‘Misuse' of Law by Women and Dalits/Tribals:

'Selective Silencing' by Judiciary

Abstract

Both the cases, Rajesh Sharma (2017) and Dr. Subhash (2018),decided by the Supreme Court,were dealt with under two different laws, the commonality that invites a re-reading of judgments is the ignorance of the judiciary towards its history andobjectives with which those laws were framed.Both these judgments as public literature, reiterated the hegemonic construct of patriarchy and casteism and perpetuated 'structural subordination' by adopting the popular narrative of 'misuse'.Judiciary has created an 'impunity' for patriarchy and casteism as the interpretation in these cases were related to law against violence over women (gender) and Scheduled Castes/Scheduled Tribes (caste). Though the forms of discrimination/lived experiences of women and dalits/tribals are different, there is similarity in elements of oppressions, rigidity and limitations on accessibility, which brings these recognized weaker sections under the Indian Constitution together for analysis. Apart from analyzing flawed reasoning, the paper would discuss social realities and impact of these judgments in daily lives of women and dalits/tribals. The paper would adopt the discourse of development in gender and subaltern narratives, as everyday experiences of discrimination and torture results in undignified social existence and affects productivity and empowered life.

KeyWords: *Section 498 A, SC/ST Prevention of Atrocities Act, Structural subordination, cultural hegemony, narrative of 'misuse', pro-arrest policy, victim empowerment*

Introduction

The recent judgments on Section 498 A[1] and SC/ST Prevention of Atrocities Act[2] (POA) has invited criticism for its lack of gender and caste sensitivity and erosion in its outlook towards social realities of Indian society. Both the judgments (Rajesh Sharma's case and Dr. Subhash's case) authored by the same judges raised their concern about the misuse of the law and false implications under the law, reiterating the hegemonic construct of patriarchy and casteism. However, the subsequent Review petitions had different outcomes. In the review petition on POA presided by the same bench[3], the Supreme Court refused to admit that there was dilution to the POA Act by talking about 'false implications against the innocent'. On the other hand, in the review petition on Sec. 498A[4] presided by three judge bench (different judges) of the Apex Court disagreed with the position that such a position by the court would 'curtail the rights of the women who are harassed' and tortured inside matrimonial homes.[5] Though this paper analyses strategic adoption of the ground 'misuse or false implication' by the higher judiciary to slam protective provisions in favour of women and dalits/tribals, the author realizes differences in experiences of discrimination and struggles for dignity by women and dalits/tribals in the history of their existence. The attempt in the

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[1]Rajesh Sharma vs. State of U.P., Cr. Appeal No. 2013 of 2017, decided on 28th July, 2017

[2]Dr. Subhash Kashinath Mahajan vs. State of Maharashtra & Anr., Cr. Appeal No. 416 of 2018, decided on 20th March, 2018

[3]Union of India vs. The State of Maharashtra & Ors., ROP (Cr.) _____ of 2018, 3rd April, 2018

[4]Nyayadhar vs. Union of India Ministry of Home Affairs & Ors., Writ Petition (Cr.) No. 156/2017, decided on 13th October, 2017.

[5]Ibid, para 2.

paper is to understand the 'selective silencing' aimed at dalits/tribals and women by the judiciary ignoring saga of resistance against humiliation and subordination.

Protectionist laws for women and dalits/tribals are enacted to assist both the sections in their struggle against the discriminatory world. While the former fights against the various forms of patriarchy and gender discrimination, the latter fights against the caste system and its discriminatory manifestations. Though the forms of discrimination are different, there is commonality of oppression, rigidity and limitations on accessibility and cruelty on weaker sections. These injustices against 'social justice' were dealt with under the legal policies, Section 498 A and the SC/ST Prevention of Atrocities Act. These laws empowered the communities against discrimination and indignity, on the basis of gender and caste. In the discourse of development, it contended that everyday experiences of discrimination and torture results in undignified social existence and affects productivity and mobility in life (ICRW 1999). While recognizing particular variations and differences between women and dalits/tribals - in their lived experiences, history of discrimination, resistance and continuity of movements -, this paper analyses glibness of the statements in judgments that would position women and dalits/tribals as secondary citizens. The author would like to state here that the discussion is not to establish any kind of linkages or comparison between the lived experiences of discrimination amongst women, tribals and dalits. The discussion is confined to technical use of 'misuse or false implication' theory to take away the rights of women and disadvantaged groups (dalits/tribals) by the higher judiciary, adopting the discourse of structural subordination and juridical hegemony.

