Rape is the worst form of victimization, of a woman. It is one of the most terrifying events in a woman's life. The sexual act performed, often affects her psychology, as she loses her chastity, feels humiliated and degraded in society. Being the victim of man's passion without any fault, she is rejected by everyone, as if she is the sinner.

5.1 Rape

Rape is committed by means of force, fraud, fear, coercion or temptation. The society is responsible for this crime, as it portrays woman like a sex object and woman is regarded as the property of man for their sexual and productive use. In the Indian context, rape implies social ostracism and alienation of the family. If the girls are single, she finds it difficult to get married. In the circumstances, it is unlikely that a rape charge will be brought lightly, especially when the rape wounds the victim's dignity and destroys her security, while the trial forces her to undergo insulting cross examination and humiliating procedures of the criminal justice system in the glare of publicity.

The offence of rape is a social evil leading to many contingent anti-social problems. It is a phenomenon depicting the degree of pollution and physic psychic imbalance of weak but crooked minded enemies of civilization who want to satisfy their sexual lust by brutal force. The phenomenon shakes the faith of the society and the hopes of the youth. Although instinctive and momentary, the
incidence of this indecent act haunts the victim throughout her life as an arrow’s strike in the middle of the back. Incidentally, it again appears from the reporting in media that the victims of many of these sexual offences are mostly minor girls or protection less women.

The statistics are grim and shocking. According to the National Crime Records, which reflect the social degeneration, almost, 75% of rapists are married men who have sex regularly at home; 86% women do not feel safe in cities, three out of every ten rapists are either friends or relatives of victim. According to the WHO, every 54 minutes a woman is raped in India, whereas as per a CDWS study, 42 women are raped in India every 35 minutes.¹

More disturbing than the above statistics is the grim scene of unreported cases. On atrocities against women it was found that for every reported rape case, as many as 68% rapes went unreported. According to the National Crime Reports Bureau, the number of rape cases in India increased from 15,468 in 1999 to 16,496 in 2000, a recording jump of 6.6 per cent.²

It may be observed that inspite of there being the IPC and Cr.P.C. provisions; the rate of sexual offences is in an increasing trend. This may presumably be because of the noticeable lacuna in the law, such as lack of precision in the definitions given to the terms rape, sexual intercourse, man and woman, thus leaving the major responsibility of interpretation of the same in the given circumstances to the criminal courts, lack of uniform punishments to the

² Ibid.

offenders irrespective of the age and other considerations absence of any provision for the payment of compensation to or rehabilitation of the victims of sexual offences, abnormal delays in the administration of justice, and the like. There is, therefore, an immense need to analyse the existing legal provisions so as to tackle this growing indecent social contingency.

5.1.1 Sexual Intercourse and Penetration

The definition of the term Rape under the Indian Penal Code contemplates, inter alia, three important elements, i.e., will, consent and "sexual intercourse for constituting the offence of rape." While the terms will and consent are substitutes to each other, but the term sexual intercourse must co-exist with either of the first two terms for bringing a sexual act within the meaning of the term rape. However, it is surprising to note that the IPC is silent regarding the defining of these three important terms, except providing that "penetration is

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3 Sec. 375 of IPC, Rape, A man is said to commit 'rape' who, except in the case herein after excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: Firstly – Against her will, secondly – Without her consent. Thirdly – With her consent, when consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly – With her consent, when the man knows that he is not her husband 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.
sufficient to constitute the sexual intercourse necessary to the offence of rape".4 Accordingly in *State of Kerala v. Kundumkara Govindam*,5 it was held that the crux of offence under section 376 of IPC is rape and it postulates a sexual intercourse. The word intercourse means sexual connection. In intercourse there is temporary visitation of one organ by a member of another organ for certain clearly defined and limited objects. In this case also the Kerala High Court states that penetration means access or through. It has also been held in *Ghanshyam Mishra v. State*,6 and *Nathu Ram v. State of Haryana*,7 that the depth of penetration is immaterial.

Similarly, in *Prithi Chand v. State of H.P.*,8 The Supreme Court observed that, the argument overlooks the fact that in the absence of penetration there would not be absence of hymen with profuse bleeding from the vagina staining clothes. Merely because the doctor found that vagina admitted one finger with difficulty it cannot be inferred that there was no penetration. In *Prem Narayan v. State of Madhya Pradesh*,9 the accused dragged a 9 year old near the bushes and tried to penetrate. The girl was severely injured. Due to the pain the girl did not permit the doctors to carry out an internal examination. Hence the exact extent to the vaginal tear could not be determined. Giving maximum benefit of doubt to the accused, the trial court convicted the accused only of an attempt to

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5 1969 Cri. L.J. 818.
6 1957, Cri. L.J. 469.
9 1989, Cri. L.J. 70734
commit rape. On appeal the High Court commented that the accused had erroneously escaped punishment for rape but held that since the state has not appealed against it, it was not proper to look into this question. Further, every case of indecent assault upon a woman does not amount to an attempt to rape. The prosecution has to prove that there was a determination in the accused to gratify his passion at all events and in spite of all resistance. When the accused could not go beyond the stage of preparation, it will be viewed as merely an act of violating a woman's modesty.

Again in Ankariya v. State of Madhya Pradesh,¹⁰ and Kandappa Thakuria v. State of Assam,¹¹ the offence which is termed attempt to rape is precariously perched between successful penetration and beyond the stage of preparation, which is extremely difficult to prove. Thus in Ankariya case¹² the accused had loosened the petticoat cord of the woman and was about to sit on her waist, when she woke up and cried out for help. The session's court had convicted the accused for attempt to rape. But on appeal, the High Court acquitted him on the ground that the act had not advanced to the stage of attempt to rape but was only at the stage of preparation for the same. Similarly, in State of Maharashtra v. Vasant Madhav Devre,¹³ forcible penetration of finger does not amount to rape, under the patriarchal scheme of things. But in this case even while the judge admitted that the hymen was ruptured because of

¹² Supra note 10.
forcible finger penetration. But the court held that it did not even amount to assault. But in Madan Lai v. State of J & K, the court observed that, if an accused strips a girl and then forcibly rubs his organ on the private part of the girl but fails to penetrate the same into her private part, it is difficult for the court to hold that it was a case of merely assault under Section 354 of IPC and not an attempt to commit rape. In the facts and circumstances of the instant case the offence was clearly established and the High Court rightly convicted him under Section 376 read with Section 511 of IPC.

5.1.2 Consent

Under the provisions of Section 375, consent is the fundamental issue in a trial for rape. This is a crucial test, as the law requires that sexual activity should have been without the consent of the woman. In legal parlance, if the court is satisfied that the woman failed to ‘resist’ the ‘act’ she is deemed to have consented. The Supreme Court in Tukaram observed that Mathura was “shocking liar” for “there were no marks of injury on her body” after the reported incident and their absence went a long way to indicate that the alleged intercourse was a “peaceful affair”. Again, in Pratap Misra v. State of Orissa, the Court observed: “It is very difficult for any person to rape, single-handed, a grown up and experienced woman without meeting slightest possible resistance from her”. It concluded that “from this the only irresistible inference can be that the prosecutrix was a consenting party” and when there has been any real

14 (1997), 7 SCC 677: 12997 SCC (Cri), 1151.
15 Tukaram v. State of Maharashtra, AIR 1979 SC 185 188.
16 AIR 1977 SC 1307.
resistance there is bound to be local injury and marks of violence on the body and the limbs of the victim. In such a case, the act and demeanors of the girl immediately after the alleged commission of the crime should be subjected to very critical investigation, as these may provide valuable evidence, corroborative or otherwise, regarding the alleged ravishing.

It is time that the judicial attitude saw a change and courts accepted the testimony of women subjected to violence. In many a case, undue emphasis has been placed on the victim’s background and conduct, with the result that the judicial authorities often display serious reluctance to believe the version of the victim. The police records indicate that in 90 per cent of rape cases reported, the rapists are known to the complainants proving that this crime is generally committed by relatives or known persons, rather than by strangers.

Even so, a woman may not be a consenting party although she may know the man. In situations where two people, familiar with one another, are involved in an allegation of rape, common experience in courts of law has been that the judges begin with doubting the veracity of the victim’s statement concerning the assault. As the victim is unable to prove her abhorrence of the act and lack of resistance on her part, the courts infer that the complainant must have consented.

In the west, there are ‘date rapes’, acknowledged by law, wherein a boy dates a girl and forces a physical relation on her. The situation is not the same in

17 Ibid., at p.1313-14.
India and judicial attitudes differ. In *Prem Chand v. State of Haryana*,\(^{20}\) it was argued before the court by the defence counsel that the prosecutrix was a consenting and willing party as she was going around with the appellant on her own free will and, therefore, the question of commission of offence did not arise. Again in *Nana Ram Chanda v. State of Maharashtra*,\(^ {21}\) it was observed that since the prosecutrix was a willing and consenting party, the court opined that a lenient view should be taken. In another case, a tribal woman was raped by a police constable who entered her house at night while her husband was away at work. The Bombay High Court acquitted the accused by stating that: probability of the prosecutor who was along in her hut, her husband being out, having consented to sexual intercourse cannot be ruled out.

