Hundred and Seventy-second Report in 2000. The Commission suggested that all sorts of penetrations in any orifice of the body as well as oral sex should be covered under the proposed offence of sexual assault.  

(ii) **Meaning of Consent**

Consent is regarded as the most important element in order to constitute the offence of rape under Indian law. Ironically, the term ‘consent’ has not been defined anywhere in positive terms. Section 375 of the Code defines consent in negative. The section fails to distinguish between ‘consent’ and ‘a real consent.’ In the absence of any definition given to it in Section 375, it is capable of ample interpretations. Hence, the Law Commission in its Eighty-fourth Report\(^{31}\) and One Hundred and Seventy-second Report\(^{32}\) suggested the substitution of the word ‘consent’ by ‘free and voluntary consent’, which they felt indicated active consent as distinguished from consent implied by silence or mere submission. However, the researcher feels that, despite the Commission’s efforts to lay down suggestive amendments, there are some areas that need to be answered. In line with the recommendations of the Eighty-fourth Law Commission Report, the

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\(^{28}\) Interventions for Support, Healing and Awareness.

\(^{29}\) All India Democratic Women’s Association.

\(^{30}\) Sexual assault means-

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

(i) any part of the body of another person or

(ii) an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;

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

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

(d) engaging in cunnilingus or fellatio; or

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


third clause of Section 375 should be widened in its scope. It covers only the consent given under fear of death of a human being or under fear of hurt. It fails to give protection against sexual intercourse obtained under non-violent threats, spreading of scandalous information etc.

The fourth clause of Section 375 again reflects the conservative pro-male notions of sex. It fails to cover a large number of cases where the dishonest men allure innocent women on the false assurances of marriage. And after enjoying biological favours, they refuse to marry the victims. The pro-male notions of the judiciary could be seen in Hari Majhi v. State33, where the accused procured sexual favours from a girl on the false assurance of marriage. The Court declared the accused not guilty of rape on the ground that he has neither misrepresented nor cheated the girl. She willingly consented to the act. Similarly, secret marriages performed without any valid formalities, whereby the treacherous males make the women believe to be legally wedded by just putting vermilion on their foreheads are not covered by this clause.

Despite the addition of Section 114-A in Indian Evidence Act, the courts, by and large enthused by historical values have insisted that the burden of proof for absence of consent is on the victim. On the same lines the fifth clause places burden on the woman to prove that because of intoxication or stupefying or unwholesome substance administered by the accused she was unable to understand the nature and consequences of that to which she gave her consent.

While glancing through the development of law of rape, it can be clearly visualized that the consent has by and large, been used as a strong and valid defensive weapon.34

A woman may successfully prosecute a man for rape who had sexual intercourse with her consent when the man knew that he was not her husband and that she had consented believing him to be someone else to whom she was or believed herself to be lawfully married.35 A similar mistake about the identity of

33 1990, Cri. L.J., 650 Cal.

the accused made by an unmarried, widowed or divorced woman provides her with no protection even if the man knows that she consented to the sexual intercourse believing him to be someone else. The message is clear. The tie between marriage and sexuality is unmistakable. The law protects virgins and chaste married women. A woman who is not married if she decides to be sexually active, she does so at her own peril. A man can swindle her for her promiscuity without any risk to himself. Any sexual activity beyond the private sphere of marriage is not worthy of legal protection.  

(iii) Recognition to Martial Rape

Indian Penal Code provides, “Sexual Intercourse by a man with his own wife, not being under 15 years of age, is not rape. Only two groups of married women are covered by the rape legislation –those being under 15 years of age and those who are separated from their husbands. This allows husband to have complete sexual control over their wives in direct contravention to human rights regulations. The law simply echoes what social mores often take for granted, that women have no right to their own bodies and that their will is subject to that of their husbands. The undeniable confusion is that a wife is presumed to have given irrevocable consent to sexual relationship with her husband over though there is no presumption of consent for any other purpose, including the marriage itself. The option of puberty given by Hindu and Muslim Laws relating to marriage allows woman to revoke their marriages performed before attainment of majority but there are no sanctions against a husband establishing sexual relationship within such a marriage. The husband is punishable at par with other rapists only if the wife is too young physically for sexual intercourse. Her mental maturity or her clear withdrawal from matrimony by living separately is of little protection to the woman against aggressive sexual access of her husband. It is submitted that

35 Clause fourthly, Section 375 of Indian Penal Code, 1860.


37 Exception to Section 375, Indian Penal Code, 1860.

38 Section 376-A of Indian Penal Code, 1860.
though husband has every right to have conjugal relations but that does not give him the right to rape his wife.\textsuperscript{39} The proper remedy should be to approach the court for restoration of conjugal relationship.

The initial underlying idea behind this exemption was the assumption that on marriage, property of the father gets transferred to husband. Jurists over the years unanimously discarded this concept and expressed the opinion that for twenty-first century woman this has no rationale. Years of extensive scrutiny, sustained criticism and persistent activation have resulted in same jurisdictions taking significant, positive and far reaching steps to abolish this exemption. In England, House of Lords in \textit{R v. R}\textsuperscript{40} announced that husband’s immunity no longer exists. It was followed by enactment of Sexual Offences Amendment Act of 1994, which formally abolished this exemption in \textit{England}.\textsuperscript{41} In 1993, marital rape became a crime in all fifty–states of \textit{USA} under at least one or the other section of the sexual offence codes.

In India also a significant development was made when Section 376-A was introduced as an amendment based on the recommendations of the Joint Parliamentary Committee on the Indian Penal Code (Amendment Bill), 1972 and the Law Commission of India. According to this section, a husband can now be imprisoned upto two years, if \textit{firstly}, there is a sexual intercourse with his wife, \textit{secondly}, without her consent and \textit{thirdly}, she is living separately from him, whether under decree or custom or any usage. When the Law Commission in its Forty-second Report advocated the inclusion of sexual intercourse by a man with his minor wife as an offence it was seen as a ray of hope.\textsuperscript{42} The Joint Parliamentary Committee that reviewed the proposal dismissed the recommendation. The Committee argued that a husband could not be found guilty


\textsuperscript{40} (1991) 2 ALL ER 747.

\textsuperscript{41} Sexual offences Act of 1994, Section 147.

of raping his wife whatever be her age. The National Commission for Women in India released a report, “Rape a legal study” which recommended the abolition of marital rape exemption. Unfortunately, it did not find favour with the Law Commission of India. The legal provisions continue to be reflective of the double standard we carry towards women. We treat rape as a crime but are far from recognizing that rape is a rape no matter who does it.\textsuperscript{43}

(iv) Child Abuse

The researcher feels strongly that there should be a separate section in IPC aimed at curbing the galloping incidents of child rape. To combat the menace of child rape, the following steps are suggested:\textsuperscript{44}

1. Instead of dealing with rape of a child like the rape of an adult female, a separate section may be inserted in the Indian Penal Code punishing any type of sexual abuse of a female child below 14 years of age, whether it is rape, attempt to rape or sexual assault with an intent to outrage or insult the modesty of a female child. A minimum sentence may be prescribed without giving any discretion to the courts to award a lesser sentence below the minimum.

2. The rules of evidence and the procedure have to be simplified and a time limit has to be set for deciding these cases at the trial and appellate stages.

3. These cases have to be investigated, inquired into and tried by victim-oriented female personnel and the trial has to be held in camera. The victim has to be kept informed of the status of investigation and trial.

4. The impact of the crime on the victim has to be taken into consideration by the court while awarding compensation to the victims.

\textsuperscript{43} Supra note 39 at p. 283.

\textsuperscript{44} (2001) 2 SCC (J), p.31-32.
5. State sponsored victim support schemes have to be set up to play an active role as a representative, advocate or advisor of the victim. Centres manned with trained counsellors have to be set up to provide services for rape victims, the most important of which is to provide a place where these girls, who have raped or sexually assaulted can be placed and provide them with help in dealing with any official agencies such as police or medical services.

(v) Sentencing Policy

Given the limits of discretion in sentencing by the legislature, the courts have to decide the quantum of punishment to be inflicted in each case. In practice, in almost every rape case, a less than minimum sentence is awarded. The culprits should always be given the statutory minimum “not less than ten years but which may be for life” without the milk of human kindness flowing for the offender. The tendency of the courts has been to sympathies with the accused and takes notice of the repercussions of the offence on him and his family. The courts, including the Apex Court, do not even try to find out what happened to the victim of the crime and there is no mention of the consequences of the offence on the victim in most of the decisions on rape.\(^{45}\) By and large therefore, the approach of the courts towards rapists has been mechanistic and unimaginative. Reasons for confirmation, reduction or enhancement of sentences have been immediately stated. Application for enhancement of the sentences or appeal on behalf of the State for the purpose is seldom take up.\(^{46}\) It is no doubt true that deterrence does not come from mechanized increase of punitive severity but from quick investigation, prompt prosecution and urgent finality. But this does not mean that

\(^{45}\) Madan Gopal Kakkad v. Naval Dubey (1992) 3SCC 204: 1992 SCC (Cri.) 598 is one of the few cases wherein, the Apex Court tried to find out the consequences of the offence on the victim.

\(^{46}\) In T.K. Gopal v. State of Karnataka (2000) 6SCC 168: 2000 SCC (Cri.) 1037, notice was issued to the accused to show cause why sentence of 10 years rigorous imprisonment should not be enhanced to life imprisonment. However, having regard to the extenuating circumstances, specially the fact that the accused’s two daughters have come of age and are to be married, the Supreme Court held that enhancement of sentence is not called for.
undue leniency be shown to the rapists thereby reducing the confidence of the victims in the criminal justice administration.

Some have suggested death penalty for the rapist. However, capital punishment has not reduced the incidence of murder. The deterrent effect of death penalty on rapists is doubtful.

Experts feel that it is not the quantum of punishment that matters, but certainly quality of punishment. In their view, death penalty would further reduce the conviction rate and delay judgment. They feel that time frame should be worked out for rape cases.

A number of women activists believe that the existing laws should be implemented stringently without leaving room for loopholes. Sometimes, the rapist has cunningly offered to marry the victim. The proposal comes prior to the pronouncement of the court verdict. Such a marriage proposal cannot absolve the rapist of this crime.

(vi) Special Courts Headed by Women Judges

To deal with the huge backlog, the Central Government has evolved a scheme by establishing special courts in the name of fast track courts. The fast track Courts within four years have not only brought the backlog of 24000 Sessions cases to nil, but has also enhanced the speed of disposal of Sessions cases double to the rate of institutions. This has significantly brought down the crime rate in the State. The Fast track Courts have been established with the especially constituted team and special task which has created conducive atmosphere different from the routine functioning of the Courts.\(^{47}\)

Such courts must be brought in for the trial of rape cases. As far as possible, such courts should be manned by women judges as emphasized by the Supreme Court in several cases over the years. The presence of women judges would ensure the

\(^{47}\) As observed by \textit{N.M.Mathur, J} in \textit{Suo Motu v. State of Rajasthan} RLW (2005) 2 Raj LW 1385.
dignity and respectability of the victim in the court as well as a sympathetic and forbearing attitude towards them.48

(vii) Provisions under Procedural Law

Rules of evidence and procedural laws, regarding cases of child rape should not be the same as for other cases of rape. A summary trial for punishing the child rapist is must. There should be a provision to have the statement of the child victim recorded in familiar surroundings of her own dwelling, without the accused being present.

These should be a stipulation in the procedural laws making it obligatory for a competent magistrate to record the statement of a raped woman immediately and to get the medical examination done. The medical examination report should be taken as sufficient proof. It has been recommended that in rape cases the report under Section 177 of Criminal Procedure Code should include the medical examination report. The National Commission recommended the inclusion of a new section which will make it obligatory to get the victim examined by a female medical practitioner. It is suggested by the National Commission for Women and the Law Commission that the investigation including the collection of evidence and trial of these cases to be conducted by women police officers. If the victim happens to be a child less than 18 years, she should be questions only in the presence of her parents. All the investigation work such as preparation of statements of witnesses, medical examination of the victim etc. should be done by women officers.

The need for speedy trial in rape cases seems to have been properly appreciated by the Law Commission. It has thus proposed that trials of rape cases should be completed within a period of two months from the commencement of the examination of the witness.

48 Dipa Dube (2008), Rape Laws in India, p. 171.
4.3 Deceitful Marriages and the Law

Section 493 of IPC asserts that every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him or to have sexual intercourse with him shall be punished with imprisonment of either description for a term which may extend to ten years and fine.

A comparison of Section 375 *fourthly* and Section 493 bring out another discrepancy. Both sections punish the man who cohabits with a woman to whom he knows he is not married and that she has given the consent for cohabitation believing herself to be married to him. Section 493 applies when the man deceitfully created the belief of marriage but the woman was not mistaken about the identity of the man. But if she was under a misconception as to his identity, even though he did not create that misconception, the man is liable for rape.\(^49\) With the introduction of mandatory minimum punishment of seven years imprisonment for rape, the man convicted under Section 493 may receive very much less punishment even though the substantive nature of the activity under both sections remains the same. In fact, the man liable under Section 493 is more devious as he not only exploits the wrongful belief but also deceitfully creates that belief in the woman according to the requirement of the section. Further, it is provided that cognizance of this offence cannot be taken by any court unless the complaint is made by the aggrieved person\(^50\) i.e. the woman deceived while court’s jurisdiction can be invoked in rape cases by information of the offence by anyone.

4.4 Sexual Harassment at Workplaces

Women have been praised and honoured in the literature and religion of our society. They have been called *devi* and *shakti* yet their actual position is

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\(^49\) Section 375 *fourthly* of the IPC reads : With her consent, when the man knows that he is not her husband, that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

\(^50\) Section 198 of Cr.P.C.
made clear at the time they go out of the house alone. As more and more women are joining work force which is a positive indicator of development, it is essential that they be provided with a work environment that is free from discrimination, promotes gender equality, provides respect and dignity and gives full freedom to women to develop their fullest potential. But unfortunately, sexual harassment at workplace is one problem that is a most common yet pervasive experience of working women world over which takes a serious toll on women hampering their creativity, intellect and psycho social well being. Sexual harassment is defined as unwanted conduct of sexual nature or other behaviour based on sex that affects the dignity of men and women at work. This includes uninvited and unwelcome attitudes, jokes or the use of sexually explicit language, references to person’s private life, sexual orientation, comments on dress or figure, persistent leering at a person or at part of her body.

