

**Network of Lawyers (NOL) 1<sup>st</sup> Training Programme Report**  
**23-26<sup>th</sup> June 2014**  
**Mir Taqi Mir Building, Jamia Millia Islamia**

**Introduction**

Availability of quality and accessible legal aid is one of the most critical components towards enhancing access to justice mechanisms. In addition to need for sensitivity, legal aid lawyers often lack adequate knowledge and understanding of laws and legal remedies, particularly in situations of violence perpetrated against women and children. And in cases of violence against children, particularly sexual violence, sensitive and nuanced handling becomes the key to prevent secondary victimization and enable children to speak out.

Over the years, NGOs/CSOs/rights groups across the country have played an important role to provide support services. However, studies have shown that legal services provided by/through these organizations are often inadequate due to lack of professional staff. Hence, there is a need to strengthen such capacities by linking trained lawyers with NGOs/CSOs/networks working on women and child rights issues.

Lawyers Collective is developing a National Network of approximately 25 lawyers from across the country to develop their advocacy capacities to provide rights-based legal services to women survivors / child survivors. The aim of the Project is:

- Creating a cadre of trained lawyers who can approach advocacy and litigation from a rights-based approach.
- Strengthen the capacities of the Network of Lawyers to the extent that they become potential trainers in turn.

The first NOL Training workshop was held from 23rd to 26th June 2014 at Jamia Millia Islamia, with support from the Faculty of Law.

Please refer to *Annexure 1* for the agenda of the training programme.

Please refer to *Annexure 2* for the list of participants at the training.

**DAY 1 - 23rd June**

**Welcome and Opening Remarks**

The workshop commenced with an official welcome from Dr. Manjula Batra, Dean, Faculty of Law, Jamia and Ms. Indira Jaising, LCWRI.

Dr. Manjula Batra spoke of the importance of refresher courses for lawyers aimed at developing their skills in handling cases of violence against women (VAW) and sexual violence against children. She welcomed the participants to Jamia.

Ms. Jaising asked the participants to introduce themselves and also to highlight difficulties they have encountered in their practice. Some of the concerns which emerged from the participating lawyers in the round of introductions were:

- Implementation of orders (such as maintenance orders, residence orders under PWDVA) is a problem;
- Judges are insensitive in cases involving VAW. Training of judges is important;
- Very often, the husband and in-laws do not appear in court in cases involving matrimonial disputes and domestic violence;
- Inability to find witnesses particularly in domestic violence cases and cases under section 498A IPC is a problem;
- In Cochin, only Saturdays are reserved for hearing of domestic violence cases. Hence, cases take a long time to come to a conclusion.

Ms. Jaising began by stating that laws are not made in boardrooms, but emerge from the ground. She referred to the Mathura rape case in this regard and mentioned the chain of events that led to shifting of the burden of proof in cases of custodial rape. Ms. Jaising provided the timeline for changes in IPC, 1860; Cr.PC,1973, Indian Evidence Act, 1872, sexual assault laws, rape laws, dowry provisions and cruelty provisions (Please refer to *Annexure 3* for details). She referred to marital rape and explained that although rape is now an offence if the married partners are separated, the provision exempting marital rape remains in the IPC.

Ms. Jaising provided the participants with important tips, such as:

- Procedural law is as important as substantive law;
- Making a list of dates in a chronological order while drafting a case is the most important first step;
- When dealing with a client, keep the interests of the woman paramount;
- The success of a lawyer depends on the level of confidence the client has in him/her;
- She highlighted the importance of referring to the Indian Constitution and judgments of the Supreme Court of India;
- Ensuring identity of the woman in a case of sexual violence is not revealed in discussions.
- In her concluding remarks Ms Jaising observed that all changes in the laws have come about due to some real life incident which triggered the mobilization of the women's movements.

### **Pre Training Questionnaire**

A pre training questionnaire was circulated to the lawyers, which required the lawyers to fill up the following information: (i) The court(s) in which the lawyers usually practice, (ii) what kind of cases they take up, (iii) how many years of practice they have, (iv) if they have an independent practice and if not, who is heading the firm they work for, and finally, (v) aside from the referring NGO, how many other NGO's have the lawyers worked with?

Most of the lawyers practice in the High Courts of their respective States and the Sessions and Magistrates courts. A few of the Lawyers primarily practice in district courts.

The numbers of years of practice the lawyers had varied from 9 months to 17 years of practice.

Most of the lawyers have an independent practice, except for those who had just started their careers in litigation.

Most of the lawyers were associated only with the referring NGO, and not with any other NGO.

