Rape and the Law

Chapter: VI
I. INTRODUCTION:

Laws like any other social phenomenon are products of society. The power dimension extent in a society reflects itself in the legal apparatus. If one proceeds on the grounds that most societies are patriarchal- as are its constitutive institutions like the family, community, state and media, it is but natural that the laws of society would reflect this gender power balance. It is important however to fully appreciate the complex network of institutions like the state, law and media. Like most institutions of liberal democracy they are double edged weapons. On the one hand they reflect the dominant voices in society (class, gender, caste) and on the other they provide avenues for interrogation and intervention.

Over the course of a century and more, successive women's movements have turned to law as a way of securing their political goals. Feminist activists and social reformers have successfully lobbied for law reform in both the public and private realms of women's lives, in the hope that law would somehow transform these realities. Yet, despite the intensive engagements little seems to have altered in women's day to day lives. The reasons for this are many and complex. Cossman and Kapur (1996) examine the ways in which law has been implicated in the subordination of women. Legal discourse has considered women as gendered subjects- as passive and weak, as subordinate and in need of protection, which in turn has contributed to the subordinate position of women through its very construction of women's roles and identities. At the same time, law is a site where these roles and identities have been challenged. In place of an instrumentalist vision of law, it needs to be reconceptualised as a site of discursive struggle, where competing visions of the world, and of women's place therein, have been and continue to be fought (Cossman and Kapur:1996). It is argued that a reconceptualisation of law can better capture both the possibilities and limitations of law, and law's contradictory nature in women's struggles for social change.
For the purpose of this study I will focus on rape and law in modern India. A mention, here and there about law in the ancient and medieval period may not be out of order. There will be a focus on women and law in India, the colonial influence on Indian rape law with an emphasis on the evolution of law, a critical look at the contemporary law on rape and other sexual offences with recommendations, a comparative understanding of the law on rape vis a vis three countries of the West. Finally, a critical look at law with respect to a particular case, that of Aruna Shanbaug. This case is being focused on because it reflects the ambiguous nature of the rape law and its implementation.

Here too, the focus is on feminist legal scholarship because it is in the field of law that literature was generated by Indian legal feminists after the Mathura case. The aim of contemporary legal feminists is on reforming the rape law. The legal system is also a part of society and much of the biases, attitudes and beliefs which are revealed by people in general are also voiced by lawyers and judges. The legal system therefore often plays an instrumental role in 'throwing out' a victim from society because of many of its lopsided and biased judgements and insensitive treatment of victims. On the other hand, by being an important social institution and a part of society it is law which can bring about a positive change through a reform in rape law. It is in this sense that law plays a dubious role.

A look at women, law and sexual violence becomes necessary at this stage:

II. WOMEN, LAW AND SEXUAL VIOLENCE:

The demand for legal rights has long been a cornerstone of the women's movement in India. Social reformers in the nineteenth century, women in the independence movement, and activists in the contemporary women's movement, have all fought for women's rights and law reform. Many of the political campaigns for women's rights have been successful, in so far as the state responded by enacting new legislation. To name a few, laws prohibiting sati, child marriage, dowry and rape have all been passed. While the specific laws often fall short of the demands of the movements for women's rights, the law
has nevertheless been reformed in response to the political demands for change. More recently, the Indian state has ratified the *Convention on the Elimination of All Forms of Discrimination Against Women.*

**II.1. Law and the Contemporary Women’s Movement in India:**

Law has long occupied an important position in organised efforts to improve women’s status in India through the nineteenth century, the independence movement, and the contemporary women’s movement. All the focus and objectives of each wave of reform differed in important ways, each wave nevertheless turned to law as a vehicle for improving women’s social, economic, political and cultural status and has therefore placed some hope in law’s ability to deliver such social change.

Almost every single campaign against violence on women resulted in new legislation. The successive enactments would seem to provide a positive picture of achievement, but the crime statistics revealed a different story. Each year the number of reported cases of women killed or raped increased. The rate of convictions was dismal. Some of the enactments in effect remained only on paper (Agnes: 1992). The question was raised as to why the laws were ineffective in tackling the problem. Agnes (1992) analyses the process involved. Firstly, the laws, callously framed, more as a token gesture than from any genuine concern to changing the status quo of women, was full of loopholes. Also, in most cases there was a wide disparity between the initial demands raised by the women’s campaigns as well as the recommendations by Law Commissions and the final enactment. Many positive recommendations could not find a place in the bills presented to the parliament. The activists and experts who had initiated the campaign could not participate in the process of drafting the bills.

Law has played a prominent role in the most recent wave of the women’s movement. The women’s movement has launched major campaigns to reform

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1 As cited in Cossman and Kapur (1996), this was ratified by the Government of India on July 9, 1993.
rape and dowry laws in the late 1970s. During the early eighties, rape became an important issue for newly evolving autonomous women's movement. It was triggered off by the infamous Supreme Court judgement in the Mathura rape case.

The sustained campaign during the initial years had various facets and received wide publicity. The campaign adopted various forms of raising public consciousness like songs, skits and street plays. The groups worked at various levels and many aspects about rape were brought to light (Datar:1993): case studies and theoretical debates tried to break existing myths about rape in society and change social attitudes; gross sexual atrocities by police and army were highlighted. The most significant aspect of the campaign was its thrust towards legislative reforms in existing rape laws whereby judgements would be softer on the victims.

II.2. Law-A Review of Literature:

One form of positive social action could be through the legal process. Law can play a role in struggles for social change. As seen earlier, almost every single campaign against violence on women resulted in new legislations. It is however important to view how effective these laws have been in preventing crime against women. Certain studies which explore the relationship between law and women's lives seek to explode the claim that law is an objective, neutral truth, and exposes its role in women's oppression (Kapur & Cossman: 1996). The traditional boundaries of law have been challenged recently. Law has been decentralised- that is- to make law but one area of inquiry into the multiple ways in which women are subordinated and oppressed.

Feminist legal studies in India have drawn upon the contributions of legal feminists elsewhere, while at the same time not fallen into the traps and limitations of those contributions. In particular, feminist legal studies as it initially emerged in North America was over determined by gender. This position, in some ways reflected the situation of feminist politics at the time. The result was the construction of a common experience of women's oppression
based on gender that served to obscure the differences between women. However, black feminists subsequently challenged this construction, and began the process of multiple voices into feminist politics generally, and feminist legal studies specifically (Kapur & Cossman: 1996).

In India, Kapur & Cossman (1996) assert that there is a considerable scope for expanding the meaning of feminist legal studies which avoids the limitations of a linear understanding of women based exclusively on gender oppression. In particular, feminist legal studies in India needs to use women's diversity as its starting point: it can offer the possibility of understanding not only where women are located in different relationships of power with men, but also how women's differences determine where they are located in relationships of power with other women. Recognising the multiplicity of women's experience, that is, how race, religion, sexual identity, marital status, caste and class mediate women's experience of gender, enables to deconstruct law's hegemonic understanding of the world and provide spaces for alternative understanding of the world and provide spaces for alternative understandings or perspectives to be included. It reveals the chameleon quality of law and hence creates the possibility of formulating more specific legal and non-legal strategies to challenge the different ways in which women are subordinated.

Despite the legal triumphs over the years the social, political and economic status of women has shown little improvement. There is evidence of the amount of physical and sexual violence against women- rape, dowry and domestic violence persists in the face of legislation designed to eliminate these practices. There seems to be a gap between women's formal legal rights and their continuing substantive inequality (Kapur & Cossman: 1996). This gap has not gone unnoticed within the academic writing on women and law. Some legal commentators suggest that the problem is one of enforcement and access. Others have suggested that law alone may be unable to eliminate women's inequality. Still further, others suggest that the problems are more structural, the law is informed by and serves to reinforce patriarchy.
In the 1980s, a considerable literature on women in law began to emerge in India. This literature has been reviewed and characterised by women legal scholars (Kapur & Cossman: 1996). I will reproduce that model here in order to highlight the distinct perspectives on this theme. The three approaches highlighted in this regard are (a) protectionism; (b) equality; and (c) patriarchy.

In the first approach (protectionism), these writers have emphasised the need for law to protect women who are assumed to be 'naturally weaker' than men. This protectionist approach simply accepts traditional and patriarchal discourses that construct women as weak, biologically inferior, modest and so on. The 'feminine' characteristics are perceived as natural. Writers within this approach highlight women's roles which she is required to play within the family-roles essentially regarded to be sacred and natural. This approach is firmly entrenched within patriarchal discourses and often reflected in judicial approaches to the question of the relevance of gender difference. Women are viewed as weak and subordinate and therefore in need of protection and therefore should be treated differently in law.

In the second and most common approach in the literature (Equality), the relationship between women and law is seen as one promoting equality. Writers within this approach have tended to provide comprehensive reviews of the range of legal provisions that affect women, from personal laws to criminal laws, to labour laws. This literature highlights laws that continue to discriminate against women and successful challenges to such discriminatory laws. The dominant view that emerges is one of law as social engineering. The view that emerges is that law is a necessary but insufficient part of a more general strategy of bringing about social change. It focuses on law reform and law enforcement. The literature on women and law that emphasises equality can be seen to be characterised by the same insights and limitations as liberal feminism. The literature has focused on, and brought attention to laws that treat women

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2 This view is found in both academic writing and government reports. For instance, the Report of the Committee on the Status of Women in India places considerable importance on the role of law.
differently, and the need to reform such discriminatory laws. This literature has insisted that the assumption of the relevance of difference be challenged. According to this approach, the starting assumption should be one of equality and not difference.

A third approach (Patriarchy) in the literature on women and law is one in which law is seen as an instrument of patriarchal oppression. In this view, law is seen as an instrument of patriarchy. It can be seen to loosely correspond to radical feminist perspective on law. Baxi (1984) emphasises that the law embodies in every major respect the ideology of 'patriarchy' and that understanding of this ideology is necessary in order to develop a counter, a feminist ideology. Law is seen to be based on male norms, male experience and male domination. The focus is often on the legal regulation of sexuality and of violence. Kapur & Cossman (1996) asserts that it is not sufficient to claim that law is patriarchal, or that the law makers are sexist. The vision of law as an instrument of patriarchy informs very little about the precise workings of law, and even less about if and how women can use law.

Towards a New Approach:

Two different feminist positions have been identified regarding the role of law in women's struggles for social change: a dominant and liberal feminist view of law as social engineering, in which law is seen to have discriminated against women, but which with reform can operate as an instrument of liberation for women; and a dissenting, radical feminist view of law as an instrument of patriarchal oppression (Kapur: 1996). These approaches have also been criticised as also being applauded for their contribution to the literature on women and law, neither of these approaches captures the complex and contradictory nature of law (Kapur & Cossman: 1996).

More recent feminist scholarship has begun to specifically address the issue. Two perspectives seem to emerge, which are considered of importance in

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3 Nandita Haksar's (1986) work *The Demystification of Law for Women* examined the way in which law has reflected patriarchal oppression.
understanding the contradictory and complex of nature of law: socialist feminism and poststructuralist feminism.

Socialist Feminism is based on an analysis of both gender and class. Within law, this approach not only examines particular laws that discriminate against women, but further explores the role of this legal regulation in reinforcing women's oppression. A socialist feminist perspective attempts to reveal the complex and contradictory ways in which the law operates in particular circumstances to shape and reinforce relations of class and gender. Socialist feminism directly challenges the basic economic, political and social structures of society. As an approach to law, it has highlighted the role in sustaining and legitimating unequal power relations within the state. This approach has been criticised for not having adequately explored the diversity of the forms of women's oppression—particularly for not adequately recognising and theorising the significance of race, culture and religion (Kapur: 1996).

More recently, another perspective on feminism and law has emerged, poststructuralist or postmodernist feminism. This perspective eludes any simple, or singular definition. The various strands share a common thread in that they critique the basic philosophical tenets of the Enlightenment—rationality, objectivity and subjectivity. They claim that knowledge is a product of perspective and therefore partial. It similarly rejects the Enlightenment's understanding of subjectivity, that is, of an individual subject that exists prior to its interaction with the society around it; a stable, coherent, self-constituting subject (cited in Kapur & Cossman: 1996). The poststructuralist challenge to objectivity and universal knowledge has lead many feminists to reject it as politically disempowering and nihilistic. The question posed is that if all knowledge is partial and contingent then how can normative claims be made about the oppression of women. Poststructuralist feminists have argued that the recognition of the contingency and the partiality of knowledge does not undermine the ability to engage in normative debate. Poststructuralist feminism
does not reduce women's oppression to singular or universal factors, but rather examines the multiple and shifting dimensions of women's oppression.

Feminist legal scholars have begun to adopt the insights of poststructuralism in examining the way in which law has contributed to women's subordination, and in exploring the future of legal strategies to overcome this subordination. The insights of poststructuralism have been useful in addressing and integrating the challenge of difference and diversity among women. Also, the insights of poststructuralism have been useful in examining law as discourse, and the ways in which legal discourses constitute women and gender identity, including law itself.

**New Feminist Legal Studies in India:**

Feminist legal studies have begun to develop increasingly complex analyses of law's role in women's oppression, and its potential role in challenging the oppression. It is claimed that feminist legal scholarship that has been developed outside of India cannot be unproblematically applied to the specificity of the struggles of the women's movement in India.

Despite limitations in the feminist legal scholarship, the theoretical debates that have emerged from the specific experiences of women engaging with law may still have resonance in India. The kinds of questions that have been asked about the role of law by the feminist theorists both inside and outside India are pretty similar.

Flavia Agnes' work has been an important contribution to the development of more complexed and nuanced analyses of feminist engagement with law. Throughout her work, Agnes interrogates the impact of law reforms on women, and questions whether laws intended for women's benefit have lived up to their

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4 Some feminist legal scholars have adopted the insights of poststructuralism to deconstruct the debates that have been plaguing feminist legal theory, such as the sameness/difference debate. This debate involves the question of the relevance of gender, and whether gender difference should be taken into account in law. The sameness position argues that these differences should be not relevant. The law should treat men and women the same. In contrast, the difference position argues that there are many ways in which gender differences are very relevant, and must be taken into account in law (cited in Kapur: 1996).
promise. Her work on violence against women, has addressed the failure of law to adequately address the reality of violence. According to Agnes almost every single campaign against violence on women in the 1980s resulted in new legislations aimed at protecting women. However, these have had limited impact. Through a detailed examination of the laws addressing rape, dowry, domestic violence, prostitution, indecent representation of women, sati and sex determination tests, Agnes explores the broader questions of why law has had so little impact in women's lives, and whether law can bring about social change. In her analysis of rape laws, for instance, Agnes reveals the ultimate failure of the campaign for reform in the early 1980s to bring about a transformation in the definition of rape. She illustrates the extent to which 'the same old notions of chastity, virginity, premium on marriage and fear of female sexuality are reflected in the judgements of the post-amendment law' (Agnes: 1992).

Agnes is highly sceptical of the concentration of criminal law power in the state in the name of protecting women. She reveals that some of the laws 'which purport to protect women from violence actually penalise the woman'. As she observes, 'instead of empowering women, the laws strengthen the state' (Agnes: 1992).

According to Kapur & Cossman (1996), Agnes' work on law has pushed feminist analyses well beyond the either/or dichotomy of law as a mere instrument of social change, or an instrument of patriarchy. In going beneath the surface of legal discourse, Agnes is attempting to reveal the assumptions embedded in this discourse, and the need to challenge these assumptions. On the one hand, she is critical of protectionist legislation which vests increasing powers in the state, but she does not eschew the role of law in feminist struggles. Rather, her work attempts to bring out some of the contradictions in the role of law while at the same time making concrete suggestions for how law might be made to better empower women.

Therefore, feminist legal studies have begun to make important contributions in advancing the understanding of the role that law has played in
women's oppression, and to the potential role that it can play in challenging that oppression. As highlighted earlier, the new scholarship in India has begun to move beyond the instrumentalism and essentialism of earlier literature. It has begun to explore the diversity of oppression that women experience, across not only class lines, but also religion, ethnicity and culture, and the way in which the law has been implicated in that oppression (Kapur: 1996).

II.3. Rape and law:
The contemporary women's movement was galvanised at the end of the 1970s largely through two campaigns for law reform: rape and dowry. The debate to reform the rape laws demonstrates the centrality of law in this movement. Sections 375 and 376 of the Indian Penal Code which deal with the issue of rape had remained unchanged in the statute books since 1860 (Agnes: 1992). The amendment was the result of a sustained campaign against these antiquated laws following the infamous Supreme Court judgement in the Mathura case.

Mathura, a 16-year old tribal girl, was raped by two policemen within a police compound. The sessions court acquitted the policemen on the ground that since Mathura had eloped with her boyfriend she was 'habituated to sexual intercourse' she could not be raped. Further the court held that there is a world of difference between sexual intercourse and rape. The high court convicted the policemen and held that mere passive or helpless surrender induced by threats or fear cannot be equated with desire or will. The Supreme Court set aside the high court judgement and acquitted the policemen and held that since Mathura had not raised any alarm, her allegations of rape were untrue. Her 'consent' was not a consent which could be brushed aside as 'passive submission' (case cited in Agnes: 1992). The judgement triggered off a campaign for changes in rape laws which included public protests and wide media publicity.

