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# **IMAGES (1920-1950)**

## **REASONABLE MAN, REASONABLE WOMAN AND REASONABLE EXPECTATIONS**

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The “reasonable man” is a product of English, judicial, genius.<sup>1</sup> He was created for justicing convenience. Judges, attempting to unravel the mysteries of human conduct, intent and motive, have for years turned to the Reasonable Man for guidance. Deviance and delinquency have been determined by reference to him. The choice between condemnation and compassion have rested on judicial expectations of what a Reasonable Man would have done.

Of course the assumptions in defining the Reasonable Man beg to be challenged. This generalisation, upon manufacture, takes on the mask of principle, dislocates the particularity of the individual and is pragmatic without pretence of perfection. The judicial function, being in large measure a matter of relating the broad statements of enacted law to individual contexts and acts or omissions, this generalisation which displaces difference and produces stereotypes is particularly suspect.

The presence of the Reasonable Man, however, alerts us to the possible existence of the Reasonable Woman. The phrase was never enunciated, perhaps because judges followed the fashion of the day where legislators clubbed women, minors and the mentally incapable together, as being deficient in reason. Perhaps it was the recognition of proprietorship of the man over woman, which rendered reference to her reason irrelevant. Or, again, perhaps it was the relative rarity of women accessing courts which made her a player around whom cases were fought, but who was not bidden to contribute her perspective to the few principles that developed in her name.

Yet, it must be said, the presence of women in law reports is not limited, either in its frequency or in its variety, to cases where women moved the courts. As accused, as victim, as witness and as property, women have been drawn into courts, and pronounced upon.

Revisiting the decisions of High Courts between 1920 and 1950 introduces us to a triumvirate of judicial creations: the Reasonable Woman, the Reasonable Man and Reasonable Expectations.<sup>2</sup>



Women, these cases tell us, are essentially of three kinds. There is the **wife**. The wife who is wronged by the husband; the wife who drives her husband to desperation; the wife who is seduced by another; the wife who is slandered. There is empathy for the cause of paying a price to become a wife, as there is derisive ire poured on those who murderously lead a wife to the pyre of her husband. Occasionally, the wife is replaced by the mother or the daughter.

Then there is the **non-wife**. In her relationship with a man, she is recognised as possessing an autonomy and independence which is not granted to the wife. Sometimes identified as a concubine, at others as a prostitute, there is an agency which is acknowledged in the non-wife which is quite categorically denied to the wife. She is her own person, and not the creation and concern of a ‘guardian’. We also meet the woman in prostitution who challenges the power of the state to exile her from her home.

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1. The reasonable man was characterised by Lord Bowen as “the man on the Clapham Omnibus”, and so cited by Lord Greer L.J. in *Hall v. Brooklands Auto Racing Club* (1933) 1 KB 205 at 224. An American writer, also quoted by Lord Greer L.J. in *Hall*, described him as “the man who takes the magazines at home, and in the evening pushes the lawnmower in his shirt sleeves”. Eldredge, *Modern Tort Problems* is quoted as saying: “The reasonable man is a fiction — he is the personification of the court and jury’s social judgment.” And, as Lord Macmillan would say, the judge has to decide what “reasonable” means, and it is inevitable that different judges may take variant views on the same question with respect to such an elastic term: *Glasgow Corporation v. Muir* 1943 AC 448 at 457: see W.V.H. Rogers, *Winfield and Jolowicz on Tort*, Sweet and Maxwell, London, (Thirteenth edn.), 1989, pp. 46- 47.

Rogers adds a comment: “Despite the inveterate use of the masculine gender, there is no doubt that the personification includes the reasonable woman.” p. 46, fn 32. We may of course arrive at a different conclusion.

2. The source for the cases is the decisions reported in the All India Reporter from 1920 to 1950. It includes decisions from all High Courts, as also from the Privy Council and the Federal Court. All judgements where women were featured and spoken about were extracted. What was largely left out were decisions under the categories of Hindu law, Mahomedan law, Parsi law... except for a few illustrative cases on marriage, maintenance and divorce. The reason for leaving them out was that they inhabit a universe in which familial hierarchies and property relationships are at its centre, and its politics could be better explored in a work on personal laws.

In a third projection, she is the **criminal**. There is the cold, callous criminal who kills children to steal their ornaments. She is sent off, with equal coldness, to the death row. And there is the victim of passion who, in attempting to hide her illegitimate infant from life itself, impels the judges to plead for executive clemency.

Sometimes prominently, sometimes in interstices, the Reasonable Man and Reasonable Expectations appear in these narratives.



Marriage provides a good starting point for telling tales.

A woman derives spiritual benefit in gifting property to her son-in-law in consideration of his marrying her daughter.<sup>3</sup> The message from the court was unequivocal. The context was provided by reversioners who battled gallantly to retrieve property that the woman had let pass from the hands of the family to a relative stranger.<sup>4</sup> They lost, but a lot was said before the case was through.

A profile of the dutiful widow and her property emerges from amidst a profusion of precedents and allusions to ancestral texts. Being without male issue, the court said, there was no denying that the lady in question had succeeded to her husband's property as an absolute owner. Yet, her power of disposition was qualified. It was apparent to the court that a wife who survives her husband and takes the entire estate of her husband is enjoined to perform acts which are "calculated to increase the prosperity of her and her lord, such as, performing *sraddhas*, digging wells, etc., and giving presents with pious liberality in proportion to the wealth inherited by her". It is not to be forgot that it is "the performance of religious and charitable purposes and acts conducive to the welfare of the husband (which) are the objects for which she takes the estate of her husband". For, it is to be remembered that "(m)aking useless gifts to dancers, players and the like and the wearing of delicate apparel, etc., the tasting of rich food, etc., and the like being improper for a widow who is enjoined to restrain her passions (they) are equal to theft". The distinction between "legal necessity for worldly purposes" and "the promotion of spiritual benefit of the deceased" would determine the limits of the widow's power of disposition. And ancient wisdom enjoins a widow not to commit "waste" and "prohibit(s) expenditure not useful or beneficial to the late owner of the property".<sup>5</sup>

Where, then, does the gift to the son-in-law come in? First of all, the widow was performing an "imperative and religious duty" when she arranged for her daughter's marriage. It was also plain that had she not agreed to giving the property to her son-in-law, the marriage would have never happened. The mother, anxious to seal the match, would then have had her wishes thwarted. Moreover, a gift of land to a son-in-law on the occasion of marriage or at the time of departure (*bidai*) is meritorious, and the gift can be made at the time of the actual marriage or in connection with the ceremonies connected with it.<sup>6</sup>

The gift of landed property was, according to the court,<sup>7</sup> on this reasoning, a reasonable expectation, lending legitimacy to the widow's power to alienate property—a power denied to her in almost every other circumstance.

We may pause at another court which tells us that "purchase of a woman" by "payment of a ... sum" to "secure a wife" was customary in the community of the marrying man, and "the transaction was not really in the nature of a 'purchase' in the sense urged".<sup>8</sup>

And move on.

The economics of marriage notwithstanding, Hindu law, the courts would say, regards marriage as a sacrament constituting a holy and indissoluble union, primarily for the propagation of children, and also to ensure the

3. *Ram Sumran Prasad v. Govind Das* AIR 1926 Pat 582 (Jwala Prasad and Bucknill JJ.)

4. An aside before we set off: it is impressive, the range of issues that reach courts as squabbles over property rights. "Reversioners"—those to whom property reverts after the lifetime of a person who inherits partially as do, for instance, widows who are only given a life estate—have contributed a rich fund of cases in their pursuit of inheritances. To illustrate, validity of marriages, sanity of erstwhile holders of property, bona fides of guardians have often been called into question out of a distant, and often obscure, past. See also, for e.g., *Ram Sumran supra* n. 3.

5. *Supra* n. 3.

6. *Ibid.*

7. *Ibid.*

8. *Bhan Singh v. Ram Singh* AIR 1931 Lah 599 (Bhide J.).

performance of certain religious duties.<sup>9</sup> Dissolving the indissoluble requires both judicial will and textual support. Manu Smriti, Yagnyavalkya Smriti and Narada Smriti are illustrative, and capable, assistants to judicial sophistry. They may be read to assert the inevitability, and customary correctness, of the bribing of bridegrooms.<sup>10</sup> Or, with deftness, they may be selectively interpreted as anachronisms.

So it came to pass that a proposition that impotence ought not to make marriage dissoluble since *niyoga* was a substitute of some vintage met with an English judge's metaphorical curling of the nose. It led to his finding authorities that declared the obsolescence of *niyoga*, even as he declared that a matrimonial alliance between an ordinary healthy woman and an impotent man as an indissoluble union was contrary to public policy. The marriage was annulled.<sup>11</sup>

Divorce does not, however, deserve the support that marriage does. And it certainly is not legal necessity when a mother sells property to find the resources to obtain her daughter's divorce. The daughter's claim to a share in her mother's property, as reversioner and made long years after its sale, was rejected by the court, but not before the court iterated its position that "under the Hindu law, no doubt, the marriage of a daughter would be a legal necessity justifying the alienation of property by a widow. A divorce, however, is against the policy of Hindu law, and no precedent has been pointed out which would justify the court in holding that a divorce may be regarded as a legal necessity."<sup>12</sup>

Resistance to divorce is expressed in other ways too, as where the court would say: "No one can demand a divorce as of right, nor yet a declaration of nullity". The status that marriage confers, and the consequences that flow from it, "particularly after consummation are so serious and far-reaching, especially with regard to the children of the marriage, that any breaking up of the marriage tie cannot be left to the choice of the individual". It is therefore that, in divorce proceedings, the discretion of the court "is absolute. There is no question of limitation. There is no question of estoppel. There is no question of laches .... (T)hese are not ordinary civil proceedings. They are matters in which the state is interested and are matters in which the courts can, and must, make as full and complete an investigation as they can."<sup>13</sup>

Again, "the state is vitally concerned in the institution of marriage and insists on strict proof and a close investigation before it will permit the tie to be dissolved". It is extreme and "very rare" cases, "always (for) adequate reasons", which may justify a deviation from the norm of holding marriages together by law.<sup>14</sup>

It is in a matter concerning "unwifely" conduct that the uneven effect of the difficulty of divorce was suggested. The court, in passing, referred to the society where the husband may marry more wives than one, and "the woman has no such corresponding privilege", nor can she obtain a divorce, "for divorce in this community is not recognised".<sup>15</sup>

Now to the unwifely conduct. The wife initiated a case for restitution of conjugal rights and for restraining the husband from marrying a second time. But he was married before he could be called to the court. She carried on with the proceedings she had begun for restitution of conjugal rights.<sup>16</sup>

In the court's narrative, trouble arose between the husband and the wife some time after they were married, after she had "(borne) him a son". The "wife left the husband's house" and did not return. After "vain efforts at reconciliation", the husband married a second wife. It was for this "ulterior purpose" of preventing the husband marrying another time that the wife, "frustrated" in her "real purpose", brought the suit. This was not "in good faith at all". It was this that led the Sub-Judge to believe the case to have been "at the instigation of her father".<sup>17</sup>

The deep and sinister purpose of preventing the husband from marrying again lay revealed. There is a severe "aha, caught you!" in the judgment.

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9. *Smt Ratan Moni Debi v. Nagendra Narain Singh* AIR 1949 Cal 404 (Edgley J.).

10. *See supra* n. 3.

