woman. The foetus in the birth canal was found to be part of the mother, so that injury to the foetus constitutes injury to her.<sup>29</sup> This view was rejected in a later case, *Bonbrest v. Kotz*,<sup>30</sup> and the unborn child was recognised as a human being. The unborn child need not reach the stage of viability of maintain an action for recovery of damages under the Law of Torts.<sup>31</sup> Thus the unborn child to whom live birth never comes is held to be a person who can be the subject of an action for damages for his death. The Law of Succession also for many purposes treated a child in the womb equal to a person in existence.<sup>32</sup>

### **12. Child of a fallen woman**

Equally, the right to the child is the concern of the society so that fallen woman surpass trafficking of her person from exploitation; contribute to bring up her children; live a life with dignity; and not to continue in the foul social environment. Equally, the children have the right to equality of opportunity, dignity and care, protection and rehabilitation by the society with both hands open to bring them into the mainstream of social life without ore-stigma affixed on them for no fault of her/his. The Convention on the Right of the Child, the Fundamental Rights in Part III of the Constitution, Universal Declaration of Human Rights, the Directive Principles of the State Policy are equally made available and made meaningful instruments and means to ameliorate their conditions—social, educational, economical, and cultural, and to bring them into the social stream by giving the same opportunities as had by other children. Thus, case calls for a careful and meaningful consideration with diverse perspectives, to decide the problems in the light of constitutional and human rights and directions given to the executive to effectuate them on administrative side effectively so that those rights become real and meaningful of them.<sup>33</sup> To care for, plan out needs of the children are successful implementation is, therefore, our duty, as citizen, be an Administrator, a Magistrate or a Judge.<sup>34</sup>

### **13. Forcible termination of pregnancy of minor**

In the month of December, 1993 a father of a minor girl of 16 years age filed a writ petition before the Madras High Court under Medical Termination of Pregnancy Act, 1971 for a direction from the Court to terminate the pregnancy of his minor daughter. The Court dismissed

<sup>28</sup> (1988) 43 CCC 3d 65.

<sup>29</sup> *Dietrich v. Northampton*, 138 Mass 14, (1884).

<sup>30</sup> 05 F. Supp 138 DDC 1946.

<sup>31</sup> *Wuilms v. Marison Rapid Transit Inc.* 152 Ohio 114.

<sup>32</sup> AIR 1996 Journal Section p. 13o at 140.

<sup>33</sup> *Gaurav Jain v. Union of India*, AIR 1997 SC 3021

<sup>34</sup> *Ibid.*



the writ petition and held that abortion cannot be forced on minor girl when she is willing to bear the child.<sup>35</sup>

#### **14. Killing foetus**

In *Dam's v. Davis*,<sup>36</sup> case where a divorced wife and husband disputed on claiming of right on Frozen Preembryos for implanation to have a child, the Judge concluded that as a matter of law, human life begins at conception and the legal provisions governing a human being existing as embryo in vitro to be those of child custody law, dominated by the obligation to seek, protect and advance the best interest of the child. Since the time immemorial Indian Law too treated the termination of pregnancy as an offence. According to Hinduism abortion or killing of foetus was considered a sin. According to Islam after a foetus was completely formed and given soul, abortion was "Haram" (forbidden). The same was expressed in terms of law in Section 312 of the Indian Penal Code. Abortion is permissible under IPC only in exceptional circumstances to save the life of the pregnant woman when the continuation of such pregnancy poses danger to her life. It is allowed through surgical removal of child from mother's womb. Similarly, Section 3 of the Medical Termination of Pregnancy Act permits abortion in exceptional circumstances only when in the opinion of a doctor continuation of such pregnancy causes any physical or mental injury to the woman. Thus the right to abortion beyond 20 weeks of pregnancy. The State never sanctioned a blank licence to any woman or other persons to kill the child in mother's womb. On the other hand imposed many restrictions on termination of pregnancy and thus protected the right of unborn child to be born alive.<sup>37</sup>

