CHAPTER 1
INTRODUCTION AND METHODOLOGY

1.1 Overview

1.1.1 Women have been the recipients of violence since time immemorial. Being weaker of the human specie, she has all through been the target of aggression by males. Even the periods of social transformation have not been easy for them, wherein all forms of atrocities, whether rape, molestation, slavery or trafficking have been perpetrated upon her.

1.1.2 The word ‘rape’ has been derived from the term ‘rapio’, which means to seize. Rape is, therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves a coercive, non-consensual sexual intercourse with a woman. Rape can be viewed as an act of violence of the private person of a woman, an outrage by all means. It is the ultimate violation of the self. The Supreme Court of India has aptly described it as deathless shame and the gravest crime against human dignity\(^1\). Sexual violence, apart from being a dehumanizing act is also an unlawful intrusion of the sanctity of a female. It is not only a blow to her supreme honor, but also offends her self-esteem. Rape is not merely a physical assault, but is also destructive of the whole personality of the victim. It shatters the entire social fabric, destroys the poise of the milieu and ruins the harmony of the atmosphere.

\(^1\) Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922
1.2 Concept of Rape in Ancient Times

1.2.1 Historically, the concept of rape originated, not to protect the autonomy of women, but rather, to protect male interests in women, akin to property rights. The evil that the law tried to prevent was the ravishment of virgins, to the detriment of the family pride and honor, who, thus, were often compromised into marriage with their predators. The Babylonian laws, Mosaic Laws all bear testimony to this fact. However, the early Vedic age characterized the offence from the woman’s perspective. It regarded it as an ultimate violation of the self. The offence of rape came under the heading of ‘STRISANGRAHANAM’. The Dharmashastras like Katyana Smriti and Brihaspati Smriti attempted to specify and categorize the offence and impose severe penalty for the same. Narada Smriti also recognized forceful intercourse causing pregnancy by a person not being the husband as one of the ‘APARADHAS’(crime). However, the later Vedic period witnessed a change akin to that of the Western world where women were secondary owned beings under the complete control of their male relatives and any invasion of her body or soul was viewed as an unlawful infringement of the rights of the owner over his property.
1.3 Present Position

1.3.1 With the progress of civilization, the concept of rape has undergone a change. Today, the substantive offence is concerned with the sexual violation of women. Rape is perceived as an infringement of the bodily integrity and honor of a woman - a violation with violence of her privacy.

1.3.2 Sections 375 and 376 of the Indian Penal Code, 1860, deal with the offence. The former describes the offence while the latter is a punitive section. Rape is said to be committed when a man has intercourse with a woman, not being his wife, against her will, without her consent, with her consent given under fear of injury or death or under misconception or under influence of any intoxicating or stupefying substance. Sexual intercourse by a man with his wife is in no case rape unless the woman is less than 15 years of age. Consent is immaterial for the purposes of a victim girl aged less than 16 years.

1.3.3 Section 376 IPC, 1860 thereafter prescribes punishment for the offence of rape. It ranges from seven years to a maximum of life term, though the Court may, for adequate reasons, impose a sentence of less than the minimum prescribed. After the infamous case of Mathura in the 70s\(^2\) where a tribal girl was raped in police custody and the Court refused to accept her statement, a nation wide protest was launched for the inclusion of custodial rapes within the legislative provisions. Accordingly the Criminal Law (Amendment) Act, 1983 was passed, which included situations of aggravated rape. Thus,

rape of a woman in police custody or in jail or in hospital or rape of a pregnant woman or rape of a girl under 12 years of age or in cases of gang rape, higher punishment of a term not less than ten years which may extend to life has been prescribed. The Indian Evidence Act, 1872, has also been amended to impose the burden of proving consent in the aforesaid cases of aggravated rape on the accused as opposed to the general principle of burden on the prosecution.

1.3.4 However, one aspect, which has continued to bother the legislators and common man, is the increased occurrence of the offence. The medical student rape case of Delhi, the Mumbai chowki rape of a 16 year old by a police constable, the Rajasthan University rape case or the German lady rape case of Jodhpur, the numbers continue to rise in spite of efforts by the legislators to tighten the laws.

