

9-18-2009

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Recommended Citation

Agnes, Flavia (2008) "Women's Rights and Legislative Reforms: An Overview," *International Journal of Legal Information*: Vol. 36: Iss. 2, Article 10.

Available at: <http://scholarship.law.cornell.edu/ijli/vol36/iss2/10>

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Women's Rights and Legislative Reforms: An Overview

FLAVIA AGNES*

The Indian Constitution with its mandate of equality (Art.14), non-discrimination on the basis of sex (Art.15) positive discrimination in favor of women (or affirmative action) (Art.15(3)) equality and non-discrimination in employment and service conditions (Art.16), right to life and liberty (Art.21) is an important instrument for the protection of women in India. Although certain protective legislation was enacted in the first thirty years after the Constitution came into being, it is only during the last three decades that women's concerns were highlighted in the official discourse and in the public domain. One major contributory factor towards this change has been the Report of the Status of Committee for Women brought out in 1974 as the background country paper for the forthcoming United Nations Conference in 1975 – the International Year of the Women.

Ratification of International Conventions such as the Convention for the Elimination of All forms of Violence Against Women (CEDAW) by the Indian State in 1993 has been yet another contributor factor which has led to some land mark judgments. These include the Vishaka Guidelines, which amounted to judicial law making in aid of women.

The Indian Women's Movement initiated in the late 1970s has been yet another contributory factor and has served to bring issues of violence against women out of its closeted existence and into the public domain. As a result of this intervention, issues such as rape and dowry became concerns both for the lawmakers as well as for the judiciary. The catalyst for the campaign was the Supreme Court judgment in the *Mathura* rape case. (*Tukaram v State of Maharashtra* AIR 1979 SC 185) Mathura, a 16 year old,

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illiterate, orphan, tribal girl was raped by two policemen while they were on duty. The rape took place within the vicinity of the police station. But since the young girl had eloped with her boyfriend and was brought to the police station due to a complaint filed by her brother, she was viewed as a woman of loose moral character. Since there were no marks of injury, the court termed Mathura a liar. Her evidence regarding the rape was disbelieved. The Supreme Court overruled the Bombay High Court decision and acquitted the policemen.

The result of the public campaigns initiated by women's organizations was legislative reforms which received a prompt reply from the state. If oppression was to be tackled by enacting laws, then the decade of the Eighties could easily be declared as the golden era for Indian women, when pro-women laws were given on a platter. During this period every single issue concerning violence against women taken up by the women's movement was transformed into legislative reform. The enactments conveyed a positive picture of achievement, but the statistics revealed a dismal story. Each year the number of reported cases of rapes and unnatural deaths of married women increased. The rate of convictions under the new and laudable legislation was dismal. Hence their deterrent value was never realized.

The salient features of the 1983 amendments were that in selective cases of custodial rapes (such as in police lockups, prisons, hospitals, rescue homes, remand homes, and so on), the burden of proving consent, once the sexual intercourse was proved, shifted to the accused. Further, a minimum mandatory punishment was imposed: seven years for ordinary rape and ten years for rape of an aggravated nature, such as gang rapes, custodial rapes, rape of children under the age of 12 years, and rape of pregnant women. The amendments also introduced a new offence and made consensual sexual intercourse in certain custodial situations punishable.

In the following years, sexual assault continued to dominate public discourse as the country witnessed a steady increase in reported cases. The National Crime Record Bureau, Ministry of Home Affairs, in its annual publication titled, *Crime in India*, provided the following official statistics of reported cases of rapes in India, over the years:

Reported Cases of Rapes in India 1990-2000

Reporting Year	1990	1994	1995	1996	1997	1998	2000
Number of Reported cases	9518	12351	13754	14846	15330	15031	16496

During the period between 1990 and 1998, the Bureau reported an increase of 92.5% in crimes against women in the country. There was an alarming increase of over 65% in reported cases of rapes within a decade from 1988 to 1998 according to the same source. Even more alarming is the fact that these figures reflect only the tip of the iceberg as a large number of cases still remain unreported due to the stigma attached to the crime.

Despite the positive stipulations, most cases ended in acquittals and rape trials continued to be traumatic for the victim. The relevance of the victim's moral character and sexual history was a contentious point. Despite the demand from the women's movement for its deletion, the stipulation that a victim's past sexual history can be used as a defense for the accused was retained. This continued to provide the scope for the defense lawyers to humiliate the victim. Through shaming the victim in a packed courtroom through crude and vulgar cross-examination, a criminal lawyer could display his legal acumen and obtain an acquittal for his client, or so it seemed.

In the context of rape, the two most prevalent social myths which often translate into dominant legal discourse are that when a woman says *no*, she really means *yes*, and that women who are jilted by their lovers frequently accuse their former boyfriends of rape. The anti-rape campaign subscribed to the traditional notion of rape as the ultimate violation of a woman and a fate worse than death. Marital rape, non-penetrative sexual abuse and other forms of sexual assault remained outside of its ambit.

