CHAPTER 3
LEGISLATIVE APPROACH TOWARDS LAW OF RAPE- A PERSPECTIVE STUDY

3.1 General Introduction

3.1.1 The laws of Rape have undergone vast changes all over the globe. Countries, whether common law or civil, have attempted to strengthen its provisions so as to afford the highest level of protection to the hapless victims of this crime. Thus, in some places, the word 'rape' has been substituted with 'sexual assault' or 'sexual coercion'; in some places, it has been made gender-neutral; in some others, the element of 'consent' has been done away with, while in few others, marital rape has been recognized. The present writer has begun the chapter by examining the international developments aimed at reducing violence against women and recognizing their human right to live a violent free dignified existence. Thereafter, the legislative provisions as regards rape of some countries of the world has been laid down; thereafter an in-depth analysis of our country's own laws has been attempted in order to understand how far we have been able to internalize the global trends towards a non patriarchal gender-friendly law.
3.2 International Milestones in Addressing Violence against Women - A Brief Overview

3.2.1 Several International developments have taken place over the years with regard to violence against women. A brief overview of the same may be provided before embarking on the laws of rape in particular.

3.2.2 The Convention on the Elimination of All Forms of Discrimination Against Women, 1979, guarantees women equal rights with men in all spheres of life, including education, employment, health care, vote, nationality, and marriage.

3.2.3 The World Conference on Human Rights, Vienna, 1993, affirmed that women’s human rights are a fundamental part of all human rights. The Declaration asserted for the first time that women’s human rights must be protected, not only in courts, prisons, and other areas of public life, but also in the home. Progress made in implementing the Vienna Declaration was reviewed at the March–April 1998 session of the UN Commission on Human Rights.

3.2.4 The 1993 UN Declaration on the Elimination of Violence against Women for the first time provided a definition of violence, and included psychological violence in the definition.

3.2.5 The International Conference on Population and Development (ICPD), Cairo, 1994 affirmed that women's rights are an integral part of all human rights. It stressed that "population and development programmes are most effective when steps have simultaneously been taken to improve the status of

women". Women's empowerment was a central theme of the conference. The recommended actions for governments included prohibiting the trafficking of women and children, promoting discussion of the need to protect women from violence through education, and establishing preventative measures and rehabilitation programs for victims of violence. ICPD was the first international forum to acknowledge that enjoyment of sexual health is an integral part of reproductive rights.

3.2.6 The UN Fourth World Conference on Women, Beijing, 1995 recognized that "all governments, irrespective of their political, economic, and cultural systems, are responsible for the promotion and protection of women's human rights". This document also specifically declared that violence against women is one of the 12 critical areas of concern and is an obstacle to the achievement of women’s human rights. Section 106(q) states that countries should "integrate mental health services into primary health-care systems or other appropriate levels, develop supportive programs and train primary health workers to recognize and care for girls and women of all ages who have experienced any form of violence, especially domestic violence, sexual abuse, or other abuse resulting from armed and non-armed conflict".

3.2.7 Thus, recognition of human rights of women has been the core element of all international conferences and conventions. Women are entitled to a free, peaceful and dignified existence, devoid of violence or abuse. The countries of the world have accordingly designed laws to curb violence against women.

\[ id. \]
3.3 United States:

3.3.1 Part I of the Code of Criminal Law And Criminal Procedure (Title 18, United States Code) deals with Crimes. The offence of rape, termed as 'sexual abuse' under the Code, has been conceived of in special situations and punishments have been prescribed accordingly. They are as under:

Sec. 2241. - Aggravated sexual abuse

(a) By Force or Threat. -

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act -

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By Other Means. -

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly -

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or
(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby -

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(e) With Children.

Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.
(d) State of Mind Proof Requirement. -

In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

Sec. 2242. - Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly -

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is -

   (A) incapable of appraising the nature of the conduct; or

   (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both

Sec. 2243. - Sexual abuse of a minor or ward

(a) Of a Minor. -
Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who -

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a Ward. -

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is -

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses. -

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence,
that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of Mind Proof Requirement. -

In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew -

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging

Sec. 2244. - Abusive sexual contact

(a) Sexual Conduct in Circumstances Where Sexual Acts Are Punished by This Chapter. -

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate -

(1)
section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2)

section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3)

subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4)

subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.

(b) In Other Circumstances. -

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.

(c) Offenses Involving Young Children. -
If the sexual contact that violates this section is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

**Sec. 2245. - Sexual abuse resulting in death**

A person who, in the course of an offense under this chapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

**Sec. 2246. - Definitions for chapter**

As used in this chapter -

(2) the term "sexual act" means -

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

3.4 Germany:

3.4.1 Chapter Thirteen of the German Criminal Code\(^3\) deals with "Crimes Against Sexual Self-determination". It lays down as under:

Section 174: Sexual Abuse of Wards

(1) Whoever commits sexual acts:

1. on a person under sixteen years of age who is entrusted to him for upbringing, education or care in leading his life;

---

\(^3\) Promulgated on 13 November 1998 (Federal Law Gazette I, p. 945) p. 3322 (Translated).
2. on a person under eighteen years of age who is entrusted to him for upbringing, education or care in leading his life or who is a subordinate within the framework of an employment or a work relationship, by abusing the dependence associated with the upbringing, educational, care, employment or work relationship; or

3. on his natural or adopted child who is not yet eighteen years of age, or allows them to be committed on himself by the ward, shall be punished with imprisonment for not more than five years or a fine.

(2) Whoever, under the prerequisites of subsection (1), numbers 1 to 3:

1. commits sexual acts in front of the ward; or

2. induces the ward to commit sexual acts in front of him, in order to thereby sexually arouse himself or the ward, shall be punished with imprisonment for not more than three years or a fine.

(3) An attempt shall be punishable.

(4) In cases under subsection (1), number 1 or subsection (2) in conjunction with subsection (1), number 1, the court may dispense with punishment pursuant to this provision, if, taking into consideration the conduct of the ward, the wrongfulness of the act is slight.

Section 174a: Sexual Abuse of Prisoners, Persons in the Custody of a Public Authority, and Persons in Institutions Who are Ill or in Need of Assistance

(1) Whoever commits sexual acts on a prisoner or a person in custody upon order of a public authority, who is entrusted to him for upbringing, education, supervision or care, by abusing his position, or allows them to be committed on
himself by the prisoner or person in custody, shall be punished with imprisonment for not more than five years or a fine.

(2) Whoever abuses a person who has been admitted as an in-patient to an institution for persons who are ill or in need of assistance and entrusted to him for supervision or care, in that he commits sexual acts on the person by exploiting the person's illness or need of assistance, or allows them to be committed on himself by the person, shall be similarly punished.

(3) An attempt shall be punishable.

Section 174b: Sexual Abuse by Exploiting a Position in a Public Office

(1) Whoever, as a public official who is charged with participation in a criminal proceeding or a proceeding to order a measure of reform and prevention involving deprivation of liberty or custody imposed by a public authority, and by abusing the dependency caused by the proceedings, commits sexual acts on the person against whom the proceedings are directed, or allows them to be committed on himself by the person, shall be punished with imprisonment for not more than five years or a fine.

(2) An attempt shall be punishable.

Section 174c: Sexual Abuse by Exploiting a Counseling, Treatment or Care Relationship

(1) Whoever commits sexual acts on a person who is entrusted to him for counseling, treatment or care due to a mental or an emotional illness or
disability including an addiction, by abusing the counseling, treatment or care relationship, or allows them to be committed on himself by the person, shall be punished with imprisonment for not more than five years or a fine.

(2) Whoever commits sexual acts on a person entrusted to him for psychotherapeutic treatment by abusing the treatment relationship, or allows them to be committed on himself by the person, shall be similarly punished.

(3) An attempt shall be punishable.

Section 176: Sexual Abuse of Children

(1) Whoever commits sexual acts on a person under fourteen years of age (a child), or allows them to be committed on himself by the child, shall be punished with imprisonment from six months to ten years, and in less serious cases with imprisonment for not more than five years or a fine.

