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Three Reasons Why Women are Still Fighting

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ABSTRACT

Faces behind patriarchy are given a tight slap and a strong message is conveyed to the society whenever someone throws some light on women's rights. Even after seventy years of independence, women are still struggling for their independence from the invisible forces of the society that binds her. Women often feel restricted when it comes to their expression of thoughts and they are not given the respect they deserve. This article talks about the distressing journey of women from their mother's womb to the wooden tomb. The decision of the life of the unborn girl is vested on the society and it is observed that, India who first recognized the value of reproductive rights of women and commercialized it has now been banned, and the said decision has gone against the fundamental rights of women, which could also lead to an increase in illegal reproductive practices in the country. Thirdly, women have to face this plight of marital rape which Indian laws cover it under domestic violence, cruelty and sexual abuse but are inadequate. The article also indicates the predicament of women and children during COVID-19 where they had no other option left but to live with their abusers.

I. INTRODUCTION

"When men are oppressed, it's a tragedy. When women are oppressed, it's a tradition"

This beautiful quote by Letty Cottin Pogrebin appositely divulges the vulnerability of women in our society from time immemorial. The persistent oppression against women is so deeply rooted in the society that it has become *COMMON* or rather a tradition. India is a country where young girls are called to houses for Navratri Poojan and are worshiped as they are given the status of goddesses or are held to be 'divine'. But the reality is that women do not want themselves to be called as divine or want themselves to be treated as goddesses, they just want themselves to be treated as humans and be given equal status in society. It is an unfortunate state that even in the twenty-first century equality and empowerment to women still seems to be a distant dream or a privilege for many, and women are demanding for something they deserve. From Fundamental Rights to Directive Principle of State Policies, Indian Constitution

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is enormously enshrined with various laws which protect the rights and promotes the welfare and dignity of women and children. With various schemes, amendments, and evolution of law, India has shown a positive aggression towards this social evil. India has also ratified International treaties and conventions in the past which constitutes CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women), Optional Protocol to CRC on Sale of Children, Child Prostitution and Child Pornography and various others to strengthen its laws. But even after existing statutes, ratification of several treaties and evolution of law for protection of rights of women, various issues are still rampant in our society which attack the women at first hand. There still exists a wide gap between the goals enunciated in the constitution, legislation, policies, plans, programs and related mechanisms on the one hand and the situational reality of the status of women in India, on the other hand.³ The three pillars of the Constitution: Legislature, Executive and Judiciary have to understand this hurdle as the need of the hour to help our country thrive, as it is a well-known fact that a developing country like India cannot achieve its target of becoming a socially developed nation until and unless women are treated equally.

Women have established themselves in every field of life, whether it be a commanding post in an army, a politician, a lawyer, a doctor, an athlete or a scientist, this list of their strength and courage is never ending. Women are called an epitome of love and sacrifice who always consider her family's wish over her's. It can be said that the character of women in today's world has modified from being responsible for maintaining household budgets to being responsible for the Finance portfolio of a nation. But this smooth looking road of self-sufficient and financially independent women had many struggles, women had to face various direct and indirect evil forces of patriarchy. The journey of freedom and equality for women with a common objective of fighting against oppression had crossed many milestones, discovered new altitudes and society as a matter of fact had indeed covered a long way but it had been observed that even after formation of various laws women do not live a life of their own. The values and ideas behind the statutes are being neglected and subsequently basic rights of women are a privilege and a distant dream for many and as a result women have to go through a vicious cycle of their life fighting for their rights from womb to tomb.

II. FEMALE FOETICIDE

Motherhood is a blessing for parents in India. The desire to bear one's own child is paramount for parents. Those who are childless feel incomplete and have a sense of loss in their lives.

³ Purnima Ojha, *WOMEN'S ISSUES IN INDIA: ROLE AND IMPORTANCE OF MEDIA*, 72 *IPSA* 87, 87 (2011).