11. *Supra* n. 9.

12. *Tangeva Venkappa v. Govindappa Ayappa* AIR 1928 Bom 495 (Fawcett Ag. CJ and Mirza J).

13. *Ganesh Prasad Ramprasad v. Damayanti* AIR 1946 Nag 60 (Niyogi, Bose and Sen JJ).

14. *Kishore Sahu v. Mrs Snehprabha Sahu* AIR 1943 Nag 185 (Niyogi, Vivian Bose and Digby JJ).

15. *Rukibai v. Dr Partabrai Godhumal* AIR 1938 Sind 233 (Davis JC and Weston J).

16. *Ibid.*

17. *Ibid.*

What was it about the wife's conduct that so raised the ire of the court? In the obligations imposed on a Hindu wife for the benefit of her husband, upon her marriage she should have become "one with the family of her husband". Yet, "(s)he has in her heart remained in the family of her father. She has sided with her father's house against her husband's house; she has refused all efforts at reconciliation and insulted and outraged his house by the charges of misconduct she has brought against him and his widowed sister-in-law". It was "clear that she left her husband's house without his permission; she did not ... realise her position as a Hindu wife, and though it may well be that time and the spread of education have softened the harsh austerity of the simple rule that a Hindu wife must look on and revere her husband as a god, yet it is clearly her duty to honour and obey him...."<sup>18</sup>

It was clear to the court that though she had not been guilty of adultery, she had nevertheless deserted her husband's house. And she had sought an order for restitution of conjugal rights "not because in truth she wanted to live with her husband as one of two wives ... but to punish him". The fact that she had "borne her husband a child" in itself not being "sufficient to outweigh her failure in other duties", and being "guilty of such unwifely conduct", she was not entitled to the order she sought. This failure to get an order, said the court in its wisdom, was not to prevent her "becoming reconciled with her husband, if good people should ... intervene".<sup>19</sup>

The fact that a girl was only 9 years old when married, and that she lost her option of puberty since it was her father who gave her in marriage, is another dimension to nullity and divorce.<sup>20</sup> "Mere disparity in age" or the "tastes of the bride", not being relevant in Mohammedan law, "must not be taken into account nor allowed to influence the decision".<sup>21</sup> Nor was it a relevant ground for divorce that a wife had begun to hate her husband.<sup>22</sup> The continuance of marriage at the cost of the woman stood reinforced.

The man petitions for divorce averring the woman's frigidity. The woman admits to coldness, frigidity and hysteria, brought on by the profusion of "his marital effusiveness" almost amounting to cruelty, and that her response had made her husband impotent in his relationship with her. The man does not contest this.<sup>23</sup>

The court finds the case "unusual". (The dissenting judge even finds it "unnatural".) There is a suspicion of collusion.<sup>24</sup> They are both professional actors, and she had been a medical student for two years; *that adds* to the doubt about the facts in issue. The court believes the man, and, overcoming its reluctance to give him an order which will liberate the wife too, grants him a divorce. It asserts that there is much against the wife. For, while she swore she was a virgin, she refused to submit to a medical examination. She had not been wholly frank, they say, when she swore that there were no embraces before marriage; the man, on the other hand, stated "that their courtship proceeded along normal lines (... from the standards of the West and of modern emancipated India)". There was a mixed marriage and in the face of orthodoxy. Their profession is not noted for its sexual reticence. As a medical student she had made "a not too superficial study of the psychology of sex". And it is impossible to believe that "a woman who had told lies about her premarital relations with this man and who has this knowledge and background, and who says she has this psychological approach to marriage, would refuse to submit to a medical examination from motives of reticence".<sup>25</sup>

As if in penalty, she is directed to pay the cost of the proceedings because "the fault throughout has been hers, and because she has refused to assist the court by declining to submit to a medical examination; also because we do not think she has been frank".<sup>26</sup>

A post-script, quoting from the dissent: "The hysterical attitude is extremely strange," said the English judge, "in this country where one would expect a frank and natural approach to the physical fact of marriage."<sup>27</sup>

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18. *Ibid.*

19. *Ibid.* See also *Kurma Pullamma v. Kurma Thatalingam* AIR 1945 Mad 44 (Kuppuswami Ayyar J.).

20. *Fatima Bibi v. Mian Eusoof Sulaiman Ahmed* AIR 1937 Rang 361 (Roberts C. J. and Leach J.).

21. *Ibid.*

22. *Umat-ul-Hafiz v. Talib Hussain* AIR 1945 Lah 56 (Abdur Rahman J.).

23. *Supra* n. 14.

24. It is a continuing paradox that, even after the introduction of divorce by mutual consent into the law, "collusion" between a husband and a wife who both desire divorce is a sin in the eyes of the law. A finding of collusion could deny them divorce.

25. *Supra* n. 14.

26. *Ibid.* Compare it with the treatment of the woman in *supra* n. 9.

27. *Supra* n. 14.

## IV

Are there limits to judicial tolerance of a man venting his spleen on his wife? It appears the courts believed there was. “Small beatings” may not be legal cruelty,<sup>28</sup> and if a prisoner, coming from a poor class, had “chastised his wife moderately, but not sufficiently to do her serious damage”, resulting in her death “probably no more would (have been) heard of the matter”.<sup>29</sup> And while some in the lower rungs of the judicial hierarchy may deny a decree of judicial separation to a wife whose “hands were tied with a chain and her feet with a rope and she was kept hanging in a doorway”, because “a few isolated acts of violence” were not enough to constitute legal cruelty, this view might well be overridden in appeal.<sup>30</sup> The higher, therefore wiser, court could yet reiterate that “(c)ruelty is, in its character, a cumulative charge”, and it was the “repeated acts of violence” in that case which they termed legal cruelty.<sup>31</sup>

Subbia Goundan was charged with having voluntarily caused hurt to his 20 year old wife when he beat her, and with having injured her mother when she intervened, resulting in her death. The episode inspired the Sessions Judge to set out what he called “the right of the husband to beat his wife for impertinence and impudence”.<sup>32</sup> The Sessions Judge was so “obsessed with his belief in the existence of such a right” that he launched into a criticism of the police for having included the charge of causing hurt to his (Subbia Goundan’s) wife. While the Sessions Judge “may be entitled to have his own views on the subject in a private capacity,” the High Court said, “he was not justified in this manner from his seat on the Bench, and declaring in general and unqualified terms that a husband has the right of punishing his wife by beating her for impudence or impertinence”. For, “no such general or unqualified right is nowadays recognised by law, and wife-beating is not *eo nomine* one of the Exceptions in the ... Penal Code .... We think it necessary to state in unmistakable terms that the learned Sessions Judge’s declaration of the rights of husbands in this regard has no foundation, so that no one may rely upon that in future as a justification for wife-beating.”<sup>33</sup>

It must have been these eminently thought-provoking debates which instigated learned tracts to be written on the subject. In an article on “How far it is lawful to chastise the wife under the Mahomedan law”,<sup>34</sup> the learned author, alluding to juristic works, decided cases and statutes deduces that after the Muslim Personal Law (Shariat) Act 26 of 1937 entered into force, “(t)he right of a Mahomedan husband to chastise is a matrimonial right and has been restored”. Concerned and earnest, he concludes his article thus : “The right to beat the wife was abrogated by statute law and by judicial decisions. Has it been restored (as we think it is) by Act 26 of 1937? Do the Mahomedans want to retain this right; or abolish it by amending the legislation? These are very important questions and, we think, as lawyers we should take prominent part in moulding popular opinion in these respects.”

The interest generated by the husband’s right to beat his wife even inspired a book.<sup>35</sup> “(T)he author has given a brief history of husband’s right over his wife by referring to passages from the Holy Bible, the Holy Quran and the Manusmriti,” runs a review. And adds that the book “affords interesting reading and can be read with profit by the Bench, the bar and laymen”.<sup>36</sup>

The courts did draw a line somewhere. Nose-cutting was, indeed, too “vindictive and cruel”.<sup>37</sup> Disfigurement as a factor in determining the gravity of the crime<sup>38</sup> and suspicions of ‘unchastity’<sup>39</sup> recur in the proceedings. Disfigurement of a woman could lend a complexion of cruelty to an act, which mere beating could not always ensure. And allegations of adultery could excite ambivalence in the court.

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28. *Kamala Gangamma v. Venkatarami Reddi* AIR 1950 Mad 385 (Panchapakesa Ayyar J).

29. *Emperor v. Koya Partab* AIR 1930 Bom 593 (2) (Beaumont CJ and Madgavkar J).

30. *Mary Browne (Mrs) v. A.N. Browne* AIR 1937 Oudh 52 (Nanavutty and Ziaul Hasan JJ.).

31. *Ibid.*

32. *In re Subbia Goundan* AIR 1936 Mad 788 (Pandrang Row and Menon JJ).

33. *Ibid.*

34. Jatindra Mohan Datta, “How far it is lawful to chastise the wife under the Mahomedan law”, AIR 1940 Journal 25.

35. Anand S. Bhatnagar (approx. 1940), *Husband’s Right to Beat Wife*, Allahabad Weekly Reporter Office. The book was 80 pages long.

36. “Review” at AIR 1940 Journal 51.

37. *Emperor v. Bhano Bhojo* AIR 1944 Sind 186 (Davis CJ and O’Sullivan J).

38. *Kedarmal v. Crown* AIR 1950 Ajmer 13 (1) (Ramabhadran JC); *Emperor v. Ismail Umar* AIR 1936 Bom 430 (Broomfield and Norman JJ); *Emperor v. Bhano Bhojo* *ibid.*

39. E.g., *supra* n. 37 and *Emperor v. Ismail Umar* *ibid.*

There was the case for the prosecution which averred that the husband beat and ill-treated his wife, till he finally refused to maintain her.<sup>40</sup> She found employment as a maidservant in one Vassanmal's house. When she had been working there for a very few days, the husband met her on the road on her way to work, seized her by the hair, threw her to the ground, took out a dagger and carved up her face. There were 11 wounds, 10 on the face, forehead, nose and near the eyes. The husband argued it was grave and sudden provocation. That she was an unchaste wife, he had met her by chance that day, lost self-control and struck her.

No credence was given to the husband's defence. The travails of the court in talking around the aspersion of unchastity is telling. On the one hand, "we think that it must be made plain that aggrieved husbands, even those who suspect their wives of unchastity, are not entitled to punish them in this cruel and vindictive manner", they said. Though, "we can concede that in this case the husband was angered, even distressed, by the circumstances in which his wife lived". "On the other hand, it is to be remembered that if a man turns his wife out of his house, she may perforce have to earn her living somewhere." On the other hand, yet again, she served in the house of Vassanmal, who kept a hotel. She was just 18, and "according to her own statement, visitors used to come to the house and she was called upon to bring them *pan* and others". "The surroundings were not desirable." Yet, again, "this appears ... in no way to justify this cruel and barbaric assault upon this woman".<sup>41</sup>

There is a manner of limiting the apparent gravity of a crime that insinuates itself into the cases. The case goes before a Magistrate, and he could at most pass a sentence of 2 years rigorous imprisonment (RI); that is the extent of his power, and the charge gets reduced accordingly. Any appeal would be confined to applying this sentence as a maximum. In a sense, then, the crime is declared to deserve no more than two years RI. And, even after citing a "particularly brutal case" from 1892, where the husband had "tied his wife by her arms and legs to a bedstead and then cut off the whole of the soft parts of her nose, and a portion of her upper lip" for "the sole reason that the complainant would not live with the accused as his wife",<sup>42</sup> the court drew back from making a heavy sentence into a probability. It expressed a preference for taking the case before the Magistrate as a matter of course, reference to the Court of Sessions being the exception.<sup>43</sup>

## V

This jurisprudence of the husband's right to beat his wife, and to be nominally punished when he steps beyond the tolerable, takes one into the region of maintenance.