(2) Whoever induces a child to commit sexual acts on a third person, or to have them committed on the child by a third person, shall be similarly punished.

(3) Whoever:
   1. commits sexual acts in front of a child;
   2. induces the child to commit sexual acts on his own body; or
   3. exerts influence on a child by showing him pornographic illustrations or images, by playing him audio recording media with pornographic content or by corresponding speech,

shall be punished with imprisonment for not more than five years or a fine.

(4) An attempt shall be punishable; this shall not apply for acts under subsection (3), number 3.
Section 176a: Serious Sexual Abuse of Children

(1) The sexual abuse of children shall be punished with imprisonment for no less than one year in cases under Section 176 subsections (1) and (2), if:
1. a person over eighteen years of age completes an act of sexual intercourse or similar sexual acts with the child, which are combined with a penetration of the body, or allows them to be committed on himself by the child;
2. the act is committed jointly by more than one person;
3. the perpetrator by the act places the child in danger of serious health damage or substantial impairment of his physical or emotional development; or
4. the perpetrator has undergone a final judgment of conviction for such a crime within the previous five years.

(2) Whoever, in cases under Section 176 subsections (1) to (4), acts as a perpetrator or other participant with the intent of making the act the object of a pornographic writing (Section 11 subsection (3)), which is to be disseminated pursuant to Section 184 subsections (3) or (4), shall be punished with imprisonment for not less than two years.

(3) In less serious cases under subsection (1), imprisonment from three months to five years shall be imposed, in less serious cases under subsection (2), imprisonment from one year to ten years.

(4) Whoever, in cases under Section 176 subsections (1) and (2):
1. by the act seriously physically maltreats the child; or
2. by the act places the child in danger of death,
shall be punished with imprisonment for not less than five years.
(5) The time in which the perpetrator is in custody in an institution pursuant to order of a public authority shall not be credited to the term indicated in subsection (1), number 4. An act as to which judgment was rendered abroad shall be deemed equivalent in cases under subsection (1), number 4, to an act as to which judgment was rendered domestically, if under German criminal law it would have been such an act under Section 176 subsections (1) or (2).

Section 176b: Sexual Abuse of Children Resulting in Death

If by the sexual abuse (Sections 176 and 176a) the perpetrator at least recklessly causes the death of the child, then the punishment shall be imprisonment for life or for not less than ten years.

Section 177: Sexual Coercion; Rape

(1) Whoever coerces another person:

1. with force;
2. by a threat of imminent danger to life or limb; or
3. by exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence,

to suffer the commission of sexual acts of the perpetrator or a third person on himself or to commit them on the perpetrator or a third person, shall be punished with imprisonment for not less than one year.

(2) In especially serious cases the punishment shall be imprisonment for not less than two years. An especially serious case exists, as a rule, if:
1. the perpetrator completes an act of sexual intercourse with the victim or commits similar sexual acts on the victim, or allows them to be committed on himself by the victim, which especially degrade the latter, especially if they are combined with penetration of the body (rape); or
2. the act is committed jointly by more than one person.

(3) Imprisonment for not less than three years shall be imposed, if the perpetrator:
1. carries a weapon or another dangerous tool;
2. otherwise carries a tool or means in order to prevent or overcome the resistance of another person through force or threat of force; or
3. places the victim by the act in danger of serious health damage.

(4) Imprisonment for not less than five years shall be imposed, if:
1. the perpetrator uses a weapon or another dangerous tool during the act; or
2. the perpetrator: a) seriously physically maltreats the victim through the act; or b) places the victim in danger of death through the act.

(5) In less serious cases under subsection (1), imprisonment from six months to five years shall be imposed, in less serious cases under subsections (3) and (4), imprisonment from one year to ten years.

Section 178: Sexual Coercion and Rape Resulting in Death

If the perpetrator through sexual coercion or rape (Section 177) at least recklessly causes the death of the victim, then the punishment shall be imprisonment for life or for not less than ten years.
Section 179: Sexual Abuse of Persons Incapable of Resisting

(1) Whoever abuses another person who is incapable of resisting:

1. because of a mental or emotional illness or disability, including an addiction or because of a profound consciousness disorder; or
2. physically,

in that he, by exploiting the incapability of resisting, commits sexual acts on the person, or allows them to be committed on himself by the person, shall be punished with imprisonment from six months to ten years.

(2) Whoever abuses a person incapable of resisting (subsection (1)), in that he induces the person, by exploiting the incapability of resisting, to commit sexual acts on a third person, or to allow them to be committed on the person by a third person, shall be similarly punished.

(3) An attempt shall be punishable.

(4) Imprisonment for no less than one year shall be imposed, if:

1. the perpetrator completes an act of sexual intercourse or similar sexual acts with the victim, which are combined with a penetration of the body, or allows them to be committed on himself by the victim;
2. the act is committed jointly by more than one person; or
3. by the act the perpetrator places the victim in danger of serious health damage or substantial impairment of his physical or emotional development.

(5) In less serious cases under subsections (1), 2 and 4, imprisonment from three months to five years shall be imposed.

(6) Sections 176a subsection (4), and 176b shall apply correspondingly.
3.5 **Australia:**

3.5.1 In Australia, the Criminal Code Act, 1995, deals with the offence of rape in the following manner:

**71.8 Unlawful sexual penetration**

(1) A person is guilty of an offence if:

(a) the person sexually penetrates another person without the consent of that person; and

(b) that other person is a UN or associated person; and

(c) the UN or associated person is engaged in a UN operation that is not a UN enforcement action; and

(d) the first-mentioned person knows about, or is reckless as to, the lack of consent.

Maximum penalty: Imprisonment for 15 years.

Maximum penalty (aggravated offence): Imprisonment for 20 years.

(2) Strict liability applies to paragraphs (1)(b) and (c).

(3) In this section:

*sexually penetrate* means:

(a) penetrate (to any extent) the genitalia or anus of a person by any part of the body of another person or by any object manipulated by that other person; or

(b) penetrate (to any extent) the mouth of a person by the penis of another person; or
(c) continue to sexually penetrate as defined in paragraph (a) or (b).

(4) In this section, being reckless as to a lack of consent to sexual penetration includes not giving any thought to whether or not the person is consenting to sexual penetration.

(5) In this section, the genitalia or other parts of the body of a person include surgically constructed genitalia or other parts of the body of the person.

"268.14 Crime against humanity—Rape

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator sexually penetrates another person without the consent of that person; and
(b) the perpetrator knows of, or is reckless as to, the lack of consent; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) A person (the perpetrator) commits an offence if:

(a) the perpetrator causes another person to sexually penetrate the perpetrator without the consent of the other person; and
(b) the perpetrator knows of, or is reckless as to, the lack of consent; and
(c) the perpetrator’s conduct is committed intentionally or
 knowingly as part of a widespread or systematic attack
directed against a civilian population.
Penalty: Imprisonment for 25 years.

(3) In this section:

\textit{consent} means free and voluntary agreement.

The following are examples of circumstances in which a person does not
consent
to an act:

(a) the person submits to the act because of force or the fear of force
to the person or to someone else;

(b) the person submits to the act because the person is unlawfully
detained;

(c) the person is asleep or unconscious, or is so affected by alcohol
or another drug as to be incapable of consenting;

(d) the person is incapable of understanding the essential nature of
the act;

(e) the person is mistaken about the essential nature of the act (for
example, the person mistakenly believes that the act is for
medical or hygienic purposes);

(f) the person submits to the act because of psychological
oppression or abuse of power;

(g) the person submits to the act because of the perpetrator taking
advantage of a coercive environment.

(4) In this section:

\textit{sexually penetrate} means:
(a) penetrate (to any extent) the genitalia or anus of a person by any part of the body of another person or by any object manipulated by that other person; or
(b) penetrate (to any extent) the mouth of a person by the penis of another person; or
(c) continue to sexually penetrate as defined in paragraph (a) or (b).