1.4 Magnitude of the Problem

1.4.1 Rape can safely be termed as a 'burning problem'. It continues despite measures to curb its occurrence. According to the Crime in India, 2002 compiled by the BRPD\(^3\), rape cases have reported a mixed trend over last 5 years with a decrease of 2.5% in the year 2001 and an increase of 1.8% in the 2002. Madhya Pradesh reported the highest number of cases (2891), contributing to 17.6% of total cases reported in the country, followed by Uttar Pradesh (1415), Maharashtra (1352), Rajasthan (1051) and Bihar (1040).

\(^3\) Bureau of Police Research and Development, New Delhi.
1.4.2 If we try to track the increase in the offence from 1950 to 2002, we find that
information on reported cases of rape was not compiled till 1970. In 1971, the reported
cases of rape were 2487, in 1981 it was 5409, in 1991, it was 10,410 and in 2002 it is
16373. The increase in the cases as represented by the figures is staggering. We must
herein remember that these figures are indicative of the reported cases and not the actual
figures, since many hundreds and thousands of such cases go unreported due to fear of
social stigma, ostracization, family honor etc.

Crime against Women under IPC and SLL during 1996-2002

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1.4.3 Another aspect worth mentioning is that crime statistics have shown an alarming trend of incest rapes with an occurrence of 369 such rapes in 2002. The figures were 439 in 2001. Though there has been a decrease of about 16% of incest rapes, nevertheless its prevalence in the country is well acknowledged. Madhya Pradesh has reported the maximum of incest rapes (72), followed by Chattisgarh (63), Haryana (52), Delhi (32) and Rajasthan (31). The popular notion that rapes are largely perpetrated by strangers have also been dealt a blow with statistics showing offenders as known faces to the victims. Most of the offenders are parents, close relatives or neighbors of the victims whose age ranges from 10-18 years. The Crime in India 2002 reports that of the 16373 victims of rape, nearly 7.7% are girls under 14 years of age while teenaged girls aged 14-18 years constituted 8.1%.

1.4.5 The above-mentioned data is a sad reflection of the state of affairs when it concerns violations of human rights of victims of sexual offences. While much of the cases go unreported, those, which find the light of day, meet even dreadful plights. The insensitive and callous attitude of the investigation, prosecution and finally the judiciary, sometimes leave the victim more traumatized and insecure than the incident itself.
1.5 Judicial Perspective

1.5.1 The Indian judiciary has shown a mixed trend over the years. While the period immediately after independence till the 70s witnessed a conservative and narrow-minded judicial system, the late 80s and 90s have seen the emergence of judicial activism which reached its heights in *Saakshi v. Union of India*\(^4\). Nevertheless there are both sides of the coin and instances of injustice being heaped on the victim have continued to persist.

1.5.2 Mention may be made of the infamous Mathura rape case\(^5\) or the Nandan Kanan rape case\(^6\) of Orissa or Raju’s case of the 90s. The first has already been mentioned in brief and would find an elaborate discussion in the thesis; the second speaks of the turmoil of a pregnant woman who was raped by three NCC cadets while her husband was held hostage. The Supreme Court interpreted it as a case of consensual sexual intercourse where the consent purportedly was given by the husband of the victim since she was not his ‘legally wedded first wife’. The Court also stressed the point that she was a midwife and therefore experienced and no one on earth, even the strongest man, can ever dare to rape her. Ridiculous it may seem, but the truth stands out harsh and naked. *Raju v. State of Karnataka*\(^7\) was another instance of glaring disregard for human right of the victim. Here the lady was a nurse who, while traveling was befriended by two youths who agreed to take her safely to the place destined. Since it was evening and they had to take another bus, she was taken to a lodge where in the same room they put up for the night. She was thereafter raped by these two men, inspite of protests and resistance, which medical