The ground rules are "(a) the husband must, prima facie, support his wife. This he can do by making her share his board and house".<sup>44</sup> It is only her comfort and safety which are relevant. Maintenance has no bearing on conjugal relations, except to the extent that such relations are rendered unsafe for the wife; impotence is, consequently, irrelevant in a demand for maintenance.<sup>45</sup> And a wife cannot insist that she should be treated as a member of the family with a right to live in the family home. For, "she was not entitled to be treated as a 'wife' but only to be maintained".<sup>46</sup> Also, an "unchaste woman is not entitled to anything but a 'bare' or 'starving' maintenance, and even that may be forfeited if she continues or persists in her unchaste life".<sup>47</sup> It is only wives who are entitled to maintenance—long years of living together does not invest the woman with the incidents of being a wife.<sup>48</sup>

Further, the "obligation of a husband to maintain his wife arises from the anxiety of the legislature to protect deserted wives from the bitter necessity of earning a living by trading on their sex. That obligation ... ceases when it has been voluntarily assumed by some man other than the woman's husband. No woman can fairly claim a right to be kept by two men. But it is obviously not the law that a man may desert and neglect his wife and thus tempt her to unchastity and then resist her claim to be maintained by him on the ground that she is unchaste."<sup>49</sup>

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40. *Supra* n. 37.

41. *Ibid.*

42. *Queen Empress v. Abdul Rahiman* (1892) 16 Bom 580 where the case was sent back to the Court of Sessions and a sentence of 8 years was passed.

43. *Emperor v. Ismail Umar supra* n. 38.

44. *Emperor v. Daulat Raibhan* AIR 1948 Nag 69 (Hidayatullah J).

45. *Ibid.*

46. *Arunachala Asari v. Anandayammal* AIR 1933 Mad 688 (Burn J).

47. *Bai Appibai v. Khimji Cooverji* AIR 1936 Bom 138 (B. J. Wadia J).

48. *A.T. Lakshmi Ambalam v. Andiammal* AIR 1938 Mad 66 (Newsam J).

49. *Ibid.*

Habitual ill-treatment of the wife could draw varying responses at different rungs of the judicial hierarchy. So it was when a husband apparently developed intense dislike for his wife and “practically put her away” and brought another into the house as his mistress. “Time after time Hira has kicked and cuffed her. Time after time as a result of this ill-treatment the unfortunate woman has been compelled to run away (to) ... the house of her father. Panchayats were convened on several occasions. The decree of the panchayat was that the wife should go back to her husband and try to make up with him ... and ... each time she became the object of her husband’s abuse and inhuman oppression. On the last occasion ... he kept her without food for a day or two and then turned her out.”<sup>50</sup> This “abuse and inhuman oppression” of which the High Court spoke was treated with tolerance by the Magistrate, who said : “There are occasional outbursts of temper even in well organised families and it is not a matter of surprise or of unusual importance that there should have been such a treatment of the wife by the husband who are *koris* (by caste) and unfortunately not very civilised....” A High Court judge, retorting perhaps ironically rather than accurately (as our experience with wife-beating tells us), said : “I am not aware of any social rules prevailing in the Hindu system of society, at the present day and hour or in comparatively recent times which allow or countenance the habitual ill-treatment of the wife by the husband nor am I aware of any custom in vogue which would compel the return of the wife to the husband in spite of his habitual ill-treatment....”<sup>51</sup> This was of course belied by the decisions of the panchayats which the court spoke about. Perhaps the concern for the woman can be tracked to the opening paragraphs of the decision where it was said: “No aspersion has been cast upon the character of Mt. Kaluiya. She has been a faithful wife and ‘has kept unsullied the bed of her lord’. It has also not been alleged or proved that she has been guilty of such minor offences in the performance of her household duties which were in any way calculated to cause annoyance to or impair the comfort of her husband.”<sup>52</sup>

Occasionally, a factor beyond chastity—a mere child of 14 who was a credible victim of rape by an absconder and yet stood excommunicated at a caste meeting<sup>53</sup>—may impress a court while deciding issues relevant to maintenance. Nevertheless, even where the charge of rape is not seriously doubted, it may surrender the sensitivities of the child-woman, and say: “Even if the act of sexual intercourse was with the consent of the girl ... it is a single isolated act”, and then award her maintenance.<sup>54</sup>

Even more occasional is the ‘naikin’, married after entering into a prenuptial agreement to provide her with a separate house and motor car, ornaments of ancestral worth and to pay off her debts, being provided maintenance.<sup>55</sup> And, when her husband first denies the marriage, and later offers to take her back in his house, gets a court which says: “It is true that the Hindu law enjoins implicit obedience on the wife. Her husband is to her as a ‘god’ or ‘deity’, and to be regarded as such. But the Hindu law (does not go) so far as to allow a husband to first abandon his wife, then to deny the validity of the marriage, then to neglect her and to refuse to have anything to do with her....” and acknowledges her right to reside separately and be maintained.<sup>56</sup>

Between the early years of our study and 1950, something changed in the court’s attitude to a wife who was relegated to being a first wife. In 1926, a court states, without challenging it, that “it has been held repeatedly that the marrying of a second wife would not justify a first wife to refuse to live with her husband”. It then orders maintenance because of continued ill-treatment.<sup>57</sup> Even in 1948, a court asserts that “the occasional lapse from virtue of a husband does not entitle the wife to ask for maintenance under Section 488, CrPC”. Scolding, it says, “a wife cannot refuse to go and live with the husband solely on the ground of his having a mistress” and cites authorities to bolster its stand.<sup>58</sup>

In 1946, the right of Hindu women to separate residence and to maintenance where the husband married again was recognised by statute.<sup>59</sup> Perhaps a court needed a law to assert that, where the husband married a second time, his offer of taking the wife back and treating her well could not be taken to be sincere. “Even if he takes her back,” it said, “he will only make her an unpaid cook and maid for all work of himself and his second wife, an intolerable

50. *Mt. Kaluiya v. Hira* AIR 1929 All 950 (Sen J).

51. *Ibid.*

52. *Ibid.* See also *Mt. Tajbaro v. Ghulam Qadar* AIR 1933 Peshawar 101 (1) (Middleton J).

53. *Yesubai v. Parasram Daji* AIR 1933 Bom 21 (Beaumont CJ and Nanavati J).

54. *Ibid.*

55. *Supra* n. 47.

56. *Ibid.*

57. *Pritam Singh v. Mt. Basant Kaur* AIR 1926 Lah 353 (Broadway J).

58. *Rose Mary v. T.S. Arulswamy* AIR 1948 Mad 509 (Govinda Menon J).

59. Hindu Married Women’s Right to Separate Residence and Maintenance Act 1946.

position and one to which no court should drive a married woman.”<sup>60</sup> This is also an uncommon instance where the court considered the husband’s having to maintain another wife as a relevant factor in computing maintenance.<sup>61</sup>

It was in 1948 that Justice Chagla expressly acknowledged that the movement of time creates anachronisms. And it was then that the passage of a law was used to break with habits of the past.<sup>62</sup> Fifty or hundred years ago concubinage may not have been looked upon with disfavour, he said, but that had changed by 1944, when the suit for maintenance in the case before him was instituted. It is not only physical cruelty, but also mental cruelty, that may justify a Hindu woman leaving her husband’s house; and a transfer of affections to another woman could constitute such cruelty, he said. With that he introduced the law to the notion of “self-respect” of the wife. Generalising in time the content and import of the Hindu Married Woman’s Right to Separate Residence and Maintenance Act 1946, he said: “This Act does not surely amend the Hindu law but it is also to a certain extent declaratory of Hindu law as it existed before the Act was passed.”<sup>63</sup> Perhaps this decision represents a reinterpretation to erase judicial attitudes thus far exhibited, and to give a manner of retrospectivity to the treatment of women.

It was not beyond the law’s reckoning that a daughter maintain her mother. But the daughter needs resources to meet a maintenance order. A Burmese Buddhist wife, as a dependant spouse, was as such entitled to one-third of her husband’s salary; but a court would not recognise this entitlement as any definite share in his salary from which she could maintain her mother. It was there that the court definitely, and peremptorily, drew the line.<sup>64</sup>

## VI

The visible woman with, and in, the passive voice emerges while reckoning with her role as a lawful guardian. We also see her in a state of depleted autonomy. The father and the husband battle for the power of disposition or possession of the woman. It is in this struggle for control that a father is charged with procuring a minor girl (Section 366-A, IPC) when he tells his daughter to go away with him from a house where she was unhappy, and he will find her another husband—for this was an inducement, and he had induced her as the law said he shouldn’t. “It is true that those provisions were enacted to give effect to the International Convention for the Suppression of Traffic in Women and Children signed at Geneva in 1922”, the court said. “When a married girl is unhappy with her husband and her father takes her from the husband’s house and gives her as a wife to somebody else that can hardly be called trafficking in women. At the same time, having regard to the provisions of the section, I am of opinion that the act of the father would come within these provisions.”<sup>65</sup>

It is in this delineation of power that a court holds that, under Hindu law, upon the marriage of a minor daughter, her father ceases to be her legal guardian and her husband takes over.<sup>66</sup> In silencing the woman, an 1889 decision gets cited, which says: “It is immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her and this keeping and the refusal to give up amounted to detention which was unlawful.”<sup>67</sup> This sentiment is reinforced though the court did direct that the girl, being “old enough to form an intelligent judgment”, be allowed her say before deciding about the husband “recover(ing) possession of his wife”.<sup>68</sup>

It is in this contest between father and husband that the legally sanctified guardian finds himself indulged in his illegality. And a court may recognise the power of a civil court to decline custody to the husband and “permit her parents to retain her in their custody until she reaches maturity. But it by no means follows that, if such a husband seizes an opportunity that presents itself to him of taking his wife into his own custody, he commits a criminal offence”. For, “(a) husband becomes the lawful guardian of his wife as soon as the marriage ceremony has been performed, and it is immaterial whether or not his wife has then attained puberty”.<sup>69</sup>

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60. *Senapathi Mudaliar v. Deivanai* Annual AIR 1950 Mad 357 (Panchapakesa Ayyar J).

61. *Ibid.*

62. *Mallawa Shiddappa Ujjannavar v. Shiddappa Bhimappa Ujjannavar* AIR 1950 Bom 112 (Chagla CJ and Tendolkar J).

63. *Ibid.* See also *Lakshmi Ammal v. Narayanaswami Naicker* AIR 1950 Mad 321 (Viswanatha Sastri J).

64. *Maung Kun v. Ma Kyaw Shin* AIR 1930 Rangoon 147 (2) (Das J).

65. *Ram Saran v. Emperor* AIR 1930 All 497 (Dalal J).

66. *Tulsidas Janglyadas v. Chetandas Domadas* AIR 1933 Nag 374 (Subedar AJC).

67. *Abraham v. Mahtabo* (1889) 16 Cal 487 quoted in *ibid.*

68. *Supra* n. 66.