Sexual harassment can be classified in to two types. The **first** is ‘quid pro quo’ which means ‘something for something.’ This occurs when an employee’s submission to unwelcome sexual conduct becomes an explicit or implicit condition of employment, or when personnel actions such as promotion and transfers are determined on the basis of an employee’s response to such conduct. The **second** type of sexual harassment or sexual annoyance is known as the ‘hostile environment’, occurs when unwelcome sexual conduct interferes with an individual’s job performance or creates an intimidating, hostile or offensive work environment. It has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment. Sometimes, the employee is subjected to persistent requests for sexual favours and is persistently refused. In hostile environment the victim faces “cruel trilemma” i.e. she has three options: (1) to endure the harassment, (2) to attempt to oppose it and likely make the situation worse, or (3) to leave the place of employment.

Sexual harassment affects all women in some form or the other. Touching, wolf-whistles, looks are part of any woman’s life, so much so that it is dismissed as normal. Working women are no exception. Sexual harassment is an extension of violence in everyday life and is discriminatory, exploitative, thriving in
atmosphere of threat, terror and reprisal. It is all about expression of male power over women that sustain patriarchal relations. It is used to remind women of their vulnerability and subjugation.

4.4.1 Preventing and Punishing Sexual harassment in India

The basic problem in dealing with the sexual harassment is that Indian Penal Code has no specific provision covering the subject in its entirety. However, the related laws are framed as offences that either amount to obscenity in public or acts that are seen to violate the “modesty” of women. This should be noted that for the first time in 1994, Crimes in India Report categorized section 509 of the Indian Penal Code\(^{51}\), as sexual harassment. It is significant to note that this category was footnoted to explicitly say; “referred in the past as eve teasing.” Thus, the social contestations are read into the legal categories making eve teasing a matter of past. Sexual harassment at workplaces can also be incorporated in Sections 209\(^{52}\),294\(^{53}\) and 354\(^{54}\) of the IPC.

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51 Section 509, IPC deals with word, gesture or act intended to insult the modesty of woman and lays down that:
Whoever intending to insult the modesty of any woman utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such object or gesture shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or both (cognizable and bailable offence).

52 Section 209, IPC deals with obscene acts and songs and lays down:
Whoever, to the annoyance of others:
does any obscene act in any public place or
sings, recites or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment of either description for a term, which may extend to 3 months or with fine or both. (cognizable, bailable and triable offence).

53 Section 294, IPC deals with obscene acts and songs and lays down:
Whoever, to the annoyance of others:
does any obscene act in any public place or
sings, recites or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment of either description for a term, which may extend to 3 months or with fine or both. (cognizable, bailable and triable offence).

54 Section 354, IPC deals with assault or criminal force to a woman with the intent to outrage her modesty and lays down that:
Further, Rule 3C of the Civil Services (Conduct) Rules 1964 provides that, no Government Servant shall indulge in any act of sexual harassment of any woman at her workplace and they shall also take appropriate steps to prevent sexual harassment at workplace. Ironically, the violation of this rule comes under the heading of ‘misconduct’ only. Cases can also be filed under Rule 5, Schedule 5 of the Industrial Disputes Act, if an employee suffers unfair dismissal or denial of employment benefits as a consequence of her rejection of sexual harassment. A civil suit can also be filed for damages under tort laws. Moreover, the Indecent Representation of Women (Prohibition) Act, 1986 also has the potential to be used for such cases. The Act lays down that if an individual harasses another with books, photographs, paintings, films, packages, etc. containing “indecent representation of women”; he is liable for a minimum sentence of 2 years. Further, Section 7 (offences by companies) holds companies guilty where there has been “indecent representation of women” and the minimum punishment is sentence of 2 years.

But the real breakthrough came when the Supreme Court responded to the writ petition filed by social activists demanding the establishment of guidelines prohibiting sexual harassment at the workplace, alongside the criminal case in *Vishaka v. State of Rajasthan.* Vishaka became the very first case in India in which the Supreme Court declared sexual harassment in the workplace to be unconstitutional. It was first brought to the Supreme Court in the form of a writ petition filed by several social activists and NGOs spurred on by the brutal gang rape of a female social worker in a Rajasthan village. Chief Justice Verma delivered the court’s judgment. The specific complaint on the gang rape was turned over to a criminal court. However, his opinion did hold that sexual harassment in the workplace is a violation of the fundamental rights of “gender equality” and the “right to life and liberty.” It is a clear violation of the rights

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

under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under Article 19(1)(g), which protects the right to ‘practice any profession or to carry out any occupation, trade or business.’ Justice Verma observed that the fundamental right guaranteed in Article 19 depends on the assumption of a ‘safe’ working environment and went on to emphasised that the primary responsibility for ensuring such safety and dignity through suitable legislation and the creation of a mechanism for its enforcement, is of the legislature and the executive.

However, when cases of sexual harassment violate the fundamental rights of women workers under the Constitution, and are brought before the Apex Court for redress under Article 32, it is the duty of the Court to do what the legislature should have done in the first place- provide some guidelines for the protection of these rights. Justice Verma laid down guidelines with regard to the definition of ‘human rights’ as set out in the Protection of Human Rights Act of 1993. The notice was taken of the fact that India’s civil and penal laws ‘do not adequately provide’ any protection for women against sexual harassment at work. It was observed that it would take a good deal of time to put such legislation on the books, and that is precisely why the Supreme Court must set out useful guidelines so that employers and other responsible persons or institutions may begin to observe such rules to aid in the prevention of any future sexual harassment of women in the workplace. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.

Guidelines set out by the ruling actually require quite a bit from Indian employers. The first duty of employers is set to be the prevention or deterrence of acts of sexual harassment followed by the provision of procedures for the resolution, settlement or prosecution of such acts. Employers should notify, publish, and circulate in appropriate ways to their employees that sexual harassment is expressly prohibited. In addition, appropriate work conditions should be provided in respect of work, leisure, health and hygiene’ to further
ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4.4.2 Existing Loopholes in law and Suggestive Measures

The guidelines issued by the Supreme Court of India, impose an obligation on employers to set into motion the complaint’s mechanism. The procedure involves a Complaints’ Committee, which may either directly or indirectly take an investigation of the case.

Mandatory pre-requisites for setting up such a Committee are:
(a) It should be headed by a woman.
(b) It should have 50% women members.
(c) It should include a third-party representative from an NGO or any other agency conversant with the issue of sexual harassment.
(d) It should handle complaints in a confidential manner and within a time-bound framework.
(e) It should prepare an annual report on sexual harassment cases to be submitted to the appropriate government department (for example; the Ministry of Labour, Department of Women and Child Development, the Ministry of Social justice and Empowerment or the National Commission for Women) and should report on the action taken by the Committee.

While entertaining the petition titled as Medha Kotwal v. Union of India and others,\(^{56}\) it was found that despite the directions issued in Vishaka, Complaints Committees were either not constituted or not properly constituted. The Supreme Court decided to broaden the canvas of this case to look into whether, the Vishaka guidelines were being compiled with and assess whether they need to be strengthened. Accordingly, notices were issued to all the States and Union territories and also to professional bodies like Bar Council of India, Medical Council of India, and University Grants Commission etc. for them to appraise the court of the steps taken by them to implement Vishaka. The replies filed by States

\(^{56}\) Writ Petitions Nos. 173-177 of 1999.
revealed that many of them have not constituted the Complaints Committees and thus required them to form the Committee within two months.

In practice, where Complaints Committees have been formed, it is noticed that in many cases there is only one Committee for the entire State or Union territory. This is impracticable and amounts to only paper compliance with the guidelines. Therefore, it was sought that the Complaints Committees have to be set up at the level of the Institution/Establishment/College as far as is practicable so as to ensure that the victim is not put to a further disadvantage by having to travel long distances to have a grievance redressed and also to ensure that the Committees are not overloaded with a large number of complaints.

The Committee, as enunciated in Supreme Court’s guidelines may also consider the following suggested remedies in order to provide options for adequate redress to women who experience sexual harassment at workplace:

a) It could document the harassment in the harasser’s confidential report and issue a warning to him.

b) The harasser can be asked to give an apology either written or verbal, in public or private to the affected woman.

c) It could remove any detrimental comments in the files on the work performance of the complainant which have been recorded during the period of harassment.

d) It could downgrade the job status of a perpetrator.

e) It could observe the harasser more closely at work.

f) It could also transfer, suspend or dismiss the harasser.\(^57\)

Despite bold judgments by the Supreme Court, there is no sexual harassment complaints committee at workplaces. Not many institutions have set up mechanisms like complaint committees to tackle sexual harassment. Most women, therefore, continue to suffer in silence, either enduring the harassment, or quitting the jobs when the going gets too tough.

Because of the lack of awareness among women regarding their rights and what constitutes ‘harassment’, many women are still reluctant to come out in the open. In today’s corporate environment, filing a sexual harassment case becomes a self-destructive exercise that affects the future employability of the victim. She gets labeled as someone given to litigation leaving her virtually unemployable.

Surveys indicate that a large percentage of women feel that complaints in their organizations are ignored or that offenders receive only token reprimands, revealing a credibility gap in the organizational efforts to deal with sexual harassment. Ashish Bhagat, Senior Supreme Court lawyer explains that

a) The law requires too many questions to be answered. Ideally it should be a summary trial. The lengthy trial involving exerting cross-examination and character assassination adds to the frustration and trauma of the victim.

b) Further, there is no law that recognizes sexual harassment. So if a woman complains of a friendly pat it is booked as a case of sexual molestation, as in the *KPS Gill v. Rupen Deol Bajaj* case. But at the trial stage proving that a pat was actually sexual molestation becomes a daunting task. The existing penal code does not help.

Crucial amendments have been suggested by women groups in the Sexual Harassment at Workplace-2007 draft bill to give it more teeth. Some of the amendments proposed by Women Power Connect, a conglomerate of more than 400 women’s organizations, include the need to broad base the definition of ‘sexual harassment’ to include long-term impact of a single incident of humiliating sexual commentary. The amendments also seek expanding the applicability and scope of coverage from a few illustrations to a whole range of incidents of harassment, the need to make it clear whether an establishment which has violated a provision of this bill can be forced to pay monetary damages to the suing party, etc.

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58 *AIR 1996 SC 309.*

After going through the provisions of the Bill, one comes across the following loopholes:

1. One of the major drawbacks of the Bill is that the definition of workplace as given in 2(1)(P) includes public place ignoring the interest of self-employed unorganized sector women workers e.g. ladies selling different items whose workplace is the public place/space, when sexually harassed, whom should they approach?

2. The Bill provides that all instances of harassment from employee to employee, employer to employee and the third-party whether related to work or not, in the official premises or outside shall be covered under this act. It has confined the offence to the workplace but it may occur in non-working hours and spaces. It needs reconsideration.

3. The Bill is silent on the issue of third party harassment, extent of control of the employer on such harassment e.g. in case of educational institutions and universities, where there are different cadres of third-party members; the majority category is that of students, others like the visiting staff, external supervisors and examiners. This particular aspect has to be taken care of while enacting a law on sexual harassment.

4. NGO’s have been incorporated at every level of complaint redress mechanism but no criterion has been laid down for selecting the NGO.

5. The counselling part has been ignored in the Bill. In most of the cases; women will be satisfied at the counseling level if the act of the sexual harassment is not serious or grave. Many cases can be sorted out at the preliminary stage and there will be no need to have a full-fledged enquiry. Though the Bill provides for mediation but it does not provide for counseling services.

Law alone is not enough to root out this social evil. Society has to change its attitude so that women can come out and participate in public life without feeling threatened. What needs to be inculcated is a sense of mutual respect between men and women. Relationships built on an equitable balance of power and mutual respect between genders must be fostered. The role of employers, trade unions, State instrumentalities, non-governmental organizations and as well
as of media in creating a healthy environment for the dignity of workers is of vital
importance in preventing and combating sexual harassment at workplace. In this
regard the National Commission on Labour, 2002 observes, “Approximately half
the population of our country and, therefore, of the potential workforce is of the
female gender. Any social, economic or industrial system that ignores the
potentials, talents and special aptitudes of this half will be flawed on many counts.
It is, therefore, necessary to ensure equal opportunities and protection from
Indignities.”

4.5 Molestation and Indecent Assault

Molestation of a female particularly of tender age is a greater evil as her
body is immature, her sexual powers are still dormant and she has not developed a
sense of awareness about her sexuality. But nevertheless from her very birth she
possess the modesty which is so inherent in her being an individual of the fairer
sex which is violated by such acts and leaves deep scars on her memory. These
acts are committed by more mature male members or known elders on nubile
females who find it difficult to understand the motive behind such acts of violence
and are unable to communicate and express their anguish.

4.6 Eve teasing, Winking, Staring, Bottom Pinching, Improper Touching etc.

These sexual offences are becoming common amongst teenagers with
urbanization and are morally committed in crowded places like college campus,
public transport, fairs and fetes. These expressions are a result of sadistic
tendencies and sick mentality of those human beings who cannot control their
urges of indecent acts towards fellow female beings in society. The reaction of
female gives them the pleasure they had sought by violating the privacy of
another individual. The male feels elated about his superiority; he boasts about his
act amongst his peer group and thinks as if he has achieved something great and
unusual. Actions like these need immediate reaction from rational people. These
are to be nipped in bud. An act which is demonical can never be appreciated and

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needs emphatic resistance. These cases not get reported and therefore, it is for the public and citizens to be vigilant about them.

4.7 Prostitution and Trafficking

Trafficking is the worst form of exploitation of women and as an institution it speaks of man’s tolerance of this exploitation on an organized level in society. Social anthropologists are of the view that trafficking has always been present in the society in the one form or another. There is no doubt that trafficking is the worst form of exploitation. What is a cause of grave concern is the ever increasing commercialization of trafficking in the society and the various forms and facets it has acquired in the modern times.

Prostitution and immoral traffic in women and girls is a classic example of how time immemorial sexual gratification of men has seen the pushing of countless girls in an age of innocence to flesh trade. While strict rules of conduct are applied to women, men can maintain their sexual freedom and promiscuity, which is considered proof of their manhood. This results in the segregation of women into two groups pure and virtuous, and impure and vicious. The latter are expected to satisfy the uncontrollable vice of male sexuality.

From behavioral point of view, prostitution should be taken to include as the act or practice of a person, female or male, who for some kind of reward-monetary or otherwise, engages in sexual relations with a number of persons, who may be of the opposite or same sex. Unless otherwise stated, it shall be presumed that she provides sexual pleasure to men in exchange of cash or kind.

*Random House* Dictionary defines prostitution as:

“A person, usually a woman, who engages in sexual intercourse for money; whore; harlot. A person who willingly uses his talent or ability in a base and unworthy way, usually or money; to hire (oneself) out as a prostitute.”

