CHAPTER - IV

PROTECTIVE LEGISLATION AND VIOLATION OF HUMAN RIGHTS OF WOMEN :-

In a society, violence against women is an obstacle to the achievement of the objectives of equality, development and peace. In the previous chapter, it was discussed about the violation of the human rights of women under the protection of Constitution of India. Apart from the protection under the Constitution of India, there are various legislations enacted by the Parliament for the protection and welfare of women. These protective legislations are the important tools for the establishment of human rights of women. Despite the existence of these human rights tools women are often found to undergo violence by men. Historically, in Assam, the women’s struggle against violence has been closely interwined with their fight, mainly to overcome discrimination. Though, the religious texts of Assam have prescribed guidelines for every social aspect, still the religion and social tendencies are found to be in contradiction to each other. The struggle for legal equality has been one of the major concerns of the women’s movement in Assam. The pre and

post independent era of India witnessed a large number of legislations, which are enacted for the protection of women’s right. These legislations are in accordance with the Constitution of India and hence are equally applicable to the women in Assam. A critical examination of the legal provisions of these legislations revealed that most of the protective laws for women suffer from various loopholes or shortcomings. Many of the provisions are complicated and ambiguous, and instead of solving the issues make the situation more complex. Often, those provisions of law are not clear and precise; it makes them the sole ground for legal interpretation in the hierarchy of Courts. Certain laws remain confined to the statute books, because of either the enforcement machinery is inadequate, or the penalties are not awarded in accordance with the provisions provided in the statute. Whether the position of women in the parental or matrimonial home or in the external society for acquiring education, skills, or professions or employment – all these involve the law and hence it required a thorough analysis of relevant laws. Advocates in all regions have adopted law reform and advocacy in the Courts as key strategies for ending violence against women. Law embodies the social contract and can catalyse social change by sending a clear message that
violence against women will not be tolerated.\textsuperscript{196} Thus, the first movement against violence against women and for protecting the women’s right in India were centered round, mainly, on three major problem -- infant marriages, enforced widowhood and lastly, property rights for women.\textsuperscript{197} Normally, violence against women interwined with crime against women which lead to the violation of human rights of women. Although, women may be victim of any of the crimes such as ‘Murder’, ‘Robbery’, ‘Cheating’ etc., the crime which are directed specifically against women are characterized as ‘Crimes against Women’. These are broadly classified under two categories –

(1) The crimes identified under the Indian Penal Code (IPC) and the relevant procedural laws.

(2) The crimes identified under the Special Laws.

Although all these laws relating to crime against women are not gender specific, some of the provisions of law, affecting women significantly, were reviewed and amendments were carried out to keep pace with the emerging requirements.

As mentioned earlier, almost all the legislations enacted for


protecting the civil and criminal rights of women have various lacunas, lacking co-ordination with each other. A critical analysis of these laws revealed the fact that these general as well as specific lacunas are one of the major reasons for violation of women’s human rights. Sometimes the interpretation of these laws become too wide or too general which create ambiguity to find out the intention of the legislature. Hence, in this Chapter all these protective laws are analyzed, the lacunas are discussed, which are the major causes for women’s human rights violation.

It is worth mentioning that the discussion first has been confined to the crime identified under the Indian Penal Code and then the procedural laws and other statutes.

**The Indian Penal Code, 1860:**

The Indian Penal Code was passed in 1860 and it deals with various criminal offences and punishment for them. The Act deals with various offences relating to body, marriage, honour or modesty of women.

Section-10 of Indian Penal Code includes the expression “women” as a female human being of any age. Hence any offence committed against a woman under the Indian Penal Code is a clear violation of the women’s human rights. It is already mentioned that the violation of women’s human rights will arise only when the statute have the loopholes
within its provisions. Hence, the different sections encompassing women under the Indian Penal Code and the loopholes under its provisions are discussed hereunder –

Section-304B. Dowry Death – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called “dowry death”, and such husband and relative shall be deemed to have caused her death.

Explanation --- For the purpose of this Sub-Section, ‘dowry’ shall have the same meaning as in Sec.2 of the Dowry Prohibition Act, 1961.

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

In dowry death cases and in most of such offences direct evidence is hardly available and such cases are usually proved by circumstantial evidence. This section, as well as Sec.113B\(^{198}\) of the Evidence Act enact

\[^{198}\) Sec-113B – Presumption as to dowry death – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. 
Explanation - For the purposes of this Section “dowry death” shall have the same meaning as in Sec.304B of the Indian Penal code.
(1) The death of a woman should be caused by burn or bodily injury or otherwise than under normal circumstances.

(2) Such death should have occurred within seven years of her marriage.

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

(4) Such cruelty or harassment should be for or in connection with demand for dowry.199

Thus, it is obligatory on the part of the prosecution to show that death occurred within seven years of marriage. If the prosecution would fail to establish that death did not occur within seven years of marriage, this section will not apply.

Another ingredient for the section to come into play that the cruelty or harassment was meted out ‘soon before her death’. But the expression have been used in the substantive Sec.304B, IPC and Sec.113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression ‘soon before her death’ is not defined, and it is left to be determined by the courts, depending upon facts and circumstances of each case. If the alleged incident of cruelty is

remote in time from the consequence of the event then this expression would have no meaning.\textsuperscript{200}

In case of dowry death, dying declaration is an important part. The Supreme Court held that dying declaration could be acted upon without corroboration, if the Court found it truthful and acceptable and free from any effort to induce the deceased.

From all the above analysis, it is cleared that unnatural death occurred to a woman, but not fulfilling the three ingredients as mentioned in Sec.304B will not be considered as a dowry death. In such situation the accused cannot be convicted under Sec.302\textsuperscript{201}. In many cases it becomes virtually impossible to prove harassment of wife within the four corners of a house. Another striking nature of this section is that the punishment for dowry death is only from seven years imprisonment to life imprisonment, not of death sentence. Hence for an offence of a pre-planned murder under the guise of dowry death is undermined by the law maker and provided for a lesser punishment than the murder done under Sec.302.

**The causing of miscarriage and injuries to unborn children** :-

Section-312 to 318 of the Indian Penal Code deals with the offence relating to the miscarriage of a woman with or without her consent, and

of the offences against the unborn child. Now-a-days, in Assam, infant mortality of girl child has been increased on alarming rate. Under such situation, the different provisions of Indian Penal Code regarding miscarriage of unborn child require a pragmatic study.

Section-312 – causing miscarriage – Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and if the women be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation - A woman who causes herself to miscarry is within the meaning of this section.

Thus, this section deals with the causing of miscarriage with the consent of the woman.

Section-313 – Causing miscarriage without woman’s consent – Whoever commits the offence defined in sec.312 without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Under this section the act should have been done without the consent of the woman. Under it, the person procuring the abortion is alone punished. Thus, where the accused woman kicked a pregnant woman in her abdomen resulting in miscarriage, her conviction under Sec.313 was sustained\(^{202}\).

**Section-314** – Death caused by act done with intent to cause miscarriage –

Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

This section provides for the case which occurs in causing miscarriage. The act of the accused must have been done with intent to cause the miscarriage of a woman with child. Thus, in Surendra Chouhan – Vs – State of M.P.\(^{203}\), the accused was alleged to have had illicit relation with the deceased woman. He took her to a doctor for the purpose of aborting her of pregnancy. The doctor caused her death in that process. The doctor was not qualified for the purpose, nor his clinic was approved

\(^{202}\) Tulsi Devi – Vs – State of U.P. 1996 Cr.L.J. 940 (All)

\(^{203}\) AIR 2006 SC 1436.
by the Government under the Medical Termination of Pregnancy Act and was also not having the basic facilities for abortion. There was a concurrent finding that the act was done by the doctor in furtherance of the common intention with the accused. It was held that the conviction of the accused under this Section read with Section-34 was proper.

Section-315 - Act done with intent to prevent child being born alive or to cause it to die after birth –

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine or with both.