69. *Dhuma Manjhi v. Emperor* AIR 1943 Pat 109 (Meredith and Shearer JJ).

The closing in on the woman effected through the guardian was again smuggled in when citing, in reiteration, a Punjab case where “it was held that providing shelter for a married woman was such an inducement as to amount to detention within the meaning of Section 498 (Penal Code)”. There was no evidence of forcible detention, but that there was “persuasion” was enough to indict the man in whose house the woman “was found”.<sup>70</sup>

The irrelevance of the woman’s reason, emotion, need, determination and choice was thus combined with the threat of punishment held out to any who might respond to her unhappiness or suffering, or who represented her expression of will and choice.

## VII

When a girl, less than 15 years old, commits suicide; there is information that she had been “systematically ill-treated, beaten, abused and prevented from going to her parents” by her mother-in-law and her husband; police investigation leads to the mother-in-law being charged, and the court absolves her because her son had not been jointly charged, it adds a poignancy to the plight of the child-bride.<sup>71</sup> Even as the court denied a pride of place to the question of “lawful custody or legal custody” to prosecute under the Bengal Children’s Act 1922, it yet said that the evidence showed that the “deceased girl was living with her husband in the husband’s house, and ... the mother-in-law also lived there”, but that was not enough to establish that the mother-in-law had “custody, charge, or care of the deceased girl” in fact.<sup>72</sup> So we see the infiltration of the fiction of the legal guardian into the decision, even as the court denied its relevance.

A word in passing: This apparent reluctance to find a woman culpable should not be mistaken to be willingness of the court generally to protect women from punishment. We do encounter at least two instance of the death penalty being passed on women for stealing ornaments off 12 year old children and killing them. The youth of the convicted women—20 and 22— and that they had, in each case, delivered a child while in jail, were not considered extenuating circumstances.<sup>73</sup> The court did suggest that the Local Government may take these factors into account in answer to a plea for clemency, but they should not, it considered, weigh with the court.<sup>74</sup>

Whatever the law, it is manifest in decisions in cases of infanticide that the court found itself moved to finding a way of lessening the charge from murder. This they did when they held that a woman who had jumped into a well with her child—she survived and the child died—had caused the death of the child by “negligent omission”: “the omission to put the child down before jumping into the well”. She was given a sentence of 6 months’ simple imprisonment.<sup>75</sup> In the alternative, where they found themselves bound by the law to affirm a sentence of transportation for life, the judgment would conclude with a persuasive recommendation to the Local Government for a much shorter sentence.<sup>76</sup>

## VIII

Returning to the theme of the guardian, there is the instance of this politically active 17 year old who, when part of a procession taken out without permission of the District Magistrate, was arrested with seven others under the Defence of India Rules 1939. While three of her compatriots apologised and were let off, she was among those sentenced, to one year’s RI and a fine of Rs 100. While one of her convicted friends appealed, she did not.<sup>77</sup>

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70. *Banarsi Raut v. Emperor* AIR 1938 Pat 432 (Agarwala J).

71. *Bhagwati Devi v. Emperor* AIR 1938 Cal 638 (Bartley and Khundkar JJ).

72. *Ibid.* Section 40 of the Bengal Children’s Act 1922 provided punishment for a person who had custody, charge or care of a child or young person if they ill-treated, neglected, abandoned ... the child or young person....

73. *In re Thalappil Thithachumma* AIR 1941 Mad 27 (Burn and Mockett JJ) and *Mt. Jamunia Partap Lohar v. Emperor* AIR 1936 Nag 200 (Grille and Gruer JJ).

74. *Ibid.*

75. *Supadi Lukadu v. Emperor* AIR 1925 Bom 310 (Pratt and Crump JJ). See also *Mt. Hassan Pari v. Emperor* AIR 1941 Peshawar 22 (Almond JC and Soofi J).

76. *Ghulam Jannat v. Emperor* AIR 1926 Lah 271 (Shadi Lal CJ and Zafar Ali J) where they recommended three years RI, and *Mt. Alam Bibi v. Emperor* AIR 1932 Lah 297 (Harrison and Dalip Singh JJ) where the recommended sentence was one year RI.

77. *Emperor v. Kamal Dattatraya Sohoni* AIR 1943 Bom 304 (Beaumont CJ and Weston J).

Her father did. And he was allowed to. It gave the Chief Justice the opportunity to deliver a peroration on the nature of a “political offence” and its disruptive consequences, and to comment : “No doubt, the fine will probably have to be paid by the parent, but after all parents may reasonably be expected to restrain the activities of their children when those activities conflict with the law. The effect of imposing a fine is to give the parent the option of keeping the child out of jail by a moderate payment.” With that, and a comment that he wouldn’t have imposed a sentence of more than 4 months’ RI, the sentence of imprisonment was reduced to the period already undergone, which was 6 months.<sup>78</sup>

The judgment makes no pretence of having let the girl speak at any time in these appeal proceedings. Her father was permitted to appropriate, and demolish, her politics. She was the only girl who had gone to conviction and sentence, and the opportunity that her father gave to the court to lecture, and release, her—one that she refused to provide by not appealing—inhabits the silent spaces in this judgment.

It may be mentioned here that the mother, “not answer(ing) the description of either the father or the guardian”, has no role in giving consent to a marriage under the Special Marriage Act 1872.<sup>79</sup>

The reasonableness of the outrageous was written into *K*’s case. When *K* came of age, her mother took her back home from her husband’s house. Her husband approached the court asking that she be “restored to his lawful custody”. *K*’s mother responded that the girl was just 13 and “not in a fit condition for consummation. Apart from her young age, she is also in poor health and undergoing medical treatment.” She therefore pleaded “in the interests of the minor that immediate custody of her daughter should not be directed to be given” to the husband.<sup>80</sup>

For the court, the first concern was whether the remedy to recover custody of his minor wife “illegally detained by others” existed in criminal law. The answer was, it did. Then, it was a question of whether the husband became the lawful guardian “and therefore entitled to her custody”. In one word, “undoubtedly”. In fact, “(e)ven if the girl desires to stay with her mother ... that would not confer a right on the (mother) to detain her”.<sup>81</sup>

Yet, *K* was a minor and “this court should have, as the paramount consideration, her interest and welfare”, and the mother’s “fear that the (husband) requires the custody of her daughter in order that the consummation of the marriage should take place” not being unfounded, a suggestion made by the husband that “gladdened” the court, was adopted. “If this Hon’ble Court is of opinion that the consummation may be postponed,” he had said, “the minor may be ordered to be/kept in the custody of some public institution such as Sevasadan and not with the (mother) for a reasonable period and I am prepared to meet the expenses.” Having regard to this attitude of the husband which “cannot be said to be unreasonable”, *K*’s mother was directed “to surrender her minor daughter to the (husband) forthwith on condition that (he) should arrange to have ... *K*... kept in the custody of some public institution for the period of one year and incur the necessary expenses for the purpose”.<sup>82</sup>

A police constable lodges a complaint of adultery against four persons who he alleges are “carrying on an intrigue with his wife”. The Magistrate issues a warrant permitting a search to be undertaken for a person “wrongfully confined”.<sup>83</sup> Upon search, the wife is arrested. With nothing to indicate that the wife was confined under circumstances which would be an offence, the Magistrate yet proceeds to make an order “consigning her to a certain ashram in Calcutta”. The High Court, on appeal, records that “(t)he information before the Magistrate was that the petitioner was living in her mother’s house, and there was not even a suggestion that she was being detained by her mother against her will”, prefacing her release from “irregular imprisonment” with the legal sentiment that “(s)he was as much entitled to her liberty as anybody else”,<sup>84</sup> reinforcing the importance of access to appeal.<sup>85</sup>

While still on the use of institutions, we may dwell a while on the disadvantage of belonging to a sex which has relatively few who transgress the law. Adolescent girls couldn’t be sent to Borstal School since it was only for boys. Without further inquiry, it was presumed that “some arrangement is ... made in the women’s jail at Vellore for segregating adolescent offenders from the hardened adult ones”. And the weight shifted from the court’s

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78. *Ibid.*

79. *Supra* n. 13.

80. *P. Venkataramaniah Chetty v. Pappamah* AIR 1948 Mad 103 (Rajamannar J). See also *Om Radhe v. Emperor* AIR 1939 Sind 152 (Lobo and Weston JJ).

81. *Ibid.*

82. *Ibid.*

83. Section 100 of the Criminal Procedure Code 1898; Section 97 of the Criminal Procedure Code 1973.

84. *Thankamani Debi v. Nepal Chandra Bhattacharyya* AIR 1938 Cal 704 (Bartley and Henderson JJ).

85. See also *Raghubar Dayal v. Emperor* AIR 1938 Oudh 81 (Ziaul Hasan J).

shoulders : “In any event, that is a matter for the government to arrange and the court can only impose such sentences as it thinks proper and leave the government to make such arrangements as are possible for the protection of adolescents.”<sup>86</sup> The economics of running institutions governing the existence and scale of schools, homes and jails, and with courts not insisting that a distinction be maintained, it is surely a prescription for the steady trickle of girls into adult penal institutions.

## IX

Possession and control of the woman by the man to whom she belongs has nurtured, in law, notions of adultery, seduction and enticement. Fathers seeking to retrieve their daughters from the men they—the daughters—choose to live with resort to charging the other man with kidnapping, abducting or inducing the daughters to compel them into marriage. The popularity of this provision has had the court remark that it is “unfortunately a section which comes before the court possibly more often than any other particular section in the (Penal) Code, except those of riot and hurt”.<sup>87</sup>

The offence of enticing away a married woman<sup>88</sup> would “depriv(e) the husband of his proper control over his wife for the purpose of illicit intercourse”. Where a woman had been “carrying on an illicit intrigue” with a man other than her husband, and it “did not require a great deal of persuasion” to “induce (her) to leave her home”, the man would still be subjected to the punitive regime. For “providing a shelter for her was an inducement to her to withhold herself from her husband”, making the man guilty in law.<sup>89</sup>

The tort of seduction raises questions about what is lost when seduction happens. A suit for seduction would be to recover damages from the offending outsider. Where the daughter is seduced, it is the father who has a right of action against the offending man; and with the father’s death, the suit would not survive for the family to prosecute.<sup>90</sup> It is the legal obligation of a father to maintain his daughter and to perform her marriage. “Any seduction of an unmarried daughter not only impairs the honour and reputation of the family but increases the pecuniary burden owing to the difficulty of getting her married thereafter.”<sup>91</sup> Yet, it ought not to be missed that the daughter herself can have no remedy against a seducer, since the courts do recognise that seduction takes place “by her own consent”.<sup>92</sup>

“However deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant”, the loss of service being the material factor.<sup>93</sup> But, where the husband is the offended individual, the case “stands on a different footing from that of a servant or daughter because there is a contract of marriage between the husband and the wife”.<sup>94</sup> “It is not the mere depriving of a husband for a day or two which gives rise to this action : it is the fact that the defendant has acted in a way towards the wife of the plaintiff which is illegal, and which he is not entitled to do.”<sup>95</sup>

The man’s right to possession and control over the woman’s sexual life is reinforced when it is said that to “sustain a conviction for adultery, it must be established inter alia that sexual intercourse was committed without the consent or connivance of the husband”.<sup>96</sup>

The logic of leniency to a woman who had been deserted by her husband and who had then lived with another, was advocated by the court, quoting a 1911 decision<sup>97</sup> for support. The earlier decision read : “Some people think that they must treat men and women on the same footing. But this court has not taken, and I hope will never take, that view. I trust that in dealing with these cases it will be ever remembered that the woman is the weaker vessel; that her habits of thought and feminine weaknesses are different from those of the man; and that what may perhaps be excusable in the case of the woman would not be excusable in the case of men. Where you find that the woman has

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86. *Public Prosecutor v. Rajam Ammal* AIR 1942 Mad 674 (Horwill J).