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5 The Supreme Court decision led to a public outcry of the miscarriage of justice, and a national campaign to reform the rape laws. The protest was ignited by an open letter written by four Delhi University law professors to the Chief Justice of India, calling for a rehearing of the case. Women's groups across the country joined in the protest (called by the Bombay Forum Against Rape), organising marches and demonstrations to denounce the decision, and to bring the attention to the issue of sexual violence against women.
In the campaign that ensued, the women's movement attempted to challenge the prevailing legal and social understanding of rape and consent. Further, the discourse of the campaign was not one of equality, but rather, represented a significant shift to the discussion of patriarchy (Kapur: 1996). The feminist campaign against rape was attempting to connect this violence against women with the idea of systemic oppression of women by men. Redefining `consent' in a rape trial was one of the major thrusts of the campaign. The Mathura judgement had highlighted the fact that in a rape trial it is extremely difficult for a woman to prove that she did not consent 'beyond all reasonable doubt' as was required under the criminal law. The Supreme Court judgement had interpreted that absence of injuries and passive submission implied consent. The major demand was that the onus of proving consent should shift from the prosecution to the accused. This meant that once sexual intercourse was proved, if the woman states that it was without her consent, then the court should presume that she did not consent. The burden of proving that she had consented should be on the accused (Agnes: 1990). The second major demand was that in a rape trial a woman's past sexual history and general character should not be used as evidence.

The response of the government to the campaign was prompt. A Law Commission was set up to study the demands. The Law Commission’s recommendations included both the demands raised by the anti-rape campaign, i.e., regarding onus of proof and women’s past sexual history. The commission also recommended certain pre-trial procedures:

- women should not be arrested at night,

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6 The feminists campaigns, and the issue of police rape was picked up by the media, and the protest spread well beyond the women's movement. The subsequent police rape of a young woman, Maya Tyagi in Baghpat, Haryana, intensified the protest, with mainstream political parties entering into the rape controversy. With the entry of politicians, the discourse of the campaign transformed in nature. It was not one of patriarchy but one of protectionism, that is, of the need to protect women's honour and chastity from violation (cited in kapur:1996).
- A policeman should not touch a woman when he is arresting her and statements of women should be recorded in the presence of a relative, friend or a representative of women's organisations,
- All state officials interacting with a victim should be women, the trials should be in-camera.
- It also recommended that a police officer's refusal to register a complaint should be treated as an offence.7

However, the bill which was presented to the parliament in August 1980 did not include any of these positive recommendations regulating the police power. The demand that a woman's past sexual history and general conduct should not be used as evidence in a rape trial was excluded from the bill. The demand that the onus of proof regarding consent should be shifted to the accused was accepted partially, only in case of custodial rape, i.e., rape by policemen, public servants, managers of public hospitals and remand homes and wardens of jails.

The bill had certain regressive elements which were not recommended by the Law Commission nor the women's movement. The demand for in-camera trials took a draconian form imposing press censorship. It sought to make publishing anything relating to a rape trial a non-bailable offence. This meant a virtual censorship of press reports of rape trials.8 After soliciting public opinion from a wide section, the committee submitted its report in November 1982. The regressive provisions were not scrapped but made slightly milder. For instance, publication of a rape trial was made into a bailable offence (cited in Criminal Law Amendment Act 1983).

The important provisions of the amendment were (Agnes: 1992): (1) A new section was added which made sexual intercourse by persons in a custodial

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7 Incidentally, one of the rape victims I spoke with, narrated how even while pleading with the police officer on duty to register her complaint, he ignored her pleas and instead hurled verbal abuses at her.

8 This seemed ironical, as was pointed out by many, because the public pressure during the campaign was built up mainly through media publicity and public protests. This provision met with a lot of criticism, and was referred to a joint committee of the parliament for further debate.
situation (policemen, public servants, managers of public hospitals and remand homes and wardens of jails) an offence even if it was with the consent of the woman. (2) For the first time a minimum punishment for rape was laid down- 10 years in case of custodial rape, gang rapes, rape of pregnant women and girls under 12 years of age and 7 years in all other cases. Even though this was not the major demand it turned out to be the most important ingredient of the amendment.

While the feminist campaign was successful in so far as the issue of police rape was placed firmly on the public agenda, and legislation, and legislation was passed to address it, the broader struggle over the meaning of rape was somewhat less successful. As Flavia Agnes' evaluation of the case law following the amendments to the rape law has revealed, the reforms have had very little effect in challenging the traditional definition of rape, and many of the same assumptions about women's sexuality continue to prevail in the cases (Agnes: 1992). For example, ten years after the Mathura case, the Supreme Court reduced the mandatory minimum sentence of ten years imposed on two police officers found guilty of raping a young woman- Suman Rani- to a maximum of five years (cited in Agnes: 1992). Similarly, the recent Bhanwari rape case judgement highlighted the prevalence of inherent biases on the part of the judge. On November 15, 1995 the judgement passed by District and Sessions Court (Jaipur, India) acquitted five men of gang rape of Bhanwari Devi. The judgement reeks of prejudice and gender bias which have become characteristic of sexual offence cases. For instance, in this case, according to the judge the

9 Judgements did not succeed in evolving a new definition of rape beyond the parameters of existing value systems. In fact, the age old notions of chastity, virginity, premium on marriage and fear of female sexuality were reflected in the judgements of the post amendment period.

10 The women's movement was not able to displace assumptions about virginity, chastity and the nature of women's sexuality. Rather, its demands for the reform of rape laws was taken up and supported by other, more conservative political voices, and cast within the more traditional voice of shame and dishonour. These beliefs still prevail till date and are obstacles to rightful judgements.

11 Bhanwari Devi worked as a sathin for the women's programme in Rajasthan. She was ganged raped by some men in her village only to 'teach her a lesson' as she was instrumental in bringing
rapists were middle aged and therefore respectable citizens whilst rape is usually committed by teenagers. Also it was claimed that since the rapists were from upper castes, the rape could not have taken place because Bhanwari was from a lower caste.

A positive aspect of this crusade was that the media coverage proved positive in certain respects, for instance, prior to the campaign, only the most gruesome rapes committed by police in a custodial situation (like Mathura, Rameeza Bee and Maya Tyagi) had been highlighted. This resulted in perceiving the issue as a 'law and order' problem. But systematic media reporting of the incidence of rape brought out many complexities, forms and dimensions of rape (Datar: 1993).

The movement had its spells of ups and downs. There was a need to look at alternatives. The realisation led to a national conference of activists in Bombay in April, 1990. The conference aimed at a redefinition of rape- a renewal of the campaign couldn’t be achieved. Although feminist activists were of a common view on the need to contest dominant understandings of rape and consent, not all agreed on the strategies to be pursued. Some voiced concerns about the strategies that relied too heavily on the state, and particularly on criminal law. The amendments to the rape law did not go so far as to shift the burden of proving consent on to the accused, but introduced a presumption in favour of a victim who stated that she did not consent and restricted the application of this clause only to cases of custodial rape. Nevertheless, the question of the reliance of the women’s movement on the state and more specifically, on the power of criminal law has remained controversial. While some within the women’s movement have continued to lobby for criminal legislation to protect women against violence, others have grown increasingly concerned about the

some positive social changes among the people. Some upper caste men detested this and raped her.
willingness of the state to enact such legislation and thereby extend its criminal powers.\textsuperscript{12}

In the aftermath of the campaigns to amend the rape laws as well as a similar campaign to reform the dowry laws, a sense of disillusionment seemed to take root in the women's movement regarding the role that law reform could play in improving women's lives. However, the disillusionment experienced by many women's groups did not lead to a complete abandonment of law. Some women's organisations shifted their focus away from law reform and towards taking up the individual cases of women in courts.

III. A CRITICAL LOOK AT THE RAPE LAW IN INDIA:

The laws that affect the ordinary man and woman most in their daily life are criminal laws. The Constitution hardly impinges on their consciousness. Their rights with regard to life and liberty are covered by penal laws. Dhagamwar (1992) asserts that criminal law illustrates most vividly the problem that arise when social norms differ or contradict the provisions of the law. It has been found, almost universally, that in such cases social norms prevail. For instance, in the case of rape, a woman's character becomes a crucial issue. Not only the people, but the government and judiciary are influence by social norms. In this section I shall critically analyse the law of `sexual offences' with a thrust on rape.


It is believed that till the early nineteenth century the British knew little about India. Yet it was the British who controlled her destiny. Studies reveal that as the British knew little about India, they tended to make laws for the country based

\textsuperscript{12} There are three streams of thought among the Indian women's movement. The first one has total faith in state machinery. Such organisations also take support of state fundings and maintain amicable relations with the police, administration etc. The second group is totally distrustful of the state apparatus. They have a negative approach. These mass organisations rely on their own strength. The third trend tries to seek space for women in distress knowing fully well that the state machinery works mainly in favour of the status quo. They believe that the government is answerable to the people and therefore the women's groups must use their machinery for their purpose. Through public pressure they try to induce the state apparatus to provide immediate results to women victims of violence.
on their experiences and the ideas that prevailed in England at that time. Hence, the British legislated for Indians, the majority of whom were not middle class, on the basis of an experience as removed from them by distance as by class.

In the majority of cases—where laws were made to deal with such crimes as robbery, murder and treason—the gap between the ethos in which the Indians lived and that which the British brought with them would not matter. But offences against the person, particularly where they involved concepts of family honour, were defined by reference to social attitudes which varied widely (Dhagamwar: 1992).

Besides influences of political thinkers like Bentham, J.S. Mill and Macaulay, on political thought in nineteenth century England and their relation to India. One such influence on Indian legislation must, for obvious reasons, have been British laws. The laws which had governed Britons for centuries were, not surprisingly, accepted by them as creating the right legal framework. When they themselves had made these laws, the British were more likely to act on this assumption than they were to question its validity. In nineteenth century England, the ruling classes were inclined to assume that their values and interests were those of everyone, at home and abroad. This meant that they would regard British laws as the model for other countries, however different their social structure was from that of England (cited in Dhagamwar:1992).

Dhagamwar (1992) explores a few English laws in relation to which social and moral values were relevant in defining the offence and determining the punishment. In most cases, as highlighted, the differences in social structures were not relevant. For example, theft, treason, arson or murder, could be defined and punished without much doubt about popular reaction. Most societies, if indeed not all, would consider such actions as offending against the very existence of society, and would therefore consider them as eminently deserving of punishment. In crimes which involve the violation of a person’s body or of his freedom, social values are, however, often involved. This is particularly the case where it might be committed with sexual motives, as in abduction. While a man
whose car is stolen is not disgraced, a man whose grown-up daughter is abducted, is, in India at any rate dishonoured. It is assumed that in some way the girl must have ‘asked’ to be abducted, that, therefore, she must have been a person of disreputable character. This, of course, is a slur on her family’s name and honour.\textsuperscript{13}

If the victim is tarred with the same brush as the offender, the laws made to punish that offence have to be of a different nature than they would have to be in a situation where the victim is not so maligned. This appears to have been the case in England and India with respect to the crimes mentioned above. The British Common law and Statute law on abduction, rape and kidnapping demonstrates this fact. Macaulay’s draft of the Indian Penal Code dealt with the offences of rape and kidnapping. When the draft was revised, the Indian Law Commissioners included abduction and sale of human beings in the Code. British Common law and Statute law dealt with all four of them.

Bracton’s \textit{Treatise on English Law} (undated, cited in Dhagamwar:1992), gave many of the definitions of various crimes known in his time. These were evidently taken from the Common law.\textsuperscript{14} It is believed that these definitions and classifications are the root...of English criminal law, but they have less importance in its history than this might imply, because most of them had been replaced or altered. The definitions of rape, robbery and arson were ‘mere names’. Their definitions emerged from case law, and were not given in any one place. Blackstone’s \textit{Commentaries} have been referred to, where successive laws on these offences were cited, and sometimes examined. It is quite difficult to separate the English law on abduction from the English law on rape. Blackstone

\textsuperscript{13} Even in the \textit{Ramayana}, in the case of Sita’s abduction by Ravana, it was a member of society whose questioning instigated Rama to conduct the \textit{agnipariksha} on his wife to test her ‘purity’ and ‘honour’.

\textsuperscript{14} Bracton reportedly lived during the reign of Henry II, i.e., 1216-74. Common law was secular law; till the Conquest ecclesiastical courts and their laws had dominated the legal scene. The period between 1066 and 1215, when the Magna Carta was signed by King John, marked the beginning of the Common law.
devoted several pages to the offences of abduction, kidnapping and rape, starting with:

the offences most affecting the female part of His Majesty's subjects; being that of their forcible abduction and marriage, which is vulgarly called 'stealing an heiress.' An inferior degree of the same kind of offence, but not attended with force, is punished by the Statute 4 and 5 Ph. And Mar.c.8, which enacts that, if a person above the age of fourteen unlawfully shall convey or take away any woman child unmarried, which is held to extend to bastards as well as to legitimate children, within the age if sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned for two years, or fined at the discretion of the justice, and if he deflowers such maid or woman child, or without the consent of parents, contracts matrimony with her, he shall be imprisoned for five years, or fined at the discretion of the justices and shall forfeit all her lands to her next of kin during the life of her said husband.

According to English Law, notions of family honour were evidently deeply involved in the offence of abduction. No action for abduction appears to have been taken if the woman was over the age of sixteen, and, therefore, no longer a ward. The right of action, if any, appears to have rested with the kinsmen of the woman, not with her. Pollock and Maitland (as cited in Dhagamwar: 1992) have said this of abduction:

The crime which we call rape had in very old days been hardly severed from that which we call abduction; if it had wronged the woman, it had wronged her kinsmen too, and they would have themselves felt seriously wronged, even if she had given her consent, and had, as we should say, eloped. Traces of this feeling may be found at a later time; but rape in the sense of 'violentus concubitus' is soon treated as a crime, for which the woman and only the woman can bring an appeal.

In discussing the law on rape, Blackstone and others mention the circumstances in which the woman's evidence would be admissible. Care had to be taken over this as the punishment for rape had been punishable by death (under Saxon law). Under William the Conquerer the punishment was 'reduced' to blinding
and castration (Blackstone, 1795 cited in Dhagamwar: 1992). Blackstone commented:

In order to prevent malicious accusations it was then the practice, it was then the law, (and it seems, still continues to be so in appeals of rape) that the woman should immediately after 'dum recens fuerit maleficium' go to the next town, and there make discovery to some credible persons of the injury which she has suffered: and afterwards she should acquaint the high constable of the hundred, the coroners, and the sheriff, with the outrage. This seems to correspond in some degree with the laws of Scotland and Arragon, which require the complaint to be made within twenty-four hours: though afterwards, by Statute Westm. I.c.13, the period of limitation in England was extended to forty days. At present there is no limit fixed, for it is usually now punished by indictment at the suit of the king and the maxim of 'nullum tempus occurrit regi' applies, but a jury will rarely give credit to a stale complaint.

Before the passage of the above mentioned statute, it was held for law that the woman, with the consent of the judge and her parents, and if the course was agreeable to the offender, could 'redeem' him by accepting him as her husband. The man's consent was important, he could not be forced into a marriage. This statute, which was passed in 1275, reduced considerably the punishment for rape. The offence of ravishing a girl 'within age', that is under twelve tears of age, with or without her consent, and of ravishing any other woman against her will, was reduced to trespass, and had to be prosecuted by appeal within forty days. The punishment for the offence was two years

15 In present times, in India, there has been talk of capital punishment for rape but there are too many arguments 'for' and 'against' the issue that this has opened a 'pandoras box' of sorts. I want to bring out another finding which was revealed to me by my interviewing and questioning during the course of my research. I noticed that majority of people responded by saying that rapists should be hanged, castrated and given life imprisonment (all in serial order). All respondents unanimously agreed that the present punishment was too less for the crime of rape. When I questioned the victims about the sort of punishment that should be meted out to the rapists, it was revealed that they wanted to torture the rapist and then leave him to die slowly and painfully. As one of them said, main usko tarpa-tarpa ke marna chahti hoon (I want to kill him gradually and painfully).

16 This mentality was revealed in my field study too. In two cases of acquaintance rape studied by me, the family of the victim and the victim was ready to forgive the rapist if he would marry the victim.
imprisonment and sometimes a fine in addition, if the courts deemed it expedient. 'But this lenity, produced the most terrible consequences, so that ten years later the statute of 13 Ed. I, made the offence of forcible rape a felony within Westm. II c. 34.' (Blackstone, cited in Dhagamwar:1992).

Pollock and Maitland (1968, cited in Dhagamwar:1992), have noted that appeals of rape were often brought in the thirteenth century, but were mostly 'quashed, abandoned or compromised'. They go on to say that 'an appeal of rape was not infrequently the prelude to marriage. The judges seemed to have thought that, if the woman was satisfied, public justice might be satisfied.' If the woman prosecuted by appeal, then rape was a felony. If the man was blamed at the king's suit (the woman having failed to appeal) then imprisonment and fine was regarded to be sufficient punishment. The proper compensation for rape was considered to be that the ravisher should marry the woman.

