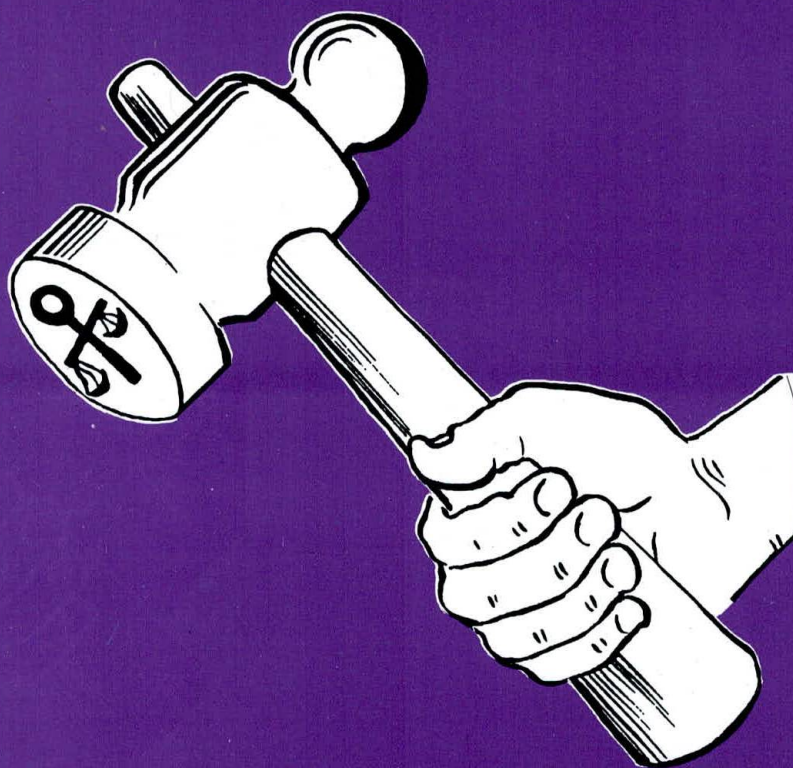


GENDER & JUDGES



A JUDICIAL POINT OF VIEW



Sakshi

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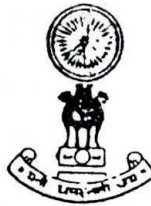
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P R E F A C E

Women constitute almost one half of the globe's population but their contribution to society has been limited, not because they are not capable of making a contribution as significant as that by men but because they have been denied opportunities by men who for their self-interest, desired that women should be confined to certain roles only. They have been victims of exploitation by the male dominated society. The time has come when they should free themselves from the shackles and fight for their rights and their rightful place in society.

I firmly believe that a woman's most effective human right is education - education alone can make her self-reliant and confident. At the same time, men need to be oriented about their obligations towards women. Simultaneously, women need to be empowered to enable them to claim their due share in decision making at all levels - including in positions of authority.

The present report based on some studies conducted by "Sakshi" is informative and educative and reveals that we all have still much to learn about issues concerning women. Judges need to apprise themselves of the various view points that prevail in the society. A feminist perspective of the issues concerning women is equally important. A reading of the report will help to overcome the general male chauvinist attitude that is unwittingly nurtured by us.

CHIEF JUSTICE OF INDIA

New Delhi
December 20, 1996

Preface

In 1989 the Supreme Court of India passed a judgement in which it used the moral character and conduct of a minor victim to reduce the sentence of two policemen who were convicted of gang rape. The behaviour of the minor was described by the bench as "lewd and lascivious". In response to a review petition filed against the judgement, the same bench clarified that they were critical of the victim's conduct i.e. that she had taken seven days to report the crime. While the judgement is not unique, for our purposes, it illustrates in the extreme how terminology used for women (even as it is erroneously used in this case) entails strong moral judgement. Not necessarily because the judiciary views women as less deserving of justice but because of the strong presence of perceptions and myths which stamp women as a gender. The judgement was a setback for hard fought legal changes won by the women's movement, which while enshrined in the letter and spirit of the new law, fell victim to the imperceptible realm of gender inequality. This study is an attempt to address and analyse the realm of gender bias in its relationship to violence against women, its genesis and impact, and how systematically it eclipses women's access to justice.

India's constitutional promise of gender equality comes closest to articulating the relationship between law and life, between men and women. But nowhere has that promise faced greater neglect than in the area of violence against women. Experiences of violence have virtually been excluded from most sex equality arguments. Equality understood and defined in terms of women's concrete experience is absent in all thinking, including judicial adjudication when it comes to violence against women. It isn't as if judges deliberately look to condone such violence but in the words of one judge "perhaps I'm not sufficiently equipped to see where the bias exists. How can I then effectively fulfil the equality promise?"

The conservative nature of judicial decision-making in a country like India uses tradition constantly as an argument and more so in the case of women even when those very same

traditions are violating legally defined rights of women. Law is supposedly a dynamic process and has to keep pace with the changing needs and values of a society without which it will fail to preserve the collective and individual health of its social structure. Yet judgements are replete with references to women's traditional roles and images even when those very same images are instrumental in leading to violence and abuse. Sexual abuse is acknowledged the world over as a sex specific violation. Not only are women overwhelmingly the victims of such crimes but the perpetrators are generally men, a recognition that is integral to how inequality between the sexes occurs and to the way judges understand the violation of women's human rights. The critical issue in the case of gender is the fact that the very same issues, i.e. murder, assault, freedom of expression, right to live without the fear of suppression and abuse, which uniformly are part of the human rights agenda for all people somehow become merely crime specific to women and therefore more complex and less deserving of serious concern. Women are the only gender who face violence first from within the four walls of what they call family and their safe space. To realise a woman's right to live life with dignity guaranteed under article 21 of the Constitution of India, means first to recognise the pervasive indignity of women's condition. This report is an attempt to highlight that condition which is often clouded by myths and prejudices about women and violence which judges, like most of us, harbour. Yet unlike us, judges are positioned to effect change.

This report particularly aims at change, through the acknowledgement that gender equality is possible through an active reorientation of judicial perspectives of women and of the violence they face. In the absence of such change in existing attitudes, the constitutional hope for women remains elusive.

Naina Kapur
(Director, Sakshi)

Acknowledgements

In our effort to persuade and seek change, we wish to especially thank and acknowledge the following amongst many others for their time, patience and contribution to this report:

- To the individual teams of Jaipur (Renuka Pamecha and Kavita Srivastava), Bangalore (Anita Ganesh, Lucy Kumar, Dhanalakshmi and Leena Chakko), Madras (Devika and Rama Priya), Guwahati (Mita Goswami and Arzoo Dutta), and Delhi (E.K. Santha, Shivani Kapur, Advaita Marathe and Avantika Keshwani);
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In particular we wish to thank the 109 judges who were so forthcoming in terms of time and interest for this project, the litigants and victims whose cause we seek to advocate and last but not least for his unwavering support and encouragement, the Hon'ble Chief Justice of India, Justice A.M. Ahmadi (Rtd.)

Sakshi

Some highlights of Judicial Responses

Gender bias arises from stereotyped assumptions about the roles of men and women. Below is a summary indication of myths and stereotypes, often mistaken for gender neutral treatment, which some judges, if not most possess about women. It illustrates how judges understand equal treatment of women in law to mean gender neutral treatment, an approach which can never deal with the complex nature of inequality. It does nothing to enable women to overcome the effects of historic inequalities or present disadvantages. So for example, women in marital relations have and continue to be viewed as subordinate to their spouses and therefore expected to tolerate some degree of violence. It perpetuates the belief that, women who are sexually abused, somehow 'asked for it'. And it implies there are culturally specific justifications for dowry and therefore, for offences committed against women in the name of dowry. The following statistical summary is significant in the insights it provides about the values and attitudes inherent in judicial perceptions of women who come to court in situations of violence. While the study covered a relatively small number of judges (109 judges in all), the cross-section of respondents reflects the views of judges from both regionally and judicially distinct backgrounds. *The statistical highlights set out below should not be understood in purely numerical terms but as reflective of attitudes, which prevail (even amongst a minority of judges) in dispensing justice for women victims of violence.*

I. Domestic Violence:

74% Preservation of the family should be a primary concern for women even if there is violence in the marriage.

51% Women who stay with men who abuse them are partly to blame for their situation.

49% A husband who slaps his wife on one occasion in the course of their marriage does not constitute cruelty.

48% There are certain occasions when it is justifiable for a husband to slap his wife.

In giving advice on what a judge would say to his married daughter (or other female relative) if she was in a situation of domestic violence:

90% would not opt for legal redress in a case of domestic violence involving their daughter or other female relative.

92% believe domestic violence is an under-reported crime and more pervasive than statistics suggest.

34% Domestic violence needs to be addressed in a gender equality training program for judges.

II. Women and Sexual Crimes:

76% Rape as sexual intercourse without a women's consent is an adequate definition of rape.

50% Child sexual abuse is not common.

9% A woman who says 'no' to sexual intercourse often means 'yes'.

68% "Provocative" clothes are an invitation to a sexual assault.

55% The moral character of a woman is relevant in sexual abuse cases.

97% Women fear reporting a case of sexual assault.

III. Dowry

11% Daughters should not inherit property on an equal basis with sons.

34% Feel that dowry still has inherent cultural value.

88% Dowry related offences are on the increase.

IV. Convention on the Elimination of Discrimination Against Women (CEDAW)

78% Never heard of CEDAW.¹

¹ CEDAW is the first International attempt in law to define women's human rights in terms of women's reality. The convention was ratified by the Government of India in August, 1993.

V. Women in the Courtroom:

62% The courtroom atmosphere is not conducive for women to speak openly about violence.

28% Demeaning remarks to or jokes about women are made both within the court and in chambers.

41% Women have access to justice in cases of violence less than 40% of the time.

22% Categorically disagree that there is a concept called "gender bias".

VI. Evaluation of Questionnaire and Methodology:

77% Sakshi's questionnaire was fair.

75% Sakshi's questionnaire was worthwhile.

68% Would be willing to participate in a gender equality training program for judges on violence against women.

INTRODUCTION

A. INTRODUCTION

This report is an effort to make law not only effective and judicious but to make it more equal. It examines that aspect of equality rarely considered, namely, does a woman in a situation of violence receive justice, which is sensitive to her gender? In searching for an answer to this question, it looks at how the judiciary views women who approach courts of law for redress in situations of violence. How does a Court interpret such violence in terms of substantive equality for women? How do women respond to violence? What do women seek when they opt for judicial redress from violence? Do judges understand violence as women experience it? Do they feel the need for opportunities to better understand issues raised in the area of gender abuse?

Given the constitutional promise of equality, this study seeks to find ways which will enable men and women to enjoy access to rights and quality justice on the basis of equality and without discrimination. It is in pursuit of this objective that women who approach courts of redress can do so without being stereotyped by gender prejudice and are instead understood as a class of persons subject to certain gender specific realities associated with being women.

i. Why Violence Against Women?

From 1989 to 1993 there was an overall 25.2 percent increase in crimes against women in India. From approximately 65,000 cases in 1991, this figure increased to 100,000 by 1993. The National Crime Records Bureau in its 1994 report revealed an appallingly low level of convictions and an increasing number of pending cases in crimes against women cases.² In the case of rape for example:

² Crimes Against Women have been identified as those crimes which exist under the Indian Penal Code, 1860 (IPC):

"...Out of the total cases in which trials were completed, 41.5 percent ended in conviction during 1990, 34.2 percent in 1991, 33.8 per cent in 1992, 30.3 per cent in 1993 and 30 percent in 1994. Thus the acquittal percentage is showing an upward trend over the years. The rate of disposal of cases in courts was 23.9 per cent in 1992, 16.8 per cent in 1993 and 17.7 percent in 1994. On an average, 80 per cent of the cases remained pending for trial. This is a disquieting status."

In other words out of every 100 cases of rape that actually went to trial, 80 remained pending. In the remaining 20 cases there were 5.5 convictions and 14.5 acquittals. The over-all average conviction rate for rape offences has been consistently lower than other less serious crimes such as burglary and theft.³ Yet the experience of violence against women cannot simply be understood in terms of either statistics or the existing law.

Women experience violence within their homes, in public places, at work, in education systems and yet none of these forms of violence are effectively covered by the law which claims to define crimes against women. For this reason, women's context and a judicial understanding of that context needs to be acknowledged so that judicial discretion and perspective become more effective for women to access the law.

Sakshi undertook this radical area of inquiry because we have been involved in exploring the linkages which exist in a woman's life on her road to secure final justice. In mapping that road, we began with a victim's own perception of violence especially when it is perpetuated by a man known to her. In context of the home, emotional ties and the

i. Rape (sec. 376 IPC)

ii. Kidnapping & Abduction for different purposes (sec. 363-373 IPC)

iii. Homicide for Dowry, Dowry Deaths or their attempts (sec. 302/304-B IPC)

iv. Torture, both mental and physical (sec. 498-A IPC)

v. Molestation (sec. 354 IPC)

vi. Insulting modesty (sec. 509 IPC)

³ See Crime in India 1994, National Crime Records Bureau (Ministry of Home Affairs)

tendency to revere marital/family relationships have discouraged women from expressing any kind of displeasure or unhappiness at what goes on. But in a situation of violence her logical next step means she must assume the enormous burden of breaking those ties. That step is in most cases unacceptable to her family. She therefore struggles between the violence and the emotional ties that bind her to silence. When she does step out, she does so as a complainant who approaches the police. By and large the police repeat her dilemma in siding with the family and reaffirm traditional concepts of honour, shame, dignity and guilt. Law enforcers do little to encourage her to seek legal redress. At most they burden her with the fear that if her husband is charged, what will become of her? Even then, where a victim of domestic violence still opts to pursue her case, she is directed by the police to undergo a medico-legal examination /report. In that case, the form to be completed requires a doctor to indicate whether the injuries she suffered were "simple, grievous, or dangerous". The Indian Penal Code describes "grievous" hurt in terms of the degree of injury to different body parts i.e. loss of hearing, loss of limb, bone fracture and so forth.⁴ Irrespective of the mental and emotional trauma experienced by victims of domestic violence, police response to her complaint will be determined by whether or not she has suffered a 'sufficient' degree of violence. Even if she appears black and blue, in the absence of a fracture, her injuries will be recorded as 'simple'⁵ in which case, no action will be taken.

Assuming this victim does finally reach a lawyer, she does so with a weakened sense of clarity regarding the violence she has suffered and an ambiguous sense of her rights, both

⁴ Sec. 320 of the Indian Penal Code, 1860(IPC) describes 'grievous' hurt as:

"First- Emasculation

Secondly - Permanent privation of the sight of either eye.

Thirdly - Permanent privation of the hearing of either ear.

Fourthly- Privation of any member or joint

Fifthly- Destruction or permanent impairing of the powers of any member or joint

Sixthly- Permanent disfiguration of the head or face

Seventhly- Fracture or dislocation of a bone or tooth

Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

⁵ This fact was confirmed by I.G.s (Inspector General) of police at a meeting on "Gender Sensitization and the Police" held at the National Police Academy, Hyderabad (May 1996) at which Sakshi was invited to act as a resource group.

of which give rise to even more doubts. The lawyer in addition, becomes a reflection of her confusion because he/she then points out technical loopholes in the law which, render her case ambivalent. Thus for example in the case of rape, a complainant's delay, her behaviour, her relationship with the rapist, her medical report are all used against her technically without any attempt at trying to legally specify her context. Similarly in domestic violence, family assets such as dowry/stridhan or right to property all become issues. Most lawyers are wary about disturbing existing arrangements of family property even when pitched against violence which women may undergo on account of such property.

In other words, the response of lawyers once again differentiates between abusers in the home and other violent criminals, instead of perceiving their similarities. Once again the woman is left both confused and unclear as to what is in her best interest; how her interest compromises the interests of her family and whether in exercising her legal rights she is being selfish and overlooking the interests of that family.

Finally, when a victim does reach the courtroom, all the confusion and dilemmas already encountered by her in the case await her in the courtroom through judicial pronouncements which are not only prejudiced against her, but also marginalise her context. Her gender continues to isolate her. Sakshi, in its history of working with women within their context, has tried to reduce this gender isolation. This research was perceived by us as the logical next step in doing so.

We focused this study on violence against women both because it is Sakshi's area of expertise and largely because violence against women covers a broad spectrum of abuse and discrimination. Our work with grass-root women and organisations is what first brought us in touch with the complexities and challenges thrown up by the issue of Violence Against Women (VAW). Across class and caste, we found issues relating to violence amongst the most complex to deal with, especially when it came to sexual violence. And the issues always involved complacency towards the abused women, anger

at her assertion, social ostracism, silence, myths and so on. Worse still were the large number of women who felt legal redress was beyond their scope or reach. Those who did finally access the system were often disillusioned with the outcome.

From the outset Sakshi found that sexual violence is a baseline crime that affects all women at some point in their lives - whether it is actual abuse or simply the fear of such abuse, all women fall within the broad experience of that crime. The age, class or caste of the woman seem to provide no barriers to this pervasive crime.

We also found that violence against women by definition is primarily violence perpetrated by one gender on another. Informal acquiescence in sexual violence itself has to be the most extreme form of discrimination against women yet it is often the most hidden, passive and almost conspiratorial form. ***It occurs in every area of women's lives at work, at home, on the street, in public and private spaces. It's discriminatory nature stems from the fact that violence is behaviour that hurts, humiliates and instils fear in a woman's life and more often than not remains unquestioned or unchallenged.***

At present the law on violence against women is piecemeal and inadequate. It prevents an integrated response to, and an understanding of, the violence that women experience. Therefore making judicial perceptions and attitudes to a woman's context more sensitive are all the more relevant as part of an effort to develop an integrated gender equal response to women and the law. ***The Gender and Judges Project sought to determine why and how we might try and dialogue with the judiciary to link women in situations of violence to their right to equality.*** Despite the global attention around VAW, its incidence and legal reforms, VAW is pervasive and ever increasing. It was time to ask therefore if there was a need to build perspectives on how judges perceive both VAW and women who experience such violence.

ii. The Objectives of the Gender and Judges Project

In recent years, various arms and institutions of the State have become attuned to issues around gender especially in view of the World Conference on Women held at Beijing in 1995. A gradual recognition of the need to educate various institutions to issues of gender has been expressed both within and outside government. It has led to an increased effort in training on gender issues for the Police, the Indian Administrative Service (IAS), educators and the like. Yet the most important facet of the legal establishment which has yet to be exposed to gender equality education is the judiciary.

Prior to this project our only access to perceptions of women by the judiciary have come from judgements which in themselves expose assumptions about women far removed from women's reality. Those assumptions have often projected women as 'bold' and therefore 'unchaste', 'of loose character and easy virtue', 'prone to lying', 'of a far-fetched imagination', 'motivated by a sense of vengeance' and therefore in one way or another responsible for the violence they suffer. Where a woman complainant is believed, she is perceived as "weak", "helpless" and "ruined for life". Accordingly, such women are met with a response that is not short of being paternalistic or patronising. In other words the criminal justice system does little to expand a woman's ability to exercise her rights with dignity. Instead it limits its response to one of either protecting her or judging her. In the area of violence, that view is a matter of concern given the large number of women exposed to some form or other of sexual violence. The starting point for any study of gender perceptions by the judiciary must therefore be women's experience. And that experience has shown that when women approach the legal system they are faced with a set of assumptions and stereotypes held by the criminal justice system which frequently characterise legal judgements far more than the logic of law itself.

Proving the allegation of gender bias is off course difficult and for that reason more difficult to correct. *The judiciary, unlike other institutions, observes strict protocol and is stamped by the belief that, above all, a judge must remain impartial and neutral. A belief which follows the notion that judges pass judgements according to some objective truth- a truth chiselled and defined in ways largely unaware of considerations of gender equality.*

iii. What is Gender and Gender Bias?

On December 18, 1979, the U.N. General Assembly adopted the Convention on the Elimination of Discrimination Against Women (CEDAW).⁶ It was the first time United Nations (U.N.) convention acknowledged gender. Till then, States applied international and regional human rights conventions sparingly to address violations of women's rights. Even in the case of CEDAW, more governments expressed 'reservations' to this convention than to any other U.N. convention. The Convention is the most significant international statement on gender, because it asserts that irrespective of race, class or caste, in defining the rights of individuals, gender is a distinct area. The Government of India ratified CEDAW on August 8, 1993.

By acknowledging gender, CEDAW subsequently gave rise to a more specific statement that violence against women is also a fundamental violation of human rights.⁷ This fact was specifically recognised by CEDAW read with Recommendation No.19 to the Convention. Article 1 of CEDAW has defined discrimination against women as:

“...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition,

⁶Adopted on Dec. 18, 1979, entered into force on Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR, Supp. No. 46 at 193, U.N. Doc. A/Res/34/180 (1980)

⁷ The Convention on the Elimination of Discrimination Against Women 1979 read with Recommendation No. 19 (eleventh session, 1992) Violence Against Women, New York, 20-31 January, 1992; See also UNITED NATIONS COMMISSION HUMAN RIGHTS REPORT BY SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, 22.11.1994

enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.”

The Recommendation goes on to add that:

“Gender based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include, inter alia

- the right to life
- the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment
- the right to the equal protection of humanitarian norms in time of international or internal armed conflict
- the right to liberty and security of person
- the right to the equal protection of the law
- the right to equality in the family
- the right to the highest standard attainable of physical and mental health, and
- the right to just and favourable conditions of work.”

In light of CEDAW and for the purposes of this study therefore, gender is understood to describe more than just the biological differences between men and women. It underlines those substantive differences, whether real or perceived, which classify men and women as having different roles, different duties and therefore different rights. In this context men and women experience the legal system differently and therefore justice differently. CEDAW helps take the concept of equality beyond formal equality to

address hidden yet systemic forms of discrimination against women which deny them access to justice based on their own priorities and needs.

Gender bias therefore includes stereotyped assumptions about the roles of women and men that disadvantage women. As a result of this stereotyping, women are believed to be and are treated as though they are less entitled, less valuable and less worthy than men. When a legal system perpetuates stereotyped roles of men and women, it reinforces discriminatory treatment. The starting point for a discussion on gender equality education of the judiciary therefore must be the recognition of gender equality as a legal norm. The Constitution of India (in particular articles 14 and 21) and India's adoption of various international conventions include a commitment to eradicate discrimination against women and to achieve gender equality.

Our guidelines for determining gender inequality in judicial perceptions therefore, were threefold:

- i. Where women are denied rights or burdened with responsibilities on the basis of sex;
- ii. When women are subjected to myths and stereotypes about "proper behaviour" which ignores their individual needs and priorities; and,
- iii. When women are treated differently on the basis of sex in situations where sex should make no difference.

Our study showed that many judges ascribe to a basic form of gender inequality bias which includes the assumption that women conform to a single profile or a small range of profiles despite individual differences, and where the inequality is largely founded in ignorance and misinformation regarding the economic and social realities of most women.

iv. What do we mean by gender sensitisation?

Feminist research within India has tried to work with an integrated, vertical concept of what constitutes women's experience. In the last ten years we have begun to realise that gender equality education involves collecting information, collating it and sharing it with those concerned through personal interaction to ensure collective action. Although progress has been made in other sectors, the judiciary is one of the most significant bastions of traditional attitudes around women and violence where much work still remains to be done. As a judicial forum, judges are required to be more just, more fair, and more conscious and informed about women's rights.

Keeping this perspective in mind, the specific objectives with respect to the Gender and Judges project were defined as follows:

1. To analyse gender bias, if any, inherent in judges adjudicating in different Courts (namely, at the District Court, the High Court and Supreme Court levels) in cases of Violence Against Women (VAW).
2. To assess judicial understanding of concepts related to gender specific crimes and to juxtapose this to the experiences of women, including those of female lawyers and female litigants.
3. To document how judges perceive the environment in which they operate in terms of gender.
4. To assess the extent of judicial knowledge and awareness in regard to the Convention on the Elimination of Discrimination Against Women (CEDAW) in addressing women and violence as a human rights issue.
5. To provide recommendations on the form and content of gender equality training for judges with reference to violence against women.

v. Methodology

To gather information for our research, we realised the need to have broad based representation for which we identified five centres: New Delhi, Jaipur, Bangalore, Madras and Guwahati. Ad hoc responses to the project were also forthcoming from Punjab and Haryana, Uttar Pradesh and Bombay. Our research led us to a 109 Judges at the District Court, High Court and Supreme Court. This too called for a method of personalising perceptions, an approach which had proved successful with the Tata Institute of Social Sciences, Lal Bahadur Shastri Academy (the IAS Training Institute in Mussorie) and others involved with gender equality education. We also further developed a comprehensive questionnaire administered through a participatory process. Each Centre consisted of a team of one lawyer and an activist who held joint consultations with participating judges. The teams assessed their survey of Judges at each Centre and forwarded their findings to Sakshi where those findings were analysed and documented for this final report.

vi. Endnote

In the case of violations of women's rights, the law has been inadequate, leaving women's rights campaigners to turn to the law reform process for redressal. Yet effective reform only occurs when ideas and perceptions are receptive to redefinition. Ours is a humble attempt to do just that - to redefine and inform; to make that critical link between redefinition and women's rights and to sensitise and inform judicial perceptions/attitudes about the nature and importance of that link.

JUDGES

B.JUDGES

i.Contextualising Judges

Before pursuing substantive questions about violence against women (VAW), it was important to contextualise judges in terms of background and family. In many ways, this portion of the questionnaire helped us place judges and their views and show that despite an oath committed to “neutral” and “impartial” justice, judges, like others, are clearly a product of their conditioning. In fact many

If you could imagine a life after this one, would you choose to come back as:	
a) a man	63%
b) a woman	18%
It does not make a difference	5%
I do not believe in rebirth	1%
As a human being	1%
Either one	2%
No reply:	10%

respondents were candid about their privileges as men even before they considered their advantages as judges. When asked whether a particular judge preferred to be born again as a man or a woman therefore, the majority opted for the former. That preference was accompanied by a common belief that as judges see it, “women’s identity in society is submissive and subjugated to various rules and regulations imposed on her by society.” Most judges are resigned to accepting certain assumptions about the role of men and women in society, which included the following:

- ours is a ‘male-dominated society’;
- a man’s life is much easier than that of a woman;
- as mothers and as wives, women have far greater responsibility in society than men;
- the known difficulties of being a woman are sufficient to want to be born a man;
- biologically, men are superior.