The following questions were asked in the form in order to gauge the lawyer's understanding of human rights:

- If a client comes to you with a complaint of domestic violence and non-payment of maintenance, and her husband does not have any steady income but does have property, what would you suggest to her?
  - The answers varied from seeking attachment of property in the interim application, seeking of directions not to alienate the property, seeking order of maintenance irrespective of his income, and to see whether the client can seek residence order in this property.
  - NOTE: It must be noted that some of the lawyers were unable to provide a suitable answer to this question (for example, one lawyer wrote she would advise “asking the wife to take her share in the property”. However, no reference was made to personal laws and what right the wife would have to her husband's property. Other lawyers did not answer the question and left it blank).
- If your client, a girl aged 17 comes to you saying she has eloped with a boy age 19, and her parents along with police are searching for her, what would you suggest?
  - Some of the advice given was counsel the young woman, and inform her of the Child Marriage Prohibition Act, attempt mediation in such a case, or inform her to wait for one year until she reaches the age of consent.
  - NOTE: There were responses from some lawyers stating “surrender yourself”, or “move back home” which reflect the moral leanings of the lawyer.
- A woman comes to you with a complaint of dowry violence and says that “somebody suggested including her married sister in law's name” to make the case strong. What would you advise her?
  - All the lawyers stated they would advise the woman not to falsely implicate anyone.
- A client comes to you saying she has been in a live-in relationship. Her friend has moved out of the relationship and she wishes to file a section 376 IPC case (rape) against him. What would you advise her?

- The responses varied from “if the relationship was based on a fraud promise to marry, she can file an FIR”, “an offence under section 376 IPC is not made out in live-in relationships”, “if relationship was consensual there is no case made out under section 376”, “she can file a complaint under the PWDVA”.
- NOTE: Many of the lawyers left the answer to this question blank and did not fill up anything.

### **Session 1: Understanding Gender**

Ms. Anju Pandey, Programme Officer, UN Women, highlighted the difference between sex and gender -where the former is biologically determined and fixed while the latter is socially determined and dynamic. She explained that gender is not sex. Gender is about relations between men and women that are created by, and in the society that can be changed. Gender stereotypes occur when we apply generic attributes, opinions or roles toward either gender. Examples of gender stereotypes provided by the participants for women were – patient, caring, gentle, and maternal. Examples of gender stereotypes provided by the participants for men were – strong, rough, possessive, and egoistic.

Ms. Anju Pandey observed that socialization is a process through which a new born child is gradually transformed into a knowledgeable adult and agents of socialization include institutions such as family, peer group, school, workplace. We are born male or female but learn to become men and women. This learned behaviour makes up our gendered identity and determines our gendered roles. Gender stereotypes occur when we apply generic attributes, opinions or roles toward either gender. The problem occurs when we find ourselves making assumptions about members of our own or opposite sex. Stereotypes result in the ‘victim’ becoming unsure of themselves.

The participants noted that the gender stereotypes they had noted for men could equally apply to a woman; while the gender stereotypes identified for women could equally apply to a man.

### **Session 2: Introduction to International Human Rights Law**

Dr. Ghulam Yazdani, Faculty of Law, Jamia addressed the participants on International Human Rights Law. In his address he observed that human rights are naturally acquired by human beings. Human rights are naturally acquired by human beings. A right means freedoms that are guaranteed. He observed that it is true to say that human rights are nothing but various freedoms guaranteed to human beings.

According to The Centre for Enquiry into Health and Allied Themes (CEHAT), in India social norms and cultural practices are deep rooted in a highly patriarchal social

order where women are expected to adhere to strict gender roles about what they can and cannot do. Women are subject to double discrimination, being members of a specific caste, class or ethnic group, a part from experiencing gendered vulnerabilities. Women in Indian society have low status as compared to men. They have little control on the resources and on important decisions relating to their lives.

Nation States are bound to protect Human Rights of all persons. However, since the very beginning of the human rights movement, women have been given less importance than men. This subordination happened because the traditional concept of Human Rights is based on 'Dichotomy of Public and Private Interests'.

Dr. Yazdani referred to the following International Human Rights Declarations and Conventions, which have strengthened the human rights of women:

- Universal Declaration of Human Rights, 1948;
- International Convention for the Suppression of the Traffic in Persons and exploitation of the Prostitution of others, 1949;
- Convention on the Political Rights of Women, 1952;
- Convention on the Nationality of Married Women, 1957;
- Declaration on the Elimination of Discrimination against Women, 1967;
- Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 1979;
- Vienna Declaration and Human Rights of Women, 1993;
- Beijing Declaration, 1995.

### **Session 3: Gender Based Violence and CEDAW**

Ms. Brototi Dutta, LCWRI, introduced the session on the CEDAW Convention, 1979 (also referred to as the Women's Convention) by observing that it codified international norms relating to women. Articles 1 to Article 5 and Article 24 of the CEDAW Convention lay down the key concepts and Articles 6 to Article 16 apply the concepts to distinct thematic areas.

Discrimination against women is defined as follows:

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

Ms. Brototi Dutta classified the Articles of the Convention into “Respect”, “Protect” and “Fulfill” obligations of the State Party.