Section-316 - Causing death of quick unborn child by act amount to culpable homicide –

Whoever does any act under such circumstances, that if he thereby caused death, he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
This Section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening and where the death is caused after the quickening and before the birth of the child. Any act or omission of such a nature and done under such circumstances would amount to culpable homicide. However, if the act is done against the mother with an intention or with a knowledge which brings it within the purview of Sec.299, it cannot constitute an offence under this section merely because the death of a quick unborn child has resulted from an act against the mother\textsuperscript{204}.

Section-317 - Exposure and abandonment of child under twelve years, by parent or person having care of it –

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation – This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.

\textsuperscript{204} Jabbar, AIR 1966 All. 590.
Section-318 – Concealment of birth by secret disposal of dead body –

Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child dies before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

This section is intended to prevent infanticide. It is directed against concealment of birth of a child by secretly disposing of its body. The offence becomes complete when the birth, i.e., the delivery of a child, dead or living, is concealed by any means. Therefore, after discussion of all the above sections, it becomes clear that the causing of miscarriage is not always a penal offence, if it is caused with the consent of the woman or if it is done to save the women’s life. This, of course, is a very narrow exception. But the Medical Termination of Pregnancy Act, 1971 had added many more exception. After coming into force of the Medical Termination of Pregnancy Act, 1971, the provisions of Indian Penal Code relating to miscarriage became

205. Lalbu (1898) Unrep Cr.C 961.
subservient to that Act, because of the non obstante clause in Sec-3. The Supreme Court in Jacob George – Vs – State of Kerala, held that Sec.312 of the Indian Penal Code speaks about causing of miscarriage and Sec.314 punishes the person who has intent to cause miscarriage of a woman. The Court while expressing the views of the author of the Code about Sec.312, observed as follows:

With respect to the law on the subject of abortion, this or any other law on that subject may, in this country, be observed to the vilest purposes. The charge of abortion is one which, even where it is not substantiated often leave a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of unprincipled man. This part of the law will, unless great care be taken, produce few conviction but much misery and terror of respectable families, and a large harvest of profit of the vilest pest of society.

The consequence of the view expressed by the Supreme Court is reflected now in Assam with the increase of intant mortality of girl child.

Section-354 - Assault or criminal force to woman with intent to outrage her modesty -

207. SCC.3 (1994) 430.
Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

However, where the woman is a consenting party there cannot be any outraging of the modesty of woman\textsuperscript{208}. Again, in Divender singh – Vs – Hari Ram\textsuperscript{209}, it was held that unless culpable intention is proved mere touching the belly of a female in a public bus cannot be called a deliberate act of outraging the modesty of a female within the meaning of this section. In the circumstances of the case the act of the accused was held to be accidental and not intentional.

It may be noted that the sense of modesty varies from woman to woman depending upon the status, cultural background and other sociological and ethical factors surrounding the woman. However, it is a difficult task to measure the outraging modesty of women, because apart from assault, it must be established that the person must have the intention to outrage the modesty of the woman\textsuperscript{210}.

Section-359 state kidnapping as of two kinds kidnapping from India and kidnapping from lawful guardian.

\textsuperscript{208} Sadananda, 1972 Cr.L.J. 658 (Assam).
\textsuperscript{209} 1990 Cr.L.J. 1845 HP.
\textsuperscript{210} Premiya @ Prem Prakash –Vs- state of Rajasthan, supreme 6 (2008) 596.
Section-360  - Kidnapping from India - Whoever conveys any person beyond the limits of India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from India.

Section 361  - Kidnapping from lawful guardianship - whoever takes or entices any minor under 16 years of age if a male, or under 18 years of age, if a female, or any person of unsound mind, out of keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Exception - This section does not extend to the act of any person who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Section – 363 A  - Kidnapping or maiming a minor for purposes of begging - (1) Whoever kidnaps any minor, or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purpose of begging shall be punishable with imprisonment of ten years, and shall also be liable to fine.
(2) Whoever maims any minor in order that such minor may be employed or used for the purpose of begging shall be punishable with imprisonment for life and shall also be liable to fine.

(3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

Section-364 - Kidnapping or abducting in order to murder - Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Section-366 - Whoever kidnaps or abducts any women with intent that she may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other
method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

Section-366A - Procuration of minor girl - Whoever by any means whatsoever, induces any minor girl under the age of 18 years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Section-366B - Whoever imports into India from any country outside India or from the State of Jammu and Kashmir any girl under the age of twenty one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

However, the term ‘illicit sexual intercourse’, as given in Section-366 lays down that it is an intercourse between persons who are not united by marital ties or a quasi-marital relationship. Moreover, if the prosecution fails to establish that the prosecutrix is a minor, then no
offence under Section-366A IPC can be made out. Hence, a girl above 18 years of age, when married by the offender and thereafter sale for forced prostitution, cannot be tried under these sections.

Section-375-Rape - A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions –

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

consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

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

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

Section-376 - Punishment for rape - Whoever, except in the cases provided for by Sub-Sec.(2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine.

Explanation of Sec.375, makes it clear that ‘Penetration’ is not only sufficient but also necessary to constitute the ‘sexual intercourse’ required for the offence of ‘rape’. The word ‘Penetration’, however, as interpreted by the judiciary connotes only penile-vaginal, even slight penetration.

In 1996, the Delhi High Court in Sudesh Jhaka -Vs - K.C.J.\textsuperscript{213}, was called upon to interpret ‘Penetration’ and sexual ‘intercourse’, the key phases in the offence of rape. Mr. Arun Jaitly, representing the petitioner, vehemently argued that ‘Penetration’ by a man of any part of his body into any part of body of a woman other than vagina with her consent amounts to ‘unnatural offence’ covered under Section-377 IPC, and such a ‘Penetration’ without her consent comes within the ambit of Sec.376, IPC.

In 1997 Sakshi, through a PIL Writ Petition\textsuperscript{214}, approached the Supreme court of India with a plea that existing Section 375 and376 of the Penal Code and judicial interpretations thereof are not in tune with the current State of affairs. It urged the Court to direct that ‘sexual intercourse’ as contained in Sec.375 shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/ vaginal penetration. The Supreme Court by its order in 1998 directed the 15\textsuperscript{th} Law Commission of India to communicate its response to the issues raised by Sakshi. The Law Commission recommended that the law

\textsuperscript{213} 1998 Crl. L.J. 2428.
\textsuperscript{214} Sakshi - Vs -Union of India Writ Petition (Crl.) No.33 of 1997 (1999 6 SCC 591).
relating to ‘rape’ be made gender neutral, wider and more comprehensive to bring it in tune with the current thinking. The existing age of the wife, mentioned in Exception to Sec.375, and the person assaulted sexually referred to in the clause sixty, according to the Law Commission, be raised to 16 from 15.

However, it is notable that the present laws relating to rape do not take into account the cases of marital rape. In India the idea of marital rape exemption and the consequential immunity from liability of a husband for raping his wife is premised on the assumption that a wife does by the fact of marriage give an implied consent in advance for the husband to have sexual intercourse with her. In India, marital rape exists defacto but not de-jure, because, woman who experience this and wish to challenge sexual violence from their husband are denied state protection as the Indian legislation on rape under Sec.375 of the Indian Penal Code, 1860 has the general marital rape exception. A husband cannot be prosecuted for raping his wife, due to consent to matrimony presupposes to sexual intercourse. Again, the law prevents a girl below 18 years from marrying, but on the other hand, it legalizes non-consensual sexual intercourse with a wife who is just 15 years of age. Another paradox is that, according to the Indian Penal Code, 1860, it is rape if there is a non-consensual intercourse with a wife who is aged between 12 and 16 years
of age\textsuperscript{215}. The punishment may either be a fine or imprisonment for a maximum term of two years\textsuperscript{216} or both. But this punishment is quite less in comparison to the punishment provided for other forms of rape.

Normally, it is found that it is very difficult to prove rape of married women due to non-appearance of injury in private parts\textsuperscript{217}. But the Supreme Court in Santosh Kumar – Vs – State of M.P.\textsuperscript{218}, held that absence of injuries on private parts of a victim of rape specially a married lady cannot ipso facto lead to an inference that no rape has been committed.

