



The present article seeks to address some of the salient issues which have been discussed by the Constitution Bench of the Supreme Court of India in the recent years. It has been playing an extremely positive role in examining the laws which have become archaic, several of which are provisions of the Indian Penal Code, 1860, including Section 376 which deals with rape, Section 377 which deals with sodomy and sexual relationship between homosexuals and Section 497 which deals with adultery.

Empowering Women: Legal Provisions

Geeta Luthra

*"To awaken the people, it is the women who must be awakened.
Once she is on the move, the family moves, the village moves, the nation moves"*

- Pandit Jawaharlal Nehru

Empowering women to make their own decisions without any limitations and treating them at par with men is imperative for the holistic progress of the nation. Our Constitution guarantees the right to equality and the right to not be discriminated against on the basis of sex. However, gender discrimination has its roots in the Indian society since ancient times.

The present article seeks to address some of the salient issues which have been discussed by the Constitution

Bench of the Supreme Court of India in the recent years. It has been playing an extremely positive role in examining the laws which have become archaic, several of which are provisions of the Indian Penal Code, 1860, including Section 376 which deals with rape, Section 377 which deals with sodomy and sexual relationship between homosexuals and Section 497 which deals with adultery. The details of these pronouncements and discussions are of current interest.

Section 497 penalizes any man who has illicit relations with the wife

of another man without the consent or connivance of that man. This is an extremely gender biased provision and is violative of both, Article 14 and 15 of the Constitution. Firstly, it treats a woman like the property of her husband. It is not an offence if such an act is done 'with the consent or connivance' of the husband. Secondly, the offence is said to be committed by the man having illicit relations with the wife of another man and the wife is not punishable even as an abettor as she is treated like a victim. Thirdly, if a man has relations outside the marriage,

The author has been a Senior Special Counsel for the Union of India/Central Government in the Supreme Court as well as in the High Court and has a professional experience of over 35 years. She specializes in myriad faces of law including International and Commercial Arbitration, Constitutional Law, Conflict Law/Private International. She has several leading judgments to her credit.

neither him nor the woman with whom he has such relations can be prosecuted. This section has continued without any first drafted in 1860 by Macaulay.

The recommendations by the 42nd Law Report, 1971 and the Math Committee Report, 2003, to amend the definition to make it gender neutral, have failed to materialize. It has been further held to be constitutionally valid by the Courts in various judgments over the years. It has come to light recently in *Joseph Shine v. UOI*, wherein a petition challenging the constitutional validity of this provision was filed in the Supreme Court of India. The bench observed that in this provision, the concept of gender neutrality is absent and it creates a dent on the individual identity of a woman when the emphasis is laid on the consent or connivance of the husband and the time has come when the society must realise that a woman is equal to a man in every field and this provision, on the face of it, appears to be archaic. However, emphasizing on the moral sanctity of marriage in India, the stand of the Centre has been that Section 497 supports and safeguards the institution of marriage and if it is struck down, it will prove to be detrimental to the inherent Indian spirit which gives utmost importance to the institution of marriage. What is peculiar is that adultery is the only ground for dissolution of marriage under the Hindu Marriage Act, 1955 which has been made a criminal offence. Before considering the question of making it gender neutral, one must consider whether there is even a need to make it a criminal offence? Or does it suffice to remain only a ground of dissolution of marriage?

Issue of Triple Talaq

Another issue with which the Supreme Court of India dealt with was the so-called provision of Instant Triple Talaq. The very question whether it was indeed a part of the Muslim Personal Law was the subject-matter

before the Courts. Instant Triple Talaq is an age-old practice among the Sunni Muslims, most prominently the

man can unilaterally and irrevocably divorce his wife by pronouncing the word 'talaq' three times in one sitting. Over the years, this provision had been misused by Muslim men to the detriment of the Muslim women, wherein a husband divorced his wife through a text message, or over the phone. Prior to this, a talaq pronounced under compulsion or in jest was held to be valid and effective (*Rashid Ahmad v. Anisa Khatun* [AIR 1932 PC 25]). The only condition necessary for a valid divorce was that the husband is a major and of sound mind at that time. It need not even be addressed to the wife and it took effect the moment it came to her knowledge (*Pathayi v. Moideen* [1968 KLT 763]). However, in *Hina and Ors. v. State of U.P. and Ors.* [2017 (1) RCR (Civil) 313] the Allahabad

The right to property and the right of women to own property has also been the subject-matter of interpretation of the Courts, judicial pronouncements, amendments and statutory enactments. The amendment to the Hindu Succession Act, 1956 gave women the right to a share in the joint family property of both, the parents and the in-laws. Prior to this, women had a right to a limited estate.

High Court had observed that a talaq pronounced without reasonable cause and without being preceded by attempts of reconciliation by two arbiters would not lead to a valid divorce. Similar were the observations of the Supreme Court of India in *Shamim Ara v. State of U.P. and Ors.* [AIR 2002 SC 3551]. Thus, even a Triple Talaq could not be without contemplation and without any pause or room for introspection. Many Muslim majority countries, including Pakistan, have abolished this practice. Finally, in 2017 the constitutional

validity of Instant Triple Talaq came before the Supreme Court of India in the case *Shamim Ara v. State of U.P. and Ors.* [(2017) 9 SCC 1]. By a 3:2 majority, it was held to be unconstitutional, arbitrary and violative of Article 14.

However, the question which still remains is whether the declaration of Instant Triple Talaq as unconstitutional has changed the scenario of gender equality in India? Other forms of talaq still exist, wherein Muslim men still have the power to pronounce divorce without resorting to any legal recourse. In December 2017, the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was introduced in the Lok Sabha, which sought to make Instant Triple Talaq a cognizable and non-bailable offence. It has been passed by the Lok Sabha, however, it is pending in the Rajya Sabha.

