CHAPTER 1

Introduction: Victim Testimonies and Legal Discourse

Three centuries ago, the English Lord Chief Justice, Sir Matthew Hale warned that rape is a charge "easily to be made and hard to be proved, and harder to be defined by the party accused, tho' never so innocent" (qtd. in Estrich 5). In Hales's view, the rape victim is often a flippant slanderer, and the onus of proving her charges lie squarely on her. This is the spirit of legal systems based on the English Common Law, and the Indian judicial system is no exception to this.

The Constitution of India is undeniably the supreme legal document in the country. Jacques Derrida claims that "…law is always an authorised force, a force that justifies itself or is justifying in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable" (Derrida 233) while Stanley Fish attributes two most eminently desirable properties to law: generality and stability. My work is based on the Derridean premise that law is a situated discourse. I argue that though law claims itself to be stable and autonomous, it is an evolving system that adapts itself to societal demands, and it is dependent on other areas of study or discipline-- it is intertextual like any other discourse. My attempt in this chapter is to look at this ambivalent, dichotomous nature of law, with special reference to rape law.

For this, it is necessary to look at the way rape is defined according to the Indian Constitution. The amendment of rape laws in 2013, replaced the word "rape" with "sexual assault". As per Section 375 of the Indian Penal Code, sexual assault means –

(a) The introduction (to any extent) by a man of his penis, into the vagina (which term shall include the labia majora), the anus or urethra or mouth of any woman or child.

(b) the introduction to any extent by a man of an object or a part of the body (other than the penis) into the vagina (which term shall include the labia majora) or anus or urethra of a woman.

(c) the introduction to any extent by a person of an object or a part of the body (other than the penis) into the vagina (which term shall include the labia majora) or anus or urethra of a child.

(d) manipulating any part of the body of a child so as to cause penetration of the vagina (which term shall include labia majora) anus or the urethra of the offender by any part of the child's body;

In circumstances falling under any of the six following descriptions:

Firstly – Against the complainant's will.

Secondly – Without the complainant's consent.

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

Fourthly – With the complainant's consent, when the man knows that he is not the husband of such complainant and that the complainant's consent is given because the complainant believes that the offender is another man to whom the complainant is or believes herself to be lawfully married.

> Fifthly – With the consent of the complainant, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the complainant is unable to understand the nature and consequences of that to which such complainant gives consent.
>
> Sixthly – With or without the complainant's consent, when such complainant is under eighteen years of age.
>
> Provided that consent shall be a valid defence if the complainant is between sixteen years and eighteen years of age and the accused Person is not more than five years older.
>
> Explanation: Consent means the unequivocal voluntary agreement by a person to engage in the sexual activity in question.[1]

The next important object of scrutiny is the rape law. Without doubt, the legal system claims that rape is a crime against basic human rights and violation of the fundamental rights to life as defined under the Article 21 of the Indian Constitution. However, as the voices within judiciary itself make it clear, "The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects" (*Gautam v Miss Subhra Chakraborthy*); there is certain ambivalence towards a ghastly act like rape. The amendment of rape laws, which took place for the first time since its inception in 1983 and subsequently in 2013 illustrates the Indian society's total neglect of women's concerns. It is the invisibility of women and their problems, which perhaps led

[1] For a detailed understanding of the Amendments see "India. National Commission for Women. 'Amendments to the Laws Relating to Rape and Related Provisions.'"

to the system not accommodating their needs and concerns soon enough. It is apparent to anyone interested in history of rape that the law is still in the clutches of old ideas, briefly mentioned in the beginning of this chapter. The Criminal Code lays down procedures to ensure that there is no abuse of power or miscarriage of justice to the accused in the trial. However, when it comes to women gender difference gets in way of the interpretation of the term 'equal'. A woman, who is raped, confronts "apathy, inertia, indifference combined with hostility and an anti-women bias at every step – home, neighbourhood, police stations, public hospitals and court rooms" (Agnes 13). Rape may be one of the rarest cases where the victim is looked down upon for no fault of hers in spite of the fact that rape is an intrusion upon her private life. The whole process of filing a case to the judgement day, this victim is pitted against a society which weighs heavy on her. Her voice is very often muted to inaudibility and her testimonies inadmissible, unseen or unaccounted for. These women, who are caught in a pernicious game of 'victim responsibility', are slaves to the society's prejudice, its problematic definition of good and evil. By projecting the fault of women, society has helped in keeping men's criminality invisible. Women are conditioned by the structures of thought present in the society which are undeniably influential. They try to search for and find themselves through others. Women are made to view their self through the process of the self stepping outside itself to evaluate it where it is watched and judged by an "imaginary other" which is a "projection of the opinions of real others" (Williams 66) which on the other hand leads to the castration of the self. Women exist in the realm of someone else's fantasy and the law becomes "described and enforced in the spirit of our prejudices" (67). It is this prejudice which makes an "unconscious restructuring" of burden of proof on the

victim where they are made to prove their victimhood. The prejudice also eclipses the possibility of other versions or explanations, especially from the victim's end. The social constructions are "conceived and delivered up into the realm of the real as 'right', while all else is devoured from memory as 'wrong.'" (Williams 225) This results in the society eyeing a rape survivor with suspicion while the law suspects her testimony. The legal system has historically been sceptical towards rape victims. Thus it is important to look at the language use and functioning of the culture in the socio-cultural construction of rape in the legal arena. The characteristics of legal system, which are often ambivalent showcasing of both the rigid and flexible nature of the system also needs to be explored. This dichotomous nature of law in the context of rape cases points to the fact that the legal system is continuously evolving. It is flexible; hence, there are spaces for one to plead for an inclusive system, thereby re-affirming that rape testimonies which have been rejected due to the contradiction and inconsistencies have to be relooked as texts[2], in the postmodern sense of the term. In the case of trauma, the human mind works as a text in order to keep its will to live or desire to live intact.

In this chapter my main focus will be on three questions:

1) What is the current set of beliefs underpinning the interpretation of victim testimony?

2) How does the legal discourse work as 'situated knowledge'?

[2] The postmodern notion is that everything can be read as a text because everything experienced by the human can be decoded or interpreted. When they claim anything comprising both philosophical and political system can be read as text, postmodernists like Derrida is challenging the existing dominant political meaning associated with any system or beliefs. Such an attempt exposes the "hidden meaning or the ideological significance" of a particular text (61). The benefit of such an effort is to force the scholars to look at the silences, gaps and omissions in any "symbolic/ideological system" (62).

3) What needs to be done to make the legal discourse connect with developments within other disciplines to ensure natural justice to all?

For substantiating my points, I shall concentrate on critics like Stanley Fish, Ronald Dworkin, Patricia Williams and Owen M. Fiss. Without playing down the significant differences in their views about the nature and function of the legal discourse, I would attempt to focus on their shared assumptions with the view to outline the new directions these critics and thinkers suggest.

The legal system presents itself as a rigid set of laws. Foremost among these is the dictum that saving the innocent from wrongful punishment even at the expense of exonerating many criminals. This rigidity of law is painstakingly highlighted to the society than its flexible nature. To quote Patricia Williams, "Most scholarship in law is rather like the 'old math': static, stable, formal—rationalism walled against chaos" (Williams 7). This is evident in many of the judgments passed by the judiciary. The absence of any clearly laid down law to distinguish between consent and passive submission, together with the requirement of corroboration, resulted in problematic judgments like the one in the 'Mathura case.'[3] In spite of clear evidence suggesting the possibility of rape, the apex court acquitted the two policemen charged with raping her on the rather questionable grounds[4] that the victim was a liar, and a promiscuous woman, who had in probability consented to sex. The rejection of the court to even hear the

[3] The whole incident occurred when Mathura, a tribal girl, fell in love with Ashok and started staying with him but her brother filed a suit alleging that Mathura is kidnapped by Ashok and his Aunt Nushi. At the constable's instance, they were brought to the station from where Mathura was taken to the latrine of the Police Station which was at the rear of the main building by two Police Constables, Tukaram and Ganpat and the allegation is that Ganpat raped Mathura and Tukaram molested her.

[4] An open letter by Upendra Baxi, Vasudha Dhagawar, Raghunath Kelkar (University of Delhi) and Lotika Sarkar (University of Poona) questioned the Supreme Court judgment on the concept of consent which paved the way for a massive protest by women's groups.

complainant's plea highlights the extreme inflexible stance that the Indian law shows at times, and one of the reasons for this rigidity is the self-image of the domain.