Article 2 lays down the measures to be implemented by state parties to give effect to the non-discrimination guarantee, ie -

“To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation” [RESPECT]

“To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise” [PROTECT)

Article 3 deals with “Measures to be undertaken to ensure full development and advancement of women’s human rights and fundamental freedoms” [FULFILL]

Article 4 deals with “Temporary special measures and special measures to accelerate de facto equality for women” [FULFILL]

Article 5 deals with addressing “Socio cultural norms and practices that perpetuate sex stereotyping, including in relation to child rearing in the family.”

Violence against women is not directly addressed in Convention text. However in General Recommendation 12 (1989), the CEDAW Committee asked State Parties to specifically report on VAW.

In 1993, General Recommendation 19 interpreted “discrimination against women” under Article 1 to include gender-based violence (disproportionate impact). This includes acts that inflict physical, mental or sexual harm or threat of such harm and gender based violence as nullifies/impairs women’s exercise and enjoyment of human rights and fundamental freedoms.

India has two Declarations and one Reservation to CEDAW:

- Declaration on Article 5(a) regarding elimination of customary practices that discriminate against/stereotype women;
- Declaration on Article 16(1) regarding right to marry (and dissolution) and equal rights in guardianship, adoption, personal rights to choose one’s name, right to property and Art, and Article 16(2) on compulsory registration of marriages.
- India has a Reservation to Para 1 of Article 29 regarding dispute resolution regarding the Convention’s interpretation/application and submission for arbitration.

India is not a party to the Optional Protocol.

CEDAW has been used in cases for statutory interpretation. In a case dealing with the Hindu Succession Act, CEDAW was used to interpret the law to conform with constitutional right to equality despite India’s reservations to Article 16. [*MasilamaniMudaliar and others v. Idol of Sri Swaminathaswami Thirukoil* (1996)].

#### **Session 4: Transgender issues: *NLSA vs Union of India and Ors* (15.4.2014)**

Mr. Anand Grover, Senior Advocate, Supreme Court spoke on the issue of criminalization of same sex relations in India. He discussed the history of homosexuality in India, Section 377 IPC and the current issues faced by transgender persons. He referred extensively to the arguments in the Supreme Court during the hearing of the *Suresh Kumar Koushal vs. Naz Foundation* (11.12.2013) case.

In the case of *NLSA vs Union of India*, the Supreme Court affirmed the constitutional rights and freedoms of transgender persons, including those who identify as third gender and those who identify in a gender opposite to their biological sex, i.e., persons, assigned female sex at birth, identifying as male and vice-versa. By

recognising diverse gender identities, the Court has broken the binary gender construct of ‘man’ and ‘woman’ that has pervaded Indian law. The judgment was pronounced in National Legal Services Authority v. Union of India & Ors. [Writ Petition (Civil) No. 400 of 2012 (‘NALSA’)] by a division bench of Justices K.S. Radhakrishnan and A.K. Sikri.

Filed in September, 2012 by National Legal Services Authority, the writ petition had sought several directions from the Supreme Court, including granting of equal rights and protection to transgender persons; inclusion of a third category in recording one’s sex/gender in identity documents like the election card, passport, driving license and ration card; and for admission in educational institutions, hospitals, amongst others. The Lawyers Collective had filed an intervention, on behalf of Ms. Laxmi Narayan Tripathy, a Hijra/transgender activist, seeking recognition of self-identified gender of persons, either as male/female/third gender, based on their choice.

NLSA’s reasoning rests on two broad strands of human rights: freedom and equality. Underscoring the right to personal autonomy and self-determination under Article 21, the Court observed that “the gender to which a person belongs is to be determined by the person concerned”. The decision recognises the right of a person to identify in the gender that they relate to, that is, male, female or third gender, irrespective of medical/surgical intervention. The Court also protected one’s gender expression by invoking the freedom of speech and expression under Article 19(1)(a) and held that “no restriction can be placed on one’s personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.”

This session was followed by a rich discussion on cases involving gender – for instance, a participating lawyer was dealing with a case of a woman who did not have female genitals, but had married and whose husband wanted a divorce on this ground.

### **Session 5: Activity**

Ms. Khadijah Farouqui facilitated group work activity on rights of women, where participants were asked to identify:

- What are the restrictions imposed upon the State that ensure the right to life and liberty is promoted?
- How can the Government stop third parties from violating the right to life and liberty?
- What programmes can the Government introduce to ensure this right to life, liberty and security are promoted?

### **DAY 2 - 24th June**

The second day commenced with continuation of the discussions from the Activity. Some of the issues that were discussed were:

- Need for independent Protection Officers;
- Need for One Stop Crisis Centres for women survivors;
- Successful government programmes are the Ujwala scheme, Ladli Lakshmi scheme and promotion of Anganwadis in Madhya Pradesh.