**Section-377** - Unnatural offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

In Mihir – Vs – State\textsuperscript{219}, the accused committed unnatural offence with a minor girl who gave minute details of the offence and her evidence

\textsuperscript{216} Sec-376, IPC, Punishment for rape.
\textsuperscript{218} AIR (SC) (2006) 3018.
\textsuperscript{219} 1992 Cr. L.J. 488 (Ori).
was found reliable. The conviction of the accused under Sec.377 was confirmed, but considering that he had a broken family life and belonged to lower strata of society, his sentence of rigorous imprisonment for three years was reduced to two years., which is not seem to be justified as the minor also suffers from fear, mental agony and feel insecurity.

**Commission of offences relating to marriage :-**

Sections – 493 to 498 of the Indian Penal Code, 1860 deals with the offences relating to marriage. Thus –

**Section-493** - Cohabitation caused by a man deceptfully inducing a belief of lawful marriage - Every man who by decit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

**Section-494** – Marrying again during life time of husband or wife -- Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Exception – This Section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction.

Section 495 – Same offence with concealment of former marriage from person with whom subsequent marriage is contracted – Whoever commits the offence defined in the last preceding Section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section-496 – Marriage Ceremony fraudulently gone through without lawful marriage - Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Section-497 - Adultery - Whoever have sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either
description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

**Section-498** – Enticing or taking away or detaining with criminal intent a married woman - Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

The Supreme Court has observed that prima facie, the expression “whoever marries”\(^{220}\) must mean “whoever marries validly” or “whoever... marries and whose marriage is a valid one”. Thus, if a man and woman exchanged garlands, the man promising to marry formally, and had sex as a result of which the woman became pregnant, it was held by the Court, that the exchange of garlands did not amount to falsely inducing the woman to believe that she was married to that man. In such situation Sec.493 will not be attracted\(^{221}\). Similarly, if a second marriage

\(^{220}\) Sec -494.

\(^{221}\) Amruta Godfia – Vs – Trilochan Pradhan, 1993 Cr.L.J.1022 (Ori).
is not proved to have been validly performed by observing essential ceremonies and customs in the community, the conviction under Sec. 494, I.P.C. could not be maintained\textsuperscript{222}. Thus, if a person who is already married goes through a form of marriage with another within prohibited degrees of relationship, he is still guilty of bigamy although the second marriage would be null and void in any case\textsuperscript{223}. The Indian Court were obliged due to the word "solemnized" occurring in Sec. 17 of the Hindu Marriage Act, 1955 and the inhibition contained in the proviso to Sec. 50 of the Indian Evidence act which forbids taking into consideration to show that the two persons were always received and treated as husband and wife by their friends and relations so far offences under sections-494, 495 etc. of Indian Penal Code are concerned. Thus, if one deliberately keeps a small lacuna, e.g. instead of taking the seven steps (Saptapadi) takes only six steps while celebrating the second marriage, one can easily avoid the penalty prescribed by these sections even though one virtually ruins the lives of two girls. Hence, the National Committee on the status of Women opined that to root out polygamy, there must be amendment of section- 494 I.P.C., and section-17 of the Hindu Marriage Act in such a way that anyone who goes through a form of marriage during the lifetime

\textsuperscript{222} Priya Bala – Vs – Suresh Chandra. AIR 1971 SC. 1153.

\textsuperscript{223} Allen,(1872) LR I CCR 367
of his or her spouse will come within the mischief of the offence of bigamy. At the same time, the proviso to Section-50 of the Indian Evidence Act, the last portion which says “or in prosecutions under Section-494, 495, 497 or 498 of the Indian Penal Code” should be deleted.

However, Section-497 is the violation of article-14 and 15 of the Indian Constitution and is discriminatory against women, as –

- It confers the husband the right to prosecute the adulterer, it does not confer any right upon the wife to prosecute the women with whom her husband had committed adultery.

- It does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.

- It does not take in cases where the husband has sexual relations with an unmarried woman with the result that the husband have as it were, a free licence under the law to have extra marital relationship with unmarried woman.

There may not be any constitutional grievance about the adultery, but a woman whose husband is guilty of adultery may fell aggrieved about her being debarred from the right to complaint against the husband.

Section-498A - Cruelty - Husband or relative of husband of a woman subjecting her to cruelty - Whoever, being the husband or the
relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation - For the purpose of this Section, “cruelty” means –

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

However, this section gives a very limited meaning of cruelty, which results only for the past events. The act of suicide or causing grave injury or danger to life is meant as a result of the past events. When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage, and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. But the section have been
held not to include a husband who merely drinks as a matter of routine and comes home late\textsuperscript{224}, and the wife, out of rage commit suicide.

Apart from this, the procedural requirement of Sec.498A, that the woman victim, or her parents or relatives can only file a complaint make it difficult for a victim who is alone or uneducated to lodge a complaint against her husband.

Again, where after a spell of cruelty, the husband and wife reconciled and resumed joint life and it was found that the husband left the wife back with her parents for a short spell and then took her back and within two days informed her parents of her death, and the wife made no complaint of cruelty during her short stay with parents, the section could not come into play, because there was no complaint after reconciliation.

**Section-509** - Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both. However, it is very difficult to prove the nature of gravity of the offence, as it

\textsuperscript{224} Jagadish Chandra \textit{vs} State of Haryana, 1988 Cr. L.J.1048.
depends upon the social status of the woman. Apart from this, the Section also does not give any guiding norms to measure the nature of gravity of the offence.

The Indian Evidence Act, 1872 :-

The Indian Evidence Act was enacted in 1872 Sections-113A and 113B are the newly amended sections of the Indian Evidence Act which were amended by Criminal Law (Second) Amendment Act, 1983. These two sections deals with the presumption as to abetment of suicide by a married woman and presumption as to dowry death respectively. The provisions of these sections are that the court should proceed with a legal presumption that the victim has died for dowry. But no such presumption arises until the prosecution succeeds in establishing the primary factum that the accused had harassed the (victim) before her death with the demand of dowry. Hence a bare reading of Sec.113A of the Evidence Act shows that the presumption under this Section is not mandatory and it is only permissive. In other words, the presumption under this Section is rebuttable one. Thus, a lot of preferential treatment is given to the culprit, but no one sees the person for whose benefit, both these sections of Indian Evidence Act is enacted.
The Code of Criminal Procedure, 1973 :-

The law relating to criminal procedure is applicable to almost all criminal proceedings in India, except those in the States of Jammu and Kashmir and Nagaland and the Tribal areas in Assam\textsuperscript{225}. The code has been amended from time to time by various Acts of the Central and State Legislatures. Section-125 of the Code of Criminal Procedure, however makes specific provision for maintenance of wives along with children and parents. The mandate of this Section is that it is natural and fundamental duty of every person to maintain his wife and children, so long as they are not able to maintain themselves. However, the purpose of this section is not to recognize or create a right in favour of a wife, but to ameliorate the social problems that the women have to face everyday. The primary object of this section is to prevent starvation and vagrancy of a discarded wife and urgent relief in one or the other of the forms convenient to them. It is the public policy that a wife, who is unable to maintain herself, should be paid maintenance allowance by the husband or father concerned, who can afford. If he neglects to do so, he must be made to do it. Thus, a woman has two distinct rights for maintenance. As a wife, she is entitled to maintenance. In another capacity, namely, as a divorced

woman, she is again entitled to claim maintenance\textsuperscript{226}.

However the supreme Court in Dwarika Prasad Satpath – Vs – Bidyut Prava Dixit & Another\textsuperscript{227}, held that if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under Sec.125 Cr.P.C. which are of summary nature, strict proof of performance of essential rites is not required. Either of the parties aggrieved by the order of maintenance under Sec.125, Cr.P.C. can approach the Civil Court for declaration of status as the order passed under Sec.125 does not finally determine the rights and obligations of the parties. Court also held that the Magistrate can impose a sentence which may not extend for more than one month.