Using some of the rape cases that have created an uproar in the society and the legal system as illustrative examples, I will look at the dichotomous nature of the law, the interpretation of testimonies and the debates surrounding interpretation, the intertextuality of the legal system and the new changes that have to be brought to the system in the context of rape cases. The Mathura rape case is one of the landmark cases in the history of the Indian rape laws as it led to the first amendment of the rape laws. The judgments of the three courts are worth noting in this case as it shows the inherent gender bias in the legal system. The Sessions court judge acquitted the alleged culprits and called the victim a "shocking liar" whose testimony is "riddled with falsehood and improbabilities" (Chorine 499). But he observed that "the farthest one can go into believing her and the corroborative circumstances would be the conclusion that while at the police station, she had sexual intercourse and that, in all probability, this was with accused 2" (Chorine 499). However, he added that there is a world of difference between "sexual intercourse" and "rape". Overriding this verdict, the High Court convicted the two accused and held that though the Sessions judge was right in saying there is a significant difference between sexual intercourse and rape, he erred by failing to appreciate the difference between consent and passive submission. The Supreme Court, however, overruled the High court's verdict and asserted that since there was no injury on the body of the victim, it was a "peaceful affair" and that she followed Tukaram, the accused policeman, when she was asked to without resisting or crying and this showed her consent. The fear

aroused in her was not the fear of hurt or death as suggested in the law book. Thus the offence did not amount to rape.

The judgment led to a huge public uproar and the lawyers and women's group wrote an open letter protesting against the concept of consent as defined/invoked in this case. The public pressure this case mounted resulted in the amendment of the Act though the Apex court declined to relook the matter. The Apex court's refusal to reconsider the case indicates a rather rigid and inflexible stance. The Mathura case is not a mere aberration in the life of an otherwise fair and effective system. There are several other examples that meet even the casual observers' eye: The Bhanwari Devi case and the Gurmit Singh[5] case to name a couple of them. A brief outline of these two cases will give one a better idea of how rape testimonies are presumed and interpreted by the legal system. The presumption and the interpretation derived from it make it extremely difficult for the victim to get justice.

The Bhanwari Devi case is one of the remarkable cases which mark the heights of gender bias in the Indian judiciary. Bhanwari Devi, a Dalit social worker, was gangraped by upper caste men as she was against child marriage and she opposed the marriage of a minor girl of one of the accused. Among the five accused, four were from the Gujjar community while one belonged to the Brahmin community. The Sessions court acquitted the culprits on two grounds: highlighting a stereotypical view of the Indian culture, and the lack of forensic evidence. According to the judge, it was impossible for people from two communities (the Gujjar and the Brahmin communities) to work together as rural

[5] Unlike the Mathura and Bhanwari Devi case where the cases are known by the victim's name, Gurmit Singh is the name of the prime culprit. The name of the victim is withheld in this case and thereby for the reference purpose, the case will be hereafter referred to as Gurmit Singh case.

gangs. Thus it was impossible for them to come together and gang rape Bhanwari. He stated that Indian rural society would not denigrate to the extent that they would lose "all sense of caste and class, and pounce upon a woman like a wolf" and that it is impossible that any Indian man will stand and watch his wife being raped when 'only two men twice his age are holding him'" (Gangoli 96). The verdict also claimed that it was highly improbable for an uncle and his nephew to rape together. The judge found Bhanwari Devi's behaviour abnormal as she had not disclosed the incident to her in-laws, instead filed a suit against the accused in the police station. Her testimony was considered to be full of contradictions. On these grounds, Bhanwari Devi lost her case. Though she pursued it in the higher courts, justice was denied to her.

In the Gurmit Singh case too, the Sessions court's findings are quite shocking. The incident for the case occurred when a minor girl was kidnapped and raped by three men while she was returning from school. The trial court acquitted the culprits calling the victim a girl of questionable morals. The court came to the conclusion that the girl was lying as she could not differentiate between a Fiat and an Ambassador car which made her story, that she was abducted in a car, doubtful. The police officer who was investigating the case could not trace the driver or the car used in the abduction. Based on these gaps and omissions in the prosecution's case, the court concluded that a car was not used. Further, she did not disclose the incident to her teachers or friends but only told her mother after she reached home the next day after her exam. Moreover, there was no corroborative evidence to prove her statement. However, unlike the other two cases cited above, in this case, the Apex court, in addition to delivering justice, reprimanded the lower court for its insensitive judgment. While the first two cases led to an amendment in

the legal system, the third case produced a landmark judgement with the Supreme Court opinion auguring several significant changes in the legal system; changes that will encourage female victims to come forward fearlessly to seek justice.

In majority of the rape cases, however, the judicial system seems loaded against a particular group, evident from the abysmally low pan-India conviction rate which is less than 26.4 percent in 2011 as per *The Wall Street Journal* report[6]. While the legal system expects the testimony to follow "aesthetic of uniformity" from a victim with no contradictions or slips, the basic feeling of a rape victim can be disbelief over what has happened to her. This disturbed psyche of the victim works to her disadvantage as it becomes difficult for her to produce a linear cohesive testimony. The trauma involved in the process and its impact in the human behaviour is not yet considered an important factor in the legal context. The legal system fails to look at the silences, slips and contradictions as a result of the trauma, choosing instead to question the credibility of victims and witnesses.

Given that the same testimonies and evidences have yielded diametrically opposite verdicts; it becomes imperative that the judicial process in a rape case is brought under close scrutiny. The legal system has been widely criticised for harbouring the illusion of self-sufficiency even while depending on extra-legal processes in the act of interpretation. Stanley Fish critiques the dual nature of law in his article "Law Wishes to Have a Formal Existence" and attacks the self-presentation of law in his writings. He accuses the law of presenting a false image of itself as a "principled activity" (Morss 200), the one that is above interpretation and moral judgment thereby giving a false sense

[6] For more information on the report, refer Dutta, Saptarishi and Aditi Malhotra

of “self-sufficient closure” to the legal discourse. It assumes the role of a permanent and stable form which functions based on stringent rules that are non-flexible and independent of “extra-legal” processes. However, Fish asserts that contrary to this “idealized image”, the law actually involves interpretive and moral processes where “a legal statement is only stable and coherent…by virtue of extra-legal processes of interpretation” (Morss 200). Nevertheless, one has to accept the fact that today the legal studies, especially in a court of law, has become more inclusive and thus it looks at narratives from other disciplines or fields of study. Peter Brooks makes this clear in his article: today there is a “degree of reflection on the ways narrative construct reality and meaning outside the law that is acknowledged within legal practice” (Brooks 5).

One cannot deny the fact that law cannot free itself from the influence of linguistics and rhetoric. Law needs to be more open to interpretive practices. It has to be tested against a wider range of “interpretive practices that are also often subtler, and more finely attuned to a realm of human value…not in any simple sense of moral uplift but in its address to the human condition” (Brooks 10). In the case of victim testimony, it is necessary to construct their meaning by bringing one’s knowledge of linguistic and rhetorical strategies to bear on the text. In the context of rape testimonies, each text differs from another as the psychic strategies to cope with trauma varies from one victim to another—the ability to cope or face a tragedy differs from one another. To look merely at some of the more obvious manifestations of these strategies: the consistency, lucidity and ability to recall the event/series of events in its totality differ from one victim to another. Thus interpretation should work with the assumption that testimonies are texts in the sense in which postmodern theory uses the term – as the site where meanings, as

instances of the will to power, collide. The question, “Does the testimony on its own pronounce meaning and completeness or whether the reader here the judge has to look beyond it to the intention of the parties involved” (Fish 5) is answered here. Many times the testimony may not be complete in itself but have to be pieced together to form a meaning. The court should go beyond the testimony and see whether the testimony can be considered as a final expression of the aggrieved person or whether they have to add anything more. The meanings in the testimony are to be found through an interpretive maneuver. It cannot be merely imposed on it. It has to look what is not said in the text--the silences, the slips and the contradictions. There are chances for a reader to look at a text based on the reflection of his/her own “predispositions and biases”. (Fish 201) The act of reading victim testimony begins with the assumption that there is no one-to-one connection between statement and meaning.

One should always keep in mind that the interpreters are neither completely free nor totally constrained in the act of interpretation. In Fish’s words, neither is the interpreter wholly bound to merely state what is “obviously and unproblematically ‘there’” nor are they free to read whatever they like into a text. “Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and not is a reasonable thing to say, and what will and will not be heard as evidence in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed” (Fish 211).

They have to keep in mind that the alternative reading is genuine “not irresponsible or speculative, for reading --the achieving of an interpretation-- is performed by people working within cultures of communal intelligibility, not by

transcendental and disinterested ‘critics’” (Morss 209). It is in this context that one can bring in the debates of Dworkin and Fish and come to a logical conclusion of how the two theories can add to a better legal interpretation. Ronald Dworkin in his article entitled “Law as Interpretation” investigates the legal analysis and claims that each judge looks at a new case as part of a historical context “composed of precedents that have increasingly elaborated and focused the key principles in that area of the law” (Schelly 158) and thereby not completely independent but an offspring of previous judgments. It is a sequel to previous judgments as well as a progress from what went before. According to him, the best resolution for a legal issue is when it is tested and retested. Ronald Dworkin convincingly argues the interdependence of law on the previous judgments:

> Any judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and political philosophies, in periods of different orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. (qtd. in Fish 205-206)

However, according to Fish, the interpreter is not constrained by the past but recreates it as s/he develops his/her new theory. (Schelly 159) For Fish, in legal disputes, both the principles that has to be applied to a case and the facts of the case as such are the creations of the interpreter which otherwise means "how a judge finds principles or sees facts depends on the arguments he believes he must make" (159). Fish, therefore, does not believe in a one-sided relation between the past and present acts of interpretation. The forceful urging of one point over the other is one of the means used to establish truth in a legal discourse. While one can dispute Fish's claim that the past in this case is a usable past, one must also emphasize that the reader is not completely independent of the past. Both the argument and the verdict are built on an interesting interplay of tradition and individual talent.