In certain cases courts did not examine whether consent was given voluntary or not, but Orissa High Court, in *Bijay Kumar Mohapatra & Ors v. State of Orissa*,\(^ {22}\) in case of gang rape, relying upon the *Rao Hamarain Singh*\(^ {23}\) judgement, the Court observed that, the consent must be voluntary. A mere non-resistance or passive giving in under duress cannot be construed as consent. *Saleha Khatoon v. State of Bihar*,\(^ {24}\) where girls were seduced with a false promise of marriage, to acquit the accused. In fact, there is only one positive judgement on this issue, which has held that consent given under a promise of marriage is tainted consent and has clarified further that no one should be

\(^{20}\) 1982 (2) CLR 82.
\(^{21}\) 1984 Cri. L.J. 85.
\(^{22}\) 1982 Cri.L.J. 2161.
\(^{23}\) 1985, Cr. L.J. 563.
permitted to reap the benefits of fraud in sexual matters. However, Bombay High Court took a different view in this regard in *Ravindra Dinkar v. State of Maharashtra*, Court set aside a conviction by the Session's Court in Kolhapur, the girl who was in love with the accused had voluntarily accompanied him to his friend's house where the alleged rape took place.

5.1.3 Absence of injury

In some cases courts acquitted the accused on the ground that there was an absence of injury on particular parts of the victim. In case of absence of injury court felt that prosecutrix was a consenting party. Under these circumstances the court did not consider helpless situation of the women. Accordingly, in *Pratap Mishra v. State of Orissa*, and *Laiq Singh v. State of U.P.*, the Supreme Court delivered a judgment which went unnoticed and did not cause any ripples amongst the various NGOs. In both cases women were raped and the accused were acquitted by the Supreme Court after consecutive convictions in two subordinate courts on the ground that absence of any injury on the prosecutrix indicates consent of the prosecutrix. Similarly, in *Mohammed Habib v. State*, a minor girl of seven to ten years was raped by a 21 year old. The girl has bite marks and her hymen was ruptured. The Sessions Court convicted the accused to life imprisonment and a fine of Rs.500. The Delhi High Court set aside the conviction on the ground that there was injury only on the body of the

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25 Ibid.
26 1989 Cri.L.J. 394
27 (1977)3 SCC 41:1977 SCC (Cri) 447.
29 1989 Cri. L.J. 137.
accused and not on the penis and that, in rape of a minor by a fully developed male, injury to the pansies was essential.

In 1978, the Supreme Court, again provoked another similar judgment against a conviction of the Bombay High Court under Section 375, IPC and acquitted the accused in *Tukaram v. State of Maharashtra*,\(^{30}\) popularly known as the Mathura Trial. Here, the sessions Judge found the evidence insufficient to convict the accused. The Bombay High Court reversed the finding and sentenced the accused to rigorous imprisonment.

In case *Rao Harihara Singh v. State of Punjab*,\(^{31}\) a mere act of helpless resignation in the face of inevitable compulsion, acquiescence and not resistance when volitional faculty is either crowded by fear or vitiated by duress cannot be deemed to be consent. Consent on the part of the woman as a defence to an allegation of rape, requires voluntary participation, after having fully exercised the choice between resistance and assent. Submission of her body under the influence of terror is not consent. There is a difference between consent and submission. Every consent involves submission but the converse does not always follow.

### 5.1.4 Unchaste women or past conduct

In the *Mathura Trial*\(^{32}\) one of the reasons for the judgment was that Mathura was a person of easy virtue and therefore the happenings were with her consent. Thus, the fight began for the protection of women alleged to be of

\(^{30}\) (1979), 2, SCC 143; 1979: SCC (Cri) 381

\(^{31}\) *Supra* note 23.

\(^{32}\) *Supra* note 30.
unchaste character. It was thought that consent should not be implied if the woman was unchaste. In *Prem Chand v. State of Haryana*, the Supreme Court reduced the minimum sentence of 10 years for rape to five years on account of the “conduct” of the raped girl. The raped girl was a woman of easy virtue. This decision caused a stir, an agitation and a movement by woman’s organizations led to gross criticism of the Supreme Court and resulted in the filing of a review petition. Though the review petition did not succeed, the Supreme Court tried to clarify its position. Responding to the voice of various women activists, the Supreme Court’s decision in *State of Maharashtra v. Madhukar N. Mardikar*, was appreciated. The Supreme Court, in this case, laid down that even a prostitute has a right to privacy. The unchastity of a woman does not make her ‘open to any and every person to violate her person as and when he wishes’. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution unto him before accepting her evidence. In the circumstances of the case, however, there was sufficient corroboration of the fact of a police inspector’s attempt to bend her by force to submission which evidence was generated by the inspector’s unsuccessful bid to camouflage the incident into a prohibition raid.

33 1989 Supp (1) SCC 286: 1989 SCC (Cri) 418.
34 (1991) 1 SCC 57.
The past conduct of the accused, probabilities of her loose character, were often focused upon by the judiciary while acquitting the accused. In *State of Punjab v. Gurmeet Singh*, the trial court, even in the nineties, while acquitting the accused of the offence of rape, opined: "the more probability is that the prosecutrix was a girl of loose character", thus making the character of the victim an attribute of consideration. When the matter came up before the Supreme Court, their Lordships observed: "the Courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of sex crime is concerned and even wider implications in the society as a whole, where the victim of crime is discouraged, the criminal encouraged and, in turn, crime gets rewarded. Even in cases where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse no such inference like the victim being a girl of "loose moral Character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse with anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case, should be implied against such a witness by the Courts". After all it is the accused and not the victim of sex crime who is on trial in the Court. It is a great encouragement for social workers to see that in this regard, at least the

35 AIR 1996 SC 1393.
36 Ibid., at p.1403.
attitude of the higher judiciary has taken a turn favourable and just to women. In case of *Maharashtra v. Madhukar Narain Mardika*, the Supreme Court observed that even a prostitute has a right to privacy and that past history of the woman is irrelevant in deciding a rape case. In *State of Andhra Pradesh v. Gangula Sathya Murthy*, the High Court extricated the accused from the indictment of rape on the assumption that it (rape) could have been a consented copulation. Therefore, the High Court, after considering the medical evidence while dealing with the question of rape, inferred: “there is no direct evidence to show that the accused alone had sexual intercourse with her, the deceased was aged of 16 years”. In appeal, the Supreme Court observed that, “we are rather distressed on this comment. By using the word ‘alone’, the High Court almost cast a stigma on the prosecutrix, as if apart from the appellant, there were other persons also who had sexual intercourse with her. There is no basis at all for such an assumption. There was no warrant for recording such a finding and, if we may say so, with respect, the finding is an irresponsible finding. We express our strong disapproval of the approach of the High Court and it’s casting a stigma on the character of the deceased, prosecutrix. Even if the Court formed an opinion, from the absence of hymen that the victim had sexual intercourse prior to the time when she was subjected to rape by the appellant, she had every right

37 AIR 1991 SC 207.
38 AIR 1997 SC 1588.
to refuse to submit herself to sexual intercourse by the appellant as she certainly was not a vulnerable object of rape for being sexually assaulted by any one”.39

5.1.5 Corroboration of the prosecutrix

The present law relating to rape has its origin in the laws of 1736 as applicable in Britain. That year Sir, Mathew Hale in his history of the pleas of the crown presented common law rape doctrines which were immediately noticed to be hostile to the interests of women.40 One of the requirements was to inform the jury during trial that rape charges were easy to bring but difficult to defend. Consequently, with changing times, reforms were introduced and the above requirement corroboration of the prosecutrix was removed. The rule of corroboration which was much stricter in a trial of the offence of rape than other offences was also largely removed from law.

In India, the rule of corroboration of the prosecutrix has undergone a change through statutory amendments and decisions of the apex court. Ironically, the situation has hardly improved. Conviction rate for rape is still lower than any other major crime and even today women continue to be victimized. Though corroboration is not a statutory need, it has developed as a requirement under the rule of common law. It is based on the understanding that non-examination of the prosecutrix is not material and courts can record a conviction on the basis of available evidence. But the judicial records show that they are reluctant to convict an accused on the uncorroborated testimony of the

39 Ibid., at p.1593.
complainant. Although in Gurcharan Singh v. State of Haryana,\textsuperscript{41} the Supreme Court observed that the prosecutrix cannot be considered as an accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence. Even earlier, in \textit{Bharwada}\textsuperscript{42} case, the Supreme Court had observed that in the Indian setting, the refusal to act on the testimony of a victim of sexual assault in the absence of corroboration only adds insult to injury. Why the evidence of the woman who complains of sexual intercourse should be viewed with the aid of "spectacles fitted with lenses tinged with doubt, disbelief or suspicion".\textsuperscript{43} However, as a norm of prudence, the courts normally look for some corroboration of the testimony of the complainant so as to satisfy their 'conscience' that she is telling the truth and that the person accused of rape has not been falsely implicated.\textsuperscript{44} In \textit{Bharwada}, Bhagibhai Hirjibhai v. State of Gujarat,\textsuperscript{45} a landmark judgement of 1983 the Supreme Court held that corroboration of victim's evidence is not necessary: 'in the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration is adding insult to injury'.