#### **15. Pre-natal diagnostic techniques to determine the sex**

The advancement of Medical Technology changed the fate of unborn child and posed threat to its life, in particular to the life of female child in the form of foetus. Pre-natal diagnostic techniques are being misused to determine the sex of the foetus. If a female foetus is found in such test, it is terminated by a deliberate abortion. The female foeticide is increasing throughout India. As a mark of first step to prevent misuse of these pre-natal diagnostic techniques the Maharashtra State Government passed the "Maharashtra Regulation of Use of Pre-natal Diagnostic Techniques Act, 1988." Under Section 4 (4) of the said Act it is made obligatory to obtain an undertaking from a woman who prefer such test to the effect that she will not terminate the pregnancy if the diagnosis shows the possibility of a normal child of either sex. Thus the Maharashtra State legislation has become a landmark legislation recognising the right of an unborn child to be born alive. The State of Rajasthan also banned sex determination tests. The Central Government of India also proposed to bring a legislation on this subject which shall apply to whole India. A bill was already prepared in the year 1991. Which was passed by both house of Parliament came on statute book as Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994 received the assent of President 20.9.1994

<sup>35</sup> The Hindu, dated 4.12.1993 referred in AIR 1996 Journal Section p. 136 at 137.

<sup>36</sup> (1989) 15 FLR 2097.

<sup>37</sup> AIR 1996 Journal Section p. 136 at 138,139.





and came into force from 1.1.1996.<sup>38</sup> The State has undertaken to implement economic, social and cultural rights, such measures to the maximum extent of the available resources and where needed within the framework of international cooperation.<sup>39</sup>

### **16. Protection of child from economic exploitation**

Article 32 recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Article 8 of the Declaration on the Right to Development provides that the State shall undertake at the national level, all necessary measures for the realisation of the right of development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injuries.<sup>40</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 enjoins by Article 1, prohibition of discrimination of women. Article 5 enjoins to modify social and patterns of conduct of men and women with a view to achieving elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women. Article 12 prescribes discrimination against women in the field of health care in order to ensure on the basis of equality of men and women, access to health care services, including those related to family planning. Article 13 prescribes discrimination and directs that the State Parties shall eliminate discrimination against women in other areas of economic and social life in order to ensure on basis of equality of men and women, the same rights, in particular, the right to family benefits, the right to participate in recreational activities, sports and all aspects of cultural life. Article 16 (d) enjoins the State to ensure on the basis of equality of men and women, the same rights and responsibility as parties, irrespective or their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.<sup>41</sup>

In *Madhu Kishwar v. State of Bihar*,<sup>42</sup> the Apex Court considered the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and held the same to be integral scheme of the Fundamental Rights and the Directive Principles. Article 2 (e) of CEDAW enjoins the State Parties to breath life into the dry-bones of the Constitution, International Conventions and the Protection of Human Right Act, to prevent gender-based discrimination and to effectuate right to life including empower-ment of economic,

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<sup>38</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi,2015, p397.

<sup>39</sup> *Gaurav Jain v. Union of India*, AIR 1997 SC 3021

<sup>40</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi,2015, p398.

<sup>41</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi,2015, p398.

<sup>42</sup> 1996 AIR SCW 2178.



social and cultural rights. Article 2 (f) read with Articles 3, 14 and 15 of the CEDAW embodies concomitant right to development as an integral scheme of the Indian Constitution and the Human Rights Act. Section 12 of the Protection of Human Rights Act charges the National Commission with duty to ensure proper implementation as well as prevention of violation of human rights and fundamental freedoms.<sup>43</sup>

### **17. Right of minor girl to marriage and to conceive**

Under Indian Penal Code sexual intercourse with a minor wife of 15 years or above is not an offence. The Hindu Marriage Act, 1955 and the Child Marriage Restraint Act, 1929 also did not invalidate the marriage of a minor girl. Therefore, these legislations recognised indirectly the right of a minor girl to marriage and thereby to conceive. The parent at this stage cannot be allowed to interfere with the aid of MTP Act to deprive a minor girl of her natural right to conceive. No legislation confer power on any person to subject a minor girl to any unwilling treatment.<sup>44</sup>

### **18. Right of unborn child to birth**

The Matrimonial Laws also recognised the right of unborn child to birth. Where a woman becomes pregnant during the period of wedlock, she cannot terminate her pregnancy at her will. In *Smt. Satya v. Shri Ram*,<sup>45</sup> the High Court of Punjab and Haryana held that termination of pregnancy at the instance of wife but without the consent of her husband amounts to cruelty. In *Deepak Kumar Arora v. Sampuran Arora*,<sup>46</sup> a Division Bench of Delhi High Court has observed that “if a wife undergoes abortion with a view to spite the husband it may, in certain circumstances, be contended that the act of getting herself aborted has resulted in a cruelty.”