Having acknowledged the burden of being a woman, few judges redefined roles when asked what they understood to be the role of "a husband" and of "a wife" respectively. Traditional perceptions were paramount. Husbands emerged as 'protector' and 'breadwinner' as well as 'friend, philosopher and guide' for their wife and family. The husband was also identified as one who could "inculcate moral values in family members." The majority of judges categorically viewed the husband as head of the family. Most judges surveyed were married to women who did not attend work outside of the house. Not surprisingly, a wife's primary role was understood by them to be one of 'home maintenance' and 'child rearing'. At a philosophical level comments were forthcoming about equality in absolute terms, such as a husband and wife are 'two sides of the same coin' or 'two wheels of the same chariot', but in practice, the underlying assumption was that the home is a woman's primary responsibility.

Given this traditional understanding of marriage and marital roles, 77% of judges were strongly of the view that their daughter would be better off today married compared to 8% who felt she was better off single, a view which had more to do with 'social norms and conditions' than the best interests of a daughter. An overwhelming number justified their stand on the basis that "a woman's life remains incomplete and unprotected unless she gets married." Marriage was viewed as the ultimate 'safe haven' for a woman that ensures "psychological security." According to one view: "marriage is a must. It is practical. Every human needs love and affection. It is an organised way of enjoying things in the world." At times judges located this view in Indian mythology, no less than the Ramayan.⁸ "On the basis of the Ramayan, one can say that a woman has to live life with a man. It means a woman's life is incomplete without a man."

⁸The Ramayana is commonly believed to be written by the sage Valmiki circa 5th-6th century B.C.. Ramayana is a pronouncement of the proverbial victory of 'good' over 'evil'. The 'good' is embodied in Rama the son of Dashratha, the king of Ayodhya. Rama signifies truth, justice and piety. The 'evil' is Ravana the king of Lanka, who kidnaps Sita (Rama's wife) and forces Rama to declare war on him. Sita has been touted as the 'ideal' Indian woman. The common belief is that Sita signifies 'sacrifice' and 'virtue'- qualities that all Indian women should possess. Sita's 'agni pariksha' (test by fire) is still seen as the ultimate proof that a wife can give of her virtuosity. A fact

Would you agree that your daughter or sister (or any other female relative) is better off today married or single.

Married 78%

Single 8%

Depends 9%

If we are to draw on Indian myths, it is true that Ram and Sita is projected as the eternal marriage, a coupledness which is constantly resurgent in each generation and in our culture, as the ideal. But the logical end to this coupledness is that whatever crisis Ram and Sita suffered, both individually and together, Sita ultimately opts

out of that very coupledness. She chooses instead to return to the earth, an earth goddess both autonomous and complete, far more powerful and creative than coupledness ever allows her to be. Coupledness never acknowledges the power of her sacrifice so when cast out of that coupledness by Ram, Sita chooses instead to raise her sons, send them to Ram, and herself never return.

Consistent with the belief that woman as wives must be self-sacrificing for the sake of the society, judges felt that violence should never be a basis for marital break-ups. Instead, it was argued that 'even if the husband is cruel, the wife must try to change him' given that 'marriage provides the necessary status and security a woman requires to survive in society.' Presumably, these advantages are bestowed on the wife by the husband even if he is an abuser.

According to judges, marriage assumes an all - consuming presence in the life of a woman and it is only through marriage that she acquires the following:

- personality
- family
- security
- sex

that has been pushed to oblivion is the statement that Sita makes when she refuses to stay with Rama after her 'agni pariksha'. Instead she withdraws and returns to her (literal) mother, Earth.

- children
- Social acceptance
- a settled mind
- companionship
- understanding and tolerance
- peace
- civility
- fulfilment
- dignity
- motherhood

In addition to these perceptions, judicial responses to what generally constitutes ‘improper’ behaviour for a woman further established traditional gender bias. When asked therefore, what they would describe as “improper” behaviour for a woman, judges expressed the following:

- ⇒ 71%: Where their daughter (a college student) returns home at 12:00 p.m.
- ⇒ 23%: A girl who wears a salwar kameez without dupatta, a sleeveless blouse, jeans or a short skirt
- ⇒ 74%: A woman who gives sexual services to a man for economic survival
- ⇒ 36%: A battered woman who leaves her children and her husband
- ⇒ 61%: A woman who leaves her husband because he insists on sexual intimacy
- ⇒ 48%: A woman who sees her husband as a provider
- ⇒ 72%: A woman who has had sexual intimacy with more than one man
- ⇒ 47%: A woman who has male visitors in her husband’s absence
- ⇒ 66%: A woman who insists on living with a man before she marries him.

One reason for judges understanding of ‘improper’ behaviour is related to beliefs about ‘cultural’ expectations. When asked whether there are differences in the cultural expectations of women in India compared to other countries, most judges agreed that

there are. While some judges acknowledge that Indian expectations of women are far more rigorous than that of others, some attribute the plight of Indian women to 'western influence':

"...we treat women like mothers, give her respect and important positions in the home.

Do you think there is a cultural difference in what we expect of women compared to what other cultures expect of women?

Yes 79%

No 15%

No reply 6%

Only after westerners came did we start disrespecting our wives....". Ironically, others viewed her position as a positive outcome of Indian culture: "...we have a sublime culture. *Women are expected to love better, to be affectionate, to be tolerant of torture as well as a useful and rare model to others... women are more tolerant. They are the reason why marriages last. If a man cannot slap his wife,*

who can?"

By and large, the family was rated as the icon of Indian culture. Not only was it viewed by judges as a distinct and virtuous preserve of Indian culture but one dependent on woman's role to keep it so. In the family "the husband is God"; "woman is a Goddess" and a "wife can have no sexual relationship with anyone other than her husband." In the larger picture therefore, the ideal Indian woman emerged as both a good mother and housewife where the house is the husband's castle in which she remains humbly subordinate. Within that cultural picture is a version which expects virtue and perfection from women without any sexual, social or emotional choices for her either within marriage or outside of it. With this cultural picture in mind, judges were asked to describe the three most serious problems they can anticipate for their daughter (or other female relative) as a woman in India today:

- i. ***Fifty percent of judges identified violence against women*** as a matter of primary concern. A view consistent with the majority opinion is that of all laws for women, violence-related laws were the most deficient.
- ii. ***Twenty-eight percent*** identified ***“reputation”*** as the second most serious problem a female relative will face. At the same time the onus to maintain one’s “reputation” according to judges lies with the women which means adhering to certain expectations such as: “behaving like a soft woman”; “balancing her behaviour”; “upholding Indian culture”; “being an ideal housewife”; “avoiding attraction to fashion”; “checking her manner of behaviour with men”; and above all “taking extra precaution to see that her reputation is not affected.”
- iii. Discrimination and economic independence were also identified as serious concerns which female relatives will have to face in today’s world.

Our survey indicated that, the judges interviewed came from largely conservative backgrounds where traditional notions of family, marriage, men and women, are adhered to; a context which clearly influences the way judges respond to women (including their own daughter or other female relative) in family situations. Yet family situations are the context in which women form relationships - a reality that finds little space in judges ‘cultural’ notions of what marital relationships should be. Marriage is viewed as the ultimate ‘safe haven’ for a woman. ***Despite that, judges believe the most serious problems they could envisage for their daughter (or other female relative) as a woman in India today is violence and that the perpetrator of such violence is commonly a male family member.***

ii. Women and Violence (General)

Given that violence figured as a prominent concern for most judges even with respect to their own families, we invited comments on violence against women in general. Having identified sexual assault, sexual harassment, dowry harassment, molestation, domestic violence and mental harassment as existing

forms of violence, 34% of judges recorded rape as the worst kind of violence a woman could face. At the same time, except for **14% of the judges, the majority felt that women must share the blame for what happens to them in situations of such violence, especially in cases of dowry harassment, sexual harassment and domestic violence.** In cases

Do you think women must share the blame for violence committed against them?	
Should be blamed	64%
Should not be blamed	19%
No reply	7%
Depends	10%

of domestic violence and dowry harassment even where the law does not view the victim as a responsible party, judges attributed blame to 'other' women. In no instance were judges prepared to place the responsibility and liability of violence exclusively with the men who abuse. In the case of sexual assault, sexual harassment and molestation, "her dress and behaviour", "failure to take precautions", and her "provocative"

nature were identified as reasons for why women invite violence.

Most judges found it impossible to believe that violence against a woman can be the exclusive responsibility of the perpetrator but preferred instead to believe that the victim herself somehow encouraged him. As discussed in a subsequent chapter, that view makes women feel they are somehow responsible for what happened to them. Eighty-one percent of judges accepted that violence against women is definitely increasing. The empowerment of women through jobs, education and increasing self-reliance, paralleled by a rise in social intolerance are, according to them, are partly to be blame. Several judges also felt that a lack of moral instruction, parental care, and religious teaching combined with adverse and sensational press and media coverage, as well as the growth of consumerism have contributed to increasing violence against women.

In the last fifteen years, do you think violence against women has increased or decreased?	
Increased	81%
Decreased	11%
No change	4%
Cannot say	2%
No reply	2%

Over-all, our survey found there is no situation in which judges appear to address what is the impact of violence on a woman complainant even though that approach would be more fair, more just and more real in providing redress to women in situations of violence. While judges appear more concerned about the context in which VAW takes place, this is often used to undermine the seriousness of the crime. So where the context involves family or marital relationships or somehow falls outside popular notions of 'real' violence i.e. street violence, stranger rape etc., judges were less inclined to interpret the law in favour of women. By not acknowledging the reality of women's systemic abuse and the consequent deprivation of power they suffer, judges are unable to incorporate the needs and characteristics specific to women as a gender for achieving equality for women. On the contrary the blame for such violence is instead attributed in part to women who are victims of such violence. The manner in which judges justified that blame became apparent in their responses to specific kinds of violence against women.

iii. Domestic Violence:

Legally, and according to most judges, both physical and non-physical violence amount to cruelty. In practice, such violence is "difficult to prove until and unless the woman is able to show signs of physical violence."⁹ The law offers both criminal and civil redress for battered women yet entrenched attitudes about women, marriage and family often negate these remedies. Over - all, while the blame for domestic violence is attributed to husbands, 40% of those surveyed identified alcohol consumption as the most common reason why husbands commit such violence. No explanation was forthcoming as to why a drunken husband would significantly beat his wife and not any other person either in his home or while making his way home from a drinking spree. Thirty-four percent believe abusive husbands suffer from mental illness and 26% feel men

⁹Gender and Judges project interview with judges (Sakshi, 1995)

abuse their wives out of a sense of power. "Provocation" figured as the last of four causes for domestic violence according to 27% of judges surveyed. When asked to define "provocation" in a situation of domestic violence, judges described "occasions when a man fails to subdue his wife verbally," or when a husband returns home tired and his wife "nags him or is unable to accommodate his tiredness."

Judges per se narrowly defined the parameters of cruelty. *For instance, a significant 51% of judges still felt a slap to the wife on at least one occasion during the marriage does not amount to cruelty.*

The occasions when it is justifiable to do so are:

- a. When a wife behaves indecently;
- b. The husband has been publicly humiliated by his wife;
- c. The wife does not discharge her domestic duties (e.g. she ignores the children or she challenges their paternity.);
- d. When a man needs "to chide his wife";
- e. Because there is nothing wrong in an "occasional beating";
- f. Because one slap is often "a matter of love".

Husband's who beat their wives:

i. areprovoked	27%
ii. have consumed alcohol	40%
iii. come from lower economic classes	27%
iv. have a mental illness	34%
v. enjoy having power over their wives	26%

A slap to his wife by the husband on at least one occasion in the course of their marriage is cruelty

Agree	48%
Disagree	51%
Depends	1%

Domestic violence is a family matter:	
Agree	39%
Disagree	53%
Depends	7%
No reply	1%

Each of these reasons is sufficient for a husband in the words of one judge to "punish her like a child." That such violence did not seem to evoke any sense of outrage and was not perceived as the foundation of more extreme violence reflects traditional views about women and family

and helps explain why **39% of judges agreed that domestic violence is a family matter.** Keeping the 'matter' within the four walls of the home was a priority. According to 74% of judges, preservation of the family is critical at all costs. Any notion of a legal wrong holds little weight against "sacrosanct" notions of family and marriage which explains why a number of judges were sceptical about women who leave their children and the matrimonial home despite being subjected to serious abuse. Some justified this view stating that, **"in our country, family and marriage are two solid institutions so domestic violence should be**

seen as an internal family matter and kept within the household." In advising their female relative in a situation of domestic violence, judges felt women should confront such situations boldly and ensure that "the children don't suffer. Any woman who discards her children is the worst kind of a woman."

Preservation of the family, especially where there are children, should be at all costs:	
Agree	74%
Disagree	18%
Depends	2%
No reply	6%

Having placed the burden of tolerance on women who face abuse in the home, 52% of judges in a contradictory view stated that women who stay with men who abuse them, are partly to blame. Either way therefore the woman is held responsible. **Judges were also**

unanimous in the view that there are situations in which women lie about domestic violence
including where:

i. her ego is hurt;

Women who stay with men who abuse them are partly to blame for their situation:

Agree	52%
Disagree	34%
Depends	8%
No reply	6%

ii. she has been unfaithful;

iii. she comes from a "questionable" family background;

iv. she suffers from an inferiority complex; and

v. she subscribes to a 'western' culture.

Having attributed blame to women for domestic violence and having assumed that women are capable of lying about such abuse clearly influenced

why ***43% of the respondents went on to state that physical assault of a woman in the home is not as serious as physical assault of a woman on the street.*** For the majority, in the latter case, a physical assault is psychologically more harmful and more serious given the public humiliation a woman would face. Further, abuse by a stranger is worse than abuse by one's husband. In other words the identity of the abuser influenced how judges understood the seriousness of the abuse. The distinction between private and public violence determined the nature of redress judges were willing to provide for women. Judicial apprehension in redressing 'private' violence was reaffirmed when judges were asked whether

A physical assault on a woman in the home is not as serious as a physical assault on a woman in the street:

Agree	43%
Disagree	52%
Depends	5%

men who abuse their wives should be banned from the matrimonial home. Fifty-three percent said they should not.

Reasons for this included:

- It is impractical;

- It is the woman who should leave the house and live on her own since she is the one with the problem;
- Such men need to be corrected and not banned from the matrimonial home;
- Reconciliation is a better option to breaking up the family;

Should men who abuse their wives be banned from the matrimonial home?

Agree	33%
Disagree	51%
Depends	12%
No reply	4%

This response came despite the fact that when judges were asked to estimate the incidence of

wife abuse in the state in which they preside, they responded as follows:

- "It is too much";
- "Minimum 5000 incidents per month";
- "Every minute 18 girls are burnt for dowry";
- "At least 3000 such petitions are pending before me and another 3000 before the principal judges";
- "In the course of a year, I estimate 10% of wives are abused in this state";
- "In millions".

While none of these assessments may be numerically accurate, they confirmed growing awareness that domestic violence has increased. Judges are unanimous that domestic violence is an under-reported crime. And still, most judges according to our survey were of the opinion that domestic violence is "a family matter in which every attempt should be made to settle things amicably through the intervention of elders and through other mediation."

When asked what advice a judge would give his/her married daughter if s/he discovered she was in a situation of domestic violence, only **10% opted for some form of legal redress**. The majority felt she should simply "adjust and try to please". "Compromise" was the most common response to this question, which according to judges could be achieved if their female relative adhered to one or more of the following:

- i. A certain degree of tolerance
- ii. Patience
- iii. Temporarily leaving the in-laws house
- iv. Address her own faults and "then change herself"
- v. Try to change the husband's behaviour
- vi. Determine the cause of such violence and then "avoid it"
- vii. Try to adjust with family members
- viii. Use love and understanding to "improve the situation"

Divorce was only recommended in situations where the violence "is unbearable and irreconcilable."

While judges are prepared to recognise more contemporary forms of cruelty against women, they still adhere to an instinctive belief that marriage provides women with the necessary status and security to survive in society, a belief that betrays widespread judicial misunderstanding and ignorance about the incidence of abuse against women in the family. ***From 1989 to 1990 for instance, torture of women by their husbands and relatives went up by 90%. In 1993, 22,000 women in India were reported to have been tortured or abused. This constituted 26% of the total number of crimes against women in that same year.¹⁰***

Against this factual reality, judges still blamed women for the violence committed against them, an assumption which finds no place in any other crime (it is never assumed for example that the victim of a robbery is somehow to blame for the crime). The idea that women are responsible for male violence is perhaps the most impenetrable of all myths. Nowhere has this found greater expression than in situations of domestic violence. It is the durability of this assumption expressed by judges in the course of our interviews that allows so much male violence against women to continue unchallenged, to the extent that even where women have suffered extreme violence, they

¹⁰ National Crime Records Bureau, 1983

are blamed for either provoking or tolerating that violence. These are the very myths that have influenced judicial decision-making in cases of domestic violence.

Domestic violence is the one area of family law, which shows up the clearest split in terms of gender inequality across class, caste and religion. Indian law has still not evolved adequately to deal with battering of women within the home. Even so, law reform extends the definition of cruelty to include physical and mental abuse, which comes close to acknowledging the reality of battered women, whose primary complaint is the mental trauma they endure.¹¹ In practice however, the failure of law to arrest the abuse of women within the home has nothing to do with what women expect of the law or law reform, but everything to do with how judges and lawyers seek to interpret that law for women.

When the exercise of legal rights is sought in the area of family for example, men and women are still viewed as adversaries - a point of view, which shows up the absurdity of 'gender neutral' laws. To treat a woman who has been beaten on an equal footing with the man who has beaten her obscures the line between victim and perpetrator. Though law reform attempted to address that inequality by presuming that women who are beaten should be believed, that single, ad hoc instance of reform can never tally with the asymmetry of marital relations.

The underlying premise used for validating a certain degree of cruelty inflicted on women is the sanctity and indissolubility of marriage, a view reaffirmed in judicial pronouncements. The institution of marriage has been exalted as the "very foundation of civilisation",¹² and projected as something which is in the larger collective interest of society. In other words, the larger social goal of marital/family harmony is often the basis for marginalising concern for lesser degrees of matrimonial cruelty.¹³ The "preservation of

¹¹ Section 498A IPC, 1860

¹² Suresh Nathmal Rathi v. State of Maharashtra 1992 Cri. L J 2106 (at para 16).

¹³ "It is our common experience that minor frictions which get distorted into disruption are really wear and tear of the wedded life. Stability of marriage, being in the interest of individuals, family & society, the spouses be allowed to forgive and forget their differences and to lead the marital bliss." *ibid*, para 19.

marriage" assumes rigid gender roles for men and women as husband and wife, which according to judges in our survey socialises the unequal status of husbands and wives. Accordingly, women are socialised to bear the pressures of marriage and those who withstand the test with silent grace epitomise feminine virtue, lauded even by judges. For those who fail this test, the extent to which their experience of cruelty then gets acknowledged will depend upon the notion of cruelty held by those in a position to judge.

Complaints of matrimonial cruelty are registered, investigated and adjudicated mostly by men operating from notions/knowledge of cruelty as husbands, fathers and fathers-in-law. The term 'male notion/knowledge' refers to knowledge, which is shaped and coloured by the social and cultural context in which the individual is located. Men as sons (privileged from birth), as husbands, fathers and fathers-in-law operate within the same cultural environment as women but from socially superior positions. Their status and position in terms of their social roles shape and explain their separate gender understandings.

Similarly, judges reflect a conservative male concept of marriage associated with "Indian values" which has yet to take into account the changing role of women in a changing society. Marriage therefore has been held to be ".....in the interest not only of the couple, but in the interest of the society... that the marriage tie should not be broken ... it is the duty not only of the couple but everyone in the country whether an individual or an organisation....."¹⁴ including the courts to protect this institution.¹⁵ Such logic legitimises a broad spectrum of cruelty as the routine "wear and tear of wedded life"¹⁶, thus depriving a complaint or challenge by a woman of its validity. Humiliation or ill treatment arising out of "stray domestic quarrels by the mother-in-law"; or "crude and uncultured behaviour by the in-laws or the husband towards his wife" can be treated as "mundane matters of normal occurrence in the traditional Hindu joint families".¹⁷ This description is not exonerating 'crude and uncultured behaviour' [a euphemistic term capable of covering harassment of

¹⁴ibid, para 7.

¹⁵"It is my considered opinion that this court has the obligation to generate the proper social order & to hold the community..." supra, para 15.

¹⁶See footnote 16.

every description] generally, but where such behaviour is specifically directed against the wife/daughter-in-law by other members of the matrimonial household.

This unclear distinction between domestic dispute and criminal cruelty is also part of the legislative framework. Cruelty is a legal ground for dissolution of marriage in civil law and the very same cruelty is punishable under criminal law. The judicial test evolved to distinguish between two kinds of domestic cruelty has been to require a higher degree of proof of cruelty in criminal law than in civil law for matrimonial cases.¹⁸ This forms the basis for differential treatment of cruelty against a wife in law. Hence cruelty in a matrimonial case under civil law falls under the exclusive jurisdiction of the Family Courts, which essentially treats such cruelty as a 'dispute'.¹⁹ With its statutory objective of 'promoting conciliation.... of disputes relating to marriage' and its statutory powers of employing marriage counselors,²⁰ of refusing the litigant the right to be represented by a lawyer,²¹ to adjourn proceedings,²² to facilitate protection and preservation of the institution of marriage and welfare of the family, the civil law through the Family Courts validates a certain amount of abuse and cruelty in the family. The degree of validation granted would vary with the judge's social understanding of dispute and cruelty. The predominant concept of the Family Courts Act is 'preservation of the family', a concept consistent with the belief of 74% judges who agreed that preservation of the family should be at all costs especially where children are involved. This may also explain why 48% of judges felt there were occasions when it is justifiable for a husband to slap his wife. At the same time where women stay in violent marriages, judges were equally ready to blame such women for remaining in violent situations despite that from the victims and litigants interviewed, psychological and economic constraints were critical factors which compelled them to stay in abusive relationships. Rarely is it acknowledged that a woman's failure to react is a result of fear and duress. These contradictory stands reflect a larger conflict, which

¹⁷ Smt. Padmabai v. State of Madhya Pradesh 1987 Cri. L J 1573 (at para 14).

¹⁸ C. Veerudu and Anr., v. State of Andhra Pradesh 1989 Civil Justice NOC 52 (A.P.)

¹⁹ The Family Courts Act, 1984.

²⁰ section 5 & 6 of the Family Courts Act, 1984.

²¹ section 13, *ibid.*

²² section 9, *supra.*

arises when domestic violence is exposed as similar to other criminal behavior with a distinctively gendered character. While most judges might accept that husband's do abuse their wives, 74% of judges were ready to attribute the cause to a wife's provocation, a husband's consumption of alcohol, class and mental illness. All these were labels, which allowed judges to attack male abusiveness obliquely without appearing to attack men in general or marital relationships in particular. For example, where drinking was assumed to be a cause for domestic violence, there was no attempt to understand why men who drink specifically abuse their wives when they arrive home and not anyone else i.e. a stranger on the street or any other member of his family or extended family. It also ignores the fact that men who physically and mentally abuse a spouse are sober. Judicial resistance to acknowledging domestic violence as criminal is reinforced when such abuse is attributed to say, "alcohol consumption." The alcohol/violence myth is one, which not only mitigates men's responsibility for violence but excuses it as behavior which falls outside cruelty.²³

Such an analysis is limited since it precludes any consideration of domestic violence within the family as a product of unequal power relations. Instead, judges reaffirm that inequality by preferring to criticise wife's inability to 'adjust' to her spouse's behaviour rather than directing a husband to alter his. Such behaviour may involve a husband's continued absence from home till late night,²⁴ lack of interaction bordering on intimidation²⁵ and the like, as having contributed to cruelty among other factors. Yet these experiences of cruelty are slighted by judgements which transfer the blame on to a wife's unorthodox, non-adjusting

²³ Excessive drinking by the husband was rejected by the Court as amounting to cruelty. Instead, the court found the deceased wife's inability to adjust to her husband's 'habits' as the reason for her unhappiness. (See *Harischandra and Anr. v. State of Madhya Pradesh* 1987 Cr. L J 1724; *Jagdish Chandra v. State of Haryana* 1988 Cri. L J 1048.)

²⁴ Husband continuously returning late at night soon after marriage held not amounting to cruelty: *Jagdish Chandra v. State of Haryana*, supra; *Sharad Burdhichand v. State of Maharashtra* 1984, Cri. L J 1738.

²⁵ *Sharad Burdhichand*, Supra

In this case the wife of the accused died of poisoning within 4 months of marriage. Her letters disclosed extreme unhappiness on account of her husband's behavior towards her. He hardly spent any time at home, returned very late and rarely spoke with her. These facts disclosed no serious complaint against her husband, according to the Supreme Court. Instead, they were

nature, her high and unrealistic expectations from marriage... and so on. On the other hand, men are mostly viewed as providers and guardians within marriage - a role bestowed upon them by nature and protected by law. Long absences from home, lack of communication and emotional neglect of the wife by a husband is therefore justified as the inevitable (and thereby acceptable) outcome of this primary and serious pursuit of providing. It is this sentiment which led the Supreme Court to find behaviour of this nature not cruel even though it led to a woman's death within a few months of her marriage. The Court observed, it is a "hard fact of life" that some men, like the accused, themselves (i.e. judges), lawyers and others found "little time for the family" in view of their occupation.²⁶

The tendency to blame the victim for causing violence, i.e. provocation, is also a means of minimising the severity of the offence. Our survey revealed that this tendency found legitimacy in judicial perceptions of marital violence. In a criminal complaint of cruelty the degree of proof required will vary with a judge's perspective on marriage and marital relations. *In their own advice to female relatives in situations of domestic violence, only 10% of judges were willing to opt for legal redress.* The majority sought to avoid seeking criminal sanctions against assaultive behaviour and preferred instead to instruct or advise the victim relative to modify her conduct and "try to please" her abuser. In other words to negotiate his violent behaviour against her own willingness to "adjust" hers.