If a husband fails to comply with the order of the Magistrate to give maintenance, the Magistrate can impose sentence of not more than one month\textsuperscript{228}. After expiry of one month, on fresh application alleging non-compliance, Magistrate may again impose the sentence of one month.

This section provides maintenance to Muslim women also. In a historic judgment, the Apex Court in Mohd. Ahmed Khan – Vs – Shah Bano Begum\textsuperscript{229} has held that Sec.125 is applicable to all irrespective of

\textsuperscript{227} AIR (SC) (1999) 3348.
\textsuperscript{229} AIR 1985 SC 945.
their religion. In the instant case the Court observed that Sec.125 (1)(b) contains no words of limitation so as to justify exclusion of Muslim women. The Muslim fundamentalists raised objection, which compelled the Government to bring legislation to this effect. Therefore, the Parliament passed the Muslim Women's Protection of Rights on Divorce Act, 1986, providing for other remedies to Muslim women. This Act makes provision for the Muslims to avail remedies under Sec.125 of the Code if the husband consents to it. Subsequently, the Madhya Pradesh High Court in Mohd. Umar Khan - Vs - Gulshan Begum\(^{230}\), has held that in the absence of declaration by the husband under Sec.5 of the act, the wife is not entitled to avail remedies under Sections-125 to 128 of the Code.

**The Special Marriage Act, 1954**

The Special Marriage Act was passed in 19\(^{th}\) October, 1954. It is an Act to provide a special form of marriage in urgent situation, for the registration of such marriage and the divorce under the same Act. The main object of enacting this law are that:

(a) Advantage can be taken by any person in Indian Nationals in foreign countries irrespective of the faith which either party to

\(^{230}\) 1992 Cr. L.J. 899 (M.P.)
the marriage may profess.

(b) Provisions are sought to make for permitting spouses who are already married under other forms of marriage under this Act.

Section-4 of the Act laid down the conditions relating to the solemnization of special marriage. Section-5 provides for the issue of notice of the intended marriage. Thus, the Act consists of 51 sections and it is an easy form of marriage within the prohibited degrees and inter-caste marriage. The marriage is to be registered before the marriage officer. But in Assam, it is found that the marriage is not registered before the marriage officer in accordance with the law. As a result, some persons deny the existence of marriage and take the advantage of the situation. Compulsory registration of marriage would be a step for prevention of child marriage. If the record of marriages between two persons is kept, to a large extent, the dispute concerning solemnization of marriage between two persons can be avoided. As contended by the National Commission, in most of the cases, non registration of marriages affects the women to a great measure. Though the registration itself cannot be a proof of valid marriage, yet it has a great evidentiary value.

Though, Sec.27 (2) of the Special Marriage Act, 1954 recognized

the breakdown grounds, but the matrimonial bars under the statute was over-looked. The Law Commission in its 71st Report has recommended that irretrievable breakdown of marriage should be a ground of divorce for Hindus. It suggests the period of three years’ separation as a criterion of breakdown. On the basis of the Report, the Marriage Laws (Amendment) Bill, 1981 was introduced in Parliament.

**The Hindu Marriage Act, 1955**

Marriage is considered to be one of the important components rather institutions of the Indian Society. The Hindu Marriage Act, 1955 is a codified form of Hindu Vedic Marriage, which is performed through rituals and ceremonies from time immemorial. This law relating to marriage is mainly performed by the Hindu. The steps of ‘Saptapadi’ is the last stage of marriage ceremony. After that a man and a woman is deemed to be unified forever.

Since Hindu marriage is sacrament, the consent of the parties did not occupy any important place. In all early patriarchal societies there was no difference between a slave and a child – the dominion of the father over sons and daughters were absolute like as it was over slaves. The marriage of the girl meant the transfer of father’s dominion over

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232. Shastri – Vs – Muladas, AIR 1966 SC 1119 – any person who follows Hindu religion in any of its form or development either by protecting it or by professing it, is a Hindu.
daughter to the husband\textsuperscript{233}. Thus, a person married may be a minor or even of unsound mind, and yet if the marriage rite is duly solemnized, there is a valid marriage\textsuperscript{234}.

The Hindu Marriage Act, 1955 has reformed Hindu Law of marriage. Section-5 deals with the conditions of marriage. Clause (ii) of the Section deals with mental capacity. Clause (iii) lays down that at the time of the marriage ‘the bridegroom has completed the age of twenty one years and the bride the age of eighteen years’. The age of marriage and soundness of mind relate to the consensual element of marriage. If marriage is looked upon as a contract, consent of both the parties is a condition precedent to the marriage. But, according to Sec.11 of the Indian Contract Act, the contract of a minor or of a person of unsound mind is void. On the other hand, under the Hindu Marriage Act,


marriage of a person who is of unsound mind is a valid marriage. Not only that, the violation of the requirement of clauses (ii) and (iii) does not render the marriage void. Because, the mental conditions specified in the clauses relate to pre-marriage conditions and not to post marriage mental condition. It is an established rule of law, that a contract for want of mental capacity is void; it is void ab initio. Therefore, it is clear that Hindu Marriage Act does not consider the question of consent of much importance. Thus, a marriage without consent is valid. If a woman can show that her consent was not obtained at the time of marriage, still the marriage is valid. Again, if a woman can show that consent was obtained by fraud or force, then also the marriage is only voidable.

Sec.12 (1) of the Hindu Marriage Act laid down that the consent of the guardian whenever necessary was obtained by fraud or force, then the marriage was voidable. This provision was incorporated to restrain the marriage of girl child. The Court also suggested the compulsory registration of

235. Sec.5(ii)-at the time of the marriage, neither party -- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind. (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children, or (c) has been subject to recurrent attacks of inanity or epilepsy.

Sec.5(iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage.

marriage to prevent child marriage\textsuperscript{239}.

Apart from this, Sec.13 of the Hindu Marriage Act, 1955 deals with the grounds of divorce on the basis of which the aggrieved parties can seek a decree of divorce from a competent Court of jurisdiction. However, the Hindu Marriage Act, 1955 does not incorporated the irretrievable breakdown theory of marriage, despite the fact that the spouses living under the same roof for 13-14 years without consuming the marriage, with the total separation to each other\textsuperscript{240}. The Supreme Court, therefore, suggested the complete reform of law of marriage along with the introduction of irretrievable breakdown of marriage and mutual consent as ground of divorce\textsuperscript{241}. The incorporation of the new article-409A in the Indian Penal Code, which laid down cruelty as a criminal offence has boasted the zeal\textsuperscript{242}.

It is normally observed that, whenever a woman is divorced by her husband, the husband tries to repudiate to give maintenance to the divorced wife. Section-125 of the Criminal Procedure Code, 1973 also provides for the maintenance of the divorced wife. Though Section-24

\textsuperscript{239} Naven Kohli – Vs – Neelu Kohli, AIR (SC) (2006) 1675.
\textsuperscript{240} Naven Kohli – Vs – Neelu Kohli, AIR (SC) (2006) 1675.
\textsuperscript{242} Reynold Rajamani & another – Vs – Union of India. AIR (SC) (1982) 1726.
and Section-25 and Section-18 of the Hindu adoption and Maintenance Act provides for the maintenance pendant lite and permanent maintenance, but they do not stand in the same way. The remedies under these Sections and under Section-125, Cr. P.C. are quite independent. The Supreme Court reiterated the view that nullity of marriage will not release the husband to give maintenance to wife. Hence, the husband refused to give maintenance in such situation lead to the violation of the rights of women. However, the Act is unable to fix the maintenance amount. The Supreme Court granted different amounts of maintenance in different cases, considering the varying status of the spouses, which resulted cumbersome attitude of husband towards the divorced wife.

**Hindu Adoption and Maintenance Act, 1956:**

The Hindu Adoption and Maintenance Act, as amended in 1956 codify the law relating to adoption and maintenance among Hindus.