Likewise, it becomes clear that a two-step process-- description of an incident, followed by its interpretation is not possible as both take place simultaneously – an idea that has acquired the status of an axiom in postmodern critical thought, forcefully articulated by philosophers like Gilbert Ryle, anthropologists like Clifford Geertz and literary critics like Stephen Greenblatt, Stanley Fish, Hernstein Smith, Steven Knapp, Walter Benn Michaels and others. Observation and interpretation are homologous: the underlying set of beliefs determine what will be counted as facts (Schelly 179). Any case is a legal incident where two lawyers argue convincingly the opposite possibilities before a judge who has to weigh each argument of both the sides and add it up and make it a whole. It is interesting to observe how Fish and Dworkin looks at cases. While Fish perceives a case as both the lawyers speaking the truth, Dworkin gives insight into the role of a judge who with his single voice silences all the cacophony that existed. One

should keep in mind that though the usual practice is law deciding a case, there are instances where cases decide or establish the law. Dworkin considers legal interpretation as an effort to meet the challenges posed and come up with a decision which is not just plausible but is the best. For him, legal interpretation must show its value as the "best principle or policy" (qtd. in Schelly 169).

However, one has to keep in mind that meaning or interpretation of a text is not just the property of a text but also of context and should consider the fact that all texts are contextualized. When the theory of interpretation gives the reader the right to become a judge of the text, one should consider the fact that multiple meanings or readings are possible from texts. Therefore, it will become impossible to claim one reading as right and the other as wrong and everything will become a matter of preference.

Thus one can say interpretation is a "rationalization of subjective desires and motives" (Schelly 162) and justice is a "continual balancing of competing visions, plural viewpoints, shifting histories, interests and allegiances" (Williams 121). Context is important in the interpretation of texts where words are given meaning by the context. Any incident is read as a text and one knows or considers something as right or wrong only from that particular social and historical setting. This is important as the social or cultural settings in many of the situations goes against a woman as she is told to move within a set of rules and if she crosses the boundary or surpasses the rule, she is to be blamed. A woman's attempt to move away from the dictated path is a threat to the very concept of civilization. It is the male-centered logic that invisibly and powerfully reinforces such structures of thought. In the case of Bhanwari Devi and Mathura, one can find a similar context. When Mathura has decided to live with the man she loved, she has

crossed the purview of family legitimated by the male social order and thus is pushed outside the purview of law. This has legitimized the attacks and the aggression on her and denied her access to "democratic justice". When the court assumes that the action is with consent, it accepts the privatization of the police officer's response as a justification for his public irresponsibility. Therefore, a distinction between private self vs public duty is put forth. However, with such remark the distinction becomes indistinguishable. This is not much different in the case of Bhanwari Devi. As a *saathin*[7], she tries to challenge the social order of that particular society and thereby is raped. When the judge questions her choice of not reporting the incident to either the first person she met after the event or to her parents-in-law as abnormal, the dictates of patriarchy that are at work in this instance become obvious. Only those women who conform to the societal rules are protected whereas those who assert the role as a woman and refuse the protective shell of male goodness are inconsistent and hence considered an aberration within the system. They have deviated from the norms of goodness and therefore are branded and segregated. Insofar as the legal discourse is homologous with the belief-system at work here, it cannot be regarded as purely text-bound; it has to acknowledge its dependence on non-legal processes such as the prevailing definition of morality/ prejudice. If the legal discourse is a text without outside, testimonies, rape testimonies in particular, are an overlay of the prevailing mores and the victim/witness psychic negotiations with them. The gaps, slips, contradictions, overlaps, excess of meaning, thus become threads that tie-in the text/testimony.

[7] *Saathin*, meaning 'friend,' is an initiative by the Government of Rajasthan to recruit women as grassroots worker as part of Women's Development Project

In endorsing social prejudice by articulating them, the legal discourse further reinforces these prejudices, which shape society's response to a horrific event like rape. A picture of the woman as the inferior 'other' of man, a view deeply entrenched in the mind of the individual member of the society, male and female alike, is passed onto the legal discourse, whose pronouncements in turn affects a particular section of the common people. The insensitivity towards rape crimes have been a much discussed issue. It extends to all spheres starting from the police to the lawyer to the judge. This prejudice within the legal system is quite evident from the cases that I have discussed earlier in this chapter. But the shocking insensitivity has been archived for ready reference and retrieval. A book that I came across in a court library lists the reasons for the rise of sex crimes in India recently:

> The obvious reason for the upward trend in sex-offences is that sexuality which is bio-physiological phenomenon is as essential to human organism as food or water…. The intensity of sex-emotion among individuals may, however, vary depending on their personal traits and bio-physical factors. Thus, certain persons may by nature be more sexy while others may be passive in response. This difference is due to the condition of gonad glands which are more active in some individuals than in others. These variations in attitude towards sexuality may also depend on physical, cultural or socio-economic environment of individuals. Persons of high status though actuated by sex-desire may not have sufficient courage to spell it out due to the fear of losing their social status whereas those who do not have any real status in society may not hesitate to express their sex-

> desire and indulge in sex-behaviour because they have no fear of losing their status in society. (Paranjpe 153)

Paranjpe's ludicrous thesis, "To rape is man, to suppress courage-less 'gentleman'" is thinly-veiled in medical, quasi-scientific and vulgar sociological terminology. He further 'explores' the reasons or factors responsible for the steep rise in sex offence. "Man is a creature of endless moods and caprices. Just as he wants change and variety in food he eats and clothes he wears and the music he hears, so he finds it difficult to remain absolutely faithful to one sex-partner [sic]. Thus variety being the essence of enjoyment, men and women indulge in extra-marital relations which are not always approved by society or law" (Paranjpe 155).

Paranjpe's logic is spurious, to say the least. What is worse, he presents the stereotypical portrayal of emotional energy in men as an objective representation of the male libido. He considers the influence of the Western civilization as the reason for this sex crime. "… Indian people (sic) have become more sexy than their ancestors. The peculiar costumes and clothings of modern girls and women invite lustful looks of sexy persons. The cosmetic used by modern women and the fragrance of scent essence, perfumes and other cosmetics also stimulate sex sensation" (Paranjpe 156). This piece of self-evident nonsensical remark is dealt with in this study only because it is used as a reference book both by the lawyers and the law students. This speaks volumes for the state of affairs within the domain. Insofar as the belief about sexual crimes within the legal discourse is a mere extension of popular perceptions of man-woman relation, the dominant social perceptions of sexuality, and the prescriptions and proscriptions that entail from these perceptions, have to undergo major changes for the legal discourse to

reformulate the laws pertaining to sexual offence. In the absence of a thoroughgoing reform, gender-sensitivity training to young lawyers and similar moves will bring about cosmetic changes to a system prejudiced against women.

One of the major areas of concern that needs attention is the ready association of caste/class and sexual mores. In one of the cases this study examines, class was perceived to be occupying a central position in sexual offences. One of the High Court lawyers has expressed the rather surprising view that upper class men do not rape as they can easily seduce women. Rape and molestation are thus blue-collar crimes, from which the upper class male is exonerated. Not just that. Every individual from the lower sections of the society are potential offenders, guilty, unless proven innocent. Coming from one of the leading advocates today, this statement, which reeks of deep prejudice against women and the lower classes, shakes one's faith in the legal system. This scepticism over the efficacy of the legal system to ensure natural justice to the citizens of a country, victims and perpetrators alike, when one comes across instances of the credibility of the victim's position occupies the central stage of the legal proceedings, rather than the culpability of the affluent accused. The jurists are not blind to this sorry state of affairs – in one of the judgments the court accepts the fact that in spite of a slew of amendments to the rape law, the condition of the women has not improved; it is the victim who is on trial, not her rapist.

In the case of legal discourse, the central document that determines the discursive boundaries is the Indian Constitution. The field derives its immanent intelligibility from this text. While the document, which codifies the fundamental rights of citizens/subjects of a democratic State cannot be periodically updated in the light of more comprehensive

definitions of rights and duties, the paratext of this text, which in this case, is the legal discourse, could gloss the key terms in the light of the newer defections. For instance, "The pronoun 'he' and its derivatives used of any person, whether male or female," could be glossed as referring to citizens of either gender through the use of pronouns like 'they'. This recontexualization of the legal subject would effectively reinforce the spirit of natural justice to all the citizens that the Constitution works with. The legal discourse would renew the female subject's faith in the Constitution if it acknowledges that the female citizen's identity is now a major bone of contention. Riders like the following could be paraphrased using gender-neutral terms: "…unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females. The use of the word 'His' in section 125 (1) (d) does not exclude the parents of a married daughter from claiming maintenance from their daughter" (Ratanlal 55).