What is shocking is the fact that even today the blessing of motherhood is lost if a girl child is born, and the so-called blessing gets transformed into a curse and an unfortunate state for many. Despite living in the twenty-first century and being well aware of the consequences of their vicious acts, Indian parents still have a strong sense of fondness for sons. It becomes difficult to answer why people still hate girl children. Boys are still seen as breadwinners and assets to the family who are perceived to have an economic and social value, whereas on the contrary, girls are seen as a liability who will only add burden to their families and will live a vulnerable life. It would certainly not be wrong to infer that this obsession for boys over girls is a primary reason for first, determining the sex and then, aborting the girl child. This evil practice of killing a female fetus in the womb is called female foeticide.⁴ In order to prevent this crime and pose a legal ban on the pre-natal sex screening techniques, amendments have taken place in the pre-existing Pre-natal Diagnostic Techniques Act (PNDT) to make it more stronger and effective. In 2004, this Act was modified to Pre-Conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) (PCPNDT) Act. It is to be noted that not only parents, but also the medical department is equally responsible for the commissioning of this crime. In the year 2019, birth of only male children continuously for three months in 132 districts of Uttarakhand created a sense of suspicion against the wrongful medical practices being followed.⁵ There is a high probability that it was a case of mass female foeticide. Non maintenance of records is also one of the primary reasons for commission of the offence. Frequent raids have been conducted on hospitals that are misusing ultrasound machines, shows that this practice of prenatal sex determination is still prevalent in India. In the recent case of Patiala, Punjab an abortion racket was busted in hospital raid, practicing illegal sex determination techniques. In the case of *Federation of Obstetrics and Gynecological Societies of India (FOGSI) vs. Union of India (UOI) and Ors.* -, a bench of Justices Arun Mishra and Vineet Saran observed that *the non-maintenance of the record is the very foundation of offence.* They also called this offence - “the most sinister, immoral and anti--social act.”⁶

Killing of a girl child snatches away all the rights from her before she could physically step into this world. This testifies the fact that how society has control over her life, they do not hesitate to kill her based on certain stereotypes which are actually baseless, misguided and definitely questionable. The frequency of female foeticide is increasing at an alarming rate in

⁴ Emandi Rangarao, *Felony of female Foeticide – Role of judiciary in implementation of PCPNDT act in India*, 2 IJL 31, 34 (2016).

⁵ *No girl born in 132 villages of Uttarakhand in last 3 months*, HT, July 22, 2019.

⁶ *Federation of Obstetrics and Gynecological Societies of India (FOGSI) vs. Union of India (UOI) and Ors.*, (2019) MANU 4 (India)

India. Child sex ratio which was used to be 927 in 2001 has dropped down to mere 900 in 2015 which describes the seriousness of the issue. The issue of female foeticide not only promotes, but also becomes the root cause for numerous issues prevailing in the society. In the case of *Voluntary Health Association of Punjab v. Union of India*, honorable Justice, Deepak Mishra rightly justified the depth of the issue in his words-

*“All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of the future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems.”*⁷

The society neglects this issue because they see it as killing of a foetus, and not a living being which will account as murder. According to them the unborn child has no rights, what a human being as. This poor mentality has led to the killing of countless numbers of children in the mother's womb. Society has to understand that *Abortion of female child in its conceptual eventuality leads to killing of women*⁸. Section 315 of the IPC deals with the death of an unborn child, according to which the accused will not be treated the same as a murderer because the punishments defined in this section does not include life imprisonment of the accused. While it is observed in section 313, that causing miscarriage of the unborn child without the consent of the woman can make the accused liable for as far as for life imprisonment. This creates an area of conflict between these two sections, where the end results of both led to the death of an unborn child but still, they are not treated with the same degree of punishment. The judiciary have to understand that whether it is the consent of women or not, no-one has right to kill or miscarriage an unborn child.

III. BAN ON COMMERCIAL SURROGACY

Surrogacy can be also traced back to the epics like Mahabharata, where Rohini bore the child for Devaki and Vasudev.⁹

India has taken some revolutionary steps in the past and has established an example for the world by allowing commercial surrogacy in 2002. By legalizing it, India became the first country to allow women to willfully carry pregnancy for money, which is genetically not related to her. Commercializing it was a major step towards the benefit and upliftment of

⁷ *Voluntary Health Association of Punjab v. Union of India (UOI) and Ors.*, (2016) MANU/SC/1433 (India).