(5) In this section, being reckless as to a lack of consent to sexual penetration includes not giving any thought to whether or not the person is consenting to sexual penetration.

(6) In this section, the genitalia or other parts of the body of a person include surgically constructed genitalia or other parts of the body of the person.”

3.6 China:

3.6.1 Chapter IV of the Criminal Law of the People's Republic of China deals with 'Crimes of Infringing Upon the Rights of the Person and the Democratic Rights of Citizens'.

Article 236 of the Chapter lays down that:

---

*Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997.*
Whoever, by violence, coercion or other means, rapes a woman is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment.

Whoever has sexual relations with a girl under the age of 14 is to be deemed to have committed rape and is to be given a heavier punishment.

Whoever rapes a woman or has sexual relations with a girl involving one of the following circumstances is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death:

1. rape a woman or have sexual relations with a girl and when the circumstances are odious;
2. rape several women or have sexual relations with several girls;
3. rape a woman in a public place and in the public;
4. rape a woman in turn with another or more persons;
5. cause the victim serious injury, death, or other serious consequences.

3.7 India:

3.7.1 Macaulay’s draft on Rape and subsequent changes

3.7.1.1 Thomas Babington Macaulay, a distinguished personality and an unforgettable character in Indian Legal history, accomplished the Herculean task of framing the Indian Penal Code. In 1837, he presented the draft to Lord

---

5 The Law Commission, over which Macaulay presided, also, consisted of Messers Cameron, Anderson and Mcleod. Later Millet was appointed as a member. The former were ill during most of the time that the Code was drafted and Millet had been given other work by the Govt. Consequently most of the work was done by Macaulay.
Auckland in council. In Macaulay’s draft, the provisions were called ‘clauses’. Under the heading ‘offences against human body’, clauses 359 and 360 dealt with the offence of rape. The former read as under:

“A man is said to commit rape, who, except in the cases hereinafter excepted, has sexual intercourse with a woman under the circumstances falling under any of the five following descriptions:

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 consent when she is under nine years of age.

Exception: Sexual intercourse by a man with his wife, is in no case rape.”
3.7.1.2 Clause 360 stipulated the punishment for rape to be not more than fourteen years and not less than two years, with or without an additional fine.

3.7.1.3 A careful reading of the above clauses reveals that the offence of rape was based on two elements: consent and status of woman, i.e. whether she was married or unmarried. These elements involve certain facts which appear objectionable and contrary to feminine interests.

3.7.1.4 Consent is the most important component in the offence of rape. If there is consent to the act of sexual intercourse, it does not amount to rape; but in the absence of consent, the act becomes an offence of rape. What is significant therefore, is to find out whether the woman concerned consented or not. However, mere consent is not enough; what is needed is 'real consent'. In other words, consent may be active or passive. Active consent involves a free and voluntary participation of the woman in the act of sexual intercourse. Passive consent, on the other hand, signifies mere submission, acquiescence or non-resistance of the woman.

3.7.1.5 Consent, therefore, in all cases must be real in order to vitiate a charge of rape. But in Macaulay's draft on rape, this aspect was not clearly enumerated. There was little or no distinction between active consent and

---

6 There were two clauses on 'consent' in Macaulay's draft:
Clause 30: the words 'free consent' denote a consent given to a party who has not obtained that consent by directly or indirectly putting the consenting party in fear of injury. Clause 31: The words 'intelligent consent' denote a consent given by a person who is not, from young, mental imbecility, derangement, intoxication or passion, unable to understand the nature and consequences of that to which he gives his consent.
passive submission. It was possible for the defense to take advantage of the shy, timid or soft nature of the victim and thereby establish her consent to the act, which was nevertheless done without her real consent.

3.7.1.6 In the second place, rape could be committed only when consent had been obtained by subjecting the woman herself to fear of death or hurt. It naturally implied that force used on anyone else close to the woman, in order to extract her consent, would not make out an offence of rape. In India, where relations are very strong and family bonds unbreakable, it would be natural for a woman to submit herself, although unwillingly, to unreasonable and humiliating demands in order to save another's life, especially when that other person happens to be her husband or child. Her honor is, no doubt, dear to her but nothing is more precious than the 'lives' of those persons. Sub-clause Thirdly, however failed to recognize that fact. Furthermore, we feel that it was built upon the idea of stiff resistance being put on the part of the woman, which in turn, necessitated the presence of external marks of injury on her body. Such a requirement appears to be redundant, especially when the charges are made days after the occurrence of the event or where the woman failed to react violently due to shock or fear. In such cases, it is more likely, that the accused would be acquitted, rather than convicted of the offence because the charges would be extremely difficult to prove. We may say that the provisions had been drafted very loosely- in a manner which could operate to the advantage of the accused.
3.7.1.7 Thirdly, our attention may be directed to sub clause fourthly. It afforded an opportunity only to a married woman to bring a charge of rape. If she was not married, she had no right to give consent and the very fact that she gave it was sufficient to acquit the man. "Yet matrimony was no proof that the woman was of good character and that question was open to factual proof."\(^7\)

3.7.1.8 Moreover, at the time when Macaulay's draft was made, it was natural for a man to keep concubines. These women, though not legally married, spent their lives with a single man. Unfortunately, sub clause fourthly failed to include the plight of these women who could easily be exploited by other men in society. Perhaps, Macaulay felt that extending the provision to such women would pose a greater danger — it might encourage the system of concubinage or loosen the high standards of morality in society. Or perhaps Macaulay was totally unaware of the prevalence of such a system in India as he was a stranger to the country.

3.7.1.9 The next aspect which deserves attention is sub-clause fifthly. It spoke of sexual intercourse with a girl below the age of nine years, which in all cases, was rape. The question which strikes us immediately is—what about a girl who is above nine years? Is she matured enough to give consent to sexual intercourse or does she understand the nature and consequences of it when she consents? We feel that in India girls reach their maturity at a much later stage. This is true especially of girls belonging to remote areas wherein there is no education, no media- no means at all by which one can enlighten oneself.

About 150 years ago, the situation was worse. Girls were confined within the four walls of the house, there was absolutely no education for them. Due to ignorance or curiosity, if any girl consented to sexual intercourse, the law probably preferred to close its doors on her face, rather than punish the accused for taking advantage of her innocence. The reasons which prompted Macaulay to stipulate the age of nine years are unknown. We could only say that it was wrong on his part to do so, because, though girls at that time were married off at early ages, Macaulay should have understood that attainment of puberty need not coincide with attainment of sufficient understanding and knowledge.

3.7.1.10 Again, in Macaulay's draft, "there is preference of the rights of husband over his wife against the wife's right to herself." That was why the wife was not entitled to accuse her husband of rape. This provision, based on common law, was not suitable to Indian conditions, especially when child marriages were rampant. The low age of marriage should have necessitated the law commissioners to afford protection from non-consensual sexual assaults on child brides, who were invariably weak and vulnerable. But Macaulay was much engrossed with the English Criminal Law system and thereby failed to realize the injury which the alien provisions could do on Indian soil, if implemented.

3.7.1.11 Another interesting fact, which should not be lost sight of, was the wide range of punishment prescribed for rape in clause 360. The underlying

---

* ibid., at p.113.
idea behind it was that caste, class and status of a woman determined the quantum of injury or pain inflicted upon her and punishments had to vary accordingly. Though the above proposition seems absurd, the Law Commissioners put a lot of emphasis on it. In their words⁹, "On the one hand, let us take the case of a high caste female, who would sacrifice her life to her honor, contaminated by the embrace of a man of low caste, say a Chandala or a Pariah. On the other hand, that of a woman without character or any pretension to purity, who is wont to be easy of access. In the latter case, if the woman from any motive refuses to comply with the solicitations of a man, and is forced by him, the offender ought to be punished, but surely the injury is infinitely less in this instance than in the former."