Theoretical framework: Discourse on structural subordination

As the Apex court reiterated the popular narrative of 'misuse' or 'false implications' to read down provisions in favour of dalits/tribals and women, it is important to analyse the undercurrents that had penetrated into judicial decision making. It is well explained in Foucault's *Discipline and Punish* wherein he states that the subjected is always under the control of the subjector to ascribe to the norms developed by them (Foucault 1977). Patriarchy and aristocracy in powerful positions determine the length and breadth of entitlements. The power and position in production and society generates consent according to their interpretations and convenient rulings. The norms are created through exercise of historical privilege enjoyed by dominant groups in the society (Lemelle 2010). Judiciary through its judgments here has entertained the jurisprudence of 'impunity' in favour of patriarchy and casteism. This is institutional subordination by the super structure, judiciary and law.

Gramsci defines, 'hegemony as the “spontaneous consent” given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group' (Gair 1993). The restraints on the subjected, enforced through dominance and manipulations over periods becomes normal for the living of the oppressed. In the Indian context, the superior castes exercise subjection of dalits/tribals as if it is part of their natural rights. The oppression or exploitation of the marginalized castes obstruct their mobility and undermine their productivity to use to the services of superior castes. Foucault doesn't emphasize on this 'possessive nature of power' and 'repressive nature of hegemony' (Hewett 2004) which is evident in vertical discrimination structure in India. Reading together of Gramsci and Foucault helps us to contextualize the depth of structural subordination of marginalized not only at

the hands of superior castes in the society, but also in the eyes of judiciary through its judicial expositions.

The transcendent nature of power, according to Foucault, produces gender relationship based on hegemony- the subjected (women) and the subjector (men) (1977). This narrative, though controversial to the extent of 'victimhood' that it creates on women in gender relations, has contributed to the feminist discourse. The evolution of feminist discourse on 'personal is political' has referred to gender hegemony and it highlights that personal experiences of women reflect prejudices that emanate from political, social and cultural structure.

The Woman's Movement has had to fight a long battle to convince the state to intervene into the 'familial space' as it has historically been considered to be a sanctified, private sphere of life (Agnes 1992). It has taken decades for the law to address the role that structural inequities played in familial violence. State addressed it with the realization that domestic violence is a human rights issue (Kapur 2005) as there was clarity that emerged from discussion with civil society movements and study reports of statutory commissions like Law Commission, National Human Rights Commission, National Commission for Women etc. But in reality, women's emotional, mental and physical security is determined by desires and conveniences of men. Violence has become part of conjugal relationship and the reality is that women are living in violence (Geetha, V 1998). Judgments which have no account of history of violence, struggle for dignity and continuing normalcy of violence in a patriarchal structure, are degrading and retrogressive to the society and to rule of law.

MacKinnon discusses the theory of 'structural subordination' in comparison with capital-labour theory of Marx in classist societies (MacKinnon 1982). According to her, if it is the organization of production that divides the society into two

opposite economic classes in Marxian theory, it is the organization of sexuality that divides the society into two sexes, men and women. Organization of Sexuality devised through the medium of dominance undermine her bodily autonomy and portray her as powerless (Ibid.). Privileged experiences and convenient living of men created through social norms supposes domination by men and submission by women. This dyadic conception of domination between the gender varies according to domestic context. In India, the judiciary portrays women as liars and poor decision makers. This reiterates stereotypical definition standard created by dominant gender in the society. The popular norms of structural and social subordination of women and dalits/tribals has become the rule of law by the courts. It goes against the 'tenacity of legal tradition' that considers factors beyond law.

