

THE DOMESTIC APPLICATIONS OF INTERNATIONAL HUMAN RIGHTS NORMS RELEVANT TO WOMEN'S HUMAN RIGHTS: STRATEGIES OF LAW REFORM IN THE INDIAN CONTEXT



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Introduction

The Declaration on the Elimination of Violence against Women¹ has called upon the member States of the United Nations to enact appropriate laws and procedures to give women redress and to sensitise judges, lawyers and policemen on problems of violence against women. In this context, this paper attempts to examine recent trends in legislative reforms and their impact in curbing violence against women in India. Three approaches to the issue are analysed here.

The first section examines the legislative reforms which followed campaigns by the women's movement. The amendment to the rape law following the anti-rape campaign is discussed in the context of its impact on women in rape trials.

The second section examines the biases against minorities and marginal sections in a communally vitiated atmosphere, while introducing reforms in the realm of family laws. The abolition of bigamy and the demand for a uniform civil code are issues of primary concern of this debate.

The third section examines the impulsive and ill formulated initiatives to liberate women. The chaos and confusions caused by judicial directions for "rescuing" minor sex workers in Bombay recently are dealt with.

Amendment to rape law and its impact on women

The amendment to the rape law, enacted in 1983, was the precursor to the later amendments.² This was followed by legislative reforms in other areas as well. In fact, during the decade 1980-1989, every single issue concerning violence against women addressed by the women's movement resulted in legislative reform. Dowry deaths (bride burning), sati (immolation of the widow on the husband's funeral pyre), prostitution and trafficking in women, indecent representation of women in the

¹ GA Res 48/104 (1994), UN Doc A/48/49, at 217 (1994), reprinted in 1 IHRR 329.

² Criminal Law (Amendment) Act 1983.

media, and sex determination tests leading to female foeticide are some examples. If oppression could be tackled by legislative reforms, this period could be judged as the golden era for Indian women, when laws were given on a platter.³

But despite the enactment of these laws, the statistics revealed a disturbing trend. Each year the number of reported cases of rapes and unnatural deaths of women increased. The rate of convictions under the lofty and laudable legislation was dismal. This was partly due to the fact that the positive recommendations of the expert committees did not find a place in the Bills presented to the Parliament. The callously framed laws were full of loopholes.

In addition, the reforms seldom questioned the conservative notions of women's chastity, virginity, servility and the concept of the good and the bad woman in society. For instance, the campaign against rape did not question the belief that rape is the ultimate violation of a woman and a fate worse than death. It did not transcend the conservative definition: forcible penile penetration of the woman's vagina by a man who is not her husband.

Before examining the judicial biases in rape judgments during the post-amendment period, a brief summary of the campaign needs to be mentioned. Mathura, a 16-year-old tribal girl, was raped by two policemen within a police compound.⁴ The Sessions Court acquitted the policemen on the ground that, since Mathura had eloped with her boyfriend, she was habituated to sexual intercourse and hence she could not be raped. The court further ruled that Mathura was a liar and the sexual intercourse was with her consent.⁵

The High Court convicted the policemen and held that mere passive or helpless surrender induced by threats or fear could not be equated with the desire or will and hence it could not be deemed to be consent.⁶ On appeal, the Supreme Court set aside the conviction and acquitted the policemen. The court concluded that since there were no visible marks of injury on her body, Mathura's allegations of rape were untrue and the consent could not be brushed aside as passive submission.⁷

The judgment triggered off a nation-wide campaign for changes in rape laws in 1979 which resulted in an amendment in 1983. Although the campaign focused primarily on abuse of police power in custodial situations and demanded procedural regulations to curb police power, the amendment did not focus upon procedural irregularities and emphasised only stringent punishment.

³ See Flavia Agnes, "Protecting Women Against Violence? Review of a Decade of Legislation, 1980-1989" X/XVII/17 *Economic and Political Weekly* WS-19, 25 April 1992.

⁴ *Tukaram v Maharashtra* 1979 AIR SC 185, [1979] 1 SCR 810.

⁵ [1979] 1 SCR at 814D-815A.

⁶ [1979] 1 SCR at 815B-816D.