Section-8 of the Act deals with the right of a Hindu female to adopt a child. But this right could be exercised only when she is unmarried or she has become a widow or in certain limited cases, she can adopt during the life time of her husband. It may be mentioned here that the right to

adopt normally exercised by the husband and it can be limited by the wife
only by exercising vetoing power by way of consent which is one of the
most necessary conditions for adoption by the husband. Nevertheless, a
woman can exercise her right to adoption only during the period of her
maidenhood, divorced hood or widowhood\textsuperscript{245} and fulfilling certain
conditions during the continuance of marriage if her husband has
renounced the world or has ceased to be Hindu or has been declared by a
Court of competent jurisdiction to be of unsound mind.

Again, regarding the competency of a person to adopt, the law
provides that the father could act against the will of the mother, if consent
can be taken from her. But a woman has no such power against the will of
her husband. Even a widow adopting son, is found later that the widow
was given authority by her husband to adopt son to him, then also the
adoption is not valid\textsuperscript{246}. It is a condition precedent that the couple should
be without any male issue living at the time of adoption. Therefore, it is
observed that Hindu Adoption and Maintenance Act is also not able to
uplift the women's right regarding adoption.

\textsuperscript{245} Durga Das – Vs – Santosh Kumar. AIR 1944 Cal. 428.

The Immoral Traffic (Prevention) Act, 1956 :-

Prostitution is a slur on human dignity and a shame to human civilization. For the said purpose, on 9th May, 1956, the Indian Parliament has passed an Act called Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). The Act aimed at suppressing the evils of prostitution in women and girls and to provide opportunity to fallen women and girls to rehabilitate themselves as decent member of the society. But the Act did not succeed in ample measure to eradicate or suppress the evils of prostitution, and so it was drastically amended in 1978. Besides other stringent measures, one progressive measure was the opening of probation under the Probation of Offenders Act. However, it was soon realized that the measure needed to be more stringent and the provision for release on probation was abused. So the Parliament, by its Amendment act,44 of 1986 repealed the provisions relating to probation. It also realized that time had come when male prostitution should also be covered by the Act and hence it changed the name of the Act from SITA to Immoral Traffic (Prevention) Act, 1956. In place of women and girls the Immoral Traffic (Prevention) Act includes the word ‘person’ and thus covered both the male and female.
The Act consists of 25 sections and Sections 3 and 4 provides for
the punishment for keeping brothel or person living on the earnings of
Prostitution. But the Act does not provide for the punishment of a woman
who voluntarily engage herself to the practice of prostitution. Section-
22B of the Act provides for special court to try cases summarily, so that
women reserved from brothels can get immediate remedy and protection
under adequate legal system.

It may be pertinent to note that the Immoral Traffic
(Prevention) Act is social welfare legislation, and therefore, it provides
rehabilitation and remedial measures. It can be said that this piece of
legislation is not a purely penal legislation and is also not an exhaustive
one. Along with the Act, in Indian Penal Code, Sec. 270, Sec. 278,
sec. 366, Sec. 372 and Sec. 373 are related to the prohibition of
prostitution.

In Vishal Jeet – Vs – Union of India & oths. reiterated the view
that many unfortunate teen-aged female children and girls in full bloom
are being sold in various parts of the country, far paltry sum even by their
parents finding themselves unable to maintain their children on account

247. Sec.2(e) – 'Prostitution' means the sexual exploitation or abuse of persons for
commercial purposes, and the expression prostitute shall be constructed
accordingly.
248. Section-21 – Protective homes.
of acute poverty and unbearable miseries and hoping that their children would be engaged only in household duties or manual labour. But those who are acting as pimps or brokers in the flesh trade and brothel keepers either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into flesh trade. Thus the purpose of the Act is to suppress the evils of prostitution in women and girls achieving a public purpose, namely to rescue the fallen women.

The Court also agreed that in spite of the Act and the Constitutional provision, it cannot be said that the desired result has been achieved. It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that this malady is not only social, but also socio-economic problem.

It is, thus, an undeniable fact that prostitution remains as a running sore in the body of civilization and destroys all the moral values towards women. It is a violation of the women’s right to a dignified life which requires a direct, speedy and comprehensive legal action.

**The Hindu Women’s Right to Property Act, 1937** :-

Before independence, the Hindu widow had no rights over her husband’s property. To enlarge the Hindu widow’s rights of succession to their husband’s estate, the Hindu Women’s Right to Property Act was
passed in 1937. The Act recognized eight kinds of property as women's property. They are – (a) Gift and bequests from relations, (b) Gift and bequests from stranger, (c) Property acquired by self-exertion and mechanical acts, (d) Property purchased with Stridhan, (e) Property acquired by compromise, (f) Property obtained by adverse possession, (g) Property obtained in lieu of maintenance, (h) Property obtained by inheritance.

The Hindu Succession Act, 1956 :-

But the Hindu Women's Right to Property Act, 1937 has been replaced by the Hindu Succession Act, 1956 and it recognized three widows – intestate widow, widow of a predeceased son and widow of a predeceased son of a predeceased son as heirs of a Hindu male, though gave them only limited estate. The Act, therefore, does not confer upon the widow of a deceased Hindu any interest in agricultural land and succession to shebaitship 250.

Again Sec. 2 (2 of the Hindu succession Act provides that the act does not apply to members of Scheduled Tribes. This has created some anomalous situation. The Act of 1937 stands repealed and it is replaced by the Hindu Succession Act, 1956 and it created a vacuum as regards scheduled tribes. Though, it may be possible to take the view that the

repeal is not operative at all as regards Scheduled Tribes, but the position is not very clear.

Apart from this, Sec.14 of Hindu Succession Act, 1956 has abolished women’s estate alienated by her before 17th June, 1956. Section-14 (1) also recognized the property of a female Hindu to be her absolute property as Stridhan. But Sec.14 (2) lays down that if the gift, will or any instrument, decree or order of a Civil Court or award grants only a restricted estate to a Hindu female, she will take property accordingly. Similarly, Sec.6 of the Hindu Succession Act, 1956 recognized the rule of devolution by survivorship among the male members of the coparcener. That, the above averments made it clear that the Hindu Women had no right over ancestral property under the Hindu Succession Act, 1956, excepts the limited estate under Sec.14 (2). This injustice towards women were tried to be removed for the first time by introducing the amendment of Hindu Succession Act, 1956. Thus, the Hindu Succession (Amendment) Bill, 2004 was adopted to remove this discrimination against women under Sec.6 by giving equal rights to daughter in copercenary property.251 Though the Act have been given the overriding effect, but how much it will be fruitful, time will say, as the

act is not an exhaustive one. Moreover, The Hindu Succession (Amendment) Act, 2005, which was enacted in 2004 does not make it clear about the rights of married women who marry before coming of the Act.

**The Maternity Benefit Act, 1961 :-**

Before the enactment of the Maternity Benefit Act, 1961 the maternity benefit for women was only a Constitutional right and was limited in its application. The Maternity Benefit Act, 1961 was enacted to regulate the employment of women in certain establishment for certain periods before and after child-birth and to provide for Maternity Benefit and certain other benefits. The Act had been amended several times to give the benefit to working women at different level of their work.

Section-2 of the Act stated about the application of the Act. Section-3 defines the term maternity benefit along with some other definitions. The Act, in the first instance, applies to every establishment being a factory, mine, plantation including establishment belonging to the government. The Maternity Benefit (Amendment) Act, 1988 provides that the women workers who work not less than 80 days can claim the benefit, irrespective of the number of births. The Act consists of 30 Sections and the Act tries to include all sectors of women employment. Thus, in Municipal Corporation of Delhi Vs Female Workers (Muster Roll)\(^{252}\),

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252. AIR (SC) (2000) 127
the female Muster Roll workers of Delhi Municipal Corporation were denied the benefits of maternity leave on ground that the services are not regularized and provisions of Act is not extended to Municipal Corporation. However, there is nothing in provisions of the Act which enables only regular women employees to the benefit of maternity leave. A woman employee at the time of her advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the factus. Thus, the Act aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peacefully, undeterred by the fear of being victimised.