Again and again, the Supreme Court has disapproved of the lower courts observance of those norms which have become antiquated. In \textit{State of Maharashtra v. Chandra Prakash Kewalchand Jain},\textsuperscript{46} the Apex Court observed

\begin{itemize}
\item \textsuperscript{41} AIR 1972 SC 2661.
\item \textsuperscript{42} AIR 1983 SC 753.
\item \textsuperscript{43} Ibid, at p.756.
\item \textsuperscript{44} Ibid, at p.2664.
\item \textsuperscript{45} 1983 Cri. L.J. 1096.
\item \textsuperscript{46} AIR 1990 SC 658.
\end{itemize}
that, a woman who is a victim of a sexual assault is not an accomplice to the crime, but is a victim of another man's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. Therefore, the rule of prudence that her evidence must be corroborated in material particulars has no application.\(^{47}\)

In *State of Karnataka v. Mahableshwar Gourya Naik*,\(^ {48}\) the Supreme Court went to the extent of laying down that, even if the victim of rape is not available to give evidence on account of her having committed suicide, the prosecution case cannot be thrown overboard. In such a case, the non availability of the complainant will not be fatal and the court can record a conviction on the basis of the available evidence brought on record by the prosecution.\(^ {49}\)

Similarly in *State of Himachal Pradesh v. Raghbir Singh*,\(^ {50}\) the court observed: There is no legal compulsion to look for the corroboration of the evidence of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. Again in *State of Himachal Pradesh v. Mohan Misra*,\(^ {51}\) the Court said that, merely because the victim girl is not examined this can never be a ground to acquit an accused if there is evidence otherwise available, proving the criminal act of the accused concerned. The non – examination of the prosecutrix is not very much

\(^{47}\) *Ibid*, at p.664.
\(^{48}\) *AIR 1992 SC 2043*.
\(^{49}\) *Ibid*, at p.2044.
\(^{50}\) *1993 (2) SCC 622*.
\(^{51}\) *1995 Cri. L.J. 3845*. 
material. Similarly in State of Punjab v. Gurmeet Singh, the Court observed that: the evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable and is entitled to great weight.

Unfortunately, in spite of clear norms laid down by the Supreme Court that corroboration of what the prosecutrix says is not necessary, the courts continue to insist on some corroboration. This attitude is based on the fact that conviction entails a mandatory punishment and courts are reluctant to convict an accused in cases of rape in the absence of corroborated testimony of the prosecutrix. In the absence of corroboration, the courts presume consent, on the ground that the woman had failed to resist actively and medical reports do not indicate physical injury on her body. They fail to take into consideration that due to delay in conducting medical examination, much of the evidence would have been washed away. With all these handicaps, it is not surprising that the convictions are so few and far between although rapes take place day in and day out. In Sadahiv Ramrao Hadbe v. State of Maharastra, appellant doctor alleged to have raped prosecutrix, a patient visiting his clinic. Sessions court as well as the High Court, convicting the appellant relying on the testimony of prosecutor, though in rape cases conviction on the sole testimony of prosecutrix is sustainable (provided it inspires confidence), but the Supreme Court given benefit of doubt to accused

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52 Ibid, at p.3848.
53 AIR 1996 SC 1393.
54 Ibid., at p.1400.
55 SCC 2006 (2) 161.
and set aside the conviction of High Court on the ground that, in the instant case version given by the prosecutrix, is unsupported by medical evidence and the surrounding circumstances of the case set up by her. There were many persons in the clinic and it is highly improbable that the appellant would have sexually assaulted her when they were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able, bodied person of 20 years of age with ordinary physique. Absence of injuries on the body improbabilises the prosecution version. Moreover, there was absence of spermatozoa in the vaginal swab of the prosecutrix. Presence of semen on the undergarments of the appellant as also on her petticoat and sari not sufficient by itself to prove the offence though may cause some suspicion on the conduct of the appellant. Further, the doctor who examined the appellant on the same day negatived sexual intercourse on the basis of scientific evidence. No injury found on the body or the private parts of the prosecutrix. Doctor who examined her unable to give any opinion about the alleged sexual intercourse.

5.1.6 Custodial rape

The Criminal Law (Amendment) Act, 1983 introduced new sections in the IPC, namely, Sections, 376 B to 376D to stop sexual abuse of women in custody, care and control by various categories of persons. It is an aggravated form of rape calling for a sentence sterner than ordinary rape. Hence, for combating the evils of custodial rape, rape on pregnant woman, girls under twelve and gang rape, a minimum punishment of ten years imprisonment has now been
prescribed. Accordingly, in *Bharwada Bhonginbhai Hirjibhai v. State of Gujarat*,\(^{56}\) it was held that taking note of the fact that in India, unlike the Occident, a disclosure of rape is likely to ruin the prospect of the girl's rehabilitation in a society for all times to risk merely to malign the accused. Moreover, in cases of rape, particularly custodial rape, it is very difficult to get any independent evidence to corroborate the testimony of the prosecutor. In *Jayanti Rani Panda v. State of West Bengal*,\(^{57}\) a school teacher had seduced a young girl but when she conceived he refused to marry her. A case of rape was filled. The Calcutta High Court observed that, failure to keep the promise at a future uncertain date does not amount to misconception of fact. If a fully grown girl consents to sexual intercourse on the promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity.

Custodial rape is very common by the police, teachers, doctors, who have duty to protect the women from crime, but such cases not reported due to influence of their power accordingly in *State of Maharashtra v. Chandra Prakash Kewalchand*,\(^{58}\) if the prosecutrix alleged rape in custody and states that she did not give consent, the Court shall presume that she did not consent. In this case custodial rape was committed by a police officer in a hotel within the limits of the jurisdiction of his own police station. The question before the Court was whether a crime committed by a person in authority should be approached by the court in the same manner as in any other case involving a private citizen. The

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\(^{56}\) (1983) 3 SCC 753: 1983 SCC (Cri), 728.
\(^{57}\) 1984 Cri. L.J. 1535.
\(^{58}\) Supra note 46.
infrastructure of our criminal investigation system recognizes, and protects the
right of a woman to decent and dignified treatment at the hands of investigating
agencies. Misuse of power by them cannot be treated as an ordinary situation.
Again in *P. Rathinam v. State of Gujarat,*\(^5^9\) is a case of brutal rape by a police
officer on a tribal woman. In failing to get justice, the gates of the Supreme Court
were knocked. The Supreme Court appointed a commission to find out true
facts. On the basis of Commission report, several departmental inquiries were
conducted by the Government. This led to considerable delay in the matter.

Unlike custodial rape by the police there are number of rapes by Doctor
also, in *Notthu Ram v. State of Haryana,*\(^6^0\) an illiterate taking his daughter-in-law
for treatment to a clinic doctor who told him that he would cure her with the help
of his Guru (the accused) and gave her some tablets. He called his guru and in
his presence the patient was asked to lie down inside the curtain space. The old
man was asked to fetch some hot water. When the man returned, he found the
doctor and the alleged guru in their knickers and the patient was lying
unconscious with her clothes folded. In this case "it was held that, it is the
apparel that proclaims. Is it custodial rape and misuse of his professional license
as a doctor? Supreme Court can not merely punish the accused but give
directives to the government for appointment of a lady doctor in his place.
Doctors in village clinics in the country have been exploiting innocent and

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\(^{59}\) (1993) 2 Scale 631.
\(^{60}\) 1994 AIR SCW 417 (420) 1993(3) SCJ 672.
ignorant persons, particularly women and girls. The Court observed that, the victim has a right to compensation and the accused should be severely punished.

Again in *Omkar Prasad Verma v. State of M.P.*, sexual intercourse by public servant with a woman in his custody. The accused a teacher in government school having intimacy with a girl student of the school and having sexual intercourse with her outside the school premises. The Supreme Court acquitted the accused on the ground that, ingredients of Section 376B are not fulfilled; hence, accused cannot be convicted there under. Even assuming that accused, being a teacher of a government school, was a public servant, prosecutrix cannot be said to be in his custody. Moreover, intercourse had not taken place within the school premises. From the mere fact that accused was having a love affair with prosecutrix, it cannot be shown that he had taken advantage of his official position and induced or seduced prosecutrix to have intercourse. Custodial rape may be committed by a police officer, public servant, person on the management or staff of a jail or a remand home or other place of custody for women and children or by one on the management or staff of a hospital. In all cases of custodial rape the person takes advantage of his official position.

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5.1.7 Gang rape

The Parliament introduced certain new amendments to IPC to effectively deal with the growing menace of gang rape. In such circumstances it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there is more than one in order to find the accused guilty of gang rape and convict them under Section 376 IPC. Accordingly, in Harpal Singh & Anr. v. Himachal Predesh, where a 16 year old was gang-raped, the Court observed that, the fact that there is no injury and the girl is used to sexual intercourse is immaterial in a rape trial. In Balwant Singh v. State of Panjab, on appeal against conviction for gang rape, it was contended that the conviction should be set aside because the medical report did not indicate the number of persons who had raped the prosecutrix. Rejecting the contention, Dutt, J. Said: “We do not think that on medical examination it is possible to say about the number of persons committing rape on a girl and accordingly in the report the lady doctor

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

Explanation 1. Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub section.

Explanation 2. Women's or children's institution' means an institution whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

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


64 (1987) 2 SCC 27.
has not expressed any opinion in that regard. The evidence of the prosecutor that all the appellants had committed rape on her is not inconsistent with the medical report. In the circumstances there is justification for the finding of the High Court that the medical examination and the evidence show the involvement of more than one person with act of rape".\textsuperscript{65} The track record of India's judicial system in dispensing justice in rape cases has been anything but exemplary". To reiterate this statement, four persons forced entry into a house in \textit{Pramod Mahto v. State of Bihar},\textsuperscript{66} they were charged with raping a young unmarried girl. Medical evidence supported the fact of rape. The conviction of all of them was upheld without it being necessary to show whether all of them or which of them participated in the crime. In State of Rajasthan the five accused having gang raped a \textit{Saathin Bhanvari Devi of Rajasthan},\textsuperscript{67} working with the women's development programme and struggling hard to prevent child marriages in Bhateri village during Aakha Teej period did not receive justice from the courts. The accused were acquitted on the plea that they were elderly people and of social standing belonging to higher castes etc.