Alongside these reforms, which are at the best gestural, the legal system also needs to appreciate the complexity of the female psyche, especially in the discovery/enjoyment of sexual pleasure. When it is established that a woman had given conflicting message - saying 'no' while meaning 'yes', or, as in some other contexts, finding pleasure in invoking pleasure but not in gratifying it, the woman's claim to victimhood is rendered null and void. But one should notice that what is forgotten in such cases is the inability of men to interpret complex emotional cues and the gender-specific mental processes these cues point to. According to one expert, "[T]he ambiguities and ambivalences associated with sexual discovery for women are read as complicity in or license for male intrusion. To be confused or ambivalent about one's sexual desire has too little 'safe space' in feminine development" (Haaken 141). Patricia Williams holds a

similar view with regard to the autonomy of a woman's body. According to her, there is a "complicated ability of women in particular to live freely in the territories of their own bodies" (Williams 12). The fundamental difference in the erotic behavior of the two sexes can only be ignored at the expense of the freedom to experience sex the way one chooses to, without infringing upon the other's freedom. The judicial spin on the idea of consent, in effect, amounts to challenging the legitimacy of the way women experience sex, partly in deference to the male way of experiencing sex. This patrionormativity, to coin a term, is at work when a court narrowly defines the concept of consent. A woman's willingness to be in an intimate relationship with a man, intimacy that falls short of sexual intercourse, annuls her claim of rape. This is forgetting the myriad ways in which a person, a woman in particular, looks at relationship. Needless to say, popular (read patriarchal) perception and social positioning in such instance works its way into the legal arena, denying justice to the deserving. This is quite evident in the William Kennedy Smith rape trial where the intimate talk of a woman is mistaken for sexual innuendos and her rape is given the colour of consensual sex. There is a difference between lived experience and social perception of it. Certain experiences are considered legitimate while others are not, not because the former have been experienced and recorded while the latter are not, but because they are either viewed as "empirically legitimate" endorsed directly by a community or because they are judged to be legitimate by "hidden or unspoken models of legitimacy" (Williams 9). The dominant group in society decides the boundary of what is legitimate and what is illegitimate and the process of inclusion and exclusion. The judiciary, which is part of the same socio-cultural institutions, is not free from the influences of the dominant ideas. The judiciary too works

with these stereotypes especially when it comes to the man/woman relationship. The economy of female desire, sexual desire in particular, is an area that the judiciary is reluctant to enter into, choosing instead to work with the patriarchy-driven definition of eroticism.

The concept of consent holds a central position even today as a result of the conflict between the self-declared legitimacy of the existing social order and the emergent order that seeks to de-structure this social order. The play around the word 'consent' and its varied interpretations by the different participants is the pivot around which a rape case often revolves. Though consent has been a widely discussed term in the context of rape law and many reforms have happened surrounding the term, one still tends to ask whether today in the legal arena, the meaning of consent has been settled once for all. Insofar as terms defining aspects of human experience are not prescriptive, "consent" has to be defined from time to time, in keeping with the evolving dimensions of human experience. The law-maker has to be more open in their definition of terms like 'consent'. The finer shades of meaning of the term 'consent' are seldom entertained in a legal discussion surrounding the culpability of an accused. The freedom of the individual to say 'no' at any point in the erotic ritual time is not given due consideration. The legal discourse regards consent and denial as black- and- white, coping out a serious debate citing practical considerations. One cannot over-emphasize the view that 'consent' has to be continuously redefined; this is quite evident in one of the cases this study explores in detail in the third chapter. The woman who spends some time with a man in the privacy of a hotel room is not morally culpable since she chooses to be with him, especially, when her conscience is mollified by his assurance that he is going to marry her. Her act,

however injudicious it might be, does not entail her losing her right to say 'no' to him when he approaches her with sexual overtures. This is overlooked by the system that employs the spurious rough-and-ready logic that her going with the man, willfully ignoring social norms, has warranted such an overture. As a result of this spurious logic, the woman was denied justice. Her act of going out with the man whom she hoped to marry, is perceived to be an act of transgression, a crossing of the invisible boundaries drawn by the social order; the judiciary, in this case, turns the defender of the archaic norms of an unfair society. The victim thus becomes a colluder, even perpetrator, of an offense, a criminal in the eyes of the law, whose crime is transgressing the boundaries of decency, deserving the punishment she received at the hands of her male companion.

Additionally, there is confusion between "consent" and "passive submission". Though in the Mathura case, this has been widely debated[8], it is by no means an exhausted debate. Though the term 'consent' is sufficiently defined in the Constitution, it is a term that has to be continuously redefined. Consent is often one of the recurring points raised by the defendant in a rape case to prove that rape has not happened. When the victim is an adult, i.e., above sixteen, the case revolves round the question on whether or not she has consented to the act. While courts attach a great deal of importance to circumstantial evidence, for instance the external injuries on both the victim and the perpetrator, they overlook the condition of the victim who had not put up a fierce fight to escape the clutches of the culprit. Pratiksha Baxi rightly says women's consent "does not reside in individual subjects but is seen as residing in the collective" (3). Consent implies

[8] Of course, though the High court differentiated between the two terms and passed judgment in favour of Mathura, the Supreme Court though accepted the differences asserted that in the case of Mathura it is consensual and not passive submission which is followed thence by many other judgments, a trend as propounded by Dworkin.

the "exercise of a free and untrammelled right to forbid or withhold what is being consented to, it is always voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former" (Tarun n. pag). Consent has in many instances been loosely interpreted. From the absence of resistance or refusal to submit to the female victim's clothes, and dress-sense, her social standing, to the antecedents of her sexual experience everything that suggests the victim's favourable disposal to the sexual act by a suitable partner of her choice is counted in towards defining consent. Though the law-book does not mention this in detail, this is one of the unwritten codes, evident from the cases that have been disposed of citing consensus. One of the frequent questions asked during the trial is regarding the silence of the victim at the time of the act. Defence lawyers constantly badger victims for not shouting for help in an effort to suggest consensual sex, a trend followed for generations as elaborated by Susan Brownmiller in her path breaking book *Against Our Will: Men, Women and Rape*. Culpability often hinges on whether or not the woman screamed for help and expressed her opposition to the act. This narrow definition of consent that gets exposed for what it is on the light of new research, explains the reason for the lack of resistance and the passivity of the victim:

> Survivors often experience what is called 'tonic immobility'– the less discussed but common alternative to 'fight or flight'– also known as 'the freeze instinct'. In conditions of extreme fear any of us may feel paralysed, limp, unable to move, cold. These memories make survivors blame themselves while other people jump in to blame them for 'not

> fighting back', but this is an innate biological response to predators. (Susan)

An attempt is made to give further explanation on this issue in the next chapter which discusses trauma and its impact in detail. Sandor Ferenczi, Judith Lewis Herman and Robert Jay Lifton explain the resistance strategy of the victims to escape from gruesome violence which is further explained in detail in the next chapter on trauma and its impact. But this tactic is construed as consent in the case of rape survivors which affects adversely in the interest of the survivor. Such a presumption ignores human response to a life-threatening/overwhelming situation and lumps together the differences in the way the two genders respond to these situations. Thus there is a necessity to redefine the concept of consent.

Passive behaviour of the victim is considered as a strategy to survive a brutal attack. In their study on rape survival strategies, Burgess and Holmstrom found that the victims employ a wide variety of responses like the use of verbal strategies, negotiations, physical resistance or action to escape the attack which is elaborated in the next chapter. Another study by Hazelwood, Reboussin and Warren makes a different, but equally significant claim: the rapists reported an increase in pleasure and violence when the victim fought back. They report that the rapists unleash more violence if the victim tries to use strategies to defend themselves. These investigations explain the reasons for the inactive/ passive response of a rape victim at the time of the incident. It is a survival strategy eminently admissible as a sign of resistance. But the law overlooks these facts and the honourable courts often brush the causes for the absence of resistance under the procedural carpet. Fear-induced submission cannot be construed as a far cry from consent

or willing sexual intercourse. The same logic works in the case of date rapes, which are often dismissed as consensual sex. Verdicts founded on narrow interpretations of consent tantamount to denying the female victim the right to life and limb, insofar as they read passivity, which, in this case, is the compulsion/ biological need of the organism to survive, as an act of will. Insofar as the courts are the mirrors/lamps of a society, their pronouncements are at once the dominant views of the collective called society. If one was to read the judgements and the beliefs underpinning them against the grain, one would have to come to the startling conclusion that societies prefer their female victims dead, killed in action, defending their honour at the cost of their life and limb. This is very much of a piece with the centuries-old views regarding women's enjoyment of sexual pleasure – honour, dignity and moderation should be the hallmark of a women's sexual desire even as libidinal excess is seen as a male prerogative, even a feather in the virile man's cap.