### **Session 1: Structure of Courts**

Mr. Dharmesh Sharma, Secretary, Delhi State Legal Services Authority spoke on the structures of the Courts, referring primarily to the jurisdiction and role of Family courts in Delhi. In Delhi, The Family Courts Act 1984 has been implemented. Delhi has been divided into 11 districts, with 15 Judges dealing with Family matters. Each Judge has a pendency of two thousand cases.

Domestic Violence cases are not triable under the Family courts in Delhi. Cases under PWDVA are tried by the *Mahila* Courts as per criminal proceedings.

Mr. Sharma proceeded to explain the difference between “conciliation”, “counseling” and “mediation”. In mediation, the parties decide upon a solution with the support of a neutral mediator. Counseling is a more personal process where one or both parties are counseled to determine what is the best solution for the problem. The Code of Civil Procedure allows courts to refer matters for out of court conciliation or mediation.<sup>1</sup> The settlement reached by the parties requires a seal of approval from the competent authority.

Looking at the purpose of setting up the NOL, Mr. Sharma also shared the potential of NOL linking with the DLSAs, specially for training of empanelled lawyers with DLSA, using the Bar Rooms for sensitization of Lawyers, raising awareness about

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<sup>1</sup> Section 89 CPC: Settlement of disputes outside the Court.

(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

- (a) arbitration;
- (b) conciliation
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.



laws and schemes for women by compiling such lists and sharing it with DLSA lawyers and setting up discussion forums for advocacy and awareness raising.

### **Session 2: Family Law**

Dr. Kahkashan Danyal, Faculty of Law, Jamia gave the participants an overview of family law in India focusing on Muslim law. She discussed the relationship between Muslim personal law and the Indian Penal Code with reference to maintenance. In the case of *Shah Bano*,<sup>2</sup> a Muslim women sought court intervention for the payment of maintenance under a uniformly applicable criminal procedure law. The husband's reason for non-payment was that the payment of maintenance under criminal law was in conflict with his religion based personal laws. The Supreme Court held that there was no conflict between Muslim law and the Criminal Procedure Code. The court arrived at this conclusion by taking it upon itself to interpret the Quran in an elaborate manner. This enraged Muslim religious leaders, who felt that the court had performed a theological function, which was exclusive to them, and that it was not part of the function of the Supreme Court to interpret the Quran. The mass mobilization of the community by the Muslim Personal law board led to the rejection by the government of the judgment and the enactment of the Muslim Women's (Protection of Rights on Divorce) Act 1986, which effectively excluded Muslim women from the ambit of the secular and uniformly applicable law of post-divorce maintenance.

Dr. Danyal compared the status of Muslim women in India with the Muslim women in other countries, including Islamic countries, and observed that in India the level of discrimination in personal laws against Muslim women is high. For instance, while a Muslim man can unilaterally divorce his wife through triple *talaq*, a Muslim woman needs the consent of her husband to seek *Khula*.

### **Session 3: Group Activity**

Ms. Khadijah Farouqui and Ms. Gayatri Sharma moderated a group activity on discussion of four landmark judgments of the Supreme Court of India, The participants were asked to identify the rights based issues emerging from the case studies. The judgments were as follows:

- *Air India v Nergesh Meerza (AIR 1981 SC 1829)*
- *Vishakha v. State of Rajasthan (AIR 1997 SC 3011)*
- *Daniel Latifi v. Union of India (2001) 7 SCC 740*
- *Shabnam Hashmi v. Union of India (19.2.2014)*

### **Session 4: Presentations by the Groups regarding case studies**

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<sup>2</sup>*Ahmed Khan vs. Shah Bano (1985) 2 SCC 556*

The case of *Vishaka* dealt with the issue of sexual harassment as a denial of the right to work. The PIL was filed in the court with the objective of finding a suitable method for the realization of gender equality in the workplace. The mandate was to make the workplace more accessible to women. The court stated that sexual harassment would mean a denial of the woman's right to freedom to practice any profession, occupation, trade or business under Article 19 (1) (g) of the constitution. In the absence of a statutory law on sexual harassment, the court considered international documents and covenants particularly the Committee on the Elimination of Discrimination Against Women and put in place a guideline to tackle articulate lateral application of fundamental rights and hence was a guarantee against the state and not necessarily the private sector.

The group discussion focused on how the *Bhanwari Devi* case was still pending, and the importance of filing a PIL on sexual harassment emerging from a rape case. The participants agreed that as the trial in the rape case is a slow process, it was strategic of NGO's to file a PIL in *Vishaka* focusing on getting directions on sexual harassment. One of the lacunae in the *Vishaka* order is that it does not apply to women working in the unorganized sector. It was pointed out by Ms. Khadijah that this lacunae has been resolved by the new Sexual Harassment at the Workplace Act, 2013.

