Chapter 4
Chapter - 4

CRIMES AGAINST WOMEN

4.1 GROWING PHENOMENA OF CRIMES

Emancipation of women is the call to all nations and this is further vouched by our Constitution, which has guaranteed equal treatment to men and women and also provides for protective discrimination for women. But in reality many women suffer from inequality and the protective laws made for them has not served the purpose. Taking advantage of the lower status and inequality, many crimes are committed against them.

Crimes against women are not a new phenomenon. What is new is that perception of crime as a social problem. Crime no doubt is a complex social problem. It has brought within its teeth children, youth and women. With the advance of industrialization and urbanisation, criminality is spreading in parts of the society. The crime against women takes place both inside and outside their homes. Periodical statistics from various crime-reporting bureau are showing an upward inclination and the incidence of these crimes is increasing every day. It is obvious that it cannot be totally removed, but it can be curtailed. Cultural values have to be properly balanced as it is changing fast and members of the society should properly

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comprehend the values. The majority of crimes committed against women emerge from the sexual aggression of man against woman.

The Criminal Law does not make any distinction between the sexes. It is applicable to all persons uniformly. However there are a few provisions in the Indian Penal Code and other special enactments, which extend protection to women who are exposed to offences relating to their body and property.

Criminal Law expects a man to control his animal instinct. The influence of religion, tradition, culture, education and social mores have a bearing on the behaviour of a man and helps him to keep a restraint on his animal instinct. When there is a diminishing trend in the influence of such institutions like family, religion and education, violence against women take an upper hand.

Crimes against women always existed in the society but they were not given wide publicity or significance as it is given today. Women are reared in an atmosphere, which slowly but positively helps in the development of a feeling of inferiority, they become used to the institutional legitimating of their low status and find nothing wrong in some of the crimes that are committed against them.²

In the causation of crime, a combination of factors works, mutually stimulating and supplementing each other. It is complex mixture of social,

economic, cultural, biological and legal factors that accounts for the rising crimes against women. \(^3\) More women than before now venture for work or study and some of them are targets especially when travelling alone at night, of lumpen lotharias abroad. \(^4\)

4.1.1 Major Crimes Committed Against Women

Most of the crimes committed against women fall the following categories:

(a) Rape, molestation and eve teasing.

(b) Bride burning

(c) Sexual harassment.

They are discussed in the following chapters.

The legal system in the country is a reflection of the attitude of the society towards women. The shortcomings in the legislation have served as an advantage to crime committers. Thus the offenders grow bolder because they are not caught and indulge in crime with impunity. In the contemporary context of the escalating crimes, the judicial system has a public accountability. To what extent the legal machinery and the judiciary have awakened needs to be assessed.

\(^3\) Ibid., p.23.

To understand the meaning of crime against women often demands an understanding of the religious, caste, ethnic and historical dimensions. To ignore these complexities and subsume the experiences within the category of gender alone tells a skewed story. 

4.2 RAPE - ANALYSIS OF THE DEFINITION

Rape is the most devastating crime that is committed on a woman. Ancient Babylonian Law considered it a theft of virginity. According to the code of Hammurabi, a rapist was to be seized and slain and the victim was to be considered guiltless. In recent years it has emerged as a topic of discussion amongst the feminist circle and in newspapers and journals. Sometimes sex is understood as a commodity and rape as the theft of that commodity. To examine rape within the Criminal Law tradition is to expose fully the sexism of the law. We live in an ostrich society, which has learnt to condone all kinds of offensive sexual behaviour. Sexual harassment often ends in assault and rape exists in offences on the street in

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educational institutions and most importantly on the silver screens. There are many myths propagated regarding rape. It is said women who dress seductively deserve to be raped.

It is said that women secretly enjoy being assaulted and when she says 'no' it means 'yes'. Sexual assaults are often committed by strangers in deserted places. Men who assault women are mentally ill or sexually starved. Only young and attractive women are sexually assaulted. Women ask for it by their appearance and behaviour. Based on these myths broader questions are raised about the way, conceptions of gender and the different backgrounds and perspectives of men and women should be understood and the study of the offence of rape should be made in this angle.

It is a social problem touching the bottom of the entire social fabric. In many ways it goes to restrict her mobility and cramp her style of living. It is the most serious offence against the dignity and modesty of women. It is a crime in which the victim faces more degradation. It is described as a 'deathless shame' or living 'death'. The hard pain and agony she suffers leaves a stigma not only on the woman but also on the relatives.

In the case of unmarried woman her life becomes miserable and prospects of her marriage are reduced. In the case of married women her acceptance in the family circle is jeopardised and she loses the love of her husband.

Whenever there is an act of ravishment of women, civilization takes one step back.\textsuperscript{12} Thinking that we are heading towards a civilized society we make laws and gear up the State machinery to implement the law. When the law serves no purpose and the State machinery also collapses there is no alternative for the woman who is raped.

Aside from psychological reactions following sexual assault, physical symptoms and problems may result either directly from the crime e.g. injuries, sexually transmitted diseases, pregnancy or as a result of stress.\textsuperscript{13} If the stress continues for longer duration it may take a toll of their health. There were often enduring problems with fear, anxiety, depression, social adjustment, sexual functioning and self esteem for a substantial minority of victim.\textsuperscript{14}

A rape victim, who has been subjected to a non-consensus sexual encounter and or sexual violence, is guaranteed under Art.21 of the Constitution the right to live with dignity.\textsuperscript{15}


\textsuperscript{13}Vibhute, K.I., Victims of Rape and their Right to Life with Human Dignity and to be compensated: Legislative and Judicial Responses in India, \textit{Indian Bar Review} Vol.26(1) 1999, p.66.


\textsuperscript{15}\textit{Ibid.}, p.29.
According to the Supreme Court the rape laws that exist in India are not sensitive to respect and honour the right to live with dignity of the woman. Expressing displeasure on this aspect the court observed:¹⁶

"Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society, ... Rape is therefore a most hated crime. It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely the Right to Life contained in Art.21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women.".

Again in Delhi Domestic Working Women’s Forum v. Union of India and others¹⁷ a public interest litigation was filed by Women Activists about the plight of domestic servants who were raped in a moving train. In this case the Supreme Court highlighted the ordeals of victims of rape and defects in the present Criminal Law. It laid down broad guidelines to assist them. It may be recalled that the State has also been placed with the responsibility of promoting social order as spelt out in Article 38(1) of the Constitution, which states:

“The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which


¹⁷1995 (1) SCC 14(18).
justice, social, economic and political shall inform all institutions of the national life”.

In Sudesh Jhaku v K.C.J,\(^{18}\) the Delhi High Court had to interpret 'Penetration' and 'sexual intercourse' in the definition of rape. The facts of the case in brief were a father working as under Secretary in the Ministry of Home Affairs used to take his youngest daughter, six years old, to a hotel in the evening after his office work. There along with other colleagues in company and the daughter with him, he used to watch blue films after consuming alcohol. He would make his daughter consume alcohol, remove her clothes and thrust his fingers in her vagina and anus. At home he would make himself naked and the daughter too and make her suck his penis.

Relying up on the phraseology of sections 375 and 376 IPC along with the 'Explanations' thereof and the definitions of rape from the Criminal laws of Western Australia, Washington State and Canada Mr. Arun Jaitley representing the petitioner argued that the act of the penetration by a man of any part of his body into any part of body of a woman other than vagina without her consent comes within the ambit of section 376, IPC. However the high court, refused to accept his argument. It stated that the definition of rape incorporated in IPC is solely premised on the Common Law of England where penetration means only vaginal penetration and other vaginal penetration by fingers or any other object cannot be brought within

\(^{18}\)1998 Cr L J p.2428.
the definition of Section 375. His Lordship J.Jaspal Singh, taking the risk of being labelled as an 'old guard hunkering down in the bunkers of tradition' and stressing the need for appropriate legislative intervention to bring the desired changes in the substantive rape law in India refused to bring the rape law in tune with that of other countries.19

Sexism in the law of rape no matter of mere historical interest it endures, even where some of the most blatant testaments of that sexism have disappeared, is the only form of violent criminal assault in which the physical act accomplished by the offender is an act, which may under certain circumstances be desirable to the victim.20 These are some of the myths propagated regarding rape.