\textbf{5.1.8 Child rape}

Over the last several years, there has been a spurt in cases of child rape. But, somehow, probably because our laws have failed to keep pace with changes in human behaviour, society and development in general, this issue has never found a place in law books. The Indian penal Code does not take any

\footnotesize
\begin{itemize}
\item \textsuperscript{65} Supra note 64.
\item \textsuperscript{66} 1989 Supp (2) SCC 672; 1990 SCC (Cri) 206.
\item \textsuperscript{67} 1987 Crl. L.J.1541
\end{itemize}
special cognizance of child victims of rape and this seems to be an indication of the gruesome crime that could be inflicted by unscrupulous males that even the drafters of the code has not visualized against innocent children.

Rape by itself is one of the most obnoxious crimes but child rape is the most reprehensible bestiality, which requires special provisions for penalisation in law. Ironically, rape laws make no distinction between rape of a minor and that of an adult.

The definition of rape under section 375 of the Code, applies equally to an adult and a minor. This excluded from its ambit a wide range of cases of sexual assault, specially where, the minor, being too young, is sexually abused causing grievous injury to her person. Since sexual abuse of minors has its own characteristics, it needs to be addressed separately from the offence of sexual assault on an adult person. It is necessary to give recognition to child abuse as an offence against innocence and therefore, the law against child rape needs to be made more stringent.

The media reports clearly expose an alarming increase in crimes against minors. They also show that much of the child abuse takes place within the family. Innocent minor girls are vulnerable victims and subjected to barbaric treatment by persons who should be their guardians and protectors. Thus the notice of 'safe custody' even with fathers is an elusive one for many children.

There is also no penal provision to deal with cases where a family member, may be even the father of the child, is involved in the assault. Unfortunately, nothing has been done in our country to protect the abused
children. Accordingly in Sudhesh Jhaku v. KCJ,\textsuperscript{68} although it was painfully evident that the minor, aged six, had been brutally abused by her father, purely on account of deficiency in law, the judge was left with no option but to drop charges of rape and retain only the less serious charge of outraging the modesty of the minor. But in State of H.P. v. Asha Ram,\textsuperscript{69} father charged for raping his own daughter. High Court reversed the order of conviction passed by the trial court and acquitting the accused. The Supreme Court set aside the decision of the High Court on the ground that high court erred in law as well as on facts, and thereby committed grave miscarriage of justice in acquitting the accused. Despite strained relations between the parents, PWs 1 and 2 were happily staying with the accused and there was no rhyme or reason as to why the daughter should depose falsely so as to expose her honor and dignity and also expose the whole family, risking the outcasting or ostracisation and condemnation by the family circle as well as by society.

In a country like India, there are numerous border line cases of victims whose age cannot be established conclusively. The Punjab and Haryana High Court in Hardip Singh v. State of Punjab,\textsuperscript{70} was dealing with the report of a radiologist indicating the age of the prosecutrix between 14 and 16 years. The court observed that, in the absence of direct evidence such as the birth entry, conclusion could not be based simply on the opinion of the radiologist who conducted the ossification test and estimated her age between 14 and 16 years.

\textsuperscript{68} 62 (1998) DLT 563.
\textsuperscript{69} 2006 SCC 296.
\textsuperscript{70} 1981 CLR 279.
The benefit of doubt was given to the accused as the Court observed that it was not proved that the prosecutrix was, in fact, below the age of consent when the incident occurred, but what about the victim? The culprit having been let loose, her whole life and future were at stake. Similarly in Govinder Singh v. State of Punjab, a girl allegedly below 16 years was raped. Ossification test put her age between 12 ½ and 15 years. No other evidence was available. The court held that it was not a sure test. Age was variable by two years on either side. It could not, therefore, be said with certainty that the age was below 16. The proof of age would need stronger corroboration.

Accordingly in Mahinder v. State, the court observed that it was important to prove the age of a girl for charging a culprit with an offence under section 375. It must be established beyond reasonable doubt that the age was below the age of consent. The date of birth as given in the municipal records, duly corroborated by entries in school records is necessary to support the age. No doubt, a conclusive piece of evidence of the girl's age may be the birth certificate, but unfortunately, in this country, such a document is not ordinarily available and in the absence thereof, 'benefit of doubt' favours the accused with acquittal.

Again in Shyamraj v. State, a minor girl aged three and a half was raped by a man aged 22. The doctor examined the; minor and confirmed sexual assault. He also examined the accused and found "stains of blood on the
anterior part of his leg’. He further found abrasions on the elbows of the accused. The Court, acquitted the accused of the charge and drew the conclusion that mere stains of blood, injuries or abrasions on the elbow cannot, per se, prove that rape was committed.

Some time courts show leniency towards accused, thus in Bhansingh v. State of Haryana,\textsuperscript{74} in a case reported in 1984, 7 year-old girl was raped by a boy of 18. She was severely injured and was left in an unconscious condition. The appeal to the High Court to enhance the sentence was dismissed on the following ground: Although rape warrants a more severe sentence, considering that the accused was only 18 years of age, it would not be in the interest of justice to enhance the sentence of five years imposed by the trial court, Imratlal v. State of Madhya Pradesh.\textsuperscript{75} In the case discussed above, the High Courts had shown leniency towards youth offender. But in this case, the courts express a contrary view and concern over such leniency in sentencing. For example, in a rape of a 10 year old girl, the High Court commented on the lower court’s sentence as follow: ‘imposing a sentence of three years is like sending the accused to a picnic. The judge erred in his duty in not imposing a deterrent punishment’.

Again in Sridhar Bidnani v. State of Orissa,\textsuperscript{76} in a 1988 judgement concerning a case where a 10 year old was raped by a 45 year old man, the court imposed a fine on the accused and ordered that the amount should be paid

\textsuperscript{74} 1984 Cri. L.J.786
\textsuperscript{75} 1987 Cri. L.J.557.
\textsuperscript{76} 1988 Cri.L.J : 1022.
to the girl as compensation as the amount would be useful for her marriage expenses and if married would wipe out the anguish in her heart.

Similarly in Darayaram & Anr. v. State of Madhya Pradesh,77 if the woman gets married while the case in pending in a court the court presumes that the damage caused by rape has been reduced and elicits reduction of sentence. In a case concerning a tribal girl, two persons entered the house in her father's absence and forcibly took her to a nearby jungle and raped her. The High Court reduced the sentence on the ground that the rape did not result in any serious stigma to the girl. In a shocking statement the court ruled: 'Sexual morals of the tribe to which the girl belonged are to be taken into consideration of assess the seriousness of the crime'.

But in State of U.P. v. Desh Raj,78 rape and murder of a minor girl aged 10 years. Deceased disappeared on Feb. 21 and her dead body was found in orchard of next day. On the day of disappearance, accused respondent was seen along with deceased at about 5 or 5.30 p.m. by a girl aged 12/13 years and also by another witness who belonged to the same village and stated that he, the complainant (deceased's father) and the accused were of same brotherhood. The Supreme Court observed that, testimony of the witness found by trial court to be reliable and trustworthy and nothing could be elicited from their cross-examination to discredit the same. On a cumulative reading of the evidence of witnesses who had last seen the accused with deceased, together with medical

77 1992 Cri. L.J. 3154.
78 2006 SCC 489.
evidence and non-explanation of accused of scratch marks on his face, held, prosecution consistently established the guilt of the accused and inconsistence with his innocence.

5.1.9 Rape and murder of girl: application of rarest of rare cases

In the face of stiff opposition to death penalty, the Supreme Court of India evolved the doctrine of rarest of rare cases\textsuperscript{79} in order to uphold the constitutionality of death penalty, which engrosses the "special reasons" dicta.\textsuperscript{80} Since 1980, the application of the doctrine of rarest of rare cases has narrowed down the scope of the application of the death penalty. In the beginning, the courts awarded death penalty without referring directly to the doctrine of rarest of rare cases.\textsuperscript{81} Nowadays, the court while confirming death penalty specifically shows that the case falls within the domain of the rarest of rare cases.\textsuperscript{82} It may be noticed that the vagueness of the doctrine was removed by the Supreme Court in \textit{Mache Singh v. State of Punjab}.\textsuperscript{83}

The Courts generally have to evaluate the facts in order to identify whether the case presents situation calling for death penalty or life imprisonment. For example, the child victim of rape aged about 1$\frac{1}{4}$ years died as a result of pain and hemorrhage. The High Court reduced death penalty to life imprisonment in

\textsuperscript{80} Section 354 (3) of the Code of Criminal Procedure, 1973.
\textsuperscript{83} 1983 Vol. 3 SCC 470.
State of Punjab v. Hatchet Singh. On the ground that the offence was committed out of lust and not because of any enmity.