By 18 Eliz.c.7 rape was made a felony without the benefit of clergy. This statute was repealed by 1 Geo.IV c.115, which made rape punishable by transportation for life, for not less than seven years, or imprisonment for not more than seven years, with or without hard labour (cited in Dhagamwar:1992).

Blackstone's comment on the kind of person who should be considered to have been injured by the offence of rape, is instructive (keeping in mind the fact that Indian legal system was to be influenced by it later on). Blackstone said:

the civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind: not allowing any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat, even from common strumpets, and to treat them as never capable of amendment. It therefore hold it to be a felony to force even a concubine or harlot, because the woman may have foresaken that unlawful course of life.

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17 It is clearly visible how the crime of rape was trivialised, often negated by the English legal system. A crime as grave as rape was not given the 'gravity' it deserved. What is tragic is the fact that more often than not, this trivialising happens even now.
On this point there was difference of opinion. According to Coleridge, in Bracton’s opinion, while the common law did protect the concubine, as it did a woman of good character, from the offence of rape, it varied the punishment for the offence according to the woman’s character.18

The main idea behind some of the laws on rape, kidnapping and abduction, was to protect the honour of an individual or of his family. Abduction seems to have been regarded as an injury to the family, and rape as an injury to the woman. This was probably one of the reasons why, in a case of rape, the woman’s character was scrutinised: if she was not ‘of good fame’, she had no honour to lose. It had the unfortunate effect of putting the victim in the dock along with her ravisher.19

Whether the idea was to protect honour or to protect property rights (whether in land or in other human beings), in both cases social conventions were closely involved in determining legal attitudes to the offences.

In 1834 Thomas Macaulay came to India as its first Law Member of the Supreme Council, appointed under the Charter of 1833. It is believed that the state of law in British India was confused; Hindu and Muslim law, Company’s regulations and British law (in the Presidency towns, for Britons) overlapped each other (Rankin, 1946 cited in Dhagamwar: 1992). It seems the regulations were not uniform throughout the three Presidencies. Often the native laws were either difficult to ascertain or impossible to apply. Under Hindu law, which was almost impossible to ascertain, punishment for murder depended on the caste of the victim and the killer. Some of these punishments were very cruel, ranging from boiling the unlucky person in oil to cutting off his limbs and throwing him on the dung heap outside the town boundaries to die. Under the Muslim law,

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18 A woman’s character is still held important in rape judgements even now. In the Indian context there have been judgements which show women in a poor light. Any woman who is not a virgin is viewed with biased eyes. Past sexual history of the victim seems to be influence judgements. The law is not being ‘just’ but extremely partial/bias in such cases.

19 It is even more unfortunate that even till now this situation is prevalent in most rape cases. The character of the victim is usually scrutinised at all levels of inquiry.
the punishment for murder was retaliation; for adultery, stoning; and for theft, mutilation.20

It is also reported that the law of evidence in India was equally confusing. Muslim law equated the testimony of one man with the testimony of two women. The Company's District Courts were presided over by English judges, but they had to be aided by Hindu and Muslim law officers, who would say what the testimony was and whether the testimony or proof was acceptable under their law.

It fell to Macaulay to undertake the herculean task of providing a code of substantive criminal law for India. This was his major contribution for Indian law. His Penal Code aroused much controversy and took a long time to be enacted, and when it was passed it underwent several changes. "The Indian Penal Code is an astonishing piece of work, even more so when one realises that it was drafted in two years by a young man without prior experience of drafting, and virtually single handed" (Dhagamwar: 1992). However, it was revealed that the Code suffered from certain shortcomings of a serious nature, because of the circumstances in which the authors were placed.

The problem which law-makers faced in the case of India was that they were in a dilemma to acknowledge the separate, often conflicting mores of distinct societies, communities and to reconcile them in order to provide one, just, equitable law for all. Inevitably it had to be assumed that certain attitudes, ideas, morals are held in common by the diverse people under them, and then undertake to legislate for them, as one people, in those spheres. Also, they have to bow to the cultural differences amongst them and leave certain areas to their personal- customary and religious- laws. This means that criminal offences and offences against the state or government are regarded as the proper sphere of state interference; family matters- marriage, inheritance, adoption- are governed by law of domestic relations. In the former areas, where attitudes towards

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20 These kinds of punishments are still reported from India, Pakistan and Bangladesh. The punishment for adultery (when the culprit is believed to be the woman) often leads to stoning.
murder, house-breaking and treason are shared by different groups in society, it is not difficult to enact laws and enforce them.

The Charter of 1833 empowered the government to make laws for British India, created the Law Commission for that purpose, with due respect to native customs and usages. The main problem was that legal categories tend to overlap, and in some matters both the government and the society claim the right to control conduct.\textsuperscript{21} It is claimed that where the government decides to legislate upon matters which are regarded by its subjects as being governed by religious and social sanctions, it is important for the law makers to be acquainted with social practices and attitudes. Without such acquaintance the law-makers will not be able to frame laws which will effectively impress the will of the State upon the people (Dhagamwar:1992). It is highlighted that in offences against the human body the Code steps into a ‘twilight area’, where the dividing line between the subject matter of family and general laws become blurred. Here, claims Dhagamwar (1992), the ignorance of Indian society has led to framing of provisions which are extremely faulty and iniquitous.\textsuperscript{22}

\section*{III.2. The Indian Penal Code:

The Penal Code was drafted by the Indian Law Commission with Macaulay at its helm and it emerged in 1860. In the final version of the Penal Code sections 359 to 377 dealt with kidnapping, rape, unnatural lust, as well as the additional offences of abduction and sale.

Macaulay devoted clauses 359 and 360 to the offence of rape. The first of these defined the offences and the second specified the punishment for it. Clause 359 reads: A man is said to commit rape who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

\begin{itemize}
\item A
\item B
\item C
\item D
\item E
\end{itemize}

\textsuperscript{21} The examples given earlier, of crimes involving family honour is an illustration of this conflict.

\textsuperscript{22} When Macaulay drafted the Code, he did not make any provision for sale of persons or abduction. He dealt with kidnapping and with rape.
First: Against her will.
Secondly: Without her consent while she is insensible.
Thirdly: With her consent when her consent has been obtained by putting her in fear of death or of hurt.
Fourthly: With her consent, when the man knows her consent is given because she believes that he is a different man to whom she is, or believes herself to be married.
Fifthly: With or without her consent when she is under nine years of age.
Exception: Sexual intercourse by a man with his wife is in no case rape.

Three provisions of this clause are emphasised (Dhagamwar: 1992):
- The age of consent in the fifth sub-clause was very low.
- Only a married woman could claim her consent had been given under a false impression.
- In no circumstances could a husband be said to have raped his wife. This was at a time when child marriage was the norm in India, and the children very often were infants.

From the reading of Clause 359, particularly sub-clause five and the exception, two points are highlighted: preference of the rights of husband over his wife against the wife's right to herself (and that is why the wife was not entitled to accuse her husband of rape, whatever the circumstances). Also, a married woman could claim she gave her consent because she was mistaken about the man's identity. However, if she was not married, she had no right to give her consent to any person whatsoever; the fact that she gave it was sufficient to exonerate the man. 23

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1 By any human standards, the age for statutory rape given in the Clause is too young. It is against humanity, against life. Such callous drafting reveals a condition where a girl/woman's ain (mental and physical) is totally ignored, especially considering that the crime is one against
This further leads to the conclusion, as pointed out by Dhagamwar, that Victorian notions of morality were fully recognised in the drafting of the provisions on rape. Clause 359 elicited certain comments from the judicial officers of the East India Company. They are listed below (as cited in Dhagamwar:1992): Two officers of the Madras Presidency, objected to sub-clause two, which stipulated that consent obtained by threat of death or of hurt was not a consent. They argued 'that any woman who submitted to threats of 'trivial' hurt was not reluctant and, therefore, did not deserve the protection of the law'. Another civil servant who agreed with them, suggested that 'hurt' should be amended to 'grievous hurt'. The Law Commissioners accepted this suggestion.

When dealing with cases of rape the courts are likely to take into consideration facts about the victim—such as her character, age, and experience—while determining the severity of punishment, and rightly so. No one would wish to maintain that an ignorant sheltered virgin of sixteen does not suffer more than a hardened prostitute of thirty-five; or even more than a chaste married woman. But there is surely a danger in making an assumption to this effect when drafting the law, particularly on the grounds of caste and class. A distinction made on these grounds implies that women of the privileged classes and castes are automatically more sensitive and, therefore, more offended than their underprivileged sisters. The fact is that women of low caste in India, whose economic status was as low as their social status, did not find it easy to evade assaults on them by men of the more powerful social groups. Consequently, the lower classes learned to live with the fact that women from their ranks were not safe. If from this it was concluded that women from their ranks had a reduced

the human body. It does not need to be emphasised that the results of raping a minor could be disastrous.

24 This is particularly important in the light of Macaulay’s claim that he had not adopted British laws merely because they were British; and that his sole concern was to draft a penal law, which would be entirely rational and utilitarian. I fail to understand how the age of consent of nine years and above is considered rational by any standards.

25 In the following statements the italics are entirely my own emphasis, in order to bring about the gravity of the statements.
sense of honour, it would be a disgrace. It is a cruel mockery of justice to argue that a poor woman is less sensitive because she is less able to protest. Assumptions such as these confirm the most undesirable status quo and produce a non-egalitarian system of justice.

Dhagamwar (1992) sees rape also as a crime against society, against the most valued concepts of law and order and not only a crime against the victim. This is why it is not a compoundable offence and not a tort for which compensation would be considered to be a satisfactory remedy.26

Consent is relevant to rape in this way: if the woman's consent be proved, then there is no rape. Character should not be confused with status.27 The offender should not be allowed to hide behind the woman's character after his offence has been proved. Victorian morality was evident in Clause 359. Although the Law Commissioners disagreed on the quantum of punishment for rape, they saw a problem in terms of a high caste woman's violation by low caste men as the most heinous of rapes, requiring the strictest of punishment.28

Section 375 of the final version differed a little from Clause 359. The only important amendment was of the exception which read: 'Sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape.'29 The Committee did not give their reasons for the change. On the question of rape, very strong moral judgements were brought to bear upon the victim and

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26 In the case of the victims of the Muzaffarnager rape/molestations recently, the government did grant compensations to them. Recently (March, 1999), there was a news item reporting the Prime Minister launching a rape insurance scheme. The scheme is supposed to offer cover against rape and girls from 10 to women of 75 can be insured against rape. This was not taken in good spirit by many. There are rumours of it being scrapped off.

27 The fact is that a rape is a rape and nothing can change the trauma (both physical and mental) that it entails. If the women is of lower or higher status just does not matter. While speaking to a friend about rape she revealed, when talking about her maid, you know in logon ka to kuch nahi jata, they really have nothing to lose, they are like that. This remark stunned me and I was most surprised because this was a educated adult woman making these remarks about a crime committed mainly against women.

28 This clearly reveals an inherent class bias. These kind of biases make law and enforcement of law very weak. Till date biases, prejudices are prevalent in some form or the other.

29 To think of it, one fails to understand how increasing the age from nine to ten would help. The situation was still as hopeless as before.
her character before she could obtain justice. She was also considered capable of giving her consent at a very young age.

The Question of Character and Sexual Ethics in The Indian Penal Code:

When drafting the sections of rape, kidnapping, abduction and slavery, the Law Commissioners were particularly anxious not to offend Indian sensibilities by violating their moral codes. But actually, they had assumed Indian morality to be the principles professed by the upper class male. In addition, they sometimes superimposed their own English notions of morality upon Indians (Dhagamwar: 1992). She further asserts "It is extremely depressing to see how the narrow, authoritarian sexual ethics of Indian society, heavily weighted in favour of the male, has inspired a case law which renders the Penal Code even more hostile to those who seek justice or protection than its Victorian framers had already made it."

The offence of rape has always been connected with the character of the person against whom it is committed and her character comes under the scrutiny of law. It assumes that a promiscuous woman must have invited trouble or 'asked for it', and that she would not, on account of her promiscuity, withhold her consent. The woman's evidence is essential to establish a charge of rape, but Section 375 of the Penal Code said nothing about corroboration (further evidence).

Section 90 of the IPC defines Consent as free and intelligent consent, given without fear or fraud, and with full understanding of the act to which the consent is being given. It lays down that consent must be given without misconception of fact, fear or injury.

In the light of discussions and statements made, the following case is very important to understand the state of affairs even better.

The Case of Phulmonee:

In 1891 the Parsi reformer Malabari's campaign bore fruit in the Criminal Law Amendment Act 10 which revised Section 375 of the IPC of 1860, and raised the minimum age of consent for married and unmarried girls from ten to twelve.
In 1890, Phulmonee, a girl of about ten or eleven, was raped to death by her husband, Hari Maiti, a man of 35 years. Under existing Penal Code provisions, however, he was not guilty of rape since Phulmonee had been well within the statutory age limit of ten. The event, however, added enormous weight and urgency to Malabari's campaign for raising the age of consent from ten to twelve. The reformist press began to systematically collect and publish accounts of similar incidents from all over the country. Forty-four woman doctors brought out long lists of cases where child wives had been maimed or killed because of rape (Sarkar, cited in Kapur: 1996). Medical reports of Phulmonee claimed that she died of violent sexual penetration.

The English judge, Wilson, clearly indicated that he chose to accept Hari's version, thus freeing him from the charge of culpable homicide. The charge of rape in any case was not permissible since Penal Code provisions ruled out the existence of rape by the husband if the wife was above the age of ten.

The judge built up his case on a hypothetical argument that the couple had slept together earlier. He ignored the version given by the girl's mother, aunt and grandmother. The weight of concern was on exoneration of the man. The law was so framed to preserve custom. Both the Hindu husband and the Hindu marriage system were exempted from blame and criticism. There is, in fact, an assertion about the continuity in the spirit of the law from the time of the Hindu kingdoms to the time of British rule.

A significant body of English medical opinion confirmed the clean bill of health that the colonial judiciary had advanced to the Hindu marriage system. They proceeded to review the considerable medico-legal data on sexual injuries inflicted on child wives and concluded that whatever the weight of evidence on the matter, the system of infant marriage must continue unabated. The age of

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30 What one fails to understand is how a young girl of ten should know so much about sex and marriage (especially in that time when such issues were taboo). How could a judge (who should have known better) even build a case where he justified an act so inhuman and brutal. The judge said nothing about a grown up man who insisted on sleeping with a child. The base of a faulty law was thus laid.
commencing cohabitation could be raised only if Hindus themselves expressed a great desire for change (Sarkar: 1996).

It is reported that Phulmonee’s case was not an isolated one. Investigations mentioned at least 14 cases of pre-menstrual cohabitation that had come to be noticed. An Indian doctor reported in court that 13 per cent of the maternity cases that he had handled involved mother’s below the age of thirteen. The defence lawyer threw a challenge at the court: cohabiting with a pre-pubescent wife might not have sastric sanction, yet so deep rooted was the custom that they wondered how many men present in court were not in some way complicit with the practice (cited in Sarkar: 1996). The definition of puberty proved to be the slamming block. Reformers proved that puberty sets in properly only after 12. While revivalist-nationalists equated puberty with menarche, medical reformers argued that puberty was a prolonged process, and menarche was the sign of its commencement, not of its culmination. The beginning of menstruation did not indicate the girl’s ‘sexual maturity’ which meant that her physical organs were developed enough to sustain sexual penetration without serious pain or damage. Until that capability had been attained, they argued, the notion of her consent was meaningless.

Sarkar (1996) highlights how all strands of opinion—colonial, revivalist-nationalist, medical-reformer—agreed on a definition of consent that pegged it to a purely physical capability, divorced entirely from free choice of partner, from sexual, emotional or mental compatibility. Consent was made into a biological category, a stage when the female body was ready to accept sexual penetration without serious harm. The only difference lay in assessing when this stage was reached.

III.3. A Critical look at the Contemporary Law on Rape and other Sexual Offences:

31 The English found it controversial to fiddle with Hindu rituals, even though the consent debate was an important one.
375. Rape.- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.- 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 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 is 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.

At first sight one's mind immediately goes to the past debates on the question of consent, age, rape of child wife etc., and wonders whether the changes are grave and effective. A look at the above law still (clause six) keeps the age of the victim of statutory rape very low. The point is that if according to the constitution of India the marriageable age of a girl legally, is kept at eighteen years then the age of statutory rape should be increased because in our society the marriageable age certifies 'sexual intercourse' (legally) for girls at eighteen and above. Therefore any age before that should discourage sexual intercourse of any kind.

Also, the similar argument can be put to the clause which reads exception, in the case of a husband and wife. The age of the wife is kept too low. If the legal age of marriage is eighteen years for girls then this clause is itself criminal. It indirectly encourages child marriage. Also, it is beyond comprehension how the
age of statutory rape is sixteen years whereas the rape of wife is kept at fifteen years (even lower) and below that. It seems therefore illogical.

376. Punishment for rape.- (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:
Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-
(a) being a police officer commits rape-
\* within the limits of the police station to which he is appointed; or
\* in the premises of any station house whether or not situated in the police station to which he is appointed; or
\* 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 woman's or children's institution takes advantage of his official 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 the 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 for 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.