Rape is *sui generis*, in the sense that the complainant is almost always a woman and the defendant is always a man.21 It is like any other criminal law, reflecting, through the eyes of T.B. Macualay and his colleagues, the then prevailing sexual mores in India, *inter alia*,

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criminalizes "rape"—a coercive non-consensual (as well as consensual in a set of specified circumstances) sexual intercourse with a woman.\(^{22}\)

Sec. 375 of the Indian Penal Code defines rape:

As a man is said to commit 'rape' who except in the case hereinafter has sexual intercourse with a woman under circumstances falling under one of any of the six following descriptions:

Firstly - Against her will.
Secondly - Without her consent
Thirdly - With her consent when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
Fourthly - With her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly - With her consent when at the time of giving such consent by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance she is unable to understand the nature and consequences of that to which she gives consent;
Sixthly - With or without her consent when she under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The definition makes it clear that it is for the defence to establish that there is valid consent. The section reproduces the concept of rape in the nineteenth Century English law when the Indian Penal Code was enacted. Reference to 'will' in Sec.375 recalls the older English Law while the reference to consent reproduces the law then current in England.

Rape at common law is unlawful carnal knowledge of a woman without her consent. Any sexual penetration however slight is sufficient to complete the crime if the other elements are present.

The traditional way in which a rape case is dealt with, in a Criminal Court is typified by the decision as reported in Tukaram and others v. The State of Maharashtra.23

The judgement snowballed into mass movement with activists and legal experts pressing their demand for a just law on rape.

The Criminal Law Amendment Act 1983 has amended the law relating to rape in the following respects:

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1. The burden of proof to prove that the woman consented to sexual intercourse would be on the accused if the woman states in her evidence that she did not consent.

2. It is only the fear of death or hurt or 'of any injury or criminal intimidation that would vitiate the consent of the woman to sexual intercourse.

3. When a woman is in custody either of the police or of some other official or non-officials having authority legal or actual over her then the accused, if proved guilty would be sentenced to a higher punishment or imprisonment to 10 years.

4. The ordinary punishment for rape will not be less than 7 years, though in the case of rape in custody, the court for special reasons may impose the enhanced sentence of imprisonment.

5. Gang rape committed by 3 or more persons is also punished by imprisonment, which will not be less than 10 years.

6. Even seduction by persons in authority or custody, actual or legal of a woman could be offence even though they may not amount to rape. These offences would be added to the IPC and would be punishable.

7. Trials for sexual offences will be held in camera.

8. Newspaper will not publish reports of the proceedings in which the special cases are being tried.
The law commission has further made recommendation in its 172nd report and has attempted to give a new definition to the term ‘rape’ as follows:

The Law Commission of India in its 172 Report has introduced a new offence sexual assault, “375. Sexual Assault: Sexual assault means -

(a) penetrating the vagina (which term shall include the labia majora),
the anus or urethra of any person with -

(i) any part of the body of another person or

(ii) an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;

(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora),
the anus or the urethra of the offender by any part of the other person’s body;

(c) introducing any part of the penis of a person into the mouth of another person;

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions:
First - Against the other person’s will.
Secondly - Without the other person’s consent.
Thirdly - With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly - Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly - With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly - With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault”.

In 1997, 'Sakshi', a voluntary organisation interested in the issues concerning women, through a writ petition24 approached the Supreme Court

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24 Sakshi v Union of India, Writ Petition (Crl) n.33 of 1997.
with a plea that Sections 375 and 376 of the IPC are not in tune with the current state affairs.

Based on the views of 'Sakshi' it has taken into consideration child abuse and unlawful sexual contact, the commission felt the need to punish those who indulge in such sort of offences. The offence of sexual assault is also made gender neutral. Retaining the offence of rape separately, the other types of sexual assault could have been brought as an offence under separate section. The trial court judge who has to deal with these offences would not be able to appreciate the seriousness of the offence and they may give an acquittal to the offender.

Rape stands as a separate offence, which is committed against women. The offence has to be segregated from the other offences of sexual assault. The criminal intent is patently present in almost all cases of rape whereas in other minor sexual assaults, which may be committed sometimes for fun, the intention varies.

The new definition of sexual assault reflects changes regarding sexual offences against women. They are the consequences of aping western approach to offences against women. Such an approach is unsuitable and contrary to our way of life. It may be that our way of life is also hanging and in course of time we may become more like the western societies than we are today. If that were to happen the law may have to
change. But the present condition of our society is not such that the western approach to the offence of rape should be adopted.

Similarly, sexual assault by a woman on a man is rarely reported. In the same way, a woman may have inhibitions and sexual morals and ethos of 'Indian' womanhood desist her from disclosing a 'sexual assault' on her by another woman. The proposed Sec 375 replacing the present one, if enacted, will, therefore, be a mere symbolic legislative exercise.\textsuperscript{25}

Since the Government has not considered the report of the Law Commission and no bill appears to have been introduced to that effect as on date, the old law stands good. Analysing the definition clause-by-clause reveal the lacunae in the existing provisions.

4.2.1 Against Her Will

For the purpose of the code, cohabitation by a man with a woman is called sexual intercourse. The code makes a distinction between an act, which is done against the will, and an act, which is done without the consent of a person. Every act done against the will of a person is done without her consent but an act without her consent is not necessarily against the will of the person. 'Against her will' envisages a conscious normal person who is in full command of herself and capable of untrammelled

\textsuperscript{25}See note 20 \textit{supra}, p. 44.
exercise of volition. The Oxford Dictionary states that 'my poverty but not my will consents'.

4.2.2 Crux of the Offence - Consent

The most difficult problem in the law of rape is the extent to which consent is stated in the second description under section 375. It should be equated with voluntary consent. Glanville William states that the voluntary nature of the consent can be understood only in relation to the circumstances vitiating the consent. Hence the way of life of men and women, values attached to sex, the public policy, judicial philosophy and other relevant consideration will have to be taken into account.

In most cases, the consent is interpreted from the previous or contemporaneous acts and conduct and other surrounding circumstances. A woman seldom translates her thought in these matters to words. Even a prostitute on some moment may refuse to yield her body to a stranger. Resistance and consequent injuries on her person is to be looked into to negative consent.

In Lallu Kammal v. State their Lordships held that submission without resistance will not necessarily tantamount to consent. The question of consent may arise in the following situation.

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27 1953, Cr.L.J. 1196.
A woman in an advanced stage of pregnancy may not offer resistance - Can consent be inferred here?

If non-resistance proceeds from her, being over powered by actual force.

The woman not being able to resist any longer.

Number of persons attacking her she considers resistance dangerous or absolutely useless.

The person assaulted may be too young to appreciate the nature of the act.

Yet no visible injury presumption.

The issue involved in understanding rape is whether the consent for the purpose of sec.375 is to be understood in the sense in which it is used in Sec.375 or whether it has to be interpreted from the definition of consent given in Sec.90\(^{28}\) read with sec.44.\(^{29}\)

Sec.90 defines consent as:

A consent is not such a consent as is intended by any section of this code if the consent is given by a person under fear or injury or under a misconception of fact. The word injury occurring in Sec.90 can be understood in the sense in which it is used in Sec.44. The meaning of injury

\(^{28}\)Sec.90 IPC: A consent is not such a consent as is intended by any section of the code, if the consent is given by a person under fear of injury or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception or if the consent is given by a person, who from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

\(^{29}\)Sec.44 IPC: Injury is as any harm whatever illegally caused to any person in body, mind, reputation or property.
in Sec.44 is based on the word harm and harm is not defined in the Indian Penal Code. Sec.44 only states that any harm caused to a person to his body, mind, reputation and property would be injury for the purpose of the Code. How the balance is struck in giving a clear picture to the meaning of consent? The approach of the courts should be to give a meaning to consent in proper perspective that could render justice to the women victim.