⁷ [1979] 1 SCR at 817D-819F.

A minimum punishment of seven years for rape and ten years for compounded and aggravated offences such as rape in custodial situations, gang rape, rape of children under 12 years and rape of pregnant women was stipulated. The premise underlying this stipulation was that stringent punishment would act as a deterrent and curb violence against women.

But despite the stipulations, the courts continued to award less than the minimum sentence. Hence the deterrent aspect of stringent punishment was rendered meaningless. Also, the higher the stipulated sentence, the fewer were the convictions. The theory of stringent punishment also clashed with the reformers' theories of leniency for juvenile and youth offenders.

While there was greater emphasis in statutory provisions leading to enhanced punishment, procedural regulations and stricter investigative measures were not granted due importance. Since the basic premise of the criminal law is *innocent till proved guilty*, unless there was greater accountability of the investigative machinery, proving guilt in a criminal court continued to be an impossibility. The dictum *ninety-nine guilty can be set free so that one innocent is not hanged* could be violated only at the cost of corroding the rights of civil society.

Defined within these parameters, the age of the victim, the injuries and trauma suffered by her, or the violations to her dignity and personhood within courtrooms became redundant. The equations of power during a rape trial continued to be confined within the binaries of the State versus individual men. The dignity and rights of women during investigations and trials did not invoke the protection ensured by article 21 of the Constitution which guarantees life and liberty and the interpretation that life includes life with dignity.⁸

While reformers advocated enhancement of State power, the patriarchal biases within penal statutes were not questioned. Hence the offence of rape was confined to penile penetration. Chastity and virginity continued to be the prime concerns of the judiciary. Rape trials were often rendered titillating sexual farces in which the prosecution, the defence and the presiding judge all participated in equal measure, to the cost of the victim. Collusion between defence and prosecution, which is the bane of the criminal legal system, was far more evident in issues concerning violations of women's rights.

While at one level the women victims had to confront the patriarchal biases of the State, at the other, they also had to confront biases against caste, class and community. When the State was cast in the role of the protector, a proprietorial role was assigned to the State to safeguard 'its women' and 'their morality'. Within this context, the term 'our' women could be interpreted in its widest and all inclusive sense to include 'all Indians' and thereby excluding 'foreigners' (ie Nepalese, Bangladeshis,

⁸ See Flavia Agnes, *State, Gender and Rhetoric of Law Reform* (Mumbai, SNDT University, 1995) at 35.

Pakistanis, Africans or whites) to more limited ones such as “Hindu” or “upper caste”.

The positive judgments often reflect conservative notions regarding women and their sexuality. The judicial comments include “when a woman is ravished what is inflicted is not merely physical injury but a deep sense of deathless shame...” and “...no woman of honour will accuse another of rape and thereby sacrifice what is dearest to her...”⁹ While lamenting the loss of virginity, the courts proclaim during rape trials that “virginity is the most precious possession of an ‘Indian’ woman”,¹⁰ thus insinuating that rape of foreigners is not a serious offence. (As one chief minister expressed, “for foreigners rape is like drinking tea.”¹¹)

This premise could be further restricted to exclude the marginalised sections — lower caste, poor, minority and tribe, ie the women who do not command honour and respect. If rape is an expression of power and control by the dominant class (or caste), then more women from the marginalised sections are likely to be the victims of rape by men from the dominant class. The inherent biases of the State against the marginalised sections would extend to women from these sections, and that women would not form a different category away from the baggage they carry of their caste and class — this factor was glossed over while strengthening the State to deal with issues of gender.

The judgment in the *Pararia rape case*¹² in 1988 is an example of this bias. The State machinery had destroyed a whole village, looted property and raped several women. Rs 1,000 was declared by the government as compensation to the victims. In this context, while acquitting the police of the charge of rape, the court commented: “It cannot be ruled out that these ladies will speak falsehood for a sum of Rs 1,000. These women cannot be equated with ladies who hail from decent and respectable society. They were engaged in menial work and were of questionable character.” While the judge did not rule out molestation and assault, he was convinced that there was no rape, since rape could not take place when a group of assorted men in the age group of 25 to 68 were assembled together. “Will a sub-inspector ever open his pants in the presence of a constable?” was the exasperated query.