3.7.1.12 Macaulay thus, seemed to be hesitant in extending the protection to all classes of women. Only those of the higher castes were to be safeguarded from evil because to him, their honors were more precious than that of their lowly sisters. Women of the poorer sections of society (which incidentally is more in Indian society) were more likely to be exploited and used by the powerful classes, mainly due to their low economic and social status. But for Macaulay it made little difference; the draft he enacted was for the higher strata of society, not the whole of it.

3.7.1.13 To sum up, we may say that Thomas Babington Macaulay had done a fairly good job while drafting the provisions of rape. Perhaps, nobody in his time, i.e., more than 150 years ago, could have drafted a better Penal Code. He

had crystallized the law in a definite way and given it a proper shape. But the shortcoming which was very prominent from the wordings of his draft was his lack of knowledge of Indian culture and heritage. He had no deep understanding about India and did not even want to know the country for which he had to draft a Penal Code. What he knew was that it was a colony which was being blessed by British rule.

3.7.1.14 Macaulay claimed that his Penal Code was based, not on the laws of any country, but on rational and humanitarian principles.\textsuperscript{10} Though this statement might be true to certain extent, we are unable to accept it fully because his draft, especially his provisions on rape reflected Victorian notions of morality. The low status of women in England in those days, her limited, almost negligible, rights and the high standards of sexual morality, expected of her, were visible in every wording of clause 359. It is not something we could say to be true ‘Indian’ in letter and spirit. If it had been so, masculine superiority and female inferiority would not have been so apparent. Ancient India believed in equality of men and women. There was no difference between them as regards rights or status. Though a patriarchal society, ancient India conferred on women the highest degree of respect and honor. But all these seem to be a myth before Macaulay’s draft, wherein every effort was made to safeguard man as against a woman. We would say that it was a code designed by a man for a man. The enormous loopholes inherent in the provisions operated to the advantage of man. They seem to be present only to prove the innocence of the accused and the frailty of the victim.

\textsuperscript{10} ibid., at p.4.
3.7.1.15 The final version of rape in Section 375 of the Indian Penal Code of 1860, differed little from clause 359. The only amendments effected were in clause fifthly wherein the age was fixed at ten years and the exception which read as: “Sexual intercourse by a man with his own wife, the wife not being under ten years of age is not rape.”

3.7.1.16 Section 376 IPC fixed the punishment for rape thus: “Whoever commits rape shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.”

3.7.1.17 The subsequent years witnessed minor changes in the law of rape.12

Thus we may assert that the basic idea therein remained intact. The western

---

11 Act XLV of 1860.
12 Changes effected in Section 375:

<table>
<thead>
<tr>
<th>Year</th>
<th>Age of consent</th>
<th>Age mentioned in Sec. 375</th>
</tr>
</thead>
<tbody>
<tr>
<td>1891</td>
<td>12 years</td>
<td>12 years</td>
</tr>
<tr>
<td></td>
<td>(It was the result of the Calcutta case of Queen Empress v. Haree Mohan Mythee (1890) ILR Cal. 49, in which the accused caused the death of his child wife aged about 11 years and 3 months by having sexual intercourse with her.)</td>
<td></td>
</tr>
<tr>
<td>1925</td>
<td>14 years</td>
<td>13 years</td>
</tr>
<tr>
<td>1949</td>
<td>16 years</td>
<td>15 years</td>
</tr>
</tbody>
</table>

Changes effected in Section 376:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amended Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1925</td>
<td>Whoever commits rape shall be punished with transportation for life or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine unless the woman raped is his own wife and is not under 12 years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine or with both.</td>
</tr>
<tr>
<td>1955</td>
<td>‘Imprisonment for life’ substituted for ‘transportation for life.’</td>
</tr>
</tbody>
</table>
notions of male dominance, female inferiority and sexual morality, thrust upon us by Macaulay, continued to persist. Even independent India failed to react sharply against the British despotism which manifested itself clearly in the provisions of the Indian Penal Code. No efforts were made to improve the situation until 1983- when for the first time consciousness dawned upon the people and they realized the need to break free from the shackles of colonialism and give to themselves a new rape law which afford more protection to women and thereby ensure their freedom and liberty in society.

3.8 Rape- the amended provisions

3.8.1 In this section we would deal with the amendments suggested and brought about in 1983\(^1\) to the laws of rape. But before plunging into it's provisions rightway, we need to see what circumstances compelled the policy makers to bring about the amendments.

3.8.2 Few years after India attained independence, i.e., 1959, the Law Commission began its task of reviewing the Indian Penal Code. In 1971, it submitted it's report\(^2\) on the Indian Penal Code to the Government, wherein it suggested certain changes to be effected in the various provisions of the Code.

3.8.3 With regard to rape, the Law Commission pointed out that, under clause thirdly of Section 375, the consent of the woman was vitiated only when she had been put in fear of death or bodily hurt to herself. It did not extend to a case

\(^1\) Act 43 of 1983.
where death or hurt is threatened to someone else present, on the spot, like the woman’s child, parent or husband and she is thereby forced to submit to sexual intercourse. They, therefore, suggested that, the consent obtained, by putting her in fear of death or of hurt, either to herself or to anyone else present at the place would not be consent.

3.8.4 Secondly, they put forward the necessity of excluding marital rape from the ambit of Section 375. In their words15, “Naturally the prosecutions for this offence are very rare. We think it would be desirable to take this offence altogether out of the ambit of Section 375 and not to call it rape even in a technical sense. The punishment for the offence also may be provided in a separate section.”

3.8.5 Thirdly, the Law Commission recognized the need of drawing a line between the judicially separated wife and wife, because, in the former case, the marriage subsists only technically, and if the husband has sexual intercourse with her against her will or consent, he cannot be charged of rape. That appears to be unjustified and bad. They, therefore, felt that in such circumstances, sexual intercourse by a man with his wife without her consent should be made punishable.

3.8.6 The Law Commission was also of the opinion that sexual intercourse by a man with a girl above 12 years but below 16 years, without her consent, need

15 ibid., at para. 16.115.
not be punished as severely as rape. Furthermore, in such cases a bonafide mistake as to the age of the girl should be a defense to a charge of rape.

3.8.7 The 42nd Report, thus perceived rape as follows:

"A man is said to commit rape who has sexual intercourse with a woman other than his wife:

First: Against her will; or
Secondly: Without her consent; or.
Thirdly: With her consent when it has been obtained by putting her in fear of death or of hurt, either to herself or to anyone else present at the place; or
Fourthly: With her consent knowing that it is given in the belief that he is her husband

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

Explanation II: A woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purpose of this section.

3.8.8 With regard to Section 376, the Law Commission suggested that punishment for rape should be rigorous imprisonment for a term up to fourteen years.
3.8.9 The Report also recommended the addition of Sections 376A and 376B, which separated rape of child wife and statutory rape from Section 375. The former laid down that sexual intercourse with one’s wife, who was under twelve years of age should be made punishable with rigorous imprisonment for a term up to seven years; but if the wife was aged between twelve and fifteen years, imprisonment up to two years would be sufficient. The latter one, i.e. Section 376B, recommended that illicit intercourse with a girl, between twelve years and sixteen years, even with her consent, be punished with imprisonment upto seven years. It however added that\textsuperscript{16}, “It shall be a defense to a charge under this section for the accused to prove that he in good faith, believed the girl to be above sixteen years of age.”

3.8.10 The most significant amendment suggested in the 42\textsuperscript{nd} Report was with introduction of the concept of ‘custodial rape’- an aspect which had hitherto been neglected and kept apart. It revolutionized the thinking on rape and gave a new turn to it. But the Law Commissioners were very careful and cautious while drafting the provisions. They did not make it too wide as they felt that “they might furnish a weapon for blackmail in the hands of unscrupulous woman or their relations. We would confine it to those situations where the need for throwing a cloak around the woman for protecting her chastity outweighs the opportunity for blackmail.”\textsuperscript{17} With these words, they proceeded to widen the scope and meaning of rape.