⁸ *Supra* note 6.

⁹ Ashok Warriar, *Is blanket ban on commercial surrogacy a well thought out solution?*, THEWEEK, Feb. 06, 2020.

women, especially for those belonging to the lower income group of the society. This helped them earn a good amount of money for the services they provided. The final intention in surrogacy is to hand over the child to the genetic parents, where the surrogate woman just acted as a carrier. There are other types of surrogacy also such as altruistic surrogacy, where the financial aid provided to the surrogate mother is restricted only to the medical expenses. But Commercial surrogacy is something beyond the medical expenditure, in this, a bait is provided in addition to the medical cost incurred, to lure the women who carried the child for the potential commissioning couples.

It was often observed that foreign parents used to visit India to get their surrogacy done because these services are rendered at much cheaper rates in India as compared to other countries. And there have been cases in the past where Indian courts have cooperated with other country's judiciary in order to benefit the rights of the child and the surrogate mother. It was observed that the surrogacy which cost around 1 Lakh USD in America was done at 15-20 Lakhs INR in India, which was comparatively much cheaper and affordable which made this land a prime spot for commercial surrogacy. Not only this, but the business was also estimated to earn 2.3 Billion USD in India which shows the impact of commercial surrogacy on the economically backwards section of society. With benefits, there were some downsides also, surrogate women often did not know about her rights, which led to both direct and indirect vulnerability of women. Taking undue advantage of illiterate surrogate mothers, the mediator often kept women in pitfall. In rural areas, the contracts were intentionally made inappropriately by keeping women in disadvantaged situations. The major problem occurred when the child born is disabled or when there had been a divorce between parents which left the child and women in a vulnerable state because of the flaws in the contract. Due to the lack of awareness among society, there has been a misconception made against them. The surrogate mothers not only had to face the social stigma of the society but were also left in unhygienic conditions during this time. There is a lack of legal attention in this sector which needs to be taken care of. Surrogate mothers often feel disadvantaged due to these inappropriate contracts and lack of availability of laws that not only protects but also promotes their legal rights.

Strict action by the concerned authorities was required in this issue but the cabinet instead approved a new Surrogacy Regulation Bill in 2020 which put a complete ban on commercial surrogacy.

This decision can worsen the present condition of the surrogate mothers as it will directly affect their livelihood, providing reproductive labor without appropriate compensation is unjust against them. A general rule is that one must get consideration for the services that one

provides, and it would not be wrong to provide monetary consideration to someone who is providing priceless services. Earlier when commercial surrogacy was legalized India became a medical hub for the surrogacy market due to the low cost that was offered by poor Indian women. According to a CIT report of 2012 the size of India's surrogacy market was around \$2 billion a year. What India needed was some regulations to regulate commercial surrogacy. This concern was even highlighted by the Law Commission of India to enact a law to regulate commercial surrogacy but in its 2018 report, the Law Commission of India recommended a prohibition of commercial surrogacy as there was exploitation of the surrogate mothers who were coerced to become a surrogate due to poverty and illiteracy in the society. The role of middlemen also became prevalent where they started enjoying the benefits and started exploiting the women. The contemporary bill mandates marriage of a man and a woman for five years and demands a certificate of essentiality and eligibility but this further raises a question that when live in relationships are recognized and their children are given legitimate status by the hon'ble Supreme Court, would they come under the purview of this Act or not? This also questions the extension of this act whether this would extend to single and divorced women or not? If not, this will be within itself discriminatory as such people would be left out from the Act.

This ban also violates the various fundamental rights of the surrogate mother. It is in direct violation of the art 21 as it is known that the right to life constitutes the right to reproductive autonomy, which is further inclusive of the right to procreation and parenthood. In *Justice K S Puttaswamy v Union of India*¹⁰ - it was mentioned that reproductive rights of the women form a part of personal liberty. Recently the Supreme Court has emphasized on the notion that right to reproduction is a component of right to life.¹¹ This ban is also in violation of article 14 of the constitution, as the new bill has differentiated people on the sex, age, marital status and nationality etc. By allowing Indian infertile couples who need to be married for a minimum of 5 years, with no surviving child is a big shortcoming of this bill. This creates a sense of unjust for those couples who are fertile but want to have a child through surrogacy. This is the primary reason that the provisions of this act in order to classify people seems to be completely arbitrary and unjust in nature. This bill is unjust for those women who do not want to go through the stages of pregnancy but left with no other options available. Even the Hon'ble Supreme Court has held that Arbitrariness is an anti-thesis to rule of law: equity: fair play and justice.¹²

¹⁰ K.S. Puttuswamy v. Union of India, A.I.R. 2017 S.C. 4161 (India).