Once certain kinds of behaviour gain legitimacy, any protest or challenge to it is subject to dismissal or even ridicule. Where courts have intervened in such cases, they respond to certain kinds of cruelty in precisely this way. In one instance of abuse for example, pressure was employed by the family to convey its displeasure to the daughter-in-law, eventually leading to her suicide within five months of marriage. Ill-treatment, open dowry demands and burdensome domestic chores formed part of her complaint. Rather than inquire

understood to reveal a woman's sad and morose nature, on not getting the "proper attention which she thought she would get", making her psychotic and open to suicide.

²⁶Sharad Burdichand ibid. Discussed in footnote 29.

holistically into the circumstances contributing to the cruelty she underwent, the court singled out performance of her domestic chores as inadequate to constitute cruelty.²⁷

Consistent with the majority view in our survey, 'compromise and adjustment' of the parties is a dominant characteristic of judgements.²⁸ There is a general assumption that marriage is a partnership/relationship of mutuality and sensitivity towards one another. This despite that the whole burden of adjusting and compromise is unequivocally placed on the woman. This can be gleaned from frequent analogies, which compare the wife to a "transplanted seedling".²⁹ The marital home, it has been held, should be one of warmth and support necessary in new soil to enable the woman to "get into a new mould; the mould which would last her a lifetime."³⁰ In addition to casting the burden of "moulding" on the woman, the analogy reinforces the popular notion of severance of all ties with the natal family upon marriage. Case law reveals the extent to which this notion has contributed to the death of women whose parental response to abuse in the matrimonial home is not unlike that of law enforcers and judges. A certain degree of cruelty is socially acceptable and commensurate with the subordinate status of a daughter-in-law. This, in addition to the deep seated notion that a woman once married belongs to her matrimonial home and must bear her (mis)fortunes with humility is responsible for refusal by a woman's parents to rescue her from matrimonial cruelty. The economic burden also keeps the natal family from receiving their married daughter back to avoid incurring any further expenditure on her. Hence, letters from a woman in distress to her parents expressing unhappiness, suffering and fear for her life are either not taken seriously or tolerated. Ironically these same letters emerge as 'evidence' in a court to prove murder or abetted suicide of the woman. In some cases letters convey unhappiness in marriage,³¹ while in others, unhappiness is linked to ill - treatment

²⁷Smt. Shyama Devi and Ors. v. State of West Bengal and Ors. 1987 Cri. L J 1163.

²⁸See Foot note 15, supra.

²⁹There are a few instances when the courts have used the analogy of a transplanted seedling for bride's entering their matrimonial homes. "Every marriage involves a transplant.... When a tender plant is shifted from the place of origin to a new setting ..." Para 13 Supra; Also see State v. Laxman Kumar and Ors., (1985) 4 SCC 476, Pariben v. State of Gujarat 1992 Cri. L J 2919.

³⁰Footnote 21, supra.

³¹See Sharad Burdhichand, ibid; Subedar Tewari v. State of U.P. & Ors 1989 Cri. L J 923

stemming from economic demands.³² In one case, a woman escaped to her relative's house from her matrimonial home twice in hope that her family would rescue her.³³ She was compelled to return to her matrimonial home despite her stories of torture. Eventually she committed suicide. Letters, however, are still not the most common method of communication in such cases. A woman's family is always aware directly or indirectly of her situation even when not expressly stated. Displeasure is often conveyed by either not sending the daughter-in-law to the natal home at all³⁴ or by not fetching her back from a visit there. The lack or inability of parents to rescue their daughters from matrimonial cruelty is a social reality, which receives little if any attention in judicial decision-making. In advice they might offer to a daughter or other female relative if she were in a situation of domestic violence, with the exception of one judge, no other considered taking their daughter back home as a possibility.

As seen, the delineation of specific gender roles forms the ideological basis which legitimises the unequal burden cast upon women to take a certain amount of cruelty in their stride. Women are thereby presumed to possess a biological capacity to tolerate adversity. Law enforcers apply this socialised knowledge of gender roles to judge her conduct and response when it comes to the violence she suffers. It is the capacity of a wife to tolerate on which the survival of her marriage hinges. This mandate of tolerance and adjustment flow from qualities deemed 'innate' and 'natural':

"Woman must rise and on account of certain virtues which nature has endowed... to the exclusion of the man, due credit must be given to woman Thus, woman who is capable of playing [a] more effective role in the preservation of society... has to be respected. She has greater dose of divinity in her and by her granted qualities, she can protect the society

³²See *State of Haryana v. Anil Kr. & Ors*: 1984 Cri. L J NOC 118 (P&H); *Jaspal Singh v. State of Punjab* 1984 Cri. L J 691; *Kailash Kaur v. State of Punjab* 1987 Cri. L J 1127; *Smt. Padmabai v. State of M.P.* 1987 Cri. L J 1573.

³³*State of Maharashtra v. Vasant Shankar Mhasane & Anr.*, 1993 Cri. L J 1134.

³⁴*Suresh Nathmal Rathi* *ibid* at para 14; see also *State v. Laxman Kumar*, *ibid* (at para 57);.

against the evil. To that extent, woman has special quality to serve society in due discharge of social responsibility." ³⁵

The price of a woman's 'divinity' is high. It is a means to deny her normal human response to pain, indignity and cruelty. Such denial of judicial cognisance does not merely acquit the perpetrator of charges of abetment of suicide; it demeans and ridicules the woman for her inability to forbear by proclaiming her as pathologically unfit and psychotic. ³⁶ This logic has also been commonly applied in cases of abetment of suicide. Apart from faulting the less-than-womanly conduct of a wife who commits suicide to escape routine "wear and tear" of marriage, the courts have given pathological explanation for such behaviours.

As our interviews with female lawyers and litigants revealed, family court judges were the worst culprits of this logic. The courts came in for serious criticism as unsympathetic towards battered women who are prepared to "wash their dirty linen" in public. That separation between public violence and "private" violence was again illustrated in the fact that judges surveyed made a clear distinction between violent behaviour to a woman on the street as opposed to violent behaviour towards a woman in her home. It is a distinction, which has operated to exclude gender-based violence from the human rights agenda. Preservation of family is elevated above the principle of a woman's right to protection or to a life lived with dignity.

The language of human rights in addressing gender inequalities would make it inappropriate for judges to reinforce these traditional boundaries between public and

³⁵Sharad Burdichand *ibid*. Discussed at footnote 34, *supra*.

³⁶In Sharad Burdichand, *ibid*, the Supreme Court set aside the husband's conviction for murder of his wife. The court examined the letters of the deceased wife (married for 4 months), to construe her as a secretive, extremely emotional, sentimental, sensitive, depressive, and psychotic woman prone to suicide. Similarly, in Jagdish Chander v. State of Haryana 1988 Cri. L J 1048 the Court observe: "She was probably a sentimental woman and did not like the drinking habits of the appellant (husband) who cannot be held responsible for her suicide",. See also, Public Prosecutor v. Tota Basava Punnaiah & Ors 1989 Cri. L J 2330 where the A.P. high court set aside the Suicide theory of the sessions court based on the logic that " the deceased might have committed suicide due to strained domestic quarrels in a joint family due to her own extreme sensitiveness, sentimentalism and none of the accused can be blamed for that".

private spaces.³⁷ The present distinction is what makes it presently possible to trivialise complaints of domestic violence and disbelieve family plaintiffs as well as tender advice, rather than redress, in terms of “compromise and adjust”.

³⁷ As discussed in the section on CEDAW, Recommendation #19 on CEDAW is the first time the line between ‘public’ and ‘private’ acts of violence has been abandoned and therefore begin to address the needs of women in situations of domestic violence and/or rape.

iv. Sexual Violence

In 1995, child sexual abuse(c.s.a) received unprecedented attention in light of the sexual abuse of an eight year old child by her father, a senior level bureaucrat of the Home Ministry with the assistance of four others from the ministry. That it took a high profile case to enlighten the community on c.s.a indicates the degree of ignorance and stereotyped notions, which continue to shape social perceptions of sexual violence.

In view of the rapid increase and visibility of c.s.a, it was an appropriate time to ask judges about this crime.

Fifty percent felt that child sexual abuse is an uncommon offence existing only amongst “uneducated, depressed and over-sexed people and /or people with a prostrate gland problem.” According to judges, such abuse is carried out most commonly by servants (28%) and least commonly within the family (19%).

Thirty-one percent of judges did not answer this question indicating they either did not know or wish to know about child sexual abuse. While research on child sexual abuse has only just begun in India, a 1994 study carried out with 348 girls from schools and colleges in Bangalore by Samvada (a Bangalore-based NGO) revealed that 83% of the respondents had experienced some form of sexual abuse. Of these 13% were less than 10 when the abuse took place. Fifteen percent experienced serious forms of abuse including rape, of which 31% were less than 10 years old at the time.

Do you think child sexual abuse is common?

Yes	40%
No	50%
Cannot say	5%
No reply	3%
Decreasing	2%

In 75% of the cases, the abusers were known to the girls abused by them the majority of such persons being male family members.³⁸

Do you think sexual abuse of children happens more often within the family, by strangers or by servants?

Within the family	19%
By servants	28%
By strangers	20%
By all	9%
No reply	24%

In a preliminary report on Child Sexual Abuse workshops carried out with 357 female students in government and private schools in Delhi, Sakshi has so far found that 63% of children have suffered some form of child sexual abuse. Twenty-two percent have indicated experiences of serious sexual abuse. Approximately 29% of the students have been abused by a person in whom they had complete trust. The majority of abusers fell in the category of relatives, father, grand-father or family friends.³⁹

Given this limited understanding of child sexual abuse, judges were asked whether they felt the existing definition of rape as sexual intercourse with a woman without her consent or against her will was adequate. Seventy-six percent said it was. When we presented judges with a situation in which a three year old child has been ejaculated on (but in no way penetrated) by a neighbour and asked them to categorise this crime, they replied as follows:

- i. rape (31%)
- ii. attempt to rape (21%)
- iii. outraging the modesty of a woman (10%)

³⁸ Preliminary Report of a Workshop Series and Survey on Childhood Sexual Abuse of Girls, Ms. Aita Ratnam Ganesh (Samvad, Bangalore, 1994) This finding is consistent with the established psychiatric view adhered to in India that: "Sexual mistreatment of children by family members (incest) is the most common type. Sexual abuse by friends and acquaintances of the child or family is the next most common. Least common is sexual abuse by strangers." (Nelson Textbook of Pediatrics, 14th Edition, USA 1992))

- iv. unnatural offence (14%)
- v. other (i.e. a sexual crime, violence, child abuse) (21%)
- vi. no crime (3%)

Though moved by the seriousness of the offence, judges were not prepared to use their discretion to broaden the interpretation of "rape" beyond its narrow, technical definition of non-consensual penile/vaginal penetration⁴⁰ and therefore categorised the crime as a lesser offence: "Legally speaking it may not be rape but by common sense it is as bad as rape."

In practice, judges have also been reluctant to decide cases in this way. Two recent examples illustrate the point. In the case of the government under-secretary accused of repeated sexual abuse of his daughter, the abuse involved finger/vaginal penetration, finger/anal penetration and penile/oral penetration by the father of the child. *Neither the District Court, nor the High Court, nor the Supreme Court was willing to acknowledge penetration of all three orifices of a minor child by her parent as 'rape'.*

In the words of the District Court judge:

"In order to constitute an offence of rape, there has to be use of the male organ, which must find place in the vagina of the prosecutrix. When [the] male organ comes into contact with the vagina, only then offence of rape or attempted rape would be. The word, "penetration" does not connote penetration of any foreign object. There must be penetration of the male organ and that too in the vagina. Otherwise, the act would constitute a carnal intercourse against the order of nature."⁴¹

³⁹ Child Sexual Abuse: A Preliminary Report based on school workshops in Delhi (Sakshi, 1996)

⁴⁰ It is worth noting that there is nothing in the statutory law of rape which, limits "penetration" to penile/vaginal penetration nor has such a narrow technical understanding of rape ever been challenged but for the existing case.

Similarly the High Court was reluctant to uphold the charge of rape on the grounds of a “traditional” understanding of rape.⁴² Worse still, the Supreme Court dismissed an appeal in limine passing on the responsibility for change to Parliament!

In second and more shocking finding, the apex court revealed how *judicial apprehension around child sexual abuse is rooted in a blanket denial that it exists*. The judgement discloses a disturbing lack of understanding of child sexual abuse, prejudice, and intolerance for a mother who complains of such abuse when it occurs within her family.

The tone of the judgement is determined by its opening observations on child sexual abuse: “Some eerie accusations have been made by a wife against her husband”.⁴³ From the outset the perspective of the court is that “incestuous sexual abuse” by a father is “incredulous”. It is this disbelief which reaffirms public myths and misconceptions about child sexual abuse while the incidence of such abuse in India continues to escalate. Worse still, such disbelief ultimately governs the Court’s unquestioning acceptance of one version (the father’s) and unequivocal dismissal of another (the mother’s). Time and again the court reiterates “the seemingly incredulous nature of the accusations against a father that he molested his infant child (who would have just passed her suckling stage then)”. In other words, fathers are incapable of abusing their children - a view reaffirmed by the Court’s observations in open court that such cases of child sexual abuse are “the rarest of rare case.”

The case deserves special mention as a missed opportunity for the judiciary to inform and deliberate on the nature, extent and impact of child sexual abuse as a new and evolving area of law. Instead it opts for stigmatising women who bring cases of incestuous child sexual abuse deterring others from doing the same. In the present case, the mother was described as a “vengeful” woman merely because she spoke of her marriage as “extremely painful and unhappy.” *The assumption being, women in unhappy marriages*

⁴¹ C.B.I. v. K.C.Jhaku & Ors. order dtd. 31.1.96

⁴² Smt. S. Jakhu v. K.C. Jakhu 1996 (38) DRJ 29

⁴³ Satish Mehra v. Anita Mehra : Judgment dtd. 31.7.1996 in Criminal Appeal No. 1385 of 1995.

have no recourse but to falsely accuse fathers of sexually abusing their own children.

The worst outrage is the father's allegation that the mother herself molested the child to implicate him. That allegation was used to counter the finding of an Indian paediatrician that "on examination of the genitals of the child ... a wide vaginal opening - wider than would be expected of her age group" was present. Surprisingly, the court chose to ignore the paediatrician's finding as well as a first police report filed when the family was in the U.S. and which stated that the complaint of child sexual abuse was "founded". Instead the Court accepted the father's oral submission that a U.S. doctor said the child had not suffered such abuse. No document was ever filed to support this submission. Yet the judge accepted the view of the father and concludes: "The aforesaid question, posed by the petitioner in the context of expressing grave concern over what the mother might do with the little female child for creating evidence of sex abuse, cannot be sidelined by us in considering whether the case should proceed to the trial stage."

Further, the Court having no known experience or exposure to the issue of child sexual abuse, rejected the questioning process of the child by the Crimes Against Women Cell (CAWC, a body trained to address crimes against women and children). According to the Court, the Cell "has practically put on the tongue of the little girl that her father had molested her" inferring that the CAWC was motivated in its case against the father. In this regard, the questions and answers warrant attention:

"The questioner asked the child "what your daddy did with you" and the child answered that he put his finger (and showed her private part).... the next question put to the child was "Daddy puts what else". The answer "Daddy put his bottle" followed by "Where is papa's bottle?" ... The child kept looking at the drawn sketch and pointed to the part between the legs."

It is this process of questioning which leads to a third inexplicable yet disturbing conclusion that "....we have no doubt that the purpose of such questions was to lead the

child unmistakably to the tutored answers.” No explanation is forthcoming as to what would motivate the CAWC to tutor a child about such abuse.

Why did the Court adopt this negative stance? The answer seems apparent in the last portion of the judgement, which addresses “the consequence of this nebulous allegation.” In their view, the Court found the child was too young to “be subjected to cross-questions involving sex and sex organs” and further that “the ordeal would inflict devastating impairment on the development of the child’s personality”. The case was a classic opportunity for the court to educate and inform itself about child sexual abuse. That it chose not to is in itself a denial of equality before law for victims of such abuse. Instead the judgement reaffirms what our survey revealed- serious lack of understanding and information around issues of sexual abuse as experienced by women and children.

Unlike the case of child sexual abuse, in cases involving sexual assault on an adult woman, judicial scepticism was shaped more by myths/prejudice than by the technical-legal limitations of the law. Legally, the crime of rape is defined around penetration i.e. “Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape” (section 375 of the Indian Penal Code) a traditional and very male definition. Seventy-six percent of judges were content with this existing definition of rape. The narrowness with which the judiciary views sexual abuse is also clear from the belief that if it isn’t penile/vaginal penetration, it isn’t rape and if it isn’t ‘rape’, it certainly isn’t serious. In a case in which a minor girl alleged the accused had forcible sex with her on two occasions, the accused was convicted by the trial court. On appeal, the High Court acquitted on the benefit of the doubt, reasonable or not that: **“... he [the accused] might have tried to gratify his passion by necking with the girl and might have touched the girl’s private parts forcibly with his hands causing her to misconstrue and misunderstand the situation”**.⁴⁴ The problem is that when we look at a culture in which rape is grossly unreported, it is because the definition of rape legally has nothing to do

⁴⁴Ravinder D Patil V. St. of Maharashtra 1989 Cri LJ 394

with how violated women feel. This despite that progressive changes took place in the law of rape with the 1983 Criminal Law (Amendment) Act. The most notable inclusion in the new Act was that in certain kinds of rape, it would be presumed the women did not consent. This would include rape by a police officer, a public servant, a jail superintendent, a hospital manager, rape of a female under 12, of a pregnant woman and gang rape. Despite this, very little, if any, change has occurred in the way judges perceive the larger implications, context and nature of rape. Thus ***judges were of the view that penetration of a woman is "physiologically impossible without her consent" and that in any case women are "partially to blame for such abuse."*** Only one judge, a woman, expressed the view "that intention to rape should itself be sufficient to convict a man of rape", adding that marital rape should also be recognised.

One of the most sensitive questions addressed by our survey was whether judges felt the moral character of a woman is relevant in a case of sexual assault. ***Fifty-five percent of judges felt the 'moral character' of a woman is relevant.*** Judges varied on whether her character is relevant at the time of trial or at the time of sentencing.⁴⁵

For some judges therefore, scrutiny of a woman's moral character is essential since she may be "a woman of easy virtue who has provoked someone" and that "it would be a factor in establishing her consent" to sexual intercourse. Many judges were disinclined

The 'moral character' of a woman is of relevance in a case of sexual assault:

Agree	55%
Disagree	47%
Depends	4%

to protect a rape victim if she did not comply with their version of 'virtue' including that virginity is of paramount importance for a woman before marriage. The moral character of the victim was more important to most judges than was the evidence against the accused. In cases of rape therefore, unlike any

⁴⁵ In cases of rape the 'bad' moral character of the woman is used by an accused at the trial stage as a way to prove the woman consented to have sexual intercourse with him. Moral character of the woman has also been used at the time of sentencing an accused as a reason for reducing his sentence. See discussion on sentencing trends.

other crime, the complainant's moral character assumed utmost importance, more so than the evidence itself, making it the only crime where the victim was equally, if not more, responsible than the accused.

Judges' responses to questions about sexual violence showed uncritical acceptance of rape complainants as inherently suspect and capable of making false allegations against men. Sexual violence was amongst the list of crimes against women in which 64% of judges felt women should share the blame. Our courtroom watches⁴⁶ revealed how this response put women victims on trial in a courtroom environment, which is largely unsympathetic and insensitive to their needs. This appeared in part due to most judges knowing little if anything about the nature of rape, including its long term impact on a victim, the prevalence of such crimes and the relevance of relationships with the perpetrator. In the absence of such awareness, judges felt the moral character of a woman complainant in a rape case is relevant either at the time of trial or at the time of sentencing an accused. Unfortunately the statute also made her "generally immoral character" relevant in judging the likelihood of her consent (sec.155(4) The Evidence Act).

The existence of this section has a two-fold effect. First, it allows for examination of the victim's credibility in those instances where the court has reason to doubt or suspect her i.e. where the assailant was known to her. The law's bias is made obvious by the contrasting rule that applies to an accused. By sections 53 and 54 of the Evidence Act, the fact that the accused person is of bad character is irrelevant unless evidence has been given first as to his good character. That brand of discrimination makes it obvious that the victim is to be the focus of the trial. **It is her sexual history, not his act, which becomes relevant.** And when an accused is acquitted, it not only means the prosecution failed to prove its case beyond a reasonable doubt; more significantly it points out that the prosecution failed to prove she was sexually violated. It also suggests that even if she was, it was of her own making, 'bearing in mind her sexual past'. The justification for this kind of questioning of the victim's sexual history is supposedly to test her credibility and

⁴⁶ Discussed in Part E of this report.

protect the accused against a possible false allegation (a concern peculiar only to rape). **It is also consistent with the belief of 34% of judges interviewed who felt women should share some of the blame in cases of violence inflicted on them.** In the case of sexual violence this blame was defined in terms of "her dress and behaviour", "her failure to take precautions" and "her provocative nature" to name a few. Yet no logic can justify the inference that just because a victim says "yes" on some other occasion, it is less likely that she will say "no" this time. The true inference is that "if she wasn't a virgin, no harm was done."

Against this background, the Delhi team conducted an overview of reported judgements on rape from 1979 to 1996 to examine the extent to which judicial decision-making in rape cases is influenced by such 'views'.⁴⁷

From 1980 to 1994, there were 1,28,881 reported judgements of rape all over India. As of 1994, 43,252 cases of rape were pending trial.⁴⁸ Of these we were able to trace approximately 94 cases of rape (from 1979-1996) in law reports, judgements which are largely the outcome of appeals to the High Court.⁴⁹

In approximately 80 of the 94 reported cases surveyed, the trial court convicted the accused. Acquittals were awarded in five cases. On appeal however, *the High Court acquitted in 41% cases, reduced sentences in 53% and increased sentences in 6% of the cases that came before it in appeal.* The following myths/prejudices influenced the outcome of these cases either in terms of acquittals or reduction of sentence:⁵⁰

⁴⁷ Our survey was confined to judgments on rape u/s 375/376 IPC.

⁴⁸ National Crime Records Bureau, 1994. There are no statistics to our knowledge available to indicate the outcome of the balance reported cases. It should be kept in mind that statistics on rape are seriously flawed given the vast amount of under-reporting that exists.

⁴⁹ Reported judgments do not indicate the magnitude of rape in India but are a reference point for analyzing judicial perceptions of rape victims.

⁵⁰ In June 1995, Sakshi was granted an opportunity by the Hon'ble Chief Justice of India to examine sexual assault cases pending before the Supreme Court of India at that time. The opportunity itself was an innovative attempt to isolate myths and prejudices which are prevalent in

- ⇒ The victim (irrespective of age) is "habitual of sexual intercourse"⁵¹ or is of "easy virtue"⁵²
- ⇒ the accused is "young and misguided"⁵³
- ⇒ the victim (a minor) sought to "satisfy her lust"⁵⁴
- ⇒ the victim did not cry for help⁵⁵
- ⇒ "the prosecutrix is not only prone to make improvements and exaggerations but is also a liar disclosing a new story altogether to serve her interest."⁵⁶
- ⇒ "the victim would have agreed to the sexual intercourse even in absence of the promise of marriage because she was in love with the accused"⁵⁷
- ⇒ The victim was a major and thus a consenting party. She was also married to one of the accused⁵⁸
- ⇒ The absence of external injuries on the victim, implied that she consented to sexual intercourse⁵⁹
- ⇒ It is improbable that someone would choose mid-afternoon to rape a woman in a place like the cattle shed⁶⁰
- ⇒ The child (a minor) "had ceased to be a virgin long ago and was used to sexual intercourse"⁶¹
- ⇒ "...that neither blushing nor swaggering, she [the victim] calmly went to the police station 5 km away"⁶²

rape decisions and to create the possibility of intervention by the apex court at some time. To avoid repetition, our findings have been broadly reproduced at Appendix "I" of this report.