One of the major tasks of the women's groups and people working for the well-being of rape victims is to challenge the currently popular definition of consent, present a more comprehensive view of this notion, and to fight for its effective entry into the legal domain. The dual requirement of force and non-consent to prove rape has to be "de-regularised", as the absence of these have led to the dismissal of so many rape claims, which deserve a closer judicial scrutiny. The plea here is not for legitimizing women's right to define the sexual act as consensual or forced after the event. This study acknowledges the need to continue with the definition of rape as non-consensual or forced sex "with differing degrees of severity depending on whether and how much force and violence are employed" (Whisnant 2.3). Rape denies the victim control over the most

intimate space in her universe- her own body. “Whether it is the rapist’s intention or not, being raped conveys for the woman the message that she is a being without respect, that she is not a person” (Whisnant 3.1). As discussed earlier, the representation of rapist as a master and the victim as a sufferer or an inferior object does a “moral injury” to the victim’s value. Such harmful and inaccurate stereotypes are forecast as “truthful.” Precisely, this is the reason for the victim’s feeling of worthlessness and thereby denial of self.

Similarly, the proceedings in a court often end up portraying a woman’s body as an erotic thing. When the witness deposes, she is told to describe the event in great detail. She is asked to be specific about which part of her body was touched and in what order, turning the legal stipulation that the event has to be presented in its entirety into license for a voyeuristic journey. When a seven year old rape survivor[9] is asked to describe the male organ, there is more at work than the attempt to get at truth, the whole truth and nothing but the truth. The story of this extended trauma begins when the rape victim decides to break her silence and report the incident to the police. The police force is far from being well-equipped to deal with an individual whose body has been violated, whose dignity assaulted and who is seething with anger and self-loathing with the required level of sensitivity. The medical examination, which tends to be seen by the victim as yet another attempt to invade her body, is often treated as a mere forensic exercise, often ignoring the fact that the medical examination of a rape victim is a classic instance where objectivity has to be tempered by compassion. More often than not, rape victims are made to wait for several hours for the examination and are not allowed to clean themselves during the wait. (“Mentally Challenged Rape Victim,” *India Today*;

[9] Case to be dealt in detail in the fourth chapter

"Gangrape victim made to wait for hours in hospital," *Indian Express*). The courtroom is the icing on the cake. The victim becomes a spectacle, turned into a source of perverse pleasure by the lecherous onlookers where such cases are not conducted in camera. If victimage in general is a curious phenomenon, at once evoking sympathy via the onlooker's species-consciousness and distance and comfort in not being the suffering one ("Thank God, it is him/her, not me!"), the case of rape victims is a special instance of victimage. In addition to being sympathised and being used as an object providing solace to the onlooker, the agony of the rape victim is a source of pleasure for the male spectator of this sorry spectacle. She becomes an erotic image in the eyes of the onlookers, and this cannot be attributed to sheer perverseness of a few individuals. Insofar as sex and violence are separated by a wafer-thin invisible line – studies on pornography amply illustrate this point (Malamuth et al. 27-28). The victim is, thus, potentially an erotic object. Though with the reformation in the legal system audience are banned from rape trials, there are still traces of the male gaze inside the courtroom. Further, there is enough evidence to prove that the quality of the social support to the victim has major role to play in the recovery process. It is proved that victims who choose to prosecute their offenders often end up with a more fragile mental state. Prolonged trials imply extended state of being victim; and there are "subsequent demands made on the victim that create a crisis of their own and activate the trauma" (Hartman 510). This necessitates a re-look at two discrete phenomena: the court proceedings in their entirety, the intimidation and victimization that the process triggers, and the "maintenance of active reminders" of the traumatic event. This latter point suggests that the constant grappling with the details of the traumatic event has a negative impact as opposed to a lessening of tension through the

phenomenon known as "*catharsis*". The problem with the criminal court proceedings is that it proceeds before adequate recovery of personal resources available for the victim to handle the traumatic consequences. (Hartman 510)

Similarly, the procedure forensic pathologists currently use to measure the extent of injury sustained by a rape victim is physical examination. Such an examination fails to look at the mental trauma and agony faced by the victim, a trauma that haunts her for a lifetime. Post-rape, a woman is reduced to a mere victim, one who is raped. The fear of this new identity, waiting to be foisted on her, and the social values underpinning this phenomenon, haunt most of the women, forcing them to let the gross injustice meted out to them go unchallenged. The identity as a rape-victim has traces of complicity, guilt, even predestination in a society like ours, where patriarchy is one of the main strands of the ruling ideology. In one of the judgments passed by the Supreme Court Justice Arijit Pasayat, observes "While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female"[10] (qtd. in Jain) shows the condition of woman in the contemporary society. On the surface of it, the observation is sympathetic to the plight of women. Upon scrutiny, however, the statement is ridden with patriarchal shibboleths: it reduces the identity of a woman to her sexual experience. It is as though a woman's existence is determined solely in terms of her sex life. The prejudice of a society which tags the rape victim as a degraded and defiled soul, to be equally pitied and feared exposes the patriarchal prejudice. The victim thus needs protection not just from the rapist but also from the "tyranny of the prevailing opinion and feeling, against the

[10] For more details, refer to the judgment of the case *Tulshidas Kanolkar vs The State of Goa* 2003 CRL 298.

tendency of the society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them" (qtd. in Williams 43).

Another issue with the rape law is that there is a marked difference between the law as it exists in book and law as it is practiced. Rape is a crime against the entire society, and not solely against its women. However, on closer examination, one notes with disappointment that "[M]ost of the Recommendations and enactments remained mere paper tigers and ornamental pieces of legislation. As a result, the law dealing with Rape has remained largely untouched since the original enactment" (Tarun n. pag). Pratiksha Baxi rightly suggests that "…state law is transformed in its localization, often to the point bearing little family resemblance to written law" (3). Though, the Indian legal system does not insist on corroboration for a rape case, in practice, few cases are registered without corroboration. Though the legal system places the onus of the responsibility of proving the case on the accused, in course of time, it becomes the responsibility of the victim to prove her innocence and the involvement of the culprit in the act of violence. Slowly and by degrees the victim turns into the accused/ suspect. Victim testimonies are looked at with suspicion. Though it is banned on paper, the system makes it difficult for the rape victim to register her complaint by imposing unique obstacles on their way from the requirement that their testimony be corroborated by other evidence to the unwritten stipulation that she resist her attacker, and finally to the expectation that she is sexually innocent/or has practiced sex without transgressing any of the boundaries set by contemporary society. Though the law seems to be right in letter, it seems to be completely wrong in spirit, requiring, at every instance, the interpretation/intervention of the sliver-tongued rhetoric of a Portia.

What lies beneath these interpretations of the law by law-enforcement agencies are the norms of a patriarchal society. Take for instance, the strange-yet true requirement that the rape complainant has to provide reasons for her presence at the place where the incident took place, with full documentary support.[11] How does a woman, who gets raped in the fields where she has gone to relieve herself, provide documentary evidence for the call of Nature? More disturbing is the unstated assumption that informs this strange requirement: as an owned/protected member of the society, a woman is not expected to cross the invisible *laxman rekha*. These boundaries, though invisible, are very powerful. Women are thus made to look vulnerable and this seeming vulnerability is then used to reinforce these boundaries. Restricted movement necessarily implies the status as an outsider, a subject, rather than a citizen. This becomes amply clear during the recent incidents of rape where the victims were IT professionals. The debates on these events and the so-called welfare measures taken collectively by the IT industry and the government of that day seem to suggest that the society is in favour of the free movement of women. Steps have been taken to ensure that the taxicabs are driven by men with no prior offences; female professionals should never be allowed to commute in taxicabs all by themselves; wherever possible, women workers should not be asked to do graveyard shifts/late night duties, to name just a few. The excess of meaning that these measures contain is often lost in the jingoist rhetoric of the so-called social workers and activists. Hiding under the cloak of pragmatic welfare initiatives is the stern warning to women: technology and the compulsions of the capitalist society have allowed you to stray into

[11] Bhanwari Devi case and the cases that I analyse in the third and fourth chapter details how the survivors were demanded documental proofs for their presence in the place where the incident took place

the traditional male domains, but we, the custodians of the male order, will continue to remind you of this transgression into what used to be a men-only territory.

The woman is, thus, a slave, whose chains have been slackened, and she should remain forever thankful for this benevolent gesture. As it is practised today, the law is an instance of patriarchal ideology, rather than an ideology-free zone, within whose confines only the truth, the whole truth and nothing but the truth is permissible. If, in many instances, women are victims of "constitutional omission," they also suffer when law is interpreted in the light of patriarchal belief-system or when it is tweaked to suit the demands of the male desire.