Section-12 of the Act also laid down, that a woman, when absents from work as per the provision of this Act, it shall be unlawful for her employer to discharge her on account of such absence. Thus the Act tried to give the benefit to all classes of women. But the Act does not include the women in agricultural sector.

The Dowry Prohibition Act, 1961 :-

The Dowry Prohibition Act, 1961 was enacted to prohibit the giving and taking of dowry. To give teeth to the Act of 1961, the Joint Parliamentary Committee made some recommendation on Dowry, most of which have been accepted by the Parliament. In pursuant to this, the
Parliament passed the Dowry Prohibition (Amendment) Act, 1984 and the Dowry Prohibition (Amendment) Act, 1986. Unfortunately, neither the original Act, nor the Amending Acts can curb this growing menace. One of the main reasons is that the Act is not a complete Code.

It is apparent that the Dowry Prohibition Act, 1961 contains only ten sections. Sec. 1 of the Act is the short title, extent and commencement. Sec.2 defines the term ‘Dowry’. Sections – 3 & 4 of the Act deal with the provision relating to penalty for giving or taking dowry and penalty for demanding dowry. However Sec.4A has been inserted by the Amendment Act, 1986 which prohibits advertisement regarding material benefits as consideration for the marriage of his son or daughter or any other relative. Section-5 declares the agreement for giving or taking dowry to be void. Section-6 states that in certain circumstances giving or taking of dowry is permitted if it is for the benefit of the wife or her heirs. Sections- 7 & 8 deal with the offence relating to the dowry prohibition. Although sections – 8A and 8B deal with the burden of proof which lie on the prosecuted person, and he has to prove that he has not committed an offence under Section – 3 or 4, whereas Sec.8B makes provision for appointment of the dowry prohibition officers to discharge certain functions. Sections – 9 & 10 make provisions for Central government and the state government to lay down rules for the purpose
of the Dowry Prohibition Act, 1961.253

Certain provisions of the Indian Penal code, 1860, such as Sections 304B, 306, 300, 302, 405, 498A, Section-113A and Section-113B of the Indian Evidence Act, 1872 have been made applicable to the Dowry Prohibition Act, 1961. It is therefore, clear that the Dowry Prohibition act, 1961 is not a complete Code254.

In order to distinguish between dowry given under compulsion and gifts given out of love and affection, the Act of 1961, required that the dowry must be given “as a consideration for marriage”; but this made the definition of dowry very vague. It was very difficult to prove that dowry was given as a consideration for marriage. Thus in Babulal Sao – Vs – Mool Chand Jain255, the girl’s father had filed a case under the Act stating that the father of the boy demanded dowry, but it was held that since the girl’s father is guilty of giving dowry, which is an offence, the petition cannot be maintained. Moreover, the complaint should have been filed within one year. Since it was after a year, the Court cannot take cognizance of the Act.

Dowry is generally regarded as a gift for the benefit of the husband and his relatives rather than for the benefit of the wife. This is probably

253. Ibid.
255. (1989) 2 DMC 112 (MP).
the reason why dowry is demanded and the wife is harassed for not bringing it. In Vinod Kumar - Vs - State of Punjab\textsuperscript{256} the High Court took a completely erroneous view of law and held that the very concept of a matrimonial home connotes jointness of possession and custody by the spouses, even with regard to the movable properties exclusively owned by each of them. It is therefore inept, in view of the conjugal relationship, as involving any entrustment or a passing of dominion over property day-to-day by the husband to the wife or vice versa.

However, the Supreme Court in Pratibha Rani - Vs - Suraj Kumar\textsuperscript{257} differed and held that the absolute property of the wife cannot become the joint property of the husband and the wife cannot become the owner of the joint property with the husband purely because the wife enters the matrimonial home in which everything is held by the family as a whole.

Again, in Hakam Singh - Vs - State of Punjab\textsuperscript{258} the question of limitation for the non-return of the dowry items was discussed. The Court held that this section is analogous to the offence under Sec.406 I.P.C. It is a continuing offence. But the Delhi High Court in Gursharan Singh -Vs-\textsuperscript{256} AIR 1982 P & H 372.
\textsuperscript{257} AIR 1985 SC 628.
\textsuperscript{258} (1990) IDMC 343 P & H.
Smt. Gursharan Kour\textsuperscript{259} held that the offence is complete when the specified period expires. It is not a continuing offence. In this case the demand of return of dowry items was made after the expiry of the limitation period, the claim was held to be barred which resulted the women to be deprived of the properties which her parents had given to her at the time of marriage.

The enactment of the Dowry Prohibition Act, 1961 in its original form was found to be inadequate as it is found that the demand of dowry and its recovery takes different form to achieve the same result. Thereafter, the Dowry Prohibition (Amendment) Act, 1986 was enacted along with certain necessary changes in the Indian Penal Code and Indian Evidence Act. But the dowry deaths maintained their upward spiral in spite of all legislative efforts to curb them. One important reason for the ineffectiveness of the Act was the definition of cruelty. Indian Penal Code defined cruelty as a conduct which resulted in physical and bodily injury to a person. A wife had to undergo medical examination and produce evidence that physical injury was inflicted upon her. The subjection of a wife to mental cruelty was considered a ground for her to seek divorce but it was not a ground for any penal action to be taken against her.

\textsuperscript{259} 1990. Cr. L.J. 2469.
husband. But the incorporation of new section-498A\textsuperscript{260} has made harassment and torture for dowry a criminal offence. However, in Inder Malik – Vs – Sunita Malik\textsuperscript{261}, the constitutional validity of sec.498A was challenged. It was contended that it gives arbitrary powers to the police and the Courts and that this section offends against article-14. The section also offends against the principle of double jeopardy inasmuch as the demand for dowry or any property is punished under sec.4 of the Dowry Prohibition act. The Supreme Court, nevertheless denied the contention and reiterated its own view.

Hence, from the above discussion, it is clear that whenever any bride is burnt for extraction of more dowry, or instances of brutal murder of a young wife committed by the barbaric process of pouring kerosene oil and setting her on fire, the Court has to deal with most severe and strict manner and award the maximum penalty that it may act as a deterrent to other persons. But the Dowry Prohibition Act,1961 provides only for the punishment of 7 years or life imprisonment but not with death sentence. This provision is in contravention of Sec.302 of Indian Penal Code which include the provision of death sentence in case of

\textsuperscript{260} Sec.498A deals with the offences relating to the cruelty by husband or relatives of the husband and runs thus, whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

\textsuperscript{261} (1986) Cr. L.J. 1510.
murder of a person in rarest of rare instances. The above averments show that the extreme cases of beating, torture and harassment for dowry or dowry death is a violation of right to life of a woman. The adverse situation in the matrimonial home makes the woman to take the desperate decision like suicide. These are the critical situations where the woman becomes the helpless viction.

The Medical Termination of Pregnancy Act, 1971 :-

The concept of equality among the sexes extends to the total being of both men and women, including the authority over their own body and mind. The women’s right to decide the number of children she wishes to bear and the right to terminate an unwanted or forced conception is now well recognized after passing of the Medical Termination of Pregnancy Act. The Act was passed by the Parliament in 1971 on the recommendation of the Central family Planning Board which empowered the women to have a pregnancy terminated under a specified set of circumstances.

It is an Act to provide for the termination of certain pregnancies by registered medical practitioners and matters connected therewith or incidental thereto.

Section-3 of the act provides the condition under which the pregnancies may be terminated. A pregnancy may be terminated by a
registered medical practitioner, if the registered medical practitioner is of the opinion that, -

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is substantial risk that if the child is born, it would suffer from such physical or mental abnormalities as to be seriously handicapped\textsuperscript{262}.

Explanation-I - Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute grave injury to the mental health of the pregnant woman.