There is disjuncture between the law and reality while violence over weaker and marginalized sections of society are considered normal and assertions of rights by these sections against an inadequate legal and enforcement machinery is considered to be breaking the normalcy. The law cannot be cut off from social realities and the judiciary cannot become a mere technician of law by normalizing violence over women and dalits/tribals. The resistance to accept rights discourse of women and dalits/tribals locates their existential question in the hegemonic discourse. This paper tries to read narratives on dalits/tribals and women within the judgments and understand the scalar void in application of law that makes their rights insignificant.

Analysis of cases

The cases of Rajesh Sharma and Dr. Subhash dealt with two different laws but the commonality that invites a re-reading of the judgments is the ignorance shown towards the history and objectives with which the laws were framed. Both the

judgments refer to right to liberty of the accused in a very considerate way as against the rights of the victims. There is negation of violence and violence as atoolover the marginalized sections.

While dealing with the rights of the accused, the Court in Dr. Subhash's case, resonates it with both procedural and substantive arguments. The procedural reasoning revolves around how arrest without primary investigation and denial of benefit of Sec. 438 of the Criminal Procedure Code[6] (Anticipatory bail) under Section 18 of the POA[7] violates right to liberty under Art. 21 of the Constitution.[8] The substantive grounds cover concept of secularism, vice of casteism perpetuated by the POA, judicial function to uphold individual justice and rights of the accused and misuse of law.

The court stated that working of the POA should not result in perpetuating casteism as it results in disintegration of the society and the constitutional values. There is an attempt to state how caste-based divisions would destroy Secularism and aim of the Constitution is to create a cohesive, unified and casteless society.[9] It further enunciates that secularism is all about creation of casteless and homogenous society.[10] The court ignores the right to identity and equity in a pluralistic society. The concept of secularism under the Preamble has to be read

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[6]Section 438 of the Code of Criminal Procedure empowers the High Court and the Court of session to grant anticipatory bail, i.e., a direction to release a person on bail issued even before the person is arrested.

[7]When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out.

[8]No person shall be deprived of his life or personal liberty except according to procedure established by law.

[9]Supra at 2, para 42

[10]Ibid

along with the right to religion and fundamental freedoms against any kind of discrimination. The co-reading of legalities within the constitution has been clarified by the supreme court in S.R. Bommai's[11] case wherein the court stated that secularism is about prohibition of patronizing any particular religion as state religion. This has been inferred from the speech of Dr. B.R. Ambedkar, wherein he explained the concept of 'secular' as the 'secular state shall not take into consideration the religious sentiments of the people and state shall not impose any particular religion on the people (Pylee 2017). Caste-based discrimination is a social reality and all legal reforms on protectionist laws for dalits/tribals are aimed at assisting them to assert their identity and lead a respectful and dignified life like any citizen. The interpretation that secularism emphasizes on casteless society, is equivalent to ignoring the continuing history of discrimination in the context of increasing hate crimes against dalits/tribals.

Casteism is a perpetual evil which existed in Indian society for centuries as a method to classify sections of population on the basis of their birth. It evolved from the concept of pollution and their impurity deterred their socio-economic, cultural, and political acceptance and representation. The objective of POA complies with Constitutional objective, to protect the socio-cultural and political rights of the dalits/tribals. The history of POA is explained by Anand Teltumbde (2018) by referring to failures of the Protection of Civil Rights Act, 1955 and demanding penal legislation to deal with numerous episodes of violence on dalit communities starting with Kilvenmani in 1968. He writes that violence on the basis of their identity included not only massacre but also sexual violence including rape and molestation. The nature of violence on account of caste hatred demanded a penal protectionist law to deter atrocities

[11]S.R. Bommai *vs.* Union of India, 1994 AIR 1918.

committed against dalits/tribals on the basis of their caste. Violence against dalits/tribals have been identified as a factor affecting their mobility and POA is enacted recognizing not only physical violence but also the social setting that encourages violence on the community(Chakraborty et al. 2006). The cases filed by dalits/tribals against perpetrators have considered this objective and any violence or creating a setting that encourages violence is condemned by way of POA.