The Sentence of death appears more appropriate where rape and murder is committed by an accused having criminal record. Accordingly in Malay v. State of M.P. Mohair was working as a guard in Central Jail, Reeva and Santosh was a prisoner in the jail undergoing a sentence for an offence under Section 376 IPC. on the day of incident, Seamanship, the Central Jailor asked Molai to go to his quarter to look after it and to do the house job and Santosh was sent to do the work in the garden attached to the said quarter. At the relevant time, his daughter Naveen was alone. When Somvanshi came back, he did not find her. Next day, he went to the cattle shed and saw the frock of Naveen in septic tank. The autopsy of the dead body revealed that rape on and murder of Naveen aged about sixteen years had been committed. The death was due to strangulation. Seeing the extent of cruelty in committing the offences, the Court awarded death penalty.

It becomes clear that confusion persists in the infliction of death penalty or life imprisonment in rape and murder of girl child. The judicial dilemma in the exercise of sentencing discretion becomes more pronounced in three cases decided in 2005.

Accordingly in *State of Maharashtra v. Mansingh*, the respondent was convicted by the trial court under section 302, 376 and 201 IPC. Apart from other sentences, he was also sentenced to death. As the High Court acquitted him of the charges, the appeal was preferred to the Supreme Court. The Supreme Court held that as all the circumstances had been proved beyond reasonable doubt, the order of the High Court suffered from perversity. However, it also disagreed with the death sentence passed by the trial court. The Supreme Court held that the case did not come within the ambit of rarest of rare cases and the ends of justice would be met by life imprisonment. However, it may safely be submitted that death penalty should be the rule in rape-cum-murder cases.

The Supreme Court of India came across with the issue of rape and murder of minor girls in *Satish* and *Surrender Pal* also. Both decided in 2005 further brought forward the judicial dilemma in picking up death penalty or life imprisonment. Satish was finally sentenced to death but Surendra Pal was lucky for being spared with life imprisonment only.

5.2 Sexual assault or outraging modesty of women

5.2.1 Sexual harassment

Sexual assault is probably the result of the deep-rooted male psyche to put down women who do not fit in their notions of propriety. Sexual harassment crosses all professions, social strata and levels of income. Section 354, and 509

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of I.P.C. make gestures of acts intended to insult the modesty of a woman or acts which intrude upon her privacy a crime, but it is very difficult to exploit these provisions to deal with the various expressions of sexual harassment which is something very difficult to prove. It has myriads of manifestations each more obnoxious than the other. Unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature constitute sexual harassment.

Sexual harassment is treated as low priority crimes. The term eve-teasing is itself revealing in its indulgent overtones. It seeks to trivialize a very serious issue. We find women being insulted almost every day, everywhere and every time. It is almost a torture for a woman to walk alone on the road. With cities expanding on all sides women have to travel long distances to reach their colleges or place of work. Ironically it is during the travel, specially in the university special buses the sexual harassment is more pronounced. Male predators stalk the vehicles with the sole purpose of teasing and tormenting young and bashful women.

The provisions under sections 509, 294 and 354 of the Indian Penal Code for dealing with eve teasing and its aggravated form, sexual harassment but the

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89 Sec. 354 of IPC assault or criminal force to woman with intent to outrage her modesty – whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both and 509 word, gesture or act intended 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.

90 Indian Express, September 30, 1989, p.3.
way these provisions have been worded, the complexities of the procedural laws and the type of proof that is required, make it very difficult to get the culprit punished. Theoretically any person who intrudes on the privacy of a woman or utters any word or makes any sound or gesture or exhibits any object with an intention that such word or sound shall be heard or that such gesture or object shall be seen by the woman, can be booked for sexual harassment, but it is not easy to prove the intention which is an essential ingredient of this offence. Accordingly, in Duleh Singh v. State,91 the accused was alleged to have embraced the girl and bitten her cheek but there were discrepancies in the evidence and proofs were unsatisfactory and unconvincing. Since the facts created doubts the conviction was set aside. But in Rameshwar v. State of Haryana,92 the accused caught hold of a married woman and tried to open the string of her salwar with a view to commit rape but being hit by the woman with a kulhari he fled away. The Court observed that, the accused was guilty under Section 354 and not under Section 376 IPC, as he did not show enough determination to have sexual intercourse at all cost and ran for his life on being attacked, without offering resistance. Again in I.T. Rao v. State of A.P.93 the accused caught hold of the hand of a sixteen year old girl and dragged her in his room, the girl cried and the neighbours came, the accused extricated himself and ran away, he was held guilty of sexual harassment.

91 1980 WLN (Cal) 132.
92 1984 Cr. L.J. 786 (Punj).
93 1984 Cr. L.J. 1254 (AP).
5.2.2 Outraging the modesty of a woman

The phrase "outraging the modesty of woman" or "simply the world modesty has also been subject to conflicting interpretation in the courts. In one of the landmark cases decided under the section 354 of IPC the Court went to great lengths to decide what 'modesty' would mean. In one case, a seven and a half month old baby was sexually assaulted. The court does not even explicitly state the facts. The trial court held that since a baby cannot be said to have any modesty, no offence under sec. 354 is proved; at the High Court level, one judge said that the term modesty, used in this section does not refer to a particular woman's modesty but to the accepted notions of womanly behaviour – 'scrupulous chastity of thought, speech and conduct (in men or women), reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions'. The Court laid down that an act that was clearly suggestive of sex according to the common notions of mankind came under this section. Thus the accused act in interfering with the vagina of the child was deliberate and therefore he was deemed to have intended to outrage the modesty of the child. Another judge in the case said that the essence of woman's modesty is her sex; and her being young or old, intelligent or imbecile, awake or sleeping is not the issue. The culpable intention of the accused is the crux of the matter, and though the reaction of the woman is relevant, its absence is not decisive.

94 State of Punjab v. Major Singh, AIR 1967 SC 63. 95 The Judgement states that Major Singh 'stripped himself naked below the waist', knelt over the baby and 'in that indecent posture gave vent to his unnatural lust'. The other judge says that the injuries were caused by fingering.
It was alleged in the case of Judhistir Samal v. State of Orissa,\textsuperscript{96} that the prosecutrix was requested by the accused to come to his house at night to give injection to his ailing wife. She was accompanied by her father who stood outside. When the prosecutrix did not find the wife of the accused and tried to come out, she was prevented by the accused, was caught hold of her hands and tried to outrage her modesty. She raised \textit{hullah}, which attracted the witnesses and her father. This version was not believed by the court. There was no material on record to satisfy the ingredients of Section 354 of IPC inasmuch as the Section itself envisages that in order to commit the offence there must be assault or use of criminal force. It would not be believed that the accused used criminal force to such an extent that while resisting her sari slipped off her body. Again in \textit{Ram Das v. State of West Bengal},\textsuperscript{97} where the accused as a Railway officer in presence of two passengers in the compartment embraced two ladies but the court disbelieved this holding that this could not have been probable. But in \textit{Rameswhwar v. State of Haryana},\textsuperscript{98} young college student attempted to rape her neighbour. But while opening the string of her salwar, she grabbed a Kulhari and gave him a blow on his thighs. The boy ran away. The high court reversed the session's court's order of conviction on the ground that: Since the wounded accused did not come back, he was not determined to have sexual intercourse at all events. Hence it was not an attempt to rape but merely violation of a woman's

\textsuperscript{96} 1993 (2) Crimes 973 (Orissa).
\textsuperscript{97} AIR 1954 SC 711.
\textsuperscript{98} 1984 Cri. L.J. 766.
modesty. Similarly in *Divender Singh v. Hari Ram*, two persons went to a school, dragged a girl, kicked her, slapped her and snatched her watch. The High Court reversed the session's court's order of conviction for violating the girl's modesty and held that it is not enough if the woman was pushed or beaten. The assault should be with the intention to outrage her modesty or knowing it would outrage her modesty.

The *State of Punjab v. Major Singh*, places so much reliance on the existence of the culpable intentions of the man, the conventional stereotype woman and archaic definitions of modesty, was till recently often quoted as the leading jurisprudence on the interpretation of Section 354. The Supreme Court, however, in a recent positive judgement has included within the definition of Section 354 certain acts that are an affront to the dignity of the woman. In the case of *Rupan Deol Bajaj v. K.P.S. Gill*, Mr. Gill, a senior police officer, insulted and slapped the posterior of Ms Bajaj in front of guests at a dinner reception. Ms Bajaj, a senior Indian Administrative Serviced officer, filed a complaint. In a judgement that clearly trivialized the incident the High Court quashed the complaint. The Supreme Court, however, held that if the act was one that was capable of shocking the sense of decency of a woman, then it could be brought under Section 354. The precedent of *State of Punjab v. Major Singh*, that had laid down that the act should be clearly suggestive of sex was expanded to

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100 AIR 1967 SC 63.
101 AIR 1996 SC 309.
102 Supra note 100.
include those acts, which were an affront to the dignity of a woman. However, no attempt was made to outline what situations such a definition would include or preclude, once again leaving it to the judge to determine whether the act constituted an offence or not.