In an earlier English case, *Forbes v. Forbes*,<sup>47</sup> it was held that “if a wife deliberately and consistently refuses to satisfy her husband's natural and legitimate craving to have children, and the deprivation reduces him to despair and affects his mental health, the wife is guilty of cruelty.” In *Sushil Kumar v. Usha*,<sup>48</sup> the Court held that aborting the foetus in the very first pregnancy by a deliberate act without the consent of the husband would amount to cruelty. Here the intention of the Legislature may be understood to bring the unborn child safely to the world. Neither wife nor husband individually can take decision to abort the foetus. But their collective decision is certainly a threat to the life of the unborn child. However, such collective decision is also subject to the provisions of Indian Penal Code and the Medical Termination of Pregnancy Act. When there is no possibility of begetting a living child with all human potential it is better to prevent such child to be born and thereby save it from earthly miseries. However, the right of abortion and the right to birth must be decided on the merits of each independent case. Any rigid

<sup>43</sup> *Gaurav Jain v. Union of India*, AIR 1997 SC 3021 : (1997) 2 SCJ 334 : (1997) 8 SCC 114.

<sup>44</sup> AIR 1996 Journal Section p. 136 at 138.

<sup>45</sup> AIR 1983 P & H 252.

<sup>46</sup> 1983 DMC 182.

<sup>47</sup> (1955) 2 All ER 311.

<sup>48</sup> AIR 1987 Del 86.



principles in this concern would lead to unnecessary ailment to the mother and to the child in the womb.<sup>49</sup>

### **19. Right of women to conceive**

One of the primary ends of marriage is the "procreation of children" In an English case *White v. White*,<sup>50</sup> where a husband insisted on a particular sexual practice, which practice would ensure that the wife cannot get pregnancy, the Court held that it amounts to cruelty on his part, as the wife was very anxious to have a child. According to ancient Hindu Law a girl can choose her husband three years after she becomes marriageable. Before 1978 the Hindu Marriage Act, 1955 contained a provision for guardianship in marriage. The right to arrange for the marriage of a minor girl was given to the father, then to mother etc. In the year 1978 this provision was removed from the Act and minimum age of marriage is raised to 18 years for girl and 21 years for boy.<sup>51</sup> In *Leela Gupta v. Lakshmi Narain*,<sup>52</sup> the Supreme Court of India held that breach of minimum age condition does not render the marriage void. The Child Marriage Restraint Act, 1929 also does not invalidate the marriage which violates the minimum age provision but punishes the persons responsible for such violation. Therefore, a girl minor or major possess equal right to a marriage and ultimately thereby to conceive a child. In olden days the age of discretion was considered to be the age of valid marriage. The Family Planning Laws are only advisory but not mandatory. Even the Indian Penal Code permitted cohabitation by a husband with his wife when she is below 16 years of age.<sup>53</sup> The United States Supreme Court in the year 1976 in *Danforth Planned Parenthood of Central Missouriest In re*,<sup>54</sup> held that States might not constitutionally require a married woman to have her husband's consent to abortion hour might they impose a blanket parental consent requirement for unmarried minors. The State does not possess any authority to give a third party an absolute authority, and possibly arbitrary, to terminate the pregnancy. Now the Hon'ble High Court of Madras delivered a landmark Judgment upholding the validity of minor girls' consent in the matter of retaining pregnancy. The Hon'ble Court held that a minor girl cannot be forced to abort her child much against her desire. The Court observed further that "even today deliveries were recorded in the case of teenage girls. The Court quoted the normal delivery of six year old child in Mima, Peru, few years ago. The Court further observed that teenage mothers given proper care had the least complications in child birth. According to medical experts termination of first pregnancy would affect the fertility of the woman. In the present case before the Madras High Court the doctor's report did not disclose any abnormality of pregnancy and moreover the girl was not willing to terminate her pregnancy. The girl is quite capable of understanding things. She does appear to have definite ideas about her future. When counsel asked what she would do if her husband deserted her, she replied. "I am

<sup>49</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p401.

<sup>50</sup> (1948) 2 All ER 141.