In another 1992 judgment, in a case concerning the abduction and rape of a tribal girl, while reducing the sentence from four years (which is less than the minimum stipulated by the statute) to two months, the court explained that since the rape did not result in any serious stigma to the girl, the sentence could be reduced and reasoned “sexual morals of

⁹ *Rafia v State of Uttar Pradesh* 1980 Cri LJ 1, [1981] 1 SCR 402.

¹⁰ *Babu v State of Rajasthan* 1984 Cri LJ 74.

¹¹ Flavia Agnes, “The Anti Rape Campaign: the Struggle and the Setback” in Chhaya Datar (ed) *The Struggle Against Violence* (Calcutta, Stree, 1993) at 121.

¹² An unreported trial court judgment. The judgment received wide media publicity. See Agnes, *supra* note 11, at 123-124.

the tribe to which the girl belongs are to be taken into consideration to assess the seriousness of the crime.”¹³

The latest in this trend which has attracted public attention is the decision of the Sessions Court at Jaipur on 15 November 1995 in the case of *Bawri Devi*.¹⁴ The community worker of the State-sponsored Women's Development Programme was gang raped in the presence of her husband, by a group of men from a dominant caste.

The court acquitted the accused, labelling the social worker as a liar. Insinuations regarding her character were made through a remark that the semen found on her skirt belonged neither to her husband nor to the two men but to a fourth person. Further, the men belonged to “respectable families” and would not rape a woman from the lower caste. The judgment included a further comment that it was highly improbable that the husband would stand by and witness the rape of his wife. The trial was held in camera, and hence during the trial she was the only woman in a room of 17 men.

Within this context the powers vested in the State for the protection of women could be used by the State more effectively against men from the marginalised sections rather than in favour of women from these sections.

The spate of reforms introduced by the State in response to the campaigns initiated by the women's movement uniformly strengthened State power. Arrest without warrant, pre-trial detentions, non-bailability of offences, shifting of onus of proof, in-camera trials and mandatory minimum punishments were the common feature of these reforms. There was a misplaced presumption that the longer association with the law enforcement machinery, which is generally believed to be extremely and sadistically violent, would render individual men less violent.

Enhancing State power against civil society does not render individual women strong enough to counter male violence. A strong State conversely means weaker citizens, a term which also includes women. The women could gain only as ‘wards’ of the State, within the parameters defined by the State. At best, this concept viewed women as imbeciles and weak, and weaker the women, more vulnerable they would be to male violence. The reforms could not break this vicious cycle of violence.

The undercurrents of the debate for a uniform family code

The second issue, the complexities of enacting a uniform family code, has generated an important debate in the context of uniformity versus plurality in recent times.

¹³ *Dayaram and Another v State of Madhya Pradesh* 1992 Cri LJ 3154 (MP).

¹⁴ An unreported trial court decision. The judgment was delivered on 15 November 1995 by the District and Sessions Court, Jaipur in *The State of Rajasthan v Ramkaran and Others*.

This debate has some relevance to the Convention on the Elimination of all Forms of Discrimination Against Women (the Women's Convention).¹⁵ Article 16(1) of the Convention stipulates equal rights to spouses within marriage and article 16(2) stipulates compulsory registration of marriages. India signed the Convention in July 1980 with a declaration in respect of its pluralistic culture and practical difficulty of stipulating compulsory registration of marriages in view of the low level of literacy and cultural diversity.

Some preliminary comments regarding the family laws in India are perhaps necessary before we proceed with the complexities of the current debate. Family relationships are governed by personal laws which are based either on religious precepts or customary practices. The colonial rulers refrained from legislating in the realm of family law and these matters were left either to the religious heads, or to local caste or community bodies. Hence, at the time of independence there was a great diversity in the cultural practices of various communities.

Many of the customary practices were anti-women. Denial of property rights and plurality of wives were two prevalent practices. After independence, by a statutory enactment of 1955, Hindu women were granted property rights.¹⁶ But this right remained mainly on paper due to the loopholes provided in the legislation through which Hindu men could deprive women of their property rights. In this process of codification Hindu women were granted the right of divorce and Hindu marriages were rendered monogamous.