5.3 Sexual harassment in work place

Sexual harassment is harassment of a sexual nature, typically in the workplace or other setting where raising objections or refusing may have negative consequences. Sexual harassment is a complex problem in the world of work that defies precise meaning. Accordingly, the Supreme Court observed that, "the harassers may not know that they are harassing. Sometimes, well intended gestures or remarks of friendship and affection may also be received as harassment. Sexual harassment comes in a multitude of forms. It can occur by physical contact or mere words. It can be in the form of threat, an offer or a promise. It may take place away from the immediate work setting or during business trips, work oriented social events as well as on the job. It can occur in environment completely separate from any organizationally affiliated activity. Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work, whether she is drawing salary or honorarium or voluntary, whether in Government, public or private enterprise, such conduct can be humiliating and may constitute a health and safety problem. Indeed, it is discriminatory for instance when the woman has reasonable grounds to believe

that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.\textsuperscript{104}

There is no specific law on this particular issue but there are other laws (criminal, social, civil and labour) touching sexual harassment indirectly. The most important among them is the Indian Penal Code, 1860 that prescribes punishment for the offence of assault or use of force to women with intent to outrage her modesty as well as for words, gestures or acts intended to insult the modesty of a woman.\textsuperscript{105}

A glaring example of a total lack of law is in the area of sexual harassment, which has been and continues to affect a large number of working women in India. The government has completely neglected to legislate in this area. Cases of sexual harassment are thus either dealt with under the criminal law under Section 354,\textsuperscript{106} or under the 'eve-teasing' section 509 of the IPC or under the general conduct rules relating to moral turpitude\textsuperscript{107} of the particular establishment where the harassment occurred. Thus sexual harassment of a woman by words, gestures, or stalking, only finds recognition in Section 509\textsuperscript{108}.

\textsuperscript{104} Vishaka v. State of Rajasthan, AIR 1997 SC 3011 3016.
\textsuperscript{105} Supra note, 89.
\textsuperscript{106} Jai Chand v. State, 1996, Cri. L.J.2039.
\textsuperscript{107} J. Jaishankar v. Govt. of India, (1996), 6 SCC, 204.
\textsuperscript{108} Sec. 509 of the IPC is regarding word, gesture or act intended to insult the modesty of a woman.
This prescribes punishment up to one year and is a cognisable\textsuperscript{109} and bailable offence. In fact the section is couched in completely irrelevant and outdated language and talks about making gestures and sounds with the intention to insult 'the modesty of a woman' Though suggestions for change in the law have been made by committees and women's organizations, successive governments have not amended the law.\textsuperscript{110}

It was in this situation that the Supreme Court in the recent judgement in the \textit{Vishaka}\textsuperscript{111} case tried to fill this gap by incorporating into Indian law a concept of sexual harassment derived from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and its recommendations that seek to interpret the Convention.\textsuperscript{112} In this judgement, for the first time in India, guidelines were laid down for prevention and punishment of sexual harassment at the work place. The Supreme Court had made certain observation in the case, Firstly, each incident of sexual harassment results in a violation of the fundamental rights of gender equality and the right to life and liberty under the Indian Constitution.\textsuperscript{113} Secondly, that the fundamental right in the Indian Constitution 'to practice any profession or to carry out any occupation, trade or business' is also violated by incidents of sexual harassment.\textsuperscript{114} Thirdly, that this fundamental right depended on the 'availability of a safe working

\begin{footnotes}
\item Even this was added recently as earlier the offended was non-cognisable.
\item Sec. Recommendation 19.
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\end{footnotes}
environment' and that the 'right to life' means life with dignity. Fourthly, 'any international convention which was not inconsistent with fundamental rights and was in harmony with its spirit could be read into these provisions', the court formulated guidelines and incorporated the definition of sexual harassment from the CEDAW general recommendation 23 relating to violence and equality in employment.\textsuperscript{115} Thus, Sexual harassment was defined to include any unwelcome sexually determined behaviour which could result in any humiliation to the victim or adversely affect her health and safety. Further the Court clarified that such conduct would also amount to sexual harassment and would be 'discriminatory to the woman' if it created a hostile working environment or if the woman had reasonable grounds to believe that her objection to such behaviour would affect her chances of promotion, or result in adverse consequences for her.

Lastly, the Court directed employers of all public, private and government institutions to set up committees headed by women, and with women comprising not less than half the members to hear complaints about sexual harassment. The court also directed that the complaints committee should associate with either a non-governmental organization (NGO) or another body familiar with the issue.

The guidelines make it mandatory that all the people in the work place be notified of the guidelines and prohibited behaviour. If there is evidence of any offence under the IPC, then the employer has to initiate action by making a

\textsuperscript{115} General recommendations in CEDAW regarding violence and equality in employment: (23).
complaint to the appropriate authority. The court recommended that legislation be introduced on the subject, but till then, the guidelines as laid down in the *Vishaka* case should be considered as binding and enforceable. Law declared by the Supreme Court in *Vishaka’s* case was again reiterated in *Apparel Export Prombition Council v. A.K. Chopra,*\(^{116}\) by emphasizing that the term sexual harassment as defined in earlier case shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones whether directly or by implication, with sexual overtones whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and has the effect of creating an intimidating or hostile working environment for her. It enlarged the definition of sexual harassment by holding that physical contact is not essential to constitute sexual harassment at workplace. It further observed “There is no gainsaying that each incident of sexual harassment at the place of work results in violation of the fundamental right to gender equality and the right to life and liberty-the two most precious fundamental rights guaranteed by the Constitution of India.\(^{117}\)

The issue of sexual harassment has assumed larger dimensions with the decision of the Supreme Court in *Chairman Railway Board & Others v. Mrs.*

\(^{116}\) AIR 1999 SC 625:1999 LIC 918 SC

Chandrima Das and Others, wherein the employer was vicariously held liable to compensate the victim of a gang rape who happened to be stranger and a foreigner, committed by its employees within its premises having far reaching implications. Thus, if a woman employee or even a stranger is subject to acts of sexual harassment of grave nature wherein the offender is another employee, the prospect of the employer being held vicariously liable for the acts of his servants committed on or within his premises appears to be real and opening the eyes of employers. Likewise in the wake of judgment delivered by the Andhra Pradesh High Court in K.S. Triveni And Others v. Union of India And Others, following Madras High Court, striking down of Sec. 66(1) (b) of Factories Act, 1948 as unconstitutional which prohibit the employment of women in night shifts, the issue of sexual harassment assumes all the more importance. In both the cases, while upholding the contention of the women’s for a that women should also be permitted to work in night shifts, the courts had issued elaborate guidelines in furtherance to the Vishakha’s directives, to be followed by employers when women are being permitted to work in nights shifts in factories. With the prospect of women being permitted to work in night shifts, the chances of sexual harassment would be heightened further against which the employer should ever remain vigilant.

118 AIR 2000 SC 988.
119 2002 Lab. IC A.P. 1714.
119 M. Sivaraman; Duty of Employers to prevent sexual harassment of working women, 2003; Lab. IC. Journal Section p. 85.
The Apex Court has ever remained vigilant of the issue of sexual harassment and from time to time dealt with cases of sexual violence more sternly. Again in State of Punjab v. Ramdev Singh, it was held that, “sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and Offends her self - esteem and dignity. It degrades and humiliates the victim and more so where the victim is a helpless innocent child or a minor.

5.4 Kidnapping and abduction

In Kerala, a case filed by the Kerala State Commission for Women, called the Vidura case where in a minor girl was kidnapped on her way home from school and was allegedly sold to 40 odd persons in a row. The child was raped, gang raped, tortured and was thrown back in front of her parental house after ¾ months is a pathetic story. The case was dismissed by the High Court for want of fool proof evidence. How long the contours of procedural law take twists and turn ultimately unable to reach the realm of justice. There are two types of kidnapping namely, Kidnapping a minor from India and Kidnapping from lawful guardian.

120 AIR 2004 SC 1290.
121 Ibid, para 1, 1291-92.
122 Sec. 360 of IPC, 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).
123 Sec. 361 of IPC, Kidnapping from lawful guardianship - whoever takes or entices any minor under Sixteen years of age if a male or under eighteen years of age if a female, or any person of unsound mind, out of the 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.
The crimes that are committed consequent to kidnapping are for maiming, compelling for marriage without her will, procuring minor girl for intercourse with another person, to subject that person to grievous hurt or injury or for slavery etc., again with an intent to steal from the person. And they may be any nature, gravity or dimension i.e., for wrongful confinement or for any misdemeanor or assault on woman/sale/rape and like.

The law per se prohibits abduction.\textsuperscript{124} Accordingly in \textit{Shyam v. State of Maharashtra},\textsuperscript{125} The Supreme Court set aside the connection by the Bombay High Court on the ground that prosecutrix did not raise alarm and she appears to be willing party to go with the accused on her own. Thus, culpability of the accused was not established.

Again in \textit{Hariram v. State of Rajasthan},\textsuperscript{126} prosecutrix alleged to be abducted against her will and kept at different places and she was taken in a bus and kept in company of another woman. She neither complained to any passenger of the bus nor to the woman. Instead prosecutrix told the woman that accused were her brothers. The Supreme Court acquitted the accused on the ground that, conduct of prosecutrix showing that she was a consenting party her evidence not reliable. But in \textit{Ganga Dayal Singh v. State of Bihar},\textsuperscript{127} there was an Abduction of a minor girl. Circumstances brought on record establishing conclusively guilt of the accused. Only plea of defence was that accused was 55

\textsuperscript{124} 362 of IPC, Abduction: whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

\textsuperscript{125} 1995 AIR SCW 2169: SCC (Cri) 851.

\textsuperscript{126} 1992(2) Cur CC 58 (60) SC.