The comment that POA perpetuates casteism, is without historical understanding that the Act meant to protect the dalits/tribals from the same. Being a welfare-oriented legislation, it has become a strong pillar of human rights for dalits/tribals. The POA helps guarantee the right to life and liberty of dalits/tribals, and protects these rights against casteism practiced by the dominant castes in the country. The comment of the Court that POA perpetuates casteism has exposed not only the 'a historical outlook' of the judiciary but also embracement of the rhetoric of 'immaturity' that the dominating sections of society have attached with the dalits/tribals to exploit, oppress and to undermine their self-determinism. The judiciary has accepted the irrational narrative of reverse casteism which is preached by the dominating castes in society and has caused adverse impacts on the rights of dalits/tribals. These rights were achieved after a long-fought battle and are now being taken away by the higher judiciary.

The court has also relied on right to liberty and rights of an individual against whims of another. The whim of another indicates the complainant's malicious desire to put the accused through rigors of the law. Such a judgment against character of the complainant and using such a hypothetical argument to generalize the behavior was unwarranted from the court of law. Court went beyond its balanced mind by declaring the accused not guilty and innocent. The court brought in substantive argument of violation of right to liberty in this case and raised

the criminal appeal to the level of writ petition by iterating violation of Art. 21 by the law in Section 18 of the POA.

The court uses the argument of liberty of the accused against the dalits/tribals under the ground of misuse of law. The reality has come out in different studies pointing out how police prefers to report cases under POA and register them under Protection of Civil Rights Act, 1955 to use less stringent law and to avoid procedural complexity. Only cases with violence get reported under POA while others get ignored by the police. Lack of implementation of law, speedy disposal, partiality from the part of police, fear at the hands of dominant castes and withdrawal/settlement of cases on the pretext of fear, contributes to affecting the morale of dalits/tribals in pursuing cases and further creates permissive environment to repetitive cases. Instead of effective governance of the law and considering violence against dalits/tribals as a crime against social justice, the court without analysis of socio-cultural, political and economic reasons for lack of conviction under the POA, ventured into argument of 'misuse'. Sthabir Khora (2018) argues that power imbalance results in upper castes, largely vested with the implementation of the law, declining the same in multiple ways and putting the complainant/dalits and tribals on wrong side of the law. While the presumption of innocence only leaned in favour of the upper caste accused/perpetrator, dalit complainant/victim became guilty of perpetrating casteism and representative of the community which largely misuse the system, even according to the judiciary (Khora 2018). The court has really gone beyond deciding the case and lowered the dignity of the community before the Court and rule of law.

The Supreme Court cites NCRB reports that in 2016, 5,347 cases were found to be false for the SCs and 912 for the STs[12]. It also

[12]Supra at 2, para 26

cites that in 2015, out of the 15, 638 cases decided by the courts, 11,024 cases resulted in acquittal or discharge, 495 cases were withdrawn and 4119 cases resulted in conviction.[13] The mechanical reading of the data defeats the purposive interpretation of welfare legislation that the court emphasizes in this case. The reasons for such lower rate conviction are manifold and that itself has become matter of several academic studies. A case that reaches at the trial stage before the court turns out to be false case or frivolous or sans evidence before the court. This actually suggests that there are certain handicaps that ceases dalits/tribals from persuading cases at procedural level. Lack of financial resources, technological understanding of law, lack of social communication skills to interact with people in power, differential and discriminatory treatment at the hands of enforcement machinery-from police to judiciary, inter-dependency on dominant castes/perpetrators, the fear of life/dignity etc. results in lack of motivation in persuading the case. Therefore, large number of genuine cases fail before the court of law and results in acquittal.