In *Danial Latifi* the petitioner challenged the constitutional validity of the Muslim Women's (Rights on Divorce) Act. The petitioner, who was a lawyer and Islamic law scholar contested the validity of the Act on the ground that it made unreasonable distinction between women of two groups, based on religion and deprived Muslim women from claiming maintenance. The expression 'provision and maintenance' in the Act created confusion in the rulings of the lower courts and the High Courts. Some lower courts in the country had interpreted this provision to mean that a divorced Muslim woman was entitled to a fair and reasonable amount for her future including maintenance to be made by her former husband that could extend beyond the period of *iddat*. The court pursued a harmonious construction of law and held that the statute could be deemed constitutional only if it was held that the Muslim husband was obligated to pay maintenance and make adequate provision for the future of the wife, after divorce within the *iddat* period. In the alternative the Act was bound to be struck down as in violation of Articles 14<sup>3</sup>, 15<sup>4</sup> and 21.<sup>5</sup> In this way the court stressed

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<sup>3</sup> **Article 14:** Equality before law:- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

<sup>4</sup> **Article 15:** Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them...

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

that the liability of the Muslim husband to his divorced wife under the Act to pay maintenance is not confined to *iddat* period.

Group discussions focused on whether it was possible to declare discriminatory personal laws unconstitutional. Ms. Khadijah pointed out that the Constitution exempts personal laws from the scrutiny of the Fundamental Rights chapter. Although the Supreme Court has taken progressive decisions on a case by case basis, the goal of a Uniform Civil Code remains elusive.

The *Air India* case was brought by Airhostesses of Air India demanding parity of pay with the male pursers. The two carders of female airhostesses and male pursers were kept separate and had different scales of pay. The airhostesses argued that there was no difference in their job content, yet the male pursers were better paid and had better chances of promotion. The airhostess could never become supervisors on board the aircraft as they retired at the age of 35 while the men continued to the age of 58. Instead of looking at the argument of equal pay for equal work as an essential component of the right to equality, the court held that the female hostesses could not claim parity of pay, as they constituted a separate class as they had different educational qualifications at recruitment. This argument overlooked the fact that notwithstanding the different qualifications, the job content was the same and the concept of equal pay for equal worth would immediately come into play. The court held that even though there was discrimination, there was no violation of the right to equality as the discrimination was on the basis of recruitment and sex and not sex alone. This judgment was criticized by the participants.

In *Shabnam Hashmi*, the petitioner filed a writ petition seeking recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution. The petitioner sought that the Court lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the Respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion taking a hind seat. The Supreme Court observed that under the Juvenile Justice (Care and Protection of Children) Act, 2000 – an individual is free to adopt by following the procedure prescribed in the Act, Rules and Central Adoption Resource Agency (CARA Guidelines) and “*Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him.*” However, the Supreme Court held that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right.

In the group discussions, there was a consensus that the focus of the Supreme Court was narrow and although an individual was granted the ability to adopt as per the JJ

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<sup>5</sup> **Article 21: Protection of life and personal liberty** - No person shall be deprived of his life or personal liberty except according to procedure established by law

Act, the Supreme Court avoided passing an order that would provide rights to Muslims to adopt.

### **DAY 3 – 25th June**

#### **Session 1: Criminal Law Amendment Act, 2013**

Dr. Nuzhat Parveen Khan, Faculty of Law, Jamia and Ms. Maitreyi Gupta, Lawyer provided the participants with an overview of the The Criminal Law (Amendment) Act, 2013 (CLA).

The CLA was passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013, and it provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences against women. The Bill received Presidential assent on 2 April 2013 and came into force from 3 April 2013.

The CLA was originally an Ordinance promulgated by the President of India, Mr. Pranab Mukherjee, on 3 February 2013, in light of the protests in the 2012 Delhi gang rape case. When the Criminal Law Amendment Ordinance introduced a definition of sexual assault which was gender neutral but which dropped the definition of “rape” from the law. The Ordinance while making sexual assault a gender neutral offence turned women from victims of crime into criminals, who can be prosecuted for having committed sexual assault.

Due to protests by women’s groups, the Ordinance was amended.

Some of the important amendments in law are:

**Section 166A IPC - Ss. (a)** If a public servant disobeys the law which prohibits him from requiring attendance of any person at any place for the purpose of investigation; or

**Ss. (b)** where he knowingly disobeys the law regulating the manner in which investigation will be conducted to the prejudice of any person; or

**Ss. (c)** fails to record information given to him under S. 154(1) regarding cognizable offences of violence against women, specifically acid attack (326A), attempt of acid attack (S. 326B) , outraging the modesty of woman (S. 354) , disrobing (S. 354B) , voyeurism (S. 354C) , stalking (S. 354D) , trafficking (S. 370) , employing trafficked person (S. 370A) , rape (S. 376), rape causing death or vegetative state (S. 376A), rape by husband on his wife when separated (S. 376B), sexual intercourse by a person in authority (S. 376C), gang rape (S. 376D), repeat offenders (S. 376E) and non tactile sexual offences (S. 509).

**Punishment:** He will be punished with RI for a term which shall not be less than six months but may extend to two years and Fine.