The enactment focused on stringent punishment rather than plugging procedural loopholes, evolving guidelines for strict implementation, adequate compensation to the victims and timely trials. The concern of legal experts both within and outside the women's movement that stricter punishment would lead to fewer convictions proved to be well founded. Each law vested more power in the state enforcement machinery. Each enactment stipulated more stringent punishment for convictions. This paradigm is contrary to a progressive legal reform theory of leniency to the accused. Can progressive legal changes for women's rights exist in a vacuum, in direct contrast to other progressive legal theories of civil rights? So long as basic attitudes of the

powers-that-be remain anti-women, anti-minority and anti-poor, to what extent can these laws bring about social justice? At best they can be an eyewash and a way of evading more basic issues of patriarchal power structures, and at worse they can be a weapon of state co-option and manipulation to further its own ends.

The rape campaign is a classic example of the impact of public pressure on the judiciary. Favorable judgments were delivered before the amendment when the campaign was at its peak as compared to the post-amendment period. In 1980, Justice Krishna declared, "The court must bear in mind human psychology and behavioral probability when assessing the credibility of the victim's version." Voicing his apprehensions regarding the demand for stringent punishment, he warned, "a socially sensitized judge is a better statutory armor against gender outrage than long clauses of a complex section with all the protections writ into it." The judicial trends of the post-amendment period tend to substantiate his prophetic predictions. But periodically, the Supreme Court and the High Courts laid down procedural norms and issued strictures against a lax and corrupt investigative machinery and a gender biased lower judiciary for their hostile attitude and suspicious approach towards a rape victim.

A similar situation also prevails when examining the legislation from the eighties regarding "dowry harassment" and "dowry death." While domestic violence has always haunted the women's movement and was one of its important rallying points, the analysis which linked domestic violence to dowry rendered the amendments to the Indian Penal Code ineffective.

The term "dowry death" artificially linked "dowry" which is related to property, to "death," which in this context is a criminal act of violence. The complexities of the two separate issues, domestic violence and women's rights over and access to property, were not sufficiently deciphered. The legal reforms did not take into account the vulnerability of a girl not only in her marital home, but also in her natal family.

In each case of cruelty, suicide or murder, the prosecution had to prove not only a link, but a close proximity to the dowry demand and the incident of violence as the offences under the IPC were framed in the language of "dowry," that is, *dowry death* (S.304B), cruelty to wives and *dowry harassment* (S.498A), and so on. If this could not be done, the blame was placed squarely on the victim and she was branded a liar.

In this context, the recently enacted Domestic Violence (Prevention) Act (DVA) has placed the issue of violence against women within a socio-legal framework. The benefit of the enactment is that it sets free the movement from the malaise that has plagued it for a long time: that of attributing all categories of violence suffered by women within their families to “dowry,” and widening the scope of the term “domestic violence.” It acknowledges that domestic violence is a widely prevalent and universal problem of power relationships; it is much more than the culture-specific phenomenon called “dowry death.” And more importantly, it marks a departure from the penal provisions which hinged on stringent punishments to focus on the more positive civil rights of protection and injunction.

The victims/survivors are now able to access the legal system without having to plead “dowry linked” harassment. The Act provides the scope for protective injunctions against violence, dispossession from the matrimonial home and alternate residence. It also provides the scope for claiming economic protection, including maintenance. The wide definition of domestic violence – physical, mental, economical and sexual - brings under its purview the invisible violence suffered by a large section of women and entitles them to claim protection from the courts.

Examining the Act from another angle, I find the single most significant achievement of the enactment is the widening of the scope of protection against violence beyond the category of “wives” and extending it not only to mothers, daughters and sisters, but even to women in informal relationships. Aged women, unmarried girls and widowed or divorced sisters can now seek protection from their relatives under this Act.

Further, an entire gamut of women, whose marriages are suspect due to some “legal defect” on the ground that essential ceremonies were not performed or that the man or the woman has an earlier existing marriage will be able to seek reliefs under this Act. The invalidity of a marriage can no longer be used as defense by the man to dispossess or deny maintenance to this vulnerable group of women.

How this Act will unfold in the courtrooms and whether it will open up floodgates of “sexual promiscuity” charges or whether it will redeem Hindu marriages from the burdensome yoke of monogamy is yet to be seen. But for any matrimonial lawyer concerned with rights for women – whether they are wives, maidens or concubines – the Act opens up new portals of hope.

Hopefully it will also serve to challenge the sexual Puritanism that we find evident in our courts today. How a section of the women's movement, with an equally puritanical mindset that has hinged most of its campaigns upon the politicized concept of "Hindu monogamy" will be able to negotiate this Act in days to come is an even more daunting question. The problem will arise when the right of residence of a legally married wife clashes with the right of a so-called "immoral and promiscuous" one. And this will be the moment when we will be forced to confront our own notions of sexual morality.