Explanation 1.- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.
Explanation 2.- “Women's or children's institution” means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.- “Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

376-A. Intercourse by a man with his wife during separation.-
Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or any usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

376-B. Intercourse by public servant with woman in custody.-
Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him such sexual intercourse not amounting to the offence of rape shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

376-C. Intercourse by superintendent of jail, remand home, etc.-
Whoever, being the superintendent or manager 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 woman's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.
Explanation 1.- "Superintendent" in relation to a jail, remand home or other place of custody or a woman's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 2.- The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of Section 376.

376- D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital.-

Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine. 32

Explanation.- The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of Section 376.

The old section 375 as well as its heading "of Rape" has been substituted for the present section 375 and its present heading "Sexual Offences", by Criminal Law (Second Amendment) Act, 1983 (Act 43 of 1983), with effect from 25-12-1983.

Therefore, the main emphasis on sexual violence focuses around penile penetration. Meanwhile other forms of sexual assault like molesting, leering, pinching and touching are packaged within a law against "outraging the modesty" of a woman. 33 Crimes such as these and related offences i.e., sexual harassment, are neither understood nor viewed as serious. And while at the

32 In a hospital in Lucknow, a doctor inserted his fingers up a young paraplegic girl's vagina. She bled profusely and her hymen was ruptured in the process. Where would one place a case like this? Legally, it isn't rape but the damage it caused to the young girl (both mentally and physically) is immense. The punishment for the culprit would be mild, since the offence would come under a lesser crime than rape. This case was narrated to me by a friend who was a resident doctor with that hospital at the time.

33 All the girls/women I spoke to about sexual assault claimed that they have been intensely disturbed by acts of assault which they face on a daily basis. However, most of them brush it
level of the law and public pronouncements, rape may be viewed as a serious
offence, in practice, women are able to find little or no redress from the judicial
system. The law is unable to fulfil its promise and rape remains a serious threat
to all women.

For years, government policy and law reform have tended to address sexual
violence without linking it to the larger context of women’s lives. Not only has
that perception failed to address sexual violence which extend beyond mere
‘penetration’, but it has refused to make visible forms of sexual violence which
reflected the common experience of many women. The concept of penis
penetration is based on the control men exercise over ‘their’ women. One of the
objectives of criminalising only penile rape has been to protect patriarchal
marriage. Heterosexual penetration was the exclusive domain of the husband
due to his desire to maintain sole access to a woman. According to the Supreme
Court of India, insertion of finger in to the vagina of a girl of the age of seven
years and half causing severe injury may be an offence of assault but not rape
(State of Punjab vs. Major Singh, AIR 1967 SC 63). One needs to go beyond this
definition.

A five-year-old girl was raped by a youth of around 18 years old. The
girl was made to lie on her stomach and was raped from the back. The
girl suffered severe injuries. At the police station the girl stated that a
finger was inserted. The police expected a five-year-old to know the
difference between a penis and a finger, even when she was attacked
from the back. The offence was registered as indecent assault under
section 354 of IPC. The maximum punishment of this offence is two years
while rape is punishable with life imprisonment (cited in Agnes: 1992).

Aside and almost have to live with the idea of being ‘teased’ at one time or another in a day.
These assaults happen without any form of ‘provocation’ and are done by ‘normal’ people.

34 The problematic part is that rape is seen as a sexual crime by most people. To go beyond the
biological definition is important. The questions of chastity, honour, izzat, are all related to
viewing rape purely in sexual terms rather than a grave form of violence against the victim. If
the understanding goes beyond the ‘sexual’ aspect, the pain and trauma of the victim (both
physical and mental) would be highlighted more.
It needs to be highlighted that in all criminal offences, injury and hurt caused by using weapons is more grievous than the one caused by the use of limbs but in the case of rape, the injury caused by the use of iron rods, bottles and sticks does not even amount to rape. To make the above argument more clear we should look at section 354 IPC.

. Assault or criminal force to a woman with the intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The main point is how is one to define 'modesty'? The Law of Crimes, 23rd Edition, 1995 says: “There must be intention or knowledge that the woman's modesty will be outraged. What constitutes an outrage to female modesty is nowhere defined. The Supreme Court of India has held that when any act done to or in the presence of a woman is clearly suggestive of sex according to common notions of mankind that act will fall within this section. The essence of a woman's modesty is her sex.” The accused cannot be convicted of this offence where the woman had either no modesty to mention or it was not such as would be outraged by the act attributed by him.

In the case of sexual crimes, women's access to justice is almost negligible since the primary hurdle is her loss or reputation when she makes her sexual assault public. In a country where virgins are a priceless commodity any attack on her 'honour' is a fate worse than death, parents, communities and in-laws collude to hide sexual assault cases which is the primary reason why women

35 Where does one place a case mentioned above, like where a little girl is touched and fondled by a man to the extent of harming her physically? Like rupturing her hymen? Though this act would legally fall under section 354, the punishment does not befit this heinous crime. Also, how does one define outraging the modesty of a five-year-old girl?

36 Further, how does one know when a woman has no modesty? How can modesty be tested? How is modesty revealed?
never get legal justice in this crime. Far worse is her lack of access to counselling and psychological rehabilitation, efforts which can help her deal with the personal and social trauma of her attack. Nowhere is there a concept that part of her redress must reinstate her socially because as in the case of rape, it is considered a foreclosed option.

Legally, the only provision which comes close to addressing the seriousness of sexual abuse falls within the limited provision of rape. Rape which involves ‘penetration’ commonly understood to mean penetration by penis into the vagina. In the case of children especially of tender age, penetration is not possible but the abuse may take other dimensions. The absurdity of the law in its strictest interpretation is that all such forms of abuse do not constitute rape.

The following section deals with an attempt to commit an offence. Here we will look at an attempt to commit rape. One who commits an offence first intends to commit an offence, then prepares for committing offence and then attempts to commit offence and when succeeded, he is said to have committed an offence. This third stage is made punishable under Section 511.

511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.- Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

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17 A recent article in the Times of India, 20 April, 1999 entitled, “70 per cent rape victims remain untraceable” highlights this fact. According to the article, a recent survey conducted by the Delhi Commission for Women found that in at least 70 per cent cases, the family of the rape victim became untraceable after the incident. Families shift elsewhere, either due to threats from the accused, or social ostracism. In most cases, a proper chargesheet cannot be filed because the victim is not available. This results in very low conviction rates: barely 4 per cent.
The distinction between an attempt to commit rape and an indecent assault, though thin, exists. An attempt to commit a crime is an act done with an intent to commit that crime and forming a part of a series of acts which would constitute its actual commission if it were not interrupted. In other words, attempt is an act done in part execution of a criminal design, amounting to more than preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime combined with the doing of some act adopted to, but falling short of its actual commission; it may consequently be described as that which if not prevented would have resulted in the full consummation of the act attempted (Singh & Bagga: 1988).

By section 511 of the Indian Penal Code, an attempt to commit an offence requires two conditions to be satisfied; first, there must be an attempt to commit the offence, and second, some act must be done towards the commission of the offence. The word attempt is not defined in the Code and is therefore taken in its ordinary meaning. For an offence of attempt to commit rape, there should be some action on the part of the accused to show that he was just going to have sexual intercourse.38

The prosecution must establish that the accused has gone beyond the stage of preparation: the difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. For example, in a particular case, an accused, who had laid himself on a girl and tried to thrust his male organ into her despite the girl's strong resistance, and gave up only when witnesses arrived on the spot, had gone beyond the stage of preparation and the act clearly amounted to an attempt to commit rape (cited in Singh & Bagga 1988).

Other related sections of IPC are:

38 Here again, the emphasis is on sexual intercourse. The only way the legal system sees rape is through the sexual act. However, the reality for the victims is very different. For instance, there are many forms of sexual violence which fall between 'outraging modesty' and rape, which, in turn, have serious physical and mental implications for the victim.
509. Word, gesture or act intended to insult the modesty of a woman.- Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, 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.

377.- (Sexual intercourse "against the order of nature", which is understood to refer to sodomy.

109.- (Aiding and abetting rape).

34.- (common intention or gang rape).

I would like to critically analyse some issues of the sections of IPC mentioned above and point out certain legal loopholes.

At present, the main emphasis on sexual violence focuses around penile penetration. At the level of law and public pronouncements, rape may be viewed as a serious offence, in practice, women are able to find very little or no redress from the judicial system. The law is unable to fulfil its promise and rape remains a serious threat to all women. Also the crime of rape-this is a legal and observed, not a subjective, individual or feminist definition- is defined around penetration. This according to Mackinnon is a very male point of view on what it means to be sexually violated. She thinks the crime of rape focuses more centrally on what men define as sexuality than on women's experience of their sexual being, hence violation.\(^{39}\) A common experience of rape victims is to be unable to feel good about anything sexual after being raped.\(^{40}\) In the case of rape, women's access to justice is almost negligible since a major problem is her loss of

\(^{39}\) The importance laid on virginity in our society is immense. Rape is directly equated with honour.

\(^{40}\) One of the victims I spoke with says she hated the idea of her husband coming close to her after she was raped. She felt she was reliving the traumatic experience. She confessed that she detested sex.
reputation when she makes her assault public. In a country like ours, where
virginity of a girl is considered most precious any attack on her 'honour' is a fate
worse than death, society colludes to hide sexual assault cases which is the
primary reason why women never get legal justice in this crime. Far worse is her
lack of access to counselling and psychological rehabilitation. Nowhere is there
a concept, that part of her redress must reinstate her socially because as in the
case of rape, it is considered a foreclosed option. For many years, government
policy and law reform have addressed sexual violence without linking it to the
larger context of women's lives. Forms of sexual violence which reflect the
common experience of most women have been ignored and issues centering
around 'penetration' have been recognised. The need of the hour is to go beyond
the narrow legal definition and make connections with women's social,
economic and family context.

Rape represents a special type of violence against women. While the act has
not changed much over the centuries, perceptions of it have changed with time.
In the past (and in a few societies today) rape was seen primarily as an assault
on the honour of the family or on the 'property' of the husband. The father or
husband was the aggrieved party. The women might be punished for bringing
dishonour to the family. Later rape was discussed in terms of lust and
uncontrollable sexual impulses. It was reprehensible, yes, but still seen and
explained from a male point of view. Although much of that thinking lingers,
over the past decade there has been change. Rape is increasingly recognised as
an exercise of power, a violation by force of the integrity of a person's body, a
violation of the basic human right to 'security of person'. The perspective is
shifting- rape is finally being attempted to be seen from the point of view of the
victim, though much needs to be done.

Women writers have underlined the fact that rape is an offence of violence.
Yet the legal systems of most countries had in the past dealt with the offence in a

41Sakshi. 1995. An alternate report on CEDAW: Recommendation no 19, Violence Against
Women.
manner which weighed heavily against the victim. The law on rape illustrates therefore, most vividly the problems that arise when social norms differ or contradict the provisions of the law. Not only people but the governments, judiciary and police are influenced by social norms. In most cases of sexual violence patterns of prejudices and gender biases have taken precedence over the actual violence itself.

Therefore, violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs the enjoyment by women of (their universal) human rights and fundamental freedom. The world conference on human rights urges the full and equal enjoyment by women of all human rights and that this be a priority of for government and the United Nations. In particular, the world conference on human rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects certain traditional or customary practices, cultural prejudices and religious extremism. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, murder and rape in particular require a particularly effective response.

It is important to emphasise that rape is not primarily a sexual offence. By being an offence of violence, it goes against the primary obligation laid down in the Universal Declaration of Human Rights which has "reaffirmed its faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women" (Preamble, Universal Declaration of Human Rights).

The above mentioned issues call for attention and tend to highlight the inherent biases in our legal system towards rape and victims of rape. There is
need to review the law and modify the needed clauses and also introduce many other measures to make the law effective. For example, intensifying the public consciousness to bring the offender to a court of law, social boycott of the offenders, women’s own assertion to exercise their rights etc., are equally important. Further, there is the category of rape committed by those in authority i.e., custodial rape, rape by security personnel and by people in powerful positions.

There is a need here to point to a particular case which has been brought to light recently in the form of a book. It is a true life story of a victim of rape. Her story reveals the ambiguity of the legal system, the lack of ‘action’ against the rapist and the tormented state of the victim who is an example of a ‘living dead’ person.

IV. THE CASE OF ARUNA SHANBAUG:

A mention of this real life case is important from the legal perspective of Indian law. It is being discussed here to highlight the loopholes in the legal system and eventually how a brutal rapist is set free in spite of committing the most brutal rape only because of the limitations of the legal definition of rape, and the inability of the society to mention rape/attempt to rape in the police report.

This story appeared in the form of a book authored by Pinki Virani (1998) entitled *Aruna’s Story* and it is an example of the law gone wrong. It’s a true life story of Aruna Shanbaug, an ambitious and effervescent staff nurse of Mumbai’s KEM Hospital, who has been trapped in a unique medical limbo for the past twenty five years. These twenty five years have been spent in a ‘twilight zone’, brain dead for sight, speech and movement. Yet hopelessly alive to pain, hunger and terror from the evening in November 1973 when she was attacked with a dog chain and brutally raped in the hospital where she was a staff nurse, by a staff sweeper who was avenging his offended ego.42

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42 Be it the case of Bhanwari Devi or Aruna, it makes one think whether women should boldly stand for what they feel. In the case of Bhanwari Devi, she was raped because she was being
She was raped on the eve of her wedding to a doctor, and abandoned by her family thereafter. Utterly helpless, she was tossed between a convalescent home and the hospital where she once treated patients back to health and where she now lies, barely alive.

The Attack.......'Into the Twilight Zone.....':

Aruna was brutally attacked by a dog chain and sexually assaulted by the staff sweeper. Aruna, at one time was posted to the dog's lab at KEM hospital, where Sohanlal was the sweeper. She was strict and often told Sohanlal to be careful and take his work seriously. She also threatened to complain about him if he did not comply.

The following highlights the situation just before Aruna was attacked and raped, an account of her rapist is given, as cited in Virani (1998):

He has no doubt he will overpower her easily. He is well built, his arms can be like steel bands, his wife knows this. He flexes, blue-green veins stand out in relief under his name tattooed on his right forearm. No one will come to her aid either, even if she screams loudly. She will not be heard from this huge, cold tomb filled with dead files and discarded furniture.

Holding it up, he will swing one end of the dog chain in front of her. Those eyes which have looked at him with contempt, will fill with fear. That mouth which has belittled him, time and again in front of people, will beg for mercy. He will undress the bride, slowly, as she implores him to let her go. He will take her once, that's all, she will learn her lesson from it forever.

'taught a lesson' by the upper caste men of the village who were trying to remind her that she was stepping out of line for (ironically) actually 'doing the right thing'. In the case of Aruna, she was being the dutiful, honest nurse who reminded the sweeper (who eventually raped her) that he should take his job seriously. Here, the ego of the sweeper seemed to get offended and he too was trying to teach Aruna a lesson which damaged her for life. Often, even in the movies men take revenge or try to teach the woman a lesson and get back at her by adhering to heinous measures like sexual violence. Issues like these are serious because they indirectly remind the woman that she should stay 'in line', that she should not retaliate. It scares ordinary women/girls from even saying or doing the right thing. Often, I have heard women say that they are scared to complain about the misbehaviour of some men because they are worried about the sort of reaction which might be meted out to them in the form of revenge. This kind of reaction acts as a deterrent for women to complain. These reactions perpetuate such crimes.
The room where Aruna entered was a room meant for dog surgeries, she has used it to change into her uniform for the last twenty-seven days. Even on that fateful day she was there to change. This time Sohanlal watched her do so. After she changed and came out of the inner room, Sohanlal walked up to her.....

Further, as the text narrates, Virani (1998):

He reaches under his shirt, and pulls out the dog chain. She swallows. He magnifies the sound of its rattle as he trails the dog chain on the desk in front of her. Her eyes follow the chain, she swallows again, moves back from the desk between them. Her chest heaves slightly, her eyes never leave the chain.

Now he is angry. She is not even afraid, he is going to have to make her cry so that she begs for his mercy.

He breaches the distance between them in four swift steps, slaps her hard on her left cheek. She falls against the wooden cupboard behind her, regains her balance, flies at him with her hands outstretched. He drops the dog chain, grasps both her wrists, squeezes them tight, pulls her towards him and presses his mouth down on her lips. She moves her mouth, bites him sharply on his left cheek. He has her wrists in a vice-like grip, he's holding her hard against himself, she bites where she can. Once, twice, thrice at different places on his left cheek.

He grasps her wrists in his left hand again, yanks her forward from the desk towards himself, swoops down on her, his mouth on hers and bites her on her lower lip drawing blood. While biting her lower lip he pulls up her bra. Then he throws her against the desk, yanks up her saree and petticoat, and starts to pull down her panties. She is menstruating. He withdraws his hand. She draws her legs in, kicks him in his midriff, makes to run. He grabs her from behind, knocks her to the floor, picks up the dog chain and wraps it around her neck. She feels the cold metal against her wind pipe, tries to flee, he yanks her back with the chain, pushes her towards the dog surgery, she falls into the darkness.