87. *Bajjnath v. Emperor* AIR 1932 All 409 (Boys and Young JJ).

88. Section 498, Indian Penal Code 1860.

89. *Mohammad Aslam Khan v. Emperor* AIR 1937 Lah 617 (Abdul Rashid J).

90. *Baboo v. Mt. Subanshi* AIR 1942 Nag 99 (Stone CJ and Vivian Bose J).

91. *Ibid.*

92. *Ibid.*

93. *Tika Ram v. Sobha Ram* AIR 1935 All 855 (Ganga Nath J).

94. *Sobha Ram v. Tika Ram* AIR 1936 All 454 (Sulaiman CJ and Bennet J).

95. *Ibid.*

96. *Waroo v. Emperor* AIR 1948 Sind 40 (O’Sullivan J).

97. *Pretty v. Pretty* (1911) P 83.

been guilty of adultery and that her adultery has resulted from her husband's conduct towards her, this court does and I hope always will make allowances in treating her error with leniency."<sup>98</sup>

The woman displays "sheer contempt for the husband"; the husband took no action for eight months after her "abduction"; she turned a Mahomeddan and had lived for months as the wife of another man. Then the court convicted the other man, even if it did reduce the sentence to the period already undergone.<sup>99</sup> In such a case as this, voluntariness, rejection and choice stood negated for the woman, while the nature of property rights over the woman and the criminality of anyone else taking over possession was reasserted. Her autonomy was, of course, not even a possibility.

A man ought to be a man. So, when a man was "not master in his house", where his wife was "supreme" and she seemed "to be a woman of not only a strong will but of strong muscles too", her "preferential fondness" for another man did not lead to conviction of the other man. Emphasising control rather than possession, it was said: "The legislature seems to require that the enticement of the wife must be from the control of the husband before the enticer can be convicted under Section 498 Penal Code. If however there is no such control at all of the husband over the wife then ...", surely, there can be no punishment.<sup>100</sup>

How is a man to value his loss when his wife leaves him for another? The Divorce Act 1869 will have the other man, or men, pay damages to the husband.<sup>101</sup> The extent of the loss has however to be assessed by the court.

So it is to be remembered that "the object of the damage is not punitive"<sup>102</sup> but "compensatory".<sup>103</sup> The means of the co-respondent (as the other man becomes, in the petition for divorce on the ground of the wife's adultery) "have nothing to do with the question of the quantum of damages".<sup>104</sup> "It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the (husband) has lost in his wife."<sup>105</sup>

It follows that a judge should, therefore, consider whether, in the past, his wife was "a good wife and took good care of his house and children". For, "if she were a worthless wife, always out of the house and not attending to her duties", the husband may not be entitled to any damages at all.<sup>106</sup> It once was found to have been that "the wife was a good wife to him", they lived happily together for 10-11 years when the co-respondent formed an "improper acquaintance with the wife; he took her away; the husband got the wife back again and gave her another chance for some two or three months, and then the co-respondent abducted the wife a second time, and has been living with her ever since". And the will-less wife was effectively effaced in this description of a tussle between man and man. Incidentally, the "proper sum" to compensate for the loss of the wife was, here, Rs. 300.<sup>107</sup>

It could be different where the husband's own character and conduct are responsible for his wife leaving him, and turning to the co-respondent for support. Particularly when she knew that apart from the precarious assistance her parents could give her, she had no means to support herself and her child. The court would still give him damages. And the husband may claim Rs. 25,000, and the court may grant a "nominal sum" of Rs. 500.<sup>108</sup>

It could differ again where he was a good husband, treated his wife well, his home was broken up, his feelings lacerated, and he also had to suffer "the slur of losing his wife". The court may then find Rs. 3000 not excessive.<sup>109</sup> Or, in the occasional case, the court may distribute justice by reckoning the value of the wife to the husband at Rs. 2000, and get the co-respondent to pay the wife Rs. 1000 when he leaves her to marry another woman.<sup>110</sup>

What questions would a court ask in measuring damages? It may be : "(1) How has the husband demeaned himself? (2) Did he and his wife live happily together? Because if they lived unhappily his loss in his wife is not

98. *Ibid* quoted in *Gladys Bourke v. Richard Edmund Bourke* AIR 1932 Sind 18 (Milne J) which was a case under the Divorce Act 1869.

99. *Gahra v. Emperor* AIR 1926 Lah 176 (Abdul Raof J).

100. *Gul Mahomed v. Emperor* AIR 1934 Sind 10 (Dadiba C. Mehta AJC).

101. Section 34, Divorce Act 1869 : "Husband may claim damages from adulterer...."

102. *Arthur John Mackinley v. M.D. Mackinley* AIR 1932 Oudh 182 (Kisch J).

103. *Niranjan Das Mohan (Dr.) v. Mrs Ena Mohan w/o Dr Niranjan Das Mohan* AIR 1943 Cal 146 (Nasim Ali and Rau JJ).

104. *Charles Wakehearst Peyton v. Mrs Ada Peyton* AIR 1937 Lah 417 (Coldstream, Skemp and Abdul Rashid JJ).

105. *Freer v. Johnson* AIR 1924 Mad 446. See also *Gopi v. Mt. Hiriya* AIR 1935 Nag 49 (Grille JC and Niyogi and Staples JJ).

106. *Premchand Hira v. Bai Galal* AIR 1927 Bom 594 (Marten CJ and Crump and Baker JJ).

107. *Ibid*.

108. *Supra* n. 102.

109. *Sydney Arthur Hamilton v. Alice Maude Hamilton* AIR 1933 Sind 134 (Ferrers JC and Aston and Mehta AJCs).

110. *Supra* n. 104.

so great. And (3) the position of the defendant” (co-respondent).<sup>111</sup> Or a court may be concerned with “(1) the actual value of the wife to the husband, (2) the proper compensation for the injury to his feelings, the blow to his marital honour and the serious hurt to his matrimonial and family life”.<sup>112</sup>

Emerging from amidst the concern to compensate the husband for loss of his wife may be a recognition of the pecuniary contribution of a woman to her home—reaching beyond her standard description as cook and governess. Where the wife had inherited “half a lakh of rupees and some house property from her father”, and she was “in particular ... look(ing) after the education of the children”, her money worth to the husband could be capitalised at Rs. 2400.<sup>113</sup> As for the husband’s feelings, “though they must have been considerably blunted” by the wife’s conduct of “adultery on various occasions with various persons”, “their intrigues must have destroyed any remaining chances of a reconciliation” and “have caused further injury to his feelings, however much they may have been blunted already”. Where there was more than one co-respondent, as it happened here, the liability for damages may be shared out among them.<sup>114</sup>

The court-fee conundrum which encountered the husband when he went to court for restitution of conjugal rights, and seeking an “injunction restraining the parents and other relations of the wife from obstructing the recovery of the wife by the husband”, is a tale told by two earnest, eminent and learned judges. The value of the wife to the husband was at the nucleus of the debate. If the husband averred that he valued her at over Rs. 5000, he could have the attention of the High Court as a court of appeal; he placed her value, therefore, at Rs. 5001. But the Stamp Reporter and the Registrar found that, valued at Rs. 5001, the husband would have to pay an ad valorem scale of stamp duty since he desired not merely to retrieve his wife, but also to prevent others from obstructing his recovery. That was more than the husband desired to invest in getting his way with, and about, his wife.<sup>115</sup>

There was earlier a provision in the Court-fees Act 1870 which read :

“Plaint or memorandum of appeal in a suit for possession of a wife ... Rs. 5” and this had been repealed. Also, the provision which applied to situations where the approximate money value of the “subject-matter in dispute” was not possible to estimate would not be relevant, because “there are ordinarily several criteria available, to enable the plaintiff to arrive at an approximate valuation, e.g., dowry, the amount which the husband may have to spend on the maintenance of his wife elsewhere than in his own house or the extra cost of domestic assistance for the performance of household work”. And, in a further statement of the pragmatism of valuation, it was said : “This decision (holding that court-fees would have to be paid on an ad valorem scale) will not make it difficult for a poor person to institute suits for declaration that he is entitled to exercise conjugal rights and to obtain an injunction for he can put any value he likes on his wife.”<sup>116</sup>

Such were the considerations which were to dictate the worth of a wife.

## X

The premium on chastity brought slander and defamation into both civil and criminal jurisdictions. There is, after all, “no reason why a slanderer of women should not be made liable both civilly and criminally, just as, say, the driver of a motor car who runs over a woman by his rashness and negligence”.<sup>117</sup>

It was “undoubtedly defamatory” to publish an article which indicates that “an unmarried girl of the Brahmin community who is well connected, had not preserved her virgin purity. One can hardly imagine a grosser kind of defamation”.<sup>118</sup> And an amount of Rs. 1500 may be ordered as damages.<sup>119</sup>

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111. *D’Cruz v. Mrs D’ Cruz* AIR 1927 Oudh 34 (Kendall J).

112. *Supra* n. 103.

113. *Ibid.*

114. *Ibid.*

115. *Gajendra Nath Saha Chowdhury v. Sulochana Chaudhurani* AIR 1935 Cal 338 (Mitter and Edglee JJ).

116. *Ibid.*

117. *Hirabai Jehangir Mistry v. Dinshaw Edulji Karkaria* AIR 1927 Bom 22 (Marten CJ and Kemp J).

118. *Edara Venkayya Pantulu v. Kalipattapu Chitti Surya Prakasamma* AIR 1940 Mad 879 (Pandrang Rao and Abdur Rahman JJ).