\textsuperscript{127} 1994 AIR SCW 222 (222 223); AIR 1994 SC 859; 1994 Cri L.J. 951:1994 (2) BLJ 366.
years could not have developed fancy for minor girl negated as fanciful defence by both the Courts. The Supreme Court convicted the accused on the ground that, no compelling circumstances found warranting interference in conviction and sentence.

Section 366 applies to cases where at the time of the abduction the woman had no intention of marriage or illicit intercourse but the intention of the abductor must be to compel her to marry afterwards any person against her will or force her to illicit intercourse\textsuperscript{128}. The essential ingredients of an offence under this section is that at the time of the committing of the offence, the accused intended or knew that it was likely that the abducted or kidnapped woman might or would be compelled to marry a person against her will or that she might or would be forced or seduced to illicit intercourse.

Accordingly, in \textit{Baleshwar v. State},\textsuperscript{129} the accused deceitfully enticed away a minor girl from the custody of her elder sister with intent that she may be seduced to illicit intercourse, and it was alleged that after the kidnapping, the accused raped her during the period till she was recovered. The only evidence against the accused was the admission in response to one question only, in his statement under Section 313, Cr. P.C., regarding his having been brought to the

\textsuperscript{128} Sec. 366 of IPC Kidnapping, abducting or inducing woman to compel her marriage, etc., Whoever kidnaps or abducts any woman 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, or knowing it to be likely that she will 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 find, (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).

\textsuperscript{129} 1989(1) crimes 765.
police station together with the prosecutrix. That may be treated as an admission that he had taken away the prosecutrix with him and she was recovered from his possession. However, the ingredients of Section 366 of the Indian Penal Code which postulates that kidnapping must be with the object of subjecting the woman to illicit intercourse, or intention that she be so subjected to were not satisfied, as the accused was found deserving benefit of doubt under Section 376 for the offence of rape. As such Section 366 will also not be attracted. It was observed that the case of enticing away by deceitful means, of the minor girl from the custody of her lawful guardianship is punishable under Section 363 of the Penal Code.

5.4.1 Inducement

In a number of cases prosecutrix was induced by the accused, by that he will obtain the consent of the prosecutrix in such cases the court felt that prosecutrix is consenting party. As in the case of State of Karnataka v. Sureshbabu Puk Raj Porral,\textsuperscript{130} it was observed that it was necessary to find out whether the part played by the accused amounted to taking out of the keeping of the lawful guardian. From the evidence, it was clear that the prosecutrix was also anxious to go with the accused to see places. In such a case, it was difficult to hold that the accused had taken her away from the keeping of her lawful guardian and something more had to be shown in a case of this nature like inducement. In another case of Sribatcha Khamari v. State of Orissa,\textsuperscript{131} there

\textsuperscript{130}1993 (3) crimes 600 (Kar.)
\textsuperscript{131}1994 (2) crimes 476 (Or.)
was no persuasion or inducement or force applied against the prosecutrix for sexual intercourse with the accused. Again in the case of Majidkhan v. State of Karnataka, the prosecutrix was induced to go with the accused to Bombay. The intention in inducing her to go with him to Bombay can be inferred from what took place at Bombay. The accused having developed acquaintance with the prosecutrix lured the minor girl to go to Bombay along with him. On persuasion she agreed and on reaching Bombay, the accused after taking several signatures of her on typed papers got performed Nikah and during night had sexual intercourse with her much against her will. The said events that took place at Bombay would stare at the accused and the only conclusion which can be drawn is that the accused was responsible for taking her away from the keeping of her father for the purposes reflected in Section 366, IPC. In the case of State of U.P. v. Laiq Singh, the facts and circumstances clearly indicated that the intention of the abductor was to secretly confine the abducted girl against her will, there could be no doubt that all the ingredients of Section 365 were made out.

5.4.2 Intimate Relationship

In case of love affairs or intimate relationship between the prosecutrix and accused, the court usually considers that there was no abduction of women, even though there was seduction by the accused. Thus, in the case of Laiq Singh v. State, it appeared that there were intimate relationship between the prosecutrix, aged 16 or 17 years, and the accused over a long period.

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132 1993 (2) crimes 1037 (Kar.)
133 AIR 1968 All 170.
accused was guardian of the girl and taking advantage of his position; he seduced her and made her pregnant on more than one occasion. The accused could not marry her because he had already a wife living. In fact she said that she was seduced when she was only 16 years or 17 years of age. At the time of prosecution she was aged 24 years, which shows that a period of about seven years had passed between he first seduction and the complaint which resulted in the prosecution. She admitted about three pregnancies and abortions and subsequent delivery of a child. She was a girl of loose virtue and although she was set on the path of depravity mainly by the accused, she perhaps was not averse to what happened to her. As held in the case of Baldev Singh v. State,\textsuperscript{135} where the accused and the prosecutrix had love affairs and consequently the girl leaves the home and accompanies the accused, who provides her cloths and ornaments, the accused cannot be convicted.

5.4.3 Abduction of teenaged girl with commercial object

Abducting a teenaged girl and forcing her into sexual submission with commercial object, a racket which has become an enormous national menace not with standing the social, judicial and constitutional concern for the weaker sex. This has assumed an alarming proportion, wherein involved are specialist criminals. Transportation of teenaged girls from a tiny village to glamour city is no little insult to society, judiciary and legislation, when the purpose of such trade is obvious.

\textsuperscript{135} 1984(1) crimes 936,
The Penal Code makes the act of buying or disposing of any person as a slave, punishable offence.\textsuperscript{136} The very act of "sale" and "purchase" of a woman for the sex exploitation has an element of "slavery" Section 370 includes within its meaning, not only the most extreme degree of subjection which is inconsistent with the idea of the person so treated being free as to his property, services or conduct in any substantial respect. Accordingly, in the case of \textit{Nihal Singh v. Ram Bai},\textsuperscript{137} a woman was sold, mercifully not in an open market and because the sale failed, the buyer sued for refund of money. It was held that such a transaction was violative of the constitutional injunction as envisaged under Articles 21 and 23 of the Constitution, even if the transaction is sanctioned by a caste- system. By no stress of traditional and unwitting theory of male chauvinism can it be argued that woman is to be treated as property, which can be bought or sold, or even as a subject matter of a contract. A woman is not a property, as observed in \textit{Manohar Lal v. State of M.P.}\textsuperscript{138} To arrive at such a conclusion no reference to a judicial decision is necessary.

\textbf{5.5 Domestic violence}

Domestic violence manifests as verbal, physical or psychological abuse, often in forms that are more subtle than the violence elsewhere in society. Familiarity with the perpetrator and filial values deter resistance, 'closed doors'.

\textsuperscript{136} Section 370 of the Penal Code, buying or disposing of any person as a slave – Whoever, imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

\textsuperscript{137} AIR 1987 M.P. 126.

\textsuperscript{138} AIR 1987 M.P. 132.
alienate the victim from remedies, resulting in a convenient status quo where the victim reconciles and society can connive. The reconciliation with subjugation, in the wake of limiting social circumstances violates the case of human rights, liberty and human dignity. The hopelessness of their situation harms the woman more than the violence itself as it erodes their personality and faith in their own people. Ignoring the victim and not making any attempt to provide solace or restitution is a challenge to human rights, Justice A.S. Anand: Observed that, the victim's inability to access the law makes legal remedies ineffective and the four walls of the so called “home” render the law incapable of reaching the victims – which is even more tragic. Many of the victims of domestic violence are at a risk of further violence or even death when they attempt to leave abusive relationships. Thus most incident of domestic violence goes unreported because women are reluctant to bring a complaint against a member of their own family.\textsuperscript{139}

All these factors render the issue of domestic violence very different from other forms of violence because of the women's weak and vulnerable position inside their home. It also explodes the myth that women are subjected to harassment and violence on the streets and at their workplace while the home is the safest “haven”.

Statistical data on the incidence of domestic violence in India is scant and the few studies which are available indicate that physical abuse of Indian women in their homes is quite rampant. A survey conducted by the US based

\textsuperscript{139} (1998)1, SCC, (J) 3.
International Centre for Research of Women (ICRW), spanning seven Indian cities covering both rural and urban populations, revealed that 45 per cent of the women surveyed had been subjected to at least one incident of physical or psychological violence in their lifetime. In fact the study indicates that severe physical violence is all pervasive (slapping not included while undertaking the survey), 26 per cent women said they experienced moderate to severe forms of physical violence. (This figure would go up if slapping was also included in the study) The study showed a high incidence of psychological abuse with 43.5 per cent of women experiencing at inducement of fear or abandonment. Significantly, women living in nuclear families were found to be more vulnerable to violence than those living in large families. According to a survey only 23 per cent of those living in joint families became myth that working women are less prone to such violent acts. On the contrary the study shows that more working women are beaten up at home by their unemployed husband.

"Thus it appears that domestic hooliganism and violence against married women, what has come to be called wife battering, occur all over the world on a significant and disturbing scale".

5.5.1 Domestic Violence and International law

The Declaration on the elimination of Violence against Women is the first international human rights instrument to exclusively and explicitly address the

140 The ICRW covered seven cities of Delhi, Lucknow, Vellore, Bhopal, Nagpur, Chennai and Thiruvanathapuram
issue of violence against women. It affirms that violence against women violates, impairs or nullifies women’s human rights and their exercise of fundamental freedoms.