⁵¹ Lawrence Kannandas V. St. of Maharashtra 1983 Cri LJ 1819 (also see Chidda Ram v. St. 1992 Cri LJ 4073; Bharat v. St. of MP. 1992 Cri LJ 3218)

⁵² Balvinder Singh v. St. of MP 1992 Cri LJ 715; Mohammed Saleem v. St. 1992 Cri LJ 1959; State of Punjab v. Gurmit Singh (1996) 2 SCC 384 in which Supreme Court refers to trial court reference to the "loose moral character of the victim"

⁵³ Vinod kr v. St. of MP 1987 CriLJ1541

⁵⁴ Satish Kumar v. State 1988 Cri LJ 565 (also see Balasahib V. st. of Maharashtra 1994 Cri LJ 3044)

⁵⁵ State of Maharashtra v. Vasant Madhav Deva 1989 Cri LJ 2004

⁵⁶ St. of Maharashtra v. Chandrapra-kash Keval Chand Jain 1990 (1) SCC 550

⁵⁷ Hari Majhi v. St. 1990 CriLJ 650

⁵⁸ Mahindra Singh V. St. of Rajasthan 1992 cri LJ 1401

⁵⁹ Biram Soren V. St. of W. Bengal 1992 Cri LJ 1666; Dhuli Chand V. St. of Rajasthan 1992 Cri LJ 3397; Kohli Jaga Rana V. St. of Gujarat 1992 Cri LJ 2080

⁶⁰ St. of Rajasthan V. Srinarayan AIR 1992 Sc 2004

⁶¹ Omi Alias Om Prakash V. St. of UP 1994 Cri LJ135

- ⇒ “Considering the very young age of the accused persons and considering that both of them had suffered disrepute and mental agony, the ends of justice would be met if both accused are awarded a lesser sentence”⁶³
- ⇒ The appellant (accused) was an eligible bachelor and “obviously an attractive catch for girls”.⁶⁴

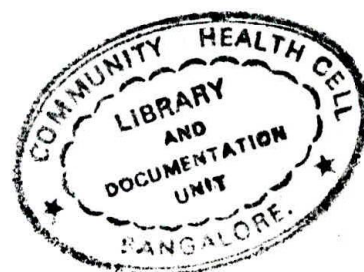
Only women who are “virgins” prior to a rape can anticipate some possible redress. ‘Virginity’ repeats itself not only in the cases surveyed but in the majority view of judges who viewed it as a necessary precondition for marriage; a perception which has influenced corroborative evidence in sexual crimes. Upholding the conviction of the District Court in a case of rape, the High Court of Rajasthan focused on the fact that “the girl was a virgin up to the time of rape. It is difficult to imagine that an unmarried girl would willingly surrender her virtue. ***Virginity is the most precious possession of an Indian girl and she would never part with this proud and precious possession.***”⁶⁵ In this case, the Court upheld the rape as a “deathless shame,” reaffirming the view that loss of her virginity in such circumstances is the worst thing that could happen to the victim in this case. ‘Virtue’ determined the view of 64% of judges who were more likely to believe a married woman than a prostitute who complains of rape. Even so called “progressive” decisions which tend to favour women allow a woman’s virginity, rather than her human rights, to determine the outcome. In 1983,⁶⁶ the Supreme Court for the first time, recognised that the rule requiring corroboration of a rape victim’s testimony added insult to injury. “Why should the evidence of the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.” The judgement, viewed as a landmark in the law of rape, suffers in its reasoning. According to the court, false allegations of rape is a western phenomena where women are moved by economic greed, “psychological neurosis”, “publicity”, “jealousy”

⁶² Balia V.St. of Orissa 1994 Cri LJ 1907

⁶³ Krishna v. State of Karnataka & Raju v.State of Karnataka '1994 (1) SCC 453

⁶⁴ Jagannivasan v.State of Kerala 1995 Supp 3 SCC 204

⁶⁵ Babu v.State of Rajasthan



or the like. In contrast, false complaints in a "tradition-bound, non-permissive" society like India, are rarely conceivable. The judgement proceeds on a dangerous assumption that in India, chastity is the rule and a woman's 'honour' her virtue and she will do anything to defend both. The exception, according to the judgement, is "when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation." In other words, only virgins, decidedly replete in India, are above the law's suspicion when it comes to rape. Those who are no longer 'chaste' have nothing left to loose and so are more apt to lie, for the sake of 'self preservation'? The law clearly places a moral value in favour of single, chaste women which judges seem to indulge. On the rest, it casts a doubtful eye. It shifts the onus of proof onto her and assumes that if she wasn't a virgin then somehow she was to blame; she 'asked for it'. That suspicion characterised a Supreme Court finding in 1983 that "in the case of a married woman it is always safe to insist on corroboration from either direct evidence or circumstantial evidence." In an extreme case, the High Court of Bihar in 1989 acquitted eight policemen and six chowkidars accused of mass rape in the village of Pararia. The judgement exemplifies how moral assessments of rape cast doubt on the women's character in the following terms: "it cannot be ruled out that these ladies might speak falsehood to get a sum of Rs.1,000/- which is a huge sum for them." The judge went on to challenge details of the sexual positions in which one of the victims was raped:

"Radhia Devi has stated in her deposition that she was thrown on the ground on her back. Two chowkidars had caught her legs and hands and three policemen committed rape with her. It was argued by the learned defence counsel, Shri B.N. Choudhary, that such a posture at the time of rape was inconceivable..... I also find much weight in the argument."

The accused were awarded punishment of one year wrongful confinement, using force, causing hurt and trespassing. Equally disturbing is the finding of the Supreme Court in

⁶⁶ Bhardwada Bhoginbai Hirijbhai v. State of Gujarat (1983) 3 SCC

the first test case of police rape under the 1983 law.⁶⁷ The victim, a young village girl, had been coerced to run off to Jammu with her nineteen year old boyfriend. Eventually they were accosted by two police constables and taken into custody. They were locked in separate rooms. The girl was then raped by both policemen. The trial court and High Court convicted both policemen of custodial rape since one of the policemen present that night testified against his colleagues. Both courts invoked the mandatory minimum sentence of 10 years prescribed by law. Nearly four and a half years later, the Supreme Court, on an appeal by the policemen, upheld the convictions but reduced the prison term by five years. The grounds? The victim *was a girl of "easy virtue", "used to sexual intercourse" and of "questionable character"*. By that brand of logic, she "asked for it".⁶⁸

Ironically a majority of judges still said they would resort to legal action if their daughter or female relative was sexually assaulted while the minority opted to keep quiet and avoid social stigma. The latter would advise their daughter as follows :

- ⇒ Forget about it and "be more careful in the future."
- ⇒ Analyse her own act/omission which may have contributed to the situation and "avoid any future incident".
- ⇒ Take action depending on whether the person is known to her or not. If known to her, then she is better off keeping quiet.
- ⇒ If both are unmarried then get them married.
- ⇒ Do not tell others about it and handle the perpetrator personally.
- ⇒ If it is an assault by another member of the family, it is better if it is not brought into the open.

⁶⁷ Prem Chand v. St. of Haryana Air 1989 SC 937

⁶⁸ A review petition was filed against the Court's finding and arose for consideration before the same bench. In its judgement the Court upheld its decision stating that by "conduct" they referred to the "lexographical meaning" of the word i.e. the girl's ten day delay in reporting the offense: State of Haryana V. Prem Chand & Ors. (1990) 1 SCC 249.

⇒ If the act is sporadic on account of provocation or a sudden emotional outburst, it is better not to publicise it.

While these comments reflect a minority view, they still indicate that where some judges have to balance social stigma against criminal human rights violation, which is largely sex specific, former clearly prevails. At the same time, ***97% of judges were clearly aware that women fear reporting a case of sexual assault***. Social stigma and public exposure through the court process were identified as reasons for such fear, while delay was also seen as affecting rape cases adversely.

In terms of punishment judges favoured the existing law, which imposes a mandatory seven year punishment in cases of 'ordinary' rape and ten years in cases of custodial rape. A minority favoured public hanging. While two judges suggested castration, two others felt the existing punishment should be reduced to five years (from seven or ten years).

As difficult as it is to bring a case of sexual assault before the existing legal system, the worst outrage for a woman occurs when the case, having been proved beyond a reasonable doubt, invites less than the statutory minimum sentence imposed by law.¹ Subsequent to the 1983 legal amendments, a mandatory minimum sentence of seven or ten years respectively was introduced depending on the nature of the rape. Such sentences were imposed in only 27 of the 94 cases reviewed by Sakshi (i.e. 27% of the total) at the lower court stage. Four to six years was the average sentence imposed in the balance cases, well below the minimum mandated by law. Even in those 27 cases in which a mandatory minimum was imposed, reductions in sentence occurred in 25 of these cases on appeal to the High Court. In at least 7 of these cases the lower court had imposed a

⁶⁹In 1983 the Criminal Law (Amendment) Act inserted section 376, 376A-376D into the Indian Penal Code to deal with specific kinds of rape perceived as especially harsh. These included rape by a police officer, public servant, jail staff, hospital staff, rape on a pregnant woman, on a female under twelve years of age and gang rape. In such cases, the punishment imposed by the section was fixed at a mandatory minimum of ten years while all other forms of rape were made punishable with a mandatory sentence of seven years. In either case, judges were given a discretion to reduce the mandatory minimum provided "adequate and special reasons" were given.

sentence of life imprisonment on the accused (all in cases involving minors, the youngest of who was four months old at the time of the rape or in cases of rape and murder). These sentences were also reduced substantially by the High Court on appeal in all but two cases. Worse still such reductions were granted on the slightest pretext. This despite that the law calls for "adequate and special reasons" for reducing the mandatory minimum sentence in a case of rape. *In a number of cases judges refer to the age of the accused, his marital and social status, his youth, financial dependence of his family on him, etc. to reduce the sentence, all factors which would have been apparent to a rapist at the time of committing a rape.* Yet these same factors are never referred to when looking to the victim's plight and the impact of rape on her life and future. In the case of rape of a minor for example, the High Court on appeal acquitted the accused on grounds that the victim's evidence was "intrinsically incredible" and "inconceivable." She was "habitual to sexual intercourse", was "responding to the irresistible urge", was "having an attachment to the accused" and "whatever she was doing-she was doing willingly, voluntarily and enjoying the same."⁷⁰ *All assumptions made in the case of a victim who was a minor!*

Irrespective of age, the courts only appear to extend themselves to redress sexual crimes where such crimes adhere to stereotyped beliefs about sex. In a case involving the brutal rape and murder of an eleven year old child the High Court upholding the sentence of life imprisonment for the offence of rape, modified the death penalty for murder to life imprisonment and held, **"it is not a case calling for extreme penalty of death. The appellant who was aged about 22 years appears to have taken the victim not to commit murder, but rather to satisfy his lust"**. The case is illustrative of a pattern that reduces rape to one of sexual appetite rather than a criminal human rights violation of women. In contrast, where an accused happened to be twelve at the time of committing rape on a seven year old victim, the former was released on grounds that "when the offence was committed by the appellant he was not even in his teens. *He was aged about*

⁷⁰Lawrence Kannandas v St. of Maharashtra 1983 Cri LJ 1819

12 years when in some weak moment he attempted to commit rape on Nandwati, a girl aged about seven years." The fact of the girl's minor age, 'family honour', potential years of personal emotional and psychological trauma and the consequent social stigma had no bearing on the sentence when weighed against the negative impact on the life of a **convicted** accused. This despite that 47% of the cases surveyed involved the rape of a minor. Of these 60% involved perpetrators who were in a position of trust, moral ascendancy or authority vis-à-vis the minor. In at least 53% of these cases, sentences were reduced on appeal to the High Court. Often the court attributed sexual experience or deviance to the minor victim for what happened, thereby allowing the accused the benefit of a lessor sentence; the assumption being that women who are sexually aware (irrespective of age) are liars.

These myths clearly influence the reluctance of women to report sexual crimes and thereby subject themselves to unequal protection of the law. In addition, stereotyped assumptions about women and sexual crimes influence why judges are extremely reluctant to look beyond their technical understanding of the law.

It is in light of such judgements that the Supreme Court's pronouncement on sexual violence last year is the first instance in which the judiciary has come closer to understanding the impact of sexual violence as women experience it.⁷¹ In the words of the court:

"It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern.... Rape is an experience, which shakes the foundations of the lives of the victims. For many, its effect is long-term, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition

⁷¹ Delhi Domestic Working Women's Forum v. U.O.I. & Ors. 1995 (1) SCC 14.

to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings...⁷²

The defect in the present system are: firstly, complaints are handled roughly and are not given attention as is warranted. The victims, more than often, are humiliated by the police. The victims have invariably found rape trials a traumatic experience....⁷³

The case is a beginning in acknowledging the formal inequality experienced by women in rape trials and the need to institute mechanism's to ensure a supportive environment, which takes into account a woman's dignity.⁷⁴

⁷² *ibid*, at para 13

⁷³ *ibid*, at para 14

⁷⁴ The case sets out the following suggestions on changes, which need to be introduced for a more fair trial process in cases of rape. At the same time, the judgment falls short in terms of addressing the substantive inequality which women face in terms of sexual offenses as a violation of their human rights and fundamental freedoms:

"In this background, it is necessary to indicate the broad parameters in assisting the victims of rape,

1. The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.
2. Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.
3. The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.
4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.
5. The advocates shall be appointed by the court, upon application by the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

On the issue of sexual harassment as a violation of women's rights, this was a novel concept for most judges. Definitions of sexual harassment, according to judges, were varied but included obscene behaviour, molestation, 'outraging the modesty' of a woman and rape. Most judges viewed sexual harassment as a common experience though all but 10% denied that their own daughter or any other female relative had experienced sexual harassment. Asked on a random basis whether they had ever addressed this question to a family member, *all said they had not*.

Sexual Harassment of women has become an issue of growing concern in India especially with the increasing presence of women in the workplace at the urban and rural levels, private and public sectors.⁷⁵ From 1977 to 1989 there was approximately 24% increase in the number of women working in the rural and urban sectors in India⁷⁶. The fact that women still represent relatively new entrants in the workplace means they tend to occupy predominantly junior and minority positions. That makes women's position in the workplace precarious from the start. Sexual harassment therefore serves to further

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6. In all rape trials anonymity of the victim must be maintained as far as necessary.
 7. It is necessary having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some for example are too traumatised to continue in employment.
 8. Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape." (ibid, para 15)

⁷⁵ Reference is invited to:

"Women Employees and Rural Development: Problems of Employed Women in Rural Areas", Anuradha Bhotia, 1987, page 13; United Nations Commission Human Rights Report by Special Rapporteur on Violence Against Women, 22.11.1994 (pp. 8-17)

⁷⁶ India Economic Yearbook, 1995 pg. 113

discredit women in the workplace "by treating her as a sexual object rather than as a credible co-worker."⁷⁷

Even under the existing provisions of law, however limited, between 1983 and 1993, the number of molestation's increased from 75 in 1983 to 20,194 reported cases in 1990.⁷⁸ The latter figure comprised 50% of the total number of crimes against women reported in 1990. In other words, women are exposed to a greater possibility of sexual violence and therefore have a greater need to seek protection and redress against this crime.

Has your daughter or wife or any other female relative ever experienced sexual harassment?	
Yes	14%
No	85%
Cannot say	1%

In November 1993, the Government of India acknowledged the existence of sexual harassment as an existing impediment to women's equality and opportunity:

"... while the existence of this form of discrimination against women has been acknowledged, there has been little concerted effort to evolve an approach or a policy and a law on the subject..."⁷⁹

Judge's responses revealed that few know, let alone understand, what women mean when they complain of sexual harassment. "Outraging the modesty of a woman"⁸⁰ or "Insulting

⁷⁷ Theresa Lehman v. Toys 'R' Us; Supreme Court of New Jersey 132 N.J.587, 626 A, 2d 445; 1993 N.J.Lexis 712;63 Fair Empl. Prac.Cas (BNA) 242; 641 Empl. Prac. Dec (CCH) p.43, 016 at pg.12 para 615.

⁷⁸ Parliamentary Question No. 2844, Lok Sabha, Mr. M.M. Jacob

⁷⁹ See "Combating Sexual Harassment at work" ILO Seminar Manila Nov. 22-26, 1993 (Country Paper, India) Rajesh Kishore, Deputy Secretary, Dept. of Women & Child Development, Ministry of Human Resource Development and Sashi Jain, Joint Secretary, Ministry of Labor at pp. 1

⁸⁰ s.354 Indian Penal Code, 1860

the modesty of a woman”⁸¹ is the closest we come in law to defining sexual harassment. Often that has meant nothing short of attempted rape.⁸²

Irrespective of such legislation, existing interpretations fail to recognise the existence of sexual harassment as a form of gender discrimination against women. At most penal laws are often applied to cases in which an offence amounts to an allegation of attempted rape or something akin thereto. The problem with a strictly penal law approach to sexual harassment is that it seeks to punish an individual wrong rather than alter the discriminatory conduct which is characteristic of sexual harassment. For this reason, numerous protective legal provisions available in labour laws are also inadequate to deal with the elimination of sexual harassment in the workplace.

In this regard, the Government of India has acknowledged the absence of any “specific law which encompasses the subject of sexual harassment in all its dimensions in the Indian jurisprudence.”⁸³ Further, that “in the absence of any consensus, the starting point in any discourse would have to be the internationally commonly acceptable definition of sexual harassment....”⁸⁴

Such a definition appears to have been recognised and accepted by the Indian Government when it ratified CEDAW in 1993. In its Recommendation on Violence,⁸⁵ CEDAW presents the possibility of perceiving and understanding violence, including sexual harassment, as women experience it. In January 1992, the U.N. Committee on the Elimination of Discrimination Against Women adopted the following recommendation: “Gender Based Violence is a form of discrimination which seriously inhibits women’s

⁸¹ s. 509 Indian Penal Code, 1860

⁸² reference is invited to 1984 Cr. L.J. 786; Cr. L.J. 1254; AIR 1992 SC 2043; 1991 Cr.L.J. 411; 1989 Cr.L.J. 383 H.P.

⁸³ *ibid*, pp. 2

⁸⁴ *ibid*, pp. 3

⁸⁵ General Recommendation No. 19 of the Committee on the Elimination of Discrimination Against Women, Eleventh session, New York, 20-31 January, 1992. Item 7 of the agenda (CEDAW document CEDAW/C/1992/L.1 Add. 15, 29.1.92)

ability to enjoy rights and freedoms on the basis of equality with men.”⁸⁶ The Recommendation found “sexual harassment” as one such expression of sex discrimination and goes on to define the same:

“ 22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace.

23. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.”⁸⁷

In 1992 the International Labour Organisation published a special volume on sexual harassment in its Conditions of Work Digest⁸⁸ setting out the broad parameters for defining sexual harassment in the workplace. According to such parameters, the critical aspect of sexual harassment was described as “conduct which is **unwanted** by the recipient;”⁸⁹ a definition which helps to draw the line between flirtatious, romantic behaviour and sexual harassment. “Sexual attention becomes sexual harassment when it is unwelcome.... Within these broad parameters sexual harassment is essentially a subjective concept: it is for each individual to decide what does and what does not offend them.”⁹⁰ Behaviour which therefore seems amusing or harmless to some may be offensive to others. To many, particularly men, this will appear as yet another unnecessary restraint on

⁸⁶ Ibid, pg. 1

⁸⁷ Ibid, pg. 5

⁸⁸ Conditions of Work Digest: Combating Sexual Harassment Vol. II, 1992 (International Labor Office, Geneva)

⁸⁹ Ibid, at page 10

⁹⁰ Ibid, at page 10

behaviour which is otherwise perceived as 'normal', a reason why women's complaints have often been dismissed as vindictive fantasies or wishful thinking.

In many parts of the world however, including the Asian Region (India being one of the exceptions), sexual harassment has in fact been described in the following terms:

- A **violation of human rights** and an affront to the dignity of the person harassed⁹¹
- A **manifestation of violence against women**,⁹²
- As a form of **inequality of women in social and economic spheres**;
- **Unacceptable conditions of work** which have detrimental effects for both employees and the enterprise.⁹³

Against this canvas therefore, sexual harassment goes far beyond being a simple demand for penal sanction. We have drawn attention to the definition of sexual harassment as understood in international law, with a view to extend the understanding of sexual harassment as a human rights violation that judges can address in terms of sex discrimination and a women's right to a dignified life free from discriminatory behaviour. While the government is presently accountable for injuries in the workplace for which compensation is payable, the type of injury most working women are likely to experience i.e. sexual harassment/abuse is not even included in any concept of injury and cannot be redressed from such a narrow perspective. An issue that becomes all the more troublesome when the workplace for many women in India extends beyond the four walls of an institution. What, for instance, is the redress available to women trained to work as instruments of change in the field of women's rights on behalf of State Governments? Do women have a right to demand that the government recognise the nature of their work and the inevitable risk of sexual harassment? And if so, in what way should government

⁹¹"Gender-based violence and all forms of sexual harassment and exploitation... are incompatible with the dignity and worth of the human person..." Vienna Declaration and Program of Action adopted at the World Conference on Human Rights (Vienna, June 1993)

⁹²Recommendation No. 19 to CEDAW at paras. 22 and 23, *supra*.

⁹³Conditions of Work Digest, *supra*

account? These are just some of the questions judges need to address if an understanding of sexual harassment as discriminatory conduct is to be perceived and redressed as women experience it. At present a narrow understanding of such conduct prevails, which accounts for hidden biases against women who experience sexual harassment but feel no scope for redress.

Our survey on sexual violence against women as understood by judges clarified a number of myths and prejudices inherent in judicial perspectives of women who experience such violence, but to which judges themselves appear to be oblivious. Unfortunately, the moral, psychological and social aspects of rape find little, if any, place in judicial pronouncements which most certainly ignores a vast sea of unreported rape. How many women actually understand any distinction between rape and sexual intercourse? Does she live under conditions where she can really question what she wants? Is she not socialised to feel responsible for a man's sexual feelings towards her? How often does she understand that when her husband, boyfriend, lover, relation, forces himself upon her, it may be psychologically, if not always legally, rape? These questions are troublesome because the ambiguity about what most men 'do' and call sex is how the legal system and judges view rape and thereby refuse to convict men accused of it.

Gender bias as understood by judges in this area was confined to obvious instances of bias in absolute terms i.e. men versus women, rather than in terms of the more pervasive subtle myths and misconceptions which operate to deny women equal rights and opportunities. Keeping that limited understanding of gender bias in mind, 27% of judges still felt there were instances of bias in deciding sexual crimes but many justified this on the following basis:

- i. Women will invite men or give them 'certain indications'. "In such a situation, a man cannot resist the possibility of sexual relations";
- ii. "Women are women's enemies which is why there are strong biases in favour of men";

- iii. Bias only exists where a woman is sexually promiscuous or if she puts herself in a vulnerable positions;
- iv. Several cases of rape are false. "Real rape cases are largely unreported. Others are brought forth because the girl was ditched or she became pregnant on an assurance that he would marry her";

However 36% of judges interviewed still expressed a definite need for gender sensitisation

Do you think there are aspects of sexual crimes against women to which the judiciary needs to be sensitised?

Yes	36%
No/Cannot Say	43%
No reply	21%

of the judiciary in this area of law. Specific areas in which judges expressed a need for gender equality training were human behaviour, psychology, sociology and ethics when it comes to dealing with women and sexual violence. Judges also observed how it might assist them to understand the perspective of a woman who has been sexually abused and

that, "sexual crimes should be understood in terms of their impact on a victim as well as in respect to her social context." Those who rejected the need for such training were content with the belief that "judges know the law".

v. Dowry

In 1991 one dowry death took place every 102 minutes.⁹⁴ Eighty-eight percent of judges interviewed conceded that dowry related offences are on the increase. A lone judge dissented arguing that "nowadays several false cases exist... the Dowry Prohibition Act has been misused."

In our survey, judges also linked dowry - giving to 'culture' making their responses to this section more ambiguous. Judges were unable to distinguish between dowry giving as

Dowry is a practice which still has some cultural value:

Agree	30%
Disagree	61%
No reply	1%
Depends	8%

a crime from the sanctity of marriage. While the majority felt dowry giving has no cultural relevance today, 34% of judges felt that it does. "Cultural value" itself is a term loosely used and which, according to judges, includes the following:

* It has value only to the extent of providing the basic things for starting a home.

* It is linked to community prestige. ("Making a show of giving wealth has social value.")

* It should not be looked down upon "if it is a gift and not extortion."

Judges attribute the pervasiveness of dowry to a number of reasons such as economics, a weak husband (i.e. the inability of husbands to prevent dowry demands) the mother-in-law, and failure of the women's parents to take her back in situations of dowry harassment. Unequal inheritance laws also figured as an economic reason for dowry giving and taking. So we asked judges if they felt their own sons and daughters should inherit equally. While 86% of judges answered positively, 12% still felt they should not:

- ♦ "The amount spent on a daughters' wedding should be adjusted against what she inherits";
- ♦ "Given that the family name and lineal heritage will be protected through my son, only my son should inherit the property";
- ♦ "Traditionally, daughters acquire a separate home when they marry, so the son should inherit";

List in order of priority the cause for dowry offences:

Economic	24%
Weak Husbands	23%
mother-in-law	22%
Weakness of girls parents	21%
Unequal inheritance laws	10%

⁹⁴National Crime Records Bureau, Crimes Against Women, 1991

- “If a daughter is married into a rich family, why should the son be deprived.”

The majority of respondents who approved of equal inheritance for sons and daughters, were unable to express equality when it came to addressing dowry-related violence against their daughter (or other female relative). A lone female judge confided that she would immediately take her daughter back home if she faced dowry related violence. Most however looked to legal redress as a last resort. ‘Keeping the marriage together’ once again characterised most responses. Hence, according to one judge, the best way to solve the problem “is to win over the husband’s family with love and affection.” Another felt it best for the daughter to “keep away from the house during the day and find some respite in work.” Similar responses advised that a wife should possess “patience and avoid any incidence of violence” or “firmly but politely refuse such demands, call a meeting of the elders and offer

Would you like your sons and daughters to inherit property on an equal basis?	
Yes	86%
No	12%
Depends (If married no	
Unmarried-yes)	1%
No reply	1%

her services to augment the economic condition of the in-laws.” Most surprising was yet another contradiction in responses where many judges felt it was best to meet demands for dowry if this would ensure their daughter’s happiness:

* “I would send her with more dowry. This may not solve the problem but it may save the family”.

* “If one has the means, then meet the requirements to avoid harassment to my daughter. If this is not workable

then bring her back home”.

* “If it is possible to satisfy the demand, I would”.

* “Give money if it would secure her happiness”.

The line between crime (even defined legally as crime in the case of domestic violence) and compromise continues to be nebulous for most judges. For those who oppose dowry,

we asked what they were prepared to do in their own life and circumstance to end this practice. Judges proposed the following:

1. Ensure that women become economically independent
2. Educate women
3. Discourage women from wearing gold ornaments
4. Say no to dowry (either taking or giving)
5. "Improve moral values" of the society
6. Socially boycott the practice of dowry
7. Make sure girls are in a position to reject a marriage proposal demanding dowry
8. Refuse to take dowry but "if something is given out of love and respect, why leave what one can get"

With the exception of one judge, ***no one assumed personal responsibility as either parents or judges to end the practice of dowry.*** In their answers the judges laid emphasis on changing women rather than altering attitudes which affect women adversely. Some judges therefore affirmed that while they would not demand dowry for their son, they would have to provide dowry for their daughter. ***Here lies the real crux of the problem with gender bias. It is located basically within the relationships with women within our own lives. Are we willing to take strong stands as husbands, fathers, brothers and sons for protecting the rights, autonomy and legal identity of women we love as citizens? The unlearning of our own traditional and learned perceptions of women in our lives and women as a gender equality education is about.*** And yet despite personal ambiguity around the issue, most judges felt there was no bias against women in the handling dowry offences in court. In fact those who did perceive a bias attributed it to everything but judicial handling of such cases including:

- ⇒ Women have no home of their own
- ⇒ Dowry is a status symbol

- ⇒ Educated and independent girls never oppose dowry demands and some times themselves demand dowry
- ⇒ Mothers-in-law play a very important role in dowry harassment.

Surprisingly, while most judges denied that gender inequality exists in handling dowry harassment cases, 44% still felt the need for gender equality training (while 40% did not).