According to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Immoral Trafficking is:

“The recruitment, transportation, transfer, harbouring or receipt of persons by means of threat, use of force or other forms of coercion,
abduction, of fraud, of deception, of the abuse of the power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of prostitution or other forms of sexual exploitation.”

Prostitution is an age-old institution in India. The well known socio-political treatise, Arthashastra, written by Kautilya sometime between 300 BC and 150 AD, states that providing sexual entertainment to the public using trained ‘ganikas’ (prostitutes) was an activity strictly controlled by the state and was also, for the most part, carried on by state-owned establishments. The ganikas had to pay taxes, usually one-sixth of their income. The chief controller of entertainment was responsible for maintaining accounts regarding State expenses for ganikas and payments made to them. Vatsayana’s KamaSutra compiled sometime between 100 and 400 AD refers to courtesans and eunuchs who depended on their livelihood on providing varieties of sexual entertainment to men. The long list of 64 qualities courtesans were expected to acquire, besides beauty and a pleasant disposition, indicates that the courtesans referred to in Kama Sutra catered only to high-class men.

Certain social customs in the past propelled many girls and women to this profession who were otherwise outside the hereditary and customary groups of sex workers. They were women dedicated to temples as devdasis. The devdasi system of dedicating young girls to temples was present in some parts of India as early as 300 AD and became an established institution in Hindu society by 700 AD. Devdasis were supposed to attend to the temple god, to dance and sing before him, and, like the servants of an earthly king, to provide sexual entertainment to temple priests and to others whom god favoured—in this case, male worshippers who paid generous donations to the temple. As time went on, lower class devdasis provided sexual favours to common visitors to the temple in exchange of money


or kind and subsequently became ordinary prostitutes. Daughters born to *devdasis* were usually reared in temple compound and initiated as *devdasis*.

The *devdasi* tradition, still prevalent in many parts of India, continues to legitimatize child prostitution. In the *Vijapur* district of *Karnataka*, girls are given to *Hanuman*, and known as *Basvi*. In Goa, a *devadasi* is called *Bhavin*. The *Banchara* and *Bedia* tribes of *Madhya Pradesh* also practice “traditional” prostitution. The *devdasi* system, the *Basvi* system, the *Jogin* system, prostitution amongst the tribals (*Bancharas*, *Rajnat*, *Domara* and *Bedias* tribes)—all these are traditional, ritualized and socially organized forms of the child prostitution. Districts bordering *Maharashtra* and *Karnataka*, known as the “*devdasi* belt” has trafficking structures operating at various levels. The women here are in sex trade either because their husbands deserted them, or they trafficked through coercion and deception, many are *devdasis* dedicated into prostitution for the goddess *Yellamma*. The State governments enacted legislations during the 1920s and 1930s prohibiting the dedication of young girls and *devdasis* but without almost any success. Shunned by the society, ostracized by their own religion and unable to get educated since their mothers cannot afford this’ luxury’, the unfortunate daughters of prostitutes have no other option than to tread the path followed by their mothers and grandmothers for centuries. Even the mothers pinch and save enough to give their daughters some kind of education. The society looks down upon such children. Unable to face the inferiority, the girls would rather go back to their mothers where they will have at least equal status amongst others. Recently, the trend is to send such unfortunate girls to Arab countries during the holy month of *Ramzan* to beg. Rich Arabs given with a open heart to these what they consider as


64 H.R.Trivedi-A survey on exploitation of Scheduled Castes women undertaken by the Harijan Sevak Sangh for the Committee. Quoted in Status of women in India report at 92.

unfortunate sinners, may be toward off some of their own sins. It is reported that begging is not the only business for which pre-pubescent girls are taken to gulf. There has been a remarkable increase in child prostitution. Officials tend to explain this increase by blaming the Arabs. Stark poverty facing them and their families in their land of birth makes many of these girls immune to the suffering of sexual abuse.  

4.7.1 Legal Provisions under Indian Penal Code and other laws

The Indian Penal Code lends a helping hand to the special laws enacted to curb prostitution by attacking the source of this evil. Sections 366-A and 366-B were introduced to punish the export and import of girls for prostitution. Section 366-A particularly deals with the procurement of minor girls for immoral purposes from one part of India to another. Section 366-B punishes the importation of minor girls for immoral purposes from foreign country. In addition to the above provisions, there are certain other provisions in the Indian Penal Code such as Section 372 (dealing with selling of minor for purposes of prostitution etc.) and Section 373 (dealing with the offence of buying minor for purposes of prostitution etc.). Both these sections relate to the same subject-matter, as they are correlative of each other, being aimed against what may be broadly described as trafficking in girls under the age of 18. The Juvenile Justice Act, 1986 also provides a solution to the problem of child prostitution. The Act provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles. The Act contains a specific provision namely Section 13 which empowers a police officer or any other person or organization authorized by the State government in this behalf to take charge of any neglected juveniles and bring them before the Board constituted under this Act. The Board under Section 15 has to hold an inquiry and make such orders in relation to the neglected juveniles as it may deem fit. Several types of protective homes are also established to take care of neglected child under the doctrine of parents patriae.

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Under this doctrine, much weight is given to physical, mental and social shortcomings of the neglected juveniles who have taken shelter in the world of prostitution.\textsuperscript{67}

The Constitutional mandate under Article 23 aims prohibition of trafficking and all forms of exploitation. This was aimed at putting an end to all forms of trafficking in human beings including prostitution and beggary. India being a signatory to the International Convention for the Suppression of Traffic in Persons and Exploitation, 1950 passed a Central law to implement the provisions of the convention.

The 64\textsuperscript{th} Law Commission Report stated that prostitution could not be banned totally. Law in every country has tried to regulate it so that it may be kept within its legitimate bounds without unduly encroaching upon the institution of marriage and family.

\textbf{4.7.2 Overview of the Immoral Traffic (Prevention) Act, 1956}

Suppression of Immoral Traffic in Women and Girls Act, 1956 was the first sustained legal effort to curb this social evil. There were provisions in the Act to penalize soliciting for clients and loitering by prostitutes, but the clients were not penalized. The practice of prostitution individually, independently and voluntarily does not constitute the offence. This means that prostitution behind the closed doors is ignored as a hypocritical veneer of morality and public decency is maintained.

In 1986 SITA was amended to do away with the loopholes that prevented it from being effective. This Act was renamed Immoral Traffic (Prevention) Act. It is applicable to both men and women. The object of the enactment was to inhibit or abolish the commercial vice of traffic in women, men and children for the purpose of prostitution as an organized means of living. It was observed that:

“It is no doubt true that what is aimed at under the Act is not abolition of prostitutes and prostitution as such and make it per se a

criminal offence or punish a woman because she prostitutes herself, the purport of the enactment was to inhibit or abolish commercialized vice, namely, traffic in women and girls for the purpose of prostitution as an organized means of living.\(^{68}\)

Section 2 of this Act makes the definition of ‘brothel’ wider to include any place used for the purpose of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. It is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single stance coupled with surrounding circumstances is sufficient to establish both that the place was being used as brothel and that person alleged was so keeping it.\(^{69}\) This broader definition of brothel will make it easier to prosecute the brothel-keepers under Section 3 of the Act. Now landlords, tenants and other occupants of the premises may not escape punishment for brothel-keeping under the defence of ignorance. The punishment for living on the earnings of child prostitute has been increased. There is an increase in the prison term for offenders convicted of procuring minors. Life imprisonment is the maximum punishment ordained when it is committed against minors and children.

Section 9 of this Act provides greater punishment to persons who cause, aid or abet the seduction of women or girls, over whom they have authority or who are in their care and custody, for prostitution. This Act empowers the Central Government to appoint trafficking officers. These special officers can search without warrant any premises where this offence is suspected of being committed, and they can rescue any person who is being forced into prostitution, or is carrying on or is being made to carry on prostitution. Discretionary powers have been given to the magistrates for interim placement of children and minors who are rescued, in an institution recognized under the Children’s Act. Provisions for protective and corrective homes for the safe custody of children and special courts for their speedy trial are some of the encouraging changes that are sought to be achieved by the new Act.

\(^{68}\) AIR 1962 Mad.31.

\(^{69}\) Krishnamurthy v. Public Prosecutor, Madras AIR 1967 SC 567.
Sociologists, social thinkers, social activists, voluntary women organizations and statutory women organization like National Commission for Women, among others, are engaged these days in empirical studies and applying their mental faculties to the question whether prostitution be legalized. Protagonists for legalization are trying to justify their view-point, *inter-alia*, on the ground that it would help socio-legal treatment of rehabilitation, sanitation, security etc. of those engaged in this profession. Legalization prostitution would prevent underground prostitution that occurs today. Underage prostitution would be curtailed. However, certain arguments are put forth against legalization. Ordinarily people believe that, in calling for legalization or decriminalization of prostitution, they are dignifying and professionalizing the women in prostitution. But dignifying prostitution as a work doesn’t dignify the woman; it simply dignifies the sex industry.

### 4.7.3 Efficacy of the Law and Suggestive Measures

Before the amendment of the Immoral Traffic Act (hereinafter cited as ITPA) there was no specific provision of law for policing and punishing of criminals who had set up inter-State network to procure children and minors for immoral purposes. The police and magistrates were powerless to deal with such inter-State offences. Now, Section 5 of this new Act of 1986 vests them with vast powers. It treats this activity as an aggravated form of crime providing for a minimum of seven years imprisonment and a maximum of life sentence, yet border trafficking goes unabated.

Payoffs to the police by the brothel-keepers are high. They charge them in the name of protection, otherwise their act is illegal. Even if honest officials go to raid the brothels, usually the madams and the pimps are tipped off by the other policemen well in advance. Children in brothels are masqueraded as relatives of the prostitutes and due to lack of evidence the police fail to pursue the case. The minors are rescued. Brothel keepers produce fake affidavits or certificates claiming to be the parents. The juvenile court releases the minors and they go back to the brothels.
Despite stringent laws and constitutional provisions against kidnapping, abduction and prostitution, more and more innocent girls and children are being forced into flesh trade. Escape from depth of this depravity remains a remote possibility. The loopholes of the Act are used by the pimps, brothel-owners and the madams to adeptly bypass the law and makes the lives of numerous girls a living hell.

The most unfortunate part of this evil is that quite often children are lured by their own relatives, near and dear ones and at times by their own parents and sold to brothels to enjoy the ill-earned money. As a result when many of them are rescued, they refuse to go back to their homes as the situation there is often worse. They come from broken homes and are victims of incest and neglect. All such incidents make a mockery of Section 9 of the Act which claims to punish any person, who has authority, custody or charge over any person, and who abets aids or causes her seduction for prostitution. Children of prostitutes usually follow their mother’s footsteps. The girls become whores and boys pimps. The law and the enforcement agencies have no cue to arrest such incidents.

The ITPA speaks of Rescue homes for those girls who are saved from the brothels or network of pimps. The intention is lofty to protect and gradually reform women ostracized from society and denied participation in the acts of daily life. But most of the rescue homes are dens of darkness in which women ostensibly rescued from misery only sink deeper into the morass.

In spite of extensive amendments for improving the working of the Act, there are number of provisions which are criticized as these provisions can be easily misused by the law enforcement personnel and some of the provisions of the Act are simply not able to achieve the purpose for which these were enacted, such as:
1. The Statute punishes any person who keeps or manages or assists in the keeping or management of a brothel.\(^70\) This provision has hampered the intervention efforts of NGOs and other organizations advocating the need to adopt safe sex practices

\(^70\) Section 3 of ITPA, 1956.
for the prevention of transmission of HIV/AIDS and other sexually transmitted diseases (STDs). The National AIDS Control Organization (NACO), a government organization under the Ministry of Health, also has initiated intervention programmes with brothel based sex workers for the prevention of the spread of HIV/AIDS. The Costing Guidelines for Targeted Interventions issued by NACO in the year 2004 specifically mandates to expand the projects to sex workers and to cover brothels.\footnote{Available at http: // www. nacoonline.org/pro guidelines.htm visited on 23 June 2008 at 14:00 hours.} The government policy itself is hampered by this particular provision because brothels have two advantages, for being settings for organized sex work; \textit{firstly}, brothels facilitate the implementation of intervention programmes by helping in identifying the target group; and \textit{secondly}, such settings promote safe sex practices that would otherwise be difficult in open spaces.\footnote{Asha Mohan, Antecedents and Consequences of the Immoral Traffic Prevention (Amendment) Bill, 2005, available at http: //crc.sagepub.com/cgi/reprint/1/2/183.pdf visited on 23 June 2008 at 14:00 hours.} The \textit{Thailand} experience shows that the HIV prevalence rate declined considerably because the State had carried out a condom use programme in 1991 in sex work settings.\footnote{Ibid.}

2. The Statute provides for punishment for any person above the age of 18 years who is found to be living on the earnings of prostitutes.\footnote{Section 4 of ITPA, 1956.} This provision is often used by police officials to harass sex workers and their children. Sex workers have been expressing their concern over this provision as they feel that it prevents them from providing care and support to their children, especially girls, once they become majors and their aged parents who are unable to look after themselves.

3. The Statute makes seducing and soliciting, in any public place, for the purpose of prostitution, an offence\footnote{Ibid., Section 8.}, where as prostitution as such is not punishable under

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\textit{Available at http: // www. nacoonline.org/pro guidelines.htm visited on 23 June 2008 at 14:00 hours.}

\textit{Asha Mohan, Antecedents and Consequences of the Immoral Traffic Prevention (Amendment) Bill, 2005, available at http: //crc.sagepub.com/cgi/reprint/1/2/183.pdf visited on 23 June 2008 at 14:00 hours.}

\textit{Ibid.}

\textit{Section 4 of ITPA, 1956.}

\textit{Ibid., Section 8.}
the Act. This provision is, as reported by sex workers, most often used by the police to harass them and extract money and sexual favours.\textsuperscript{76}

4. The Statute provides that the magistrate on receipt of information that a prostitute is residing or frequenting any place within the local limits of his jurisdiction may issue a show cause notice for her removal from such a place and prohibits his/her re-entry.\textsuperscript{77} Failure to comply with the orders of the magistrate would be construed as an offence. Sex workers are put in jeopardy due to discriminatory provisions like this whereby they are secluded from the mainstream of the society.

5. The laws on prostitution are neither formulated to give justice to practitioners nor do they attempt to eradicate or prevent prostitution. They are penalizing and controlling it. The act of prostitution is not criminal offence, yet it is not sanctioned by law. This casts vagueness and ambiguity. Hence, the law should either legalize or criminalize it in totality.