119. *Ibid.*

Slandering a woman by stating that her husband is impotent and that the child born to her was by another man was definitely defamation. “To impute unchastity to a married woman is regarded so seriously in England that it is actionable per se in civil cases for slander. I have yet to learn that the people of India, taken as a whole, value the chastity of their women any less highly. This is especially so when, as here, an imputation of this kind is taken so seriously that outcasting promptly follows any suspicion of infidelity. It would be unfortunate for courts to apply any lesser standard in India, except of course among particular tribes or castes ....”<sup>120</sup>

Defamatory remarks made in the heat of the moment, when quarrelling, would not invite the court to interfere. For, “if all such remarks could invariably form the subject of a civil suit, the courts would be swamped with trivial litigation. How often in India in criminal cases one reads the evidence, ‘He then began to abuse me by my female relations’.”<sup>121</sup>

A criminal complaint of defamation may be made by a person aggrieved. “While (this) excludes complaints by busybodies and mischief-makers, it does not say that the complaint can only be made by the person defamed.”<sup>122</sup> The question therefore was “whether the husband is aggrieved when imputations are made upon the chastity of his wife”. And it was decided that “(i)n view of the social customs prevailing amongst the community to which the parties belong, there can be no question that the husband would suffer very serious social disadvantages on account of these imputations”. When it had been earlier held that a brother is an aggrieved person when imputations were made against the chastity of a widowed sister living with him,<sup>123</sup> “(t)he case of the husband is clearly stronger”.<sup>124</sup>

Yet, a question may arise, as it did, whether a married woman could recover damages from a slanderer without proof of special damage. The conflict within the law grew out of the general rule that the law to be administered in India would be English law “as nearly as the circumstances of the place, and of the inhabitants, should admit”. English law had it that proof of special damage was not needed where the slanderous words imputed a criminal offence. However, in England unchastity was not a criminal offence; in India it was. But in India the woman in an adulterous relationship was protected from conviction and punishment as an abettor, even as the offence of adultery as defined in criminal law imputed that she was a party to a criminal offence. Applying the English rule would have meant that the man who was alleged to be committing adultery could sue, while the slandered woman would have to prove special damage before she could recover damages. The English law was therefore modified for Indian conditions to retain the position of the husband as sinned against by the adulterer even while allowing the wife to recover damages for being called unchaste. And adulterous. For the court specified: “... our decision does not affect those cases of the slander of women, where the crime of adultery with a married woman is not involved.”<sup>125</sup>

In another context, the “(d)eliberate attribution of immorality falsely to a wife will certainly fall under the definition of legal cruelty”, entitling a woman to live separately from her husband and to claim maintenance.<sup>126</sup>

It was the perils of defamation law which Mt. *G* encountered. Mt. *G*'s husband was detained in the police station while a charge of theft was being investigated against him. One day, Mt. *G* said, the SI of Police summoned her at night to the police station, questioned her about the stolen property and, on her denial of any knowledge, raped her. She asked that an investigation be made and the SI punished. The DSP ordered an enquiry and, “as he considered that the enquiry completely exonerated the SI of the charges”, the SI preferred a complaint against Mt. *G*. The charge was that she had falsely charged the SI with having committed an offence intending that such charge cause him injury.<sup>127</sup>

The Sessions Judge speculated in his judgment—an ‘on-the-one-hand ...’ manner of speculation—and acquitted her on a technical ground, that Mt. *G* had not intended to set the criminal law in motion—an improbable premise that the High Court roundly rejected. Yet the High Court too, in a stage aside, ranged over an array of reasons for discrediting her complaint. Perhaps she did it to hamper the investigation. Or may be it was revenge for implicating her husband in the crime. The court ended up with acquitting her, but not before it acknowledged: “There are ... circumstances in the course of his investigation, which call for explanation, and that explanation has not been afforded. While ... there was no evidence on the record to lead to the conclusion that *G* was raped as she alleges and that there is a great probability that her report was grossly exaggerated...(u)ndoubtedly some incidents took

120. *Sukhadayal v. Mt. Saraswati* AIR 1937 Nag 122 (Vivian Bose J).

121. *Supra* n. 117.

122. *Dwijendra Nath Talukdar v. Makhon Lal Pramanik* AIR 1943 Cal 564 (Henderson J).

123. *Thakur Das v. Adhar Chandra* 8 Cal WN 515 referred to in *ibid*.

124. *Supra* n. 122.

125. *Supra* n. 117.

126. *Supra* n. 28.

127. *Local Government v. Mt. Guji* AIR 1935 Nag 69 (Grille JC and Pollock AJC). See Section 211, Indian Penal Code 1860.

place that night which the SI was desirous of concealing.” The threat, and harassment, of criminal proceedings, and the disincentive it would be for women who were raped, went without comment.<sup>128</sup>

## XI

A woman, and of a low caste, protesting and setting the criminal law in motion, and the complaint coming to trial and punishment, is rare enough to cause comment. Even if it was reversed in appeal by a different perspective on caste. What the woman alleged was assault with intent to dishonour her, and no grave and sudden provocation to explain away the dishonour.<sup>129</sup>

The High Court perceived the facts thus : The accused was “an orthodox Hindu ... Brahmin” who “had taken his usual bath and was sitting on a stone in the midst of a stream offering his prayers. While he was performing his *sandhyawandan* and meditating on the object of his worship and reciting some prayer ... a low caste woman passed through the stream at such close distance from that place that the surface of the water got naturally disturbed and some particles of water fell on his body. The contact of such water particles causes pollution and necessitates the taking of a fresh bath before the prayer can be completed.... Such interference or break in one’s prayer ought to upset not merely a hasty or hot-tempered person, but even any person of ordinary sense and calmness.... There was besides an exchange of abuse and this provoked the accused a great deal. The trying Magistrates have after rejecting whatever exaggeration there was in the story told by the complainant, definitely found that the accused acted under provocation when he caught hold of (her) hand”.<sup>130</sup>

The District Magistrate thought otherwise, but the High Court offered this explanation : “(He) being of a different religion could not be expected to know much about the feelings and religious susceptibilities of an orthodox Hindu Brahmin....”<sup>131</sup>

“I am entitled to presume,” the judge said, “that the condition of the mind of the accused must necessarily have been such as gave him adequate cause to act in the manner he did, with due regard to decency and to the fact that the person who offended and disturbed him in his religious pursuits was after all a woman.” He must have acted as he did to “(curb) at once the insolent behaviour and the abusive retort ... and he must have felt... that the best way to curb or check her was to catch hold of her hand to attain that object and to make her feel that he could not be so trifled with by her.” In fact, “if the person insulting him had been a male, I fancy, he might have even beaten him or given him a sound thrashing”.<sup>132</sup>

It was thus that honour gave place to presumed piety. And the sinned against was dubbed the sinner.

## XII

Death for dishonour and disobedience, infidelity and impertinence, was in the law’s routine.<sup>133</sup> This was a time when, on conviction for murder, the imposition of the sentence of death was the norm, and reducing the penalty to

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128. *Ibid.* See also *Swee Ing v. Koon Han* AIR 1935 Rangoon 163 (Mackney J).

129. *Sheodia v. Mt. Jumni* AIR 1927 Nag 47 (Kinkhede AJC).

130. *Ibid.*

131. *Ibid.*

132. *Ibid.*

133. A note before launching into the next part : I am quite definitely opposed to the death penalty. I do not believe killing should be a state response to crime. I believe the continuance of the death penalty is one of the reasons that helps justify encounter killings, shoot-at-sight actions and custodial violence and death—since killing by the state is given legitimacy by retaining the penalty of death. I do not believe the death penalty is necessary for deterring the criminal—the criminal is already in the custody of the state. I do not believe it furthers general deterrence, particularly where there is such scant information on the less sensational cases. Also, I do not believe one person should be killed to set an example to others. It is retributive in its intent and effect, and retribution can be no function of the state. I believe it is a penalty heavily weighted against the poor and the socially disadvantaged. And, to state one more of the many, many reasons that exist, I do not believe that judicial process, whose most commendable attribute is its non--violence, should be engaged in the premeditated killing of any person.

It was not the sentence itself which drew my attention to these cases; it was the reasoning which the court found for justifying the death sentence, or in commuting the sentence to transportation for life, or less.

less than death—usually transportation for life - required special reasons to be detailed in the judgment. This, it appears, was also a time when “wife-murder (was) exceedingly common” and allegations of adultery were often enough to convince a court to commute.

A court may have said, “we do not think that mere suspicion of a wife’s conduct is any extenuation of a deliberate murder” especially where “the evidence shows the wife to have been a perfectly well behaved woman, whom the appellant treated very ill”.<sup>134</sup> And the court may therefore have even enhanced a sentence to death because it would not “wish to offer any encouragement to the idea that men can butcher their wives and escape hanging on the plea that they suspected them of misconduct”.<sup>135</sup>

Also, the “mere fact that a woman has been unfaithful to her husband is not in itself... sufficient ground for substitution of the lesser sentence where there was deliberate premeditation”.<sup>136</sup>

In another time and age, it might impose the death penalty where it concluded that “the accused went to the deceased (wife’s) house with the object of causing her injury in case she did not follow him and accede to his wishes”.<sup>137</sup>

Combining allegations of impudence with adultery, the husband may have sought understanding from the court, but found rebuke instead. Visiting her father’s house without the husband’s permission was no excuse for killing her, and the “penalty of death is the only possible one in the circumstances”.<sup>138</sup>

A wedding in the village. Woman assembled in the courtyard, singing. The husband calls his wife away as, he says, their children are crying. She says she will return in a while. He repeats his request three times, and receives the same reply. An hour later, when he calls her, she says she will go after the sweetmeats are distributed. Asked again, she says, “go and I will come home”. Excited, he strikes her with a *toka*. She ducks. The blow falls on the 18 year old woman sitting beside her. Applying the doctrine of “transferred malice”, he has committed the crime of murder. But, says the court, it is the lesser penalty that should be imposed, for “(h)e did not strike the blow with the intention of killing his wife and had been provoked by her repeated refusal to go home and take care of the children”.<sup>139</sup>

Carefully recorded words of the husband may tell the court “how the woman was recalcitrant in the presence of the panchayat and answered them back by saying that, whether she had any intrigue with Pragi or not, when she was charged she would carry on an intrigue from that moment”. The “words of wisdom” of the *panch* telling her that “married life should not be broken up”, and her husband’s offer the next morning that “he was prepared to pay fine and overlook any offence committed in the past” and that they move out of the village, appears to have prompted a sharp retort from her; which, in effect, was to let her be. “(A) shameless answer”, said the court, “sufficient to give fresh provocation which would help condone the severity of the crime” of murdering her. “After the panchayat the husband was in hopes that his forgiving temper may win over his wife and the answer which he received of a determination to leave him and to disgrace him must have come upon him with sudden force.” So it was that the wife’s conduct made it no longer a crime of murder, but one of culpable homicide not amounting to murder, to be punished with a 7 year term of imprisonment.<sup>140</sup>

Perhaps the court did not see the provocation represented in forgiveness where there was no fault?

The infidelity of the wife, particularly where she refused to sever the relationship that existed outside her marriage, may make the court reduce the sentence from death to transportation for life.<sup>141</sup> And where the murdered person is the other man, the court may even be moved to suggest to the Local Government to consider reducing the sentence substantially. “There is no doubt that the provocation was grave,” the court said, “and that although technically the offence comes under Section 302 the provocation was so extreme that it is not surprising that Jagar Jat killed Moman Jat.”<sup>142</sup>

134. *Dasan v. Emperor* AIR 1929 Mad 495 (Waller and Pandalai JJ).

135. *Ibid.*

136. *Ibid.*

137. *Fazl Karim v. Emperor* AIR 1936 Lah 580 (Young CJ and Monroe J).

138. *In re Manicka Nagendra Bagavathar* AIR 1950 Mad 484 (Govinda Menon and Basheer Ahmed Sayeed JJ).

139. *Rahman v. Emperor* AIR 1932 Lah 14 (Addison and Abdul Qadir JJ).

140. *Suba v. Emperor* AIR 1928 Lah 344 (Broadway and Tek Chand JJ).

141. *Gurdin v. Emperor* AIR 1925 Oudh 288 (Dalal JC).

142. *Ibrahim v. Emperor* AIR 1928 Lah 544 (Shadi Lal CJ and Bhide J).