Some judges urged that training and seminars be conducted in which judges, women's organisations, affected parties and law enforcement agencies jointly participate: "What difficulties exist in dowry-related cases should also be included." Only one judge expressed the need for "psychological training so that judges could adjust their own perspective which may influence their judgement in such cases." Preservation of family unity emerged as the causal concern for such views as well as for why judges

Do you think there are aspects of dowry offences which should be specifically addressed in gender equality training for the judiciary:

Yes	44%
No	40%
No Reply	16%

acknowledged a need for training. "After the event, we should look at what is the best way to heal both the husband and the wife with particular reference to maintaining the family."

Responses to questions about dowry offences exposed a shared ambiguity amongst judges. Sixty-one percent felt dowry has no cultural relevance today, while 35% felt it does. With the exception of one judge, all respondents opted for legal redress as a last resort. Though judges acknowledge a 'cultural' difference in what is expected of Indian women compared to other cultures, 74% argue that preservation of the family, especially where there are children, should be at all costs. That contradiction reflects a dilemma which is similar to one apparent in our discussions around domestic violence: how to balance 'preservation of the family' against women's human rights, a dilemma which is once again apparent in judicial pronouncements.

The Dowry Prohibition Act, 1961 (amended in 1984 and 1986) proclaimed in title and intent the need to eradicate the 'giving and taking of dowry'.⁹⁵ Similarly a 1983 amendment viewed certain kinds of murder as dowry deaths⁹⁶ while the introduction of 'Cruelty by Husband or Relatives of Husband', acknowledged for the first time all manner of domestic cruelty, including dowry, as a criminal offence. At the same time, "not every harassment or every type of cruelty" was declared punishable by law.⁹⁷ While obvious and gross cases of dowry deaths contain emphatic judicial denouncement of this 'pernicious' practice,⁹⁸ undisputed instances of 'giving and taking' are not accepted as dowry offences.

Such judgements are the outcome of a literal interpretation, which betrays the 'limitations' of the written law in adjudication. Both statutory and case law reflect a uniform understanding of the dowry problem - one which taboos an open display of greed by criminalising extortion and extortionary tactics (such as cruelty) but which is comfortable with the ubiquitous system of giving based on expectations and subtle negotiations. Hence, some kinds of 'giving' are termed as dowry, while others may be described as 'gratuitous' giving. 'Legalised' and 'acceptable' giving can no longer therefore be termed as 'dowry', a word which has been tarnished as a criminal offence. Criminal sanctions against dowry have robbed the term of whatever dignity it derived from 'culture' and 'tradition'. Consequently it was necessary to define dowry in a way that would criminalise the grossness yet save the traditional system and status quo beyond the purview of law.

Prior to 1985, the DPA prohibited presents, which were given "as consideration for marriage".⁹⁹ In interpreting that provision, the statute singled out only that portion as dowry, which was given or agreed to be given as consideration for marriage, thereby excluding all

⁹⁵ Statement of Objects and Reasons, Act no. 28 of 1961

⁹⁶ s.304B IPC, 1860

⁹⁷ Although beating and harassment existed in this case, it was held to not amount to cruelty as the wife could not establish that "this was with a view to force her to commit suicide or to fulfill the illegal demands" of the matrimonial family. Para 3 Sarla Prabhakar Wagmare v. State of Maharashtra & Ors.

⁹⁸ Terms such as 'pernicious' practice, social evil, evil practice are liberally used by the courts while deploring dowry.

⁹⁹ Section 2 of the unammended Act no. 28 of 1961.

gifts, cash and expenditure occasioned before, upon and after marriage. Applying this provision in a case, the Delhi High Court elucidated thus:

"...property that may pass hands subsequent to marriage, even months or years after it, merely to save the marriage from being broken... or to save the wife from harassment, humiliation or taunts, on the ground that she did not bring enough at the time of marriage **is not dowry**."¹⁰⁰

In 1985, the term "as consideration" was substituted by "in connection with the marriage."¹⁰¹ Later in 1986, presents given "any time after the marriage", were also included within the definition of dowry.¹⁰² Even as the definition was liberalised, the statute retained the exemption granted to presents given without any demand provided they were of a customary nature and not excessive in value [with regard to the financial status of the giver].¹⁰³ By widening the definition, the amended definition broadened the scope for exercise of judicial discretion, if so inclined, to declare a larger range of 'giving' as dowry.

Despite this, the line drawn in exercising discretion has remained narrow. So much so, that instances of judicial approval granted to certain kinds of 'giving' even on demand, are not unknown. A telling example is the case of Shobha Rani¹⁰⁴ who sought divorce on grounds of cruelty caused by incessant dowry demands. Her husband's letter produced on her behalf read thus:

"Now regarding [the issue of] dowry, I still feel that there is nothing wrong in my parents asking for a few thousand rupees. It is quite a common thing for which my parents are being blamed of harassment."

¹⁰⁰ Madan Lal & ors v. Amar Nath 1985 Cri. L. J. NOC 118 (Delhi).

¹⁰¹ See Dowry Prohibition Amendment Act 63 of 1984, which came into effect on 2 October, 1985.

¹⁰² 43 Dowry Prohibition Amendment Act, 1986.

¹⁰³ Clause(2) of Section 3 of the D. P. Act, 1986

¹⁰⁴ Shobha Rani v. Madhukar Reddi AIR 1988 SC 121

The trial court was inclined to agree with the husband: "Though one would not justify demands for money, it has to be viewed in this perspective. The respondent is a young upcoming doctor. There is nothing strange in his asking his wife to give him money when he is in need of it." The Andhra High Court agreed that there was "nothing wrong or unusual" in asking a "rich wife to spare some money". Fortunate for being rich, the wife was able to access the Supreme Court, which differed from the Courts below and reversed their finding.

In two separate decisions, the Madhya Pradesh High Court concluded that cash amounts given allegedly as dowry were not so. In both cases the trial court convicted the accused for abetting suicide by harassment for dowry. The High court set aside both convictions. In one case was the bride was harassed due to non-payment of Rs.10,000/-.¹⁰⁵ An earlier demand for Rs.20,000/- had been fulfilled but the subsequent demand was not met. The Court dismissed the dowry element on the ground that the earlier payment "was under mutual arrangement and with free consent of the parties concerned without any element of force or duress." Harassment for the subsequent demand was thus not "convincingly shown".

In the second case,¹⁰⁶ the bride's father paid Rs.5000/- on one occasion to the groom's family. A second demand for the same amount remained unfulfilled leading to cruelty which caused the woman to commit suicide. In appeal, the High Court was of the view that the first payment was "gratuitous and not a forced one". *The demand for the second amount appeared to be "obviously ... concocted" as the groom's family was of sound financial status.*

According to the statute, presents given without demand at the time are not dowry, so long as they are customary and not excessive in value in relation to the financial capacity of the giver.¹⁰⁷ The critical deciding factor is not so much reverence for the strict letter of law as the personal perspective of the woman and dowry. Terms like 'no force or duress', 'mutual

¹⁰⁵ Smt. Padmabai v. State of Madhya Pradesh 1987 Criminal L. J. 1573.

¹⁰⁶ Harishchandra & Anr. v. State of Madhya Pradesh 1987 Cr. L J 1724.

¹⁰⁷ *ibid.*

arrangement', 'free consent', 'gratuitous offer', are used interchangeably to suggest that gifts made without any demand do not amount to dowry. The thin dividing line between demand and 'gratuitous' offer in contemporary Indian society remains unexplored and unquestioned by the judiciary.

The play on the word 'demand' is just one way of dissociating legal provisions from the scope and intent of the statute. In cases where demand is apparent and undisputed, the emphasis shifts to another aspect for deciding the case to accord with the court's sociological understanding of both marriage as well as dowry. Even a case of unilateral demand may not be acknowledged by the court as constituting dowry in the absence of an 'agreement' to pay the same.

In 1983 for instance, the Bombay High Court was faced with a dowry complaint.¹⁰⁸ The bride was not sent to the U.S. to join her husband for a year after marriage. The reason lay in her father's refusal to pay Rs.50,000/- demanded by the father-in-law. This undisputed demand, the court held, could not be termed as a dowry demand in the absence of an agreement to pay.

The Calcutta High Court quashed another complaint of dowry demand¹⁰⁹ in a case against the husband's family for continuous demands of costly electronic goods, cash and gold from the wife's family. In the court's view, although in "common parlance" dowry demand is used where property or valuable security is asked of the bride's family, the same may be "given" or "agreed to be given".

¹⁰⁸ In this case the groom's father had demanded Rs. 50, 000 during marriage negotiations, a demand which the bride's father rejected even at that time. This led to disruption of marriage, formalities which were completed on intervention of persons known to the family. This sum was demanded for payment towards air fare of the bride and the father-in-law to join the husband in the U.S. Since, it was not paid, the bride was not sent to join her husband in the states for a year after marriage leading to a criminal complaint for dowry demand. The Bombay High Court quashed this complaint as not constituting dowry demand. In appeal, the Supreme Court set aside the High Court judgment and instead held that a unilateral demand for dowry did constitute an offense under section 4 of the Act. [L. V. Jadhav v. Shankararao Abasaheb & Ors 1983(4) SCC 231]

¹⁰⁹ Shankar Prasad Shaw v. State & Anr. 1991 Cri. L J 639.

For this reason, the 'customary' giving, culturally approved gender roles and the sanctity of the institution of marriage have consciously through statute and judicial pronouncements, been de-linked from criminal law. Pronouncements, which correspond to the view of a substantial minority (35%) of judges interviewed who continue to acknowledge the cultural value of dowry as relevant. By circumventing the criminal nature of dowry giving or taking, judges do not merely acquit the perpetrator of charges of abetment to suicide but in the process demean and ridicule the woman for her inability to forbear by proclaiming her as pathologically unfit and psychotic.¹¹⁰

The Madhya Pradesh high court deserves special mention here. Two separate cases¹¹¹ of bride burning decided in 1986 display uncanny similarity and serve to illustrate the above point. In both cases, the accused were each convicted by the lower courts for abetting the suicide of the victim woman. The High Court set aside the convictions. In both, undisputed instance of taking dowry were explained away as voluntary gifts; the subsequent demands accompanying ill-treatment were dismissed as concocted. The closing paragraphs of both judgements appear verbatim in their analysis of suicide:

"It could well be that the behaviour of the appellant - accused and her husband may not have been up to the expectation of the daughter-in-law... now deceased; and therefore, she might have come to have frustration and pessimism due to her own extreme sensitiveness and sentimentalism. *The*

¹¹⁰In *Sharad Burdichand*, *ibid*, the Supreme Court set aside the husband's conviction for murder of his wife. The Court examined the letters of the deceased wife (married for 4 months), to construe her as a secretive, extremely emotional, sentimental, sensitive, depressive, and psychotic woman prone to suicide. Similarly, in *Jagdish Chander v. State of Haryana* 1988 Cri. L J 1048 the Punjab and Haryana High Court stated: "She was probably a sentimental woman and did not like the drinking habits of the appellant (husband) who cannot be held responsible for her suicide", See also, *Public Prosecutor v. Tota Basava Punnaiah & Ors* 1989 Cri. L J 2330 where, the A.P. High court set aside the suicide theory of the sessions court based on the logic that " the deceased might have committed suicide due to strained domestic quarrels in a joint family due to her own extreme sensitiveness, sentimentalism and none of the accused can be blamed for that".

¹¹¹See footnote 109 and 110 *ibid*.

appellant accused cannot be blamed for the deceased psychotic and emotional disorders of a weak mind."¹¹²

Rather than judge the legal implications of a husband's neglect of his wife, the court assumed the role of psychiatrist to determine a wife's motive for suicide.

In our survey, only two situations surfaced which allowed women some relief from the rigid construct of gender responsibility within marriage - that of motherhood and the urban educated. Socially, motherhood ascribes women with a greater degree of divinity and is therefore status enhancing. It assumes a natural ability to undergo any degree of discomfort in the larger interests of a child. In cases of dowry death where the victim has a child i.e. is a mother, this fact has swayed courts to presume murder as opposed to suicide. The logic being that, even when instigated by cruelty to commit suicide, a mother would rather bear pain than abandon her child.¹¹³

Victims with higher education have also been treated leniently. Essentially intolerance to harassment in the matrimonial home seems more justified in the case of those women from urban middle class backgrounds. Although post-graduate education itself does not preclude the requirement of 'divinity' in women, it allows them a greater degree of dignity and respect. This has led courts to express greater outrage and condemnation of 'dowry' deaths in such cases¹¹⁴ - as educated urban woman are perceived more capable of starting life afresh upon dissolution of marriage rather than opt for suicide.

¹¹²Smt. Padmabai v. State of M.P. Para 21, 1987 Cri. L.J. 1573. See for Comparison Harishchandra, supra at para 20.

¹¹³See Gowar Chand v. S. P. Chingleput Dist. & Ors 1988 Cri. L J 2919; Harbans Lal & Anr, V. State of Haryana 1993 Cri. L J 75; Prabhu Dayal & Ors v. State of Maharashtra AIR 1993 SC 2164. The presence of a child, along with other evidence led the courts in these cases to reject the possibility of suicide.

¹¹⁴ "Young women of education, intelligence and character do not set fire to themselves to welcome the embrace of death unless provoked and compelled to that desperate step by the intolerance of their misery", Shri. Bhagwant Singh v. Commr. Of Police, Delhi 1983 Cri. L J 1081 (Para 18); Also see Subedar Tewari v. State of U.P 1989 Cri. L J 923 (at para 19): "It is extremely unlikely that an educated woman of this academic distinction who was prepared to face her problems would be inclined to commit suicide....." In this case there was also enough

Given that issues of dowry giving and taking will almost always be carried out through subtle family negotiation, judges fail to grasp that harassing behaviour associated with such negotiations cannot simply be determined along technical lines or by attributing mental illness to women. Such views in a system governed by a rule of law which, presumes innocence until proven guilty will inevitably work against women's access to gender equality. Technical tools simply enable a court of law to negate what is perhaps most relevant to a gender-specific crime without first understanding the perspective of that gender. Perhaps the clearest expression of a judge's sociological understanding of dowry abuses was given by the Courts in 1984:¹¹⁵

“ It is no doubt true that the girl and her family members contributed towards her oppression. In the first instance the parents are willing to pay dowry in order to get their daughters married. Each time the girl returns to her parents, she is sent back with a hope of reconciliation. The parents and the girl are reluctant to register cases against the husband and his family members. Each time there is an attempt to patch up the marriage. The girl also clings to the marriage at all costs till the end. And in the final analysis, all this goes against girl and makes conviction difficult in the absence of any complaint about harassment. The judges infer that if a woman returned to her husband or if there was no complaint made by her about the harassment and if there was discrepancy in the dying declaration, then it was not murder. The Indian woman is brought up and trained in a traditional atmosphere and told that it is better to die in the husband's home than return to her parents' home and bring disgrace to them. She finds it very difficult to violate this cardinal principle and prefers to die at her husband's place. This is the social reality of a woman's life. The legal agents in power need to understand this and be sensitive to it. Hence, simply because no

written evidence to prove that the victim wanted to start life afresh and putting her marriage behind her.

¹¹⁵ Sharad Birdhichand Sarda v. St. of Maharashtra (AIR 1984 SC 1622)

complaint is lodged about harassment for dowry, this should not be a reason to draw an adverse inference against the victims... especially in a case which involves the abuse of one gender”.

The above instances give a glimpse as to how the dowry problem has been conceptualised and treated by the courts. Similarly, the understanding of dowry that emerges from our survey is one that is historic and removed from the social environment in which it exists. Not only does it fail to take into account the inequitable social structure which subordinates women but also the imperatives of marriage both of which provide a justification for dowry. When women are devalued and can expect to attain social status only upon marriage any necessary condition will be fulfilled to attain that status- more so in a context where culture and tradition are selectively used to sanctify practices like dowry. To view a unilinear flow of cash and gifts as ‘free consent’ - dissociated from expectations which if unfulfilled may manifest into demands, displays either lack of comprehension of the dowry problem and women’s context or a disinclination to upset the same.

vi. The Convention on the Elimination of Discrimination Against Women (CEDAW)

Since CEDAW is the first international covenant of its kind, which comprehensively underscores the rights of women (contextually) and the fact that its ratification by India makes its impact on Indian laws integral, the need for the judges to know this document is critical.

Have you ever heard of CEDAW?	
Yes	21%
No	79%

While 79% of judges had never heard of CEDAW, 21% judges knew it only by name but were unaware of its contents. On being informed about CEDAW judges were remarkably responsive to its contents and felt it would definitely assist them “to

understand crimes against women in a different light and to get rid of customary gender biases." No judge had ever heard of Recommendation No. 19 of CEDAW, which describes violence against women as a human rights violation.

Unlike other International conventions CEDAW is a progressive step for women since it takes human rights into the area of pervasive and systemic discrimination against women and identifies the need to confront the social causes of women's inequality by addressing "all forms" of discrimination that women suffer. In this way, the Convention is perhaps the first significant international legal document, which pays specific focus to the nature of women's disadvantages. One such disadvantage is the violence that women suffer due to legal, social and 'cultural' traditions. It is therefore critical that judges acquaint themselves with the perspective and understanding adopted by CEDAW in considering women's disadvantages and the consequent inequality they undergo when it comes to the violence they face.

India ratified the Convention on Discrimination Against Women on 8.8.93.¹¹⁶ It is significant in a line of legislation that the country has approved even nationally vis-à-vis women's rights. It creates the possibility of evolving new strategies to address women's rights in India with an international tool for articulation and redefinition of those rights. In addition, CEDAW can help expand and strengthen national legislation by adding corridors of language and interpretation on equality and discrimination, which few laws have previously done for Indian women.

CEDAW is a document with a primary goal of defining what amounts to discrimination against women and the ways in which States can work towards eliminating discrimination. It applies to the violation of women's human rights and fundamental freedoms, which occurs "in the political, economic, social, cultural, civil or any other

¹¹⁶ The following discussion is extracted from Sakshi's report on CEDAW and Violence Against Women. See "Violence Against Women", Sakshi: Indian NGO's Report on The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Co-ordination Unit for Fourth World Conference on Women- Beijing '95, December 1995, pp.117-135

field."¹¹⁷ A powerful expression, yet given this focus, the Convention itself does not take explicit note of prohibiting gender-based violence as a primary expression of discrimination against women. It is only in 1992 that the UN Committee on CEDAW in retrospect passed a recommendation ¹¹⁸ including gender based violence as "a form of discrimination, which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."¹¹⁹ In recognising that the gender based violence is a form of discrimination against women, it is the first time an international document has articulated that, "acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty" constitute a violation of a women's fundamental human rights and freedoms.¹²⁰

More importantly the recommendation covers gender-based violence against women which occurs in the public as well as the private spheres. It has therefore opened the door for prevention, investigation, punishment and compensation to women in the area of domestic violence, rape, sexual harassment, child sexual abuse and other forms of gender based violence etc., whether this takes place at work or within the family. *For the first time therefore, the law seems to have acknowledged the personal and bodily integrity and dignity of women-especially in the home.*

It is the fact that Recommendation No.19 brings together the broadest canvas of violence against women within a single legal document and in terms relevant for women, that makes CEDAW worth working with especially since the most overwhelming hurdles placed before women in India have often been legal ones. More than anything, the fact that CEDAW, read with the Recommendation, acknowledges the existence of violence in the private sphere is a long overdue recognition of the invisible violence that women face

¹¹⁷Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), December 1979, article 1. The full text of CEDAW is set out at Appendix "II" to this report.

¹¹⁸ General Recommendation No. 19 (eleventh session) Violence Against Women, CEDAW/C/1992/L.1/Add.15, 29.1.1992 (A copy of the recommendation is included in Appendix "III" to this report).

¹¹⁹ibid. para, 1.

¹²⁰ibid., para 8

in both the home and at work. It makes such critical links as between violence and family ideology, which have always put a woman's honour in the foreground rather than the violence she has experienced.¹²¹

CEDAW presents a different opportunity and challenge to use the law to women's advantage and to broaden the way in which we perceive the law and its possibilities in terms of gender violence. Most importantly, Recommendation No. 19 is the broadest attempt so far at understanding just what VAW is in terms of women's experience. The importance of this for Indian women is that it helps give recognition to those areas of abuse and neglect which have never been acknowledged as gender violence such as displacement, sexual harassment, certain kinds of customary law, violence as a health issue, family violence and sexual exploitation. It also extends the narrow parameters of law into other dimensions. For example, unlike traditional domestic laws on VAW which seek to penalise the offender through systems which lead to protracted humiliation and suffering to be endured by the women, the recommendation on violence specifically provides for "support services" and "gender sensitive training of judicial and law enforcement officers and other public officials", as essential to ensure effective implementation of CEDAW.

In other words, an important emphasis of this legal document is that it branches into areas of prevention and awareness-building rather than punishment, skills which have traditionally been part of the larger women's movement and violence intervention but which now find voice in an international document for women.

¹²¹ *ibid.*, pars.10 and 13, pg. 3; CEDAW articles 2 and 3

vii. Women in the Courtroom

When women complain about violence, they are at some point required to attend the court as witnesses. They normally do so unaware of the atmosphere, procedure and politics of speaking in court. Given that most violence against women is within the family the experience of speaking openly in a public forum is for most women complainant's, at first.

Judges were therefore asked whether they felt the courtroom atmosphere is conducive to women speaking openly about the violence they have faced. Sixty-two percent of judges felt it is not. In-camera trials alone

were deemed inadequate to solve the problem. As discussed later in this report, women litigants we spoke to reaffirmed this view. By and large they experienced the following kinds of inequality in taking their case to court:

- Stereotyped expectations about 'proper' conduct for women
- Female litigants are subject to disrespectful or demeaning forms of address by opposing parties, lawyers, court personnel as well as judges
- Sex-specific comments
- Female litigants repeatedly claimed how they lacked credibility in the courtroom, which was seen to relate to their gender.

While one judge was pessimistic in his view that nothing can be done to improve the situation for women in court, others made recommendations which they felt might ensure a more conducive atmosphere in the courtroom. These included:

Is the Courtroom atmosphere conducive to women to be able to speak openly about the violence they have experienced?

Yes	36%
No	62%
No reply	2%

- Not only hearing such cases in-camera but also in chambers
- Creating separate forums for crimes against women cases (68% expressed this view)
- The need for judges to be much more proactive in intervening during examination of female witnesses especially where sexist conduct or innuendo arises
- Securing the support of more women advocates and women judges
- Conducting the trial in such cases on a day-to-day basis

Looking to the attitude of court personnel, 30% of judges claimed that remarks or jokes demeaning to women are made in courts and in chambers. By and large, these remarks are passed by advocates, courtroom staff, sometimes in the court premise by the general public and other persons.

Judges are not unknown for remarks demeaning to women. In a case of father/daughter child sexual abuse in May 1996 for instance, a judge of the apex court declared in open court that mother's who allege such crimes against the father of a child are "mentally sick" and are "unnecessarily spoiling the child's future prospects for marriage and a happy life". In another case of child sexual abuse, a sessions court judge dismissed the allegation as one of a "promiscuous imagination". Nineteen eighty-nine saw the well-publicised case of a woman whose extra-marital lover murdered her two children born from her marriage. The woman, tried for conspiracy, attracted more public and judicial censure than the actual murderer himself. In a rare eight page bail judgement, the Court made an elaborate statement regarding the woman's sexual inclinations ending with the view that her bail should be rejected because she was into "kinky sex. Ask Freud."

Courtroom interaction per se reflects part of the formal inequalities women face when they come to court. How women are perceived and treated here reflects larger social and legal attitudes towards women. The court is where overt forms of gender bias surface. Changing courtroom practices so that women who approach the system do not feel disadvantaged by their sex is a challenge that the courts must meet. To do less is to ensure that unfairness and inequality in the courtroom will continue.

vi. Women's Access to Justice

Fifty-two percent of judges interviewed felt women had access to justice less than 40% of the time. In this context, the majority of judges agreed that some degree of gender inequality is evident:

Overall how often do you think women in situations of violence have access to justice?

a) Less than 40% of the time	52%
b) 40%-60% of the time	28%
c) 60%-80% of the time	7%
d) 80%-100% of the time	2%
e) 100% of the time	5%
f) No reply	11%
f) Cannot Answer	5%

- ⇒ 24% felt it exists in certain areas;
⇒ 23% felt it is widespread but subtle;
⇒ 19% felt gender inequality is readily apparent;

Only 22% of the respondents felt there is no such inequality at all.

Perceptions of women clearly affect the attitudes, practices and decision-making by judges. Inequality is apparent in terms of battered women who are viewed as partly responsible for the violence they face, victims of sexual violence where the offence

is only ever perceived as truly serious when it happens to a "virgin" but even then not sufficiently serious to warrant a mandatory minimum punishment; in dowry where the line between violence and tradition are blurred depending on how much a women is expected to tolerate. Evidence of gender inequality was clearly apparent from our interviews but the spirit for change was equally so. ***Seventy percent of judges interviewed showed a willingness to participate in gender equality programme on violence against women.***

WOMEN LAWYERS

C. WOMEN LAWYERS

Law schools in the last two decades have seen an increase of women in the legal profession. While there are no recent statistics on how many women are entering this profession, their numbers are still few compared to male lawyers. The legal profession being predominantly male, we sought to gauge the responses of women lawyers on what discrimination, if any, they have to face in the profession as well as their views on the courts and women litigants in situations of violence. To gather this information, Sakshi teams were asked to follow certain guidelines against which the following findings are recorded below. The survey was carried out with 80 women lawyers from Guwahati, Delhi, Jaipur, Bangalore and Madras.

Our Findings:

i. In the course of your work have you ever felt patronised, ignored, demeaned, harassed and/or treated as an outsider?

Patronised	18%
Ignored	13%
Demeaned	7%
Harassed	1%
Treated like an Outsider	8%
All	17%
No	36%

Sixty-four percent of women lawyers related how they often felt patronised, ignored, demeaned, harassed or treated as outsiders in both subtle and apparent ways in the course of their professional life. Such experiences included the following:

- Women lawyers are perceived as less intelligent and less serious than men, - “they are viewed as simply carrying out a past-time.”
- Woman lawyers feel they have to “work a hundred times harder than men to reach a particular level in the profession which is more easily attainable for male lawyers”; “there’s an expectation that we can’t do it so we have to work harder.”