\(^4\) AIR 2004 SC 3566.
\(^5\) *id.*
\(^7\) AIR 1994 SC 222.
evidence and oral evidence of the police constable, staying in the next room, confirmed. Yet the Sessions Court as well as the Supreme Court took a light note of the facts emphasizing that “the prosecutrix had voluntarily allowed the accused persons to have a merry time and to have sexual intercourse with her... the prosecutrix herself caused inducement to the accused who was a young man and only on such inducement and under a grave provocation he had lost the mental frame and in a fit of passion which was very natural in that age committed the offence of rape.” Surprisingly, the Court invented the theory of provocation, because of young age and uncontrolled youthful passion and imposed a sentence of three years on the accused.

1.5.3 However, it would be unjust if the victim centric approach of the Court is not stressed upon. The same may be discussed under the subsequent heading.

1.6 Victims Position in the Justice Process

1.6.1 The jurisprudential foundations of victim justice perspective have gained importance only in the recent past.

1.6.2 Indian Criminal Justice System is not victim oriented but accused oriented. Under our Criminal Procedure Code, 1973, the accused is treated as a privileged person and is provided with all possible help including a defense counsel at the cost of the State. A number of constitutional protections are also available to an accused under Articles 20, 21 and 22 of the Constitution of India; but, unfortunately, very few legal provisions are
there in our Criminal Law and Constitution to provide succor to the victim. In the public mind, the interests of the offender seem to have greater attention than the interests of the victims. Hence, a strong wind in the form of Victimology is blowing in the area of Criminology, the focus of which is placed on restitution or compensation to victims and their dependants.

1.6.3. The decisions of the Apex Court of the country have had a remarkable impact on victim justice movement.

1.6.4 An increased sensitivity towards the plight of the victims is particularly noticeable in the landmark case of State of Punjab v. Gurmit Singh. This case raised a very pertinent question- why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of the accused. The evidence of a victim of sexual assault stands at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness, in the sense, that he/she is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, the absence of corroboration notwithstanding. Dr.A.S.Anand and Saghir Ahmad JJ. made some revolutionary and ground breaking observations—

8 AIR 1996 SC 1393.
• Delay in lodging FIR is not material when properly explained

• Testimony of prosecutrix (victim) in cases of sexual assault is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the Court should find no difficulty in convicting the accused on her testimony alone.

• Trial of sexual offences should be in-camera and invariably by lady judges, wherever available.

• The Court must share responsibility and restrain from making loose observations about the character of the prosecutrix.

• The Court is under an obligation to ensure that the prosecutrix is not unnecessarily harassed and humiliated in cross-examination in case of rape trial.

1.6.5. In 2004, the Apex Court expressed concern over the plight of child victims of sexual assault, who often, have to describe their experiences of the assault in court. It has a tremendous effect on the psyche of the child, and her physical and mental well-being. The Court accordingly prescribed the following guidelines:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident

\[\textsuperscript{9} \text{Supra n. 4.}\]
should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required.

1.7 Compensation to Victims

1.7.1. The judiciary has, on many occasions, while convicting the accused of rape, ordered compensation to be paid to the hapless victims. The necessity of payment of compensation has been the concern of the United Nations as well. The 7th United Nations Congress on Prevention of Crime and Treatment of Offenders came out with a declaration of Basic Principles of Justice of Victims of Crime and Abuse of Power, which was later adopted by the U.N. General Assembly. In the declaration, the U.N. defined the "Victims of Crime" as follows:

1. Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such race, color, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin and disability.