She has fallen on her knees and the back of her hands. The dog chain is around her neck, he tightens it. She chokes, he twists the chain, she gags, fluids flow from her mouth and nose, her head lolls. He pushes away crumbled fabric, pulls down her panties, she is bleeding heavily.....

He holds the ends of the chain in one hand, keeps up the pressure, unbuttons himself, feels for her other opening. With the dog chain pulling at her throat, he rides her in the darkness.

After assaulting her so brutally, he takes her gold chain with its pendant from around her neck, he also took her wrist watch, her saree (which was in her bag)
and pockets some money from her purse. In the dank hospital basement, Aruna hung on to life for 15 hours before she was discovered. The incident left Aruna brain-dead for sight, speech and movement. Yet alive to pain, hunger and terror.

**Reaction of the others....**

Another sweeper from the hospital discovered Aruna after 15 and a half hours of the incident. He informed the other senior nurses and Aruna is taken in for medical aid. Sweepers Inder and Sohanlal rush to the dog lab on the terrace to tell others about what happened to their department in charge, staff nurse Aruna Shanbaug. As the text states:

Word is spreading like wild fire. Nurses are converging at matron Belimal's office. A barrage of questions, a flood of concern, collective rage.

'What exactly has happened to staff nurse Aruna Shanbaug? She has been raped, hasn't she?'

'Oh my God, really?'

'They will not tell us even if she has, they will hide it.'

'Yes, they will cover it up.'

'Who has done this, it has to be an insider.'

'Of course, otherwise how could he go into the basement?'

'As though that is a problem! We all know how the security is mismanaged in this place.'

'What was security doing all that time? I have heard she was in the basement from yesterday evening.'

'And no one from security went to check whether the basement door was locked?'

'Her things must have been stolen.'

'Sister Pai says her wristwatch and gold chain are not there.'

'You all are bothered about a wristwatch and gold chain! She has been brutally attacked.'

'has she really been raped?'

'We all will be, very soon, if the dean does not take appropriate action.'

'Where was the guard when she was attacked? What time was she raped?'

matron Belimal interjects, 'We must stop using that word. Let us not forget she is to be married soon.'

'And will he marry her now?'
As for relatives, Aruna’s family simply disappeared when the exhortations to take her home grew too insistent.

The punishment.....

Aruna’s rapist walked a free man after a mere seven years in prison for ‘robbery and attempt to murder.’ At the police station, after questioning Sohanlal, the officers look in the register to see what other charges have been made by the hospital other then ‘attack on nurse with intention to rob’. None. No one came forward- not one doctor, nurse or relative- to add attempt to rape or even outraging of modesty. Therefore he was formally arrested for Attempt to Commit Murder and Robbery.43

What rape were they talking of? Medical examination showed Aruna’s hymen to be intact, so the hospital found an escape route from a bigger scandal.

The Aruna Shanbaug case got transferred to the Crime Branch. A Sub-inspector voices the thought on everyone’s mind. They have all read the case in the papers, there have been telephonic conversations with the police.

‘They have given a medical report that there was no vaginal penetration. Why was there no medical report about whether there was any unnatural offence or not? If proved it will get him an additional ten years.’

‘Perhaps because she is supposed to get married shortly.’

‘Then why not at least 376 read with 511, Attempt to Rape? If not that then 354, Outraging Modesty which is two years added to whatever sentence he gets?’44

43 According to IPC, section 393 (Attempt to commit robbery), the punishment is rigorous imprisonment for a term which may extend to seven years, and a fine. Moreover, Section 307 (Attempt to murder), the punishment would include imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. If hurt is caused to any person by such an act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. However, in the case of Sohanlal he only got a seven year term. The punishment for attempt to murder seemed to have been ignored totally.

44 Even though the police was discussing all this, no one from the hospital made these charges against Sohanlal. He was allowed to serve his two sentences simultaneously, and walk out in seven years instead of 14.
Sohanlal was arrested thereafter. The book reports that by pure oversight he gets to spend a day less in jail. It reads (Virani: 1998):

But then what is a day here or there for a man who is going to be spending seven years less since his sentences run concurrently? Another two years less because no one has complained about Outraging of Modesty, never mind the obvious Attempt to Rape? Or ten years less because no Unnatural Offence has happened on paper? A total of how many years less, not counting the fact that there is no set jail term under the law for someone who kills human brain cells, inflicts irreversible brain stem injury and leaves the victim hopelessly alive?

On the day of Sohanlal’s release, Aruna was found unconscious on the floor, the guard-rail on her bed inexplicably lowered, her tongue mysteriously bitten, and reports of a man sighted trying to enter through the window of her hospital room.45

The following excerpt from the text (in conversation with the author) will reveal what rape meant to Aruna’s fiancee, a doctor in the same hospital, who later in his life got married and had two sons. When he got to know of the rape, he was shattered:

His voice is still low, even, measured as he continues, ‘The other day I read about a man whose wife was raped in front of him. What must have this man gone through while it was happening? In spite of such facts, movies glorify rape. Does it occur to no one, not even the censors, that the instigation of rape is as big a crime? The media, including women” magazines, report on rape in such a blasé fashion these days, no one seems to be shocked by rape any more. Why, has it become an acceptable crime? Is it enough that if a woman is raped she should be successful in getting on with her life physically, mentally and financially? No, it is not okay to get raped even if you emerge victorious legally and emotionally at the end of it all. The mainstream Press should ask for the law to be made very severe when dealing with rapists.’

45 A rape victim always serves a sentence longer and more tortured than that of her molesters, but even by this dubious token, Aruna Shanbaug’s incarceration is exacerbating.
Sohanlal is a free man now. He has shifted residence to Delhi and is a ward boy in one of the hospitals here. He probably has left behind his sordid past. The fact is he could be a threat to so many other women whom he works with........46

There has been an effort made on the part of the legal system towards reviewing the nature of rape. This is in the form of a sensitive judgement which was passed by the Hon'ble judges of the Supreme Court in 1996. The case above (Aruna's), as also the one's based on my field work reveal the fact that law often operates at levels totally detached from the reality of women's experiences as victims of sexual violence. However, in the following section I will focus on some important features of a sensitive judgement which, in itself is a major breakthrough in the field of rape and sexual offences The following are some observations made in this judgement which was passed in 1996 by the Hon'ble judges of the apex court in convicting the accused and setting aside the trial court judgement.47

V. A MAJOR LEGAL BREAKTHROUGH:

Extracts of the Judgement:

A girl in a tradition bound non-permissive society in India would be extremely reluctant to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracised by the society or being looked down by the society.........avoid talking about it to anyone, less the family name and honour is brought into controversy........The Courts must, while evaluating evidence remain alive to the fact that in a case of rape no self-respecting woman would come forward in a Court just to make a

46 This is a sad story. It makes one scared, angry and sad. To realise that there could be a Sohanlal out there any where, that there is a system which isn't fair and a society who can let us down. These are very truthful prospects and very sad too.

47 Case referred- State of Punjab vs. Gurmit Singh and Ors. AIR 1996 SC 1393. In the case referred, all the three accused of raping the prosecutrix who was a girl of 16 years were acquitted by the trial court. The reasons given by the trial court for acquitting the accused were that the girl in question was 'of loose morals', the case was 'false' and the accused had been implicated on account of enmity. The apex court however, strongly disapproved of the 'unintelligible' judgement and criticised it for 'lacking sobriety and insensitivity' and the judgement was set aside.
humiliating statement against her honour such as is involved on the commission of rape on her. The testimony of victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court should find no difficulty to act on the testimony of a victim of sexual assault alone to convict and accused........ Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.....It must not be overlooked that a woman or a girl subjected to sexual assault is not accomplice to the crime but is a victim of another person’s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion.

In setting aside the inference drawn by the trial Court regarding the prosecutrix being of loose character the Supreme Court observed:

The Courts are expected to use self restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole..... Even if the prosecutrix in a given case has been promiscuous in her sexual behaviour earlier, she has the right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.

Directing the trial courts in conducting rape trials, the Supreme Court states:

Some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story of inconsistencies with a view to attempt to twist the interpretations of events given by her so as to make them appear inconsistent with her allegations. The Court therefore should not sit as a silent spectator while the victim of crime is being cross-examined by the defence...... A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again in unfamiliar surroundings, what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray
sentence may be wrongly interpreted as 'discrepancies and contradictions' in her evidence.

The above mentioned judgement is definitely a breakthrough in the field of law. The fact is that much more needs to be done in order to realise the gravity of the crime of rape. However, a beginning has been made and a positive change can take place if there is an increased sensitivity among members of society regarding sexual violence.

Therefore the need to extend the canvas of sexual violence beyond a narrow legal definition would seem necessary if we take a look at the law of rape in some other countries. This is needed at this stage also to emphasise that in different countries rape law may have similar biases, loopholes but there are some countries who have made an effort to reform the rape law. Reform in the rape law is needed in India too. A comparative look at other systems, therefore would enable one to critically analyse the Indian rape law. A look into the following section would make things clear:

VI. A COMPARATIVE STUDY OF RAPE LAWS OF THE WEST:
Many western countries have totally abolished the term 'rape' and termed it as 'sexual offences'; the punishment is determined by various factors including the amount of injury caused. By this definition the distinction between rape, attempt to rape and violation of woman's modesty is abolished and they are treated as offences of a similar category and punishment is based on the severity of the offences.

By examining the changes in the rape law that have occurred in other nations with a similar basis, it is important to view whether the same changes are plausible in India and what the repercussions or consequences may be in pursuing various alternatives. For instance, a change in just the definition of rape may have significant consequences on the issue of consent and on the types of sexual offences that become integrated into the definition of rape.
VI.1. Definition of Rape and the Criminal Justice System in Some Countries:

At common law, the elements of rape consisted of carnal knowledge, force and the commission of the act against the victim's will or without her consent. Today, these elements still exist in many modern rape statutes in various commonwealth nations. In particular, three commonwealth countries, England, Australia and India still retain some form of the traditional definition of rape. Sexual intercourse in these statutes is defined solely as penile penetration of the vagina. Although Australia's definition of rape uses the common law words 'carnal knowledge', it is apparent from case law that this vague term embodies only vaginal sexual intercourse.

In the late 1960s, the rape debate was launched in the United States of America. It has since spread to every nation in the Western, industrialised world. In each place the law of rape and the handling by the criminal justice system of rape complaints have been subjected to scrutiny. Generally, both have been found wanting. However, one country which has been successful in broadening the definition of rape, is the United States. The federal law has been changed to include all forms of sexual intercourse with any person. On the state level, Michigan has abolished the word "rape" and replaced it with a sex neutral gradation scheme comprising four central features. This gradation scheme has a ladder of offences labelled as criminal sexual conduct (CSC).

There are a number of interconnecting problems which rape currently presents for the criminal justice system. First, there is the victim, doubly traumatised by the event itself and its subsequent handling by police and courts. Secondly, and in part consequentially, there is the low reporting rate. Thirdly, there are the rapists, prosecuted infrequently and convicted rarely. Finally, there is the law of rape and the evidential rules which surround it. Here, we will discuss the law angle:

Rape laws have presented a series of problems for the criminal justice system. First, in many respects, their ambit has been very narrow. This has been a factor in low prosecution and conviction rates. In Michigan, for example, to
prove rape it was formerly necessary to show that force was used by the defendant and that the victim did not consent. To establish non-consent, the victim was required to have resisted 'to the utmost' from 'the inception to the close' of the attack (cited in Tomaselli & Porter: 1986). In England, as in many other jurisdictions, rape covers only penile penetration of the vagina. The objection raised here is that other sexual assaults, often considerably worse in character, are relegated to less important offence categories. Moreover, by confining the offence to women who are not married to the perpetrator, rape laws are discriminatory and deny equal protection to a class of persons on account of their status.

Use of the term 'rape' accounts in part for the narrow scope of the offence. Moreover, the word evokes images and associations which are not altogether helpful in a modern context. For rape, as the dictionary states, is a taking or carrying off by force, the ravishment or violation of a woman or of a country. Arguably today, the law should seek to protect the right of every woman to choose whether to have sexual intercourse or not and its language should reflect this objective.

It is, of course, true that the legal definition of rape in England is sexual intercourse without consent, which, on the face of it, seems rather broad. Certainly it is an improvement on the position which prevailed until the nineteenth century when rape constituted an act against a woman’s will so that violence or the threat of fear of it was required. The question of consent is also an important one. It might be said that a crucial problem in the law of rape is precisely that it focuses unswervingly upon the non-consent of the complainant. Did she consent or did she not? That is the question. It is she who is the object of attention. The prosecution must prove beyond all reasonable doubt that she did not consent and the defence will be irresistibly tempted to raise that doubt by suggesting that she is the type of woman who might well have done. In England, moreover, the judge is obliged to administer the corroboration warning. He
must warn the jury that it is dangerous to convict on the basis of the complainant's evidence unless it is corroborated.

There is nothing inevitable in this legal arrangement. Sexual intercourse without consent can be shifted from centre stage towards the wings even if it can never be removed from the set altogether. For other nefarious conduct will generally accompany the act of non-consensual sex. There may, for example, be violence, a variety of threats, the presence of participation of a gang, or a commission of another offence such as burglary immediately before hand. There is no reason why the spotlight should not, in the first place, be directed at the defendant and at acts such as these. Moreover, rather than letting the officials of the criminal justice system interpret rape as they choose, there is much to be said for spelling out in precise terms the circumstances in which a sexual offence is committed.

There may also be a case for a scale of penalties for rape rather than a single maximum of life imprisonment. Under the present system, most defendants plead not guilty to rape and indeed, given the high penalty and the low prospects of conviction, they would be foolish to do otherwise. The advantage of a scale is that it permits a defendant to decide where he fits on it and to plead guilty if he so chooses (Temkin: 1986).

In most states of United States, legislation has been passed to amend the legal framework relating to rape. In some states, radical change has been introduced. In Canada and Australia, law reform in this area is advancing apace. In England, whilst certain amendments have been implemented, relatively little has been achieved and little more is on the agenda (Temkin: 1986).

The Michigan statute, passed in 1974, is regarded as a turning point in rape law reform and has been used as a model by other jurisdictions. The Canada provisions were enacted almost a decade later, in 1982, and thus provide an example of more recent law reform in this area.

**U.S.A (Michigan):** In the early 1970s, the women's movement in the United States succeeded in bringing the issue of rape to the attention of the nation.
During the same decade, rape crisis centres sprang up throughout the country and the Federal Government manifested its concern by making available between 1973 and 1981 an estimated $125 million for research into sexual assault (cited in Temkin: 1986). The Michigan legislation was not enacted in response to the proposals of an official law reform committee, neither was it introduced by the state government. On the contrary, it was very much the product of a grass-roots initiative resulting from dissatisfaction felt by many women working in rape crisis centres at the criminal justice system’s treatment of rape victims.

The reform lead to the Criminal Sexual Conduct Act. It has four central features. First, instead of rape, it creates a ladder of offences, each of which is described as criminal sexual conduct. The first degree offence carries a maximum penalty of life imprisonment, with 15 years maximum for the second and third degree offences, and two years for the fourth degree offence. Each degree covers a range of sexual assaults, so that, for example, the first degree covers any act of sexual penetration. The four degrees are differentiated according to the amount of coercion used, whether or not penetration has taken place, the extent of physical injury inflicted and the age and incapacitation of the victim. The law describes with great particularity precisely the conduct which is covered by each degree. In this way it is hoped to encourage prosecutors to prosecute and defendants who are guilty to plead guilty.

The new Act also dispenses with the need for the prosecution to establish the victim’s resistance. The offences of criminal sexual conduct focus entirely on the conduct of the defendant and do not specifically include a non-consent requirement. On the other hand, the Act cannot in all circumstances prevent the defence from seeking to allege that the victim consented, particularly where no weapons were used and where little or no injury was sustained.

The third important feature of the Michigan legislation is its strict regulation of sexual history evidence, which is totally prohibited save in two exceptional circumstances. These are where past sexual conduct was with the defendant
himself and where the evidence relates to the source or origin of semen, pregnancy or disease.48

Finally, the criminal sexual conduct may be committed by one spouse against another provided that they are living apart and one partner has filed for separate maintenance or divorce. It is gender-neutral, so that women may perpetuate it and men may be the victims.

It is believed that this new law has not eradicated all the problems which face the criminal justice system in dealing with sexual assault. However, its most solid achievement is to produce a clear increase in the number of arrests and convictions for conduct of this kind. It has also improved the treatment of victims within the legal process (Temkin: 1986).

Canada:

In Canada, the legislation passed in 1982 was federal not provincial, but women, once again, played a powerful role in securing it.49 At the time when women were gaining a foothold in the federal institutions of the government, developments were taking place at other levels, particularly in relation to the issue of violence against women. Largely influenced by initiatives taken in the United States and England, rape crisis centres began to appear.

It was finally at the end of the 1970s that activity at a number of levels on the issue of violence against women was to accelerate and coalesce.50 Of particular significance was a publication of a book by Lorenne Clark and Debra Lewis in 1977 which was described as a 'break-through', providing 'the first solid data on

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48 For example, where the complainant alleges that the criminal sexual conduct in question led to her pregnancy, the defence could adduce evidence to show that the pregnancy was in fact caused by sexual activity with another on a particular occasion.