The reasoning of the court starts with the remark of misuse and false implications under the law as if it was preoccupied in the minds of the judges. This was not reached at by way of discussion but started its discussion from the same. POA was enacted as a legal measure to remove wrongs against specific communities on the basis of their identity. This legislation protects the dalits/tribals from crimes of domineering and indignity. In the narrative of the Court, the liberty of the accused was emphasized ignoring the protectionism that POA offers and its importance to keep the existence of the dalits/tribals dignified and possible. The court is right in stating that any unilateral version shouldn't be treated as conclusive. However,

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[13]Ibid

the court failed to apply the same and made unilateral comments against the protectionist law. The remark that 'law should not result in caste hatred'[14] further exposes the implied prejudice and misunderstanding of the judiciary about the reality of atrocities against dalits/tribals.

The generality that the court read into this case and attribution of the 'others' to the upper castes is problematic. Prior investigation and permission brought by this judgment defeats the purpose for which it was enacted. The protection of victims who are weaker inherently, tend to be violated/threatened for life if they file complaints against the upper castes. The provision of immediate arrest protects them from any consequent violation post filing of complaints. This judgment legally handicaps the dalits/tribals and leaves them vulnerable to perpetrators of caste atrocities. The legal misunderstanding and lack of realization about the importance of protection of dalits/tribals in the time of increased hate crimes, marks rejection of their struggle and resistance for right to life. The judgment would definitely affect arresting crimes against dalits/tribals in India.

The court could have decided the case on material facts without delving into narrative of misuse which is a dominant narrative prevalent from decades together. Echoing the same by judiciary adds to its leverage and primarily enhanced use of the same by the enforcement institutions.[15] The studies of two decades have indicated using the same excuse not to register the complaint by the police and informal system of prior investigation even existed (Khora 2014). Now with the judiciary declaring it, this would be used against them formally and directly. This would

[14]Supra at 2, para 72
[15]Supra at 16

take away protection against revenge/retaliation against dalits in case of filing of complaints under POA. In a society where higher the caste-higher the power and wealth, it is easier for the 'other' (SIC) to use the system against the weaker, the dalits (Nawsagaray 2018). We have seen many riots/violence against dalits for assertion and resistance for their rights. The democracy would fail if we cannot provide space for liberty and dignity of dalits as the statistics of violence according to NCRB reports under POA are increasing.[16]

Rajesh Sharma's case

The remarks of judiciary in Rajesh Sharma's case is reminiscent of the remarks by Justice ML Pendse (then senior most judge of Bombay High Court) which led to protests by women organisations in 1995. The judge had commented that routine misuse of laws by women has resulted in injustice, meted out against their husbands and family members. This statement was made while addressing the postgraduate law students of Bombay University in March, 1995. While inviting academic insight in the light of this incident, Flavia Agnes in her article, wrote about an instance of 1992, wherein then additional commissioner of Police (Crimes) directed subordinate police stations in the city to register cases only if women approach the police station with bleeding injuries (1995). These instances denote flouting of law by enforcement agencies overriding legislative provision that intended to protect women from cruelty at matrimonial home. Lack of substantive data to indicate the allegation of misuse has been highlighted in the past and the present situation is no different. The Supreme Court has been entrapped into the same gender dominant

[16]The NCRB data of crimes against SC/ST (PoA) Act, as revealed in its 2017 annual report, reveals that that while in 2014 the number of cases were 40,401, they had dropped marginally by 4.3% to 38,670 in 2015, but had risen by 5.5% to reach 40,801 in 2016.

narrative, a narrative which was irrelevant to decide the matter. The Supreme Court kicked off the debate once again at the apex level of judiciary with wrong interpretation of data to substantiate the allegation. The court feels that the 498 A cases are filed in the heat of the moments over trivial issues which are not bonafide. The assumption or judicial prejudice about women's immaturity in decision making is evident in these words. It further states that filing of cases results in diminishing chances of settlements between the parties. Instead of understanding the desperate situation at which a woman is pushed to take up legal recourse and challenges that she encounters during this phase, the court was concerned about the violation of human rights of the innocent accused.