\textsuperscript{16} ibid., at para. 16120.
\textsuperscript{17} ibid., at para. 16.123.
3.8.11 Sections 376C, D and E were created. They dealt with custodial rape by public servant, by a superintendent etc. of a women’s or children’s institution, or by a manager etc. of a hospital with mentally disordered patients. They read as:

"376C. Illicit intercourse of public servant with woman in his custody- Whoever, being a public servant compels or seduces to illicit intercourse any woman who is in his custody as such public servant shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

376D. Illicit intercourse of Superintendent etc. with inmate of women’s or children’s institution- Whoever, being the superintendent or manager of a women’s or children’s institution or holding any other office in such institution by nature of which he can exercise any authority or control over its inmates, compels or seduces to illicit sexual intercourse any female inmate of the institution shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Explanation: In this section, women’s or children’s institution means an institution whether called an orphanage, homwe for neglected women or children, widow’s home or by any other
name, which is established and maintained for the reception and care of women or children, but does not include:

a) any hostel or boarding house attached to or controlled or recognized by an educational institution; or

b) any reformatory, certified or other school or any home or workhouse, governed by an enactment for the time being in force.

376E. Illicit intercourse of manager etc. of a hospital with mentally disordered patient- Whoever, being concerned with the management of a hospital or being on the staff of the hospital, has illicit intercourse with a woman who is receiving treatment for a mental disorder in that hospital, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Explanation: It shall be defense to a charge under this section for the accused to prove that he did not know, and had no reason to believe that the woman was a mentally disordered patient.”

3.8.12 The efforts of the Law Commission must be appreciated. They, for the first time, highlighted the need of effecting changes in the existing Penal provisions, which they felt, was no longer able to safeguard women’s interests.
They stressed on the occurrence of custodial rapes in society and suggested amendments accordingly. The Commission also excluded judicially separated wives from the purview of 'wife'. These recommendations, though not wholly adequate, were at least an attempt on the part of the Commissioners to cover up the loopholes blatantly existing in Macaulay’s design. But, unfortunately, for us and especially the womenfolk, the Government failed to initiate any action in this regard and 42nd Report lay in the shelves to gather dust.

3.8.13 It was in the eighties that rape became an important issue. The immediate trigger was the infamous Supreme Court judgment in Mathura rape case. Mathura, a young tribal girl between the age of 14 and 16, was raped by two policemen in the police station at the dead hour of the night. The Supreme Court acquitted the accused policemen. It refused to believe that Mathura was so overpowered that she could not make an attempt to resist. Furthermore, the fact that the girl was used to sexual intercourse was held against her.

3.8.14 This judgment launched a nationwide protest. Every section of society—lawyers, politicians, social workers, students came together to demonstrate against the infamous decision which had stripped women of all their rights, status, honor and dignity and failed to protect them from the evil forces of society. However, we must remember herein that, although the Mathura judgment shook the nation, it was not the sole notorious pronouncement by the Indian judiciary. Even prior to Mathura, the Apex Court had pronounced

serious anti-women judgments, but they went unnoticed.\textsuperscript{19} The difference which Mathura made was that it attracted the attention of four legal luminaries\textsuperscript{20} of the country who wrote an open letter to the Chief Justice of India. While demanding the reopening of the case, they pointed out that\textsuperscript{21}- the Mathura Judgment 'with all it's cold blooded legalism snuffs out all aspirations for the protection of human rights of millions of Mathuras in the Indian countryside...This is an extraordinary decision sacrificing human rights of women under the law and the Constitution." They emphasized the need "or liberation from the colonial and male dominated notions of what may constitute the element of consent, and the burden of proof, for rape which affects many Mathuras on Indian countryside."

3.8.15 The letter touched the hearts of millions of Indians who vowed to restore to women their proper place in society. But, it failed to melt the hardhearted Indian judiciary which responded to the nationwide outcry by stating that the Courts would not be "cowed down by rallies and slogan shouting."\textsuperscript{22}

3.8.16 The demand for the reopening of the Mathura case met with a sad end. But it did not stop the agitation which now directed its focus towards reform in rape laws. The Government responded to the call by requesting the Law

\textsuperscript{20} These Luminaries were Prof. Upendra Baxi, Prof. Vasudha Dhagamwar, Prof. Raghunath Kelkar and Prof. Lothika Sarkar.
\textsuperscript{21} An open letter to the Chief Justice of India, Sept. 16, 1979.
Commission of India to make a special study of the law relating to rape and assaults on the modesty of women. It read as

1. “You would be aware that recently there has been considerable amount of discussion in the press and in other forums regarding the inadequacy of the law to protect women who have been victims of rape or assaults on their modesty. There has also been certain amount of criticism that the law does not contain enough safeguards to protect the women who might be summoned to police stations or other places for the purposes of interrogation or investigation or who might be taken and kept in custody.

2. In view of the strong public opinion on this point, Government desires that the Law Commission should make a special study of the subject. The subject should cover not only the substantive law relating to rape, but also the rules of evidence and the procedure followed in criminal trials wherein a person is charged with the offence of rape or for assault on the modesty of a woman and other related matters. The existing practice and administrative instructions with regard to interrogation and arrest of women might be done gone into.

Letter dated 27th March, 1980, D.O. No. PS/LS/LA/80, from the Secretary, Department of Legal Affairs, Ministry of Law, Justice and Company Affairs to Member-Secretary Law Commission of India.
3. Government would like the Commission to give priority
to this work and to submit an urgent report within as short
a period as possible."

3.8.17 Thereafter, on 29th March, 1980, Geeta Mukherjee, a Member of
Parliament, tabled a motion for amending the rape laws which was supported
by Susheela Gopalan, Mrs. Sahi and others. They jointly protested against the
frequent occurrence of atrocities on women, a matter of great shame for the
country, and demanded broadening of the scope of rape laws. Geeta Mukherjee
in her discourse brought forth the concept of 'power rape', i.e., rape by those
people who can use power in one way or other, like money power, economic
power, social power24, and advocated the need for imposing deterrent
punishment on the culprits. At the end of the prolonged debates, the
Government assured the house that it would take necessary action, "because it
is national problem. It is a problem of everyone. We have to give very serious
thought to it. We must start monitoring and taking action against it."25

3.8.18 Less than a month after this episode, the Law Commission sent it's 84th
Report26 to the Government. It laid special emphasis on the element of
'consent' which is the 'antithesis of rape'27. Consent, they said, must be real. In
the absence of any definition given to it28 in Section 375, it is capable of ample

25 Ibid., p.463.
26 Law Commission of India, Eighty-Fourth Report on Rape and Allied Offences: Some
Questions of Substantive Law, Procedure and Evidence, April 1980.
27 Ibid., at para.2.6.
28 Section 90 of the Indian Penal Code, 1860, defines consent in the negative sense. It reads as:
"A consent is not such a consent as is intended by any section of this code, if the consent is
given by a person under fear of injury or under a misconception of fact and if the person doing
the act knows or has reason to believe, that the consent was given in consequences of such fear
interpretations. Hence, the Law Commission suggested the substitution of the word ‘consent’ by ‘free and voluntary consent’ which they felt indicated active consent as distinguished from consent implied by silence or mere submission.

3.8.19 As regards the third clause to Section 375, the suggestion was that consent should be vitiated ‘not only when the woman is put in fear of death or hurt, but also when she is put in fear of any injury being caused to any person (including herself) in body, mind, reputation or property and also when her consent is obtained by criminal intimidation...Thus, if the consent is obtained after giving the woman a threat or spreading false and scandalous rumors about her character or destruction or her property or injury to her children or parents or by holding out other threats of injury to her person, reputation or property, that ‘consent will also not be consent under the third clause as recommended to be amended.’ The Commission also intended to include in Section 375 cases in which intercourse took place by the use of stupefying substances administered by the accused or someone else on his behalf. Though the expression ‘free and voluntary consent’, if introduced would have taken care of the above circumstances, the Law Commission wanted to mention it separately.