In one of the early case Moti Ram v. The State of Maharashtra\textsuperscript{30} a married woman was falsely told by two constables that they had a warrant of arrest against her, under which she was arrested and taken to Bombay. If she was to avoid the arrest she should submit to sexual intercourse with these constables. The woman being afraid directly surrendered. The question arose whether such consent given by the woman was sufficient to take the sexual intercourse outside Sec.375 or not. The court acquitted the accused on the following reason:

"Ashabi knew well that what Motiram and Kisan (accused) wanted her to submit to sexual intercourse. She thought that by permitting them to have sexual intercourse with her she would be able to escape her arrest and repatriation to Bombay. In other words she was willing to allow the two appellants Motiram and Kisan to have sexual intercourse with her for a price. No doubt, the price which they offered was a fictitious one because

\textsuperscript{30}AIR 1955 Nag. 121.
there was no warrant of arrest against her". The Court followed the English Law about fraud and the third clause about the fear of injury but has not made any effort to explain whether Sec.90 is applicable or not.

In *Rao Harnarain v. The State* the learned judge of the Punjab High Court took a wider view of the circumstances vitiating consent. In the case under pressure from one of the accused, an advocate who was an additional Public Prosecutor, one Kalu Ram was induced to provide his wife Surati to satisfy the lust of the accused and his guests. The girl protested but it was useless as she was forced by her husband to surrender her chastity. The accused and his guests ravished her during the night and she died. The neighbours heard her shrieks during the night and the court based on the evidence given by them convicted the accused. The court distinguished between submission and a true consent. The observation of the court is as follows:

“A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non resistance or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be consent as understood in law. Consent on the part of a woman as a defence to an allegation of rape requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance

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32 *AIR 1928 Pun.* 123.
and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Another landmark decision where the question was centered around consent is Pratap Misra v. The State of Orissa.\textsuperscript{33} The prosecutrix was a pregnant woman. She had been raped in quick succession by three men and suffered miscarriage after few days. She had gone on a holiday with her husband. While at stay in a resort the incident of rape occurred. From the findings of the Lower Courts the three accused were convicted of rape and other offences. The Supreme Court however contradicted. It agreed that there was inter-course with the woman, but not rape. There were no injuries on the bodies of the accused. The Supreme Court found that there was no resistance from the prosecutrix 'except shouting, particularly when the prosecutrix was a fully grown up lady and experienced not only in sexual intercourse but also in the art of midwifery. She knew that she was pregnant and if any violence was caused to her, it may lead to abortion'.\textsuperscript{34} Another reason for giving its verdict against rape was that the woman was not the lawfully wedded wife of her husband, Bata Krishna whom the courts continued to refer as her husband. The learned judge reasoned out that:

We do not mean to suggest even for a moment that PW2 was a pimp, but the fact remains that the appellants undoubtedly wanted to have

\textsuperscript{33}AIR 1977 S.C. p.1307.

\textsuperscript{34}\textit{Ibid.}, Para 8.
negotiations with him before insisting upon him to open the door. This is also a circumstance, which militates against the case of rape and shows that PW2 himself connived at the sexual intercourse committed by the appellants with his concubine.\textsuperscript{35}

The question that raises here is can a man give his consent on behalf of a woman even if she happens to be his concubine? After giving the consent can he revoke it? The reason for raising this question is the husband of the prosecutrix was found weeping and the inference drawn was he was regretting for giving consent. Based on this and medical evidence and circumstantial evidence the Supreme Court branded the case as 'inherent improbabilities' and 'deliberate suppression of truth'. The accuseds were ordered to be released. This case created no disturbance in public. In terms of miscarriage of Justice, \textit{Laiq Singh v. The State of U.P.}\textsuperscript{36} stands in the same position of Pratap Misra's case.

The English approach to rape in the case of \textit{D.P.P. v. Morgan}\textsuperscript{37} the consent given by the husband was taken as the tacit consent of the wife. The four accused friends of Mr.Morgan and her husband took the defence that they believed that the woman was consenting to the act. The House of Lords held that the lack of consent has to be found as a subjective belief of

\textsuperscript{35}\textit{Ibid.} Para 10.

\textsuperscript{36}\textit{AIR 1970 S.C. 658.}

\textsuperscript{37}1976 AC 182.
the accused. On this ground they acquitted the four accused. This case created uproar in the public and press. The consequence of this was the passing of the Sexual offences (Amendment) Act 1976. It defined rape in sec.1(1) as follows-

'A man commits rape if,

(a) he has unlawful sexual intercourse with a woman who, at the time of intercourse does not consent to it; and

(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it'.

It must be pointed out that in the Indian law under sec.375, the second element of the 'knowledge of the accused' as stated in the English Law that the woman is not consenting is not taken into account. The effect of the law is that the burden of proof on the prosecution to show that the complainant did not consent to sexual intercourse is to be easily discharged. It is for the defence to prove the positive i.e. she did consent. This is to be proved by existence of several negative tests such as to the lack of resistance or shouting on the part of the complainant at and during the sexual intercourse.

The Indian Law of rape is truer to life than the English law.38 If the prosecutrix proves that she did not consent, but the accused states that he

38Despande; V.S. Women and the New Law, Publication Bureau, Punjab University, Chandigarh, p.16.
reasonably believed that she was consenting, the accused can escape punishment.

The extent of resistance given by the woman is taken as a factor for deciding the consent of the woman.

In the Morgan case, Mr. Morgan had briefed the accused that his wife may resist by kicking and shouting and that should not be taken as non-consent. This made the accused believe that the prosecutrix was consenting. The law should evaluate the conduct of 'reasonable' men, not according to a Playboy macho philosophy that says 'no means yes', but by according respect to a woman's words.39

The behaviour of the woman may look like resistance although her attitude may be one of consent. The behaviour pattern may change according to the persons. It is a safe guideline therefore that in rape cases the court should first consider whether the woman knew the man from before and if so what degree of intimacy existed between them.40

The place of women in society, their standards of life and how a woman is regarded and what is expected of her are factors taken into consideration both in the Western and Eastern culture. It is said that some woman enjoy fantasies of being raped and they tried to link their relationship with leading personalities. It is not that only in the Western

39 Estrich Susan, Rape, op.cit., p.1093.

40 Supra note, 38, p.17.
societies this can happen, even in the Eastern countries the social values keep changing and it can happen. The nature of women may be the same in the east and the west. But women in the east are inhibited and do not think as freely as women in the west.41 This institution is not static and it is bound to change with the change in the status, though it may be slow.

The Judges in India have been very often applying the western view of law to Indian conditions and this has resulted in gross injustice. Even in the western countries the law has not served the purpose for which it is drafted. This is reflected in the opinion expressed by Susan Estrich. The purpose of the consent rule is not to protect female autonomy and freedom of choice but to assure men the broadest sexual access to women.42

On one side, a victim of sexual assault and on another side a scholar in Criminal Law, Susan Estrich has analysed threadbare of the law of rape. The justification for the central role of consent in the law of rape is that it protects women’s choice and women’s autonomy in sexual relations.

In September 1978, the Supreme Court of India pronounced a routine judgement in an appeal against conviction from Bombay High Court under section 375.43 The accused gained acquittal. But this matter did not go unnoticed. The judgement, which was published in February 1979, startled

41 *Ibid* page 18.