6. Prostitutes should be made aware about their legitimate rights through literacy programmes.

7. Women and girls found in the flesh trade are usually sent to protective homes, where in addition to informal education, they receive some form of vocational training. Many social activists have attempted to describe the right policy and approach for dealing with the problem. It is believe that there is not perfect policy in our country to safeguard the interests of girl child. This is true for different reasons. \textit{First}, it is nearly impossible to design a comprehensive welfare programme that many of us will think is satisfactory. Every girl child who is found in the brothel is brought within the protective umbrella of the protective home. Institutionalization causes many other problems including further degradation and sexual exploitation by the staff members and outsiders. Any step taken after the girl is rescued from the brothel may lead to the feelings of more insecurity. A number of studies have shown how far relationship to the general

\textsuperscript{76} Supra note 72.

\textsuperscript{77} Section 20 of ITPA, 1956.
public, and many more have been diagnosed as neurotic and with serious mental disorders at the time of discharge from the corrective homes. Often, the best that society can do for the victims of flesh trade is to provide them with good education and vocational training so as to make them competent to participate themselves into respectable and meaningful avocation and self-employment schemes. Second, various protective homes which have been established in different States have different missions. Most of these institutions work as custodial centres only having no reference to the protection, care, treatment and rehabilitation of the victims. The idea of such institutionalization is to provide only informal education and training in the production of soap, chalk, making khadi and weaving activities which have nothing to do with the rehabilitation of the victims. The idea of our welfare programme should be that the foul practice is totally eradicated and the victims are redeemed from the plight and are not again trapped into the prostitution.78

8. Victim of this vice requires social and emotional rehabilitation along with job security. In order to make a drive against prostitution a success law teacher, lawyers, and social workers should organize themselves and form committees. These committees should identify the areas of the operation of this class of sexual exploitation of women then a complete surveillance of that area should be done with the co-operation of the police so that effective action can be taken as and when the situation demands. These committees should also be empowered to detect and report incidents of prostitution and help in the arrest and follow up proceedings in the courts. Besides these, long-term remedial measures must be evolved to eliminate the discrepancies between the law and its enforcement and alternative jobs should be provided to women to give them economic security. Unless we are sincere in our efforts the results are bound to be dismal.

9. Concerned over the flourishing human trafficking in the country, Dr. Justice A.S. Anand, has advocated development of a national action plan to weed out the “obscene threat to human dignity”. It no longer remains a racket but has taken the shape of organized crime worth $8 million, he said. While addressing a seminar

78 Subhash Chandra Singh,’ Child Prostitution: Some Legal Aspect’, 1999 Cri.L.J.
on ‘Trafficking in Women and Children’, held at the Institute of Social Sciences in New Delhi on 3 December 2004, Justice Anand also suggested that every police station should have a unit specialized to tackle this crime. Justice Anand also observed that sensitization of judicial officers, police officers and other stakeholders is important as no amount of legislation or stringent penal provisions can be a substitute for a sensitized official. There is a need for coordination and collaborations between all government departments, States, between governmental organizations and non-governmental organizations and between neighbouring countries. The anti-trafficking programme needs integration into policies, programmes and projects of all ministries and departments such as education, health, tourism, home and women and child development.

10. The HIV epidemic is a newly emerging phenomenon which requires immediate and effective control. AIDS pandemic is not only a threat to the socio-economic development and public health but also a challenge to the women’s right, status and dignity. Discriminatory treatment exists in the area of prostitution. Only women are forced to undergo HIV test. There are proposals that men also should be compelled to undergo test. The National Commission for Women should take utmost care in plucking all discriminatory aspect while making any legislation for women. This can be achieved only when all kinds of unequal and discriminatory treatments are rooted out from the society socially, economically, psychologically, medically, legally and attitudinally. The recently evolved scheme of distributing identity cards to the prostitutes is a good work towards better health and hygiene. The Identity Cards will enable them to get free medical aid on a priority basis and provide an opportunity to get them tested for AIDS. The health records will be maintained by the centre issuing the cards.


11. Measures should be taken for the proper implementation of directives given by the Apex Court in *Gaurav Jain*\(^\text{81}\) and *Dr. Upendra Baxi*\(^\text{82}\) case.

12. Strict measures and special force should be created to monitor prostitution laws, their implementation to prevent child prostitution.

13. There should be a provision in the Act to distinguish the girls who are thrown forcibly into the prostitution through an act of rape and intimidation and in such cases the punishment should be more stringent for the person responsible. Very often such girls are rescued only after their prolonged stay in the brothels and it is not possible to point out who was the first client although the first client is invariably committing rape on her. In case of such girls, the brothel owner, pimps and touts should be charged as abettors and onus of the proof should be on them that they have not abetted/forced the girl/woman to enter into prostitution through the act of rape. The law enforcement machinery should also be made more effective to save those girls in time who are likely to be forced into prostitution.\(^\text{83}\)

Prostitution and trafficking in women and children has been unanimously decried as a gross violence on the most vulnerable sections of our society. It violates all known canons of human rights and dignity. Prostitution is for livelihood or for commercial purpose, it is a matter of legal interpretation, and it takes lot of time and gives lot of scope to grow this profession. At present this profession has gained momentum with the inflow of girls from *Nepal* and *Bangladesh*, influence of the cyber system, beauty parlours etc. The HIV menace is another problem which has its genesis in this profession. Presently, the law takes care of these women who are compelled to adopt the prostitution but law does not take care of those who join this profession voluntarily.

Prostitution is being regulated by law, but there are still some grey areas which need correction. The children of prostitutes are the most stigmatized and

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\(^{81}\) (1997) 8 SCC 114.

\(^{82}\) (1983) 2 SCC 308.

helpless group. The surrounding environment in the brothel gives a wrong direction to the children of the prostitutes. There should be a law to save the human rights of voluntary prostitutes and strict implementation of law to rehabilitate the prostitutes and their children.

The attempts made by the legislators and law enforcing agencies have not succeeded so far because the problem of prostitution is not only legal one but it has social dimensions too. Law has its own limitations and it cannot eradicate the social problems immediately. A change of social behaviour is required. It needs social revolution through education and economic empowerment of women. The existing provisions of the Immoral Traffic (Prevention) Act, 1956 and provisions of I.P.C. should be strictly implemented. The pace set up by the Supreme Court in Upendra Baxi v. State\textsuperscript{84}, and Gaurav Jain v. Union of India\textsuperscript{85}, for the rehabilitation of prostitutes and their children should be further strengthened by the Government by enforcing the guidelines strictly.

4.8 Law Relating to Obscenity and Indecent Representation of Woman

The concept of obscenity has always been directly linked with the concept of morality in the society. Law and morality are almost similar but not identical concepts. Where morality prescribes the standard code of conduct, law prescribes punishment for its violation. Thus, law and morality are concepts; complementary to each other. They strengthen and reinforce each other. In fact morality is the blood, which runs through the portals of law. The concept of obscenity or indecency is also a part of the larger body of our system of social morality. Social morality is something, which has the vocal and tacit approval of the society. What is beyond the accepted and established norms of society becomes immoral. Law comes into play, only to curtail and eradicate this growth of indecency and obscenity in the society.\textsuperscript{86}

\textsuperscript{84} AIR 1987 SC 191.

\textsuperscript{85} AIR 1998 SC 2848.
Women have been depicted in the most respectable and aesthetic manner on the one hand and, on the other, they have also been victims of indecent, vulgar and obscene depictions. This contrast is difficult to balance especially where women are treated as “goods” to promote sales. The use of women as ‘bait’ in the sale of products ranging from cosmetics to liquor or motor cars is noted in countries as diverse as China, Norway, the United States, Yugoslavia, Philippines, India and others. In going through all advertisements, it has been found that the function of almost all campaigns in any country is to use woman’s body or part of the body in an erotic attraction appealing to male viewers. And it does not really matter what you are advertising- soft drinks, motor cars, shaving creams or sleeping pills, the additional female nudity is a must to attract. Most degrading and objectionable use of women is observed in pornographic literatures or films which are sold in huge number in the world market. The literatures or films have projected women as mere sex object. In India, it was felt necessary to have a separate legislation to effectively prohibit the indecent representation of women through books, advertisements, pamphlets etc., and thus came “The Indecent Representation of Women” (Prohibition) Act, 1986 into existence.

(i) Definition and Meaning of obscenity

According to Collins Cobuild English Language Dictionary, obscenity is behaviour that shocks and offends people because it involves nudity, sex, violence, bodily functions, etc. in an unpleasant or indecent way. The definition of obscenity both in language and law is vague. Neither Sections 292 to 294 of Indian Penal Code1860 nor Section 2 of the Indecent Representation of Women (Prohibition) Act, 1986 make even feeble attempt to define ‘obscenity’ and the courts, all over the globe, in general and in India in particular, resort to the test, laid down by the Hon’ble Chief Justice Cockburn, in famous Hicklin’s case87.


87 (1868) LR3 QB 360.
which is whether the tendency of the matter, charged as obscene, is to corrupt those whose minds are open to such immoral influences.  

(ii) Definition and Meaning of Indecency

According to Collins Cobuild English Language Dictionary, indecent means that if you describe words, pictures, films, etc. as indecent, you mean that they are shocking and offend you because they refer to show, or suggest naked people or sexual acts.

The words ‘indecent’ and ‘obscene’ are not synonymous. The one may shade into the other, but there is a difference of meaning. The words ‘indecent’ or ‘obscene’ convey idea, namely offending against the recognized standards of society, indecent being at the lower end of the scale and obscene at the upper end of the scale. These however are not rigid categories. Whatever leads to unhealthy sexual excitement and corruption of mind should be treated as obscene and indecent.

(iii) Definition and Meaning of Vulgarity

Vulgarity arouses a feeling of disgust and revulsion and boredom but does not have the effect of depraving and corrupting the morals of any reader of the novel or viewer of a film whose minds are open to such immoral influence. A vulgar writing is not necessarily obscene.

4.8.2 Conceptual Analysis of Obscenity under Indian Penal Code and other Laws

Sections 292-294 of Indian Penal Code, 1860, deal with the obscenity. Section 292 makes distribution, exhibition, hire, import, export, advertisement


89 Dr.Hari Singh Gour (2000), Penal Laws of India, p. 2282.

etc. of obscene books, pamphlet, paper, writing, drawing, painting, figure etc. punishable. Such act shall be punished on first conviction with imprisonment which may extend to two years and fine up to two thousand and on subsequent conviction with imprisonment up to five years and fine up to five thousand. But the section shall not be applicable in the following cases-

1. Any publication in the interest of science, literature, art or learning etc. for public good;
2. Any publication is used bona fide for religious purposes;
3. Anything protected by the Ancient Monuments and Archaeological Sites and Remains Act, 1958;
4. Any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Section 293 prohibits the sale, hire, distribution, exhibition, and circulation etc. of obscene objects to the person under the age of twenty years. It provides imprisonment for three years and fine up to two thousand rupees on first conviction, and it shall enhanced to imprisonment up to seven years and fine up to five thousand rupees on subsequent conviction. Section 294 provides that if any person does any obscene act etc. in or near the public place, shall be punished with imprisonment up to three months, or with fine, or both.

The Supreme Court in *Ranjit D. Udeshi v. State of Maharashtra*\(^92\) observed that the test of obscenity laid down by *Cockburn C.J.*\(^93\) should not be discarded. It held that the test of obscenity to adopt in India is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and it is obscenity in treating sex in a manner appealing to the carnal desire of human nature or having that tendency. It was further observed in this case that merely treating with sex and nudity in art and literature cannot be regarded as evidence of nudity or obscenity without

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\(^92\) AIR 1965 SC 881: (1965) 1 SCR 65.

\(^93\) In *Hicklin Case*, (1868) LR 3 QB 360.
something more. It was held that where obscenity and art are mixed, art must be so preponderating as to push the obscenity into the shadows or the obscenity is so trivial and insignificant that it can have no effect and may be overlooked. When treatment of sex becomes offensive to public decency and morality is judged by the prevailing standards of morality in that society, then only the work may be regarded as obscene production.

4.8.3 Indecent Representation of Women (Prohibition) Act, 1986

Sections 292, 293 and 294 of the Indian Penal Code, 1860 deal with the law relating to obscenity. None of the provisions of the Indian Penal Code have any special reference to the indecent representation of women and perhaps due to this lacuna a tendency has started to represent women in a very indecent manner. To deal with such a situation the Indecent Representation of Women Bill, 1986 was introduced in the Rajya Sabha on 20th August 1986 to prohibit indecent representation of women through advertisement or in publications, writings, paintings, figures or in any other manner. The Bill was passed by both the Houses of Parliament and was assented by the President on 23rd December, 1986.94

Section 4 of the Act95 prohibits publication, selling, hire, distribution, production, circulation etc. of books, pamphlet, paper, slide film, writing, drawing etc., containing indecent representation of women. It makes an exception in the following cases:

(a) Publication for the public good in the interest of art, science, literature etc.
(b) Anything protected by the Monument and Archaeological Sites and Remains Act, 1958.
(c) Any film to which Cinematograph Act, 1952 is applicable. In Section 5 the power to enter and search is provided. Section 6 provides penalty for imprisonment up to


95 Act 60 of 1986.
two years and fine up to rupees two thousand, on first conviction. On subsequent conviction, minimum imprisonment for six months and maximum five years and fine up to one lakh but not less than ten thousand has been provided. Section 3 provides for the advertisements containing indecent representation of women. Section 7 defines the offences under this Act by the companies and liability thereof. Under Section 8 it is provided that the offences are to be cognizable and bailable. Section 9 protects the action taken by any officer of Central and State Government in good faith, for the purpose of this Act. Section 10 gives the rule-making power to the Central Government.

4.8.4 The Information Technology Act, 2000

With the advent of revolution in the information technology, there arose a tremendous possibility of transboundary free flow of obscene and pornographic material. The Information Technology Act of 2000 was enacted by the Parliament in an attempt to regulate and facilitate the cyber space. On publication of obscene information in electronic form, the IT Act provides:

Whoever, publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakhs rupees.

4.8.5 Young Persons (Harmful Publications) Act, 1956

In Young Persons (Harmful Publications) Act, 1956, harmful publications means any book, magazine, pamphlet, leaflet, newspaper or other like publication

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96 The Information Technology Act, 2000 (No.21 of 2000).

97 Ibid., Section 67.
which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures, being stories portraying wholly or mainly:

1) the commission of offences; or
2) acts of violence or cruelty; or
3) incidents of a repulsive or horrible in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner whatsoever. Liability is on all who sells, lets to hire, distributes, publicly exhibit or in any manner puts into circulation, any harmful publication, or for purposes of sale, hire, distribution, public exhibition or circulation, prints, makes or produces or has in his possession any harmful publication, or advertises or makes known by any means whatsoever that any harmful publication can be procured from or through any person. He shall be punished with imprisonment which may extend to six months or with fine or both.