**Section 357C of the Cr.P.C:** All hospitals, including public and private hospitals, will provide first-aid or medical treatment, free of cost, to victims of acid attack (S.

326A), rape (S. 376), rape causing death or vegetative state (S. 376A), rape of wife by husband when separated (S. 376B), sexual intercourse by a person in authority (S. 376C), gang rape (S. 376D) and rape by repeat offenders (S. 376E).

**Section 166B IPC:** It penalizes those in charge of hospitals, whether public or private, who fail to provide first aid or medical treatment to victims of acid attack or rape as provided in S. 357C of Code of Criminal Procedure, 1973. Punishment: Imprisonment for a term which may extend to 1 year or Fine or Both.

**Section 376E-** Whoever has been convicted of an offence under Sections 376(rape), 376A(rape causing death or persistent vegetative state) and 376D(gang rape), and is subsequently convicted again will be considered a repeat offender.

**Punishment:** Life without parole or death penalty.

The CLA, 2013 incorporates some of the suggestions of the Verma Committee Report – importantly, introduction of new offences of acid attack, voyeurism, and stalking, and offences other than peno-vaginal penetration are included within the definition of “rape”. Sexual Harassment is included within the ambit of multiple provisions being Sections 354,<sup>6</sup> 354A<sup>7</sup> and 509.<sup>8</sup>

It was observed in discussions that the CLA remains problematic for three reasons:

- Marital rape exemption;
- Age of consent is raised to 18;
- Death Penalty

Discussions in this session focused on the recent Shakti Mills case where the Principal Sessions Judge, Mumbai awarded death penalty to three of the offenders under section 376E IPC. The participants were divided over whether this was a correct judgment, or whether section 376E should be declared to be unconstitutional. While some felt that death penalty is an appropriate deterrent for rape, others felt that death penalty would not prevent rapes. In order to prevent sexual violence against women, police sensitization, proper investigation by the police, and sensitization of Judges is more important.

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<sup>6</sup> **Section 354:** Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

<sup>7</sup> **Section 354A (1):** A man committing any of the following acts - (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) showing pornography against the will of a woman; or (iv) making sexually coloured remarks - shall be guilty of the offence of sexual harassment

<sup>8</sup> **Section 509:** Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, of that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, and also with fine.

## **Session 2: Protection of Children from Sexual Offences (POCSO) Act, 2012**

Ms Gayatri Sharma, LCWRI gave a brief introduction to the participants to the POCSO Act. As there was no other law governing child sexual abuse until 2012, sections 354, 509, 377 and where appropriate, section 376 of the Indian Penal Code, 1860 (IPC) were invoked to cover cases of child sexual abuse.

Sexual offences in the IPC are gender specific. The provisions (with the exception of section 377 IPC) only apply to women as victims, while the perpetrators are male. In contrast, the POCSO Act protects children of both sexes from offences of sexual assault, sexual harassment, and pornography. Further, both men and women can be offenders under POCSO. POCSO contains broad definition of sexual offences, not only restricted to rape. For instance, section 7 POCSO covers “any act with sexual intent.”

The POCSO Act is only applicable to child survivors and adult offenders. A sexual offence committed by a child against another will be covered under Juvenile Justice (Care and Protection of Children) Act 2000;

Two concerns created as a result of the POCSO Act are:

- The age of consent has been raised to 18 years;
- Section 19 of POCSO Act provides for mandatory reporting of sexual abuse of a child or apprehended sexual abuse of a child to either Special Juvenile Police Unit or the local police. The POCSO Act imposes punishment for failure to report or record a case under section 21 with imprisonment upto 6 month or fine or both.

Due to the mandatory reporting clause, POCSO has led to a situation where, for example, a girl under 18 who wants medical services (such as abortion) would have to be reported to the police, even though she may not wish to report a case of sexual abuse. Cases have been reported from CEHAT where such young adults have preferred to go to unregistered hospitals to have abortions (it is unknown whether the abortion was done safely or not), rather than report the matter to police.

Under section 19 (6) of POCSO, it is the SJPU or local police that will report and produce a child before the Child Welfare Committee. Rule 4(3) of the POCSO Rules lists the following circumstances in which a child is to be brought before the CWC:

- living in the same or shared household with a person who the police allege has committed or is likely to commit or attempt to commit an offence under POCSO;
- living in a child care institution and does not have parental or other family support;
- is found without any home or parental or other family support.

POCSO provides for the establishment of special procedure for reporting of cases, special procedures for recording statement of a child, and Special Courts for the trial of such offences. For example, when a child gives information to the police under section 19, the special procedure of recording it, in the interest of justice, consists in the use of:

- (i) simple sentences in reducing information to enable the child to understand contents of the record [section 19 (3)];
- (ii) language understood by the child; and
- (iii) qualified and experienced translator or interpreter when necessary on payment of fees prescribed [section 19 (4)].
- (iv) police officer shall not be in uniform while recording the statement [section 24(1)];
- (v) the statement before the Magistrate must be recorded in the presence of the parents or any person having the trust and confidence of the child (section 26)

### **Session 3: Protection of Women from Domestic Violence Act, 2005**

Ms. Ujwala Kadrekar, LCWRI, provided the participants with an overview of the PWDVA.