42 Susan Estrich, Rape, *op.cit.*, p.1122.

four law teachers. They wrote an open letter to the Chief Justice strongly protesting against the judgement.\(^{44}\) The case, which created so much uproar amongst the legal luminaries, was *Tukaram v. State of Maharashtra*.\(^{45}\) Mathura was a young tribal girl between fourteen and sixteen years of age. Tukaram and Ganpat were two police constables. The charge was of raping Mathura in the police station by two constables. The letter highlighted the wrong notion in which, consent was interpreted by the Apex Court. Referring to the onus of proof regarding consent in a police station, Vasudha Dhagamwar writes, ‘Is the police station a place for intercourse even with consent? It is high time we came face to face with the fear and helplessness, which the police generate. The law must provide that in all circumstances intercourse in the police station is rape and that no question about the women’s consent will be asked’.\(^{46}\)

The Government responded to the public campaign. On 25th April 1980 the Law Commission sent its 84th report to the Union Law Minister. On consent the Law Commission suggested amendments ‘which would fortify the concept of free consent for the purposes of section 375 and spelt

\(^{44}\)An open letter dt.16-9-1979 to the Chief Justice of India entitled "Where Law Impinges on Justice" was written by Professor Upendra Baxi, Professor Raghunath Kelkar, Professor Lotika Sarkar and Professor Vasudha Dhagamwar from Delhi University and Poona University. Quoted in :Vimal Balasubramanjan,In Search of Justice,Shubhada SaraswatPrakashan Pune,1990, p121.

\(^{45}\)AIR 1979 S.C.185.

\(^{46}\)Mainstream, May 3, 1980.
it out more clearly in its application to several conceivable situations that represent the variety of flaws in consent.47

The Law Commission felt the term consent should be replaced by the phrase 'free and voluntary' consent. The substitution of the expression ‘free and voluntary’ consent for the word ‘consent’ in the second clause makes it clear that the consent should be active consent, as distinguished from that consent which is said to be implied by silence.48 This description of consent with the qualified terms free and voluntary is similar to the description given to confession under the Evidence Act. Glanwill Williams observed that consent may be inferred from -

1. the knowledge of the complainant of act that is proposed to be done in respect of her body.

2. the consent is to something or to some act and not in a vacuum.

3. the complainant must have the ability to make a choice as to whether she should agree to the proposal or not;

4. she must have the ability to exercise this choice and

5. she must have also the ability to indicate or signify her assent or refusal.

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48 Ibid, para 2.8.
Another substantive change proposed by the Law Commission is the modifications to be made to the third clause. It states that 'third clause vitiate consent not only when a woman is put in fear of death or hurt, but also when she is put in fear of any 'injury' being caused to any person in body, mind, reputation or property and also when her consent is obtained by criminal intimidation.\(^\text{49}\)

Thus, if the consent is obtained after giving the woman a threat of spreading false and scandalous rumours about her character or destruction of her property or injury to her children or parents or by holding out other threats of injury to her person, reputation or property, that consent will also not be consent under the third clause as recommended to be amended.\(^\text{50}\)

This would extend the concept of rape to uncontrollable length. It has been said that it is the freedom of the woman to choose with whom and when she will have sexual intercourse and which should be the important consideration in distinguishing rape from other crimes.\(^\text{51}\)

The exhaustive meaning suggested by the Law Commission has not been taken into consideration by our legislatures. Only 'consent', which is obtained by fear of death or hurt to the woman or any person in whom she is interested, has been considered as a consent, which is vitiated. There is a

\(^{49}\)Ibid, para 2.9.

\(^{50}\)Ibid para 2 9.


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distinction between serious crime of rape and the obtaining of sexual intercourse by subtle pressures.

In serious crime of rape, there is invariably continuous resistance by the woman from the beginning of the act of violence and this resistance continues till the end. In the case of rape, by subtle pressure, some sort of force is applied which need not be only physical pressure. It can be mental pressure. Consent of the woman can be obtained by misconception or mistaken identity and while obtaining this, subtle pressure is used. What should be the extent of this pressure is to be determined by the court based on the facts and circumstances of the case.

In the report of the Law Commission of India, to which the Honourable Supreme Court of India had referred the matter as contemplated by “Sakshi” an organisation fighting for women's cause, did not want to suggest any changes and after a discussion with the organisation the Supreme Court felt that the existing provisions would meet the ends of justice. It observed “that the said expression has already been interpreted and pronounced upon by the courts in India in a number of cases”.52 It referred to the definition given by Justice Jaspal Singh, which is based on the decisions of the Madras, Punjab and Nagpur High courts as “consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary, and conscious

acceptance of what is proposed to be done by another and concurred in by the former”.

Hence heavy responsibility has to be shouldered by the courts while giving on interpretation to the meaning of the word consent. First it has to differentiate between consent and submission as it happened in Mathura’s case. Further there may not be prolonged resistance in all cases. The Court should not come hastily to a conclusion that there was no rape of woman, if there is no bruise scratch or contusion not to speak of black circles around the eyes. They have to take into consideration the socio-economic status, the lack of knowledge of legal rights, the age of the victim and the fear complex, which haunts the poor, and the exploited. Gone are the days of taboo against pre marital sex. So the courts cannot draw any conclusion regarding consent based on the previous behaviour of the woman.

4.2.3 Consent by Misconception of Fact

A misconception of fact regarding the very identity of the person by which the woman consents to live with a man believing him to be her husband amounts to rape under s.375 clause (4). The kind of consent envisaged by this clause is also covered by sec.90 IPC. An honest misconception by both the parties however, does not invalidate consent. The misconception to invalidate consent must have been induced by the fraud of the ravisher. Even if he did not participate in inducing the belief, it
is enough if he had knowledge of the act and kept silent in order to effectuate his criminal act.

Usually the man in such cases may go through some form of marriage with a woman whom, he knows is not binding on him, but the woman may be ignorant of this fact. Under the belief that she is lawfully married to the man, she submits herself to intercourse with him.

In Krishnaraja v. State of Mysore the accused, a man who was already married tied a thali around the neck of a Christian girl before the picture of Christ and thereby induced her to have sex with him. It was held that he was guilty of the offence of rape.

In Dutta Bhai Shinde v. State of Maharashtra both the accused and the prosecutrix knowingly went through the ceremony of marriage and both believed that it was a valid marriage, the court held that the offence of rape was not committed. In the case of Hari Majhi v. State the accused had promised to marry the girl. The girl had sexual intercourse based on the promise. The court held that the accused had not cheated the girl or misrepresented her. So he was not guilty of rape.

53 1969 Mysore LJ (104).
54 1979 Cr.L.R.133 (Bom.).
55 1990 Cr.L.J. 650.
In *Jayanti Rani Panda v. State of West Bengal*\(^{56}\) the accused and the prosecutrix loved each other. He assured her that he would get the permission of her parents. Based on this assurance she started having cohabitation with him. When she become pregnant she insisted that the marriage be performed. He suggested that she may get aborted and the marriage would be performed at a later date. When the girl refused the accused stopped visiting her. The ruling of the court was since she was a major, the consent was not vitiated.

The ruling of the above case was relied on in *Harri Majhi v State* where the court held\(^ {57}\)

"that if a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not act induced by misconception of fact. S.90 of the Penal Code cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other unless the court can be assured that from the very inception the accused never really intended to marry her".

The expression ‘misconception of fact’ seems to have been used to distinguish it from a representation of future conduct or of something, which does not relate to existing fact.\(^ {58}\) Most of the cases discussed above

\(^{56}\)1984 Cr.L.J. 1535.

\(^{57}\)1990 Cr. L.J. 653.

deal with sexual intercourse obtained by false promises. They are
distinguished from sexual intercourse obtained from mis-representation or a
mistake of existing fact. The term mis-conception of fact is too wide. It is
stated, only the accused knows about the misconception and he takes
advantage. It does not mention that the conduct of the accused made the
woman believe he is her husband.

The fifth and the sixth description of rape deal with the incapacity of
the woman to give consent. The fifth clause deals with incapacity of the
woman due to unsoundness of mind. A person of unsound mind is incapable
of understanding the nature and consequence of sexual intercourse and is
therefore unable to give true consent. When the woman is so intoxicated, as
a result of the administration of unwholesome substance that she is unable
to understand it, then the accused is responsible for inducing this state of
mind or body in the woman.