1.7.2 The U.N. Social Council’s draft “Guidelines for Measures on behalf of Victims of Crime and Abuses of Power” laid down the types of harm, injury, loss or damage caused by wrongful conduct. It is as follows:

“the loss of life or of support, impairment of health, including physical or psychological injury, pain and suffering, both physical and mental, loss of income or livelihood, loss of property or damage to it which is not subject to restitution and deprivation of the use of property. Due account must also be taken of the special damages or expenses and costs reasonably incurred by the victim or, where appropriate, by the victim’s family, dependants or heirs, which resulted from the victimization, including medical costs, transportation costs, and similar and related costs and expenses.”
1.7.3 The victims in general may be broadly classified into twelve categories. They are:

1. Victims of War

2. Victims of Accidents that occur
   a. On road
   b. On railways
   c. On the Aircraft
   d. On sea and
   e. In the Workplace

3. Victims of Abuses of Power by Lawful Authority
   a. Custodial death
   b. Death due to firing
   c. Groundless arrest and detention
   d. Unnecessary Harassment

4. Victims of Rape

5. Victims of Criminal conspiracy, offences of giving and fabricating false evidence, fabricating false documents or forgery of records, valuable documents, certificates or causing disappearance of evidence by way of destruction or concealment of the documents, fraudulent acts with the intention of causing bodily or mental harm to a person, murder, miscarriage, hurt, wrongful restraint and wrongful confinement, assault, use of criminal force, kidnapping, abduction, forced labor, unnatural
offence, theft, extortion, robbery and dacoity, cheating, mischief, arson, criminal
trespass, adultery, bigamy, fraudulent marriage, dowry, torture and death,
defamation, criminal intimidation, insult and annoyance.

6. Victims of offences relating to manufacture and sale of adulterated, substandard
and prohibited drugs, liquor and food.

7. Victims of offences of smuggling, black marketing, unfair trade practice and
evasion of tax.

8. Victims of offences committed by public servants, such as negligence and
inefficiency in discharging duties, corruption, bribery and misappropriation of
public funds.

9. Victims of environmental pollution and wanton destruction of flora and fauna,
and public nuisance.

10. Victims of offences committed in the election.

11. Victims who are also offenders as perpetrators of crimes such as drunkenness,
consumption of narcotic drugs, gambling, attempt to commit suicide and
prostitution, which are otherwise known as victimless crimes.

12. Victims who create compelling situation in which the offender reacts violently by
committing a criminal act. Sometimes the victim provokes the offender to commit
the crime. Victims of affray, free fight and rioting may also be included in this
category.

1.7.4 The Basic Principles enjoin upon the offenders or third parties responsible for their
behavior to make fair restitution to victims, their families of dependants. Such restitution
should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. It enjoins upon States to endeavor to provide financial compensation to:

a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

b) The family, in particular, dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm. Furthermore, victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

1.7.5 In line with these core guidelines, the Indian Judiciary has laid down broad parameters in assisting the victims of rape in the *Delhi Domestic Working Women's Forum v. Union of India*\(^{10}\).

\(^{10}\) (1995)1 SCC 14.
(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in Court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represents her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the Court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were
questioned without undue delay, advocates would be authorized to act at the police station before leave of the Court was sought or obtained.

(6) In all rape trials, anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue in employment.

(8) Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board, whether or not, a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth, if this occurred as a result of the rape.

1.7.6 However, sadly enough, not much has been done by the legislature on this front. It has been left solely to the Courts to award compensation in individual cases to the victims. There has also been some disparity in this regard with some Courts awarding huge amounts as compensation while others not awarding any or little amounts. A Bill on Compensation to Victims had been tabled in Rajya Sabha as early as in 1994, but till date there has been no further move.

1.8 Research Question:
What have been the Legislative and Judicial trends in India as regards the Offence of Rape and how far has the problem been addressed from victimological perspectives?

1.9 Methodology

1.9.1 The objective of this study has been to find out the attitude of the legislature and judiciary towards rape and its victims and as such it is a fact-finding investigation of the laws of India and judicial decisions of the higher courts.

1.9.2 The method of the study is doctrinal or arm chair method of library research. In analysis of the cases, this research has used all law reports and journals specially relating to Criminal Law and Justice. After review of the relevant judgments, the researcher has analyzed the attitude of the judiciary in victimological perspective. Finally, on the basis of studies of relevant laws and cases studies, the researcher has made a critical analysis of the present scenario with stress on future initiatives, keeping in mind the international developments.