She noted that violence against women is a serious problem. Overall, one in three women age 15-49 have experience physical violence and about 1 in 10 have experienced sexual violence. This translates into millions of women who have suffered and continue to suffer as the hands of husbands and other family members. Never married women also experience physical and sexual violence. Most women do not seek help when they are abused

The PWDVA recognizes a woman's right to live free from violence. Neither civil law nor criminal law defined "domestic violence", prior to the enactment of the PWDVA. Domestic violence is not only physical or even emotional abuse. There are also other forms of abuse such as verbal, sexual abuse which are equally damaging.

Key features of the PWDVA are:

- A woman's right to live free from violence: section 3 of the Act defines "domestic violence";
- A woman's right to reside in a shared household is provided under section 17 of the Act;
- A woman's right to seek remedies is provided under section 12 of the Act;
- The PWDVA recognizes "relationships in the nature of marriage" and intimate partner violence.

In *Batra v Batra*,<sup>9</sup> the court declared that only the house owned by the husband, or the house taken on rent by the husband or the house of joint-family in which even husband has a share can only be declared a matrimonial home of the wife, and not one owned by his parents, notwithstanding that the wife has lived in the home of his parents in a joint family. In doing so, the court not only completely disregarded the letter and spirit of the PWDVA which provided for the right to residence of a woman in her matrimonial home and which made a clear distinction between the right to reside and the right to ownership, but also disregarded the social reality of India. This judgment once again proves that when it comes to property, the male bastion is kept intact and breakthroughs hardly happen.

Ms. Ujwala Kadrekar also provided a critique of Supreme Court judgments on “live in” relationships. In *Indra Sarma vs. V.K.V. Sarma*<sup>10</sup>, the Supreme Court laid down following guidelines to determine what is a live-in relationship:

- Duration of period of relationship
- Shared household
- Pooling of Resources and Financial Arrangements
- Domestic Arrangements -Entrusting the responsibility - cleaning, cooking, maintaining or upkeeping the house
- Sexual Relationship - so as to give emotional support, companionship and also material affection, caring etc.
- Children – intend to have a long standing relationship.
- Socialization in Public
- Intention and conduct of the parties - Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

This judgments expands on the criteria laid down by the Supreme Court in *D. Velusamy v. D. Patchaiammal*.<sup>11</sup> In this case, the Supreme Court held that a relationship in the nature of marriage is akin to a common law marriage which, although not being formally married, requires that:

- a) The couple must hold themselves out to society as being akin to spouses;
- b) They must be of legal age to marry;
- c) They must be otherwise qualified to enter legal marriage, including being unmarried; and
- d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

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<sup>9</sup> *S.R Batra and Anr vs Taruna Batra* 2007 3 SCC 169

<sup>10</sup> Special Leave Petition(CRL.) No. 4895 OF 2012

<sup>11</sup> AIR (2011) SC 479



### **Session 5 Sexual Harassment at The Workplace (Prevention, Prohibition and Redressal) Act, 2013**

Dr. Manjula Batra, Dean, Faculty of Law, Jamia Millia Islamia, provided the participants with an overview of the history and creation of the Sexual Harassment at the Workplace (Prevention, Prohibition and Redressal) Act 2013.

In India, women are entering the formal labour workforce in unprecedented numbers, yet as a proportion of the workforce, the percentage of women workers is declining. More than ever before, India as a country of contradictions presents a challenge to women in the work force. Deep-rooted ideologies of gender bias and discrimination remain the most pervasive and persistent form of inequality in the world today.

Dr. Batra cited examples of sexual harassment she had encountered and dealt with during the course of her own professional growth. She compared the provisions of the SHW Act with the *Vishaka* directions. She observed that the Act has certain shortcomings – for instance, it encourages conciliation between the parties. Section 14 of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redresses) Act 2013 imposes sanctions on a woman for making a “false complaint”.

### **Session 6: Feminist Counseling**

Advocate Abha Joshi explained the basics of feminist counseling to the participants from the perspective of conducting client interviews. She made the following observations:

- Many women have not had the space or opportunity to figure out what they really want.
- Many women would be talking about extremely personal matters to a stranger for the first time in their lives. Therefore, the lawyer must assure privacy and confidentiality, assure her of your competence, assure her she is not taking a wrong step, engage her with positive stories and outcomes
- Many women may be severely under-resourced financially, socially, emotionally. Therefore, the lawyer must explain legal processes and allow flexibility in solutions which fits her time, money and energy

Ms. Rachel, LCWRI also provided the following tips:

- Ensure that the environment in which the interviewing process takes place is safe, private and comfortable.
- Arrange for seating and sit in a manner that reinforces equality between the yourself and the client.