Due to the communal conflict which led to the partition of the country, the Muslim leadership viewed the issue of personal laws as a symbol of its cultural identity and resisted State interference in the realm of personal laws. However, Muslim women were granted the right of divorce through a pre-independence enactment and Muslim women also had better rights of property inheritance. The two aspects of Muslim personal law which have attracted criticism are the issue of plural marriages and the right of husband to unilateral divorce.

An important case in this debate is the judgment in the controversial case of *Mohammad Ahmed Khan v Shah Bano Begum*¹⁷ where the Supreme Court awarded maintenance to a divorced Muslim woman. The communal undertone of the judgment led to protests by the minority community and resulted in an enactment which placed Muslim women out of the purview of secular and uniform legislation.¹⁸ While this was projected as an anti-woman piece of legislation, in quite a few instances, it worked in favour of women by granting them the right of lump sum divorce settlements.

¹⁵ 1249 UNTS 13. India signed the Convention on 30 July 1980 but ratified it only on 9 July 1993.

¹⁶ For details, see Hindu Marriage Act 1955 (Act 25 of 1955), reprinted in 1955 AIR Act 80 and Hindu Succession Act 1956 (Act 30 of 1956), reprinted in 1956 AIR Act 252.

¹⁷ 1985 AIR SC 945, [1985] 1 SCJ 96.

¹⁸ Muslim Women's (Protection of Rights on Divorce) Act of 1986 (Act 25 of 1986), reprinted in 1986 AIR Act 152.

The issue of concern here is that while the *Shah Bano* judgment and the events that followed received wide publicity, instances where the Hindu community was taken out of the realm of common and secular laws went unnoticed. For instance, in 1976, the Hindus were taken out of the purview of the secular legislation, ie the Special Marriage Act, and were permitted to be governed by Hindu Succession laws to preserve male privileges. This issue did not receive any publicity. Also the communal undertones of the *Shah Bano* judgment went unnoticed by most secular and progressive movements.

This is the background against which the demand for a uniform code is now being raised. In recent years, the Hindu communal forces have made this an important plank in its anti-minority propaganda. The communal demand focuses primarily on inadequacies of the Muslim law. The fact that a large number of women who are murdered or who are driven to suicide are Hindus, and that this might be due to the gender bias within Hindu cultural practices and legal provisions is conveniently glossed over in this debate. A myth created by the media is that the 'enlightened' Hindus are governed by an ideal gender-just law and this law now needs to be extended to Muslims in order to liberate Muslim women.

A recent Supreme Court judgment in the *Sarla Mudgal* case¹⁹ has given a boost to the demand. While adjudicating upon a case of conversion and bigamy by Hindu men, the court held that prevalence of polygamy under Muslim law provides "... an open inducement to a Hindu husband, who wants to enter into a second marriage to become a Muslim...." The judgment commented more upon the Muslims and Muslim law rather than the tendency of Hindu man towards bigamy.

The communal undertones of this judgment can be ascertained only when we study the judgments of the Supreme Court and the High Courts on the issue of bigamy by Hindu men over a span of thirty years. The penal provisions of bigamy became applicable to Hindus only in the year 1955. In the first case decided by the Supreme Court in 1965,²⁰ the Court held that even if a couple was living together as husband and wife and the community accepted them as such, there could not be a conviction for bigamy unless essential ceremonies of a Hindu marriage were proved. This was followed by several judgments of the Supreme Court and the various High Courts over the span of thirty years until the decision in the *Sarla Mudgal* case in 1995. Relying upon technicalities within the Hindu Marriage Act, the judiciary absolved the Hindu husbands of any criminal consequences of bigamy. An analysis of the judgments confirms the fact that an Hindu marriage is the most illusory

¹⁹ *Sarla Mudgal v Union of India* [1995] 3 SCC 635.

²⁰ *Bhaurao Shankar Lokhande v State of Maharashtra* 1965 AIR SC 1564.