This prejudice is not restricted to the legal system; it is spread across other institutions which are directly or indirectly related to the legal system and contribute to their proceedings - the police, and institutions of forensic medicine being some of the most important delinquents. At present, one of the major obstacles in delivering justice to rape cases is the poor quality of investigation. The reason behind this ranges from gender-bias and corruption to the general inefficiency of the police. In any case, the initial decisions are made by the police. The police enjoy a substantial amount of discretion, and this discretion is exercised quietly, and off-the-record. They decide whether a woman's complaint is "founded[12]" or "unfounded"; only "founded" complaints are forwarded for possible prosecution. They decide whether or not to investigate the case, the duration and the extent of the investigation - decisions which affect the quality of the evidence available for the trial which in turn affects the trial itself. This is evident

[12] Founded rape cases comprise stranger rape cases while unfounded are date rape or acquaintance rape cases

in the Gurmit Singh case, already mentioned, in the beginning of this chapter where one of the reasons for dismissing the case was the poor investigation. The shocking part of the case is that since the police could not trace out the car or the driver, the court declared that the story was concocted and thus dismissed the case and acquitted the culprits. One of the disadvantages of rape cases is the deep prejudice prevalent among the police force against rape victims. They are unfairly skeptical of rape complainants and they believe that rape victims often exaggerate/even fabricate rape incidents.

In India, cases like Mathura rape case, Bhanwari Devi case and Gurmit Singh's case are a few examples where the law machinery brushed aside victim testimony and supported the culprits. The introduction of the rape shield laws is a remarkable change in the history of rape laws - it limits the introduction of the evidence concerning the past sexual history of the rape victim at the trial. However, the sexual history of the survivor can still be introduced into the proceedings if the defendant is able to successfully prove that it is relevant to prove his innocence especially in unfounded cases where the victim and the perpetrator are acquaintances. In such cases where the victim and perpetrator are related, the defendant attempts to bring in consent as a major tool and thereby impeach the credibility of the victim. Thus, though the law is introduced, it is bypassed and the past histories are brought in the court to prove the 'promiscuity' of the victim and thereby to establish the propensity for filing false claims.

Another limitation of the legal system is delayed judgement. Very often, cases stretch for years extending to decades for the final judgment. Cases causing grievous injury, physical and/or emotional such as rape, require immediate retribution. In these cases, judgement is not just to reform the culprit, but also to send a message to the

society. The longer the trial lasts, the longer the woman's identity is reduced to that of a victim. In her case, justice delayed is identity denied, and trauma extended.

More importantly, the court should radically redefine the truth criteria when it comes to victim testimony. The traditional criteria of verifiability, internal consistency, coherence, should be relaxed in order to allow victims to negotiate with trauma even as she attempts to recall the sequence of events.

Victim testimony is a text that seamlessly links with her psychic strategies to negotiate with an event that drives her to the edge of sanity. Insofar as the psychic is the site of the agon between socio-biological impulses, the testimony is also an extension of contemporary beliefs and values. When this is the founding assumption of interpretations of victim testimony, the victim will be allowed to move back and forth through the narrative, with each re-telling of the incident annulling parts of what has previously been admitted as true. These contradictions, overlaps, jumps and false starts should not warrant tout court dismissal of the testimony as is the case in the current scenario. The silences and fissures in the testimony have to be analysed as it is these that articulate the struggle to redefine one's subject, post-rape, vis-à-vis the unforgiving norms of the society in an effort to return to normalcy. In fact, the attempt to seek justice and avenge oneself is an important part of this process.

While blaming the law for its stiff-necked rejection of complex psychic maneuvers, one should remember that the law is not autotelic but it is a discursive field, being defined by and defining other similar discursive fields. Any self-conscious practitioner of law interested in the genealogy of the field would see it as a continuously evolving system, whose definitions of truth, nature and justice are works in progress,

rather than bench-marks that one readily inherits when one enters the field. Law is an open-ended system though it presents itself as a rigid system. The social/semantic field of reference of the law-book is constantly undergoing change, with the application/interpretation of the legal code being in a dynamic, dialectical relation with the former. Each verdict, which is at bottom, an act of interpretation, is shaped by the interpretive tradition even as it contributes to this tradition through an active engagement with this tradition. Fresh insights into the nature of a particular case are often the products of developments within the field necessitated by social compulsions and facilitated by the availability of new paradigms in social and human sciences. Far from being locked in a one-sided relation where the law is the conscience keeper of a society, the legal system is engaged in a dialogue with the socious, whose chief manifestations are the executive and the free press. Even as it reminds the individual or organization to keep its act clean in accordance with the norms of good behavior stipulated by the Constitution, it allows for the modification of its interpretation of the code - not just the finer points, even the fundamental ones. This dialogue is not free from the struggle for one-upmanship. The judiciary often tries to challenge the authority of the law, in whose self-image it is the unrivalled keeper of the social contract. The press is often critical of judgements, and this is done by pitting the jurists against one another. The legal community is at times critical of the performance of the political class; the executive is often sore about judicial activism; the press has a field day re-presenting this contest between the two pillars of democracy, if one can be pardoned for the mixed metaphor. More than in any other part of the world, this struggle is quite marked in a vibrant democracy like India. Willingly or reluctantly, instinctively or self-consciously, the law has been acknowledging that the

written word is not totally different from its interpretation/application, nor is its meaning/reference out there for the jurist to see, without intervention of an interpretive routine.

The time bound reformation in the legal system is the result of this compulsion and the changes it has entailed. The relation between the legal and the 'extra' legal is obvious to any student of law during certain moments of crisis, be it the Jessica Lal case, the Babri Masjid verdict, or the more recent dispute over the quantum of punishment for juvenile offenders or criminality or otherwise of same-sex relationships. But even when the legal discourse is not challenged by the other institutions of the society, there are minor modifications to the legal code which often acquire critical mass and transform the code itself. While it is difficult to say whether change is cumulative or effected suddenly through a paradigm-shift, one can safely argue that the law continuously altered itself to have nuanced responses to situations it is required to play the adjudicator.

The law is always already changing to keep in tune with the cultural needs of the society, with even the basic tenets of law being redefined to meet the ever-changing requirements. These changes are evident in the case of rape laws too. The first major step in the direction of a more humane approach to rape is replacing the term 'rape' with the phrase 'sexual assault' and modifying the definition of sexual assault. This initiative is a reaction to the wide protests followed the Delhi gang rape case of December 2012. The amendments that took place in 1983 and 2013 in the rape laws have several sections added to the Indian Penal Code (IPC), the Code of Criminal Procedure (CrPC) and the Indian Evidence Act (IEA). This is a significant advance over earlier provisions on rape - "withholding the victim's name in published reports; redefining consent, trial in camera,

criminalizing custodial rape" (Flavia 7). The amendment recognized, for the first time, forcible intercourse with a separated wife as rape. It redefined rape and the introduction of the new section 114 A was a major shift from the legal provisions at that time, which demanded that the court will presume a person to be guilty, on the basis of the statement of a woman that she did not consent to sexual intercourse, until proven otherwise. By replacing the word 'rape' with 'sexual assault', the amendment broadened the sphere of sexual intercourse not just to the penetration of vagina but to the extent of including a wide horizon of crime against women which includes a number of acts which harm and outrage the modesty of a woman. The age limit for consensual sex is raised from 16 to 18 and that of the wife is increased from 15 to 16. Hereafter, a husband who is indulging in sexual activities with his wife who is under 16 years of age is liable to be prosecuted. Allegations of sexual offence have to be recorded by a lady police officer as far as possible; the introduction of clause (4) in section 146 of the Evidence Act forbids cross-examination of a rape victim with a view to establishing her general immoral character or previous sexual experience to prove consent in the particular case. With the amendment, the legal system has become more in tune with the principle of equal justice to all.

Apart from these amendments, the Bhanwari Devi case has resulted in the formation of new guidelines known as the Vishaka Guidelines which provide basic definitions of sexual harassment at workplace and the guidelines on how to deal with it. These reforms have been introduced as a result of a continuous dialogue between the legal, para-legal systems and other disciplines. This is proof enough of the fact that the legal system is not an autonomous zone but is dependent on other disciplines. More than anywhere else, the legal code is legal practice, in the form of delivery of justice,

reflecting upon itself. Each of the legal provisions bears traces of previous interpretations in the form of popular verdicts, pressure-group interventions, and developments in sister disciplines and other fields. The legal discourse is thus a highly intertextual affair. The postmodern annulling of First Principles in all fields of enquiry impacts the legal discourse more than any other discourse. Legal Studies can now reshape the self-image of law and what counts as immanent intelligibility within the field. The dialogue with other disciplines can now be acknowledged and the provisional status of tenets, the clauses and sub-clauses in the law book can now be seen as acts of interpretation, determined as they were by a complex of forces that are imagined as principles and precepts of a hermetically-sealed discipline, whose field of reference falls totally within the discipline.

The notion of intertextuality problematizes the idea of text having boundaries; it further disrupts the binaries inside/outside. It makes one aware of the fact that each text exists in relation with the others. A text is a "woven thing" which is knitted from the texts that preceded, historical references and practices and of the free play of language or as Foucault says in *The Archaeology of Knowledge* "it is caught up in a system of reference to other books, other texts, other sentences: it is a node within a network" (35).