- The obstacles for women lawyers are not necessarily tangible but rather invisible, “more to do with attitudes towards and about women as a whole and not just as lawyers”.
- Women in the legal profession are constantly up against “a brotherhood”.
- “I’ve known of women lawyers, especially at the junior level to be exploited by their seniors.”
- “Discrimination definitely exists between male and female juniors when it comes to pay benefits and emoluments” or when “women junior advocates are often allocated less serious cases than their male counterparts”.
- “There is a popular notion that criminal law is not meant for women- the one area of law that seems to impact on women most on women’s lives.”

ii. Have you ever experienced stereotyped expectations because you are a woman?

Yes	47%
No	31%
No response	22%

Forty-seven percent of women interviewed have experienced stereotyped expectations of their work largely in the form of what their peers traditionally expect of women, irrespective of their vocation. These expectations were understood to include the following:

Stereotypes were attached to notions of the “decent women” such as quietness, reserve, conservative dress, and those who “don’t make it a habit to talk to men”. Women who fall outside of these expectations are commonly referred to as ‘chalu’ (a fast woman).

Expectations of client’s who are sometimes averse to engaging female criminal lawyers: “There is an expectation that criminal law is a dirty business and only male lawyers are ‘capable’ of handling it.”

Stereotypes which are veiled in the logic of ‘tradition’ but are really intended to degrade women as professionals. Comments such as “don’t work too much or soon

you'll be an old maid with no one to marry" have to do with the kind of threat women pose as competent professionals.

- Women cannot be taken seriously as legal professionals. "Women are treated as these showpieces who spend a little time in court till they get married. For that reason we are often paid less and involved in less serious matters. That notion is also based on the assumption that the practice of law depends on long hours which is not necessarily related to the volume of work but the need to be seen to be present in the office."

iii. As a woman advocate, have you ever experienced physical or verbal sexual harassment by judges, lawyers, court personnel, others?

Apart from general attitudes expressed above, women lawyers had specific things to say about more invisible forms of discrimination such as sexual harassment. Our survey indicated that 54% of female lawyers reported verbal and physical sexual harassment from both judges and other lawyers. The nature of harassment varied according to the court. In Delhi courts for example, such harassment is referred to as "white collared" (i.e. subtle) harassment when it occurs in either the High Court or the Supreme Court. In the lower courts harassing behaviour manifests itself as offensive remarks or physical contact. Verbal harassment was far more common than physical harassment and lawyers were more likely to be the source of the problem than others, ***Sixty-five percent of women lawyers have reported that they are sometimes or often subjected to, or have observed verbal or physical sexual harassment from other lawyers. Approximately 20% of those surveyed identified judges as a source of verbal sexual harassment.*** Remarks from judges often include observations regarding dress, referring to female counsel by her first name and allowing sexist remarks to be passed in court without judges intervening. The nature of verbal sexual harassment experienced by women from other lawyers included:

- Use of stereotyped role characterisation. This included comments such as, "a woman's place is in her home"; "what do your husband and children think of you going to work"; "women advocates are here to mark time until they get married"; "the

courts are too tough for women" and "if you can't argue, then you're better off cooking".

- ***Sexual innuendo.*** This referred to suggestive comments about the 'nature' of a young woman lawyer's relationship with her senior. One lawyer disclosed how her "senior would gloat over my dependence and never deny rumour of having an affair with me. The personal life of women lawyers is always a part of the discussion". Several women lawyers spoke of suggestive remarks regarding their success implying that "she slept her way up".
- ***Devaluation of women's work.*** Male lawyers repeatedly viewed women lawyers as second income earners in a marriage. As one lawyer put it- "I'm always asked what my husband does first- it's one way to find out if I'm married and otherwise indicates that my male colleagues don't take my being a lawyer seriously"- observations which reaffirmed entrenched notions that the primary role of a woman is that of homemaker and not professional.
- ***Appearances and character.*** Female advocates are common targets for comments on dress as well as behaviour. Such comments include: "who is she trying to impress today"; "its nice to see girls in skirts at court - makes it a better place"; and where women lawyers get favourable orders the suggestion is that she "must have managed it through a connection".
- ***Obscene and vulgar language*** as well as offensive humour addressed to women were also common occurrences.

Experiences of physical harassment occurred mostly in the "lift" and "crowded" court - rooms in the narratives related to us. "In a lift, male lawyers take advantage to brush up against us." Referring to her black lawyers coat, one female lawyer stated how "this coat covers a lot. I feel safer when I wear it. Lewd staring, objectionable remarks which have sexual overtones are the order of the day but we've got used to it." That comment also reflects a common view amongst women lawyers who have grown complacent to harassment largely because "you can never prove it". "Harassment is there but it's subtle with the result that women lawyers are often forced to just compromise." Put more

starkly: ***“Sexual favours are forced upon junior women lawyers but no one talks about it. We are such a small group, every thing becomes gossip and complaining will only ruin a girls career.”*** Not surprisingly, a number of women advocates interviewed admitted to experiencing some form of sexual harassment “off the record”, a response which reflects traditional behaviour patterns of women despite being in empowered professions. This preoccupation with “reputation” is what characterised two well-publicised incidents of physical assault on a female advocate in a High Court and in the Supreme Court of India respectively. In the High Court incident, a women advocate was openly punched by a male colleague on the court premises for refusing to join him for a cup of coffee. When the advocate attempted to report the incident, a senior member of the bar dissuaded the police from filing the case on the ground that “it would tarnish the reputation of the bar.”¹²² In a related incident, a male lawyer slapped a female lawyer on the Supreme Court premises. Once again his reason for doing so was that she refused his advances. Not only was there an insufficient quorum to attend a Supreme Court Bar Association meeting summoned pursuant to the incident but also the agenda for the meeting simply intended to address *“whether or not action should be taken against the male lawyer.”* Women advocates also complained of complete indifference by Bar Association to the issue of gender discrimination: “If the matter is taken to the Bar council, it usually ends in a compromise and no action is taken against an offender.”

iv. Have you ever been subjected to comments about your physical appearance or dress (when no such comments are made about your male counterparts)?

No	44%
Yes	55%
No response	1%

The majority of women lawyers admit that they have been subjected to comments related to their physical appearance and dress mostly from male lawyers who “make fun at our expense.” In South India, senior women advocates spoke of problems

encountered in the mid-eighties when they began to wear salwar kameez.

¹²²This incident has been more fully documented by Asmitha (a Hyderabad based NGO) in 1995.

“Male counterparts resorted to sarcasm and jokes in order to demean women lawyers and their ‘hep’ sense of dress.” In one instance a woman advocate described how a judge on seeing her in salwar kameez admonished her in open court stating “shame on you and your senior. You girls should wear sarees!” Questions like “whom do you want to please today or whom do you want to kill today” are commonly asked of women lawyers in reaction to their court attire.

v. Have you ever been subjected to remarks or jokes in court, your firm or in chambers, which were demeaning either to you, or to women in general?

No	52%
Yes (unspecified)	48%

Approximately ***forty-eight percent*** of the women surveyed said they either heard or experienced remarks or jokes that were demeaning to women. The respondents largely blamed

male lawyers, court personnel and judges respectively. While 52% of advocates responded in the negative to this question, that view contradicted an earlier finding in which 54% of women said they had experienced physical/verbal sexual harassment. It appears that demeaning humour /remarks about women in general are not understood by the majority of women (or men) as sexual harassment. Offensive humour which sexually degrades women is socially recognised and accepted behaviour and is not commonly understood as offensive to women. It is also possible to surmise that women are subjected to more serious forms of sexual harassment than jokes or remarks. Irrespective, those remarks that were described by the respondents as demeaning included the following:

- ♦ A woman’s integrity is often put to question if male colleagues do not find her sufficiently conservative. Comments on this score have recently been associated with

Anjali Kapoor ¹²³- “it’s easy for a woman to become a significant advocate, look at Anjali Kapoor”.

- ♦ References to songs such as “choli ke peeche kya he” (what’s underneath the blouse) are common refrains in the language of interaction between male and female advocates.
- ♦ Remarks, which seek to devalue women’s work as a professional: “I think discrimination in this profession is rampant. I can’t think of a single male lawyer who values the fact that a number of women who want to be in this profession have to balance that with domestic work. Instead, they are devalued for having that ability.”

vi. Do you feel judges attach more credibility to the arguments of male lawyers over female lawyers?

Yes	48%
No	52%

When looking at whether judges addressed male lawyers differently to female lawyers, nearly half of the women professionals expressed a difference. Women lawyers felt judges

could be either paternalistic or patronising when it came to women (particularly juniors) arguing cases. One reason according to some women is that “judges continue to view women as the weaker sex is in need of protection rather than as humans whose rights need to be advanced.” “We are not treated on par with male lawyers” expressed others, attributing this to a mind set where “judges do not take women lawyers seriously. They generally make us feel that we are incompetent. Though they talk about encouraging women, this attitude is largely patronising. Preference is always given to male advocates. Judges think women are weak in arguing the case as well as less intelligent”.

vii. Is there anything in the language of the court or the process of lawyering that you feel is either offensive or demeaning to women and which ought to be changed?

¹²³ Male members of the bar resorted to strikes and public criticism of Anjali Kapur an advocate for modeling on the cover of "Fantasy" magazine, which has a largely male readership.

Yes	43%
No	55%
No response	2%

The type of language used in the courtroom itself in cases of violence is, according to women advocates, “demeaning”. In cases of sexual abuse, “personal questions regarding the sexuality of the victims are constantly asked

with a view to humiliate”. In one instance a victim was asked if she had ever “exhibited her personal organs/private parts with a view to imply she was of ‘loose’ character. “Even if she was, so what” protested one women lawyer - “the wrong was done to her not by her!” According to number of women advocates in such cases “it always seems as if the woman is on trial,” a basic reason why most felt, women in situations of violence are deterred from approaching the legal system. The courtroom was considered by most of the complainants as “extremely unhealthy and insensitive”, when it comes to criminal justice for women and one which allows women to be freely ridiculed. “ In the case of a woman seeking divorce, the court staff was overheard to comment “yar jitni jan yaha laga rahi hai pati par lagati to kabhi na chodta” (had she put the same effort into her marriage as she is into the case, her husband would not have left her). Such comments are deemed to be common in cases of violence against women with women lawyers taking serious exception to the fact that “judges never issue any reprimand because it’s considered acceptable to address a woman in such terms.”

G. viii. Have you ever observed any gender specific bias against women in the court or in chambers in a case involving violence against a woman?

Yes	38%
No	56%
No response	6%

Approximately 38% of the women advocates spoke of some form of gender specific bias. While 56% expressed not observing any gender bias, this appeared to be due to the fact that not all of the women interviewed have dealt with cases

of violence against women. Those who did observe such discrimination related the following instances and examples:

- ♦ The courtroom atmosphere is “not conducive to women to depose openly in cases of violence against them.”
- ♦ The courtroom atmosphere is “unhealthy and insensitive, compounded by a majority of male advocates and court staff”
- ♦ “The courtroom is unsympathetic to women and allows for women to be ridiculed and made the butt of jokes.”
- ♦ “Bias definitely affects the outcome in a case of violence against a woman. For example, whether or not relevant, the past character of a woman invariably surfaces as a determining factor in a case.”
- ♦ “Notions of family and the sanctity of marriage are paramount for most judges and that is characteristic of the kind of bias women face in the court-room. In one case a judge advised a woman plaintiff “mare ya jo bhi kare sasural hi tumhara ghar hai” (where you are beaten or whatever else is done to you, your husband’s home is your home).
- ♦ “The bias is so evident in the way judges punish rapists. In a case of gang rape for example, not only were the accused sentenced to less than the mandatory minimum, on appeal the judge reduced the sentence on the grounds of both ‘youth’ and that it was their only offence to date.”

While many women did not accuse judges of indulging in such behaviour they were critical of the fact that “judges fail to put a stop to it.” *The majority of women advocates expressed the view that judges rarely if ever intervened to stop gender bias behaviour in the courtroom.* But as one District Court Judge in Guwahati told us: “I may not recognise what is gender-biased behaviour. Gender sensitisation may increase that awareness.” *In other words when judges fail to correct behaviour it may be because they are unable to characterise behaviour they observe or engage in as gender biased.* Secondly, “judges may not understand how objectionable certain kinds of behaviour is to women” stated one advocate. Given the responses to the questionnaire survey for judges, this statement is an accurate assessment of how judges rate the extent to which they consider certain kinds of behaviour towards women as discriminatory. While it is true that 72% of judges did

advocate scolding in open court where sexist comments or offensive humour demeaning to women are made, only 8% recorded observing any discriminatory behaviour in the courtroom. This contrasted the experience of both women advocates and women litigants. According to advocates, "judges may assess the offensiveness of a remark in light of a particular situation, if at all, but they never apply a clear standard of offensiveness." None of the advocates we interviewed could relate to us an instance of judges intervening when they themselves were aware of sexist conduct in the courtroom. More often than not, especially in cases of VAW, advocates observed passive non-intervention. At the same time, women advocates admitted hesitancy on the part of advocates to point out or object to gender biased behaviour - "You are caught in a bind. On the one hand is your case and your client and on the other hand you will probably be laughed at." In other words advocates feared refocusing attention of the case to gender issues. And even where they did, the matter would generally be dealt with in a jocular fashion:

"I recall a trial court in Jaipur where the defence counsel was harassing a victim who was testifying in a rape case. The prosecution raised a meek objection. The judge simply smiled and waved his hand in a gesture, which indicated that the prosecution restrains him and not gets so worked up. It was totally patronising."

In another trial involving child rape, the defence counsels (seven in number) repeatedly laughed at every opportunity in an attempt to ridicule the very possibility of a father raping a child and reduce it to "a western phenomenon." Once again no intervention was forthcoming from the judge hearing the case.

xix. *Do you feel the justice system is gender sensitive or gender biased in cases of violence against women?*

Not sensitive	15%
No reply, can't say	12%
Gender bias	43%
Gender Sensitive	30%

Looking at over-all sensitivity of the legal system to cases of violence against women, 58% of women felt the system was either gender bias or gender insensitive, while 30% felt it was gender sensitive. Twelve percent of the respondents were unable to identify gender bias or gender insensitivity and so were unable to answer this question. Those women advocates who did perceive insensitivity and gender bias in the criminal justice system were vehement in their views:

- "The judicial system is so insensitive that women only come seeking justice when their condition is unendurable. Gradually they are compelled to become immune to the brutality of the court atmosphere."
- "There is no understanding of what actually happens in a woman's life. The system is so far removed from a woman's reality".
- "There is no sensitivity on part of the judges. Women's issues are not treated as human problems".
- "The system is intimidating for women and rather than empower her, it seeks to break her down."
- "Women seek to avoid unwanted experiences and generally shy away from court. Most perceive the court as insensitive towards women's issues"
- "Cases of domestic violence are dealt with passively as if it's no big deal, just an ordinary crime like any other in the penal code- but these are human beings, women with rights and feeling."
- "The justice system prefers to treat the violence as an "internal or private matter rather than a violation of a women's rights in which the court is expected to intervene effectively."
- "Deserted or divorced women are not humiliated directly but often it's stated clearly that she should have adjusted."

- “Judges subtly but invariably advise a woman to compromise and settle the matter whatever the degree of cruelty.”
- “Judges take it for granted that woman have problems and keep crying for each and every thing. So they take it as a routine”.
- “They (judges) are so willing to give husbands the benefit of the doubt (reasonable or not) even in cases of dowry death.”
- “Even though a judge may be aware of the wrong being done to a woman in her home, a “chaltha hai” [it happens] attitude prevails.”

x. Do you feel the court in which you function is accessible to women who experience violence?

Sixty percent of women lawyers felt the courts were not accessible to such women who are in situations of violence for the following reasons:

- Not only is the courtroom atmosphere “not conducive to women speaking”, it is

often both ‘callous’ and indifferent.

- Court staff will harass women who come to court. - “How do you think such a woman feels when she comes to court having already had to face ‘social’ and

Accessible	34%
Inaccessible	60%
No response	5%
Depends	1%

family pressure and in most cases being unaware of her actual rights”;

- “There is a tendency to hush up matters related to sexual violence. Delay in dispensing justice also costs a female complainant more dearly. Not only is she in an economically weaker position in the society but a traditional value system, the cultural ethos, lack of self confidence and fear of social ostracism simply get re-affirmed

- "Judges look down at women especially in cases of rape, prostitution and obscenity. The whole system is male dominated. That message tells women who come to court not to speak openly about the violence they have faced."
- "In cases of sexual abuse male advocates will resort to intimate and demeaning questions to embarrass a victim and prevent her from pursuing her case fearlessly."
- "Acquittals/reduction of sentence in cases of violence against women are made on flimsy grounds. What kind of justice are women having to access in a system that views violence as an acceptable life condition for women?"¹²⁴

The harshest criticism related by women advocates was directed at family courts, which were condemned by the majority as "highly insensitive".¹²⁵ Instances cited included the

¹²⁴ Situations described by lawyers themselves regarding grounds for acquittal included the following:

- * I was able to get an acquittal for an accused in a rape case on grounds that the victims could have run away while he removed her "tight" trousers.
- * In another case of dowry burning the husband threatened the wife that he will kill the child if she speaks the truth, so she attributed her burns to an explosion of the kitchen stove. The explanation was never verified and he was acquitted. She died three weeks after the incident.
- * Even at the level of the Supreme Court, a recent appeal on the part of an accused was admitted for the rape of a seven and a half month old on the ground that, the judge was not prepared to believe that it is possible to commit rape on a child of that age.

¹²⁵ Comments on family courts by lawyers included the following:

- "Speaking of the family courts, even I as a lawyer am nervous about going there. Something about the atmosphere and look of the place that makes me feel uncomfortable as a woman. I wonder how women litigants must feel";
- "The reliance, evidence and procedure is burdensome especially for women; it is very difficult to get proof of income or income certificates, especially if the husband is an independent, professional. Secondly, women become the subject of a host of allegations intended to blame her for marital problems such as she is insane or mentally unsound. Judges can be sympathetic but they have fixed views about women and marriage and expect exceptional tolerance from women who face problems including violence in the marriage."
- "I recall a divorce case, where a male advocate appearing for the defense began making fun of the wife who alleged adultery. In his words " the allegation is clearly the result of the wife's insecurity. After all, there is no witness to the fact that the my client actually engaged in sexual intercourse with another woman." As a woman I would have been humiliated in such a situation."

case of domestic violence where the judge 'consoled' the victim by saying it shouldn't really matter to her too much- "After all it is your husband who is beating you". Women advocates related numerous instances in which women victims had suffered appalling levels of physical violence yet family courts tended to adopt an aggressive tone or pose intimidating questions to victims, only to compound that insecurity. "In the matrimonial courts, women are treated in a callous and abusive manner, almost as if they are being blamed for bringing their marriage to court." Some judges were criticised as being "wholly unsuited to deal with such matters. Women arrive before these judges already in a state of nervousness only to be met with offensive language and disrespect - the objective being to intimidate her into some kind of settlement." Responses to this question were consistent with judicial belief that most women in situations of violence have access to justice less than forty percent of the time.

xi. Does the fact that you are a woman advocate influence women clients who come to you from situations of violence?

Yes	48%
No	47%
No Response	5%

A majority of women lawyers felt their gender is important when it comes to women clients who approach them in situations of violence. Women lawyers perceive themselves as being "better equipped", "more sensitive" and "more understanding" especially in cases of "sexual violence and matrimonial issues."

A contrary view advanced by some women lawyers is that in cases of very serious forms of violence, "there is some tendency to prefer male lawyers.... which is consistent with the belief that criminal law is a 'dirty game' and requires aggressive, often 'crude' handling.... women lawyers are not encouraged in criminal law nor is there an atmosphere conducive to women practising in this area".

xii. Is there a need for gender equality education of lawyers on issues of violence against women?

Sixty-four percent of women advocates we spoke with felt there is a need for gender equality education for all advocates (both men and women). At the same time a number of women advocates expressed hesitancy about

Yes	64%
No	27%
No Response	9%

such education because they were concerned that the reaction of their male colleagues maybe very defensive.¹²⁶ Towards the end our survey, Sakshi decided to look broadly at the perspective with which women lawyers often view violence against women. We discovered that women lawyers also held internalised biases. In most cases this was in part to a literal understanding of the meaning and scope of gender discrimination rather than a substantive one.

To corroborate this, the Delhi team conducted a random survey of an additional forty seven women lawyers at the Tis Hazari District Courts and the High Court of Delhi. A similar survey was carried out with women lawyers in the Madras District Court as well as women lawyers of the Bangalore High Court. Women advocates were asked to respond to myths on sexuality behaviour that constitutes cruelty and the conduct of women

¹²⁶ A note from the teams;

Teams who actually conducted interviews with women lawyers provided some feedback on regional differences amongst women lawyers that we feel is useful to share here. Despite that our survey showed ample proof of gender bias in all centers, women advocates at centers such as Jaipur and Guwahati were much less forthcoming vide the implications of such bias. According to the survey teams, this was in part due to women advocates being less willing to participate in discussions on discrimination. This was attributed to an overwhelming sense of professional self-preservation; "If you push women lawyers into talking about discrimination, there is a fear that somehow they are projecting themselves as vulnerable." Team members were often met with arguments from individual advocates that "I succeeded in this profession so clearly there is no discrimination". This formal notion of discrimination is based on a traditional view that "women are looking for equality with men" rather than equality per se. In other words some women advocates were unwilling to address the issue of gender in terms of the differences between men and women but preferred instead to look at them in terms of similarities. Assamese women lawyers exhibited the most resistance in terms of articulating sex discrimination to the extent that most

victims. Our findings disclosed attitudes and concepts, which were largely conservative in situations of violence. The views of women lawyers were similar to the judges interviewed when it came to family unity, sexual autonomy and cruelty but to a lesser degree. The majority of women lawyers surveyed found for example that it was not cruel of a husband to tell jokes at the expense of his wife at a party or to want to have sex with her when she did not. Most felt that men were justified in divorcing women who could not bear children given that "such a man needs to remarry so that the family name will continue." In terms of family, a number of women were of the view that women should think about their own behaviour when they experience violence at the hands of a husband. Despite these views, women lawyers were still clear and progressive on a number of other unconventional issues including:

- a single slap by a husband to his wife is cruel
- there is no occasion in which violence against a woman, wife or otherwise is justified
- the marriage does not need to be preserved at all costs, especially where the woman is facing violence
- there is no difference between violence against a woman in the street and in the home

In terms of gender equality education for lawyers, women lawyers proposed the following suggestions:

1. Training in legal counselling techniques especially with regard to violence against women in terms of sex equality laws.
2. Building a perspective and understanding of violence against women.
3. Develop a process of intervention in support of female advocates subjected to derogatory or gender insensitive conduct in the court.
4. Ensure gender sensitivity education for male lawyers.

women advocates surveyed placed the onus on "female advocates to avoid any untoward incidents" since "discrimination largely depends on female advocates themselves."

5. Evolve a participatory process for both judges and lawyers in such trainings which allows each to hear what the other actually sees or experiences in a court-room around gender (in) equality. Joint trainings should also take place with the police and criminal lawyers to ensure a holistic process in terms of registration of a case and court proceedings in VAW cases.
6. Dissemination of information on the development of legal concepts around gender equality in the area of violence against women.
7. The need for Bar Associations to acknowledge the existence of gender inequality faced by women lawyers and provide an effective response to address the problems raised by women lawyers in this survey.

Women advocates were also prepared to lobby for a gender sensitive environment for female professionals in terms of the following:

1. Build up unity amongst women lawyers as a class in terms of their concerns experienced as women professionals.
2. Agitate Bar Associations to increase the number of women entering the profession.
3. Introducing a feminist perspective in the existing law school syllabus as well as specific courses on women and law, in law schools.
4. Ensuring legal action be taken against those who behave in a discriminatory manner.
5. Collectively intervening in any sexually offensive incident of a colleague.

The effect of sexist conduct or gender biased attitudes towards women lawyers is to undermine them as professionals who are equally concerned about client interests as their male colleagues. It is the reason why most female advocates find themselves in difficult, demeaning or harassing situations because of the power of the judge. If her response to such situations is perceived negatively by a judge, the consequences for both her case and her client could be adverse. While a lawyer as an individual may accept such consequences, she will be less willing when it places her client's interests in jeopardy. The fact is, these women have limited avenues for redress, a statement, which was

reaffirmed by the fearfulness with which most women advocates spoke to the teams and the effect it might have on them professionally.

At the same time, our survey also found the legal profession to be largely hostile and exclusive. The numerous instances of masculine defined codes of conduct for women in terms of dress codes and professional conduct forced many women to simply conform to such code and conduct.

WOMEN LITIGANTS

D. WOMEN LITIGANTS

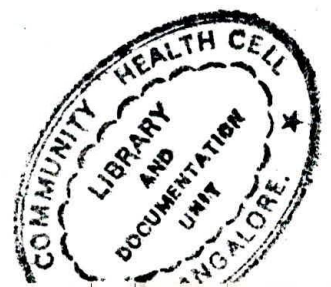
Legal rights have little value if they cannot be enforced in practice. The third portion of our study therefore looked at female victims of violence who chose to exercise their right to take an accused to court and the barriers they faced in doing so. Forty-four women litigants were interviewed on their perceptions and experience of going to court, being in court, and what they thought in hindsight. The women represented a variety of backgrounds, rural poor, middle class and upper-middle class as well as a cross-section of experience with violence i.e. rape, domestic violence and dowry. Our findings in this section are based on over-all perceptions rather than individual responses gathered from discussions and workshops held by our teams, a process which was more conducive to women sharing their experiences openly and honestly.

Our Findings

1. Why did women choose to go to court?

Most women who choose to go to court do so as a last resort despite strong apprehensions, social implications and family opposition. This is largely because in our sample, the offence against which they filed a case is often characterised by family or sexual violence. The option of court was normally the result of having exhausted all other possible options including tolerance, adjusting, enduring, shame, humiliation and anger:

- i. "I couldn't bear the thought that my son-in-law having burnt my daughter to death, could get away with doing it again. Who else was going to stop him."
- ii. "Yes the option of court is not a pleasant one. But just the mere hope of justice and the fact that you tried motivates you. At least our voice and grievance is heard."
- iii. "I got my children back. But only because I could afford to go to the Supreme Court."