<sup>51</sup> Section 5 (3) of the Hindu Marriage Act, 1955.

<sup>52</sup> AIR 1978 SC 1351.

<sup>53</sup> Section 375 Exception, Indian Penal Code.

<sup>54</sup> 49 L.Ed. 2d.788.



not worried" Asked what she would do if her husband disowned the child, she said that she would bring it up herself. Therefore, the court expressed opinion that she could not be deprived of the right to conceive just because she was only of 16 years of age.<sup>55</sup>

### **20. Right to conception, right to abortion, right to birth are conflicting rights**

The right to conception, the right to abortion and the right to birth are very much conflicting rights and became controversial subject-matters of law and procedure of the time. There involved many questions of values on moral, ethical, sociological and legal grounds. Any rigid statute to regulate these rights will pose critical problems and challenges both to the well being of a woman and unborn child. For example when a woman has liberty to conceive, it implies liberty to terminate the pregnancy if she dislikes to continue this, which in turn breeds a new right to kill the foetus. But the right to kill in any manner cannot be inferred from the statute. Or when right to birth (life) is recognised, it implies absence of right to abortion which in turn impose a duty on woman to carry on unwilling child. Therefore today's existing law stands good and serves the purpose in this concern. Under the present law a woman has an absolute discretion whether to conceive or not. At the same time such discretion for abortion is limited by IFC and MTP Act which allow abortion under exceptional circumstances only. The unborn child under present law may lose its life only when it poses a serious problem to its mother's life or to itself where chances to be born alive are bleak. Thus the right to abortion is regulated and the child birth is guaranteed. Coming to the parental right under MTP Act to seek termination of pregnancy of a minor girl, such right is subject to two conditions. One is the maturity of understanding of the minor girl and the other is the opinion of the Doctors. The Madras High Courts judgment in the present case is a landmark decision on the subject. The MTP Act needs changes in this direction. A girl whether minor or major cannot be compelled to terminate her pregnancy when she desires to bear the child.<sup>56</sup>

### **21. Right of abortion**

The Matrimonial Laws also recognised the right of unborn child to birth. Where a woman becomes pregnant during the period of wedlock, she cannot terminate her pregnancy at her will. In *Satyn (Smt) v. Shri Ram*,<sup>57</sup> the High Court of Punjab and Haryana held that termination of pregnancy at the instance of wife but without the consent of her husband amounts of cruelty. In *Deepak Kumar Arora v. Sampuran Arora*,<sup>58</sup> a Division Bench of Delhi High Court has observed that ".....if a wife undergoes abortion with a view to spite the husband it may, in certain circumstances, be contended that the act of getting herself aborted has resulted in a cruelty" In an earlier English case, *Forbes v. Forbes*,<sup>59</sup> it was held that "if a wife deliberately and consistently refuses to satisfy her husband's natural and legitimate craving to have children, and the deprivation reduces him to despair and affects his mental health, the wife is guilty of cruelty. In

<sup>55</sup> Doocan Cromile, dated 3.12.1993 referred in AIR 1996 Journal Section p. 136 at 137,138.

<sup>56</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p403.

<sup>57</sup> AIR 1983 P & H 252 : 1983 Hindu LR 117 : 1983 Marri LJ 153 : 1983 Punj LJ 192.

<sup>58</sup> (1983) 1DMC 182.

<sup>59</sup> (1955)2 All ER 311.



*Sushil Kumar v. Usha*,<sup>60</sup> the Delhi High Court held that aborting the foetus in the very first pregnancy by a deliberate act without the consent of the husband would amount to cruelty. Here the intention of the Legislature may be understood to bring the unborn child safely to the world. Neither the wife nor the husband individually take a decision to abort the foetus. But their collective decision is certainly a threat to the life of the unborn child. However, such collective decision is also subject to the provisions of Indian Penal Code and the Medical Termination of Pregnancy Act. When there is no possibility of begetting a living child with all human potential it is better to prevent such child to be born and thereby save it from earthly miseries. However, the right to abortion and the right to birth must be decided on the merits of each independent case. Any rigid principle in this concern would lead to unnecessary ailment to the mother and to the child in the womb.<sup>61</sup> Abortion is an issue clouded with the questions of morality, infanticide, suicide, ethics, religious beliefs and women's Today, some 50 to 60 million a abortions occur every year throughout the world, up to half of them illegal and dangerous, killing about half a million women annually. Apart from this, at least 500 million women around the world are placed at the risk of repeated pregnancies with serious health problems. However, it is scandalous that such a basic right as the right to help with planning or preventing the birth of child has been denied to women.<sup>62</sup>