Explanation-II - Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Thus, the Act liberalises the existing provisions of Indian Penal Code by including many exceptions to the Sections-312 to 318 to ensure

\textsuperscript{262} The Medical termination of Pregnancy Act, 1971.
better heath and avoidance of risk to the life of the pregnant woman. The provisions of the Indian Penal Code relating to miscarriage have been subservient to the Medical Termination of Pregnancy Act because of the non obstante clause in Section-3, which permits abortion / miscarriage by a registered practitioner under certain circumstances like heath, humanitarian or eugenic ground\textsuperscript{263}. Apart from this, the condition "failure of contraceptive devices"\textsuperscript{264} and "termination by minor girl with the consent of guardian"\textsuperscript{265} virtually allows abortion on request due to difficulty of proof. This liberal condition increases a large number of female foetus which violate the right to life of those unborn female babies and the violation of reproductive right of women.

Another critical juncture of the abortion of woman is causing death with intention to cause miscarriage of a woman. Thus in the case of Surendra Chouhan – Vs – State of M.P.\textsuperscript{266}, the accused had illicit relation with deceased. The deceased became 3 months pregnant. The appellant took her to the co-accused, a Electro Homoeopathy Doctor for abortion. The deceased died while abortion was being done. Both the accused are convicted under Sec.314 and 34 of IPC. This incident is one example

\textsuperscript{263} Dr. Jacob George – Vs – State of Kerala. SCC.3 (1994) 430.
\textsuperscript{264} Explanation-II of Sec.3.
\textsuperscript{265} Section-4 (a).
\textsuperscript{266} AIR (SC) (2000) 1436.
where pregnancy was terminated illegally by a person who is not competent to do abortion. But in Assam a large number of pre-nuptial abortions and illegal abortions are done under the veil of this Act.

**The Equal Remuneration Act, 1976** :-

Historically, equal pay for work of equal value has been a slogan of the women's movement. Women workers are in no way inferior to their male counterparts, yet they have to draw lesser pay for the similar work. Equal pay laws, therefore, deal with sex-based discrimination in the pay of men and women doing the same or equal work.267 The International Labour Organisation (ILO) adopted the Convention (No.100) concerning equal remuneration for men and women workers for work of equal value. As a member of ILO; this convention was ratified by the Government of India in 1968.268 To give effect to the ILO Convention and the provisions concerning equality in economic activity, both for male and female workers, the Equal Remuneration Act was promulgated in 1976. To begin with, the Act was enforced in plantations covered under the Plantation Labour Act, 1951 and later it was extended to several different employments and establishments.

It is an Act to provide for payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex against women in the matter of employment and for matters connected therewith or incidental thereto.

Section-4 of the Act provides the duty of employer to pay equal remuneration to men and women workers for same work or work of similar nature.

Section-5 of the Act provides that on and from the commencement of this Act, no employer shall, while making recruitment for the same work or work of a similar nature, make any discrimination against women except where the employment of a woman in such work is prohibited or restricted by or under any law for the time being in force.

Section-6 of the act provides for the appointment of an Advisory Committee to advise the appropriate Government with regard to the extent to which women may be employed in such establishment.

Section-7 of the Act provides about the power to appoint authorities for hearing and deciding claims and complaints regarding equal remuneration. Thus, the Court, while discussing the equal pay for equal work in M/s Mackinmon Mackenzie & Co. Ltd. – Vs – Audrey D
Costa & anth., held that discrimination arises only when men and women doing the same or similar kind of work are paid differently. Wherever sex discrimination is alleged, there should be a proper job evaluation before any further enquiry is made. But the Act does not make any provision or provide any guidance as to evaluation of work either individually or as a class or group. In this case lady stenographer was paid less than the male stenographer after a settlement between the Company and the Union.

Regarding the remuneration of daily wager, there is always seen the tendency to pay lower wage to the women worker then the men worker. This wage difference is a violation of human rights of women and the Equal Remuneration Act, 1976.

The Muslim women (Protection of Rights on Divorce) Act, 1986:

In Shah Bano’s case the Supreme Court of India has held that Sec-125 is applicable to all irrespective of their religion. In the instant case the Court observed that Sec-125 (1) (b) contains no words of limitation so as to justify exclusion of Muslim women. In view of this revolutionary judgment the Muslim fundamentalists raised lot of hue and

cry, resulting the Central government in bringing a legislation to this effect. Therefore, the Parliament passed the Muslim Women’s (Protection of Rights on divorce) Act, 1986 providing for other remedies to Muslim Women. This Act makes provision for the Muslims to avail remedies under Sec-125 of the Code if the husband consents to it.

The object of the Act is to protect the rights of Muslim women who have been divorced by or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto.

Section-2 defined divorced woman, which means a Muslim woman who married according to Muslim law and has been divorced in accordance with Muslim law. Iddat period means three menstrual courses and three lunar months after her divorce or delivery of her child or the termination of her pregnancy, whichever is earlier.

Section-3 of the Act makes it compulsory that at the time of divorce a Muslim woman is entitled to get the ‘mahr’ on other properties belong to her. The husband is liable to pay dower money or other properties belonging to his wife at the time of divorce.

Under section-4, the liability to maintain divorced woman has been cast on her children- both male or female, married or unmarried, her parents or other relatives entitled to inherit her property on her death.
Section-5 provides the declaration given by husband about the preference of Section-125 to Section-128 of the Code of Criminal Procedure, 1973.

The Gujarat High Court in Abdulla – Vs – Mohmuma Saiyadhan\(^{272}\) has held that a Muslim divorced woman is entitled to maintenance from her former husband throughout her life or till she remarries, that her right to maintenance is not limited to the iddat period.

The same view was expressed by the Apex Court in Danial Latifi – vs- Union of India\(^{273}\), wherein Sec.3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, a Muslim husband is liable to make reasonable compensation and for provision for the future of the divorced wife which also includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period in terms of Sec.3(1)(a) of the Act is praiseworthy.

In the instant case the Apex Court observed that a divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under sec.4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death. If any of the relatives being unable to pay

\(^{272}\) AIR 1988 Guj. 141.
\(^{273}\) 2001 (3) GLT.9 (SC) 1.
maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay maintenance.

Though the Act is considered to be of immense historical significance, as it is the first attempt to codify the Muslim personnel law by independent India, yet the Act is the gel of hurriedly drafted and hastily enacted statute. Thus the analysis of the Act makes it clear that the husband is virtually made free from all kinds of liabilities under the Act to maintain his divorced wife. The Act also has not clearly defined the iddat period. Sec.5 of the Act make it worse by providing that sec.125 to 128 of the Criminal Procedure Code will be applicable if a declaration is made by the divorced women and her former husband exercising their option to be governed by the provisions of Sec.125 to 128 of the Code. In this way Muslim women can exercise a very limited right to get maintenance.

**The Indecent Representation of Women (Prohibition) Act, 1986** :-

This is an Act to prohibit indecent representation of women through advertisement or in publication, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto.
Section-3 of the Act prohibits the advertisements containing indecent representation of women.

Section-4 prohibits the publication or sending by post of books, pamphlets etc. containing indecent representation of women.

Section-6 provides for penalty for a person who contravenes the provisions of Sec.3 and 4 with imprisonment of two years and with fine. But Sec.8 made the offences cognizable and bailable.

Thus, despite the presence of the Act, indecent representation in various forms and in various modes is galore in the society\textsuperscript{274}. One of the main reasons is due to absence of punishment of the woman who voluntarily made herself for advertisement in the form of indecent representation. Apart from this, due to the advancement of science and technology, the new form of indecent gesture of women by advertisement through SMS, MMS in mobile are rising which is not covered under this Act. The Supreme Court also in Ajay Goswami – Vs – Union of India\textsuperscript{275}, recognized the growing tendency among the youngsters and minors in indulging in X-rated jokes, SMS and MMS. Hence any article in such topic in newspapers may not strictly be obscene legally, but certainly have tendencies to deprave and corrupt the minds of young and


\textsuperscript{275} Sec.1 (2007) 143.
adolescents who, by reasons of their physical and mental immaturity may commit the crime against women and hence needs special safeguards and care. Sections-3, 4 and 6 of Indecent Representation, read with sections-292 and 293 of Indian Penal Code state that publishing as well as circulating of obscene and nude/ semi-nude photographs of women constitutes a penal offence. It is also the responsibility of the press not to abuse the freedom of speech and expression to publish such type of obscene photographs. The Cable Television Network (Regulation) Act, 1994 came into force on September 29, 1994. It ensured that the programmes broadcast by Satellite Networks are done under the framework of the Indecent Representation Act, 1981\(^\text{276}\). However, the act have no stringent measures against indecent representation. Moreover, many provisions of the Act are not corroborated with other relevant laws.