The Bill, in its present form, cannot be said to be devoid of problems. Is making it a cognizable offence fair to the Muslim men? Under the Indian Penal Code, 1860 the offences related to marriage, where no physical harm is caused to the wife, are made non-cognizable to ensure that prosecution can only be at the instance of the aggrieved party. However, making Instant Triple Talaq cognizable would ultimately mean that a Muslim man can be prosecuted even if his wife has no intention to prosecute him. The Bill, in an attempt to promote the rights of the Muslim women, may inadvertently prejudice the rights of the Muslim men and discriminate against them.

Right to Property

The right to property and the right of women to own property has also been the subject-matter of interpretation of the Courts, judicial pronouncements, amendments and statutory enactments. The amendment to the Hindu Succession Act, 1956 gave women the right to a share in the joint family property of both, the parents and the in-laws. Prior to this,

women had a right to a limited estate. The ouster of women from right to inherent and own property, if they married outside the community, is present under tribal law as well as under various religious laws. Under the Chotanagpur Tenancy Act, 1908, women who married outside the community, were said to have "lost their right to parental property".

Right to Religious Identity

Similar is the situation under the Parsi Laws, where Parsi women who marry outside their community are said to have lost their religious identity. The children of a Parsi man married outside the community, can become a Parsi. However, the children of a Parsi woman married outside the community cannot become a Parsi. A Parsi woman married outside the community is not allowed to visit the Tower of Silence and attend her parents' funeral rituals. This was challenged by a Parsi woman, Goolrukh Gupta in the Gujarat High Court, wherein the Court upheld the decision to debar a Parsi woman from performing religious practices by observing that in all religions, whether Christianity, Parsi, or Judaism, the religious identity of a woman shall merge into that of her husband. When this ruling was challenged in the Supreme Court of India, the Parsi Trust went against its age-old tradition and stated that it would allow her to visit the 'Tower of Silence' to attend her parents' funeral rituals. While discussing the question whether Parsi women who marry outside their community lose their religious identity or not, the Court observed that when a man married outside the community is permitted to retain his religious identity, how can a woman be debarred? Can it be said that a woman mortgages herself to a man by marrying him and she loses her identity, including her religious identity?

Physical Molestation

Since the incidents of rape in India have gone up exponentially, the Courts as well as the legislature have stepped

in with various amendments. Prior to 2013, the definition of 'rape' under Section 375 of the Indian Penal Code, 1860 was a narrow one, including only sexual intercourse within its ambit. It was only after the infamous Nirbhaya gang-rape case that the Criminal Law (Amendment) Act, 2013 (Anti-Rape Bill) was passed under which the definition was enlarged to include acts like penetration, insertion of objects, etc. In 2018, the Supreme Court of India upheld the death sentence of four out of six accused persons in that case. One of the accused persons was a juvenile and despite being the most brutal, he was released after three years only because he was a few months short of 18 years of age. Subsequent to this incident, the Juvenile Justice (Care and Protection of Children) Act, 2015 was passed which provided that a juvenile, 16 years or older, who commits a heinous offence (offence punishable with imprisonment of seven years or more) will be tried as an adult. After the Kathua gang-rape case, the Criminal Law (Amendment) Ordinance, 2018 was approved by the President, under which the quantum of punishment for rape was increased, especially in case of a girl under 16 years of age. A noticeable peculiarity is that the definition of rape, even after the amendment, does not recognise 'marital rape' as 'rape', unless the wife is under 15 years of age. The stand taken against criminalizing it is that it would lead to degradation of the institution of marriage in our society.

Common Civil Code

The preamble of the Constitution of India states that "*We, the People of India, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and....*" Secularism means equal treatment of all the religions by the State. A Uniform Civil Code which governs the personal matters of all the citizens irrespective of their religion is the linchpin of true secularism. There is a need for such a code as various personal laws prevalent in India discriminate against women and have a long way to move towards promoting gender parity. According to Article 14,

every citizen is subject to the same set of laws, criminal and civil, the only exception being personal laws. With the increase in the number of women approaching the Courts to protect their fundamental rights, the Law Commission has been asked to probe into the possibility of implementation of the Uniform Civil Code in India, whereby men and the women will be put at par in relation to personal laws. Article 44 (Directive Principle of State Policy) of the Constitution of India articulates a provision for the Uniform Civil Code. It states that "*The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.*" The Supreme Court of India has observed in *Mohd. Ahmed Khan v. Shah Bano Begum and Ors.* [AIR 1985 SC 945] that it is a matter of regret that Article 44 of our Constitution has remained a dead letter. No community is likely to bell the cat by making gratuitous concessions on this issue and it is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. Despite the difficulties involved, a beginning has to be made if the Constitution is to have any meaning. Again, in *Sarla Mudgal v. Union of India* [(1995) SCC 3 635] the Supreme Court discussed the need for a Uniform Civil Code. However, such a Uniform Civil Code is not devoid of difficulties, especially in a country like India where there is tremendous cultural diversity across various religions, castes, etc. It may be perceived as an encroachment on the guaranteed right to religious freedom. No matter how progressive, no such decision can be forced on the people without their acceptance.

Thus, over the years, the need for reform has been recognized in India and the Supreme Court of India has been playing a constructive role in reshaping laws which have become archaic. However, we still have a long way to move towards achieving an equal status for women in the society. □

(E-mail: geetaluthra@gmail.com)