3.8.20 With regard to age, they were of the opinion that it should be increased to eighteen years. In their words, “the minimum age of marriage now laid down by law (after 1978) is eighteen years in the case of females and the relevant

or misconception; or if the consent given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequences of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.” It may be added here that Section 90 is too often overlooked by courts while defining ‘consent’ under Section 375.

Supra n. 26, para. 2.9.
clause of Section 375 should reflect this changed attitude. Since marriage with a girl below eighteen years is prohibited (though this is not void as a matter of personal law), sexual intercourse with a girl below eighteen should also be prohibited.  

3.8.21 With reference to the 42nd report, the Law Commission opined that the restructuring of Section 375 into three categories namely, rape proper, rape with a child wife and statutory rape, would not be conducive with the current thinking. They felt that such arrangement would "produce uncertainty and distortion" and hence, section 375 should 'retain its present logical and coherent structure.' The Commissioners, however, retained sections 376C, D and E which dealt with custodial rape, in the form recommended in the earlier report. They were renumbered sections 376A, B and C. 

3.8.22 The newly designed section appeared as follows:  

"A man is said to commit rape, who, except in the circumstances hereinafter excepted, has sexual intercourse with a woman under the circumstances falling under any of the six following descriptions
First: Against her will; or 
Secondly: Without her free and voluntary consent; or. 
Thirdly: With her consent when her consent has been obtained by putting her in fear of death or of hurt or of injury, 

---

30 Supra n. 26, para.2.20.
31 Supra n. 26. para. 2.21.
32 The words italicized indicate the recommendations of the Law Commission.
either to herself or to any other person or by criminal intimidation as defined in Section 503; or

Fourthly: With her consent

a) When the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, or

b) When her consent is given under misconception of fact, when the man knows or has reason to believe that the consent was given in consequence of such misconception.

Fifthly: With her consent, if the consent is given by a woman who, from unsoundness of mind or intoxication or by reason of the consumption or administration of any stupefying or unwholesome substance, is unable to understand the nature and consequence of that to which she gives consent, or is unable to ..... after effective resistance.

Sixthly: With or without consent, when she is under eighteen years of age.

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

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

Explanation II: A woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purposes of this section.
3.8.23 With regard to Section 376, the Commission was of the opinion that punishment of rape should not be interfered with and the discretion of the court in this aspect should be left unfettered.

3.8.24 The Law Commission in its 84th Report also gave several suggestions for reforming the procedural laws- Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. Instead of examining all of them, we shall restrict ourselves to those which have a serious bearing on the offence of rape. In the first place, they pointed out that trials for rape should be held in-camera. Though in camera trial is against the principles of Criminal Justice, the Commission felt that the rule has to be relaxed in case of sexual offences, wherein a stigma is attached to the victim, as well as the accused, for years afterwards. Moreover, in such trials, the victim might feel embarrassed to narrate her traumatic experience before everybody and thus, in camera trial becomes a desideratum. A proviso was accordingly suggested to Section 327 of Cr.P.C., 1973:

"Provided further that unless the presiding judge or magistrate, for reasons to be recorded, directs otherwise, the inquiry into and trial for rape or allied offence shall be conducted in camera."

3.8.25 Secondly, the Commission recommended, and rightly so, that "it should be obligatory for the Court to draw prima facie inference of want of consent, once the woman who is alleged to be the victim states in the witness box before

33 Supra n.26, para. 7.7.
the Court in her evidence that she did not consent.”34 It had the effect of shifting the burden of proof on the accused.

3.8.26 Trials for rape often fail, because the prosecution is unable to prove lack of consent on the part of the victim. The absence of marks of injury on the woman’s body or unavailability of eye witnesses arouse a strong presumption in favor of the accused that the woman consented to the act of sexual intercourse. To eradicate this disability, the Commission suggested the above change.

3.8.27 Lastly, the report dealt with the most sensitive aspect of rape—past sexual history of the victim. The Indian Evidence Act, 1872, permits evidence to be given on the general immoral character of the prosecutrix in a prosecution for rape.35 It has, in turn, the effect of humiliating and degrading the woman in front of the whole world. It seriously affects her mental well-being and peace and gives an opportunity to the accused to hide behind the character of the woman. The Law Commission felt that Section 155(4) of the Act should be confined to sexual relations with the accused and not with other persons. In their words36—“Evidence of acts of intercourse with persons other than the accused indicates a remote or faint likelihood of the woman having consented

34 The Law Commission recommended the insertion of the following section in Indian Evidence Act, 1872: Section 111A: In a prosecution for rape or attempt to commit rape, where sexual intercourse is proved and the question is whether it was without the consent of the woman and the woman with whom rape is alleged to have been committed or attempted states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

35 Section 155(4) reads as follows: Impeaching credit of witness: The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls him...(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

36 Supra n. 23, para. 8.2.
to the particular act. Even when a harlot or a prostitute is raped, her consent at the time of the commission of the crime must be proved by evidence aliunde." \(^{37}\) It must be acknowledged herein that the Law Commission did a brilliant job in restructuring the existing laws on rape. It was indeed a bold attempt on its part to do away with the defects underlying the law for almost a century. Macaulay's basic framework was no doubt evident in the draft suggested. But the old body was given a new look. It wiped off the essence of male chauvinism existent in the earlier code and adopted a gender neutral attitude which "attempted to strike a balance between the interests of the accused and those of the victim in a case relating to rape and thus to protect the interests of the society." \(^{38}\)

3.8.28 However, the entire efforts of the Law Commission turned out to be futile. Their dynamic achievements fetched no reward as the Government failed to give effect to most of the suggestions while passing the Criminal Laws (Amendment) Act of 1983. Flavia Agnes laments that \(^{39}\), "What started with a bang ended in a whimper."

\(^{37}\) The Law Commission recommended two other additions in this regard:
Section 146(4): In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, it shall not be permissible to adduce evidence or to put questions in the cross examination of the prosecution as to her general immoral character, or as to her previous sexual experience with any person other than the accused for proving such consent or the quality of consent.
Section 53A: In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, evidence of the character of the character of the prosecutrix or of her previous sexual experience with any person other than the accused shall not be relevant on the issue of such consent or the quality of consent.

\(^{38}\) Supra n.26, para. 8.2.

\(^{39}\) Supra n.21, p.117.
3.8.29 Let us examine the changes brought about, so as to find out, how far the Government really succeeded in its endeavor to protect the womenfolk.

1. It amended clause thirdly so as to include consent obtained by putting the woman or 'any person' in fear of death or hurt.

2. It inserted a separate clause fifthly to protect woman who are of unsound mind or intoxicated.

3. It increased the punishment for rape.

4. It included the concepts of custodial rape, gang rape and rape on pregnant woman and provided for stringent punishments.

5. It distinguished rape on judicially separated wife and laid down a lower sentence for it.

3.8.30 With regard to procedural laws, the Act provided for trial in camera of rape cases and reversed the burden of proof in cases of gang rape, custodial rape and rape on pregnant woman\textsuperscript{40}.

3.8.31 When compared to the great expectations and demands of the people with which the whole movement was launched, we can only say that the Act achieved very little. It failed to define consent in clear and explicit terms, so as to rule out the possibility of passive submission being interpreted as active consent. It did not allow a woman to plead misconception of fact, unless she was a married woman, and was in a situation to say that she had mistaken the man to be her husband. The Act shifted the burden of proof to the accused, not in all cases of rape, but only in some specified cases. Lastly, the Act failed to incorporate the provisions whereby a woman's whole sexual history could be

\textsuperscript{40} See, Section 327(2) Code of Criminal Procedure, 1973 and Section 114A Indian Evidence Act, 1872.
prevented from being brought forward in a trial for rape. It continued to be a weapon in the hands of the accused who could use it every time he needed to save himself from the clutches of law, while on the other hand, it left the woman vulnerable and prone to attack.