¹¹ Devika Biswas v. Union of India and Ors., (2016) MANU/SC/0999 (India).

¹² Lakshmi Precision Screws Ltd. v. Ram Bhagat, (2002) MANU/SC/0672 (India).

In India, adoption could be an alternative to surrogacy but then there will not be any genetic/biological connection or relation between the parents and child which surrogacy provides easily. Surrogacy is a good option for them as they can have a genetic linkage between their child and also where there is scarcity of the adoption of the children.

Considering this act to be draconian in nature the government should reconsider its decision by seeing this from a different lens in order for welfare of women at large. The role of middlemen should completely be prohibited and should be made punishable as this would lead to exploitation of women. This would also safeguard the privacy of surrogate mothers. Legally binding contracts by involving credible institutions like banks can be made between *surrogacy parties* to make it more viable.

IV. MARITAL RAPE

“Marital rape doesn’t become a rape.... they say. And why would it be? Since he had posted a logo of his surname on her body !!!” -**Namita Singh**

Hypothetical:

A twenty-three-year-old unmarried girl named Alia enjoyed and made the most out of her teenage journey. Her parents have supported her in every situation and have stood by her in every thin and thick of life. She took law as her career and successfully succeeded the first milestone of her life by completing her five-year law degree from a reputed law school. One day while coming back from a party, she saw a man abusing her wife near the bus stand, after watching this, she was unable to ignore the wrong and she ended up admonishing the man amidst the crowd. This caused loads of embarrassment to the man and this hurt his male ego which triggered him to teach Alia a lesson. He then chased her and finally raped her calling it a revenge and then left her alone. When Alia gained consciousness, without even wasting a moment she went to the nearest police station and filed a complaint against that man. The case went to the court and she finally succeeded in convicting that man under rape laws. During all these proceedings, what kept her going was the constant support by her family which never let her feel down or ashamed which motivated Alia to always take her stand and fight against the unjust. After a few years of this incident, she got married. Her life was going good with her husband and they had expressed love and affection towards each other. One day her husband demanded for sexual intercourse, but Alia was not willing to do it, she directly refused him. This hurt his male ego and he abused her stating that she is his wife and he has all the rights over her. Even after resisting he did not listen to her and went against her will and forcefully

raped her. She felt the same jitters and suffered from the same nervous breakdown as she did when she was raped before. She found that there is a gross violation of her fundamental rights and decided to explain the whole scenario to her parents first. Having heard this, her parents who always used to support her, this time took a different route and tried to persuade her stating the importance of this immortal and pure institute of marriage and claiming that going against her husband will actually harm her. After this she decided to stand alone and filed a complaint against her husband calling it a rape. But this time, the decision went different, her husband was not convicted under rape laws. This made her feel helpless and hopeless. There were several questions which were bothering Aliya.

She was unable to understand that when the offence is same, both prior to and after the marriage then why punishable at one stage and why not at another? Does giving consent to marriage mean the same as giving consent to sexual intercourse, every time at the desire of the husband? Does giving consent to marriage mean the same as giving consent to have control over her body? Do the fundamental rights of a woman get exhausted after marriage? Whether rape before marriage is any different from rape after marriage?