49 It has been highlighted that women have a very important place in the institutional structure of Ottawa. A Status of Women Council was set up in Canada. In 1976, after the Canadian Government's endorsement of the United Nations' 'Decade for Women', Status of Women Canada was enlarged and became an independent agency.

50 This included the coming together of influential women's organisations, including the National Action Committee on the Status of Women (NAC), which is a very large umbrella organisation.
rape in Canada’ (cited in Tomaselli & Porter: 1986). The book was immediately influential.

In 1978, the Law Reform Commission of Canada published its Working Paper on Sexual Offences. The Commission recognised that the substantive law of rape is not to be considered in a vacuum but in the context of its operation in the criminal justice system as well as in society at large. Most significant of all, however, is its central proposition that:

rape is actually a form of assault and should therefore perhaps be treated as such under the law.....The concept of sexual assault more appropriately characterises the actual nature of the offence of rape because the primary focus is on the assault or the violation of the integrity of the person rather than the sexual intercourse. (cited in Temkin, in Tomaselli & Porter: 1986).

This statement was compared with what Clark and Lewis (1977) had to say in their book, published the previous year. They state:

We are saying that our rape laws should reflect the perspective of women- the victims of rape. They experience rape as an assault, as an unprovoked attack on their physical person and as a transgression of their assumed right to the exclusive ownership and control of their own bodies.....This act is experienced by the rape victim as a denial of her physical autonomy....This follows from her belief that she is a fully human person and entitled to all the protections given to persons under the law. Since she knows that the right to exclusive control over one’s own body and to freedom from unprovoked physical interference by others, are two of the fundamental rights guaranteed to persons under the law, she quite justifiably expects redress when she is raped.

The Law Reform Commission was able to see the repetition. It singled out ‘the protection of the integrity of the person’ as a central policy issue. It spoke of ‘the right to be free from unwanted infringement of one’s bodily integrity’ and ‘the right to be free from physical assault’. It was in this context that its proposal to abolish rape and introduce a new offence of sexual assault was made.
In November 1978, the Law Reform Commission of Canada produced its final report on Sexual Offences. This too recommended the abolition of the offence of rape and its substitution by two new offences, described as 'sexual interference' and 'sexual aggression'.

The Canadian reform of 1982 bears a certain resemblance to the Michigan legislation looked at previously, although it is weaker in certain respects and stronger in others. The crime of rape no longer exists in Canada. Instead, a gradation scheme had been introduced which creates three offences of sexual assault covering rape and certain allied crimes. The three grades are distinguished purely in terms of the level of violence involved and no distinction is drawn between penetration and other sexual acts. Simple sexual assault carries a maximum of ten years' imprisonment but may, at the prosecutors discretion, be tried summarily, in which case a maximum penalty is six months' imprisonment or a fine of not more than $500. Next on the ladder is an offence carrying a maximum of 14 years' imprisonment, which applies where the defendant, in committing a sexual assault, carries, uses or threatens to use a real or imitation weapon or threatens to cause bodily harm to a person other than the complainant or is a party to the offence with any other person. Finally comes aggravated sexual assault, which is the most serious offence of the three and carries a maximum of life imprisonment. This offence is perpetrated where the defendant, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

The new law entirely abolishes the marital rape exemption, it also places firm restrictions on the use of sexual history evidence. As far as corroboration is concerned, the judge is no longer permitted to issue the corroboration warning, although he will still be able to comment on the evidence.

**England:**

When the rape debate reached England in the early 1970s, it met with a receptive and sympathetic response in many quarters. However, in England, two trends were obvious, the lack of academic interest in and commitment to rape law
reform and the absence of anything resembling a cohesive and powerful women’s political lobby which might have taken up the issue, as well as the general absence of women in the ‘corridors’ of power.

Both the lack of strong academic support for rape law reform and the absence of a powerful women’s voice in its favour, may have contributed to the negative approach to the matter manifested by the Criminal Law Revision Committee (CLRC) in its final Report on Sexual Offences published in 1984 (Temkin in Tomaselli & Porter: 1986).

In its report the CLRC proposed that the law of rape should continue to cover only penile penetration of the vagina. It was not prepared to recommend abolition of the marital rape exemption, only that it should cease to operate where the couple were living separately. On the issue of consent, the committee’s approach was similarly restrictive. It recommended that legislation be introduced to ensure that threats other than of immediate force be precluded from the scope of rape. Although it received representations from a considerable number of women’s organisations and groups, their views often appear to have been rejected.

What has been highlighted in the above experiences is that in the American state of Michigan and Canada women played a major role in the accomplishment of radical rape law reform. In countries as diverse as Australia, Israel, Denmark and Sweden women have actively and successfully campaigned against antiquated rape laws and retrogressive proposals for reform. In England, by contrast, traditional women’s organisations and those of the radical fringe, have, for the most part, shown a marked disinclination to do battle for legal change.

It is therefore very important for women and men to realise the gravity of the crime of rape. At first, women need to realise that rape/sexual abuse vitally affects all women. The importance lies in victims of violence being able to assert that they have faced violence, speaking about it rather than remaining silent.
throughout life only to realise that the suppression has only made them weaker and helpless.

Today, as a result of the women’s movement, not only in India but in many countries, governments have been compelled to look at the offence of rape as one which violates the human rights of a woman on the ground that she is the victim of violence. The main aim now, as emphasised by many, should be to get mass support, enough so that the government, the judiciary and the police would be forced into reforming their policies and procedures on public and private violence as they relate to women.

Rape is a complex issue and needs much more attention than is generally attributed to it. Certain recommendations and strategies in this area have been suggested and will be highlighted in the following concluding chapter.
I. INTRODUCTION:

Silence shrouds the phenomenon of rape. This study was an attempt to break through this silence and explore. The most difficult part was to actually get to 'meet' and 'talk' to rape victims. The difficulty in tracing victim's of rape and ultimately talking with them itself proves the difficulty to study a phenomenon like rape. This difficulty in a way compelled me to redefine my initial research intent to study rape victims in the Uttarakhand movement. While I did manage to speak to some victims of sexual violence, I studied it as only one incidence of rape- rape as state violence where the state personnel used rape to terrorise the people and attempted to break the movement. In the course of my field work, which extended over a long period of two years I was able to meet other 'rape victims' in the area of my research and some elsewhere. Most were raped by acquaintances, some were raped by army men, some by strangers and some by family members.

The nature of this kind of research necessarily meant a different understanding of the 'field'. It was not field work in a bounded area of study as in a village study or a slum study or a factory. The attempt rather was 'thematic'. What bound the study was the phenomenon of rape. However, it was for the most part confined to the Uttarakhand area and Delhi. In the case of the railway rape (Muri express) I spoke with the victim in Delhi.

What I am seeking to draw attention to is the very specificity of the phenomenon of rape that in a way defined both my 'field' and my very long, difficult task of first identifying 'rape victims' and then being able to speak to them and their close relatives. What struck me through the field work was: One that rape was very much a social phenomenon yet an enormous body of myths existed to suggest that rape was actually an aberration of societal functioning; two, that in the case of rape, like no other crimes, the victim is held responsible for the act.

Also, the questionnaires I administered also pointed to the fact that there are wide spread myths held by members of society. Throughout the two year period
I kept a diary, jotting down the everyday observation that pertained to attitudes regarding sexual violence.

Scholars have spoken of ethical questions that field work throws up. In this case the questions were all the more bothersome especially because of the pain and trauma involved in an issue so grave. Here, Veena Das's (1995) advocacy of an anthropology of pain has great relevance to the study of women's situations. Das demonstrates that pain can be communicated and felt in another body. It is maintained that a researcher can only feel in his or her own body the pain and sufferings that have been inflicted on women in their exploitation and oppression by a patriarchal set-up by becoming more intensely and intimately involved in close pain sharing relationships with his or her researched subjects (Haider cited in Thapan:1998). In the course of my research, some victims also thanked me for 'listening' to their pain only because they were unable to talk of it to any one else, because mostly in a post-rape scenario, the victim is ignored and what the 'others' are interested in doing is to somehow hush up the incident to restore their lost sense of honour and shame.

Here, I would also like to highlight the fact that 'voices' weren't the only means of self expression and communication between the victims and myself. Certain pauses, long silences, gestures, tears and body language also formed important aspects of the narratives.

This study had attempted to understand the phenomenon of rape in society. While seeking to bring out the voices of rape victims, the study also viewed the manner in which the social institutions (family, community, state and the media), the government, the legal system and society on the whole address the issue of rape and sexual violence. As a crime against a person, it is revealed that rape is uniquely heinous in its short term and long term effects. The anguish it brings is often followed by an abiding sense of fear and shame. Having said this, discussions of the data on rape inevitably seem callous. How can one quantify the sense of deep violation behind the statistics? Terms like incidence and prevalence often abstract ourselves from the misery. Yet, it remains clear that to
arrive at intelligent policies and strategies to decrease the occurrence of rape, one of the alternatives is to gather and analyse data. This makes clear the point that rape is not something which is confined to one place, one person. It can happen to anyone at anytime and any place. A definitive field is unattainable in issues as grave as sexual violence. Also, it took years of labour to locate victims of rape. Even though in some cases they were traced, most were unwilling to speak. Much silence still shrouds the study of sexual violence particularly rape. The theme of rape runs through this study. This study also entails everyday experiences of sexual violence faced by some women and this everyday construction of ideology forms a continuum which highlights the fact that such violence is widely prevalent, though often ignored. Therefore, in some parts of the text voices of victims of sexual violence/assault (not legally amounting to rape) have also been mentioned.

This study attempted to voice the anguish of these victims along with their relationship with social institutions like the family, community, state and the media. As believed by most people, the importance of a supportive society are very important in the victim's recovery and survival, but in reality, in a sense, victims are 'thrown out of society' of which they are an important part. The family, for instance, often called the 'safe haven' was in a sense unable to maintain its image of a 'safe haven'. Victims of sexual violence, therefore emerge as outcasts of society.

But most importantly from this difficult exercise emerged a possibility of 'recording', 'documenting' what has been a widely accepted and silenced phenomenon. This thesis in that sense belongs to the broader effort of making what has been invisible from the body of social science research, visible. Only if something is made 'visible' can policies be drafted to deal with it, can recommendations be suggested and strategies be given to tackle it. Making such an issue 'visible' is just the beginning.........
II. ON "THEORY" AND "METHOD":

This study has sought to understand the phenomenon of rape in society. It did so by synthesising sociological and feminist methods. Feminist scholarship is interdisciplinary and therefore crosses boundaries with social sciences. Particularly in the domain of field studies it often merges with related disciplines, especially sociology. For instance, socio-psychological categories of attitudes and sociological categories of myths and beliefs are studied through feminist methodology and hence the overlap is evident.

This study draws attention to rape as a social phenomenon. Feminist theory has positioned rape within a broader socio-cultural context, viewing sexual assault as only one consequence of socially constructed and constrained gender roles. Along these lines rape has been conceptualised as an act of violence, power, domination and exploitation rather than a crime of sexual passion. A common thread in feminist thought is that rape does not qualitatively differ from other aspects of male and female relations. It may be seen as an extension of typical male and female interactions, reflecting the conventional pattern of male domination and female subordination. Further, the anguish of a victim of rape gets doubled when social institutions like the family, community aggravate the situation by being unsupportive leading to the isolation of the victim. This isolation ultimately leads to 'throwing out' of the victim from active society. The culture of silence, prevailing myths of rape, attitudes and beliefs actually, in a sense, condone rape and encourage a rape culture in society.

This reconceptualisation of rape has shifted the psychological study of sexual violence away from the pathological traits of individual offenders and blame worthy victims and has suggested that rape is not an isolated act experienced by some women, but a universal problem for all women.

In addition to revising our understanding of what rape is, attention is given to pervasive rape myths, prejudicial attitudes about rape and rape victims which trivialise sexual violence and reflect victim blame, denigration and disbelief.
These in turn, emphasise the negative consequences for women, men and society.

The tendency that people have to blame rape victims for their own misfortune has been an object of concern for feminists. In this light, sociological concepts help in more in-depth analysis of the impacts on victims' self-concepts and self-esteem. In this context the sociological theories of self have merged with feminist theories to explore the negative consequences of rape myths on victims' responses to sexual assault. More explicitly it is seen how pervasive rape myths in general, and the attitudes and perceptions of 'significant others', more specifically are accepted and internalised by victims themselves. Influenced by societal values and interpersonal interactions, victims frequently blame themselves.

Therefore feminist scholarship provides the fundamental theoretical framework for the study of rape. The feminist reconceptualisation of sexual violence portrays rape as an act of domination and control, posits socio-cultural causes including gender roles and socialisation and social stratification and highlights the existence and negative repercussions of inaccurate conceptions of rape and prejudicial attitudes toward rape victims.

In undertaking this research I have relied on a rich tradition of sociological concepts and categories. To name a few: attitude formation, myths, social institutions, honour, stigma, shame, social construction of the self etc. Obviously these theories were not originally generated to explain the causes and consequences of rape myths, rather they have been transplanted from sociology and applied specifically to this area to elaborate on and understand rape as a social phenomenon. Both feminist scholarship and sociology recognise the social construction of the self. Although the vantage points are different, feminist scholarship has provided impetus for sociological research, and sociological concepts/categories and research have added momentum to feminist cause. As such, both the approaches may be seen as mutually informing and reinforcing each other.
As emphasised earlier, the method used is multifaceted. Feminist research relies on an array of methods common to the social sciences, including interviews, surveys, case studies and participant observation techniques. However there are techniques of research which distinguish feminist research from mainstream social psychological investigations. For instance, feminist research emphasises power sharing between researchers and research participants. The nature of interviewing is informal, often a dialogue, the respondent may influence the direction and pace of the interview. In this study I related to the victims at a personal level often sharing my experiences as well. This made them more 'at ease' while talking and sharing. This method diverges from the more popular form of structured interview in social psychology/sociology, which is directed by a researcher who is expected to remain aloof from the topic of discussion in order to eliminate potential bias in subject responses.

In this research a preference for qualitative methods is favoured. This is not to undermine the importance of statistics/data. For an issue like rape where lack of reporting exists the favoured nature of study of the phenomenon of rape should focus on qualitative methods of research. MacKinnon (1983) has cited consciousness-raising as an original feminist research method. This form of data collection enables women to describe, discuss and understand their experiences in their own voices. The voices mentioned in the study along with victims’ voices are voices of various other people who represent an important part of society vis a vis the victims. This in turn helps in a more broader sociological understanding of rape.

III. MYTHS AND FINDINGS:
There are two premises which bind together the literature on rape attitudes, attributions, institutional management of sexual violence and victim reactions. First, rape myths are widespread; they have been documented over time and across cultures. Secondly, these myths or misunderstandings about the socio-
cultural phenomenon of rape have far reaching consequences for both individuals and societies.

What are the myths and misunderstandings? To name a few, rape is rare. It happens to 'other people' and generally involves sex-starved, deviant men and/or provocative, deserving women. Rape usually occurs between strangers, and physical force and coercion distinguish it from consensual sexual intercourse. These inaccurate stereotypes persist despite evidence which shows that rape occurs most frequently between people who know each other, often quite intimately, that coercion is more commonly achieved by threat or psychological tactics, and that victims only occasionally show signs of physical resistance. Also, unsympathetic attitudes abound, and tendencies to blame and denigrate victims, to trivialise their experiences, and to doubt their credibility are common.

The consequences of rape myths can be observed not only in macro-level analysis of institutional responses to sexual assault, but can also be considered on the micro-level in connection with individuals' responses to victims of sexual violence. The results of the questionnaires administered by me clearly highlighted the prevalence of widespread myths of rape. These included rape related attitudes which maintain that women really want to be raped, that they provoke sexual violence by their physical appearance and behaviour. Popular conceptions also reflect the belief that rape is a sex crime committed by deviant men. However, it was interesting to note that the punishments advocated by the people for rape were as grave as death penalty, life-imprisonment and even castration. This indirectly reflects the gravity of the crime of rape in the minds of people though they remain silent about it.

It is commonly believed that rape is rare, but misconceptions about sexual coercion extend beyond myths about its prevalence. When victim characteristics are highlighted, it is generally believed that young and often provocatively dressed women are frequent targets of rape. When offender characteristics are emphasised, it is commonly expected that the perpetrator is a sex-starved
deviant. When situational factors are considered, it is usually predicted that rape occurs between strangers in deserted and unsafe public places. And when the aftermath is discussed, it is frequently expected that the innocent victim can achieve compensation and redress in the criminal justice system. This is, of course, only after the reality of rape is acknowledged. It is more often believed that a woman cannot be raped against her will and that accusations should be regarded with scepticism, particularly if the victim does not bear signs of resistance.