3.8.32 What may be stated herein, is that, the legislators displayed an insensitive attitude towards the issue of rape and its hapless victims. Perhaps their only concern was the dilution of the pressure which had been created by women’s organizations, social groups and other activists. Thus, while the Government showed great interest in the initial days to bring about a reformation and change in the plight of women of the country, in the later days, it lost its enthusiasm and passed the Amendment Act, negligently and hastily. The Bill could secure only one hour and thirty minutes debate and only fifteen members were present when it was placed before the house. Most of the Hon’ble members spoke in favor of economic emancipation of women which they felt could curb the occurrence of rape. Some stressed on the need of changing the attitude of society towards women, while some others expressed fear regarding the introduction of provisions in favor of women which could easily be misused by unscrupulous ladies against innocent men and therefore, every step had to be taken consciously and carefully.41 The impression one gets from the discussion surrounding the Amendment Act is two-fold: first, the legislators were not much in favor of changes in the law. They felt that, apart from law, some other factors might help in improving the situation and hence those should be emphasized upon. Secondly, they were also of the opinion that

41 For details, See Lok Sabha Debates, Dec 1, 1983, pp. 364-460.
if any amendments are brought, they should not tilt too heavily in favor of the women as there lies the danger of abuse. Hence, changes had to be effected to the least possible extent so as not to disturb the existing patriarchal set up. With this in mind, they set onto their task and the fruits of their labor were entirely unsatisfactory and inadequate. It merely voiced another victory of Macaulay's design, with its deep embedded male chauvinism and buried aside the country's own cultural heritage where man and women were equal and treated with equal dignity, equal rights and opportunities.42

3.9 Emerging Trends in the Laws of Rape

3.9.1 In response to the international call for a victim-oriented criminal law and the changes in legislative provisions the world over, the Law Commission in India has made a bold attempt of reforming the laws of rape. The Supreme Court in Sakshi v. Union of India43 requested the Law Commission to relook into the existing provisions in the light of the issues put forward by Sakshi, an women's organization. The latter urged that, having regard to the widespread prevalence of child sexual abuse in the country, it would be appropriate to redefine 'rape' as 'sexual assault', so as to bring within its fold all forms of penetration, namely, penile/vaginal, penile/oral, penile/ finger, finger/vaginal, finger/anal and object/vaginal.44 Accordingly, the Law Commission drafted the 172nd report on rape laws45 suggesting dynamic changes.

42 ibid., at p. 382.
44 For other issues see, Law Commission of India, One Hundred and Seventy Second Report on Review of Rape Laws, March, 2000, pp. 9-10.
3.9.2 In the first place, it has suggested deletion of the term ‘rape’ and its substitution with ‘sexual assault’. The reasoning forwarded by the Commission is that, sexual assault has assumed alarming proportions in contemporary times. It causes severe trauma and psychological damage to both young boys and girls who are subjected to it. Hence, it is necessary to widen the scope of the offence and give it a gender-neutral approach. The new connotation, ‘sexual assault’, covers not only penile penetration, but other varied forms of penetration perpetrated through finger, toe or artificial objects. “Penetration” has also been extended to mean ‘to any extent whatsoever’, for the simple reason that, in case of young children, it is rarely complete.

3.9.3 Secondly, taking note of the increasing incidents of child sexual abuse within the four walls of their houses, the Law Commission has proposed the insertion of a proviso in sub section (1) of Section 376 which provides for criminalisation of sexual assault committed by a person, being in a position of trust or authority towards the person assaulted or a near relative. The proposed punishment for the offence is rigorous imprisonment for a term upto 10 years.

3.9.4 With regard to sexual assault within the bonds of marriage, the Commission adhered to its earlier opinion that recognition of such a provision ‘may amount to excessive interference with the marital relationship’. Hence, while retaining the exception to Section 375, it has suggested a minor change in

---

46 ibid., at p.23.
47 id.
49 Supra n.45, p. 27.
50 id.
the age of the wife from fifteen to sixteen years. Similarly, in Section 376(2), which elucidates certain offences of grave nature, the age of the person assaulted in cl.(f) has been raised from ‘twelve’ to ‘sixteen’ to enlarge the tentacles of law.

3.9.5 Section 375 and 376 have, therefore, been designed as follows\textsuperscript{51}.

"375. Sexual Assault: Sexual assault means -

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

i) any part of the body of another person or

ii) an object manipulated by another person

except where such penetration is carried out for proper hygienic or medical purposes;

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

\textsuperscript{51} The words italicized indicate the suggested changes.
(c) introducing any part of the penis of a person into
the mouth of another person;

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses
(a) to (d) above

in circumstances falling under any of the six
following descriptions:

First- Against the other person's will.

Secondly- Without the other person's consent.

Thirdly- With the other person's consent when such
consent has been obtained by putting such other person or
any person in whom such other person is interested, in
fear of death or hurt.

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

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

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

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

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

"376. Punishment for sexual assault - (1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault 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 person subjected to sexual assault is his own wife and is not under sixteen years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

If the sexual assault is committed by a person in a position of trust or authority towards the person assaulted or by a near relative of the person assaulted, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than minimum punishment prescribed in this sub-section.

(2) Whoever,-

(a) being a police officer commits sexual assault-
(i) within the limits of the police station to which he is appointed; or

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

(iii) on a person 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 sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or

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

(d) being on the management or on the staff of a hospital, takes advantage of his official position and
commits sexual assault on a person in that hospital; or

(e) commits sexual assault on a woman knowing her to be pregnant; or

(f) commits sexual assault on a person when such person is under sixteen years of age; or

(g) commits gang sexual assault,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- Where a person is subjected to sexual assault 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 sexual assault 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 an institution called 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.

3.9.6 The Law Commission has also suggested certain modifications in Sections 376A, B, C, and D. As regards the first one, it has recommended enhancement of punishment upto 7 years, while in respect of the other forms of custodial assault, it has recommended an increase in punishment upto 10 years and not less than 5 years.52

3.9.7 As regards the procedural law, the most important suggestion of the Law Commission has been in respect of deletion of Section 155(4), Indian Evidence Act, 1872, which permits the offender to adduce evidence regarding the general immoral character of the woman ravished. It has been pointed out that there is 'no relevance or reasonable connection between the offence of sexual assault and the general immoral character of the victim. No one can claim to have a

52 ibid., at pp.33-6.
right to have forced sexual intercourse with a woman even if she is generally of an immoral character.\textsuperscript{53} Therefore, in consonance with the 84\textsuperscript{th} Report, the Commission has recommended the insertion of cl.(4) in Section 146 and a new section – Section 53A, which would abolish altogether any reference to the general immoral character or past sexual experience of the woman concerned, in a rape trial, other than with the accused. By virtue of the Indian Evidence (Amendment) Act, 2002, the same has been given effect to and cl (4) of Sec 155 has been deleted.\textsuperscript{54}

3.9.8 The modifications suggested by the Law Commission are most welcome. They are, undoubtedly, in line with the amendments being effected all round the globe in the law of rape or sexual assault; at the same time, they are accumulative of the emerging complexities in criminal offences seriously threatening the fabric of the society. In other words, the suggested reforms, surely afford sufficient protection to the people, especially children, who are generally made the victims of perverted sexual desires.

\textsuperscript{53} ibid., at p.76.

\textsuperscript{54} The Indian Evidence (Amendment) Act, 2002 reads as: Amendment to Section 146-
In section 146 of the Indian Evidence Act, 1872 (Act 1 of 1872), after clause (3), the following proviso shall be inserted, namely:-

" Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross examination of the prosecutrix as to her general immoral character."

Amendment to Section 155-In section 155 of the principal Act, clause (4) shall be omitted.
3.9.9 However, one may feel, that, inspite of the Commission’s sincere endeavors to lay down a comprehensive gender neutral law, there are still certain grey areas which require reformulation.