²¹ For a detailed study of these judgments, see Flavia Agnes, "Hindu Men, Monogamy and Uniform Civil Code", XXX/50 *Economic and Political Weekly* 3238, 16 December 1995.

legal entity and the conviction for bigamy of Hindu men is an impossibility.²¹

The Hindu Marriage Act unified diverse cultural practices of the Hindus along Brahminical rituals. In many of these communities, customary divorce and remarriage of divorcees and widows was prevalent even prior to the Hindu Marriage Act. The rituals for solemnising the marriage of virgin brides differed from the rituals for solemnising the second marriages. But the Act which homogenised diverse rituals and customs into rigid Brahminical rites could not provide for these cultural variants. Due to this, the marriages which are valid in the community became "no marriages" in the eyes of the law and hence they did not attract the penal provisions of bigamy.

But what is even more significant in the context of rights of civil society, the judiciary would have to exercise great care and caution before invalidating a marriage which is customarily accepted by the community. Hence the need for strict proof in criminal litigation, lest rights and legitimacy of women and children are not jeopardised.

There are instances where the first wife, by initiating a criminal prosecution against her husband, loses the presumption of marriage by which she will be governed under the provisions of section 50 of the Indian Evidence Act in matrimonial litigation. This presumption (which has worked well for Indian women) lays down that, if the man and woman are living together and the community has accepted them as such, the woman will be entitled to civil rights such as maintenance and residence and strict proof of marriage is not necessary. But since criminal prosecution requires strict proof of both marriages, the marriage of the first wife who has initiated the proceedings is set aside and the second marriage is held to be the valid one.²²

The demand for abolishing polygamy overlooks the fact that every bigamous or polygamous marriages affects the rights of two sets of women, ie the first and the subsequent wife (or wives). If the cultural practices of a community permit collateral marriages and if poverty and illiteracy are the factors which contribute to this phenomenon, then marriages will continue to be polygamous despite penal prohibitions, in the same manner that the phenomenon of child marriages continues defying penal prohibitions to this effect.

But the second wife, whose situation is most vulnerable, will be devoid of any enforceable legal rights. This is one of the primary effects of abolishing polygamy among Hindus. The legal dictum that no one is permitted to reap the benefits of his wrong does not seem to apply to men in bigamous relationships. It only operates against women who are denied maintenance.

It is significant to note that in 40% of the cases reported in a

²² *Ravana Siddaswamy v Public Prosecutor* 1990 Cri LJ 1001, referred to in Agnes, *supra* note 21.

matrimonial law journal in 1994, where maintenance was the issue, the husbands denied the validity of their marriage in order to escape the liability of paying maintenance to their wives. At another level, despite legal provision for or prescription of monogamy the percentage of bigamous marriages is more among Hindus than Muslims. After a prolonged battle, only in recent years the Supreme Court has recognised the rights of second wives and granted them maintenance.²³

A uniform civil code and the compulsory registration of marriage seems to be an apparent solution to the problem posed by cultural diversity. But this is rather a simplistic solution to a far more complex phenomenon. Two proposed legislative measures which have been formulated to deal with this issue are discussed below.

The first is a Bill drafted by the National Women's Commission and titled "The Marriage Bill 1994". In one stroke, this Bill repeals all existing laws on marriage and divorce, and seeks to abolish polygamy by the compulsory registration of marriages. For default in registration, the Bill stipulates a fine of Rs 100 per day for a period of one month and thereafter invalidates the marriage. The fact that a significant section of the Indian population does not earn Rs 100 per month is conveniently overlooked.

The Bill also overlooks the fact that more often than not, it is the woman who would be in need of legal redress and it would be to the husband's advantage not to register the marriage and thereby escape economic liabilities.

While many countries in South Asia region provide for registration of marriages, no country has extended this logic so far as to invalidate an existing marriage with its adverse implications for women and children. In fact, a growing tendency in western countries is to grant rights and benefits to people in informal relationships. While the global trend is towards granting rights to cohabitants, the tendency in India seems to be towards increasing regimentation and State interventions in family relationships.