The sixth clause embodies the principle that the consent of a girl
below the age of sixteen is immaterial to the offence of rape. This law
applies between husband and wife also when the wife is below the age of
15 years. The age was ten in the year 1891 but it was found to be the cause
of grave suffering and permanent injury to child wives by adult husbands,
which resulted in great shock to the wife. The Law Commission in its 84th
Report\textsuperscript{59} pointed out that as the minimum age of marriage had been increased to eighteen for girls after 1978 they felt that, "... sexual intercourse with a girl below eighteen years should also be prohibited."\textsuperscript{60}

4.2.4 Sexual Act by a Man with His Own Wife

The IPC does not recognise marital rape. Sexual act of a man with his own wife will not amount to rape unless the wife is below the age of fifteen. This has been stated in the exception to sec.375 IPC. Consent is presumed to have been obtained when the parties enter into the matrimonial bond. The restriction ‘not being under 15 years of age’ has been provided to preserve the health of the girl. Public opinion in Western countries insists that marital rape should be considered as a crime. Though this should fall in the domain of Family Law, at present this is not a great problem in our country.

4.2.5 Custodial Rape

Custodial rape is an aggravated form of rape. Sec.376 2(a), (b), (c) and (d) deals with custodial rape. It states-

\begin{verbatim}
376(2) Whoever, -
\end{verbatim}

\textsuperscript{59}Law Commission of India, Eighty Fourth Report on Rape and allied offences Some questions of substantive Law, Procedure and Evidence, op.cit.

\textsuperscript{60}Ibid par 2.20
(a) being a police officer commits rape -

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) On a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) Being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women’s or children’s institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution, or

(d) Being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) Commits rape on a woman knowing her to be pregnant; or

(f) Commits rape on a woman when she is under twelve years of age; or

(g) Commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.
Provided that the court may, for adequate and special reasons to be mentioned in the judgement impose a sentence of imprisonment of either description for a term of less than ten years.

Sec.376(B), (C) & (D) deals with sexual intercourse not amounting to rape committed by a public servant, Superintendent or Manager of a jail, management or staff of a hospital respectively. The punishment is imprisonment of either description for a term, which may extend to five years and shall also be liable to fine.

The pressure exercised in ordinary cases of rape is different from the pressure exercised by the custodian. The relationship between the victim of rape and the custodian should not be abused due to undue influence. It is an assault by those who are supposed to be the guardians of the women concerned and are specially entrusted with her welfare and safe keeping.61 Even the limited supportive mechanisms that exist for women becomes less effective when the rapist is a custodian.62 Single women, widows and women from the lower strata of society who take up jobs to sustain a living become an easy prey to this kind custodial rape. The Mathura case was one eye opener. Bowing to public pressure, the law was amended to make minimum punishment for custodial rape to ten years. In the case of custodial rape, the woman is unable to resist because she is overpowered or

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62 Ibid p.89.
over awed by the dominating position of the rapist and finds herself completely helpless.

The first case to come to lime light on custodial rape is the Mathura case. It took seven and a half-tortuous years before the Highest Court in the land to finally deliver its judgement. To what extent the protectors of law can exploit innocent public is brought out in this case. There was mass support to fight against the hitherto unspoken crime, but all the public indignation did not serve to deter the perverted elements within the police force. Hardly eight months after the Mathura episode, another reprehensible police crime took place where Maya Tyagi, the victim was stripped naked and paraded through the streets of Baghpat. At the end of the ordeal the woman who was also pregnant was raped.

Thanks to the outcry and demonstrations by the public. Government ordered an inquiry and the investigation was entrusted to the C.I.D. After eight years of legal wrangles, the judgement was delivered. The observation of the judge was that it reminded him of the primitive days of police raj where the people were at the mercy of the despot. Notable feature of the judgement was that it imposed death penalty to six policemen and life imprisonment for the remaining four. The judgement confirmed the hopes

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of the people and the observation of Justice A.N. Mulla who described the police as criminals in uniform. But this jubilation was only short-lived. 64

In State of Karnataka v. Mehboob65, a case of gang rape, the prosecutrix, a married woman, was travelling alone at night. She was gang raped by the auto rickshaw driver and four other accomplices. There was no injury on the accused. The court did not insist on corroboration of prosecution’s evidence. The sentence of minimum imprisonment was reduced to five years. This reduction had to be done after giving special reasons. The court simply said in single phrase ‘in the circumstances of the case’ and reduced the punishment.

In Balwant Singh v. State of Punjab66 a college girl was gang raped by four men. The corroborative evidence was the medical report and the father’s testimony who found her unconscious after the incident. Here also the sentence of ten years was reduced to five years without giving any reason for the reduction of sentence.

The consequence of the amendment on gang rape, which had no effect on the punishment aspect, can be further illustrated in the case of Prem Chand and another v. State of Haryana.67 In this case popularly

65 1987 Cr. L.J. 940 (Kar.).
66 1987 Cr. L.J. 971 (SC).
known as Suman Rani’s case, the girl eloped with her lover only to be raped by two constables. The family filed complaint against the lover who had eloped with her. The two constables were tried for custodial rape and convicted on charge of rape. The sentence of minimum ten years of imprisonment was imposed on them. The High Court confirmed the sentence. While on appeal, the Supreme Court did not dispute the custodial rape but reduced the quantum of punishment.

The Supreme Court said,\textsuperscript{68}

“No doubt an offence of this nature has to be viewed very seriously and has to be dealt with condign punishment. But the peculiar facts and circumstances of this case coupled with the conduct of the victim girl, in our view do not call for the minimum sentence as prescribed under section 376 sub-section 2”.

The sentence was reduced to five years by utilising the proviso to the section. When the case was taken for review, the Court dismissed the petition and said that while deciding it took into consideration the peculiar facts and circumstances of the case coupled with the conduct of the victim.

In custodial rape or gang rape, it may be calculated and cold-blooded oppression or revenge, whether on an individual woman, a caste or a class. But it is the most horrible experience for the woman. The mass rape of women during wars as part of the victory spoils, the rape of the womenfolk of the rural poor to crush an uprising and the regular brutalisation by

\textsuperscript{68}Ibid par.7.
policemen of helpless victims will bear out the statement.\textsuperscript{69} This statement bears testimony to many cases that happen in India.

The custodians of law, the Police have been often misusing the power entrusted to them. On the night of Feb'88 a group of policemen helped by home guards and chowkidars plunged the village Pararia in Bihar. Fourteen policemen ransacked the village and committed mass rape. The policemen were acquitted on the ground that the women could not be equated ‘with such ladies as hailing from decent and respectable society’, and the women who were raped were of questionable character.\textsuperscript{70}

The story of Bhanuvari Bai is another case of exploitation of women by police. Bhanuwari was a sathin in the Women’s Development Programme of the State of Rajasthan. She was entrusted with the work of preventing child marriage, which was prevalent in the State. This culminated the threats of Badri Gujar. The local M.L.A. also contributed his bit against the W.D.P. work. Bhanuwari’s husband was attacked and she was raped by the Gujjars. Thus this was another case of a victim falling into the trap of the public servants who were supposed to be protectors of the Constitution. On going to the police station to register the case, the police refused to register the complaint. The doctors in the Primary Health Centre also refused to conduct the medical examination. The best medical evidence


\textsuperscript{70}The Illustrated Weekly of India, Jan.28, 1990, p.13.
was made to disappear by lapse of time. 'Bhanuwari Bai, her children and her husband can never be compensated enough till the court enforces constitutional culture by formulating the concept of constitutional crime against an official machinery which seems to have become a predator instead of a protector.\textsuperscript{71}

Gang rape by criminals in uniform has become very common. It is used as a weapon to intimidate women who are poor or living in the lower strata of the society. The story of 27-year-old girl of Jaipur came to the lime light only after the interference of the Chairperson of the National Commission for Women.\textsuperscript{72} This is the case of gang rape by influential persons. The silence of the law enforcement authority to interfere in the matter irritated the people. Finally the Chief Minister who found that there might be political fallout because of this incidence, had ordered an inquiry by the C.B.I.

Women easily fall into the trap laid by men on various pretexts like getting them a job, helping them when they are in distress.

The law has been amended in 1983 to bring about a change in the attitude of the judiciary. The legal presumption in cases of custodial rape was expected to deter the custodian of law from committing the crime. The

\textsuperscript{71} Mahajan Krishnan, Who Will Protect the Protectors of Women, \textit{Indian Express}, February 14, 1993.