Hence, the discussions reveal the fact that this enactment is required for the protection of the right to dignity and a decent life. The existence of lacunas lead to the violation of women’s human right.

**The National Commission for Women Act, 1990** :-

This is an Act to constitute a National Commission for women and to provide any matters connected therewith or incidental thereto.

\(^{276}\) Ibid.
Section-2 of the Act defines the Commission and its members. Section-3 provides for the Constitution of the National Commission for women. Section-10 under Chapter-III provides the functions of the Commission. The function of the Commission is mainly to investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws. The Commission also takes up the cases of violation of the provisions of the constitution and other laws relating to women with the appropriate authorities.

The Commission looks into complaints and takes suo moto notice of matters relating to –

i) deprivation of women’s rights.

ii) Non-implementation of laws enacted to provide protection of women and also to achieve the objective of equality and development and other matters incidental thereto.

The National Commission for women may appoint committees as may be necessary for dealing with special issues as the commission may consider. But the Act suffered from the following drawbacks –

The National Commission for Women does not have enforcing power, but enjoy only a recommending power, which ultimately makes it a teethless body. The Commission can only recommend regarding any
violation of women’s rights under the statutory provision or otherwise. But the commission cannot prosecute for any violation of rights of women.

Thus the working of the commission is hampered by the lack of autonomy and a clear status. The Government is the controlling authority and therefore the members of the Commission are susceptible to bureaucracy and politician’s interference and influence.

The Supreme Court of India also expressed its view in Delhi Domestic Working Women’s Forum – Vs – Union of India\textsuperscript{277}, that National Commission for women have to evolve a Scheme for compensation and rehabilitation in assisting victims of rape. In this case four domestic servants were subjected to indecent sexual assault by seven Army personnel in train and then raped them. For this type of weaker sections of society, the National Commission for Women must be called upon to engage themselves in the exercise of drafting such a Scheme and impress upon the Union of India to frame a Scheme as early as possible. The Apex Court held that under Sec.10 of the Act National Commission for women shall perform the following functions:

(a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws.

\textsuperscript{277} SCC. 1 (1995) 14
(b) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal. Such a Scheme shall be prepared within six months from the date of the judgment. Thereupon, the Union of India will examine and take steps for the implementation of the Scheme at the earliest.

**The Protection of Human Rights Act, 1993** :-

The Protection of Human Rights Act, 1993 was adopted in 8\textsuperscript{th} January, 1994. This is an Act to provide for the constitution of a National Human Rights Commission, State Human Rights Commission in State and Human Rights Courts for better protection of human rights and matters connected therewith against the State agency. As defined in People’s Union for Civil Liberties – Vs – Union of India\textsuperscript{278}, the Scheme of the Act is to protect and implement human rights including those envisaged in article-21 of the Constitution and International Covenants.

Section-2 of the Act define ‘human rights’ which means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International covenants as enforceable by the Courts in India.

\textsuperscript{278} SCC. 2 (2005) 436.
Section-12 of the act provides the functions of the Commission. The commission can inquire suo moto or on a petition about the violation of human rights by a public servant along with the review power of the Commission. The Act also provides the inquiry procedure with investigation. The Human Rights Commission also has to arrange the awareness programme, to encourage the NGOs to spread literary programme for protection of human rights.

The protection of Human Rights Act, 1993 is the first legislation which directly related to the human rights issue. The Act does not mention anything on women’s human rights. It has to be presumed that in the Act human rights include women’s human right also. Hence any violation of the women’s human right can be resolved by the Human Rights Commission established under the Act. However, after the World Conference and Beijing Declaration and Platform of Act, it is justified to amend the Act to include and define the women’s human right. Moreover the Act considers only a limited kind of human rights violation.279. Apart from this, the Act does not confer any enforcement authority upon the National Human Rights Commission and State Human Rights Commission. It is therefore, whenever there is any human rights violation

279. Sec. 2(d) – “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodies in the International Covenants and enforceable by Courts in India.
of women by the State machinery has come before the Human Rights Commission, the Commission can award only a suggestive judgment against the government. Another point is that Human Rights Commission can decide only the violation done by Government or its agency. But it cannot decide the cases of human rights violation by private person. As the Human Rights Commission is a State run organization, hence the Commission may not be able to free from biasness in case of deciding a dispute.

**The Pre-Natal Diagnostics Techniques (Regulation and Prevention of Misuse) Act, 1994 :-**

This Act is enacted to provide for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female faeticide. The object of the Act is to prohibit pre-natal diagnostic techniques for sex-determination. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. Hence this Act was enacted to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.
Section-3 of the Act provides the regulation of Genetic Counselling Centres, genetic laboratories and genetic clinics.

Section-4 of the Act provides the regulation or pre-natal diagnostic techniques.

Section-6 provides that the determination of sex must be prohibited.

However Section-4 provides some relaxation for making of pre-natal diagnosis.

This relaxation increases the rate of female faeticide which is a violation of right to life of female foetus. They are restraint before coming up to this earth.

**The Protection of Women from Domestic Violence Act, 2005**

Domestic Violence is undoubtedly a human rights issue and serious deterrent to development. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relative, it is an offence under Section-498A of the Indian Penal Code. Hence, this is an Act to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.
Section-3 of the Act defines the domestic violence and it includes four kinds of abuses which constitute domestic violence. These abuses are physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. Sec.8 provides for the appointment of Protection Officer for monitoring against the domestic violence. The Act also provides for appointment of service provider under Sec.10. The procedure under this Act is Civil Procedure Code, 1908 and Criminal Procedure Code, 1973.

Thus the Act provides for immediate relief of women who is subjected to domestic violence. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. The far reaching effect of the Act may be either judicial separation or divorce, if there is no settlement between the spouses. In such situation, the Supreme Court of India held that the wife is only entitled to claim a right to residences in a shared household which may be either rental house or joint family property. But the property of a mother of the husband cannot be called a shared household. Nevertheless, the effect of the implementation of the Domestic Violence Act may be observed in future only.

After going through all the above discussions, it is cleared that there are different laws for the protection of women in India as well as in

Assam. But the rights guaranteed under those Acts and the lacunas thereunder makes those laws mostly ineffective to curb the violation of women’s human rights. The social awareness and adequate education to women regarding those laws will help the women to know the law and to remove the lacunas within those laws for demanding their women’s human rights.

In Assam, another kind of human rights violation is rising. The insurgency problem in Assam developed the human rights violation of women in three different ways – (a) human right violation by insurgent groups, (b) women’s human rights violation for army atrocities due to combing operation and (c) women’s human rights violation of the widows of those persons directly engaged in armed conflict. The deployment of Armed Forces (Assam and Manipur) Special Power Act, 1958 and the combing operation of army during the decade of 90’s resulted the subsequent rise of terrorism in Assam. Now a days bomb blasting, extrajudicial killing like Parag Das, the noted Journalist, enforced disappearance by way of kidnapping, rape etc. are the common phenomenon in Assam. Section-4 of the Armed Forces Special Power Act, 1958 empowered the Security Personnel to shoot at sight. The broad provision of this Act not only facilitated grave violation of human rights
of women, but also encouraged more violation as the security forces are free from fear that they will be made liable for any crime or offence committed by them under those provisions of law. To curb the terrorist activities, the Central Government had passed two Acts, namely, The Terrorist and Disruptive Activities (Prevention) Act, 1985 and Prevention of Terrorist Act, 2002, which was further repealed by the Government due to public opposition from all over India. Thus, all those burning problems and situations in Assam and their subsequent consequences that the women in Assam are now facing are discussed in details in the next Chapter, the core area of this thesis, so that it can reflect a clear vision of violation of human rights of women in Assam.

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