Her questions are quite rational in approach which questions the lacunae in the contemporary Indian statute. According to the International Center for Research on Women, about one-third men confess having forced their wives for a sexual favor.¹³ Further, according to a study by the UN Population Fund, more than two third women in India, between the ages of 15 to 49 have been beaten, raped, or forced to provide sex¹⁴. This certainly means that this social evil is entrenched within the society and has become the so called 'normal' for many without even realizing the extremity of their appalling actions. One of the primary propulsions behind this mentality is that women are still considered to be the property of their husbands. The roots of this mentality also goes back to the time when upon marriage, a woman's legal rights and obligations were subsumed by those of her husband, in accordance with the wife's legal status of *the doctrine of coverture*. It was in the year 1981 when in the US, the wife's legal subordination to her husband was fully ended by the case of *Kirchberg v. Feenstra*.¹⁵ The United States Supreme Court held a Louisiana Head and Master law, which gave sole control of marital property to the husband, unconstitutional. Even in India at the time when IPC was drafted in the 1860s, a married woman was not considered an independent legal entity. Rather, she was considered to be the chattel of her husband.¹⁶ As a result, she did not possess many of

¹³ Sarthak Makkar, *Marital Rape: A non-criminalized Crime in India*, 33 HHRJ (2019).

¹⁴ Simran Kaur, *Marital Rape in India*, CFFP (2017).

¹⁵ *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

¹⁶ *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harv. L. Rev. 1255,

the rights now guaranteed to her as an independent legal entity, including the right to file a complaint against another under her own identity.¹⁷ It is high time that people should treat women as individual identities and above all humans and respect their fundamental rights guaranteed by the Constitution of India by breaking the evil stigmas in the society. The essential of rape laws in India is 'absence of consent' for sexual intercourse. The sexual acts and intercourse between married women and their men are outside the ambit of rape and is devoid of any reasoning or logic. It is unreasonable to presume the presence of consent for all sexual intercourse and acts during marriage and thus the classification of elements of rape based on marriage under section 375 (2) is unjust, arbitrary and against the natural principles of justice, thus making it violative of Article 14 of the Indian Constitution. It also overruns the right to equality as it divides women into two groups solely because of the reason of them being married or not.¹⁸ An unwilling and non-consensual sexual intercourse with a woman being married or not is considered to be an infringement of the Right to privacy covered under the purview of Right to life and personal liberty, held SC.¹⁹ The Supreme Court also held that right to Privacy includes Right to make choices concerning intimate relationships or acts.²⁰ The Hon'ble Supreme Court has partly struck down a part of the exception clause laid down in section 375 of IPC. Under the Protection of Children from Sexual Offences Act, 2012 ('POCSO'), it is not legal to have sexual intercourse or any other sexual acts with a child under the age of eighteen. However, the exception clause used to allow for this in case a girl is married and is between the ages of fifteen to eighteen. The Court noted that this differential treatment to the girl on the basis of marriage was wholly unconstitutional. The court held that a child under every aspect of legal frameworks need protection against sexual abuses and it referred that by instilling this exception the government is after all making child marriage legitimate indirectly.²¹ The reason behind this was because marriage did not serve as a reasonable classification. It is heartening that courts have considered the fact that the rights of women cannot be incorporated on the basis of marriage. Even the J.S. Verma Report, gave a four-prong suggestion to effectively criminalize marital rape.²² But the parliament has not effectuated the same.

Presently there are few remedies that are available to the victims of marital rape. Under criminal

1256 (1986).

¹⁷ *Supra* note 13.

¹⁸ *Supra* note 13.

¹⁹ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

²⁰ *Supra* note 11.

²¹ Krishnadas Rajagopal, *Sex with minor wife, despite consent, is rape: Supreme Court*, HT, Oct. 12, 2017.

²² J.S. VERMA REPORT, *supra* note 33, 117.

law the accused can be prosecuted under section 498A of the IPC that specifically deals with offences related to cruelty against women. This further brings an important question of adequacy of covering rape laws under the definition of cruelty. We strongly believe that there is a marked difference between cruelty and rape as rape within itself is a distinctive crime with different essentials of the offence. Protection of Women from Domestic Violence Act, 2005 also protects women from physical and mental cruelties of all forms, which specifically includes sexual offences. This Act criminalizes marital rapes but only as a form of domestic violence.²³ Under the Protection of Women from Domestic Violence Act, 2005 Act, if a woman has been raped after marriage, she can approach the court and demand judicial separation from her husband. This is again inadequate and undoubtedly much more needs to be done by the authorities in regard to marital rape.