This indulgence was not extended to “a Baluchi who suspects that so ignominious an encroachment has been made upon his conjugal privileges ....” and resorts, not to the law, but to murder. “There is a deliberate resolution to set law at defiance”, the court observed, and denied tolerance, for, “we have already, and as long ago as 1913,<sup>143</sup> laid down the rule that the Baluchi custom of killing for unchastity cannot be taken into consideration in the mitigation of sentence.”<sup>144</sup>

Yet while it “is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of manslaughter only and not of murder. But that rule has no application where the relationship between the parties is not that of husband and wife”.<sup>145</sup> Not even if it is a person he is engaged to marry.<sup>146</sup>

It is the status of a woman as a wife, then, that particularly attracts the notion of person as property.

The means and the motive for murder in the home appear distinct for women and men. Men were found to have drowned,<sup>147</sup> strangled<sup>148</sup> or truncheoned<sup>149</sup> their wives. Women were generally brought in on charges of poisoning their husbands. *Dhatura*, the stuff of which the fiction of Agatha Christie was made, was the poison most commonly used. Men were provoked by suspicions of infidelity and by impertinence. Women were found to have been led to murder after “a severe beating” and threats that she would be killed;<sup>150</sup> “to recapture her husband’s failing attentions” where she mistook the poison for a love potion;<sup>151</sup> or “to be free to continue her relations with her paramour”.<sup>152</sup> The court’s response ranged from acquittal,<sup>153</sup> to reduction of charge from murder to causing hurt by means of poison and a consequent reduction of sentence to 6 months’ imprisonment,<sup>154</sup> to the death penalty, where the court did not believe she did not realise what she was giving him since she had a motive - another man — to commit the crime.<sup>155</sup>

Where there were women-accused, the oft-iterated defence of grave and sudden provocation advanced in crimes of violence has had to give way to a defence of ignorance of consequences, and motives of reviving deteriorating relationships in the home.

### XIII

Nestling in the creases of the cases, we find courts acknowledging the provocation of sustained abuse. In the variations on ‘slow burn’, anger and hurt at the betrayal by the wife/mother in her role as such wife/mother has given a reasonableness to the provocation leading to the crime.

The 21 year old was “admittedly” a woman of evil reputation unanimously denounced in “common talk of the village” as being “a very bad character”. There was no doubt that she “was a woman who was leading an immoral life while living in the house of her husband”.<sup>156</sup>

One day, as her husband left home for work, he asked her “not to be very often absent from home”. “In reply she abused (him) who, according to the rough ways of the people of his class, gave her a shoe-beating accompanied with abuses.” When she abused him further, the “exasperated” husband picked up a stick which “unfortunately happened to be lying handy, (and) gave her a couple of blows one of which proved fatal”.<sup>157</sup>

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143. *Jagar Beg Jat v. Emperor* AIR 1937 Lah 692 (Young CJ and Monroe J).

144. *Emperor v. Rahim Khan* 18 Cri LJ 501.

145. *Kaim Dilmurad v. Emperor* AIR 1935 Sind 44 (Ferrers JC and Dadiba C. Mehta AJC).

146. *Emperor v. Dinabandhu Ooriya* AIR 1930 Cal 199 (Mitter and S. K. Ghose JJ).

147. *Ibid* quoting *Rex v. Palmer* (1913) 2 KB 29.

148. *Ghulam Mohammad v. Emperor* AIR 1934 Lah 675 (2) (Agha Haidar J).

149. *Khanun v. Emperor* AIR 1930 Lah 171 (Tek Chand and Fforde JJ).

150. *Supra* n. 142.

151. *Mt. Bhukin v. Emperor* AIR 1948 Nag 344 (Hemeon and Sen JJ).

152. *In re Kuruba Chinna Hanumakka* AIR 1943 Mad 396 (King and Kuppuswami Ayyar JJ).

153. *Minai v. Emperor* AIR 1938 Nag 318 (Grille and Digby JJ).

154. *Supra* n. 151.

155. *Supra* n. 152.

156. *Supra* n. 153.

157. *Jan Muhammad v. Emperor* AIR 1929 Lah 861 (Broadway and Agha Haidar JJ).

“(In judging the conduct of the accused,” the court said, “one must not confine himself to the actual moment when the blow ... was struck.... We must take into account the previous conduct of the woman. Her evil ways were the common scandal of the village and must have been known to the husband, causing him extreme mental agony, shame and humiliation.... It must have undoubtedly irritated and annoyed him to a degree when in answer to his veiled remonstrance and injunction to her to mend her ways, the woman started abusing him. Like the last straw which breaks the camel’s back, we may take it that a point was reached when the unfortunate husband lost all self control....”<sup>158</sup>

In a lucid description of slow burn, the court said : “... the whole affair should be looked at as one prolonged agony on the part of the husband which must have been preying upon his mind and led to the assault upon the woman, resulting in her death.”<sup>159</sup>

Considering too that that it was “extremely unlikely that the husband would have gone beyond the stage of shoe-beating” if the stick had not been lying there, the conviction was altered to the lesser charge of culpable homicide, and the sentence reduced from transportation for life to 10 years RI.<sup>160</sup>

There is the “extremely sad” case of the 30 year old soldier of “unblemished character” that the court narrates for its readership.<sup>161</sup> There was nothing to indicate that he was “a man of a violent or vindictive character”. Yet, when once they went to the Jhelum to have a bath, he confessed, “he first immersed (his wife) in the water and then pushed her to a spot where the water was beyond her height”. Thereafter, he lodged a complaint against another for enticing his wife away—a futile attempt to conceal the truth.

The Magistrate, when recording his confession, “went out of his way to suggest to the accused that if he had killed a faithless wife after all he had not done anything very heinous and should save his own life”.

His confession “was a voluntary statement... (and) contained the whole history of the unhappy married life of the accused and how he tried hard to reform his erring wife without any success”. And from the confession, the court found that the “woman apart from being an unfaithful wife, was also a thief. She took away the ornaments and clothes which had been entrusted to her by her husband to her lover”. Then, he ‘confessed’, “when she was living with (him), she abstracted a sum of Rs. 20 from a box with the intention of leaving him and joining her lover in her native village”.<sup>162</sup>

In this manner did the husband accused of murdering his wife “confess” to the unchastity and thievery of his wife, in mitigation of his crime.

He was convicted not for the offence of murder, but of attempted murder. Forgiving of the wronged husband who had killed his wife, the court said : “Having regard to the protracted sufferings of the accused through the obstinacy, viciousness and flagrant immorality of the deceased”, the sentence was reduced from 7 years imprisonment to 3 years.<sup>163</sup>

“This is a tragic case,” said the court when a lad of 19 murdered his mother.

The boy’s father had died about 15 years before the incident. His mother had since lived in concubinage with one *KP*. The boy “confessed” that his mother had settled all her property on *KP*, that he had been asking her for a long time for his share and his brother’s share and also asking her to arrange for his marriage. “He complained that far from agreeing she would not even cook for him.... When she refused to cook for him that morning,” it was said, “he stabbed her in front of his house.”<sup>164</sup>

Recommending treatment in a Borstal institution in preference to a long term of imprisonment, the court held : “There has been no sudden provocation in the present case but long and sustained provocation which resulted in a complete breakdown of control.”<sup>165</sup>

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158. *Ibid.*

159. *Ibid.*

160. *Ibid.*

161. *Ibid.*

162. *Supra* n. 148.

163. *Ibid.*

164. *Ibid.*

165. *In re Periyaswami Asari*, AIR 1949 Mad 223 (Govindarajachari and Mack JJ).

It seems probable that the court was seeking mitigating circumstances to deal with what it perceived to be “this very difficult case of criminal psychology”. Yet, there is the court’s statement that “(t)he appellant has been the victim of an abnormal and unnatural environment bereft of maternal affection ...”<sup>166</sup> which both implies slow burn and the reasonable expectation of a woman, the absence of which may justify condoning violence to her person.

## XIV

The sati of Sampati Kuer when she was 20, had been married for 10-12 years during which time she had continued in her father’s house, and went to her husband’s only to nurse him when he fell ill till he died, happened in 1927. It appears the marriage was never consummated. She was a “pious, gentle Hindu girl of high caste. She was *pardanashin* ...” She had no father; “she had no sufficient male protection - only a weak-minded superstitious boy brother”.<sup>167</sup>

The story as recorded finds the police using persuasion and threats to prevent the sati. The overpowering of the police by the family of the dead one, Sampati’s brother and the “fanatical mob” was followed by the young widow seating herself on the pyre. A conjurer’s trick was employed to set her on fire. “At the torture of the flames the poor creature leapt from the fire and rushed into the river.... Some police put out in a boat and tried to rescue her. They were threatened...; she was told to drown herself.”<sup>168</sup>

However, the police did manage to get her ashore. For two days and two nights she lay there in agony before she died. The doctor and the police, trying to relieve her agony, were driven away. For, when she lay under the tree, there began that “which was the first fruits for which the Pandes had been waiting, a stream of coins to flow which they greedily picked up”.

The relation of the event points to murder all the way, but it was unlawful assembly and abetment to suicide which were the charges. And punishment was prescribed accordingly.

In a passage in conclusion, the court said : “This is our judgment firstly that such evildoers may be punished; secondly, that an innocent girl may be avenged so far as we can avenge her; and, thirdly, in order that those who will not learn by reason may be taught by fear.” And continued: “I do not pretend to know if there be any survival after this life is finished, but if so and if god be just and merciful in the sense that we very imperfectly understand justice and mercy, then such of these men as survive their earthy punishment may well go on humble pilgrimage to Sampati’s shrine and with ashes on their heads cast themselves down and invoke her gentle spirit to intercede with the almighty to save their guilty souls from everlasting damnation.”<sup>169</sup>

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So ends a saga in sati that started in marriage.

## XV

We leave the wife behind and enter the grey area of prostitution in law which has occasionally emerged to be argued in the courtroom.

A keen tussle to establish the validity, or otherwise, of the adoption of daughter by a dancing woman of the prostitute class is reported. When the Penal Code made buying and selling of a minor for purposes of prostitution a crime, some argued, it controlled private law, and adoption of a daughter by a dancing woman would be invalid. A judge would however say that adoption in Hindu law was “allowed partly for continuing the family and partly for securing a person competent according to the custom of the cast to perform the funeral obsequies of the

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166. *Ibid.*

167. *Ibid.*

168. *Emperor v. Vidyasagar Pande*, AIR 1928 Pat 497 (Courtney Terrell CJ and Adami J).