\textsuperscript{72} \textit{India Today} 'Shame and Horror'. Feb. 14, 1993 June 8, 1993.
The onus of proof lies on the policemen, managers of remand homes, superintendent of jails who are in a custodial position, has not brought required result. Even the clause regarding minimum punishment has not been taken seriously. On some pretext the proviso clause, which gives power to the judge, to reduce the sentence to sub minimum, stands as an advantage to the accused. It is distressing to note that the cases reported are rising but the conviction rate is going down. What further steps should be taken to plug the loopholes in the procedural and evidence law is analysed in the next chapter.

4.3 SEXUAL HARASSMENT

Sexual harassment of women at work place is a growing crime, which has acquired much significance after the sensational case of Rupan Bajaj, a senior I.A.S. lady officer. Women in the workplace experience a wide range of sexual conducts ranging from sexist comments to non-violent sexual contacts to violent sexual impositions. Women taking up jobs to substantiate the income of the family find it a great social problem.

A noted American lady psychologist Fitzgerald and her colleagues have recognised three types of sexual harassment (or) gender harassment; (b) unwanted sexual attention and (c) sexual coercion. In India there is no

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specific legislation on sexual harassment and the three sections of Indian Penal Code (Sections 294, 354 and 509) have been utilised to deal with the offence to some extent.

4.3.1 The Offence as understood in IPC

According to sec.509 of IPC, "Whoever intending to outrage the modesty of a woman, utters any word, makes any sound or gesture or exhibits any object, intending, that such word or sound shall be heard or 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 one year or with fine or with both."

Section 294 of IPC punishes any one who to the annoyance of others does any obscene act or sings, recites or utters obscene songs in a public place with three months imprisonment or fine or with both. Sec.354 of IPC punishes any one who uses assault or uses criminal force to women with intent to outrage her modesty.

Theoretically the sections may be sound and clear, but it is not easy to prove the intention, which is an essential ingredient of this offence. There are innumerable incidents of teasing women or girls in public places, singing obscene songs, but no one reports because no immediate action is stipulated under these sections and gathering of proof afterwards is almost
impossible. Such cases are rarely reported to the police because the women who are harassed do not want to fight a losing battle.

Again the word 'modesty' has not been defined anywhere in the code. Section 509 applies to cases, which are in insult to the modesty of a woman while in sec.354 the modesty is intended to be outraged. Both these sections seem to overlap each other. The difference is that in section 354, assault is an essential ingredient along with gestures, while gesture is the only ingredient of section 509. The intention of the accused is to be established to frame charge under sec.354. These sections are invoked only where the intention of the harasser is to outrage or insult the modesty of a woman. Therefore, IPC has not only failed to appreciate the importance of the institutions of marriage and family from an Indian viewpoint, but also the implications like outraging the modesty of a woman, which though a serious offence from the viewpoint of the Indian culture and traditions has been treated very lightly in the penal code.

In the workplace, the intention of the employer or supervisor may not be to outrage or insult the modesty of a woman employee, but to gain sexual access through the promise of promotion or other benefits relating to the job or threat that some punishment may be imposed relating to job if she does

74 AIR 1996 S.C .309.

not satisfy his requirement. There are further instances of sexual misconducts, which cannot be brought within the preview of the sections 354 or 509 or 294. Standing very close to her or beating her on the back are cases where a woman finds it difficult to disclose anticipating a worst consequence.

Not minding the consequence Rupan Bajaj a senior I.A.S. Officer, accused Mr.K.P.S.Gill, the then Director General of Police, Punjab of offences under Sections 341, 342, 352, 354 and 509 IPC at a dinner party.76 At the initial stage there was no disciplinary action taken against him. When even the Governor, the highest authority in the State refused to take action against the Director General to Police, Bajaj decided to launch a criminal proceeding. Mr.Gill sought to minimise the whole incident as trivial offence where the court need not take any action.

The High Court also took the same view and stated if the incident occurred it must have been accidental and so trivial that it does not warrant criminal penalisation according to section 9577 of the Penal Code. The case was thus dismissed. Bajaj took an appeal to the Supreme Court where the Court had indicted Mr.Gill and also gave guidelines as to the working conditions to avert sexual harassment in work place. However, it is


77 Sec.95 Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.
submitted with respect that the punishment did not appear to have much effect either on the individual or on the society.

4.3.2. Guidelines Laid by Supreme Court

Broad guidelines for the protection of Fundamental Rights of the women in the workplace were laid by the Supreme Court in the landmark judgement of Visaka v. State of Rajasthan. A group of social activists filed a writ petition to enforce their rights in working place and fill the vacuum in the existing legislation. The Supreme Court held that every incident of sexual harassment of women at the work place results in violation of the Fundamental Rights of Gender Equality and the Right to life and liberty. Such incident as occurred in Visaka’s case is also a violation of the fundamental rights guaranteed under the Articles 14, 19 and 21.

The judgement has taken all efforts to ensure that the judiciary will not be a mute spectator to the violations of human rights committed upon women just because there is absence of a legislative will.

79 Ibid.
80 Kumar Raj and Jain Prathiba, Gender Justice Perspective on Crimes against Women in India, Indian Journal of Criminology, Op.cit., p.16.
In Visaka's case the Supreme Court clarified that:

"Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof to promote the object of constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in the Seventh Schedule of the Constitution."

The Court laid down broad guidelines so as to protect the women working in any place from sexual harassment. The significant aspects of the judgement are:

(i) The interpretation of the fundamental right to carry on any occupation, trade or profession which depends on the availability of a 'safe' working environment.

(ii) Right to life means life with dignity.

(iii) Regard must be had to the international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

(iv) Sexual harassment includes such unwelcome sexually determined behaviour (a) physical contact and advances (b) a demand or request for sexual favour (c) sexually coloured remarks (d) showing
pornography (e) any other unwelcome physical, verbal or non verbal conduct of sexual nature.

(v) Gender equality includes protection from sexual harassment and right to work with dignity which is a universally recognised basic human right.

(vi) It is the duty of the employer to prevent or deter the commission of acts of sexual harassment. Awareness of the right of female employees should be created.

(vii) The rules/regulations of Government and public sector bodies relating to conduct and discipline should include rules and regulations prohibiting sexual harassment and provide for appropriate penalties against the offender.

(viii) Appropriate working conditions should be provided in respect of work, leisure, health and hygiene to further ensure there is no hostile environment towards women in work places and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

(ix) The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

(x) For time bound treatment of complaints a complaint committee should be provided. This committee should be headed by a woman and not less than half of its members should be women. To prevent
undue pressure from senior levels the complaints committee should also involve a third party like the NGO or other body who is familiar with the issue of sexual harassment.

The petitioners in the Visaka’s case had pleaded the court to set up a committee with the coordination of the National Commission for women to prepare and submit guidelines on sexual harassment. But the Supreme Court itself took the initiative to prepare the guidelines and norms. “Unlike its hitherto judicial law making process, directed that these guidelines be treated as the ‘law declared by the Supreme Court under Article 141 of the Constitution.” The legislatures have been asked to fill the vacuum. It is for the legislatures and the National Commission for Women to act in the directives of Supreme Court.

The Law Commission in its 172nd report has taken note of the growing menace of sexual harassment at work place and has given the name, to the offence as "unlawful sexual contact". The definition given by the law commission begins with the clause ‘with sexual intent’. Mostly in work place and in places where a person holds authority sexual harassment may be in the form of coercion. This aspect has not been covered in the definition. The person concerned may exercise continuous threat and pressure. If the threat or coercion has to be read within the clause ‘sexual

81 Vibhute K.I. Victims of Rape and their Right to Life with Human Dignity and to be Compensated, op.cit., p.71.
intent' then under the provisions of criminal law the person, may allow be punished. Therefore specific mention should be made about coercion in the definition of unlawful sexual contact.

Severe punishment is imposed under sub sec.376E (3). If the punishment is made very severe the law enforcement agencies and the court have to go deep into the rules of evidence to establish the crime. If there is some doubt the benefit of doubt is given to the accused and he is acquitted. The punishment can extend to a period of three years or fine instead of punishment being to the extent of seven years of either description or fine.