In *Kamasutra* advertisement, *Milind Soman* and *Madhu Sapre* had faced charges on ground of obscenity and pornography. Similar charges were raised against the Editor of *Anandbazar Patrika*, *Aveek Sarkar* and the Publisher in a trial court in *Kolkata* relating to the reproduction of a nude photograph of former tennis player *Boris Becker* and his fiancée in *Sports World* magazine, published by the group in May 1993. A *Madurai* Court issued non-bailable warrants against *Sen* and *Shilpa Shetty* for “posing in an obscene manner” in photographs published by a Tamil newspaper. The report stated that the two actresses had failed to comply with earlier summons for the same reason, hence warrants were issued. The petitioner submitted that the paper had published “very sexy blow-ups and medium blow-ups” in its issues December 2005 and January 2006 and which allegedly violated the Indecent Representation of Women (Prohibition) Act, 1986, Young Persons (Harmful Publications) Act, 1956 and the Indian Penal Code Section 292.
4.8.6 Effectual Analysis of the Law and Suggestive Measures

The law relating to obscenity codified in Indian Penal Code and Indecent Representation of Women (Prohibition) Act, 1986 has not succeeded in curbing this evil.

The latest trend in the indecent representation of women has appeared through the voluptuous display of women in the advertisements. These advertisements influence the minds of young generation. One does not need to be inordinately perceptive in dissecting the text of women’s representation in popular Television advertisements. The sexism inherent to the media language, manifesting itself in countless instances of women’s com modification, is steeped in the area of a reductonist aesthetic. We need to define our responses to the most potent and wide-reaching impact of the media generated that has increasingly become an apparatus for hegemonic intervention in the nature of identity and agency. For women to register a meaningful presence in the cross-current of our public and private life, popular media has to work towards a transformative vision. The immensely effective means of advertising can be used for positive social change leading to the expansion of human interest at large.98

The NRI film scheme of the Government which was actually conceived as a scheme to bring valuable foreign exchange in the country has been bombing viewers with sex. Under the scheme, a NRI could import a foreign feature film into India by paying to the Government owned National Film Development Corporation (NFDC). The scheme took off like a wild fire bringing glut of sex and violence despite censorship checks. It soon became an organized racket as only sleazy and sensational films have a market.

Pornographic magazines have become a big business. Their popularity has increased with the parallel increase in the range and boldness of the subjects covered. Bookstalls are covered with periodicals and novels offering an unchanging sex-crime recipe in the best tradition of the worst pulp, but it has become so common that people take it as natural.

The Press Council of India established under the Press Council Act, 1978 adopted certain norms of journalistic conduct, including guidelines on eschewing obscenity. The Council has the following guidelines:

1. Newspapers/journalists shall not publish anything which is obscene, vulgar or offensive to public good or taste.
2. Newspapers shall not display advertisements which are vulgar or which, through depiction of a woman in nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale.
3. Whether a picture is obscene or not, is to be judged in relation to three tests; namely
   i) Is it vulgar and indecent?
   ii) Is it a piece of mere pornography?
   iii) Is its publication meant merely to make money by titillating the sex feelings of adolescents and among whom it is intended to circulate? In other words, does it constitute an unwholesome exploitation for commercial gain?

The sexist representation of women in cross-culture is an issue of grave concern. Obscenity is a threat to the purity of women’s sexuality and her modesty. It tends to deflect an active involvement and participation so that men cannot be held to be at fault. Blame, however, lies with those who produce these obscene representations including the women who appear in it. An intelligent, well-built and groomed, half-clad woman on the cover page of ‘Cosmopolitan’ all over the world provokes more sexuality than bare adivasi rustic females.

Mere existence of these legal provisions can do but nothing when they are not adequately invoked and implemented. In order to regulate market and ensuring public good, these provisions need to be effectively adhered to.

From the above discussion we can conclude that fair-sex is a thing of physical beauty. To glamorize anything, women are presented as a beautiful commodity. Surprisingly, women have no objection to it. They know that they are used for entertainment and recreation, but they defend it in the name of freedom and their struggle to achieve liberty. In Indian culture women are treated as symbol of respect. Now the question is how the symbol of respect has been
transformed into a saleable commodity, despite there being various enactments. The answer is that societal attitude is changing fast towards westernization by ignoring our rich cultural heritage. The law guarantees freedom to women but that should not be misused for commercial purpose. There is enough protection of law against vulgarity, obscenity and indecency. But in a situation, where women are ready to expose themselves, law cannot help. The present legal framework has drawn the limit of woman representation in public life. Anything beyond the limit is illegal and is punished by law. The exposure of women in the media has direct relation with the morality of the society. The conception of morality changes with the time and place. There should be a balance between exposure of the women in public and morality of the society. The enacted laws should be interpreted in a way so as to make a balance between the liberty of women and decency in public life.

4.9 Overview

Violence against women is a matter of grave concern. Rape, particularly is one of the most brutal forms of aggression against women which shatters the life of the victim. In addition to the trauma of rape itself, the victims have to suffer further agony during the legal proceedings. Most of the victims develop post-traumatic stress disorders.

Rape is a crime in which the accused is innocent till proven guilty, but the victim is guilty from the moment it is reported. CPM politburo member Brinda Karat points out that accusations about “dressing provocatively” are not the only ones rape victims have to face. Innuendo about the victim having had clandestine relations with the accused is common too. In general, the notion that the victims have somehow invited rape is “depressingly” widespread. The problem lies not with the victim but it emanates from the deep-rooted “Gender Ideology.” All over the world, in all life situations women are more vulnerable than man in public and private life. Violence subjects women not only to servitude and subordination but also keeps them in a state of despair and dehumanization, indignity and humiliation.
Violence against women takes many forms—physical, sexual, psychological and economic. They are interrelated and affect women from birth to old age. As societies change, patterns of violence alter and new forms emerge. Some forms of violence such as trafficking has crossed national boundaries. Even periods of transformation have never been comfortable for them. Types and trends of crimes, however, kept changing with change in mindset and technique. Unfortunately, women were not only accorded a lower status in the society but they also came to be used as objects of enjoyment and pleasure. Its culmination has been their regular exploitation and victimization. On the continuance of this practice, exploiters became culturally violent, having opted violence as a way of life. Besides, there also developed situational and institutional violence against women along with the new demands of the time where they have to step out of the confines of their homes to earn a living. Thus, crime against women is an outcome of their long history of deprivation of socio-economic rights.

All too often, universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. We must realize that civil, political, economic and social rights are integral and complementary parts of coherent system of global human rights. The international efforts to yoke the malady of the gender violence culminated in the Declaration on the Elimination of violence against Women (DEDAW), 1993. It defines gender violence as:

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

Similarly, the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 declared with Conviction:

“The human rights of the women and of the girl child are an inalienable, integral and indivisible part of universal human rights. Gender-based violence and all forms of sexual harassment and exploitation are incompatible with the dignity and worth of human

99 Article 1.
person, and must be eliminated. This could be achieved by legal measures and through national action and international cooperation.”

Considerable progress would be realized if governments comply with human rights treaties and international agreements that they have already ratified, such as the Convention on the Elimination of all Forms of Discrimination Against Women (1979), in which the United Nations Declaration states:

“Enact and enforce legislation against the perpetrators of practices and acts of violence against women and give vigorous support to the efforts of non-governmental and community organizations to eliminate such practices.”

Governments should strive to harmonize their legislations with these commitments and bring about the necessary changes in national laws, policies and programming for advocacy of gender equality and human rights. Monitoring of national progress towards international commitments needs to be strengthened.

It is submitted that criminal law provisions needs to be gender sensitive. In the process of its sensitization, the law makers and administrators must be sensitive to the prevailing social and cultural contexts in which they are applying criminal law. The criminal law with regard to rape, marital rape, dowry etc. has changed in response to the demands by the women’s movement but it still incorporates patriarchal values.

The penal provisions apply equally to all persons irrespective of them being men or women. Apparently, the Indian Penal Code seems essentially and inherently gender neutral. This approach, however, does not take into account the differential impact of the scheme of provisions on men and women due to the differential status, socialization, role expectations and resources available to men and women in reality.


101 Ibid., p. 678.
In the ultimate analysis there can be no two opinions about the need for stringent laws, sensitive judiciary, effective law enforcement machinery and women groups to deal with such atrocious crime. But what is needed more than anything else is a total revolution in the thinking of our society. There should be a change in the mind set of men towards women.

*Mahatma Gandhi* strongly feels that “If only the woman of the world would come together they could display such heroic non-violence as to kick away the atom bomb like a mere ball. Women have been so gifted by God. If an ancestral treasure, lying buried in a corner of the house unknown to the members of the family were suddenly discovered, what a celebration it would occasion. Similarly, a women’s marvelous power is lying dormant. If the women of Asia wake up, they will dazzle the world.”

### 4.10 Gender Disparities and Hindu Law

Dispensation of justice to women world over is an age-old problem dating back to the origin of the human society on this planet. Human society has always remained male dominated and mainly patriarchal in social character even after man began to progress in organizing his social order. The natural consequence of this state of things was the domination of the males over females in almost all social dealings. In the previous chapter we have seen that our constitutional provisions contained under various articles are sufficient to prevent inequality or unequal treatment purely on the ground of sex and thus to eliminate gender injustice from all personal laws and customs prevailing in the country.

The day to day life of women is most directly governed by the existing structure of the family, the patterns of which vary according to religion, class and region. In Indian context, the predominant position given to men in the family structure leads to discrimination against women members of the family in almost all matters that regulate their existence. The structure of the family, and the social norms and values that are built around are thus completely against the democratic

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principles that our republic stands for. This system of gender based inequality, often referred to as patriarchy, does retardation to the growth of women’s personality and affects her mentally, socially and psychologically. For, the systematic violation of the rights of women is institutionalised in prevailing family system. The inequality of women within the family extends to and is related with their socio-economic and legal position, each reinforcing the other.

The laws that affect women most closely are those relating to the family that is, marriage, divorce, maintenance and inheritance etc. known as family or personal law. Laws such as those in the Indian Penal Code and the Code of Criminal Procedure as well as most positions in civil law, apply to all citizens. But personal law ever since its codification has been based on the religious practices of different communities. Even after nearly four and a half decades of independence and inspite of Article 44 in part IV of the Constitution regarding the Uniform Civil Code has remained to be a dead letter till date. Even though many progressive social legislation have been passed there are still certain practices and coercions against women which remain widespread because of religious and social sanctions. At present five sets of personal laws exist pertaining to the Hindu, Muslim, Christian, Parsi and Jewish communities. A score of legal statutes and Acts regulate marriage, divorce, maintenance and adoption. The essential feature of these laws has been the assertion of male dominance over women.

The present is the second part of the chapter has undertaken a study of Hindu Laws with reference to marriage, adoption and succession in particular. It makes an endeavor to study some broad aspects of Hindu law to show how they have hampered dispensation of justice to our women.. This part has deliberately been constricted to study these aspects only as the study of all personal laws would not have been possible in the given time.

4.11 Law of Marriage and Hindu Woman

Marriage has been, since ancient times, one of the most important social institutions. Sociologists have offered several different explanations. In the words
of George A. Lundberg, ‘marriage consists of the rules and regulations which define the rights, duties and privileges of the husband and wife’. Otto Larsen, one of the greatest scholars of American sociology, defines marriage as a ‘contractual agreement which formalizes and stabilizes the social relationships which comprises the family’. Generally speaking, marriage is an act of marrying each other that confers status on a union of a man and woman, for legal purposes. With the passage of time, the concept of Hindu marriage has undergone continuous modifications and traditions of thousands of years have been strongly dissolving. In fact, the most significant change occurred in the concept of Hindu marriage is its transformation from sacrament to contract.

4.11.1 Changing Concept of marriage

Marriage in the Vedic period was regarded as a sanskara. Sanskara are very deeply rooted in the Hindu social system. The Vedas do not mention the word, but a reference to it is found later in the Grhyasutras which are based on the Vedas. Sanskaras are certain performances and undertakings which are aimed at making the life and the personality of a person complete, and marriage is one of them, According to Manu, several impurities enter the body through the womb of the mother owing to the parental relationship, but Man can get rid of these impurities through sanskaras. Inseparability of matrimonial relationship was the firm foundation of original strict Hindu law because marriage was, and is, still considered a Sanskara – a sacrament which was the root of family life and the consequent development of national culture and ethos. Under Hindu Law, marriage is never considered a mere contractual social arrangement for satisfying carnal and material desires of worldly existence. It was and is considered bondage of souls who were supposed to endeavour jointly in search of Dharma, Artha and Kama.

Generally, a Hindu marriage is solemnized with the customary rites and ceremonies practiced by both the families involved. One of the most important

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Hindu marriage rituals is Saptapdi, i.e. seven steps taken together by the bride and the bridegroom around the sacred fire. It is only after the seventh step of Saptapadi is taken, that the marriage ceremony is considered complete. Through these rites and customs, especially of marriage-regulated by law—a Hindu, whether male or female, attains full personhood. As Satapatha Brahmana, an exposition of Vedic religious rites and practices, says, ‘He alone is a perfect man who consists of his wife, himself and his offspring,’ A man who does not win a wife is really half and he is not a full man as long as he does not beget an offspring.’ Similarly, Manu expresses the idea that men are created to be fathers and women to be mothers. So marriage is obligatory for both man and woman.

Marriage in the shastras was viewed as a sacrament. The relationship of husband and wife, once established through proper customs and rituals, was believed to be irrevocable. In Hindu marriage, custom is sacrosanct, which is why a marriage ceremony is considered to be complete only when the customary rites and rituals are fully performed. It also implied permanency as in Indian culture; the union of a man and a woman is not the union of their physical selves but a union of their souls. A tie which cannot be untied; an eternal union not merely in this life but also in their lives to come, as Hindus believe in rebirth. According to Kautilya’s Arthashastra:

*Amoksha Dharmabibahanam*, that is the Hindu dharmic marriage is an inviolate, inviolable, indissoluble, interminable, eternal, perpetual union.

The Hindu Marriage Act, 1955 introduced radical changes by incorporating the concept of judicial separation and divorce and brought to an end the indissoluble concept of a Hindu marriage; yet at the same time retained the concept of Smritis texts primarily for its solemnization. Thus, a Hindu marriage is still solemnized according to the Smritis texts and would, therefore, be an

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\[104\] Manu, IX, 46.

\[105\] Sardar Akarpuri(1954), Lok Sabha Debates, 7471.

\[106\] Sardar Akarpuri, Lok Sabha Debates (1954), N.C. Chatterjee at 7652.
indissoluble union as far as its solemnization is concerned. It is this spiritually or
religiously indissoluble union that is made dissoluble, under the Act, at the
instance of the parties or due to its legal validity requirements, e.g., a validly
solemnized marriage and thus an eternal union can, nevertheless, be void having
no effect in law if it violates section 5(i); (iv); (v) of the Hindu Marriage Act,
1955 and the parties to this union without putting an end to it cannot legally marry
any other person.