3.9.10 First, our attention may be focused on clause thirdly of Section 375 which speaks of consent given under fear of death or hurt. In line with the recommendations of the 84th Law Commission report, we feel that the provision should be widened to cover cases wherein consent is obtained, not only under fear of death or hurt, but also under criminal intimidation. Such a provision would protect women and children from exploitation, under threat of blackmail, spreading of scandalous information etc.

3.9.11 Secondly, we need to examine carefully clause fourthly of Section 375 dealing with consent by a woman under the belief that the man is her husband. While the Commission boasts of its gender-neutral approach, one fails to understand the existing provision giving protection only to married women. In modern times, similar situations can arise in respect of unmarried persons also, male or female. In fact, the identity of one’s sexual partner should be the determining factor and not the marital status. Therefore, we suggest the deletion of the existing clause, to be substituted by the following:

3.9.12 With the other person’s consent given under misconception of fact, when the offender knows or has reason to believe that the consent was given
consequence of such misconception. The 84th Report, it may be mentioned, had suggested the insertion of a somewhat similar provision in clause fourthly, part (b). The underlying object is merely to widen the periphery of the offence and thereby to protect the victims.

3.9.13 The next aspect that may be criticized is the exception to Section 375, which subjects a husband to lesser criminal liability for sexual assault upon his wife, when she is above the suggested 16 years of age. It is true that a marital bond is sacred and should not be interfered with, but it is equally arguable that a life long bond should not impose unreasonable fetters on the liberties and rights of an individual. Upon marriage, a woman does not intend to make her body accessible to her husband whenever he wants her. She probably indicates that she will consent to intercourse, while keeping intact her right to refuse it. But the marital exception asserts the husband's unquestioned right to sexual intercourse with his wife and her duty to submit. It denies the wife, her right to freedom of choice in marital relations and the husband's duty to respect that right. It, therefore, amounts to law's refusal to acknowledge that the harm and injury thereby inflicted on the wife in unjustifiable and inexcusable.

Furthermore, it must be remembered that if rape laws are to be designed to protect women, it would make no sense to make an exception of a husband who rapes his wife, because a woman may suffer "no less pain, humiliation or fear from forcible sexual penetration by her husband than by a relative, a boy friend

55 See note, Acquaintance Rape and Degrees of Consent: No means No, But what does Yes mean? 117 HLR 2341(2004); Marlene A. Attardo, Annotation, Defense of Mistake of fact as to Victim's Consent in Rape Prosecution, 102 ALR 5th 447.
56 Charlotte L. Mitra, "For she has no right or power to refuse her consent", 1979 Crim. L.R. 558.
or a stranger." 57 Rather, her pain and mental agony may be twice as much, as, she has to endure the outrageous demands of the accused, her own husband, to whom she looks up for care and comfort. It is, thus, important that the distinction drawn by the lawmakers between a married and unmarried woman is not impressive and should be scrapped off and the wife must be given an honorable recognition as an individual being instead of being treated as a plaything in the hands of her husband.

3.9.14 Some jurists argue that even if rape by husbands are recognized (by law), it may serve merely as a cosmetic provision, due to the reluctance of wives to come forward against their husbands and the difficulties of proving the charge. It is undoubtedly true, that in a country like India hardly any woman would prefer to go public with the story of sexual assault by her husband; but that is not reason enough for adhering to the exemption. Criminal law cannot turn a deaf ear towards any injustice or inhumanity that is perpetrated in society. It must interfere and give legal recognition to unlawful acts that occur, irrespective of the fact as to whether such recognition bears the desired fruits. Complaints against marital rape may be few, almost negligible, yet the law should take account of it, in order to prevent acts of sexual aggression upon wives.

3.9.15 The above reasoning hold good in case of a judicially separated wife enumerated in Section 376A. She is living separately under a decree of separation. Her decision to live independently should be respected, even by her

husband and the later cannot prey on her merely on the strength of the existing marital ties. Moreover, judicial separation denotes the stage of partial breakdown of the marital connection. It is a deliberate move on the part of the spouses. In such a situation, it is illogical, rather absurd, to expect that the bond might retrieve by forcible sexual assaults by the husband on the wife. On the contrary, the woman may loathe such attacks with spiteful disgust and hatred, as they are inclined at demoralizing, destabilizing and degrading her individual entity. The deletion of Section 376A is accordingly suggested and the existing sections namely, section 376B, C and D can be renamed as Section 376 A, B and C respectively.

3.9.16 The last assertion, which we would like to make, is for the insertion of the second paragraph of Section 376(1), which speaks of sexual assaults by near relations in Section 376(2). The reason for such proposal lies in the fact that section 376(2) enumerates certain offences of grave nature. It speaks of aggravated sexual assaults. Though the Law Commission has displayed its reluctance in categorizing the offence into two classes depending on the severity of it, the truth remains that while Section 375 IPC stresses on sexual assault per se, Section 376(2) IPC highlights certain extraordinary situations, wherein the act may be perpetrated, so as to acquire a higher degree of intensity and culpability. That being so, it is apt that sexual assaults by persons of trust or authority should be incorporated in the second part of Section 376. It would characterize the assault as a serious one, warranting the infliction of the highest degree of penal liability. Similarly, the provisions of Section 144A Indian
Evidence Act, 1872, would be applicable to it and the onus of proving consent for the sexual assault by near relations would lie on the accused.

3.9.17 Proposed Sections 375 and 376:

With the suggestions put forward, the concerned sections would read as follows:

"375. Sexual Assault: Sexual assault means -

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

i) any part of the body of another person or

ii) an object manipulated by another person

except where such penetration is carried out for proper hygienic or medical purposes;

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

58 The words italicized indicate the suggestions of the present writer.
the other person's body;

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

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses
(a) to (d) above

in circumstances falling under any of the six
following descriptions:

First- Against the other person's will.

Secondly- Without the other person's consent.

Thirdly- With the other person's consent when such
consent has been obtained by putting such other person or
any person in whom such other person is interested, in
fear of death or hurt or injury or criminal intimidation as
defined in Section 503.

Fourthly- With the other person's consent given
under misconception of fact, when the offender knows or
has reason to believe that the consent was given in consequence of such misconception.

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

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

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

"376. Punishment for sexual assault - (1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault 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.
Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than minimum punishment prescribed in this sub-section.

(2) Whoever,-

(a) being a police officer commits sexual assault-

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

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

(iii) on a person 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 sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or
(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital; or

(e) commits sexual assault on a person being in a position of trust or authority towards the person assaulted or a near relative;

(f) commits sexual assault on a woman knowing her to be pregnant; or

(g) commits sexual assault on a person when such person is under sixteen years of age; or

(h) commits gang sexual assault,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be
for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- Where a person is subjected to sexual assault 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 sexual assault 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 an institution called 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."
3.9.18 To end this chapter, we may contend that Macaulay, the architect of the Indian Penal Code, 1860, had laid down the foundations of a patriarchal structure, drawing inspiration from the English societal conditions. It leaned heavily in favor of male dominance and superiority, while conferring very little rights and freedoms on the fairer sex. Such a design has hardly been modified and reformulated by the Indian legislature in subsequent years. In fact, it would not be wrong to admit that the legislative wing has shown its reluctance in drafting new provisions on rape laws, devoid of sex, character and status consideration. On the contrary, it has shown its willingness to adhere to the values of the bygone era, wherein male chauvinism was appreciated and feminine interests neglected. Time and again, the legislature has warned that drafting of provisions liberating the fairer sex from the clutches of the male counterparts may prove detrimental. It may serve as a weapon in their hands to victimize the hitherto superior class. Hence it is best to cling to the existing structure, rather than to frame new provisions, disturbing the social set up.

3.9.19 However, the changing dimensions of the laws of different countries of the world as well the emerging situations in relation to crime has proved to be an eye opener for the Law Commission and its latest endeavor is a significant step in this respect. It has attempted to do away with the aspects of male chauvinism and gender biases implicit in laws of rape. A gender-neutral law, independent of sex, character and other considerations has been recommended, which, if given effect to, would disentangle the law from abominable patriarchal values and empower women to secure their apt place in society.