Society as a whole has not been very sensitive of responsive to its female members. Women's perspectives and realities have too often been ignored. The low status of women, cultural barriers and low political commitment hinder the recognition of abortion right as a part of women's rights. Because of the backwardness of educational in abortion matters, caused by long taboo and totalitarian pro-nationalism, it appears that the future battle for gaining this right would be waged through the Courts rather than Parliament or State Legislatures. Sooner or later, the right to life and personal liberty as guaranteed by Article 21 of the Constitution would be interpreted in such a way as to include the "Right to Abortion" also.<sup>63</sup>

Since its inception the United Nations has maintained that reproductive freedom is a basic human right.<sup>64</sup> The vast majority of Governments worldwide theoretically recognize this right but in the absence of political will it has not yet been accepted as a part of Municipal law. However, some have taken steps to include the abortion right in their constitution. During the past few decades a number of U.S writers claim that the right to abortion is a woman's absolute right.<sup>65</sup>

## **22. Right regarding Abortion**

Abortion continues to be completely illegal of severely restricted by law in almost every county. Whether and to what extent abortions should be permitted, encouraged, restricted of severely repressed, is a social issue that has divided theologians, philosophers, legislators and

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<sup>60</sup> AIR 1987 Del 86

<sup>61</sup> AIR 1996 Journal Section p. 136 at 139,140.

<sup>62</sup> AIR 1997 Journal Section p. 129 at 129.

<sup>63</sup> *Ibid*, at 135.

<sup>64</sup> *Ibid*, at 131.

<sup>65</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi,2015, p405.



general public. Today in most countries abortions are permitted for reasons that fall into four categories, namely :

- i) to preserve the life of physical or mental well-being of the mother;
- ii) to prevent the completion of a pregnancy that has resulted from rape;
- iii) to prevent the birth of a child with serious deformity, mental deficiency, or genetic abnormality; or
- iv) to exercise birth control, that is to help from having a child for social or economic reasons.<sup>66</sup>

However, some countries in the world have adopted more liberal laws that allowed abortion when requested by the concerned woman. Those who advocate abortion on demand, are implicitly valuing the claim to life of a foetus as less important than the claim of a woman to choose the sex of her family, pursue an uninterrupted educational and service career, or avoid bringing up an unwanted child.<sup>67</sup> Termination of pregnancy is justified only if it is done with the consent of the pregnant woman unless she is a minor or a lunatic one, in which cases, the consent of her guardian will be required. Consent of the husband of a married woman is not necessary.<sup>68</sup>

### **23. Right to love and marry**

Where the parties were both adults, the law does not prohibit them to love each other. They have every right to take an independent decision in regard to the performance of their marriage. The parties who marry each other have the right to live life as per their own wishes. Article 19 of the Constitution enjoins freedom of speech and expression, meet peaceably, but without arms, and move freely; reside and settle throughout the country. And Article 21 guarantees right to privacy. They have a right to live with dignity and honour and make their life meaningful.<sup>69</sup>

### **24. Cohabitation right**

The term "cohabitation" has been defined as a non-marital hetero-sexual arrangement; or a semi-permanent hetero-sexual relationship outside marriage. An eminent American anthropologist Newcomb elaborating these definitions for operational purposes, identifies cohabitating couples as those "living together at least five days a week for at least three months, not legally or religiously married, yet sexually intimate, with or without the goal of marriage in the future"<sup>70</sup> In cohabitation, the person lives on a relatively stable basis sharing room, board and bed. While accurate figures on cohabitation are hard to come by, there is no doubt that it is on the increase as a substitute for marriage, especially in secular circles.<sup>71</sup>

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<sup>66</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p406.

<sup>67</sup> *AIR 1997 Journal Section p. 129 at 131.*

<sup>68</sup> *Ibid* at 129.