In a country which cannot provide basic facilities like shelter, primary education or drinking water and where a large number of women are illiterate and live below the poverty line, the requirement of compulsory registration of marriage is not practical. The presumption of marriage under the Indian Evidence Act has served us well and is better suited to Indian socio-cultural conditions. Stringent punishment and invalidation of non-registered marriages will only lead to increasing State control in people's personal lives without in any way protecting women.

Even 40 years after the enactment of the Hindu Marriage Act, most States have not even provided the minimum infrastructure for the registration of Hindu marriages. While there is an urgent need to set up

²³ *Vimala v Veeraswamy* [1991] 2 SCC 375, [1991] 1 SCR 904.

the necessary infrastructure, registration of marriages can only be a facilitating measure.

While the Bill deals elaborately with the issue of registration, only one section collectively deals with economic rights of maintenance and residence. The Bill does not even protect women's exclusive rights under ancient systems, ie the Islamic provision of *mehr* or the customary right of *stridhana*. By using the term spouse, the Bill presumes an equality between husband and wife which does not exist in reality. Situating unequals on an illusory premise of equality will only serve to widen the gulf of inequality.

The second example of giving legislative effect to this demand is the Bill introduced by the State of Maharashtra, which is ruled by a communal Hindu alliance which was responsible for the riots in Bombay during 1992-93 and which has a clear and explicit anti-minority stand. After the Supreme Court decision in the *Sarla Mudgal* case (discussed above), a Bill was hurriedly rushed through the State legislature in August 1995. There was no public debate on the issue. While the Bill seeks to abolish polygamy, the manner in which this is to be achieved is not specified. It does not even stipulate registration of marriages as a measure to curb polygamy.

The only purpose of enacting this Bill is to grant the communal state an additional lever to interfere in the lives of the Muslim community. This Bill must be viewed in the context of other developments within the State. During the one year of its rule, the right wing Hindu communal alliance disbanded the State Minority Commission, and introduced a Bill to ban cow slaughter (a sensitive issue for Muslims). The government also, on the eve of the recent elections, unceremoniously scrapped the Srikrishna Commission enquiring into the communal riots of 1992-1993 in Bombay, which had examined hundreds of affected people. Human rights activists had expressed great hopes for the findings of this commission. Against this background, a Bill to abolish polygamy will cause further insecurity within minority leadership and rigidify the positions internally, something which will hinder the process of gradual reform from within.

The initiatives of Muslim women who are working within community structures are far more relevant here. These women are opposed to banning polygamy, as they fear that this move will affect their work among Muslim women. They in turn have put forward an alternate scheme to deal with the issue of polygamy which aims to regulate polygamy by economic constraint. The first wife of any man contracting a polygamous marriage will be entitled to maintenance, custody of children and the right to reside in the matrimonial home (or an alternate residence) and will herself also have the right to divorce. The Muslim women feel that these measures will work far better rather than a blanket ban on polygamy, which would only serve to drive a further wedge between communities without strengthening Muslim women.

While the Women's Convention stipulates equality for spouses within the marriage, this provision needs to be contextualised within national and regional politics and plurality of cultures. Resisting homogenisation of communities through uniform legislation has become an important agenda of human rights, and women's rights need to be situated within this context.

While reforms are necessary, the strategies of reform are of equal significance. Community initiatives will have greater significance to women rather than legislation imposed through centralised enactment with hidden agendas. Great care and caution needs to be exercised while initiating strategies of legal reform so that they do not place further fuel in the hands of anti-minority forces. This is the challenge before the Indian State. Hence one hopes that the declarations made while ratifying the convention will be adhered to while bringing in reforms in women's favour.²⁴

Judicial initiatives to rescue minor sex workers of Bombay

The third section addresses the issue of ill thought-out strategies of reform which create further trauma for the beneficiaries of such programmes. This is in the context of a recent rescue operation carried out by the city police under judicial directions.

In February 1996, the Chief Justice of the High Court of Bombay converted a newspaper article into a *suo moto* petition. The article mentioned that 65% of the 70,000 sex workers in the red-light districts of the city were infected with AIDS. As a sequel to this news article, the Chief Justice of the High Court of Bombay directed the city police to rescue minor sex workers, carry out HIV tests, and evolve a scheme for rehabilitation.