169. *Ibid.*

adoptive parents and to take their property". Adoption in the case of dancing girls should not therefore be "confounded with prostitution which is neither its essential condition no necessary consequence, but an incident due to social influences".<sup>170</sup> "The policy of the Penal Code," he said, "...is not to obliterate altogether the line of distinction between the province of ethics and that of law, but to protect the chastity of minors and to assure them the freedom of choosing married life when they attain their age, whether they are the natural or adopted daughters of dancing women, and to leave otherwise the incidents of their legal status as daughters untouched, whether the parties concerned are dancing women or ordinary Hindus."<sup>171</sup>

This statement of the special status of prostitute woman apparently had a reiterative resonance, for, again : "as a matter of private law it must be taken, the class of dancing women being recognised by the Hindu law as a separate class having a legal status, the usage of that class, in the absence of positive legislation to the contrary, regulates rights of status and inheritance, adoption and survivorship."<sup>172</sup>

Where it was found, as fact, that the adoption was with the "intention of prostituting the adopted daughter even while she was a minor", particularly after the Penal Code was brought into effect in 1861, the adoption would not be valid.<sup>173</sup>

All these discussions and decisions were in the Madras High Court. The Bombay High Court's view was that adoption of a daughter by a dancing woman of the prostitute class was invariably to promote prostitution, and so opposed to public policy.<sup>174</sup>

In the case which ranged over these decisions it was held that the presumption that the adoption would be for the purposes of prostitution was "rebuttable". As there was evidence "that it is customary among dancing women of Mandapata village to which the parties belong, to adopt girls for the purpose of giving them in marriage to others", the adoption was recognised as valid.<sup>175</sup>

A study in contrasting concerns and presumptions is witnessed where a husband demands restitution of conjugal rights, and his 'wife' denies there was any legal marriage between them. She alleges that "she was brought by her father to the plaintiffs house (when she was about 16) after the death of her grandmother and made to live there by her father and was subjected to various kinds of torture and ill-treatment by the plaintiff and her father", and that she was "ultimately compelled to lead a life of prostitution".<sup>176</sup>

A motor driver gave evidence before the court that he had visited her on three occasions. The court said, simply, "I do not believe the evidence of this witness." When another witness, a plumber, said that he had seen her being compelled by the plaintiff to lead an immoral life, and that she was always subjected to ill-treatment and assault, the court again merely said, "I also disbelieve the evidence of this witness." She said she had asked a neighbour - with whom she later moved in - to report to the police and that he had said it was not his business to do so. But the court said that, all available evidence suggested that "if" her story was true, "she had ample opportunity of complaining about the conduct of her father and the plaintiff and could have easily obtained protection and could have left the plaintiff". The "story" of the woman, the court said, was "so highly improbable that no court should attach any weight to it".<sup>177</sup>

Why this disbelief?

"I can hardly conceive that a father would degrade his only child at the age of 13 or 14 by taking her to the house of a Gujerati for the purpose of living on the earnings of her prostitution."<sup>178</sup>

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170. *Ibid.*

171. Muttusami Ayyar, J. in *Venku v. Mahalinga* (1886) 11 Mad 393 quoted in *Duggirala Veeranna v. Duggirala Sarasiratnam* AIR 1936 Mad 639 (King and Menon JJ).

172. *Ibid.*

173. Muttusami Ayyar and Parker JJ. in *Muttukannu v. Paramaswami* (1889) 12 Mad 214 quoted in *Duggirala supra* n. 171.

174. *Duggirala supra* n. 171.

175. *Mathura Naiken v. Esu Naicken* (1879) 4 Bom 545; *Hira Naikin v. Radha Naikin* (1913) 37 Bom 116 and *Girimallappa Channappa Somsagar v. Kenchava San Yellappa Hosmani* 1921 Bom 270 (MacLeod CJ and Fawcett J) referred to in *Duggirala supra* n. 171.

176. *Ibid.*

177. *Gokuldas Waghaji v. Lutchmi* AIR 1937 Rangoon 308 (Sen J).

178. *Ibid.*

Perhaps this presumption dominated the decision.

The part prejudice plays engaged the court's attention when *PD* appealed against her conviction and sentence under Section 8 of the Calcutta Suppression of Immoral Traffic Act 1923. *PD* was Lakshi's mother. Lakshi was 13. An anonymous letter set in train an investigation and prosecution, charging *PD* with having brought her daughter to Calcutta from Rangoon to carry on the business of a prostitute. *PD* protested that her daughter was a musical artiste of some repute. There was evidence of her engagements which led the High Court to say that it was "tolerably clear and indeed beyond doubt that this girl Lakshi was a skilled and attractive performer as a singer and dancer who had already made good in her profession". But the Chief Presidency Magistrate, convicting *PD* had said: "But the fact remains that hers is a dual calling. It is perfectly obvious that her profession as a cinema actress does not militate or clash with her other less reputable calling." And, again: "Another circumstance worth noting is that the girl is not a cinema actress but only a singer and dancer who performs in cinema theatres. It is well known that singing and dancing constitute the advertisement side of prostitution."<sup>179</sup>

The High Court explained the prejudice: "It may be that actresses and actors in this country are still regarded as persons who are not respectable just as in England in the middle ages they were deemed to be rogues and vagabonds." And added, "but it does seem to me even so that it is carrying the matter a little too far to suggest that the carrying on of a profession of a singer or dancer by a woman does necessarily and of course connote the business of prostitution." The mother was then given the benefit of doubt, and acquitted.<sup>180</sup>

When prostitute women were sent into virtual exile by municipal bye-laws, they didn't take it lying down. We witness the rare sight of women accessing courts to assert their rights of residence. Sometimes it was when a bye-law specified the area within which prostitute women were permitted to reside - they were otherwise exiled. They then argued that this area was "a busy market area not far from the centre of a large city, an area which may be suitable for a few wealthy members of the profession, but difficult of access to numbers of unfortunate prostitutes who are for this reason practically prohibited from residing in the municipality. And the court held that, under the law, there was power in the Municipal Board of Agra 'to make a bye-law prohibiting prostitutes from residing in specific areas or area, but not (to) make a bye-law prohibiting them from residing in the whole of the municipal area with the exception of a certain specified part'.<sup>181</sup>

Then, another judge in another case disagreed with this interpretation, and sent it up for consideration by two judges. Now, these two judges disagreed with the earlier decision.<sup>182</sup> Their view was that, since the municipal limits were determined, and the exceptions to the rule that public prostitutes could not reside or ply their trade were specified, the law - which required that the area from where they were to be excluded be specified - stood satisfied.<sup>183</sup>

It was in another aspect that the bye-law incurred judicial displeasure. The bye-law excluded prostitute women who already owned houses in the prohibited area; it was only future acquisitions of property which were targeted. It was this "invidious distinction" which met with the court's stern disapproval, and caused it to strike down the bye-law.<sup>184</sup> It is in another similar situation that the court's central concern becomes clear: The Municipal Board, the court suggested, "would be well-advised to re-draft this bye-law so as to make it of general application".<sup>185</sup>

Even if it is to recommend that all prostitute women be sent into exile, we do here hear the language of equality being used - a reasonably rare occurrence, certainly where women are concerned.

"All the world over," a court said elsewhere,<sup>186</sup> "some women take to the life of a prostitute either from choice or by force of circumstances." "Public prostitute," as the court defined her, "is a woman who usually and generally offers her person to sexual intercourse for hire and who openly advertises and acknowledges her occupation by

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179. *Ibid.*

180. *Parbati Dasi v. Emperor* AIR 1934 Cal 198 (Costello and M. C. Ghose JJ). For an instance of the presumed sexual licence of a cinema actress, see *supra* n. 14.

181. *Ibid.*

182. *Mt. Muhammadi v. Emperor* AIR 1932 All 110 (Kendall J).

183. *Mt. Naziran v. Emperor* AIR 1932 All 537 (Sulaiman and Young JJ).

184. *Ibid.*

185. *Ibid.*

186. *Mt. Chanchal v. Emperor* AIR 1932 All 70 (Sulaiman J).

word of mouth, deportment or conduct.” And it is a “great deal of moral degradation alone (which) will attract the application of a drastic law which involves the consequence of a woman being compelled to leave her house in which she might have invested her fortune or might have other associations”. Recognising citizenship in the woman, the court remarked : “The Municipality is entitled to make bye-laws with a view to preserve order and decency; but the bye-laws must be strictly construed where they trench upon the rights of a citizen.” Reading her rights so, the court held that the Municipal Board could not treat the girl as a public prostitute “simply because she belonged to the caste of prostitutes or that her mother and mother’s sisters were public prostitutes”.<sup>187</sup> This, despite an inevitability expressed in its comment : “In view of her antecedents and environments, it may not be difficult to make a forecast of the plaintiffs (who was a singing girl) future life.”<sup>188</sup>

The “unfortunate woman”,<sup>189</sup> as we see, was not a passive entity in the judicial process. It was not paternal protection, or admonition, that reached the woman in prostitution, though there were manifestations of disbelief about the role men played in inducting the women into prostitution, and keeping them there. She may not find herself silenced into a passivity which is the consistent condition of the wife. There is, instead, a certain agency recognised in her interaction with law and with the state. Perhaps their other-than-ordinariness when the court referred to “dancing women or ordinary Hindus”,<sup>190</sup> and their identity as a “separate class having a legal status”<sup>191</sup> gave them a position denied to the wife in the arena of law.

## XVI

The incremental construction of the Reasonable Woman and the Reasonable Man is done. It is only left now to draw out a description of the Reasonable Woman and the Reasonable Man.

The Reasonable Woman is a wife.

She becomes one with the family of her husband.

She is sexually available to her husband.

She doesn’t expect to be treated as a wife; only to be maintained. She is entitled to shelter and safety, though she is not entitled to stay in her matrimonial home.

She has no marital honour, so she cannot encash her honour as her husband can.

She does not put obstacles in the path of her husband marrying another wife.

She goes to another man only when her husband does not support her. And she cannot reasonably claim to be maintained by two men.

She is chaste and keeps unsullied the bed of her lord, even when he deserts her.

She may, in the occasional case, have a share in her husband’s salary, but she cannot use it to maintain her mother.

She belongs to a man - generally her father or her husband.

She is married young.

She does not exercise choice.

She has no politics.

She is incapable of being a legal guardian.

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187. *Municipal Committee, Etah v. Mt. Asghari Jan* AIR 1932 All 264 (Sen and Niamatullah JJ).

188. *Ibid.*

189. *Ibid.*

190. As the prostitute woman is euphemistically termed in *supra* n. 146 at p. 20.

191. *Supra* n. 171.

She does not have children; she bears her husband children.

Her worth is reckoned on the capitalised value of her usefulness to the man.

She does as her husband would have her do. She does not roam about, but stays at home, cooks and takes care of the children.

She does not complain of rape.

She is incapable of being dishonoured, especially if she is of a low caste and the assault is by a high caste man.

She does not answer back. She does not retort even if she is incorrectly and publicly accused of carrying on a relationship outside her marriage.

She is not a cinema actress, or a singer, or a dancer : she is a dependant.

An actress, not being a Reasonable Woman, has no right to reticence in being medically examined to demonstrate her virginity.

The Prostitute Woman is a not a Reasonable Woman, and is not to be judged as a Reasonable Woman would.

\* \* \*

A pause at marriage before we launch into a discovery of the Reasonable Man : Marriage is a necessity. The state is vitally interested in keeping a marriage going. It is only rare and exceptional cases which may convince the court to accept the inevitability of divorce. In any event, divorce is not a legal necessity.

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The Reasonable Man gets married and gets a dowry for it. May be he marries again.

He chastises his wife in moderation, perhaps with small beatings. But he doesn't cut his wife's nose.

He may murder his wife if he catches her in adultery, but he is not to murder for one who is not his wife, such as his mistress, concubine or one to whom he is engaged.

A Reasonable Man confesses to his wife's infidelity, thievery and adultery.

He has control over his wife, and his daughter.

He knows that he becomes a procurer if he encourages his daughter to return home from ill-treatment and suffering with a promise to find her another husband.

He demands damages from the adulterer when his wife is in an adulterous relationship, and asserts his power of legal possession. But he does not make profit out of his wife's dishonour.

He is entitled to custody of his wife, even if she has not yet reached puberty. If he can't have her in his possession, he has her sent away from her mother into an institution.

He does not steal another man's wife; he respects another's property; even if he doesn't treat his own property well.

Prolonged agony may cause him to kill.

\* \* \*

Reasonable Expectations span the distance between the Reasonable Man and the Reasonable Woman.

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