The Commission has also proposed to enhance the punishment under Sec.509 from one year to three years. The punishment of one year can be retained as since no deterrent effect is going to be created by enhancing the punishment to three years.

In developed countries, working women are protected to some extent. In the United States the law on sexual harassment is well developed both at interpersonal and organisational levels\textsuperscript{82}. The employer is made responsible and damages are imposed on him. Definitely, the most appropriate relief to the victims of sexual harassment would be to award compensation to them which may include the compensation for medical costs, absenteeism, job withdrawals, requests for transfers and the costs of

\textsuperscript{82}1998 Cr.L.J. Journal p.39.
emotional counselling. A multi disciplinary preventive approach is required to deal with the growing problem of sexual harassment at work place in India.

4.4. DOWRY DEATH AND BRIDE BURNING - ESCALATING CRIME

In Ancient India the parents of the bride at the time of solemnisation of marriage of their daughters gave ‘Varadakshina’ to the bridegroom as a symbol of love and affection. This custom of giving ‘varadakshina’ underwent a sea of change in later period and as it stands today it is posing a great threat to Indian womanhood. Dowry implies ritual and secular transfer of gifts from the family of the bride to that of the groom. Only certain communities practised it, but now it has spread among all classes of Indian Society. Religion may be a barrier for the practise of bigamy or for implementing population policy. When it comes to dowry there is no difference made on the basis of caste, community or class.

With the spread of the practice has come a rapid rise in the killing of women for not providing dowries that are opulent enough, that are in the

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83 Ibid.

eyes of the husband and his family too meagre for their satisfaction and needs.\textsuperscript{85}

Statistically, it is safer to be in the streets after dark with a stranger, than at home in the bosom of one's family, for it is there that accident, murder and violence are likely to occur.\textsuperscript{86} This may occur to Indian women also, because cruelty and harassment begins at home.

In order to put an end to the practise of dowry the legislatures have taken serious concern and introduced the Dowry Prohibition Act 1961. Despite the law, the practise of giving and taking of dowry takes place in a very confidential and secretive manner, leaving very little evidence demanded by a court of law.\textsuperscript{87} In order to correctly understand and comprehend the weaknesses in the Act and the reasons for its failure, the Parliamentary Joint Committee heard evidence on the working of the Act from representatives of various women's organisations and social welfare institutions.\textsuperscript{88}


\textsuperscript{86}Sydney Brandon in M.Borland (Ed.) \textit{Violence in Family} (1976) p.1.


4.4.1 Pitfalls in the definition of Dowry

The failure of the Dowry Prohibition Act, 1961 is attributed to the defective definition of dowry⁸⁹ as it is very difficult to prove as to what is 'consideration' for marriage. The Act defines dowry as in Sec.2 as:

(i) Dowry means any property or valuable security given or agreed to be given either directly or indirectly

(a) by one party to a marriage to other party to the marriage; or

(b) by the parents of either party to a marriage or by any other party to the marriage or to any person; in connection with the marriage.

This definition was found to contain loopholes. So what gift was given as love and affection could not be differentiated between things given on demand. As a result in the new definition by the 1986 Amendment Act the phrase ‘in connection with the marriage’ was substituted by the phrase ‘or any time after the marriage’ in Section 2 whereby continued demand for dowry long after the marriage was expressly within the mischief of the law.

Taking the definition of the word ‘Dowry’ it is found that, this definition by not putting any ceiling proportionate to income, on gifts or presents has virtually given a new grab to the expression of dowry and the same is still being extracted in the form of so called voluntary presents.

It has been held by Bombay High Court in *S.A.Pawar v. L.V.Jadhav*\(^9^0\) that as section 2 of the Act (unamended) speaks of dowry as ‘property’ agreed to be given, the demand of property by one party not agreed to be given by the other party as a consideration of marriage would not come within the mischief of this definition and consequently cannot be punished under Sec.4 of the Act.

The above decision has been reversed by the Supreme Court in *L.V. Jadhav v. Shankar Rao Pawar*.\(^9^1\) The Court observed ‘having regard to the dominant object of the Act which is to stamp out the practice of demanding dowry in any shape or form, either before or after the marriage, in the entire definition of the word dowry should be imported into Sec.4 and a liberal construction has to be given to the word dowry used in the Act to mean any property or valuable, which if consented to be given on demand being made, would become dowry within the meaning of section 2.

In *Subhash Chandra v. S.M. Agarwal*\(^9^2\) the accused Subash Chandra along with his mother and brother were found guilty of killing Sudha Goel for more dowry. They were awarded death penalty by the trial court but the High Court reversed the penalty on the unfounded excuse of impinging the fairness of the trial by the interview of the trial judge, to the press and the

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\(^9^0\)1983, Cr.L J. 269.

\(^9^1\)1983, Cr.L.J. 1501.

\(^9^2\)1984 Cr.L.J.481 (Del.).
Doordarshan. It was after the intervention of women organisation that the Supreme Court declared the mother and son guilty of killing Sudha Goel.

In Shanker Prasad and Ors v. State it was observed that in common parlance one very often used the term dowry demand, when a dowry is demanded under Sec.4 and Sec.2(1), but the mere demand of dowry is not an offence, it should either be given or agreed to be given. The Supreme Court did not agree and declared that the mere demand of an amount as a condition to solemnise marriage would be an offence and the agreement of the bride’s parents was not essential. This liberal construction of meaning of dowry is a welcome approach to stamp out the evil practice of demanding dowry.

In State of H.P. v. Nikku Ram the definition of dowry under the Dowry Prohibition Act 1961 was interpreted. The court held that the demand made even after the solemnisation of marriage would constitute dowry. “... the addition of the words ‘anytime’ before the expression ‘after the marriage’ would clearly show that even if the demand is long after the marriage, the same could constitute dowry if other requirements of the section are satisfied”.

93 1991 Cr.L.J. 639.


95 Ibid p.69.
In *Gopal Reddy v. State of A.P.*\(^{96}\) the court drew attention to the definition of dowry contained in Sec.2 of Act. It held\(^{97}\) The legislature has in its wisdom while providing for the definition of ‘dowry’ emphasised that any money, property or valuable security given as a consideration for marriage before, at or after the marriage would be covered by the expression dowry and this definition as contained in Section 2 has to be read wherever the expression ‘dowry’ occurs in the Act.

The question that arose in *Vinod Kumar v. State of Punjab*\(^{98}\) was whether dowry should be held as a trust property. Dowry is regarded as a gift for the benefit of the husband and his relatives rather than for the benefit of the wife. The High Court in Vinod Kumar’s case took an erroneous view and held the very concept of matrimonial home connotes jointness of possession and custody by the spouses, even with regard to the movable properties exclusively owned by each of them. It is therefore inept, in view of the conjugal relationship, as involving any entrustment or a passing of dominion over property day to day by the husband to the wife or vice versa'.

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\(^{96}\) *AIR* 1996 S.C. 2184.

\(^{97}\) *Ibid* p.2187.

\(^{98}\) *AIR* 1982 P & H 372.
The erroneous view held in the above case was set right in *Prathibha Rani v. Suraj Kumar*.\(^9^9\) The wife’s absolute property cannot be considered as joint property of the husband and his relatives just because the wife enters the matrimonial home in which everything is held by the family as whole.

As a result, Sec.6(1)(c) of the Act was amended in 1984 by which pending the transfer back of the dowry or the gifts from the husband or his relatives to the wife within one year of the marriage, the husband and his relation shall hold it as a trust for the benefit of the woman. ‘The dowry shall be transferred to the wife within three months of the marriage. It is not the joint property of the husband or his relatives, they hold it as a trust. Power has been given to the court to transfer the dowry to the wife, and failure to comply with the statute is punishable with imprisonment and fine’. This was done in *Kamini Sahuami v. P.C. Sahoo*\(^10^0\) where the High Court directed the husband to return her gold ornaments when she was driven out of the matrimonial home.