In response to this, the police contacted rescue homes and orphanages to ascertain the number of vacant beds, without specifying the purpose for which this information was sought and arrived at a magic figure of 450. In a swift and highly confidential operation, brothels were raided and 450 girls were "rescued" and dumped upon unwilling wardens of orphanages and shelter homes. The operation was so swift that there was no time even to collect the clothes, personal belongings, babies or medicines of the minor girls. Nor did the fact that not all of them

²⁴ India made the following declarations upon signature and confirmed upon ratification:

"With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent.

With regard to article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that, though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy."

UN Doc CEDAW/SP/1996/2, at 19-20.

were minors or sex workers matter. The magic figure of 450 had to be reached.

Usually, these raids are a white-wash. When the rescued girls are produced before the magistrate the following day, they are bailed out by the brothel keepers and then it is "business as usual". But since the higher judiciary was seised of the matter and the operation was under public scrutiny, things did not follow the usual course. When the police reported about the successful operation, the Chief Justice issued a further direction that the rescued minors could not be released through an order of a juvenile court.

Meanwhile, the rescued girls posed a social problem. The aided orphanages also run schools. There was fear and panic among "respectable" parents who did not want their children to mingle with the infected scum of the city. The institutions rushed to court and obtained an order that their orphanages should be cleared of the rescued girls.

The girls were then shunted away to the Beggars Homes and kept in quarantine. The State which now became the guardian of the rescued minors insisted that no one should be allowed to meet the girls to prevent their re-entry into the trade. With this, the little solace offered by a few social activists was cut off.

Then started the round of health check-ups. Compulsory HIV testing was done despite the government policy on AIDS which prohibits mandatory testing. But the results of the HIV tests were not communicated to the institutions housing the girls. Regarding the purpose of the test, the State welfare functionaries caustically commented that two different schemes would be evolved and the negative ones would be rehabilitated. Specific questions about the HIV positive girls revealed the stance that since they were doomed to die, nothing further needed to be done regarding their rehabilitation.

This comment caused alarm among social activists, who intervened, to secure a ban against further testing. Since the blood was already collected, the rare opportunity of testing 450 child sex workers to gather epidemiological data was not to be lost on grounds of "human rights" or "morality". But a concession was made that the tests would be "un-linked" and "anonymous".

There were so many ironies. Half the rescued girls were minors aged between 10-15 years for whom childhood meant captivity. So they lied that they were 20 and above. The others were above 20. Some were even above 25. But to meet the magical figure of 450 the police insisted that they were minors. So ossification tests were ordered to arrive at the correct age and until then even those who were visibly and obviously adults could not be released.

There was also the problem of "outsiders": the Nepalese and the Devadasis of Karnataka. They ought to be rehabilitated in their own native land. It did not matter that they were used and abused in this city. It did not matter that back in the village there was no "home" left. They

were the wards of their native State. The constitutional guarantee of freedom of movement did not seem to apply to minors in captivity. It was only feasibility that mattered. The rescue homes in and around Mumbai have no space for rehabilitating “outsiders”.

Through all this, the girls continued to be in a state of shock. The food in the government homes was inadequate. For almost a month the girls slept on the floor, wearing the clothes in which they were “rescued”, and huddled together in fifties and hundreds.

In the days that followed, the “outsiders”, the Nepalese and the girls from Karnataka were dispatched. A few of the girls died in the city hospitals. According to experts offering support to AIDS victims, the trauma caused by the rescue operation aggravated their situation. No scheme had been evolved yet for long-term rehabilitation.

The stark reality of this operation is that if the city needs 450 more girls to take the place of those in captivity, they will be procured. But, on the other hand, if the present economy warrants a new type of flesh trade, then the brothels situated in the midst of the city which have catered to the industrial workers of yesteryear will have to give way and the land will be made available to the new market forces. Then there will be another raid and the cycle will start all over again.

Conclusion

In conclusion it needs to be stressed that while international conventions have to be implemented, they have to be contextualised within national, regional and local specificity. Care has to be taken so that not only the letter of the conventions but the spirit is maintained while legal strategies are formulated and implemented.