<sup>69</sup> *Shamsheer Alam alias Sheru v. State of U.P.*, 2002 Cri LJ 3588

<sup>70</sup> .R. Newcomb : *Cohabitation in America : An Assessment of Consequences*, Journal of Marriage and the Family, 1979, Vol. 41 at pp. 597-603, referred in *AIR 2002 Journal Section p. 28- 29.*

<sup>71</sup> *Ibid.*



Though cohabitation is not a crime, it has not achieved a significant measure of success in rights claims brought under the protection of human rights and fundamental freedoms. In fact, it is another form of sexuality which is practised by a fraction of our population who have secular ideology about marriage and family.<sup>72</sup>

### **25. Development in tradition of marriage and fidelity**

Traditional sexual mores in our society have emphasised abstinence from sexual relations prior to marriage and fidelity to one's own spouse following marriage. In recent years these mores have been increasingly challenged both in theory and practice. In a very recent judgment by a two Judge Bench consisting of Mr. Justice M. Katju and Mr. Justice R.B. Misra in the case of *Payal Sharma alias Kamla Sharma alias Payal Katara v. Superintendent, Nari Niketan, Kalindri Bihar, Agra*,<sup>73</sup> the Allahabad High Court has given a decision giving the green signal to a man and a woman to live together even without getting married. This decision may not be welcomed by our religious leaders and other moral custodians but it is certainly a sign of the breakdown of our traditional sexual mores.<sup>74</sup>

### **26. Cohabitation and criminal law**

From the criminal law perspective, it is said cohabitation is not a crime in India. A man and woman of major age can live together without marrying and can share the same room and bed without violating the provisions of criminal law. Even under the Civil Law, long cohabitation will have the same effect as a legal marriage.<sup>75</sup>

### **27. Legal and personal problems with cohabitation**

Cohabitation entails a number of legal and personal problems for the partners. Since the cohabitating couple does not have a marriage, the partners are not normally under the protection of laws which define and regulate matrimonial relationships. The legal status and rights and obligations of cohabitators are not yet well defined, so that the dissolution of the relationship creates numerous legal problems concerning the disposition of jointly accumulated property, money and debts, as well as the custody, guardianship and maintenance of children born out of such relationships. In law, a woman cannot claim maintenance from the cohabitating man. To claim maintenance under Section 125 of Cr. P.C. the woman must come within the category of "wife". The term "wife" means a legally wedded wife. The same is true under the Hindu and Muslim personal laws. In the legal circle, it is argued that cohabitating couples could avoid many of the potential Legal problems by drawing up a legal contract to protect the rights of each one as

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<sup>72</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p406.

<sup>73</sup> AIR 2001 All 254.

<sup>74</sup> R. Newcomb : *Cohabitation in America : An Assessment of Consequences*, Journal of Marriage and the Family, 1979, Vol. 41 at pp. 597-603, referred in AIR 2002 Journal Section p. 28- 29.

<sup>75</sup> R. Newcomb : *Cohabitation in America : An Assessment of Consequences*, Journal of Marriage and the Family, 1979, Vol. 41 at pp. 597-603, referred in AIR 2002 Journal Section p. 28- 29.



a cohabitating partner. But the legality of such contract is still doubtful in India as it is in many other countries.<sup>76</sup>

### **28. Cohabitation—Whether alternative to marriage**

Many of the legal problems of cohabitation can be solved recognising long-term cohabitation as legal and binding from of relationship for all purposes, and the child born to the couple during cohabitation should also be recognised as a legitimate child born out of wedlock. Since there is no legal requirements for marriage in our marriage laws such as blood test and marriage licence systems, the necessity of wedding ceremony serves no purpose. With the increase in couples living together as a permanent alternative to marriage, the reciprocal rights and responsibilities of men and woman who cohabit without benefit of legal marriage is likely to continue to be problematic and subject to different interpretations by our Courts unless such mutual agreement is recognised as a valid and binding contract within the purview of our contract laws.<sup>77</sup>