It is time to declare section 376 (2) as unconstitutional and recognize the fact that rape is rape whether it happens with an unmarried or married woman and failure to criminalize it is complicit acceptance.

V. IMPACT OF COVID-19

It is said that every challenge brings some opportunities with it and it is upon us how we accept it. During this uncertain lockdown due to the pandemic situations around the globe, families came together and had a good opportunity to understand each other's relevance. This was also an opportunity for many Indian husbands to prove that they treat their wives equally and respect their worth. But the various harsh consequence of this lockdown narrates a different story. Various reports show that women and children had to fight a duel, both against the pandemic outside their home and patriarchy lying indoors. With the launch of child line helpline number, within 11 days more than 92,000 calls were received seeking protection from abuse and violence. While 11% of the calls dealt with physical health, 16% of them were for child labor and missing children.²⁴ In addition to these, a report released by National Commission for Women (NCW) shows a 100% increase in complaints registered by women against domestic violence. In this patriarchal society, household chores are primarily considered as women's jobs. But during lockdown as maid was absent, crested an extra burden for women, which acted as adding fuel to fire and resulted in increased chances of domestic violence against women.²⁵ All these reports and complaints indicate that the lockdown acted as an extended captivity for

²³ The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii).

²⁴ *Coronavirus lockdown | Govt. helpline receives 92,000 calls on child abuse and violence in 11 days*, HT, Apr. 08, 2020.

²⁵ *COVID-19, Domestic Abuse and Violence: Where Do Indian Women Stand?*, EPW Engage, (2020).

both women and children who were trapped with their abusers. Government has to realize that fighting these abusers and the beasts who prey upon the frangibility of women, is as salient as tackling the pandemic. The vulnerability of women and children cannot be ignored while the fight against the pandemic continues.²⁶ NCW also launched a WhatsApp number to increase the outreach but the other side of the coin is that in India only 38% of the women have access to their own phones and internet connection is another hurdle, which makes this platform inaccessible to the majority of women in the country.²⁷ The other major setback happened for the women when the government allowed the opening of liquor shops. This moment did not reduce the level of stress among the family but due to the overconsumption of liquor at home, even a small argument resulted in violence. This aggravated the disasters for women as various women's movements have shown evidence that liquor consumption is directly linked with an increase in incidences of abuse against women.²⁸ With this, it can be said that even after various laws against domestic violence, there still exists a male ego of patriarchy which suppresses the rights of women and children. Again at this stage, women do not want themselves to be treated superior but they deserve to be treated equally.

VI. CONCLUSION

This pitiful journey of women in society starts even before her birth as soon as the sex of the unborn foetus is revealed. The excitement and celebration stemming from the news of pregnancy is quickly transformed into remorse, as people begin to sympathize with the family. From that day the life of the unborn girl child is put in jeopardy as invisible forces come into play to decide whether or not she has a right to live.

The problem here is not only of authority men traditionally hold, but also the submissive nature of women. What happens in the majority of the cases is that the woman who faced oppression several decades ago, at the hands of her family forgets her past. As she grows old, she becomes the unintentional donor of the very oppression she was subjected to throughout her life. This forms a vicious cycle which takes away any hope of improvement of conditions for women. The need of the hour is for the concerned authorities and the society understanding that women have rights over their individual bodies. It is also to be realized that protecting the institution of marriage is no defense for rape. These recent incidents have once again proven that there is

²⁶ Prachi & Astutya Prakhar, *Pandemic Triggers Domestic Violence*, The Leaflet, July 15, 2020.

²⁷ Kanika Arora and Shubham Kumar Jain, *Locked-down: Domestic Violence Reporting in India during COVID-19*, OXFAM, Aug. 20, (2020).

²⁸ Shalu Nigam, *COVID-19: India's Response to Domestic Violence Needs Rethinking*, SSRN, May 12, (2020).

a need for revolutionary changes in the areas of law when it comes to the protection of women's rights. Reaching a credible solution requires us to analyze the very roots of this issue. The problem here is not enlightening men to honor every life and basic moral sense.

We are the creators; we are the broadcasters, and We are the slayers. The problem originates from us and terminates into us.