The Hindu Marriage Act, 1955 was based on a formal concept of equality
where spouses were deemed equal and had equal rights and obligations towards
each other. Inspired by the English statutes, the Indian legislature granted both
men and women equal rights to matrimonial remedies and ancillary relief.
Additional grounds have been given to wives if they need to get out of this
marriage, sometimes even where the husband may or may not be at fault. This tilt
in theory, however, stands in sharp contrast to the operation of these provisions in
reality. What perhaps works on an equal platform in the western society is
markedly deviated in Indian scenario due to wide disparity in the Indian law and
the cultural environment including the embodiment and protection of the
institution of marriage, stereotyping of roles of men and women in the family and
acceptance, idealization and glorification of a woman’s subordination. The statute
that was enacted was merely ornamental instead of being made of genuine and
concrete efforts at rectifying the gender discrimination written into the Hindu law.
In the light of the above context, a look at the disparate Hindu marriage law
becomes necessary to examine the extent of gender disparity inculcated in it or
practiced by the courts while interpreting the various provisions. Some of the
anomalies within the law are examined here.

Gender bias and consequently the inferior status of a woman starts from
the solemnization of a marriage itself. Marriage of a girl means the transfer of the
father’s dominion over the daughter to that of the husband, the supreme marital
objective being to provide a successor to the property and to avoid extinction of
the family line. Kanyadan and panigrahan-the two important accepted
ceremonies of marriage as are described as the acceptance by the bridegroom of a
girl as his wife, the girl being given away by her guardian.\textsuperscript{107} The ancient texts do not refer to any order of preference amongst the relation of the minor boy to give him in marriage where as a long list of relations is provided who can give away a girl in marriage while the bridegroom remains competent to accept the girl personally.

The term \textit{Kanyadan} signifies the absolute control that the father enjoys over his daughter as no one can gift something that is not his absolute property. The \textit{kanya} is considered as a sort of chattel having no soul. It signifies that the father has absolute power to choose to whom to gift the daughter with practically little or no accountability.

Even at the time of the enactment of the Hindu Marriage Act, our Parliamentarians disapproved of the ceremony of ‘\textit{Kanyadan}’ as a ceremony depicting the lower or in fact inconsequential value of the girl.

Today we have in our society the practice of \textit{Kanyadan}. \textit{Kanyadan}, means that we treat the daughter as property and like we gift a cow, a goat or money we can gift a girl. In the educated world this practice cannot go and it is mandatory to take the consent of the girl and the boy. It is amply clear that these ceremonies contribute in according a lower status to the girl, and are prevalent even now amongst the majority of Hindus.

The superior status accorded to the bridegroom and his relations at marriage continues even after its solemnization.

The wife should be “\textit{paturnuvrate}”, i.e., follow the same principles as that of her husband.\textsuperscript{108} “The husband is the lord and master of his wife. He must be adored and obeyed even if devoid of all virtues.”\textsuperscript{109} “He must be obeyed as long as he lives and the wife should be faithful to his memory even after his death.”\textsuperscript{110}


\textsuperscript{108} Manu, VII at 228.

\textsuperscript{109} Ibid., V at 154.

\textsuperscript{110} Ibid., 151; Yajnavalkya Smriti, 175; Vishnu, XXV 13-14.
“He should be worshipped like a God even though he is a man of bad character with no qualities or a goonda.”

While the wife is described as “grahani” or “grahalakshmi” the husband is called “bharti” as he provides food for the wife and the children and “pati” as he protects her. The terminologies arising out of a direct consequence of stereotyping of roles evidently and unshakably display their omnipotent presence in the Indian context. Homemaking is still considered as the legitimate function of a woman and even if she is economically active, she is totally dependent on the husband and the in-laws for her sustenance having no ownership over material assets. The need to improve her economic condition is sidelined after terming it necessary by putting the emphasis on the need to protect and perpetuate the patriarchal set up.

The legal inequality of the two partners bequeathed to us from earlier social conditions is not the cause but the effect of the economic oppression of the woman. In the great majority of cases today at least in the possessing classes, the husband is obliged to earn a living and support his family and that in itself gives him a position of supremacy without any need for special legal titles and privileges.

Strangely enough none of this is evident from any of the provisions of the Hindu Marriage Act. The provisions dealing with solemnization appear balanced and the inequity in practice appears directly a result of customary practices and familial pattern. Since the position and outlook of women are so remarkably transformed over the years, it is quite natural that the concept of marriage as well as its traditions would undergo a radical change. This was recognized by Nyayamurti Mahadev Govind Ranade, a judge of the Bombay High Court, well-known not only as an erudite scholar and thinker but as a prophet of the cultural renaissance of India. As he declared, legislation is one of the important methods of changing the social structure and elevating it to a higher level. In fact, one of the distinguishing characteristics of modern society is the heavy reliance on law to bring social change.

The traditional concept of marriage is now greatly changed and Hindu marriage today has assumed more or less the nature of a contract for mutual benefit of the parties concerned, duly aided by different legal provisions and reforms. It is, however, necessary to realize that there are limits to the extent to which changes can be effected by law. Attempts to bring about changes in the status of woman either through legislation or judicial activism can achieve little success without a simultaneous movement to transform the social and economic structures and the culture (values, ideologies and attitudes) of society.

(i) Monogamy- Its Inefficacious Legal Imposition

The Hindu Marriage Act, 1955 introduced the Christian concept of monogamy into the Hindu marriage and this provision seems to have caused a great deal of resentment among Hindus. The popular support for the demand for a Uniform Civil Code is rooted in the resentment that while the sexual tendencies of Hindu males are curbed by the introduction of monogamy, the Muslim males are left free to enjoy the privileges of bigamous marriages. The provision of monogamy was introduced ostensibly to elevate the status of Hindu women and it was a demand raised by women in the nationalist movement. Hence it would indeed be interesting to observe how the provision of monogamy under the Hindu Marriage Act has affected women.

Although it was claimed during Parliamentary debates that Hinduism is not a religion but a conglomeration of culture and the Act transformed the Hindu marriage from status to a dissoluble contract, the form of solemnizing the contract remained *Brahminical* and scriptural with *saptapadi* (seven steps around the sacred fire) and *Vivahahoma* (the sacred fire) as its essential features. But within a pluralistic society, the Act also had to validate diverse customary practices.\(^{112}\) But the notion of a valid custom remained ancient and that of time immemorial, as stipulated under the English law. This mingling of *Brahminical* rituals at one end, customary practices at the other, with English principles thrown in for good measure, has resulted in absurd and ridiculous rulings regarding the validity of

\(^{112}\) Section 7(1) & (2) of Hindu Marriage Act, 1955.
Hindu marriages and women have been the worst sufferers of these legal absurdities.

Bigamy has remained one of the chief causes for a woman’s subordination and her secondary status till it was sought to be curbed by the legislature. In 1955 the Parliament abolished it for all Hindus who were subject to the application of the Hindu Marriage Act, 1955. However, the process of abolition of bigamy was not an easy one, nor was it done by consensus. Parliament witnessed heated debate between those who wanted its permissibility and continuance under certain specific cases. They questioned the logic of making lunacy a ground for divorce and pointed out the benefits of polygamy, if the first wife is mentally sick or is suffering from a disease which has been made a ground for divorce.\footnote{N.G. Deshpande at 6509.} They pleaded that the prevention or abolition of bigamy will cause tremendous hardships in respectable families especially in cases where the couples fail to get children. They saw absolutely nothing wrong in a situation where the man is allowed to remarry, with the consent of the first wife.\footnote{Ibid., p.7364.}

Polygamy proclaims the inferior status of the feminine sex. The woman is not recognized as equal partner of a man. As he possesses more than one of the many other objects of enjoyment he also claims the right to possess more than one wife to give him satisfaction or pleasure. This concept is at the root of polygamy. If woman is an equal partner of a man in marriage, this outrageous conception of polygamy should be condemned in the severest terms. People who support polygamy do not like to accord equality of status to our womanhood.

The argument did not take into account that it would be difficult to ensure the free and voluntary consent of the woman who at the instance of her husband and other family members might be pressurized to make an express declaration.

In this background, absolute monogamy was made the rule for all Hindus governed by the provisions of the Hindu Marriage Act, 1955. Section 5(1) of the Hindu Marriage Act, 1955 and Section 4(a) of the Special Marriage Act, 1954 prohibits polygamy; Section 11 of the HMA and section 24 of Special Marriage
Act makes bigamous marriages void and Section 17 of the Hindu Marriage Act and Section 44 of the Special Marriage Act makes bigamy a penal offence under sections 494 and 495 of the Indian Penal Code.

The offence of bigamy is committed if a person marries again during the lifetime of his/her spouse. For the application of Section 494 of the Indian Penal Code and to prosecute the husband for the offence of bigamy the courts insist on a very strict proof of solemnization of both the marriages. Under the laws of minority communities, the formalities of solemnizing marriage are strictly prescribed and the officiating priest has to provide the necessary document by way of a marriage certificate or he is required to register the marriage with the Registrar of Births, Deaths and Marriages. Since Muslim, Christian and Parsi religions are more institutionalized; their rules and procedures for contracting marriage are definite and unambiguous and are strictly controlled by the religious hierarchies. But Hindu marriages which were based more on community practices are relatively less institutionalized and hence their legality is more ambiguous. This ambiguity has provided a Hindu male ample scope to contract bigamous marriages. Practical experience shows that it is extremely difficult to prove polygamy and punish the guilty because of the application of the double validity test of the marriage under Hindu law. If it is validly solemnized i.e. observance of all the necessary customary and shastric ceremonies by the parties then it will be called a marriage.

Since the law recognizes only monogamous marriages, the women in polygamous relationships are placed in a vulnerable situation. In the absence of any clear proof, the man has the choice of admitting either the first or his subsequent relationship as a valid marriage and escape from financial responsibility towards the other woman. When the man refuses to validate the marriage, the woman loses not only her right to maintenance but also faces humiliation and social stigma as a mistress. So much is at stake for the woman that it is not an uncommon sight for two women who are vying with each other for the status of a wife to come to blows during the court proceedings.
The flip side of this predicament in maintenance proceedings is the dilemma faced by women in criminal proceedings in cases of bigamy. Here, years of litigation failed to end in conviction for the errant male due to the courts adopting a rigid view that Saptapadi, Vivaha homa and Kanyadan etc. are essential for solemnizing a Hindu marriage. If these ceremonies could not be proved by the first wife in respect of her husband’s second marriage, the husband could wriggle out of conviction even though he had cohabited with the second wife, the community had accepted the man and the second wife as husband and wife or even if he had fathered children through the second wife.\(^{115}\) In other words, the remedy the legislature provides to the first wife is that she can snap her relation with such a husband; can deny him her company (if he still wants her) but cannot have him punished or get him back to her, which is exactly what a majority of women trapped in these situations still want and hope and pray for.

Thus, we see that the second marriage by the husband is not only detrimental to conjugal prosperity of the spouses in the matrimonial home but may also operate harshly against the first wife who may have to face cruelty and insult at the hands of the husband. She even undergoes deep psychological trauma when she is deprived of the love and companionship of which she has the legitimate right. Whereas on the other hand, the status of the second wife too goes into dilemma. She does not acquire the status of legally wedded wife. Such a position is also not accepted for the second woman fraudulently married in the mock marriages. If, however, the second marriage breaks up, then she is in a difficult situation. The law can only declare her a mistress and decree that she is not entitled to maintenance. Consequence thereof, she has to endure humiliation and social stigma as being only a mistress.

It is therefore, submitted that the progressive sounding provision of monogamy not only turned out to be a mockery but in fact more detrimental to women than the uncodified Hindu law which recognized rights of wives in polygamous marriages. For instance, in a case for maintenance where the husband

\(^{115}\) For a detailed discussion on this issue, see Flavia Agnes, ‘Hindu Men, Monogamy and the Uniform Civil Code,’ in Economic and Political Weekly, XXX/50 (1995), p.3238.
pleaded that since the woman was his second wife he was not entitled to pay her maintenance, the court took recourse to the uncodified Hindu law and held that since couple is governed by the ancient Hindu law (which permits bigamy) and not by the reformed code, the second wife is entitled to maintenance.\footnote{Anupama Pradhan v. Sultan Pradhan 1991 Cri.L.J. 3216.} This judgment speaks much for a law which was ushered in with great fanfare as an instrument of empowering Hindu women.

The practice of bigamy is a fertile source of evil and relic of barbarism in which woman have to endure ill-treatment and harassment in the matrimonial home. This practice may be attributed to sinful lust, to abuse power of the strong over the weak and to the dominion of one sex over the other. Therefore, in the interest of justice, social values and morality, there is a need for amendment, as the existing provisions of Hindu law relating to bigamy have failed to achieve the desired object. The following changes in law are suggested to make its enforcement more effective:

(1) The Committee on the Status of Women had recommended\footnote{‘Towards Equality’, Report of the Committee on the Status of Women in India 110 (1974).} that the word “solemnization” in Hindu Marriage Act should be replaced by “goes through a form of marriage” so that the area of law is not narrowed down. The Committee suggested the addition of an explanation also to the effect that an omission to perform some of the essential ceremonies shall not be construed to mean that the offence of bigamy was not committed, if such ceremony gave rise to a defacto relationship of husband and wife. Paras Diwan\footnote{Paras Diwan, ‘Ceremonial Validity of Hindu Marriages: Need for Reform’, (1977) 2SCC (J) p. 22.} suggests that there should be a uniform ceremony for all Hindus otherwise “dupes may take advantage of this state of law and innocent persons may become their victims.”

(2) Section 6 of the Act, may be restored and a provision may be incorporated whereby, a relation or friend of the wife or of the second woman or of the
husband should be allowed to ask for an injunction restraining the parties against proposed bigamous marriage.

(3) A proviso may be added to Section 11 of the Hindu Marriage Act, 1955, that in case marriage takes place secretly, any relative or friend of the wife or of the second woman or of the husband be allowed to ask for a decree to nullify the second marriage.

(4) All marriages solemnized under the Act, should be compulsorily registered and any violation of the proposed law should be made a cognizable offence.

(5) The admission by a person accused of bigamy or by the second woman that he or she entered into second marriage, should be accepted by the court as a proof for the purpose of Section 494 of the Indian Penal Code.