### **29. Cohabitation under Hindu Law**

Under the Hindu Law, as originally enacted in 1955 (as also under the Special Marriage Act, 1954) children born of a void marriage were illegitimate and had no rights unless a decree of nullity had been passed at the instance of one of the parties to the marriage. Suitable changes have now been made through the Marriage Laws (Amendment) Act, 1976 to rectify the defect. Now the condition of obtaining a decree for legitimation of children born of void or voidable marriage has been dropped, though such child would not have the status of a legitimate child in the matter of succession. It is important to note that the Hindu Law protects the interest of only that illegitimate child who is born under the void of voidable marriage. The protection is not available to the offspring of cohabitators where the marriage is not proved to be solemnised. Here it may be noted that the common-law marriage is not recognised in our country. A common-law marriage is one that is entered by mutual consent of the partners without being solemnised by a wedding ceremony. The couples live together and present themselves to the community as husband and wife. Since the law does not recognise marriage outside wedding ceremony, the question of property rights of the partners and inheritance rights, are frequently found in the dockets of Courts. Even in countries where common-law marriage is recognised the widows of such relationships often have legal difficulties in establishing their insurance benefits, property inheritance rights of social security benefits.<sup>78</sup>

Cohabitation increases the risk of pregnancy and illegitimate births. In law, the child of an unmarried cohabitating couple will normally be considered illegitimate child of the woman. The right of the putative father is doubtful in our country. The primary onus of maintaining an illegitimate child is on the mother, but by an affiliation order or by contract she may obtain

<sup>76</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p408.

<sup>77</sup> P.R. Newcomb : *Cohabitation in America : An Assessment of Consequences*, Journal of Marriage and the Family, 1979, Vol. 41 at pp. 597-603, referred in AIR 2002 Journal Section p. 28 at 29.

<sup>78</sup> P.R. Newcomb : *Cohabitation in America : An Assessment of Consequences*, Journal of Marriage and the Family, 1979, Vol. 41 at pp. 597-603, referred in AIR 2002 Journal Section p. 28 at 29.





contribution from the father. At one time an illegitimate child was *filius nullius* save for certain purposes of the relationship with his parents, and could in general not inherit property but could acquire it by gift of will. With the passage of time statutes have materially altered the old legal position and have gone a considerable change towards assimilating the position of the illegitimate to the legitimate. Now an illegitimate child may acquire property by gift of will, succeed as intestacy and recover damages for the natural parent's death.<sup>79</sup>

### **30. Sexual autonomy of women is right to privacy**

A woman even of so-called easy virtue was entitled to protect herself against unwilling sexual assault. This was part of her personal liberty which was included in the right to privacy. The Supreme Court in *State of Maharashtra v. Madhukar Narayan Mardikar*<sup>80</sup> aptly observed:

"Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law."

### **31. Use of contraceptives is right to privacy**

The Supreme Court of the United States for the first time in *Griswold v. Connecticut*<sup>81</sup> elaborated and discussed the constitutional right to privacy. The appellant Griswold was the Executive Director of the Planned Parenthood League of Connecticut and he gave information, instructions and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device. The Connecticut Statute made the use of contraceptives a criminal offence even to married couple. The appellant Griswold was sentenced to pay a fine of \$100 for violating the statute and the appeal finally landed in the Supreme Court of the U.S. The Supreme Court held the statute invalid as an unconstitutional invasion of the right of privacy of the married persons. The Court reasoned that the Fifth Amendment in self-incrimination clause enabled the citizen to create a zone of privacy which the Government may not force him to surrender to his detriment. The Ninth Amendment enumerated in the Constitution that certain rights shall not be construed to deny or disparage others retained by the people. The Court held that such law cannot stand in the light of the familiar principles and if allowed to stand will have maximum destructive impact upon the relationship lying within the one of privacy created by several fundamental constitutional guarantee. The Government cannot intrude into the area of protected freedom.

The Supreme Court of the United States in *Eisenstadt v. Baird*,<sup>82</sup> held that the Massachusetts statute which prohibited distribution and sale of contraceptives to single persons was violative of Equal Protection Clause of the Fourteenth Amendment. The said statute, however, permitted the married persons to obtain contraceptives.

<sup>79</sup> Dr. Neelam Kant & Sanyukta Singh, *Law Relating to Protection of Women From Domestic Violence*. Orient Publishing Company, New Delhi, 2015, p409.

<sup>80</sup> AIR 1991 SC 207.

<sup>81</sup> 381 US 479 (1965).

<sup>82</sup> 92 S Ct. 1029 (1972).



Thus, the right to privacy in the marital relation is fundamental and basic, a personal right retained by the people within the meaning of the Ninth Amendment. Thus, the law which prohibited the use of contraceptives either by married or single persons was held unconstitutional being violative of the right of privacy.