The judgment procedurally finds fault with the safeguard of immediate arrest to state that women rush to file complaints. Also, the court finds filing of cases problematic as it has 'large' consequences of bringing the family together through reconciliation. Wives are not just a tool to rework or (re)construct the family but individuals who deserves rights like every individual and dignity. Any suggestion of alternative that sounds similar to return to violent husband or family is judicial injustice towards women. The comment of the court is without understanding that there is no other protection other than criminal law that can protect the women from immediate torture and threat to life.

The court cited Reports of National Crime Record Bureau (NCRB), 2005, 2012 and 2013 to conclude that low rates of conviction and upward trend of acquittals in 498 A indicates false cases on account of mistake of fact or law. This conclusion is flawed as there are enough cultural and social factors that deter women to settle these cases such as welfare of children, financial concerns, social concerns, lack of shelter etc. Flavia Agnes cites the National Family Health Survey-III (NFHS-III), 2005-06 to reveal that 31% of married women were physically

abused and 10% were subjected to 'severe domestic violence.' Twelve per cent of those who reported severe violence suffered at least one of the following: bruises, wounds, sprains, dislocation, broken bones, broken teeth, or severe burns and 14% experienced emotional abuse (Agnes 1995). She also quotes the World Economic Forum's (WEF) Gender Gap Report, 2016, where India ranks second from the bottom among 144 countries. This data indicates that violence against women in India is a daring reality. It is hard to recognize that the system ignores and tries to find fault with women for approaching law specifically enacted to protect them. The statistics are being used by the judiciary conveniently to hold it against the victims without understanding its sociological, cultural and political underpinnings.

The court legitimizes the sexist assumption of women as immature decision makers by way of this judgment. The court is more concerned about manipulation of law by a helpless, tortured, financially non-independent women against the dominant gender in the society than the protection of the same. Such an analogy is far from the truth and lowering down her dignity and normalizing the violence over her.

Only legal provisions empowering women seem to be under constant scrutiny of the alleged misuse, in spite of the fact that there is no systematic data to substantiate the allegation. Perhaps deep-seated biases rather than logic, reasoning or hard facts are at work when these allegations are hurled at women. It appears no other legal provision is being misused by people except the one benefiting women.

The Constitution and the narrative of 'misuse'

Sociologically, women and the members of the scheduled castes (SC)/scheduled tribes (ST) are considered to be weaker sections. Women and dalits/tribals had been given special status within the Constitution. Article 15 (3) casts obligation on

the state to protect women and children through special provisions and Article 15 (4) entrusts obligation on the State to enact special provisions for advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. These provisions are facet of equality guaranteed in clause (1) of Article 15 and an effective method of realising and implementing it.

Unequal treatment of equals is as much violation of that right as equal treatment of unequals. Every difference of treatment is not inconsistent with that right just as every identical treatment is not consistent with it. The right to treatment as an equal consists in equal respect and concern while the right to equal treatment consists in identical treatment. But, as we have seen, identical treatment is neither possible nor consistent with the right to equality. Therefore, what the right to equality requires is equal concern. The protectionist laws to protect women and dalits/tribals from atrocities and cruelty at the hands of dominant gender or communities enacted from the understanding that atrocities hinder socio-economic mobility of the community. The concept of equality qualified into equity is realized through laws that deter/prohibit any kinds of cruelty or discrimination on the ground of gender or caste. It's against these procedural safeguards provided under Sec. 498 A of the Indian Penal Code for women and Sec. 18 of the Prevention of Atrocities against Scheduled Caste/Scheduled Tribe Act for dalits/tribals, the court has declared its discontent and considered both women and dalits/tribals as flimsy decision makers and as abusers of protectionist laws.

The enactment of protectionist laws to protect them from rigors of social and cultural inequal structure was not a smooth process. The long saga of struggle to enact these laws by social movements—feminist movement and dalit movement cannot be disregarded by use of these terminologies, 'misuse' and 'false implications'. Implementation of these laws are important part

of success of the redistributive policies rather than assuming that these would result in end of violence or discrimination.