(6) Section 496 of the Indian Penal Code which provides punishment to those who knowingly contract ‘mock marriage’ should be made applicable to marriage under the Hindu Marriage Act, 1955.

(ii) Early Age of Marriage

Undoubtedly, child marriages popular in past, and still not uncommon in India are a major social evil leading to a disastrous effect on the health of the young wives and their children, leading to a high incidence of suicides among young mothers and a permission to unscrupulous parents to play havoc with the lives of their young daughters by selling them to rich men of advanced ages for money.

The movement against child marriage started in Bengal about mid-nineteenth century. The grievances of Bengali women ventilated through newspapers did not go unheeded, and contributed much to the agitation against the traditional system of marriage. In July 1847, the Samvod Pravakar pointed out that early marriage was detrimental to the education of young boys. Early marriage was likely to distract their attention, hamper their studies and spoil their future. This lead to premature childbearing, often damaging the health of young parents who as a consequence rarely had strong and healthy children.

The movement against child marriage gathered momentum throughout the sixities and seventies of the nineteenth century. The Bamabodhini Patrika
published an article denouncing the evils of child marriage, pointing out many abuses caused by it, such as early death, ill health, lack of education, poverty etc. It burdened growing young men, hampered their studies and led them to the horrors of poverty. The weekly paper, Somprakash, was very critical of child marriage and polygamy, and wrote strongly against it. Early marriage, it observed, was the root of numerous evils and the main cause of the gradual decay of the human race. Just as strong trees could not grow from weak seeds, so a prosperous mankind could never grow from physically weak and mentally undeveloped boys and girls.¹¹⁹

On 9 January 1891, the issue of the age of consent was placed before the Viceroy’s Council. Andrew Scoble, a member of the Council, while introducing a Bill in the Council to amend Indian Penal Code and Code of Criminal Procedure 1882, cited the Hari Maity case¹²₀, in which Hari Maity, aged thirty-five, caused the death of his wife Phulmoni, aged only nine, by forcing her to have sexual intercourse. He said that under Section 375 of the Indian Penal Code, the offence of rape was committed when a man had sexual intercourse with a woman under certain circumstances, one of those being intercourse with or without the consent of a girl under ten years of age. No exception was made in favour of married persons. Scoble proposed that the age of consent be raised both for married and unmarried women, from ten to twelve years.

The Bill was passed on 19 March 1891 as Act X of 1891. By virtue of this Act, the age of consent prescribed in the Indian Penal Code 1860 was amended and raised from ten to twelve. Although the immediate effect of this Act was not very encouraging, a silent change in social attitude gradually became visible. This was perhaps due to the spread of education and the consequent change in the thinking of the people. Two Indian princely States, which adopted measures to abolish child marriage, deserve special mention. First, the Mysore Government passed the Infant Marriages Prevention Regulation in 1894 to stop marriage of girls under eight and to prevent marriage between man and woman of very


¹²₀ XVIII ILR (Calcutta) 49 (1891).
unequal age, particularly of girls below fourteen. Second, the Gaekwad of Baroda, in the face of a good deal of opposition, passed the Infant Marriage Prevention Act for his State in 1904, which absolutely forbade the marriage of girls below the age of nine and allowing girls below the age of twelve and boys below the age of sixteen to marry, only if the parents first obtained the consent of a tribunal consisting of the local Sub-Judge and three assessors of the petitioner’s caste.¹²¹

Efforts to fight this evil continued. The Child Marriage Restraint Act (hereinafter cited as CMRA) was passed in 1929. It prescribed the minimum ages for the girl and the boy as 14 and 18 respectively. By an amendment in 1949, the age of the girl was raised to 15 and in 1978, the ages for the girls and the boys were raised to 18 and 21 years respectively. Ironically, while a feminist or a socialist views the child marriage as detrimental to the interests of children and in particular to the girl child (for whom it is both physically and mentally detrimental) the Parliament and government policies view them only as a direct contributor to the population explosion in India. Thus, whatever changes have been brought in the CMRA since its enactment were to raise the marriage age not to give the parties a chance to make a vital decision in their favour but to control their fertility and thereby boost the family planning program. It is evident from the statement of objects and reasons for the amendment in 1978 of the Child Marriage Restraint Act. It said:

“The question of increasing the minimum age of marriage for males and females has been considered in the present context when there is an urgent need to check the growth of population in the country. Such increase in the minimum age of marriage will result in lowering the total fertility rate on account of later span of married life. It will also result in more responsible parenthood and in better health of the mother and the child.”¹²²

¹²¹ Supra note 119.

The age requirement also shows a consistent pattern, i.e., a man must be older than the woman in age, but nowhere is it provided in any legislation as to what should be the minimum age difference between the ages of the husband and the wife. Presently, she can be validly given in marriage, which in fact is a major cause for concern. Taking advantage of this, the cases of parents selling their daughters for money to middle aged or even older men are not uncommon. Besides, the unscrupulous or helpless parents selling their daughters to older men takes cognizance of the biological maturity of the parties also take into account one very important patriarchal preference of superiority in age and experience leading to an implied dominance of the man over a woman.

The juniority in age of the wife is an accepted social factor. It necessarily implies obedience by the wife to the commands of the husband. This age disparity is also rooted in stereotypical gender roles and a patriarchal presumption that a man needs more time to equip himself to meet the financial challenges in the matrimonial life. Superiority of the wife would always to be a case of deception on part of the wife leading to an inevitable conclusion that she or her parents must have lied about her age and projected herself as younger to the husband. In a case, the husband sought annulment of marriage for fraud committed on him by the wife in concealing her age from him. The wife was told to be one year younger to the husband at the time of marriage, but was proved to be seven years older to him, a fact that he ascertained from her matriculation certificate. But the reasons the court gave for annulling the marriage shows that the thinking wavelength of the judges and the patriarchal society concurs.

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124 The Court held that where by an arranged matrimonial alliance, a marriage takes place, between an older woman and a younger man, it must raise a presumption rebuttal, no doubt, of some concealment or misrepresentation regarding the woman’s true age, “as common experience shows that it is indeed unusual for a young man to knowingly and willingly marry someone elder than him in age. Where fraud on this account as alleged, the burden must shift on the wife to bring on record evidence or circumstances to dispel the suspicion of any such concealment or misrepresentation.
Another aspect of child marriage is the inability of the children to avoid such marriages and prevent their exploitation at the hands of their own parents or guardians. Prohibition of Child Marriage Act, 2006 and all the personal laws are silent about the validity of child marriage. Unfortunately, these marriages once solemnized remain perfectly valid despite the difference in the ages of the parties and efforts to penalize those responsible for solemnization of child marriages are scanty and apparently half-hearted. The earliest case that gained notoriety but sent shockwaves amongst the orthodoxy was the challenge to the validity of her marriage by a 21-year old girl Rukhmabai.\textsuperscript{125} Married at the age of 11 years, her marriage was never consummated as she did not go to her husband’s house at all. When she failed to join him even after attaining puberty he filed a petition for restitution of conjugal rights seeking her company. Now as a woman of 21 years she pleaded the inability of the husband to get a restitution petition passed in his favour on grounds of personal and social incompatibility. Her main contention was that at the time of marriage she was barely 11 years old and hardly in a position to voluntary make a choice for this marriage and thus a marriage solemnized with practically no consent of hers should not be binding on her. Accepting her contention and holding that in absence of her consent to the marriage they could not compel her to go to her husband’s house only so that he could consummate the marriage against her wishes. \textit{Pinhey, J.}, dismissed the petition of the husband. This pronouncement led to an uproar and an ugly backlash and the society fervently frowned at the audacity of a girl refusing the company of her husband when he wanted it. Severely condemning it, they heaved a sigh of relief only when it was overruled by the High Court on an appeal filed by the husband. The High Court also remanded back the matter to the trial court for considerations afresh. The new judge granted a restitution petition in favour of the husband and directed the wife to join him within a period of one month failing which she was to be imprisoned for six months. With an out of court settlement and payment of a sum of Rs.2000, the wife purchased her freedom and the husband agreed not to press the execution of this decree. Rukhmabai, who later

\textsuperscript{125} Dadaji Bhikaji v. Rukhmabai, IX ILR 529 (Bombay Series 1885).
went abroad to study medicine and then practice it in Gujrat wrote a letter to the Times of India on 9 April 1887 on the ills of child marriage and stressed the correlation between early marriage and denial of education to women.

It is a mocking reality that even after the promulgation of the earlier legislation i.e. Child Marriage Restraint Act, 1929 and the newly enacted Prohibition of Child Marriage Act, 2006, the child marriages in India continue to receive recognition at one time or the other. While the relevant statutes are conspicuously silent on the question of legal validity of child marriages, advise leniency, and in fact whisper condonation of social practices, the cases on this issue have been arising in all kinds of circumstances. Significantly, from the very first case in 1933 onwards, the courts have upheld child marriages as valid, with only one major exception.

In 1933, the courts upheld the validity of a marriage of a seven year old girl to a man in his late twenties performed by her widowed mother. Allahabad High Court gave a similar opinion in 1936 and 1939. Noting that the Parliament did not intend to treat child marriage as either void or voidable Himachal Pradesh High Court in Premi v. Daya Ram:

“A marriage which contravenes the condition, specified in clause (iii), or clause (vi), of Section 5 of the Act is not declared to be void by Section 11 or any other section of the Act. The omission to declare such a marriage to be void by the legislature does not appear to be merely accidental. The legislature has provided punishment in Section 18 of the Act, for the breach of the aforesaid conditions. It is not for the court to speculate upon the reasons for the aforesaid

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127 Jalsi Kaur v. Emperor AIR 1933 Pat. 471.


129 AIR 1965 H.P. 15.
intentional omission. But, it may be that the legislature did not intend to declare child marriages as void, as, though such marriages are discouraged by society and law, yet the evil is deep-rooted and child marriages are not rare in the country and declaring such marriages as void must have resulted in unfortunate consequences and unnecessary hardship to the parties."\(^{130}\)

The legislature, therefore, stopped short of declaring such marriages as void and contended itself by making such marriages merely punishable. During the 1970s, a remarkable episode is provided by the case of *Panchireddi v. Gadela Ganapathu*.\(^{131}\) This case sought to break the mould of condonation of child marriages by declaring them void. It was held:

"That the object of the Hindu Marriage Act is to prevent and eradicate the evil of child marriages. That is why the marriageable ages of the bridegroom and bride are prescribed. A marriage between the bridegroom and the bride, if their ages do not satisfy the requirements of clause (iii) of Section 5, cannot be solemnized as it is prohibited under clause (iii) of Section 5. It is not necessary that, in event of contravention of clause (iii) of Section 5, either party to the marriage rush to the court for declaring that marriage as null and void. Such a marriage is void *ab-initio.*"\(^{132}\)

The decision invited resentment from all the corners of the society. Academicians, scholarly opinion as well as the trend of judicial practice went against the opinion held by the *Andhra Pradesh* High Court and submitted this decision ‘as unrealistic and unacceptable in view of the present conditions of the society.’

Meanwhile, in other parts of India, High Courts continued to treat child marriages as legally valid marriages. The *A.P.* High Court in 1977\(^{133}\) pronounced

\(^{130}\)AIR 1965 H.P. 16.

\(^{131}\)AIR 1975 A.P. 193.

\(^{132}\)AIR 1975 A.P. 195.

\(^{133}\)P. Venkatarman v. State AIR 1977 A.P.
them as perfectly valid and the Supreme Court put its stamp on its validity in *Lila Gupta v. Luxmi Narain*.134

Thus, child marriage once solemnized is perfectly valid though the parties responsible for its solemnization are subject to punishment. But the refusal of the authorities to consider solemnization of child marriage as a crime and the quantum of punishment clearly indicates that both the legislature and the judiciary are not as sensitive to the issue as they should have been. In *Public Prosecutor v. Thammanna Rattayya*135 Madras High Court refused to convict the mother of a child bride for marriage nor could prevent its solemnization. Similarly, relatives and invitees attending a child marriage but without any hand in performing or conducting it are not guilty of abetting the crime of getting a marriage solemnized in violation of the Child Marriage Restraint Act.136 Parents are seldom punished but in a few cases the priests and moneylenders advancing money to solemnize a child marriage were punished for it, as according to the judiciary, it was their responsibility to make inquiries about the age of the parties.137

Despite the evils of child marriage glaring in the face of the community at large, the menace continues unabated. Under the garb of customary practices, or for the sheer convenience of shrugging of the parental responsibility of minor girls, young girls continued to be married off by their parents at an early age. It is a harsh reality that the newly enacted Prohibition of Child Marriage Act, 2006 is far from perfect. The Act says that every child marriage shall be voidable at the option of the contracting parties.138 It includes that in case the petitioner is a minor at the time of filing of petition, the petition may be filed through his or her

134 AIR 1978 SC 1351.

135 AIR 1937 Mad. 490.


guardian or next friend along with the Child Marriage Prohibition Officer. The petition is to be filed within two years of completion of majority. The Act makes the provision that the punishment for the male, above the age of eighteen, who contracts marriage with a minor shall lead to rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both and anybody who performs or abets a child marriage shall also be subjected to rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees, unless he is able to prove that there was no reason to believe that it was a child marriage. Also the guardian or the person in charge of the child, in case of not being able to prevent the marriage shall be subjected to the same punishment. The Act says that the marriage shall be void only in cases of trafficking, compulsion and deceit.

It is lamentably ironical that the law which seeks to put an end to child marriages is providing them with an implicit social acceptance. Child marriages in India are not void; almost shockingly once the ceremony is complete the child marriage is as valid as any other normal marriage. The bride and the groom may be punished for such a marriage but once married; they are man and wife to one another and enjoy the same status before the law as a normally married couple. The law explicitly states that only those child marriages are void where either of the contracting parties is under a compulsion or either of them is a victim of human trafficking. Such evidence of social consent in the law itself may be said to be the single most damaging factor to the efforts of eradicating this evil. The absence of a legal provision declaring a child marriage to be void may be

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139 Section 3(2), Prohibition of Child Marriage Act, 2006.
140 Ibid., Section 3(3)
141 Ibid., Section 9.
142 Ibid., Section 10.
143 Ibid., Section 11.
144 Ibid., Section 12
interpreted to be an encouragement for the willing offender. Once solemnized, the marriages remain perfectly valid. Thus, it is not uncommon for the parents to marry off their wards when they are minors. Yet, at the same time if a minor girl goes on her own gets married to a boy of her choice against her parents wishes, they file kidnapping charges against the boy turned groom. The Delhi High Court recently held\textsuperscript{145} that the marriage solemnized in contravention of age requirement prescribed under Section 5 of the Hindu Marriage Act, is neither void nor voidable under Sections 11 and 12 and were only punishable under Section 18, of the same enactment as also under the provisions of the Child Marriage Restraint Act, 1929. They also cautioned that this judgment does not mean nor indicate that the age of marriage has been reduced from the one prescribed under the Hindu Marriage Act. Two petitions were disposed off by this judgment, both involving elopement of girls in the age group of 16-17 years with their boyfriends. One of them came back to her parents after living with him for several months at various places, while the second continued to live with her husband.