- Use a form of language the woman is comfortable with discussing personal matters, enlist the assistance of a translator if necessary
- Maintain eye contact throughout the client interview process
- Emphasize that the entire content of the interview will remain confidential
- Explain the process of taking notes as necessary for the purposes of representing her best interests.

### **Session 7: Application of Laws in Court**

Ms. Santhosh Snehi Mann, Director, Academics, Delhi Judicial Academy gave the participants valuable advice on how to present a case before a court – with reference to the cases of violence against women and children.

She observed that it is necessary to be well prepared in all cases. Many times, women do not get relief under PWDVA as the lawyer does not present the case properly to the Judge dealing with the matter. For example, lawyers ask for residence orders mechanically without specifying the nature of residence order required by the woman. Hence order is denied to the woman.

She also provided the participants with important tips. For instance, in PWDVA applications it is advisable to attach a separate page with details of the nature of violence suffered by the woman and the nature of the domestic relationship.

With respect to the potential of the Network of Lawyers, Ms. Mann appreciated the efforts of Lawyers Collective and felt that there was a need for regular training programmes for upgrading the knowledge and skills of lawyers in a workshop mode. There was a need to build collaborations with judicial academies for capacity building of lawyers and to create awareness about implementation of laws.

## **DAY 4 – 26th June**

### **Session 1: Basics of Criminal Law**

Dr. Asad Malik, Faculty of Law, Jamia gave an overview of the Cr.P.C focusing on basics such as what is a First Information Report, who can lodge such a report, and what is its evidentiary value.

An FIR is not a substantive piece of evidence. However, it can be used in the following ways:

1. For corroboration purposes. It cannot be ignored altogether and can be used to corroborate the statement of the eyewitnesses.
2. For contradicting the evidence of person giving the information.
3. For proving an admission against the informer.

Dr. Malik noted that an FIR become substantive evidence in the following instances:

- Dying declaration - when a person deposing about the cause of his death has died.
- When the injuries are being caused in the presence of SHO in the P.S and the injured makes a statement to the SHO saying that accused was injuring him.
- When the informer who has written the FIR or read it, fails to recall memory of those facts but is sure that the facts were correctly represented in FIR at the time he wrote it or read it.

Once an FIR is lodged, the following may occur:

- When there is sufficient evidence a “*challan*” is prepared;
- When there is insufficient evidence, F.I.R is declared as “untraced”;
- When FIR is found to be false or is transferred to other Police Station on point of jurisdiction, it is “cancelled”;
- After registering the FIR the contents of the FIR cannot be changed. Only High Court can quash the FIR.

In case false information is given, section 177 of the IPC would apply to the informant.<sup>12</sup>

**Session 4:** Ms. Meghna Singh Deo, Director Communications, LCWRI made a brief presentation on the E-Group to be started by Lawyers Collective.

It was agreed that the proposed E-Group would be a knowledge sharing forum, where participants could post important judgments or recent developments in law.

Each participant will be provided with a user-name and password.

Ms. Meghna remarked that members of the E-Group have to be sensitive to others and avoid posting any offensive material.

**Session 4:** Ms. Khadijah Farouqui and Ms. Gayatri Sharma, LCWRI discussed the draft Code of Conduct and Memorandum of Understanding with the participating lawyers. Ms Kiran Sharma, Director Operations, LCWRI, talked about the roles and responsibilities of the NOL and took feedback on the expectations of the NOL. Remuneration, reporting mechanisms, outputs and deliverables, role of the NGOs were also discussed for a better understanding of the processes related to NOL.

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<sup>12</sup> Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to **six months**, or with fine which may extend to **one thousand rupees**, or with both.

Or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to **two years**, or with fine, or with both”.

### **Session 5: Valedictory Session**

Dr. Manjula Batra spoke to the participants at the conclusion of the training. She highlighted the important learnings from the training. Dr. Batra urged the participants to use the training as an opportunity to advance their professional skills, importantly while dealing with cases of violence against women and children.

### **Feedback Forms**

At the end of the training, the lawyers were asked to complete a feedback form which included questions on the accommodation, hospitality, content of training, and quality of resource persons provided at the training, along with suggestions for the next training.

- Most lawyers found the stay comfortable. However as the hotel and venue were not close-by, commuting to the venue was inconvenient. One lawyer asked for the food quality to be enhanced.
- The session on Criminal Law was found to be the most useful by the lawyers. Other sessions that were appreciated were the “sex and gender” session, all sessions on violence against women and children, feminist counseling session, session by Mr. Sharma and Ms. Mann. Many of the lawyers observed that all the sessions were very good.
- Suggestions for future trainings included more practical trainings, focus on the Indian Evidence Act, JJ Act, Medical jurisprudence, case studies under PWDVA, how to file a petition under PWDVA, and laws on SC/ST Prevention of Atrocities Act.