The logic of misuse is highly unwarranted in the current socio-cultural context and reporting of increased crime rates against dalits/tribals and women. The low level of conviction rates is not because of falsely implicated cases. There are factors which are sociological, political, economic, cultural and hegemonic reasons for non-persuasion of cases by the victims.

'Misuse' or 'false complaints' against protectionist laws are decades old popular counter narratives. Flavia Agnes way back in 1995 wrote about it in the context of 498 A[17] and Anand Teltumbe wrote about it in the context of POA from 1990 onwards.[18] There is a study conducted by Sthabir Khora about Final Reports on 498 A cases and POA cases where more than 67% cases were closed as either false or mistake of fact. According to him, these Reports were prepared in a social setting wherein women and dalits/tribals were intimidated on the basis of social stigmas and existential concerns.[19] Majority of the situations, women have no home other than matrimonial home to live and dalits/tribals have to continue live in the same village which forces them to agree with FR findings. Dalits in a village are dependent on the upper castes socially, politically and economically. Another major discontents against police is its prevalent practice of registering atrocity case under the Protection of Civil Rights Act rather than under POA, as it seen to be less stringent compared to the former.

The narrative of misuse refuses to look at life and death situations that these weaker sections—both women and dalits/tribals—face after filing of cases under these laws.

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[17]Supra at 24
[18]Supra at 12
[19]Supra at 22

Judiciary hammered the last nail by reiterating this discourse. The monistic lens of assessing functionality of law based on rigid reading of statistics without considering its social, political, historical and economic underpinnings would dilute policies for social justice.

Conclusion

Under both the judgments, Court has criticized immediate arrest against perpetrators of violence. The court is afraid that the human rights of the accused would be violated by this measure. While concerned about the same, the court completely ignores the human rights of women and dalits/tribals, who risks their lives to come out against the powerful and dominant in the society. Such an attitude is clearly an attempt to move away from Constitutional obligations to protect the weaker sections of the society.

Struggle of women against violence within the family cannot be resolved only through individualized resolutions. It originates from structural inequities. Negotiations at different settings such as religious institutions, panchayats, community associations, political party offices (non-formal institutions) are required to identify the violent experiences of women as structural issue. Violence against dalits/tribals is also a structural or systematic torture that cascade through generations.

There is a gap between reality and application of law. Law only brings formal equality. Substantive equality depends on extraneous factors and attitude of non-formal institutions. Both women and dalits/tribals reach out to non-formal institutions for negotiations. There are multiple journeys of victims to improve their daily lives alongside their contestations within the society or family. The non-interventionist attitude further makes the aggrieved helpless and it is secondary victimization by ostracizing her/him. The rights-based discourse on domestic

violence and crimes on dalits/tribals foregrounds law and its institutions as effective modes of intervention. It is judiciary here acts ignorant of social realities, patriarchal, corrupt and biased, and it adds to institutional failure.

Many jurisdictions have moved towards pro-arrest policies and victim empowerment policies in relation to crimes based on hegemonic relations. Protection of victims (dalits/tribals and women) from immediate retaliation is priority under protectionist laws and hence, pro-arrest policy needs to be implemented and emphasized upon. Hoyle and Sanders have a different view to argue that reliance on victim to decide arrest lead to silencing the complainant against the accused (Hoyle and Sanders 2000). That would result in continuum of violence on her as they undergo varied pressure from society to community to family to take other alternate course of action other than legal recourse. Therefore, pro-arrest policy also demands victim empowerment policy to support the victim through other social interventions to ensure continuity of assistance and care at daily lives and in legal matters. This would encourage victims to stand up against violence and reduce violence over a period. It is at this point of demand for pro-arrest and victim empowerment policy that the judiciary has diluted the law by speculating the intention of cases under the protectionist laws and explicitly lamenting about the rights of the alleged violators. In India, the violence is not simply on account of power relations, there is intersectionality of caste and sex that make the victim more vulnerable. The systemic or structural violence or torture cannot be brought under the deductive lens of 'misuse' or 'false cases', to undermine the struggle and resistance of women against dominant gender and dalits/tribals against dominant castes, for centuries.

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