In this study I found that sexual assault/violence is a common experience in the lives of most women. There is a culture of 'silence' which revolves around this and most girls do not want to talk of it. Also, those women who are raped find it most difficult to accept that it has happened to them. Moreover almost every girl I spoke with confessed to being a victim of sexual violence while she was growing up. It is also revealed that rape is not rare, but the taboo attached to the crime disallows women to come forth and speak about it. It wouldn't be wrong to argue that women are potential victims, at any time, any age, any place. Rape victims may be women/girls of all ages. They are not unusually attractive (as myth suggests) nor do they generally dress provocatively. The newspaper reported a case of a ninety-year old woman to be a victim of rape and also young victims as small as six months. In many countries victims are concentrated in their teens and early twenties, the overall age range is enormous. The victims I met with ranged from 16 to 20 years with an exception of two who were in their 20s and 30s. Most of them belonged to the lower or lower middle class families. I found no evidence at all that the victims I met were promiscuous or provocative. They were victims of 'situations' and the rapists took full advantage of their weaknesses and vulnerability in most of the cases.

The commission of rape is not confined to abnormal, sick or sex-starved deviants. The rapists in the cases I studied are 'normal' men with 'normal' backgrounds. Most of the men were acquainted with their victims in some form or another, either a neighbour or a boyfriend. What was revealing was the fact
that the belief amongst most people, men and women alike, is the acceptance of sexual coercion as an integral part of male behaviour (this belief was often revealed by comments made or reactions to particular questions).\(^1\) In some way I felt that many people revealed and believe strongly that it was acceptable for a man to force sex on a woman who was wearing seductive clothing. Forced sex was often justified depending on women's dress and behaviour.\(^2\) Also these beliefs were highlighted in the questionnaires I administered where women were held mainly responsible for their rape.

Most rapes occur between people who know each other. The majority of victims are at least acquainted with the offender and some know him very well. In most of the cases I have narrated, the victim and rapist were acquainted and some were neighbours as well. A report highlighted that sexual abuse/violence is widely prevalent within families as well. Sexual abuse, especially was committed in most cases by relatives (sometimes very close) and friends of the victims. The women who talked about their experiences of sexual abuse during childhood revealed the fact that they find it extremely difficult to face those relatives or friends who had violated them. Their sense of sorrow, shock and cynicism is immense. In one of the cases I narrated it was a father-daughter rape.\(^3\) Here too the rapists or abusers are often not deviant or sick. They just know that it is easy for them to get away with such a crime, a sort of a power game is played. That could be the reason that most of the rapes which are reported are committed by unknown assailants. Known cases are reported less.

\(^1\) A few comments were, "Admi to jaanwar hota hai, jo cheez usko nahi milti who chheen kar leega", "Admi kutte jaisa hota hai" (man is an animal, whatever he does not get he snatches it). "A man is polygamous by nature and this is a fact".

\(^2\) Not only is sexual coercion considered justified, but men frequently express behavioural intentions to rape if there is assurance that they will not be caught (Malamuth, 1981). Probably this is the reason why many powerful people are involved in sex rackets and sex crimes. Not just sex crimes, in the recent times many powerful people are involved in other crimes as well. The fact that they would be left scot-free is a major reason many of them get involved in crimes of all kinds.

\(^3\) Most girls revealed that often brother-in-laws and uncles were found indulging in sexual abuse.
In Singapore, as in the United States, less than half of the reported rapes are unknown assailants (cited in Ward: 1995).

Only a minority of rapes occur in deserted public places. Many of the victims I met experienced attack and sexual violence indoors, some even in their own home. Even eve-teasing occurs in open spaces, on the road or in buses. Sexual abuse, in most of the cases took place within the four walls of the victim’s house or the house of an acquaintance or of the perpetrator. Sexual attacks also take place in residences, public transport.  

Most sexual crimes may not show signs of physical injury. Sexual coercion may be achieved more often by verbal or psychological techniques rather than the use of weapons. Just in one of the cases I studied, there was use of a weapon. The victim in this case was killed by the same weapon (which was used to threaten her earlier) after she was raped. However, injury might take place through beating and slapping. The Muri Express victims were beaten mercilessly after and before they were raped and molested. In the case of molestations, it is seen that the victims were verbally threatened and terrorised by most of their tormentors.  

Most accusations of rape are true. It is commonly believed that women fabricate stories of rape based on fantasy if they have consented to sexual relations and have changed their minds afterward, if they are angry or want revenge, or if they are pregnant. I feel that rape in our country is still so taboo and such a ‘hush-hush’ issue that probably very few women would think about falsely accusing a man of rape, since it would be she who would become the focus of negative attention. To lodge a complaint at the police station requires a

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4 Delhi tops in crime against women. According to an estimate, only one in 10 case of abuse get reported. For every case of incest reported, 25 go unreported. According to chairperson of the Delhi State Commission, a major incidence of rape cases are at the JJ clusters, slum colonies and other congested areas (The Times of India, 16-2-1999).

5 Ironically, this disadvantages women in terms of the successful prosecution of sexual offences. Lack of physical injury on the body of the victim often leads people to conclude that the victim consented to the crime.
lot of courage. It is difficult to believe that a woman would go through the ordeal of doing all the formalities just to report a false rape. Moreover, very few girls would like to go through a victimisation by the police, judiciary and society for no reason. In the United States, false reports are calculated to be in the region of 1-2 per cent, which is not significantly different from other crimes (Brownmiller: 1975).

The conviction rates are very low. Even if rapes are reported and reach trial, in many instances the chances of criminal conviction are not good. The victims I met informed me how long it took for them to go to court and still longer for their rapists to be brought to book. In some cases the perpetrators tried to bribe the victim or their family members, threaten them so they would withdraw the case. The picture is grim. Cases take years to get settled and often result in acquittals of the perpetrators of sexual violence.

It becomes clear that anyone can be a victim of sexual violence. Contrary to popular stereotypes, sexual violence occurred between 'normal' everyday acquaintances. The raped women were dressed very similar to any other women of their age. The rapists were often like any boy/man next door. The most common pattern of rape was one where the victim knew and often trusted the offender (more than half the victims I spoke with were raped by acquaintances). The incident usually occurred in a private place, indoors often in the home of the victim or assailant. Sexual compliance was obtained by verbal threats or beatings. Given that the common pattern does not match the popular stereotype, women who experience sexual assault are often disbelieved and discredited.

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6 The sheer power possessed by a known perpetrator in terms of age and experience vis a vis his known victim makes it easy for the perpetrator to indulge in sexual violence with ease. Often, the victim is too shocked to even react.

7 Probably in some cases, which would amount to a minute percentage of the total population, a girl would falsely cry rape.

8 Some lawyers I met claimed that they, while representing the rapists, often tried to prove that the girl was falsely charging the rapist or she was fabricating a false story only to blackmail him (for something like money or if she got pregnant).
This is not to suggest that rape myths and ideologies are completely unfounded. Sexual violence occurs in many forms and fashions. Women are sometimes assaulted by strangers, and rapes may occur in deserted public places. Women may be dressed in a seductive fashion and may be drinking at the time of the offence. Men who commit acts of sexual violence sometimes have inadequate or antisocial personalities. Violence may be inflicted; some women are beaten, knifed, strangled or murdered. These cases catch the public eye; they often appear more dramatic and comprehensible to us. Stereotypes about sexual violence also allow us to cling to the misguided notion that sexual coercion is far removed from conventional male-female relations, that it is something which is both unusual and pathological.

One fact which is revealed over and over again is the fact that the phenomenon of rape actually leads to the 'throwing out' of victims from society. This 'throwing out' is very similar to the concept of 'social death' (Chakravarti: 1998). However the major difference lies in the fact that whereas 'social death' of a widow is in a sense institutionalised a rape victims' 'throwing out' is not. For instance, it becomes very clear that when a woman becomes a widow she must follow certain do's and don'ts (like wearing a particular kind of clothing, abandoning ornaments, not eating particular kinds of foods etc.). In this sense her widowhood becomes institutionalised and she is accepted as a widow by society. However, on the other hand, a rape victim is in a sense 'suspended'. Her victimisation is not institutionalised. She is isolated and her 'blotted' status does not place her in any category. She is stigmatised by society and hence isolated. This kind of 'throwing out' entails misery for victimised women of rape. Even though there are no symbols to highlight a victim (a victim cannot be recognised at first glance) she lives a miserable, defeated and isolated existence. Most often the main factors responsible for her pathetic condition are the social institutions (and the cultural attitudes and beliefs they represent) which she is surrounded by; be it her family, community, the state or even the media.

9 The media often sensationalises such cases and brings them to the notice of the public.
Therefore society (through social institutions) plays a very important role in victim recovery. It is society which is responsible for ‘throwing out’ victims from active life. This ‘throwing out’ process may often be slow and indirect but the impact it has on the victims is very grave (both psychologically and physically). This ‘throwing out’ process ensures that a victim remains a victim instead of becoming a ‘survivor’. By analysing the above facts one can in a sense say that rape is a social problem and has to be tackled socially. It is a problem which concerns all of us.

Rape prevention is a primary concern of all anti-rape activities. For the most part, prevention strategies focus on rape avoidance through risk awareness and self defence capability and on social change to eliminate attitudes and beliefs conducive to rape and victimisation. The aim of society should be to rid the larger social environment of attitudes and beliefs that contribute to an enormously high rape incidence.

IV. STRATEGIES TO PREVENT RAPE:

A girl I spoke with claimed:

Over the years, since I was molested I have become much more cautious. My awareness of the possibility of rape has dawned upon me so much that I am a lot more fearful of going out at night, meeting people. I haven’t been raped but I live in constant fear, and it drains me to even think about it. The realisation that it can happen almost anywhere, by anyone, is almost crucifying. In the past, I have hitched alone, walked in quiet and isolated places. Now I can do none of these things. I feel my

10 In the West, in terms of trauma counselling for women who had been raped, the use of the word “victim” was also rejected. It was construed as implying helplessness and failure, as indicating lack of subjectivity. “Victim” was seen as disempowering and negative. The word “survivor” became commonly used as it held connotations of recovery and resistance. The use of the word “victim” also implied that the presumed helplessness and failure continued beyond the time of the crime, implying an inability to recover and an immutability of the victim status. However, the fact is that there are very very few victims who become ‘survivors’. Rape myths (along with beliefs and attitudes) and in turn ‘rape culture’ ensures that rape is perpetuated over time by society. The social institutions often act as catalysts to this perpetuation.

11 It is here that Sociology can be used to widen our sympathies and imagination, and increase our understanding of other human beings outside the narrow circle of our own time, locality, and social situation, than that it simply provides means to discover the remedies for present ills.
sense of freedom to be crushed, while men do not experience this fear. This isn't fair!

How does one avoid being raped? Is the above strategy the only solution? Certainly these are important questions for both the public and researchers to ask. Unlike these questions, which seem so straightforward and simple, there is no one simple answer. The strategies to deal with rape needs to be multifaceted.

Rape, as emphasised earlier, is related to the following social conditions: (a) lack of rape information and understanding; (b) women's subordinate role and the sense of vulnerability that women develop as a result of sex-role specialisation in a patriarchal society; and (c) women's isolation from the family, community and society. The strategies at the outset should involve those which tackle the above mentioned issues along with creating awareness among people, formation of rape crisis centres.

Rape prevention remains an elusive goal in society. Each year seems to uncover more sexual assault and more evidence of its traumatic impact. Research into the societal causes, social costs, and psychological consequences of rape is more and more needed if preventive intervention on a nation-wide scale is to be accomplished. Cultural values and societal beliefs change slowly, usually in a climate that promote the consideration of new ideas and the testing of new behaviours. We still need to see whether that climate is available.

"Preventing" rape is a broad task- and as observed by Koss and Harvey (1991), the aims of specific rape prevention strategies can include any number of diverse goals, including the following:

- To break the 'silence' on rape and talk about it openly with ease;
- To eliminate the act of rape by scrutinising those beliefs, values and myths of our society that perpetuate and condone sexual assault;
- To deter attempted rapes by educating potential victims about avoiding risks and defending themselves;
• To attempt to reduce the trauma of rape by appropriate responses to the needs of victims;
• To prevent recurrence of rapes by incarceration and/or treatment of offenders.

There are a few approaches which have been highlighted in this direction, i.e., an effort towards preventing rape. One of the approach includes tackling the problem at the individualistic level and the other at the societal level. In real life, however, these cannot be disentangled.

The individualistic approach to avoiding rape examines aspects of the potential rape victim, including what she may do in order to secure personal safety. This approach, places the responsibility for avoiding rape victimisation mainly on the potential victim, and therefore runs the risk of creating an environment conducive to blaming the victim. This approach seeks to identify strategies that particular persons may employ to reduce their chances of being a victim. However, the fact is that to identify one universally successful strategy for avoiding rape is impossible. In the traditional approach, the responsibility for avoiding rape is placed solely on the woman. Experts who adhere to this approach emphasise that women should restrict their behaviour- and therefore reduce their freedom and independence- in order to secure their own protection. This is also called the deficit oriented approach to rape prevention (Koss & Harvey: 1991). This approach almost literally identifies "good" (day) and "bad" (night) times for a woman to be our alone or the "right" places to go to. Women are advised not to hitchhike, wear certain type of clothing, avoid certain kinds of people.

The message to remain passive in the face of attack has been popular among police and law enforcing agencies but it has been criticised by many. To restrict

12 Research that has used this level of analysis has, as an example, looked at personal factors of rape victims and the behaviours that potential rape victims could employ to avoid rape.

13 The point is how can women stop living? Why should everything they are about to do be defined by such insecurities? The fact is these things still restrict women from going to certain places and at certain times. It is a vicious circle.
women's behaviour so drastically that they are essentially prisoners in their own home may be an effective (but not foolproof) rape deterrent, but the consequences are not healthy for women, it's a denial of fundamental rights. Critics argue that the traditional view is necessarily oppressive, renders women powerless, and therefore serves to increase the differential power structure between men and women. Further, such advice may actually terrorise a woman more, by building fear and encourages women to see themselves as helpless. All these make for a situation more conducive for rape.

Another approach is called the empowered individual approach. This recognises a woman's responsibility for avoiding rape, but argues that this should be done by increasing women's power, not curtailing it. Instead of setting limits on what women should do, this approach proposes that women should have the same freedom as men to live their lives as they wish. This empowered individual approach advises women to be constantly aware of their surroundings, not afraid of them. If a woman does find herself confronted by an attacker, she is advised to defend herself aggressively and not give in to the attacker. The fact is that this approach is to a great extent very unrealistic for those women who are psychologically and physically unable to overcome an attacker. All these advises often renders the woman clueless and confused. However, trying out self-defence strategies would probably be a step forward. Doing something is better than doing nothing. Whether the attacker is a complete stranger or an acquaintance, active response strategies may be positively associated with rape avoidance. Immediate physical responses could be an important deterrent to rape. Although it is easy to say certain things theoretically, it is a totally different case when one is actually faced with rape.

14 What comes to mind are questions like, 'how many times do such strategies work?' 'Do they work at all?' 'Is it so easy to overcome a male who would be physically stronger most of the time?' The victims I talked with were mostly overpowered by their assailants. In a case or two, a weapon was used to terrorise the victim. Even though most tried to resist, they were overpowered with ease. Even in cases of molestation, fighting back is rarely successful.

15 In the questionnaire I administered to women and men, to the question whether women could successfully resist a rapist, about 25 per cent of the women said 'yes' and all the men (100 per cent) said 'yes'.
Maybe in certain cases, physical and active strategies could be more successful than passive strategies. It must be emphasised that in reality, there is no magical formula for avoiding rape. There have been and will be women who fight and still get raped. Physical action might not necessarily cause rape avoidance. There are too many other factors involved to make such a confident statement.16

To address the problem of rape on a societal level, one must examine the power differential between men and women, the attitudes traditionally held in society that perpetuate the myths about rape. It has emerged, even from this study, that the societal effects have a great bearing on rape. Certain societal mechanisms that affect rape incidence and inhibit its prevention may be:

- gender role socialisation patterns and power differentials that normalise rape by advancing rape supportive beliefs.
- Sexually coercive cognitive schemata and beliefs that encourage the tendency to blame the victim, and reduce society’s capacity to empathise.
- By challenging societal beliefs and cultural values that promote and condone sexual violence.
- To foil attempted rapes by educating potential victims about risks, risk avoidance and self defence.

No evidence has been produced that a truly egalitarian society exists— one in which men and women are considered equal. And there is not, nor has there ever been, a matriarchal society, where women controlled the resources of society. Hence the only possibility for true equality between the sexes— and the removal of the differential power structure— rests in its potential in the future.

Research suggests that ascribing more power to males in society increases the risk of rape for women (Sanday: 1981), removing such barriers to power for

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16 For instance, it also depends on the physical built of the woman/girl. A fellow student in college was successfully able to resist three men who tried to molest her in a moving bus. I must emphasise that she was very tall and well-built and a sportswoman (a basket ball, and cricket player in the college teams, she was also the sports captain of the college). What I am saying is that at times one’s presence of mind, physical capability is important in determining one’s actions.
women should decrease such a risk. Finally, it is up to society- and those who hold positions of power- to take responsibility for removing such barriers.

Some have suggested that the power differential between men and women in nearly all societies, which has been documented for centuries, created sex-role stereotypes as a justification for treating women differently. As long as traditional sex-role stereotypes and attitudes remain, so probably will rape. Earlier in the text it was documented the large roles that attitudes and beliefs may play in both the likelihood to rape and the condoning of aggression between the sexes. Social change takes time, and such beliefs or behaviours are not expected to change overnight.17

It has been reported how pervasive sex-role stereotypes have even influenced the study of rape itself. In the west, until the advent of women’s movement, research on rape was primarily done by male investigators from a clinical perspective rather than one reflecting an awareness of societal forces. The emphasis was on the diagnosis of rapists; as noted by White and Sorenson (1992), the experiences of victims were almost irrelevant in the early stage. More recently, the emphasis has shifted to the experiences of women and victims.