Article 1 of the Declaration and the Platform for Action from the Fourth World Conference on Women (the Beijing Platform for Action) both defines violence against women as:

“Any act of gender-based violence that results or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

The Beijing Platform for Action commits Governments around the world to take actions to address violence against women. Among other demands, the Platform calls on governments to condemn violence against women and refrain from invoking any custom, tradition, etc., to avoid their obligation under third Declaration; adopt and/or implement and periodically review and analyze legislation; take measure to ensure the protection of women subject to violence, create or strengthen institutional mechanisms and allocate adequate resources and mobilize community resources for activities and plains of action for elimination of violence against women.142

Under Indian criminal law, there are few provisions available which can be used to address the issue of domestic violence. The introduction of Section 498 – A of IPC in 1983 was significant in bringing domestic violence out of the closet,

142 Beijing Platform for Action 1995, paragraph 124(a), (d), (1) and (p).
but this section with its specificity to dowry ignores the other factors of violence. Other offences of assault, hurt, grievous hurt, dowry death, murder, rape, etc., are also often used against the perpetrators of violence. These criminal offences, however, are not enough to deal with the complexities of domestic violence because the violence inflicted is not by a stranger but by an intimate partner or family member of the victim. More importantly, a criminal remedy will only serve to punish the abuser and is not sufficient to address the needs of the victim of violence who has to stay within that family. A man can simply throw his wife out of the home and wait for her to go through the long, complex and tardy processes of the courts for the little relief she might get or he can instill in the fear of losing custody of her children. Therefore, one of the most important consequences of domestic violence is the homelessness of the abused women. The criminal law remedies do not succeed in providing immediate or emergency protection to the victims of domestic violence.\textsuperscript{143}

As such under the civil law, there is no remedy for domestic violence, a closer look at the available remedies reveal that the various personal laws provide remedies only on divorce or separation. The only other civil remedy concerns providing maintenance to the woman seeking divorce. All these are representative of an irretrievable breakdown of family ties. In cases of domestic violence the women might not opt for divorce and may wish to continue with their martial relationship. In such circumstances the civil law is silent. It is relevant to note here that domestic violence does not pertain only to women but also to

\textsuperscript{143} Supra note 141, at p.168.
children (especially girl children), aged parents, and cohabitants and in-laws among other relationships. Therefore, when it comes to problems/offences which occur "within" marriage such as family violence, marital rape or child. Sexual abuse, there is a huge gap between where family violence is concerned. The issues have not been addressed by our legal system, leaving a void which has yet to be filled by suitable legislation.

The debate on domestic violence had a long journey from 2001, when the Bill was introduced in the Parliament, to 2005, when finally the Act was passed. There were long discussions to have consensus, number of changes were made and serious lacunae which existed filled. This Act was important to prevent women who were ostracized by their "own" people in their "own" homes. The statute provides that "All acts of gender based physical and psychological abuse by a family member against women in the family, ranging from simple assault to aggravated physical battery, kidnapping, threats intimidation, coercion, stalking, humiliating verbal use, forcible or unlawful entry, arson, destruction of property, sexual violence, martial rape, dowry or related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts shall be termed "Domestic Violence". The question is whether every person who is within the matrimonial boundaries protected under the Act or not? The answer is clear no, the act

144 Ibid.
145 Ibid.
protects all those who are covered under domestic relationship “Domestic Relationship” has been defined under the Act, as a relationship between two persons who live or have, at any point of time, lived together in a shared household\textsuperscript{146} when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.\textsuperscript{147} The definition of the term ‘an aggrieved person’ is equally wide and covers not just the wife but a woman who is the sexual partner of the male irrespective of whether she is his legal wife or not. The daughter, mother, sister, child (male or female), widowed relative, in fact any woman residing in the household who is related in some way to the respondent, is also covered by the Act.

The respondent under the definition given in the Acts is “any male, adult person who is, or has been, in a domestic relationship with the aggrieved person” but so that his mother, sister and other relatives do not go scot free, the case can also be filed against relatives of the husband or male partner. Learning from the experience of other social legislations like the Dowry Prohibition Act, its specifies that a full time “protection officer” would book cases. In earlier legislations, District-level Government authorities were given extra charge as enforcement officer, leading to delayed disposal of cases.

To make the law user-friendly, the Rules notified recently have it that the complainant would be asked to fill in a formatted complaint in front of the

\textsuperscript{146} Sec. 2 S of Domestic Violence Act
\textsuperscript{147} Sec. 2g of Domestic Violence Act
protection officer. Even relatives, friends and NGOs can file complaints on behalf of the aggrieved women. Another highlight of new law is the appointment of "Counselors" to help the litigating parties.

The women have the option of lodging an FIR and not pursuing it after counseling. There are also options like compulsory medical attention, right to stay in the home where she faced abuse, protection, temporary shelter etc.

The Act allows Magistrates to impose monetary relief and monthly payments of maintenance. The respondent can also be made to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence and can also cover loss of earnings, medical expenses, loss or damage to property and can also cover the maintenance of the victim and her children.\textsuperscript{148} It also allows the Magistrate to make the respondent pay compensation and damages for injuries including mental torture and emotional distress caused by acts of domestic violence.\textsuperscript{149}

The Act also ensures speedy justice as the Court has to start proceedings and have the first hearing within 3 days of the complaint being filled in Court and every case must be disposed of within a period of sixty days of the first hearing.\textsuperscript{150} It makes provisions for the State to provide for protection Officers and the whole machinery by which to implement the Act.

One weakness of the previous Domestic Violence Bill has been effectively removed in the present Act that is Magistrate has the powers to permit the

\textsuperscript{148} Sec. 20 of Domestic Violence Act 2005.
\textsuperscript{149} Sec. 22 of Domestic Violence Act 2005.
\textsuperscript{150} Sec. 12 (a) (4) and (5) of Domestic Violence Act 2006.
aggrieved woman to stay in her place of abode and cannot be evicted by the husband in retaliation. This fear of being driven out of the house effectively silenced many women and made them silent sufferers. However the Court, by this new Act, can now order that she not only resides in the same house but that a part of the house can even be allotted to her for her personal use\textsuperscript{151} even if she has no legal claim or share in the property.

Misuse of the Act, like all such Acts in India, cannot be ruled out. In fact, with a system as corrupt as ours, money clout and muscle power will always call the shots and as long as the woman stays a puppet or pawn in the hands of her male relatives, she will always be manipulated and used.

However, with this Act, there is at least legal recognition of the scale of domestic violence that actually exists. This Act should also put an end to many of the misuses of the Anti Dowry Act. But when one sees the dismal record of implementation of Acts related to giving relief to the oppressed, one cannot but be skeptical. For instance, the new Rape law brings only 5% of all rapes committed to court and of those only 5% get convictions.

A law is only as good as its implementability, despite the lofty aspirations. the responses to the enactment are polarized, with one section fearing its misuse by an elite class in metro cities and another segment predicting its futility to the mass of rural women saddled with the yoke of patriarchy to which courts are as yet alien.

\textsuperscript{151} Sec. 17 of Domestic Violence Act 2005.
But there is no doubt that with this Act a whole Pandora's Box of litigation will be thrown open and all the degradation, brutality and cruelty to women that has been carefully swept under the carpet for centuries in our 'old, rich heritage and civilization' is all going to be exposed. For those feminist groups that see the family or the male as the main cause for women's oppression, this Act will open up all sorts of possibilities in their struggles.

Certain provisions of the Protection of women from Domestic Violence Act, 2005 came up for interpretation before the Supreme Court in *S.R. Barat v. Trauma Batra*. Smt Taruna Batra was married to Amit Batra, son of appellants. After marriage respondent Taruna Batra started living with her husband in the house of appellants which belonged to her mother-in-law. After Taruna Batra's husband filled an FIR, she filled an FIR under Sections 406, 498A, 506 and 34 IPC and got the family of her husband including him arrested, who were granted bail after 3 days. She shifted to her parent's residence from where she then tried to enter the house, which was of her mother-in-law failing which she along with her parents forcibly, broke open the doors of the house. The appellants alleged that they were terrorized by their daughter-in-law. Meanwhile mandatory injunction had been filled by her to enable her to enter the house.

Trial judge granted temporary injunction restraining appellants from interfering with possession of Taruna Batra.

When appeal was filed against the order of trial court, Senior Civil Judge held that the house was not the matrimonial home and therefore she had no right to properties other than that of husband. Aggrieved Smt Taruna Batra filed a petition under Section 227 wherein the High Court held that she was entitled to continue to reside since it was her matrimonial home.

Thus it was considered important to interpret 'matrimonial home' and shared household as given under the Domestic Violence Act, 2005.

The Supreme Court referring to *B.R. Mehta v. Atma Dedvi*,\(^{153}\) agreed that whereas in England the rights of the spouses to the matrimonial home are governed by the Matrimonial Home Act, 1967, no such right exists in India. The rights which may be available under any law can only be against the husband and not in the laws. Here, the house in question belongs to mother-in-law of Smt Taruna Batra and therefore she cannot claim any right to live in the said house. Coming to the interpretation of "shared household" within the meaning of Section 2 (s) of the Protection of Women from Domestic Violence Act, 2005, the Court did not agree with the interpretation advanced by Taruna Batra that it includes a household where the person aggrieved lives or at any stage had lived in domestic relationships. The court said that if this interpretation is accepted it will mean wherever husband and wife lived together in past it becomes a shared household. Such a view would lead to chaos and would be absurd. Thus shared household would only mean house belonging to or taken on rent by husband or house which belongs to joint family of which husband is a member.