- iv. "I went to court to retrieve my self-respect. Even though the court has acquitted my rapists, I will still appeal"
- v. "Justice is the least of what I expect when I go to court- a little heart and a little luck- that's all"
- vi. "I went to court just so my abuser wouldn't think I'd been a coward. I realise there is so much prejudice in a system which reaffirms stigma when a girl has been raped but just filing the FIR meant something to me."
- vii. "I would never advise my daughters to go to court if they were beaten- instead I'd say just kill him."

Women are also inclined to go to court for the process rather than justice itself, implying somewhere that women approach the court with very little expectation and with the knowledge that their gender per se will affect the quality of justice they get.

2. Are women victims reluctant to go to court? If so, why?

Consistent with this view is that the majority of women interviewed preferred alternative methods of redress before approaching the courts such as:

- i. the assistance of social organisations,
- ii. family mediation with the help of an outside agency; and
- iii. the police

Approximately 64% of the women we spoke to were reluctant to file their case up until the very last moment.

Fear was identified as the primary hurdle women faced when going to court,

"At first I thought that before I approach the court I should solve the problem otherwise. I tried mediation through family, friends and organisations. In a final effort I requested my son-in-law to just send my daughter back home. Instead he burnt her to death because I could not provide for more dowry. Then, I had to go to court. I couldn't bear the thought that my son-in-law could burn my daughter to death and then get away with it. At the time I thought, only the court can stop him"

an emotion rooted as much in social conditioning and low self-esteem as in their expectations of the criminal justice system. Fear is also why litigation was for most women exercised as a last resort: "At the outset I was afraid of going to court. The main reasons were fear of breaking the family, fear of losing my honour, and fear of social stigma" said a litigant from Bangalore. "I was most afraid of being judged" said another victim of wife-assault from Delhi. In one instance of domestic violence, the victim avoided going to court for twelve years to claim maintenance to which she was entitled just because "I was afraid I wouldn't be able to understand anything there and be worse off."

Family is the second worst obstacle that women faces when they opt for court especially women who experience violence within the family. Not surprisingly, "preservation of the family at all cost" was a significant social norm for most respondents for which they dared to abandon to go to court:

- ⇒ "My husband beat me for ten years. My parents paid him to keep me even when I wanted to leave. For them, being a woman and divorced was a worse crime."
- ⇒ "When I finally left my marriage, my own parents abused and threatened me and accused me of ruining the family honour."
- ⇒ "If it's a choice between social ostracism and seeking justice, a woman prefers to maintain silence."
- ⇒ "Approaching the police or the courts should be avoided because justice is out of the question there. It is a greater injustice if a woman separates from her family."
- ⇒ "My parents brought me up to believe that family is what matters most. My worst fear was that of humiliation for my parents if I failed to uphold that one belief."
- ⇒ "When my daughter was burnt to death for dowry, I was determined not to spare my son-in-law for what he did. My family and sons resisted but I was adamant" says the mother who eighteen years later lives with regret; "what is justice when it takes eighteen years to get it. Today I feel those who loose their daughters in such a way should do nothing. You have lost your daughter, why now destroy your home and your family." The woman left her home and family to fight for justice for her

daughter. "I had to sell everything; I lost my family going to court simply destroyed my life. And what for; today when I go to court, the man who killed my daughter is married, has children and simply sits across from me giving dirty glances. It has been a humiliating experience."

Other factors that characterised women's reluctance to go to court were:

- Hope that the situation would improve
- Future of the children and the effect litigation would have on them
- Financial burden
- Embarrassment of the court
- Family honour
- Fear of being stigmatised and of social ostracism

Court is the ultimate recourse when women have staked most of what matters to them such as family, and when all other options have failed. Unfortunately, as our study revealed that while women in situations of violence are conscious of their personal, economic and social cost of coming to court when they finally do, it is with the expectation that the criminal justice system will respond favourably (though differently), only to find the court reaffirms all that she has feared in the first place.

3. What was your first impression of the court when you entered?

⇒ Having finally entered the court, we asked women to relate their first impression of it. Not a single female litigant spoke positively of her first impression. In addition to fear, nervousness, intimidation and oppression, alienation was a feeling shared by all of the women we interviewed, an experience which was more apparent amongst women whose cases came before the district courts:

⇒ "I was amazed by the numbers and most of them men."

- ⇒ “I had never stepped out of my house and here I saw the police, the accused, everyone was there. I was expected to speak in front of them all. I had never learned the confidence you need to deal with this.”
- ⇒ “It was disgusting. I felt like I was being measured head to toe everywhere I walked. How can any woman be expected to go there and not feel totally alone.”
- ⇒ “There was no one to explain, no one to direct and no one to care. I was just one more case.”
- ⇒ “On my first visit to the court” said one dowry victim, “I was scared. The whole experience seemed awesome. The magistrate appeared to be the epitome of power and authority but it was all an eyewash. In the end I felt as if I had committed some kind of sin. This was not just about property; but about my rights. Yet what seemed to count most in court was family, how I was destroying it and what a terrible daughter-in-law I was for doing so.”

Most litigants also felt self-conscious as women in a predominantly male environment when entering the courts. “Your gender is what alienates you most” was a common feeling. Not only did women express their discomfort at being constantly stared at but many also faced sexual comments and innuendo. In terms of hurdles they faced in the actual judicial process, we were able to identify five recurring themes, which included loss of self-respect.

What was your first impression of the court?

Hopeful	9%
Scared/fearful	54%
Unnerved/nervous	20%
Confident/comfortable	7%
Oppressed/intimidated	7%
No response	4%
Others	23%

Of the 23% women whose responses were categorised under others, that includes: embarrassment, shock, shame, guilt, sadness and feeling self-conscious, additional stigma, disillusionment, lack of awareness about the justice system, delay and cost.

4. Did you feel your gender disadvantaged you in any way in getting access to justice?

Judges perception of women and gender roles was identified as a serious obstacle to women's access to justice according to our survey. In fact, 66% of those interviewed said they continued to feel disadvantaged as litigants primarily because they were women.

The fact of being a female litigant was in itself a negative experience for women because "it meant I had less money and therefore less access to a better lawyer." Four women litigants from Assam spoke about how being a woman meant they were less listened to: "We are groomed to speak very little anyway, so we tend to talk less in the court. If we happen to speak out, we are told that that this is the reason why our families are breaking up." For these women, their socially inferior status

for women was directly reflected in the court process. Further, in the absence of any help from the women's organisation, it would have been impossible to go to court.

Perception of judicial attitudes varied according to the experience of women litigants surveyed. **Fifty-five percent** of the women interviewed had negative experiences with judges who heard their case. A judge in one case for instance, informed a female litigant in open court: "You are a woman, you should live like a woman, do not equate yourself with men, you should accept your family tradition, money is very important in family matters and for the development of women". In rape cases we were repeatedly told of

how indifferent judges appeared to be to offensive questions routinely put forward by the defence. In one situation, the judge aided the defence by repeatedly asking the female complainant to be more specific in describing her rape despite that the woman was both in a state of shock as well as embarrassed by the process: "I couldn't believe the judge was addressing me in this way. He did nothing to prevent me from being subjected to humiliating questions despite objections raised by my lawyer. I felt like crying. This was worse than the rape itself." **Twenty-five percent** felt that while judges were polite and courteous, their sympathy was not due to greater sensitivity towards gender issues, but because it was civil to be that way. Approximately 10% of the respondents felt gender made no difference to how they were addressed by judges.

As with lawyers, litigants targeted family courts as the worst when it came to handling cases of violence affecting women litigants:.

- "In family court the judge would constantly shut me up. My husband appearing opposite me was encouraged to say his piece. I felt like a child who is told not to speak unless spoken to."
- "The language used towards women in the family court is insensitive, demeaning and often offensive. I have known women lawyers to walk out. Judges speak to women victims as if only they are to blame and that they have no business bringing their family problems to court."
- "You would think that after all the time, courage, money and guilt I had to go through, the judge would advise me something more than just to go back to a violent home".
- *Even those women who approached the courts through legal aid and/or encountered family court counselors spoke of how most counselors and legal aid persons held similar ideas about women and family. "No one ever reaffirmed either my belief or that of the law, that what my husband did to me was a crime. Most made me feel guilty and ashamed for not being able to adjust to this violence."*

Tolerant, self-sacrificing, prepared to give more than you take and adjust were the values advocated by most Family Court counselors. In two instances from Madras, women spoke of how court counselors advised them to "adjust" and put up with the violence at home. In another case the counselor had insinuated that the woman, a victim of domestic violence, herself was responsible for the breakdown of her marriage because she "was the one who decided to come to court." Another was raped and needed a medical examination which required a magistrate's order". Reported one rural level worker from Rajasthan who had been gang-raped "The magistrate refused to grant me an order until the next day since it was after five o'clock." The motive behind the refusal was to delay the recovery of medical evidence, which is otherwise considered so critical in a rape case. It seemed astonishing that even from a health point of view (irrespective of evidence) a magistrate was not prepared to accommodate the woman; once again reaffirming the lack of seriousness with which the judicial system often perceives rape. The experience of an upper-middle class woman from New Delhi who suffered ten years of domestic violence revealed a humiliating experience at the lower court: "The judge never felt or even began to empathize with what a woman has to go through when she leaves her matrimonial home. Each time the judge's focus was to compromise. I felt his response was cowardly." In this case the woman succeeded only because she could afford to access the Supreme Court.

A woman facing divorce in Rajasthan on the grounds of her husband's cruelty was told by the judge "you are a woman, you should remain one and not confront men."

- The most telling remarks are those of a Delhi lawyer who was a victim of dowry harassment and divorce "I never felt as if the judge had any inkling of what my experience was as a woman. I don't think he ever put himself in the position of a woman who is beaten and still continues to stay with her husband for the sake of her family or of a woman whose parents will pay her husband what he demands so they don't have to take her back or of the woman who is raped and is constantly reminded that this is the worst thing that can ever happen in her life."

- An Assamese victim spoke of how a judge referred to her as "being like my daughter" and said she should be reasonable, think of her future without a husband and return- to the violent home from where she came.
- In a Rajasthan case the support organisation for a rape victim spoke of how complacent the judge was when sexual innuendo verging on obscene were simply overlooked or when defence counsel would badger the witness.

It is no wonder that all of the women litigants interviewed felt they would have been unable to attend the court unaccompanied. Even those women who had been exposed to the system for many years in a given case felt they had insufficient courage to deal with the court.

Most women also expressed feeling self-conscious as women in a predominantly male premise when entering the courts. "Your gender is what alienates you most" said one litigant. Not only did women express their discomfort at being stared at but many faced sexual comments and innuendo including:

- "I felt both embarrassed and humiliated by the number of men who would stare at me."

- One female litigant from Bangalore spoke of how overwhelmed she was just on entering the courts and fainted.
- “Lawyers are the worst. They stare at you as if you’re something cheap or else something evil.”

5. As a litigant, did you feel in control of your case?

Given the number of hurdles women had to encounter in coming to court it is not surprising that 64% of the respondents when asked whether they felt in control of their case responded negatively. While this was in part attributed to a largely impersonal criminal justice system, other reasons included:

As a litigant did you feel in control of your case?		i. Lack of confidence in dealing with the system
Yes, felt in control	32%	ii. Embarrassment at “awkward questions”
No, did not feel in control	64%	iii. A predominantly male presence during evidence
No response	4%	iv. Initial scepticism of the magistrate
		v. Delay in procedure

vi. Their own ignorance of the law and legal rights.

vii. A general failure on the part of the court to condemn sexist conduct.

Despite the negative impact on women going to the court **twenty percent** of the women spoke of positive experiences in going to court. Some felt empowered by the knowledge they acquired while others

“My husband wanted me to be a nautch girl and continued to beat me into submission yet the court never makes you feel that what he did was criminal. I never had control over how the court saw my case but then neither did the court.”

were pleased by a positive outcome though these women still spoke of a process which was hostile to them and difficult to access. Of those women able to voice a

positive experience, all had the advantage of a support group. In the words of one woman, "When my marriage was falling apart because of the violence, the only thing that gave me encouragement throughout my case was the non-judgmental response of a woman's group who stayed with me to the end." A notch

6. What was the worst experience of going to court?

In listing the worst experience of going to court women prioritised the following:

Humiliation, shame, guilt	34%
Social stigma, ostracism, social pressure	32%
Mental agony, upheaval, trauma	30%
Others (i.e. Fear of not getting help, fear of society)	4%

Those experiences are perhaps why 66% (as opposed 30%) of women litigants felt judges are not sensitive to gender and why 59% felt there was a clear need for gender awareness training of the judiciary specifically in the area of violence against women.

When women opt to go to court in situations of violence, they do so against a background of opposition from family, community and the police. Court is the final hope at the

After your experience in court do you feel there is a need for gender sensitisation, training of judiciary.

Yes	59%
No	14%
No response	27%

cost of all else. *Women litigants were finally asked therefore whether in the same situation today they would still take their case to court. Sixty-two percent said they would not.*

While, that the response has to do with the individual experience of those who went to court, it also represents a common feeling that for a woman going to court means "you have to stake your reputation, your family, your honour and your money that is the cost of justice for a woman". The emotional trauma, expense and

invisibility of a women's commitments and responsibilities outside of court led women to feel that the experience "just wasn't worth it" even in situations of a favourable outcome: "Yes, I was able to get custody of my kids and for that I am grateful but it was only because I could afford to go to the Supreme Court of India; at the lower court I couldn't believe the insensitivity of the court to my situation. I have often wondered what happens to a woman who hasn't the financial resources to access the Supreme Court.... she doesn't stand a chance."

In terms of actual hurdles they faced in the process of attending court, there were five recurring themes affecting women's access to justice. These included loss of self-respect; additional stigma, disillusionment, lack of awareness about the justice system, delay and cost. In addition women spoke of practical hurdles in which they claimed they were unable to obtain accurate/adequate legal information, proper representation or that the law itself was ill-fitted to meet their needs. They felt the process was by and large "indifferent" to their experience and gave little if any credibility to a complaint associated with family or sexual violence.

From the experiences women encountered as women, significant barriers appear to impede women's access to law and justice. Women's spousal dependence and disempowerment which inevitably arises as areas of concern, are experienced by many women. In addition women have little, if any, awareness of the law or their legal rights.

More disturbing is that even if women have been enabled to access justice free from such barriers, they repeatedly spoke of gender insensitivity and lack of understanding in the court-room itself when it came to pursuing a remedy in situations of violence.

The apprehension that most women expressed before opting for judicial redress found little consolation in the court itself. Rather than feel empowered by going to court, in the end women were left feeling ashamed and would hide the fact that they have sought help from the court especially in situations of domestic violence or rape. There is no instance in which the women interviewed felt wholly secure or empowered on going to court. On the contrary women spoke of enduring fear, loss of self-confidence and humiliation.

The fact that Family Court's came in for severe criticism from all corners deserves special mention. In 1975, a committee on the status of women recommended that 'all' matters concerning the 'family' should be dealt with separately. Hence the family courts were established to promote conciliation and speedy settlement of disputes unlike the marriage laws which emphasised reconciliation. Apart from failing to tilt the balance in favour of women, the Act was committed to preserving the institution of marriage. Worse still, failure to give Family Courts jurisdiction over family matters which extended to inter-spousal rape, cruelty against wives, dowry, or violence per se within the family was yet again a serious drawback given that women in precisely such situations were in need of the less formal, and more active investigation procedure envisaged by the act.

In the same vein, a woman's survival beyond the family ambit has remained limited in view of paltry maintenance awards, in particular under the Indian Penal Code.¹²⁷ This despite a 1989 Law Commission Report which clearly states that the meagre amounts i.e. a maximum of Rs. 500/- was wholly inadequate in view of the then existing consumer price index which called for at least Rs.4500/- per month for a single women to sustain herself. In the absence of the law's recognition of women's economic security as a need,

¹²⁷ see section 125, Indian Penal Code 1860

which must be perceived hand-in-hand with ensuring her right to be free from violence, the law has continued to reaffirm notions of family and dependency.

In all of this, the final humiliation is that the law inevitably leads women back to court where they must suffer the indignity of protracted litigation, cost, and social exposure to attain those rights which are legitimately theirs. Rights which, they advocate simply in order to be safe and free from a life of violence. Even then, the violence from which they seek escape is largely accepted as one which is visible i.e. physical with little empathy for what women suffer most, that which is invisible.

There is an assumption that when a husband and wife come to court, they do so on an equal footing with equal bargaining power. That notion is clearly inaccurate given that women do suffer from lack of personal confidence, financial resources and low self esteem in a number of cases interviewed. Irrespective of law or law reform, women in marital relationships proceed on an unequal footing. When it comes to issues of violence, a woman's vulnerability in marriage is a consequence of the basic structural inequalities that continue to exist. *To be poor, financially dependent on their spouse, and the primary parent makes up most of women's status as women. Victims of spousal violence are not oblivious to that status.* Which is why when she finally opts for legal recourse, it is as a last resort and therefore with even greater expectations of the law. Yet often, judicial interpretations of law transposes the problem into one that is then defined as having a technical solution. It will either obscure her gender specific reality or while it may protect her, refuse to change that reality.

In addition, the legal split, such as divorce which is the possible outcome of a violent marriage, shows up the complete split that exists in the lives that Indian men and women lead. She emerges from a completely privatised existence where family determines the nature of her existence, her marriage, her behaviour, her expectations and her limits, all of which work towards minimum development of her as an individual. In a tradition-bound society, she will always be faced with justifying her behaviour whether to parents, children,

friends, relations, the police or the law. And even when she does approach the law, most women face an internal conflict between their sense of guilt (about reporting her husband, exposing her family, exposing herself etc.) and her desire for liberation.

On the other hand, a more comforting set of dynamics continues to operate for the abusive husband. He will continue to enjoy social and economic sanction through the support of parents and family, work and financial status, and prospects for another marriage.

It is that distinction which has no place in the basic premise which governs judicial attitudes towards marriage and divorce laws, which appear to project gender neutrality. Which is why the emphasis of such attitudes is first and foremost to advise reconciliation. In other words even where a woman files for divorce on the basis of cruelty, irrespective of the damage done to her, the fact of her abuse would be secondary to preserving the marriage. The Family Courts Act, rather than challenge such presumptions about marriage, has become a dangerous tool in the hands of judges and legal practitioners. What might have been a means of mediation and settlement serving the gender concerns of women in the area of child custody, property and maintenance, once again compromised woman in favour of reconciliation. In other words, cruelty or harassment for dowry would be perceived as a 'quarrel' between two equal partners. At best a woman in such situations is simply told to go back home!

**COURTROOM
WATCH SUMMARY**

E. COURTWATCH SUMMARY

Much of what women litigants had to say about their experience with the judicial system was repeated by women victims interviewed in the course of this survey which served to reaffirm that women generally are apprehensive to approach the legal system in situations of violence. Similar findings were also apparent from the Courtwatch survey of our study.

In the final part of our survey, teams from different centres undertook court watches with the following objectives in mind:

1. To observe how the courtroom environment affects women (either positively or negatively) in cases, which address violence against women?
2. To assess the treatment of the women in the courtroom as clients and/or witnesses.
3. To assess the 'conduct' of judges, court masters and lawyers including the nature of their language, appearance and responses to one another as well as to women in cases addressing violence towards a woman (or women).

A total of eight courtwatches were carried out which addressed cases of cruelty, dowry murder and gang rape respectively. In each courtwatch the team was directed to record its observations on various aspects of the conduct of a VAW case in court from a gender specific point of view. These included the judge, his/her attitude, the court atmosphere, the court employees, and the lawyers.

Given that the findings corroborated what is already apparent in the rest of this survey, we have given only a summary of our observations as under to avoid repetition:

1. Generally, all courtwatch's recorded a largely male presence in the courtroom even in the case of in camera rape trials. In a gang rape case for instance, at the time of giving evidence, the victim (a village woman) was produced in camera before a battery of seventeen men present as either court personnel, lawyers, others etc. All the women interviewed strongly protested the absence of women personnel in court.

2. "What has happened has happened". This attitude was common to all of the cases surveyed in Courtwatch. In a case of dowry death, the judge as well as the defence lawyers focused on the fact that the girl was dead, which fact should not now "prejudice the living". According to the team, that view affected a lenient outcome for the accused. In another case, eight years had passed and the focus had shifted from murder of the daughter-in-law to the amount of dowry involved. Dowry issues often get translated into property issues rather than human rights violations of the woman who is harassed or murdered for such dowry.

3. Lawyers were criticised for indifference as prosecutors or aggressiveness as defence lawyers. In a case of dowry harassment, the lawyer examined the victim witness, then left the courtroom leaving her to face the defence questioning entirely on her own. In another case of dowry harassment, the accused lawyer was "determined to brand her [the victim wife] a woman who was adequately dutiful as a wife and on that basis, her claims of dowry harassment were baseless." In a more humiliating encounter, a victim of gang rape in the course of questioning was met with the following by the defence lawyer in the course of examination without any intervention from either the prosecution or the judge:

"She is a liar; she is amongst the greatest liars in the world";

"Should the accused be hanged because of her lying";

"A case should be brought against her for telling such a lie";

"Why did she never disclose to the police in her FIR more details as to how the rape was committed; how wet was the lehanga [i.e. how much semen]."

4. Though judges were viewed as courteous for the most part, our courtwatches repeatedly commented on the failure of judges to intervene when biased or discriminatory behaviour took place. In a dowry death case, the underwear of the accused was openly displayed before the court, with the prosecutor handling it with an expression of discomfort; this in front of the family he was representing. In family court, hostility towards the wife in a case of cruelty was more evident. "As it is women in court, speak very little, so when a judge shouts at them to keep quiet, she is too scared to speak thereafter. She comes to court feeling she has disrupted the family and the judge does little to make her feel otherwise."

5. Regarding the experience of Mahila Courts, while the presence of more women was no doubt of benefit to women in cases of violence they have experienced, in the limited access we had to this court in Delhi, it was observed that the presence of men in the court still far outnumbered women. In the cases observed, only the prosecution was a woman. The fact of a woman judge, may affect a woman's comfort level in being able to speak yet the criticisms observed above were no different in the Mahila court. The case illustrated problems with the assumption that women are better able to address women's cases. In fact and as this report is intended to show, gender equality is not about which sex dispenses justice for women but rather the perspective with which justice is dispensed and that it takes into account the experiences of women as a gender in contexts which are starkly different from men's experience as a gender.

6. Several Courtwatch's observed a general lack of respect when either judges but mostly lawyers, addressed women lawyers. In some cases women advocates were addressed less formally which team members felt demeaned or trivialised the professionalism of a female advocate.

7. There was a general feeling in team observations that gender bias was apparent in affecting the outcome of a case (i.e. reduction of sentence), stereotyped expectations of

women in marriage (in a case of cruelty filed by the wife) and the standard assumption that women lie about rape.

The Courtroom environment is the most visible aspect of the legal system. The conduct, practice and decisions that take place within that environment have a profound impact on the nature of legal redress. In the case of women, language, attitudes and perceptions are critical in ensuring that women, whether as professionals or as litigants, are not perceived and/or treated as less credible than men in those same roles. When women's are diminished in any one of those roles when functioning within the legal system in any way, the promise of equality is clearly placed in jeopardy.

CONCLUSION

F. CONCLUSION

This report was an attempt to highlight judicial perceptions of women in situations of violence and how such perceptions impact on gender equality. What we found was a clear need to redefine how judges understand gender equality in situations of violence and how much of what influences their personal perceptions of men and women determines the nature of justice to which women have access. Issues which, affect women in the criminal justice system include home, relationships, family, stigma, economics, illiteracy, ignorance of the law and dependency but are rarely understood as issues of concern when it comes to defining equality.

In recent years legal redress all over the world has begun to stress the need to recognise violence against women as a specific human rights violation which denies women equality in law. At the 1993 World Conference of Human Rights, a draft UN declaration on the Elimination of Violence Against Women stated:

“Gender -based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international co-operation in such fields as economic and social education, safe maternity and health care, and social support.”¹²⁸

While this is only a draft declaration, it has the advantage of being universal in terms of coverage. The adoption of this Declaration by the UN general Assembly placed VAW on the human rights agenda. The Declaration was also to “strengthen and complement” the process of effective implementation of CEDAW and recognise VAW as “ a manifestation

¹²⁸ Vienna Declaration and Program of Action 1993 World Conference on Human Rights Vienna 14-25 June, 1993

of historically unequal power relations between men and women, which have led to domination over and discrimination against women. Recommendation No.19 of CEDAW defined gender-based violence as, "a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men"¹²⁹ while article 1 of CEDAW prohibits all gender-based discrimination that impairs the enjoyment of fundamental rights and freedoms and finds that gender-based violence (of all forms) has precisely this effect on the fundamental rights of women, including the right to life, the prohibition on torture and cruel treatments, equal protection of humanitarian law, the right to liberty and security of a person, equal protection of law, the right to equality within the family, the right to physical and mental health and the right to just and favourable conditions of work."¹³⁰

Although judges are not directly to blame for the lower status of women in the area of equality, judicial perceptions of women as well as decision-making referred to here indicate that gender bias is a formidable barrier to women's equality. When women's perspective is not considered in a challenge to rights within the family, property, marriage, workplace, or with respect to bodily integrity, the impact on women is disadvantageous and therefore discriminatory. Our report found that distortions in the way judges view women's experience, biased the way they treat domestic violence, dowry, and sexual violence.

Deeply held attitudes and beliefs about women highlighted in this study clearly stresses the need to challenge and examine the way judges ultimately judge. Myths and biases inherent in judicial perceptions of women need to be understood in terms of their impact as well as the fair and equitable administration of justice. To the extent that it exists, gender bias in the legal system prevents women from enjoying equality before law in terms of both constitutional rights and benefits. In order to ensure the protection of human

¹²⁹ Cedaw, Recommendation 19, Note 3

¹³⁰ Cedaw, *ibid*, at 2-3

rights, without discrimination or bias, education of the judiciary on gender through gender equality training is essential. This report is a first step towards paving the road to gender equality for women in there desperate search for freedom, in particular, freedom from violence.