It has been urged that changes be made through education and awareness. These should include educational interventions specifically designed to change beliefs about rape and sexual violence. Mediums like the media (print and visual), schools etc., should be used extensively.18

There is no easy solution to preventing rape. The experts are unclear about the “best” strategy. However, research that has studied victims who have been attacked have found that those who used more active strategies were generally more likely to avoid being raped. Still, that does not solve the problem of

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17 Many people lay down strategies for change but are unable to implement them with utmost sincerity. The fact is that overall, healthy change can only come if all members of society make a conscious effort towards positive change. Changing one’s ideas may be difficult but not impossible.

18 Later, certain recommendations which are given by the Human rights groups, the Indian government, women’s commissions will be highlighted. In India, what is lacking in a big way, are crisis and counselling centres for victims of sexual violence. Even if they exist, they are not publicised enough.
preventing the possibility of attack. To do that requires focusing attention not on potential victims, but on the situations that create vulnerabilities for rape, on potential rapists, and on society in general.

If we as a society are going to prevent rape, we have to understand it. Even though it is possible to come to an understanding of rape, we do not see that rape is justifiable. Rape is a crime, it is an act of violence, and its consequences are dramatic. To attempt to prevent rape by focusing on the behaviour of the victim serves to perpetuate the myths and misconceptions about rape that has been discussed in the text earlier. Ultimately, all individuals are responsible for their own behaviour. It must be recognised that rape is a behaviour for which rapists must be held accountable. Society as a whole must recognise that all violence, including rape, is unacceptable behaviour.

The new millennium will pose continuing challenges to the sexual assault field and to activists, researchers, and clinical practitioners within the field. Scant resources will once again provide limited opportunity to build knowledge, change values and successfully instigate lasting change. The prevention of rape and the successful clinical treatment of its aftermath will require, once again, that advocates for legal reform and activists for community change mobilise a creative response to this challenge.

V. INDIAN STRATEGIES FOR CHANGE:
The Indian women’s movement was at its strongest during the 1980s especially in its initial sustained campaigns against violence perpetrated on women in public and in the family but the ardour soon died down (Agnes:1993). At the present juncture the women’s movement is at a somewhat critical juncture, face-to-face with rising communalism and casteism in the country which are splitting women’s solidarity, along religious and caste lines (cited in Haider:1998). Violence needs to be treated as a grave form of human rights violations and therefore an important subject of concern for women’s organisations across class/caste and party lines. The weakest point of the anti-rape campaign has
been the lack of sustained support to individual victims. There is not a single rape crisis centre in the country even after the decade long campaign is a reflection of this reality.

The focus of negative attention should be on the rapist and not on the victims. For this an effort should be made to change stereotypical myths and beliefs. The family and community can begin with such changes. Issues of honour and shame need to be redefined in this context. The fact is that isolating a rape victim might stigmatise her further and close all options for her. Perhaps the solution has to be rooted within the social support system.

Despite the tenacity of patriarchal institutions, sexist values and rape supportive beliefs, rape and rape trauma are being given more 'visibility' than before. While the attitudes and values of the larger society are still hostile to women who have been raped, a process of change seems to emerge in the form of recommendations for rape prevention by the government and the legal system, and women's organisations in the form of schemes and proposals for law reform. Some of the proposals are controversial and others have been accepted. Some of the proposals and schemes are discussed below:

One of the major steps taken by the legal system is the acknowledgement by the Supreme Court of India that Sexual Harassment at the workplace is a crime. On 13th August, the Supreme Court of India provided guidelines for this and held that the guidelines are legally binding and enforceable with immediate effect at the time, for the public and private and other institutions. Employers and employees both are equally responsible to stop the pervasive violation. In the absence of specific legislation relating to such offences, the court's guidelines to the Central and state governments was seen as an effective mechanism until such legislation was enacted. It is seen that nearly a year after the judgement, employers across the country have shown very little by way of a response to the court's directive. The apex court had defined sexual harassment, directed
government agencies to notify it as an offence, include it in their rules relating to conduct and discipline at the workplace and set up a complaint mechanism.\(^{19}\)

There was report of the Prime Minister announcing and launching a **Rape Insurance Scheme** on the 19th of March, 1999. The scheme is called *Rajeswari Mahila Kalyan Bima Policy*, meaning a policy for the welfare of women. The scheme is supposed to offer cover against rape and girls from 10 to women of 75 can be insured against rape. The premium amount is very low: Rs15 for a period of one to five years. The scheme offers compensation based on the degree of disability. In case of permanent disability the compensation offered is Rs.25000. For the loss of a limb or eye, it is 12,500; and if the victim becomes incapable of performing her previous normal functions (whatever that means) she would be offered Rs.25000.\(^{20}\) Rattled by the intensity of protests from women’s groups, General Insurance Company is having second thoughts on inclusion of rape in its new insurance cover scheme for women. The future of this scheme seems uncertain.

One of the main reasons for the spurt in abuse of women- the victims range from infant girls to elderly women- is the low rate of punishment of the guilty. The conviction rate in rape and dowry cases is deplorably low. To react to this, the Home Minister announced in October 1998 that there would be **Death Penalty for Rape**. It was claimed that the law would be amended soon to provide for capital punishment for rape, adding that the government held the view that rape should invite the most deterrent penalty. This has lead to varied

\(^{19}\) How effective this directive would be depends on the people and how they implement it. It is revealed that none of the state governments except Rajasthan (which was the respondent in the case which lead to the judgement) have even bothered to issue notifications. It seems that the court’s directive was not being followed with immediate effect. Here too, one can sense apathy in a serious issue.

\(^{20}\) I want to highlight that compensation for rape in certain cases has gone upto Rs.10 lakh also (as in the case of Uttarakhand rape victims). This scheme, in a sense, tends to highlight the heinous nature of the crime by stating the kind of physical disability it could lead to. However, in a sense, it is alleged that the rape provision implies that all women should regard rape as a possibility and insure themselves against it. Instead of helping in the creation of safe and free environment where women can live without fear and with dignity, this scheme absolves the Government, the police and the society at large of its responsibilities by institutionalising rape. It
responses from different members of society. Legal experts have called this proposal "populist and impractical" and claimed that this would lead to rapists escaping punishment. Some feel that death sentence would not deter people from committing a crime.\textsuperscript{21}

A major legal breakthrough has been made in the field of legal reform by the supreme court of India. The sensitive judgement passed has been discussed in the previous chapter, it mainly talks of a soft approach towards the victim of sexual violence. The main thing however is that it needs to be implemented with responsibility and accountability.

Some **Legal Reform** measures have been proposed by women's organisations in the existing rape laws:

The **National Commission for Women** is preparing a detailed draft on amendments to the 'obsolete' rape laws. This draft is an outcome of years of concerted effort of women's organisations across the country, which have been lobbying hard for a complete overhaul of the country's rape laws. The proposals under consideration include public shaming/ ostracisation of the accused, even death penalty and severe enhancement of punishment where the accused is also HIV- positive and has passed on the infection to the victim.\textsuperscript{22} Other suggestions mooted in the draft include uniformity in the age of 'consensual sex' as defined under Section 375 and 376 of the IPC to bring it in conformity with the Child Marriage Restraint Act, 1929. In other words, the age of consent should be 18 years, and a child below that age should be treated as a 'minor', both in the case of rape or marriage.

\textsuperscript{21} It is felt, by many legal experts that the judges would be adverse to awarding the extreme penalty, which is to be given in the "rarest of rare cases". Even now many judges have been very light in their approach towards punishment (for rape), they would therefore be very cautious in giving a death sentence. It is recommended that better sentencing facility be granted with some discretion from the judge. Some legal experts claim that compensation to the victims would help in crime deterrence.

\textsuperscript{22} This is suspected to have happened many times in the past although the matter is seldom reported.
The NCW proposes the insertion of a statutory provision in the rape laws to allow adequate compensation and provisions for counselling for the victims. The commission also suggests a cut in the red tape and the adoption of prompt methods in bringing the accused to book.

Other recommendations suggested (as cited in their booklet, *In pursuit of Justice Empowerment Equality- Initiatives of NCW 1995-1997*) by the NCW include those related to *Child Rape*:

- A new Section 166-A may be included providing for public servants disobeying any direction of law.
- Section 354 of the IPC dealing with the use of criminal force to outrage modesty of a woman should be amended by increasing the age of majority to 18 years.
- Insert Section 376-A to 376-D providing for punishment for offences committed against children.
- A separate offence of Eve-teasing and the punishment therefore should be introduced.

*Child Rape Ordinance 1996:*

The Commission has proposed for widening the definition of the child by increasing the age to 18 years from 16 years. Further it was also proposed to give more stringent punishment to the culprits; of child rape. A new section was also proposed under IPC to include the offence of incest. Further more stress was to be laid on investigation by women police officials and by women prosecutors to be presided over by women judges.

*Regarding the Code of Criminal Procedure:*

- The statement of a rape victim under 12 years and the woman outraged under Sec. 354 and 376 of IPC should be recorded only by a female police officer or person so authorised by the woman. Section 167 should be amended to provide that when the person is under 18 years of age, the detention of such person should be authorised to be in the custody of a remand home or a recognised social institution.
• The investigating relating to rape, should also include medical examination of the victim, and the investigation should be conducted in camera.

Related to Violence Against Women:

• Reviewing/monitoring bodies set up at district level to deal with complaints of violence against women, should be strengthened with more powers, appropriate status and financial and staff support.

• A special scheme should be introduced by the central government to provide financial support to NGOs for dealing with cases of violence against women.

• A gender sensitisation module should be incorporated in all the training programmes for police, prosecutors, magistrates, forensic and medico legal personnel and judiciary.

• In case of a rape reported by the victim, the burden of proof to the contrary should be on the accused.

• A National Citizens' Forum should be set up to initiate action against those screening programmes portraying vulgarity and violence against women. Women involved in issues of violence etc., should be included in Censor Boards.

• At block and panchayat levels, social action groups should be formed and empowered to register and forward the cases of violence against women taking place in the area to police and courts and help victims get appropriate rehabilitation.

• The media should popularise the ideas and thoughts with human values to develop a national character. It is essential to evolve a national media policy which will arrest violence and vulgarity.

An important area which needs to be looked at critically is the Section 155 (4) of the Indian Evidence Act. The fear of going into court and being verbally harassed and raped prevents women from coming forward and speaking up. Cross examining a victim on her chastity and past sexual history was also the law in many other countries, including the United States and parts of Europe.
The difference is that all these countries have reformed because they realised that it is an ill-founded law that prevented rape victims from coming forward and therefore encouraged rapists. The UN has already put together a new evidence code, which says clearly that prior sexual conduct of the victim shall not be admitted as evidence. The International Covenant for Civil and Political Rights, of which India is a signatory, talks about the need to protect the privacy and unlawful attacks on honour and reputation.23

Violence explodes one's hopes for peace and unity. It polarises and destroys individuals, groups and nations. Hourly reports of violence brings numbness, shock, confusion and sorrow. We live in a world which is getting more and more violent each day. Violence increasingly is threatening our struggle for existence in terms of both survival and quality of life.

As discussed earlier, women face specific forms of violence. Such violence and the continued sense of insecurity that is instilled in women as a result keeps them bound to the home, economically exploited and socially suppressed. In the struggles against violence in the family, society and state, it is recognised that the state is often one of the main sources of violence and stands behind the violence committed by members in the family, the work place and neighbourhood. It plays a double edged role of exploiter and protector. A distinctive feature of violence in this context is the acceptance of the specificity of violence on women. Violence on women cannot be equated to general violence because there is an added dimension of being sexually harassed. However, we are aware that violence is inherent in all social structures of society like class, caste, religion, ethnicity etc., and in the way the state controls people. However, within all these general structures of violence, women suffer violence in a gender specific way and patriarchal violence permeates and promotes other forms of violence.....rape is always inflicted on women and is routinely inflicted

23 The Declaration for Basic Principles of Justice for Victims of Crime, adopted by the UN in 1994, talks about the need for judicial process in every country to protect a victim's privacy. India is clearly not keeping in modern trend of progressive democratic nations(The Times of India, 12-11-1998).
in violent conflicts...women on the other hand, are powerless to retaliate because of their resourcelessness, economic and emotional dependence.

At this juncture it is important to emphasise the fact that rape as a form of violence occurs in all kinds of structures. Men from the working and landless class may also rape their own women i.e., people within the same caste/class groups may rape their own women. A distinctive feature of violence in this context is the acceptance of the specificity of violence on women. Violence on women cannot be equated to general violence because there is an added dimension of being sexually harassed. However, we are aware that violence is inherent in all social structures of society like class, caste, religion, ethnicity etc., and in the way the state controls people. However, within all these general structures of violence, women suffer violence in a gender specific way and patriarchal violence permeates and promotes other forms of violence.....rape is always inflicted on women and is routinely inflicted in violent conflicts...women on the other hand, are powerless to retaliate because of their resourcelessness, economic and emotional dependence. Women experience violence in a variety of ways. The forms of violence could be divided into family, social and state violence, to which caste, class and communal violence could be added. For instance, rape occurs within the family, within the wider social set-up and as a direct assault of the state.

VI. RAPE, HUMAN RIGHTS AND THE INTERNATIONAL AGENDA:
Violence against women is a global problem that occurs in the public and private domains, instilling fear and insecurity in many women’s lives. It is pervasive, and yet often invisible. Though some types of violence against women, such as rape have long been considered criminal acts, it is only recently that violence against women has been recognised as a violation of basic human rights. The Fourth World Conference on Women in Beijing in 1995 established clearly that women are a global force for the 21st century and that women’s human rights are central to women’s
leadership for the future. Women’s rights as human rights permeated debates and delegates’ speeches at the official UN inter-governmental conference as well as at the parallel Non Government Organisation Forum held some thirty miles away at Huairou, where it was a palpable presence in many sessions. The combined affect of these activities was a groundswell of support for making the entire platform an affirmation of the Human rights of women, including women’s rights to education, health, and freedom from violence, as well as to exercise of citizenship in all its manifestations. Previous UN women’s conferences were seen as primarily about women and development or even women’s rights, but not about the concept of human rights as it applies to women.

Every individual has dignity. The principles of human rights were drawn up by human beings as a way of ensuring that the dignity of everyone is properly and equally respected, that is, to ensure that a human being will be able to fully develop and use human qualities such as intelligence, talent and conscience and satisfy his or her spiritual and other needs. Dignity gives an individual a sense of value and worth. The existence of human rights demonstrates that human beings are aware of each other’s worth. Human dignity is not an individual, exclusive and isolated entity. It is a part of our common humanity. The denial of human rights and fundamental freedoms not only is an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations.

In this light, rape must be seen as a grave violation of the human rights of a woman. Because the act of rape is aptly described as a criminal and violent attack on the body, mind and the fundamental human rights of a woman. Rape should not be viewed as primarily a sexual offence. By being an offence of violence, it goes against the primary obligation laid down in the Universal Declaration of Human Rights which has "reaffirmed its faith in fundamental human rights, in the dignity and worth of the human person and in the equal
rights of men and women. Usually, a double standard is revealed between rape and other acts of violence. Why? Probably because of the patriarchal values of society which sanctions a man's right to control and dominate a woman. Rape is not primarily sexually motivated crime—it is intended to inflict violence and humiliation.

One of the greatest achievements of the United Nations is the creation of a comprehensive body of human rights legislation. For the first time in history, there exists a universal code of human rights one to which all nations can subscribe and to which all people can aspire.

The main point to be grasped is that human rights should be understood at a local level by all the people. The reality is that after so many years of enhancement of human rights in most places, there is still exploitation, subordination and discrimination. Women's rights are not regarded as human rights in most places. We must look to local women's groups to develop strategies for moving beyond cosmetic socio-political reforms or there will always be oppression, conflict, repression and social injustice.¹⁴

My attempt in this study was to understand the phenomenon of rape in society. I feel that rape largely remains a misunderstood crime. Incorrect information still abounds about the frequency of rape, the characteristics of rapists, and the recovery of survivors. Focus falsely remains on the victim as an instigator of most rapes. Sexual assault is still treated casually by people who should know better.

We as members of society need to understand that rape is a very grave human rights violation of an individual. Instead of driving victims of rape 'out

¹⁴ It is of utmost importance to reach women at the grassroots level and to facilitate methodologies and processes by which they can: articulate their issues and agendas; learn about formal (legal) mechanisms for prevention, protection, and defence; develop alternative, non-formal mechanisms of defence; and formulate various strategies for action. For instance, in the case of sexual violence it is important for most women to understand their rights. They must understand first and foremost that violence in any form is a violation of their basic rights. Another point I would like to highlight here is that many times women don't even accept that they have any rights, for them, violation of those rights might not even be an issue.
of society', we need to make all efforts to make them feel very much part of society.