### 4.4.2 Dowry Death: A Crime by Itself

In 1986, the offence of dowry death was incorporated in the Penal code. A new section 304-B was added to the IPC. It defines dowry death:


\(^10^0\)AIR 1987, Orissa 134.
(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty of harassment by her husband or any relative of her husband for or in connection with any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life'.

In the Code of Criminal Procedure 1973 and in the Indian Evidence Act Sec. 113A and 113B changes were made to have a better working system.

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101 Sec.174(1) of Cr.P.C.

102 Sec.113A Presumption as to abatement of suicide by a married woman – When the question whether the commission of suicide by a woman had been abetted by her husband or any relative or her husband and it is shown that she had committed suicide within a period of seven years from the date as marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

103 Sec. 113B Presumption as to absence of consent in certain prosecutions for rape – In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-sections (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual inter course by the accused is presumed and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that shed not consent, the court shall presume that she did not consent.
With all these changes it may appear that we have a better legal framework to deal effectively with the evil of dowry. A journalist has written that the frequency of unnatural deaths of housewives has increased from one in fourteen days to one in every twelve hours. Such shocking figures are given in almost all newspapers and magazines.

In dowry death whether the woman committed suicide or was murdered is immaterial. In *Soni Babubhai v State of Gujarat* it was held that both these expressions are covered by the term otherwise than under normal circumstances. In *Mrs. Premwathi v. State of Madhya Pradesh* the bride died due to poisoning within two years of her marriage. The court held that Sec.304-B will be attracted not only when death is caused by someone but when it occurs unnaturally. The court said ‘The framers intend and contemplate the liability of the occurrence of death of the bride to be fastened on the in-laws though they did not cause it, by creating a fiction. If the husband or his relatives create such circumstances as would compel a person to choose death as the only way of getting out of the misery, such treatment would also attract Section 304-B’.

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105 1991 Cr.L.J.268 (MP).

106 1989 Cr.L.J.2320 (AP).
As in several dowry death cases, dying declaration is the crucial evidence in this case and its validity to the prosecution. Though normally it should be recorded by a magistrate, a declaration recorded by a police officer can also be valid.\textsuperscript{107} In the case, \textit{State of Punjab v. Amrjit Singh}\textsuperscript{108} the trial court convicted the husband based on the dying declaration recorded by the police. The circumstances necessitated them to take the dying declaration. On appeal the High Court acquitted him, as the dying declaration was not reliable according to the court. Finally the Supreme Court believing the dying declaration found the husband guilty of dowry death.

The words ‘death was otherwise than under normal circumstances’ has been problem to interpret. In \textit{Atula Ravinder and other v. State of Andhra Pradesh}\textsuperscript{109} the court held:

‘...in a case of this nature where the prosecution has failed to establish that it was an unnatural death it cannot be surmised that it must be due to unnatural circumstances’.

The wife in this case died with seven years of marriage and her husband’s relatives had harassed her. The body showed some external injuries. The court observed

\begin{itemize}
  \item \textsuperscript{107} Antony, M.J., \textit{Dowry Related Deaths}, Indian Social Institute, New Delhi, 1995, p.18.
  \item \textsuperscript{108} AIR 1988 S.C. 2013.
  \item \textsuperscript{109} AIR 1991 S.C. 1142.
\end{itemize}
‘... In view of the facts and circumstances regarding the death, it has become very difficult, rather impossible to hold that the death was otherwise than under normal circumstances and consequently we are constrained to hold that this important aspect of section 304-B is not met out. Consequently the appellants are entitled to acquittal of the said offence’.

By adopting too much of technicalities the court failed to see the spirit of sec.304-B.

4.4.3. Abetment of Suicide

When there is a break down of the marriage, the bride commits suicide on her own but the in-laws can also be held responsible when they have abetted the commission of suicide. In Wazir Chand v State of Haryana\(^{110}\) the wife died because of burn injuries within less than a year of her marriage. The contention was that the death occurred due to dowry. But if it was due to that, she committed suicide, it had to be established that the relatives of the husband had abetted to commit suicide. Strict interpretation of the law leads to a wrong inference and such decisions coming from the Apex Court demoralises the spirit of the people.

In Brijraj Premchand v. State\(^{111}\) the issue was whether the victim committed suicide or it was a case of abetment of suicide. The trial court had held instigation to be the cause of the death of the woman but the High

\(^{110}\) AIR 1989 S.C. 376.

Court acquitted the accused. After eleven years of waiting the Supreme Court confirmed the guilt of the accused.

The degree of proof required in dowry cases when abetment of suicide is by the husband and his relatives on a young wife was discussed in *Gurbachan Singh v Satpal Singh*. The sessions court found the husband and his parents guilty of abetment of suicide but the High Court reversed the judgement of the trial court as there were two views regarding the abetment of suicide on the same evidence. The Supreme Court observed,

‘Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law’.

Judgement of this kind gives a ray of hope that justice is available when the doors of the courts are knocked.

4.4.4 Cruelty by Husband or Relatives of Husband

The 1983, Criminal law (Second Amendment) Act a new Chapter XX-A was inserted and section 498-A relating to cruelty by husband and his relatives was added. It reads “Whoever, being the husband or the

\[112\] AIR 1990 S.C .209.

\[113\] *Ibid.*
relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and also be liable to fine”.

The section has made harassment and torture for dowry a criminal offence. A conduct, which is of such a nature as, is likely to drive a woman to commit suicide or to cause grave injury to her life or limb or health is made cruelty. But the section has its limitation. The court can take cognisance of the offence on the police report or when a complaint is made by the aggrieved women or her relatives.\(^{114}\)

In *Inder Malik v. Sunita Malik*\(^{115}\) the constitutional validity of the section on cruelty was challenged. It was contended that police have been given excess powers under the provisions. The meaning of the words ‘cruelty’ and ‘harassment’ was very vague. Further section 498-A offends against the principle of double jeopardy. As already demand for dowry is punishable under section 4 of the Dowry Prohibition Act and therefore is violative of Art 14 of the Constitution. The court refused to accept the contention and stated that sec.4(2) punishes demand for dowry. The elements of cruelty are not required. Cruelty has been explained in the Act and the question of court giving a meaning to it does not arise. If giving discretion to the court means arbitrary powers then many provisions will

\(^{114}\)Sec.198 A Cr.P.C.

\(^{115}\)1986 Cr.LJ 1510.
have to be declared ultra vires. Hence Art.14 of the Constitution has not been violated.

In *Shanti v. State of Haryana*\(^{116}\) the judgement brought out the difference between Sec.498-A and Sec.304-B. In this important judgement the Supreme Court held these provisions as mutually exclusive. In both the sections cruelty is the common element and that has to be proved under sec.304-B and death should occur within seven years of the marriage. No such period is mentioned in Sec.498-A and the accused would be liable at anytime after marriage. A person acquitted under Sec.304-B could be convicted under Sec.498-A. But the court emphasised that framing of the charges is very crucial.

Thus the legislatures have toiled hard to curb the giving, taking and demanding of dowry but also the related offences of dowry death and cruelty. But still the problem continues at an alarming rate. Obviously the law is inadequate, its enforcement potential far below expectations and its impact in society is marginal.\(^{117}\) The legislations though it is necessary and essential cannot by itself normally solve deep-rooted social problems. It should have an educative factor as well as the adequate legal sanction

\(^{116}\) AIR 1991 S.C 1226.

behind it, which with the help of public opinion have an invaluable role to play in both the prevention of and the occurrence of dowry deaths.\textsuperscript{118}

Dowry is closely related to the institution of marriage. Thus dowry offences should not be pursued so as to cause disharmony in the marital relationship. The social values in India are such that Indian Women have never been seen as 'human being in their own right' most of them still feel that they have no identity outside marriage.\textsuperscript{119} Hence the Criminal Law must strike a balance between the institution of marriage and such offences while safeguarding the interest of the woman.

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\textsuperscript{119}Saxena Shoba. Crime against Women and Protective Laws, op.cit., p.66.
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