Legal arguments, which are often built on reference to other, similar cases, and verdicts that lean heavily on previous verdicts, especially of higher courts, the influence of pressure groups and Media on the outcome of cases are some of the instances of intertextuality as well as the complex connection between principles and practice. The legal discourse draws insights from a multiplicity of contexts-- both textual and social. These acts of interpretation become legitimate precedents for other trials before eventually finding their place in the law book as abstract principles, after being shorn of

their concrete specificity. Not just the quantum of punishment, even the definition of crime, is the product of the needs of the society modified by contemporary definitions of duties and rights, which is the concern for almost all the major disciplines within human sciences. To this, one must add the changes in evidentiary procedures warranted by the developments in physical sciences.

The legal community's openness to the intervention by other forces, even if these are still perceived as 'outside' forces, has resulted in the system helping the victim getting justice against all odds. The Jessica Lal case, where the Media played a pivotal role in helping the legal system move beyond the procedural red-tape, often exploited by corrupt jurists, is an interesting case in point. The fast-tracked trial and a swift verdict of the Delhi gang-rape case is another such instance. The two cases plead for self-conscious practice of law, one wherein the law is assumed to be a bricolage, resulting in an openness to the influence of developments in other fields– an approach that could speed up the legal process without sacrificing the goals of the system or the integrity of the judicial process.

But when the legal system is influenced by socio-cultural contexts and the judgments, though not always, it is influenced by popular sentiments, and such pressure on the system will result in two opposite effects. The first one is positive where the troubles of the people and their expectations from the system are highlighted when they are taken up by public fora and the judiciary. Sensitive cases are dealt with in the best possible manner where the maximum effort is taken to render justice. On the other hand, the pressure that is mounted on the court can impact negatively as well. The highlighting of certain cases and the relegation of others can result in the court considering or

preferring to deal with publicized or high-visibility cases and discarding or sidelining the other cases. This can result in unequal distribution of justice.

What are the deciding factors which lead to the selective coverage of certain cases and the relegation of certain others or the visibility of certain cases and the invisibility of others? What are the dominating forces within the discursive practice? These are important questions. Caste and class play a major role in selective visibility. There is a non-verbal negotiation between the Media and the dominating forces in the society. Media are the representatives of these forces. They take interpretive control of the incident to establish truth, a truth which is viable and acceptable for the dominant discursive identities. They superimpose the hierarchical ordering of the society by selective inclusion and exclusion which are mainly based on class, caste and gender.

What are the key patterns emerged in the reporting of rape cases? Though class and caste are not mentioned in the Media, they affect in reporting cases and hold social and cultural significance. It is the upper class, upper caste women who are over-represented by the Media though their social background is not cited and the social issues related to the 'other' group relatively remains excluded from being reported. In most of the reported cases, the image of the assailant is forecast as one coming from the lower class family, tagged as traditional societies who consider the improvements in the status of woman who are highly individuated as a challenge to his own. To reinstate their power, these assailants use rape as a weapon to drag the women back to the original status as a submissive other of the society. While the victims in most of the cases are those who represent the new India, who are liberal and outwardly, the assailants are

portrayed as rural working class misogynist men. A class-based difference is re-affirmed through such reports.

This is evident in the Wayanad rape case where the plights of the victims who are the tribal girls never occupied Media space. Wayanad, a district in Kerala where the tribals live in the fringes of the society, far away from the mainstream, is often intruded by the outsiders who rape tribal women, plunder the natural wealth and disorient the whole tribal community. The lives of these tribals are similar to the lives of the aboriginals of Australia or the native Americans. These people have been exploited for years but they have little representation in the mainstream Media. The Kairlanji massacre is another such example where the Media shunned away from reporting the case as it involved the murder of lower caste women by upper caste men. The Khairlanji massacre is the 2006 torture and massacre of a Buddhist family by the Kunbi class. The main reason for the massacre was revenge as the Dalits did not allow the powerful Kunbi people to construct a road over their field. The two women in the family were paraded naked, raped and murdered. (Pandey n. pag) It was an atrocity designed to stifle the Dalit movement in the society. In India institutionalized casteism and classism deter many women from seeking the help of the judicial system. The capitalist agenda of the Media to protect the allies who are from the upper caste and class are evident here. The dual stand taken by the Tehelka organization is another such instance. While the news organization gained its fame through investigative journalism including the extended investigative report on rape cases and prejudice dominating the police system and public in particular on rape, it has shunned from reporting the rape case when one of its employee was raped by the founder of the organization. There is a silent and strong

agenda to keep the hierarchy and hegemony intact. The reporting of such cases will unswervingly affect the patriarchal hegemonic system on which the society is built.

At the same time, there was extensive reporting in the Media of the gang rape of the tribal girl in West Bengal by a group of tribals from her own village– an attempt to portray the barbaric nature of a tribe and through that, to underscore the fundamental difference between tribal and mainstream cultures. The contrasting binaries tribal/mainstream, civilized/uncivilized, barbaric/cultured are showcased here. In addition, when the Media asserts an idea for a considerable time, it not only perpetuates the idea but also makes the truth or the crime of others invisible. It is made a sociological event, a "circus of stereotypification." The intimacy of rape becomes "a public display, full of passion, pain and gutsy blues" (Williams 175). The silence of the victim is filled by the noises that oppress the victim. She is re-presented again by the agents of the oppressor. The oppressor fills the "void of her suffering with sacrilegious noise, clashing color, serial tableaux of lurid possibility" (175). Thus untruth becomes truth through belief and truth becomes untruth through disbelief. She does not play a role in representing herself or speaking for herself. Thus the visibility or invisibility of a woman who is sexually exploited is the result of her not being part of the "larger cultural practice." This extra-large cultural picture is just a perception though a powerful one which is "concocted from a perceptual consensus" (Williams 56) to which she is not a part of. The expectation ensuing from such an atmosphere is that certain conditions are absolute or unchallengeable which in itself leads to a feeling of frustration and powerlessness. They are given a role of satisfying the pleasure and expectation of other's fantasy.

Apart from securing these agendas, the Media play a strong role in cementing the prejudice against rape victims and selectively sensationalizing the cases to attract wider viewership. The Media at present cover rape cases extensively. Sensationalizing rape cases with lurid details and titillating reports is the style that is being followed. This sensationalism, according to Soothil and Walby, acts as "soft pornography appeal" of rape which would help in selling more copies of their papers. (Turkewitz 37) Sensationalising rape has a negative impact as it creates fear in the mind of the readers – rape becomes a sexual experience and not a manifestation of violence and domination. The over-dramatized and sensationalised reportage constructs the victim in two contrasting colours; either as an innocent and naïve woman who is a typical prototypical virgin or the seductive woman who is the prototypical vamp. Such a construction oversimplifies rape and thereby tries to fit any case into convenient categories. (Turkewitz 37)

Besides, the Media, by focusing on violent rape cases, create negative or wrong impression in the mind of the readers or viewers. Reporting violent rapes, which improve a channel's TRP, impacts the cultural view of rape; and the neutral observers are indirectly to associate rape with grave physical injuries, and they would consequently blame the victim with fewer physical injuries. The Media more often focus on 'stranger rape' cases than 'acquaintance rape' cases, in spite of the latter being considerably more in number. Quite often, there is an exclusion of the reporting of incest and sexual violence by intimate partners as it can affect the family structure on which the system is built.

Selective and agenda-driven Media reportage have a great influence on the judiciary. Caste and class hegemony, of which Media coverage is an instance, sways the judiciary as well. Today legal basis comes from moral basis. Rape is a tool not only of patriarchy but also of colonialism, casteism/racism, nationalism and other 'spiteful injudicious hierarchies'. In the case of India, the upper caste men terrorize lower caste men and women by raping and/or murdering them to assert their power and domination. It is an act of physical violence to suppress their will to resist and remind them of their lower status. This is clearly evident in many cases happening across the country as has already been discussed. In the Bhanwari Devi case, she was raped to remind her of her status as a woman and as a Dalit, and shockingly the Indian judiciary itself could not deliver justice to her. The judgment of the lower court that an upper caste man cannot rape a Dalit created an uproar throughout the country. The popular belief which has been passed from generations is asserted through this judgment. It legally and socially asserts the stereotype that the rape of a Dalit woman by an upper caste man is not a possibility. Similarly, when the Apex court asserts that Mathura had sexual intercourse with consent, it assumes the promiscuous nature of tribal women. Thus, one can say that law is a "subcategory of the underlying social motives and beliefs from which it is born. It is technical embodiment of attempts to order society according to a consensus of ideals" (Williams 138-139). This can be the reason why there are certain critical theories of law which consider legal system as a product of a society which they profess to govern. For the Critical Legal Studies group, "legal rules were 'socially constructed to reflect prevailing interests of power and domination, and […] the mythology of legal discourse

serves to mystify and pacify the oppressed'" (Neacsu 3). One of the exponents of Critical Legal Studies, Joel F. Handler believes that there are no objective-neutral legal rules.