RECOMMENDATIONS

G. RECOMMENDATIONS

1. Judges at all levels of the judiciary need to be exposed to gender equality education which would enlighten the judiciary on existing assumptions, myths and stereotypes about women and how these can interfere with a fair and equitable administration of justice. Some aspects of gender equality education which need to be addressed pursuant to this report are suggested as under:

- Judges, court personnel and lawyers need to be exposed to the nature of violence against women, in particular domestic violence, sexual violence (including child sexual abuse) and dowry offences. Education should also seek to educate on the dynamics between victims and offenders in the case of violence against women and on the impact of such violence on women as well as include instruction on how to recognise as well as respond to gender bias behaviour in the courtrooms and chambers.
- The nature of language employed in official court correspondence, decisions, oral communication when referring to women litigants, witness and lawyers to ensure that it is not derogatory to women and does not perpetuate traditional myths about women and their roles.
- Exposing judges, court personnel and lawyers to the experiences and perceptions of women victims through interactions at workshops, training etc. with women/human rights groups, counsellors, social workers and educators.
- Given that Family Courts came in for severe criticism in our survey, training on the nature of family violence in the home is essential for police, court officers, lawyers, members of judiciary and magistrates when dealing with family law and violence matters.
- Specific attention needs to be given to sexual violence cases in Gender Equality education on pervasive gender-based stereotypes employed in trials of criminal sexual conduct to develop the perspective to distinguish between defences which are

routinely used to morally derogate women (she asked for it!) and those which are tenable as proof. Sentencing criteria needs to be highlighted in such education to inform judges about gender fairness in sentencing looking at the existing law of mandatory minimum sentencing of sexual offenders and the exercise of judicial discretion in this regard.

2. The evolution of gender equality is possible only through a realisation that change has to come from within. Gender equality education programmes should therefore be based on personalising aspects of women's rights so as to assist in unlearning inherent prejudices and gender stereotypes. Judges must be challenged to participate in and take responsibility for their own continuing education. For this reason Judges must be tapped to lead and implement programmes on Gender Equality Education for judges which would give both primacy as well as legitimacy to such a programme. At the same time, the skill, expertise and know-how of non-judges i.e. lawyers, legal activists, NGO's (in particular the experience of Women's NGOs') and other members of the community will be a necessary part of the process for gathering new facts and information based on skills and experiences which are outside that of judges.

3. Workshops and training sessions must give space to non-judges to participate and discuss the ground realities of their problems and experiences.

4. The establishment of a small but well-informed advisory body/task force consisting of judges, legal activists and women's rights/human rights organisations. The task force could be constituted under the auspices of the National Judicial Academy or other like, non-government body. Among the tasks assigned to this body, the following should be included:

- Review older judgements with a view to highlight aspects of gender bias/inequality in decision-making, which would then serve as an input to gender equality education. For this purpose, establish a panel of young lawyers under the supervision of a judge

to examine all judgements in a given year to review the existence of gender bias in decisions affecting women and violence and on that basis propose corrective inputs for the purpose of decision making. Such persons should have undergone gender equality education before being engaged for this task.

- Review all court forms, manuals and patterns of courtroom interaction to ensure that they incorporate a gender sensitive response to women in situations of violence.
- Initiate studies on family law and procedure on domestic violence to help, develop legislation as well as court rules and procedures designed to resolve them. For this purpose the assistance of psychologists, social workers and educators is necessary.
- Initiate a system for collating cases on violence against women especially from the trial courts where the data in terms of number of cases, nature and judgements can be recorded to facilitate documentation and analysis for concerned training institutions.
- To gather up-to-date information and developments with respect to International law on VAW and in particular, CEDAW and violence and create a compilation together with statistical developments on VAW and the development of law

5. Our survey found that women who accessed courts found it a frightening and traumatic experience. The need therefore to moderate services within the courts is a clear one. It is therefore recommended that under the initiative of the Supreme Court or other appropriate body, violence against women units should be specifically earmarked in each jurisdiction, beginning with the District Courts where a specialised group of prosecutors and defence lawyers should be suitably trained on cases of violence against women with a clear perspective of the underlying complexities for the woman victim \ client. Bar Associations should create incentives for a larger number of professionals to receive this training.

6. States should assist in making available funding for legal representation of women in such cases. Whenever possible, judges should award temporary advocate's fees and costs to the economically dependent women to enable her to pursue her relief.

7. State Courts must look towards evolving a child sexual abuse support system which, enables children to depose fearlessly in an environment conducive to them being able to do so. This may require the development of guidelines which direct the method of trial, recording of evidence and counselling services necessary in child sexual abuse cases as well as the role of support organisations. Most importantly the court atmosphere which includes language and procedure should be suitably modified to allow a child to access the court without fear or diffidence.

8. In terms of courtroom interaction, a guide needs to be developed for judges on ensuring a gender fair atmosphere to provide a uniform method for using procedure and accessibility to women in a process which is largely peopled by men.

9. The Supreme Court or other appropriate body should issue a general directive on the use of unbiased language in court documents, brochures and in forms.

10. Consistent with the last recommendation, State courts should issue uniform standing guidelines regarding the manner in which violence against women cases need to be handled.

11. Lawyers clearly influence judicial thinking and in turn, the development of law. However, in the area of gender discrimination and the law, law schools are seriously lacking. Globally the development of a women sensitive jurisprudence has grown rapidly yet in India, short of token seminars, little if any attention is given to developing skills and knowledge on gender. Law schools need to take serious initiatives in incorporating such jurisprudence. Such education should take time to expose students to ground realities of women through interactions with the community. Education must begin to incorporate those areas of law, which impact on the human rights violations specific to women such as domestic violence, dowry and sexual violence. Violence Against Women is not typically the subject of legal education either for judges, lawyers or students of law nor is it anywhere a general compulsory course such as property law, contract,

constitution or administrative law. Not only is there a need to recognise this area of law as one which is a prominent aspect of women's human rights but that recognition should encourage the development of course materials on key thematic areas of violence. While some attention has been given to rape, little or no attention is given to domestic violence, child sexual abuse and other more indirect forms of VAW such as sexual harassment, media representation of women, pornography, and medical abuse to name a few.

12. Bar Associations must establish a grievance procedure for women professionals and court personnel who experience gender bias behaviour and/or sexual harassment as well as set up a mechanism for providing in-house redress for women professionals who encounter such behaviour/attitudes. This would initially entail affirmatively raising the issue of sexual harassment in Codes of Conduct which affect the day-to-day function of advocates. Genuine remedies need to be evolved which would meet the needs of the victims.

13. Gender Equality training programmes and law schools must specifically address CEDAW.

14. It is recommended that this report might be used to initiate additional and more detailed surveys in all High Courts and District Courts on the matter of gender inequality to help initiate both awareness about the issue as well as evolve a participatory process which enables lawyers as well as judges to input into the nature as well as need for gender equality education.

APPENDIX 'I'

Sakshi Survey of Pending Supreme Court Cases of VAW (June, 1995)

In June 1995, in the course of the gender and judges project, the Hon'ble Chief Justice of India requested Sakshi to examine sexual assault cases currently pending before the Hon'ble Supreme Court of India. At the time we were given access to existing appeal cases based on which we made our findings. Eight appeal cases of rape were pending before the Hon'ble Supreme Court. Given that the cases may still be subjudice, the present report refers to the same anonymously and numerically.

Over-all we found the following common features were characteristic of decision-making in rape cases by the time they reached the apex court:

1. *The average time period taken for a case of rape to find its way from the Sessions Court to the Supreme Court was between ten to fifteen years.* In at least five of these cases, the victims were minors, a fact that is consistent with the increasing visibility given to child sexual abuse in recent years.¹³¹

2. In five of the cases researched, the Sessions Court had awarded a conviction against the accused. On appeal to the High Court, three convictions were overturned. The reasons for convictions compared to reasons for acquittal tended to be inconsistent with one another. One reason for such contradictions was in the undue emphasis placed on the medical report of a victim. For example:

In Case #1 (a case of rape) the lower court in Maharashtra relied on medical evidence which revealed a torn hymen and body pain by the 13 year old victim. The High Court

¹³¹ Between 1992 to '94, newspapers reported at least 48 cases of child sexual abuse involving children averaging between 8-10 years of age, the youngest of who was 6 months. It should be kept in mind that such cases cover only a tiny fraction of the actual abuse occurring against minors. We wish to draw your attention to a booklet published by Sakshi entitled "Child Sexual Abuse:- Beyond Guilt, Fear and Shame."

relied on the fact that no traces of sperm or semen were found. The High Court further relied on "the absence of injury on the male organ of the accused" which according to the learned judge "speaks eloquently for their innocence."

In Case #2, the High Court of Maharashtra overturned a conviction of rape by relying on a medical examination carried out by a junior doctor (not a gynaecologist) who stated that the victims' hymen was intact while ignoring the assessment of the senior gynaecologist who reported a small tear in the hymen, semen as well as absence of injury to the male organ.

Apart from the myths and inaccuracies which arise from interpreting medical evidence in this way, there several prejudices which also work against women as a result of such evidence:

i. Legally, rape is a crime in which penetration 'however slight' is sufficient. While there is no requirement in law for the hymen of a rape victim to be torn, this criteria finds constant repetition in the medical-legal understanding of rape as well as in judicial interpretation of rape. The emphasis placed on a torn hymen, semen or even injury to the male organ is not only beyond the scope and purview of the existing law, it completely ignores the larger impact and understanding of rape as women experience it. As a result, medical reports of a rape victim will commonly state the following: "not a virgin"; "hymen torn"; "used to sexual intercourse"; "vagina easily admits two fingers." Such language and focus clearly places the experience of rape in terms of a women's experience of sex, a view which is anachronistic when viewed against the increasing global perception of rape in terms of how women experience it,¹³² a perception which has

¹³² ... in rape... the intent is not merely to "take", but to humiliate and degrade.... Sexual Assault in our day and age is hardly restricted to forced genital copulation, nor is it exclusively a male-on-female offense. Tradition and biologic opportunity have rendered vaginal rape a particular political crime with a particular political history, but the invasion may occur through the mouth or the rectum as well. And while the penis may remain the rapist's favorite weapon, his prime instrument of vengeance... it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the "natural" thing. and as men may invade women through other orifices so too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral or rectal

begun to acknowledge other aspects of the crime in terms of the impact on women i.e. psychological, emotional, social.

2. Medical language gives vent to the presumption that a woman whose medical report falls outside a traditional perspective of 'a women's virtue' is less likely to be believed. This is how the medical report was interpreted in each of the three cases referred to.

3. The stress in medical reports on an intact hymen, semen and virginity apart from being legally incorrect, fails to take into account the reality of rape as women, and especially children, experience it. In biological terms alone, it is often not possible to penetrate a child sexually. In any event, sexual abuse takes into account a wide range of abuse, which is wholly absent from the existing law. This includes:

- "An adult exposing his/her genitals to a child or persuading the child to do the same.
- An adult touching the child's genitals or making the child touch the adult's genitalia.
- An adult involving a child in pornography (which includes exposing a child to pornographic material).
- An adult having oral, vaginal or anal intercourse with a child.
- Any verbal or other sexual suggestions made to a child by any adult.
- An adult persuading children to engage in sexual activity."¹³³

The problem is that none of these forms of abuse are addressed by the existing interpretations of law as recent judgements have disclosed. Such interpretations eclipse all other forms of sexual abuse which do not fit within the narrow requirement of 'penetration' by the penis into the vagina.

4. Perhaps the most disturbing observation in the area of sexual abuse of children was in the case of, Case #3 from Punjab. The case involving the rape of a 9 year old by a 60

penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self.?" (Susan Brownmiller Against Our Will, 1986)

year old in 1981 was dismissed at the Sessions Court with the following comment: *"that children of tender age often mistake forms for reality... repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment or hope of reward, is too well known and the same finds support through common experience as such to ignore these factors would amount to ignoring the reality of the situation."*

The case was ultimately dismissed on the grounds that only some indecent act had been committed upon her. An observation which has nothing to do with the experience of children who have been sexually abused. The fact is that, children who have been raped do not understand the sexual element of what they have experienced. They will often express harm in language which is familiar to them but which has nothing to do with the law or legality. At the same time, it is common to find judgements in which judges do not even appreciate the exact definition of rape - the search for semen or a torn hymen becomes evidentiary proof of rape as opposed to a victims state of mind or what she has described- placing physical violation above all else.

5. Finally, the ultimate complication in a case of child sexual abuse is when it occurs over a protracted period of time and is not a single instance of abuse. In the case of the Under-secretary's daughter, this factor was completely overlooked and several episodes of abuse were simply understood as one instance. In addition, the under-reporting of child sexual abuse is partly due to the fact that children often realise the nature of such abuse only after having become adults- when under the existing law it is too late to seek any kind of redress.

6. Another problem arising from the existing cases is what judges perceive to be 'characteristic' behaviour of a rape victim. Once again, the stereotype of a withdrawn, weeping women is considered to be consistent with 'believable' victims. In case #4 the victim and her aunt were on route to Chandapur by train on 24.7.79. As they were

¹³³ Child Sexual Abuse, Beyond Fear, Secrecy & Shame (Sakshi, 1994)

traveling ticketless, they were asked by the ticket checker to get down at Pulgaon. At the waiting room in Pulgaon, the seven accused had already been passing obscene comments and throwing pebbles at the victim. Soon after, the victim and her aunt boarded the train for Wardha at night. The seven accused also entered the same compartment. After 15 minutes, they switched off the light and threatened aunt at knifepoint while raping the girl. Near Wardha they pushed the girl out and jumped down to assault her again. The aunt, on reaching Wardha station immediately reported the case. A search party was sent and apprehended the accused in the act.

Subsequent medical evidence showed the victim's hymen was torn and that she showed symptoms of rape within 5-6 hours before examination. Seminal stains and blood were also found. While the sessions court convicted the accused and sentenced them to seven years, the High Court acquitted because of possibility that girl was a consenting party. *According to the High court the fact that the prosecutrix was not hysterical or crying, nor in a state of shock went against her: "...the fact remains the immediate conduct of the girl after she was so rescued was not consistent with the conduct of person who was recently dealt with atrociously. The conduct on the other hand appears consistent with the conduct of a guilty person..."*

7. The notion of a victim's conduct is perhaps the most problematic myth of all. In no other crime does the 'conduct' of a victim receive the kind of attention and focus as that of a rape victim. Which clearly assumes that there are justifications for why women get raped; a belief which simply casts doubts on a women's experience of rape. In the present case, the judges assumptions about the victim implies that she wanted to have 'sex' with seven men on board and then jumped off to have more. In other words what otherwise might have been considered in the domain of violence was here considered part of the sexual pleasure.

Unlike India, other countries have begun to acknowledge a woman's behaviour or reaction to her rape in support of her case. Thus for example, 'rape trauma syndrome' has

increased recognition and acknowledgement that there is no immediate reaction to rape and has also been acknowledged as part of expert testimony in court cases.

8. A final observation arising from the pending cases is the relevance of 'character', not of the accused but rather, of the victim. The only defence to rape is consent. Neither revenge nor character of the woman has any legal value when it comes to determining the guilt of the accused. The allegation of bad character is most commonly alleged in all rape cases, an allegation which continues to perpetuate the myth that women who are raped are inevitably bad-character. The stress of the law and the legal system is on how to place the rape or its occurrence on the behaviour, conduct, or character of the victim. And that means determining the character of a woman on sexual terms. A fact which creates a hierarchy of victims- those who 'deserve' what they get and others, who 'deserve' redress. If that is the case, according to the legal trend, allegations of bad character being so common, it follows that there are few women of sufficient integrity to warrant redress. Given these myths and moral overtones, it is no surprise that sixty-two percent of judges felt that the courtroom atmosphere in cases of violence against women is not conducive to a women speaking openly about her experiences our interviews with litigants revealed one reason why this is so is because judges tend to remain passive observers rather than active intervenes in cases of violence against women. This is especially true and the trial court level.

It is no wonder that many of the victims we spoke to in the course of the Gender and Judges survey said that they would never report a sexual offence. That fact is clear from the marginal number of cases which are actually reported, compared to the incidence which while not tabulated has become increasingly apparent.

If rape which has some understanding in the public mind allows women limited redress, sexual harassment has even less so. Most judges were unable to provide a known definition of sexual harassment. No doubt the term is alien in the Indian context and has received little discussion.

The opportunity to take a preliminary look at the few pending rape cases before the Supreme Court disclosed that the whole issue of sexual abuse, in particular, where it involves children, is subject to standards of scrutiny by the judiciary which work against both women and children. A number of these responses are based on myths that continue to characterise sexual abuse crimes, which prejudice victims.

APPENDIX 'II'

(Text of the Convention on the Elimination of Discrimination Against Women)

Convention on the Elimination of All Forms of Discrimination Against Women

The States Parties to the present Convention

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights.

Considering the international conventions concluded under the auspices of the United Nations and the specialised agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialised agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling, that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situation of poverty, women have least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasising that the eradication of apartheid, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggressions, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realisation of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measure required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART 1

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the

effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure women on equal terms with men. The rights:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.

- (c) To participate in non-governmental organisations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take, appropriate measures to ensure women on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations.

Article 9

1. State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal-rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training.
- (b) Access to the same curricula, the same examinations teaching staff with qualifications of the same standard and school premises and equipment of the same quality.
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.
- (d) The same opportunities to benefit from scholarships and other study grants.

- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women.
- (f) The reduction of female student drop-out rates and the organisation of programme for girls and women who have left school prematurely.
- (g) The same opportunities to participate actively in sports and physical education.
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

1. States Parties shall take appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status.

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits.

(b) The right to bank loans, mortgagees and other forms of financial credit.

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy and shall take appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.
2. States Parties shall take appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
 - (a) To participate in the elaboration and implementation of development planning at all levels;
 - (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
 - (c) To benefit directly from social security programmes;
 - (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter-alia, the benefit of all community and extension services, in order to increase their technical proficiency;
 - (e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
 - (f) To participate in all community activities;
 - (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
 - (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

1. State Parties shall accord to women equality with men before the law.
2. State Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall

give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. State Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same right and responsibilities with regard to guardianship, warship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal right as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against women (hereinafter referred to as the Committee) consisting at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilisation as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the secretary-general of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all person thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years, immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected

on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

- (a) Within one year after the entry into force for the State concerned; and
- (b) Thereafter at least four years and further whenever the Committee so requests.

2. Report may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present convention.

2. The meeting of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
2. The Secretary General shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialised agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialised agencies to submit report on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Part; or
- (b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.
2. The Secretary General of the United National is designated as the depository of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to the effect addressed to the Secretary General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organisation of the

arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed the present Convention.

APPENDIX 'III': Recommendation #19 (CEDAW) on Violence Against Women

**Convention on the Elimination
of all Forms of Discrimination
Against Women**

Distr.
LIMITED

CEDAW/C/1992/L/1/Add.15
29 January 1992

ORIGINAL: ENGLISH

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION
AGAINST WOMEN

Eleventh Session

New York, 20-31 January 1992

Item 7 of the agenda

ADOPTION OF THE REPORT

1. MATTERS BROUGHT TO THE ATTENTION OF STATES PARTIES

General recommendations

The Committee on the Elimination of Discrimination against Women brings to the attention of the States parties to the Convention on the Elimination of All Forms of Discrimination against Women, the following general recommendations:

General recommendation No.19 (eleventh session, 1992)

Violence against women

Background:

1. Gender based violence is a form of discrimination which seriously inhibits women ability to enjoy rights and freedoms on a basis of equality with men.
2. At its eighth session 1989, CEDAW recommended that States should include in their report information about violence and about measures introduced to deal with it (General recommendation 12, eighth session.)

3. At the tenth session in 1991, it was decided to allocate part of the eleventh session to a discussion and study on article 6 and other articles relating to violence towards women and the sexual harassment and exploitation of women. This subject was chosen in anticipation of the 1993 World Conference on Human Rights.

4. The Committee has concluded that the reports of States parties do not all adequately reflect the close connection between discrimination against women, gender based violence, and violations of human rights and fundamental freedoms. The full implementation of the Convention requires States to take positive measures to eliminate all forms of violence against women.

I. VIOLENCE AGAINST WOMEN IS A FORM OF DISCRIMINATION

5. The Committee recommends to States parties that in reviewing their laws and policies, and in reporting under the Convention, they should have regard to the following comments of the Committee concerning gender-based violence.

GENERAL COMMENTS

Gender based violence is discrimination

6. The Convention in article 1 defines discrimination against women as meaning:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic social, cultural, civil or any other field”. (article 1)

7. This definition of discrimination includes gender based violence - that is violence which is directed against a woman because she is a woman or which affects women disproportionately. It includes acts, which inflict physical, mental or sexual harm or suffering, threats of such act, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

Gender based violence violates human rights.

8. Gender based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedom under gender international law or under specific

human rights conventions is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include, inter alia

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- the right to life,
- the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment,
- the right to the equal protection of humanitarian norm in time of international or internal armed conflict,
- the right to liberty and security of person,
- the right to the equal protection of the law,
- the right to equality in the family,
- the right to the highest standard attainable of physical and mental health, and
- the right to just and favourable conditions of work.

The Convention covers public and private acts

9. The Convention applies to violence perpetrated by public authorities. Such acts of violence may also breach that State's obligations under general international human rights law, and under other conventions, in addition to being a breach of this Convention.

10. It should be emphasised, however, that discrimination under the Convention is not restricted to actions by or on behalf of Governments (see articles 2.e, 2.f and 5). For example, under article 2.e the Convention calls on States to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation.

11. States parties should take all appropriate and effective measures to overcome all forms of gender based violence, whether by public or private act.

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English

COMMENTS ON SPECIFIC PROVISIONS OF THE CONVENTION

Article 2 and 3

12. Under article 2 and 3 States are to take all appropriate measures to overcome discrimination in all fields. The kind of measures to be taken are not restricted to the matters covered by specific articles of the Convention. Article 2 and 3 establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under articles 5-16.

13. States should ensure that, laws against family violence and abuse, rape, sexual assault and other gender based violence give adequate protection to all women, respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.

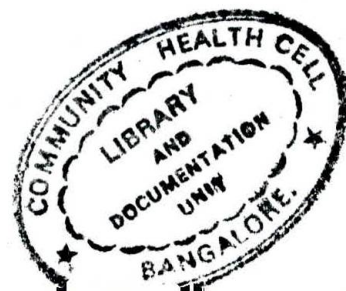
14. States should encourage the compilation of statistics and research: out the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence.

Traditional attitudes, customs and practices (Article 2.f, 5 and 10.c)

15. Traditional attitudes under which women are regarded as subordinate or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks, female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence to the physical and mental integrity of women deprives them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying (structural) consequences of these forms of gender based violence help to maintain women in subordinate roles, contribute to their low level of political participation, and to their lower level of education, skills and work opportunities. The full implementation of the Convention requires that effective measures be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices which hinder women's equality (Recommendation No.3, 1987)

16. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender based violence. Effective measures should be taken to ensure that the media respects and promotes respect for women.

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17. States reports should identify the nature and extent of attitudes, custom and practices, which perpetuate violence against women, and on the kind of violence which results. They should report the measures, which have been undertaken to overcome violence and the effect of these measures.

Exploitation of prostitution and trafficking in women (Article 6)

18. Article 6 requires States parties to take measures "to suppress all forms of traffic in women and exploitation of prostitution of women".

19. Poverty and unemployment increase the opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruiting of domestic labour from developing countries to work in the developed world, and organised marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse. Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation.

20. Poverty and unemployment also forces many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence, because their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.

21. Wars, armed conflicts, occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women which require specific protective and punitive measures.

22. State reports should describe the extent of all these problems and the measures, including penal provisions, preventive and rehabilitation measures, which have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described.

Violence and equality in employment (Article 11)

Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace.

23. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may

constitutes health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensations, should be provided.

24. States should include in their reports, information about sexual harassment and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.

Violence and Health (Article 12)

25. Article 12 requires States to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk, State should establish or support services for victims of family violence, rape, sexual assault and other forms of gender based violence, including refugees, specially trained health workers, rehabilitation and counselling.

26. In some State there are traditional practices perpetuated by culture and tradition which are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation. States should take measures to overcome such practices and should take account of the Committee's recommendations on female circumcision (Recommendation No.14) in reporting on health issues.

27. Compulsory sterilisation or abortion adversely affects women's physical and mental health, and infringe the rights of "women to choose the number and spacing of their children" (16.1(e)). States should ensure that measures should taken to prevent coercion in regard to fertility and reproduction and ----- ensure that women are not forced to seek unsafe medical procedure such as illegal abortion because of lack of appropriate services in regard to the fertility control.

28. State reports should report on the extent of these problems and should indicate the measures which have been taken and their effect.

Rural women (Article 14)

29. Rural women are at risk of gender based violence because of the persistence of traditional attitudes regarding the subordinate role of women, which persist in many rural communities. States should ensure that services for victims of violence are accessible to

rural women and that where necessary special services are provided to isolated communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns. Measures to protect them from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers.

30. States should report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and on the effectiveness of measures to overcome violence.

Family violence (Article 16)

31. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence described under article 5 which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men, in situation of financial difficulties, can be a form of violence and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality. Measures which are necessary to overcome family violence include:

- criminal penalties where necessary and civil remedies in case of domestic violence,
- legislation to remove the defence of honour in regard to the assault or murder of a female family member,
- services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes,
- rehabilitation programmes for perpetrators of domestic violence,
- support services for families where incest or sexual abuse has occurred.

32. States should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures which have been taken.

II. MEASURES NECESSARY TO OVERCOME VIOLENCE

In light of these comments, the Committee recommends:

1. That States take all legal and other measures which are necessary to provide effective protection of women against gender based violence, including, inter alia:

(a) effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;

(b) preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;

(c) protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.

2. That States report on all forms of gender based violence, and that such reports include all available data about the incidence of each form of violence, and about the effects of such violence on the women who are victims.

3. That States reports include information about the legal, preventive and protective measures which have been taken to overcome violence against women, and on the effectiveness of such measures.