However, on a positive note, one can claim that law is taking cognisance of the changes that are happening. The amendments that have been brought to the system after the judgment of these cases give more relief to victims and restore faith in the judicial system. Though such welcoming changes are brought in, the legal system still has a long way to go to suit the needs of the time. It has to be kept in mind that a rape victim may have to live with physical injuries in vaginal and anal areas, lacerations, bruising, anxiety, shock, depression and suicidal thoughts, gynecological effects including miscarriage, stillbirths, bladder infections, long drawn symptoms like insomnia, eating disorders, sexual dysfunction, negative self-image, STDs and infertility. (Desai 3&4) The law here does not look at the victim but rather looks at the incident. In crimes such as rape, the real plight of the victim is overshadowed by other discussions surrounding the event. Most of the time rape impairs the capacity for personal relationships and, alters the behavioural values generating fear psychosis in the individual. The observation of the Honourable Supreme Court on the rape trial is significant in this regard:

> The defects in the present system are: Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than no (*sic*), are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in Court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the Court proceedings added to and prolonged the

> psychological stress they had had to suffer as a result of the rape itself. (*Gautam v. Subhra Chakraborty*)

This shows the drawback of the system which seriously requires introspection.

In addition, the moral inferences of the culture which occupies the central place in the rape law is many times overlooked or neglected. This neglect has serious implication on the implementation and also on the evaluation of legal reform. In spite of the reforms, the crime has not stopped or decreased and the convictions level has not increased. This makes one wonder why despite having strong rape laws the situation remains more or less the same. The reforms in the legal discourse have not helped many of the cases involving date rape or acquaintance rape. When a daughter files a complaint against her father charging him of rape, the judiciary is often pushed into a state of shock. It often reposes its faith in the sacredness of the family and avoids crisis of confidence by calling the victim a liar. The judges are prone to "hold and uphold conservative attitudes about rape, rapists, and victims, and these misconceptions seriously thwart the ability of legal reformers to transform the law" (Matoesian 210) and not implement the new reforms.

Hence one can say that the constitutional provisions of rights are made by men, and only some of these are passed onto women as favours. Everything about a woman, including her 'womanness' is socially constructed. It is filled with conflicted meanings and meaninglessness which in itself is a reminder of societal construction of femaleness or womanness. Christopher Stone's stand in his article "Should Trees have Standing" is very much applicable in the context of women claiming their rights and special provisions for them in the Legal studies which are being denied to them for centuries.

Stone's lines foreground the true perspective of a resistance against women's empowerment in the legal arena.

> We are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social and economic dimensions…. The fact is that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us"—those who are holding rights at the time. (qtd. in Williams 160)

Today, given the high rates of sexual assaults being committed in the society, the law must have more provisions for victims of rape. The critical factor in rape is the "unwelcomeness" of the behaviour; thereby making the impact of such actions on the recipient more relevant than the intent of the perpetrator. The Apex court asserted that a man can be convicted if the presiding judge is convinced of the incident even when there is lack of circumstantial evidence in the *Rameshwar vs The State of Rajasthan* case in 1951. It depends completely on the discretion of the judge. Likewise, a delay in the FIR[13] is equally justifiable as there are major reasons for a victim to file a case weeks or months later. The social stigma, shame, fear, the shock and sometimes the threat from the culprit are a few reasons for a delayed report to the police.

[13] Delayed FIR is accepted in exceptional cases now on the condition that the case is reported a few days after the incident. However, the reporting of cases after months or years are not acceptable though there are psychological reasons to do so.

The trauma of a victim of sex crime, especially when it is a rape, is accentuated with the trauma of narrating the facts to the police and undergoing the medical examination, especially that of the most intimate organs of the body. This is enough for a woman to be discouraged from reporting a case. In addition, they have the trauma of being subjected to rigid cross examination with no mercy from any side in the courtroom. The hypothesis this study seeks to establish is that victim testimony has to be considered as a text with multiple interpretations. Contradictions and variations in a testimony are an integral part of the narrative. There are chances that a sex crime victim may not be able to unfold the truth completely and freely when they are confronted with the offender. In a sense, the victim in a rape case is no different from a child – she is tormented by fear of the recurrence of the event which often shapes her recall of the event, and this fear is at the top of the pyramid that has discomfort at becoming a spectacle as its base.

Thus, one is looking for a more humane as well as effective justice system or effective justice delivery mechanism. The principle of natural justice for all has to be meticulously defined keeping the delicate mental state of the rape victim in mind. A major part of this humane treatment that yet operates within the parameters of justice is the interpretation of victim testimony. Contradictions, gaps, slips, repetitions, overlaps, among other things, should be assumed to be the norm rather than the deviation. Unlike a written book, rape testimonies may not be complete in itself but the contradictions inherent in them can be considered as a way of negotiation. Thus testimonies should not be ruled out, especially, because of the slips, lapse and the contradictions. Memory of traumatic events has an economy of their own. If a coherent and perspicuous testimony becomes the mandatory criterion, then the chances of getting the victim coached by the

prosecution are more, which can result in the production of a concocted testimony that is far from the truth. Reading between the lines will help in understanding the context and the text. The victim has to be given the benefit of doubt. My argument is that the law must consider some of the insights on the human functioning brought in by the clinical psychoanalyst, especially, in the context of trauma. Without urging the legal system to dwell only upon the unconscious and the subconscious mind, this study pleads for selective appropriation of the insights of psychoanalysis.

Likewise, the complexity of human response to life-changing event in response to theory across disciplines including psychoanalysis, philosophy and law have to be co-opted for a vibrant judiciary. I would argue that legal issues are not restricted to the four corners of a document (Constitution) but they are inscribed by the disciplines like sociology, psychology, philosophy, history, criticism and such other disciplines. One assumes that the law can be made better and more inclusive but what has to be done to achieve this goal is the question to be addressed seriously. The law has to be cautious of the range of response individuals will have towards particular events. One has to look at the spectrum of responses society has where Media have an influential role in it. How contradictions happen, what is the role of theory and what are the human psychological defensive mechanisms employed to cope the situation are the issues to be looked into. Owen M. Fiss puts forth the reason for the law to act in a particular way. Fiss claims that judges are constrained by the rules of law and “they prescribe the kind of considerations that a judge could take into consideration, define basic concepts and terms, establish certain procedures the judge must follow and so on. The disciplining rules are not themselves part of the Constitution but rather receive their authority from a community

that in turn is defined and constituted by them. And it is the disciplining rules that provide the standards—the distinctly legal standards—for judging the correctness of judicial decisions" (Fiss 1). Fiss argues that disciplining rules are necessary to constrain different meanings or conflicting multiple interpretations. But, the immediate question here can be what is the deciding factor in bringing the disciplining rules and who are the beneficiaries of them and whether any particular section of people are put in a disadvantageous position as a result of it.

A few recommendations by the Supreme Court for a better rape law are worth quoting in this context. The Supreme Court in the *Bodhisattwa Gautam v. Subhra Chakraborty* case, 1995 put forth certain recommendations, which, if executed, can bring great relief to rape survivors fighting for justice: 1) The complainants of sexual assault cases must be provided legal assistance and representation[14]. 2) Legal assistance has to be provided in the police station as the guidance of a lawyer at the time of questioning will be of a great relief for the complainant. 3) The police-on-duty must inform the survivor of her right to representation which again has to be recorded in the police report. 4) A list of advocates willing to work on such cases has to be maintained in the police station which will be of help to those who do not have a particular lawyer in their mind. 5) These advocates shall be appointed by the court but they are authorised to assist the survivor at the time of questioning before the permission of court to not to delay the whole process. 6) Anonymity of victims has to be maintained as far as necessary. 7) A directive has to be

[14] The role of the victim's advocate will be to explain the victim the nature of proceedings, "to prepare her for the case and to assist her in the police station and in Court, to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case" (*Bodhisattwa Gautam v. Subhra Chakraborty*).

issued to set up Criminal Injuries Compensation Board to help survivors to compensate the financial loss that they have incurred due to the act. 8) Compensations have to be provided by the Court after the conviction of the offender and also by the Criminal Injuries Compensation Board. It has to take into account, the pain, the sufferings, the shocks and the loss of earning due to pregnancy and the maintenance of the child, if occurred as a result of rape.

However, though the judgment was passed in 1995, the legal system has still not implemented these recommendations. It is necessary to incorporate these in the present legal system to have more women-friendly laws. Along with these recommendations, it is necessary to look at the effects of trauma on the victim and how it can affect the proceedings of a case and what should be done to overcome such a situation. Conditions have to be created for the woman to come to the court on such cases without fear psychosis with the belief that she will get justice.

The next chapter in this thesis will look at the effect of trauma on a rape survivor. The trauma is quite evident in their narratives which has features quite distinct from the traditional narrative. The chapter explores the socio-legal structure that characterises a rape narrative and the cultural construction of identity that has a major role in the generation of the varied degrees of trauma in a survivor.