In the absence of any provision for invalidating such marriages, the courts have no option but to hold in favour of validity of such marriages. However, even the court cautioned that despite the fact that once solemnized a child marriage becomes valid does not mean and should not be understood as reducing the age of marriage. The situation becomes all the more worse where girls becomes pregnant or stays with her husband and not bowing to the family pressures. The children of these parents are subjected to honour killings thereby, posing a danger to their lives.

The court said that it was for Parliament to consider whether the present provisions in the Hindu Marriage Act, 1955 and the Child Marriage Restraint Act, 1929 have proved insufficient or failed to discourage child marriages and to take appropriate steps as required in their wisdom.

The provisions of Prohibition of Child Marriage Act, 2006 can be effective to a great extent if the following recommendations are looked into:-

\footnote{145 \textit{Manish Singh v. State Government of NCT} AIR 2006 Del. 37(DB).}
1. When child marriages are declared void by the legislature and the consent of the parties only should be mandatory for the validation of the marriage.

2. All the Sections relating to maintenance in Section 4 of the PCMA 2006 regarding maintenance to the female party to the marriage till her remarriage and the provisions relating to child custody and legitimacy of the children in Section 5 and 6 of the PCMA 2006 are to be made applicable to cases of void marriages also.

3. The law provides that a decree of nullity may be filed by a contracting party. In case at the time of filing the decree the party is a minor, then the decree can be filed through his or her guardian or next friend along with the Child marriage Prohibition officer. It must be highlighted here that one of the prime factors for the occurrence of such marriages is parental and family pressure. Further marriage among Hindus is for most part a sacrament containing some elements of a contract. Marriages in India are regarded as a relation for eternity. Breaking the matrimonial alliance is still disapproved and the defaulters are greeted with a hostile attitude.

4. Ordinarily both the parents have an equally important part to play in the marriage of their child. From initiating the marriage proposal to the performance of the marriage ceremonies, both the parents have an equitable role to play. In this context punishing the male offender and leaving the female equivalent is indeed unduly biased. The existing law on child marriages provides that no female shall be punished with imprisonment but shall only be liable to pay fine. Such a provision urges the male to shrewdly take a passive seat and the female, protected by that law may arrange for the child marriage to take place. Hence the law itself provides a loophole to defeat its own objective.

5. What makes matters worse is that whatever punishments are provided is immensely lax and lenient. A mere punishment of two years imprisonment has not proved to be sufficient to contain or hinder this practice, the unbridled continuance of this practice stands testimony to the inefficiency of these punishments and also pleads for a longer and more rigorous
sentence. Besides certain days like ‘Akhateej’ or ‘Akshay Tritya’ are witnesses to hundreds to child marriages every year. Such mass violation of the law needs to be punished more severely, but a provision to this effect remains unformulated. Although the law has appointed officials and also given them powers to take the required action, in order to stop these marriages, yet every year the law is simply brushed aside. This is because the officials are absolutely unaccountable. There is no stipulation in the existing law that punishes the government officials if they are negligent and do not perform their tasks. Further although the law makes a provision for the appointment of the Child Marriage Prohibition Officer to prevent and prosecute the performance of child marriages; however without the required financial allocations these officers may never get appointed.

6. Other Acts like the Hindu Marriage Act, 1955 should also be amended to ensure that the provisions in the said Acts are the same as and do not contradict the Prohibition of Child Marriage Act, 2006.

Child marriages have more serious effect on girls than boys more so on their physical and psychological health and on educational and other opportunities and on their personality development. The failure to take full account of devastating effect of child marriages on women shows the legislative apathy towards the interests of young girls. To pass it off in the name of customary practices is to choose an easy option without caring at all for the tender victims of this socio-cultural and political system that transgresses on the essence of humanness.

4.12 Law of Adoption and Hindu Woman

Adoption is the act of establishing a person as parent of one who is not in fact but in law his child.\textsuperscript{146} It signifies the means by which a status or legal relationship of parent and child between persons who are not so related by nature

is established or created. The very purpose is to create a new relationship. Adoption is also defined as a process by which people take a child who was not born to them and raises him/her as a member of their family.

In 1959, the UN gave official recognition to the human rights of children by adopting the Declaration of the Rights of the Child. It set out certain principles relating to the rights of a child. The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children With Special Reference to Foster Placement and Adoption nationally and internationally in 1986 also recognized that the primary aim of adoption is to provide the child, who cannot be cared for by his or her own parents, with a permanent family. It also stated that the foster place also should be regulated by law. The Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption, 1993 was adopted at the seventeenth session of the Hague Conference on Private International Law. The Convention is to cover an inter-country adoption between countries becoming parties to it, whether those adoptions are parent initiated or arranged by public authorities, adoption agencies or by private providers of adoption services. The Convention sets a framework of internationally agreed minimum norms and procedures that are to be compiled with to protect the children involved and the interests of their parents and adoptive parents.

(i) Concept of Adoption

Adoption was not unknown in ancient India. Among the Hindus a peculiar religious significance is attached to the son because he is considered to be a redeemer from hell. According to Baudhayana, through a son one conquers the

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147 Sheffidel v. Franklin, 151 Ala 492.
149 Article 13.
150 Article 10.
151 Manu V. 138.
world, through a grandson one attains the immortality and through a great-grandson one ascends to highest heaven.\textsuperscript{152}

Under the \textit{Shastric} Hindu law, the primary right of adoption vests in the husband, since son is adopted for due perpetuation of his lineage and also to secure for the adoptive father and his ancestors the spiritual blessings which only an heir male can confer. The husband could make an adoption without the consent of his wife. Her protest or dissent did not matter. Ordinarily, a woman had no authority to adopt. The capacity of woman to adopt has been controlled by her capacity for independence and to hold property. The text of \textit{Vasistha} was the authority, regarding woman’s capacity to adopt, which declares a prohibition, “Nor let a woman give or accept a son without the assent of her lord.”\textsuperscript{153} Where the power of the wife has been circumscribed by the necessity of obtaining her husband’s consent, the position of a widow was different in different provinces. Some of the schools put an absolute bar upon a widow from making an adoption. In \textit{Madras} School, \textit{Dattak Chandrika}, a special text on adoption has been construed as meaning that a widow may adopt under an authority from her husband in that behalf. The Judicial Committee of the Privy Council in Collector of \textit{Madura v. Mootoo Ramlinga}\textsuperscript{154} held that a widow may also adopt without her husband’s authority provided she had obtained the consent of husband’s \textit{sapindas} if the husband had separated at the time of his death, or, with the consent of his undivided coparceners, if the husband was joint.

In India the only law permitting adoption is the Hindu Adoption and Maintenance Act, 1956, which is applicable to Hindus only. Under the personal law of other communities, there is no statutory provision to recognize adoption, although there are customs here and there. Orthodox Muslims feel that \textit{Koran

\begin{footnotes}
\footnotetext{152}{\textit{Baudhayana} 2.166; \textit{Vishnu.xv.44: 46; Manu IX; 137-138; Yajnavalkya 1:78.}}
\footnotetext{153}{Vasistha. Cited Dattaka Chandrika, 10.}
\footnotetext{154}{12 MIA 397 (PC).}
\end{footnotes}
prohibits adoption and verses from *Koran* are often quoted to show that Islam has no place for the institution of adoption.\(^{155}\)

The law relating to adoption among Hindus underwent certain fundamental changes in 1956, beyond mere codification, extending permissibility in favour of Hindu females to adopt in certain specific situations. The changes incorporated were demanded by the progressive section of Hindu society while the orthodox opposed it. “Now after the enforcement of the Act all adoptions shall be made in accordance with the provisions of this Act. An adoption made in contravention shall be void which neither creates any rights nor destroys the right of the person in the family of his birth.”\(^{156}\)

The Act has brought about significant changes in the law and has considerably improved the position of women in this regard. For instance, females have been given a right to take and give in adoption under certain conditions; an unmarried girl and a divorcee can adopt; a widow can adopt in her own right; and a girl can be adopted too unlike earlier where only boys could be adopted. Besides, a married male Hindu who wants to adopt a child has to take the consent of his wife/wives. Despite all these revolutionary changes in the rights of females in respect of adoption, there is a clear bias which is based purely on the marital status of a female. Section 8 of the Hindu Adoption and Maintenance Act, 1956 refers to a female’s capacity to take in adoption. It runs as under:

Any female Hindu-

(a) Who is of sound mind
(b) Who is not a minor, and
(c) Who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has capacity to take a son or daughter in adoption.

Thus, it is clear that a married female cannot adopt, not even with the husband’s consent, unless her husband suffers from the disabilities referred to in

\(^{155}\) The Koran, XXXIII 4:5.

\(^{156}\) Section 5, Hindu Adoption and Maintenance Act, 1956.
the section, viz., he has ceased to be a Hindu, has renounced the world, or is of unsound mind. A husband, on the other hand, may adopt with the consent of the wife.  

Likewise, with regard to capacity to give the child in adoption under sub-section (2) of Section 9, the father continues to have the prior right. If he is alive, he alone can give away the child, though with mother’s consent. The mother may give the child in adoption only if the father is dead, or has renounced the world, or has ceased to be a Hindu, or is of unsound mind. Thus, the decision making with respect to adoption and the lead role at the time of actual giving and taking the child has to be that of the husband with the consent of the wife.

This view finds its acceptance in recently held case *Malti Roy Chowdhry v. Sudhindranath Majumdar*. The question arose in connection with the succession rights of a Hindu female who claimed the total property of her alleged adopted father as his sole heiress on his death. The Trial Court dismissed her application of her not being adopted daughter. Hence, the appeal was filed and it was argued that there was overwhelming evidence to indicate adoption. When she was barely two years old, her natural parents gave her in adoption to alleged adoptive parents in the presence of priest and other persons. According to testimony of priest, the ceremony of adoption took place by handing over the child to adoptive mother by putting her in her lap. This whole exercise took place in presence of husband and with his approval. Even when the alleged adoptive mother died, it was the appellant who had lit her funeral pyre.

It was quite unfortunate that the court rejected the contention and held that adoption was not valid as at the time of the alleged adoption the husband of the adoptive mother was alive and daughter was adopted by the mother and not by her husband. While referring to sections 7 and 8 of Hindu Adoption and Maintenance Act, 1956 which deals with capacity of Hindu male and female, respectively, to

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157 Section 7, Hindu Adoption and Maintenance Act, 1956.

158 Ibid., Section 9.

159 *AIR* 2007 Cal. 4 (DB).
adopt has to be taken factually or legally by the male in case of marriage and not by his wife i.e. the wife has no capacity to adopt even with the consent of husband and it is husband who is to take the decision and such right of husband is inchoate until the consent is given by the wife.

The Court failed to take note of the fact that adoption was collaborative and collective effort of both the husband and the wife and must be viewed as such. Even if the lead in arranging and conducting the ceremony was performed by the mother, the presence of the husband without objecting to it raised the presumption of his consent and therefore involvement of both was equal. By holding that husband only consented but did not lead the ceremony and therefore adoption was not proved, the court has strengthened the stereotypes and has pushed the wife into subservient position as incapable to take decision even with active concurrence of the husband.

The status of an unmarried woman in making a valid adoption raises another cause of concern. When there is adoption of a child by an unmarried woman, the question which usually comes up is whose name should be given after the name of the adopted child. Our present social norms demand the name of the father as suffix. It has often been observed that even where there is a column for a guardian’s name, there is another column for the father’s name as well. Thus, even if the mother is guardian, the form remains incomplete without father’s name. Therefore, the provision of the Act that an unmarried, major Hindu female who is of sound mind can adopt a child is meaningless unless present social set up liberates itself from many orthodox and obsolete concepts which are associated with the male dominated society.

4.13 Law of Property and Hindu Woman

Gender inequality facets in different forms but the most tedious one percepts to the effective property rights. This disparity in property rights pertaining to gender, spells from ancient times. During the Vedic times, woman enjoyed considerably a better status than in the subsequent period. The only limitation was that she did not have the right of inheritance. The Vedic literature
prescribed inheritance to the unmarried daughter and to a brotherless married daughter.\textsuperscript{160} The daughters with brothers, however, were excluded from the rights of inheritance.\textsuperscript{161} Though the husband and wife were treated as joint owners of the property yet it did not secure for wife an absolute equality with the husband in the ownership of the property.

_Baudhayana_, the reputed father of one of the schools of _Yajurveda_, excluded a Hindu woman from inheritance. Saying that “devoid of prowess and incompetent to inherit, women are useless”, he propounded that the _Vedas_ declared no inheritance to a woman.

During the _Smriti_ period, considerable change of popular feeling regarding the proprietary position of the woman was reflected and _Manu_, _Yajnavalkya_, _Brihaspati_, _Narada_ and other _Smriti_ writers admitted certain female heirs in the order of succession. But her heritable capacity was subject to certain conditions such as chastity, not marrying again, etc. Also, their rights were not absolute in the inherited property. A woman could neither spend the share as her own nor had power over it as regards gift, mortgage or sale. She took the inherited property as her widow’s estate. Thus, her right was not absolute during the _Smriti_ period.

After the _Smriti_ period, the law of female succession was embodied in the commentaries. Both the _Mitakshara_ and the _Dayabhaga_ have conceded heritable capacity of five females, namely, the widow, daughter, mother, paternal grandmother and paternal great grandmother. But they differed with respect to the order of succession amongst the heirs.

(i) **Dynamic Concept of Stridhan**

The seeds of _stridhan_ appear to have been sown in the _Rig Vedic_ period. Gifts from parents and brothers, gift before nuptial fire, gift in the bridal procession, and earning by mechanical arts were the main sources of _Stridhan_.

\textsuperscript{160} _Rigveda_, II, 17.7 – “**Aмуja**, who lived her whole life at her parent’s house, generally demanded and got a share of the ancestral property for inheritance.”

\textsuperscript{161} The general opinion of _Dharmasastra_ was that ‘sisters should not get any share in the patrimony, if they had brothers quoted in Dr. Lila Samatani, _Status of Woman in Vedic Times_, pp. 72-73.
during Vedic period.\textsuperscript{162} \textit{Atharvaveda} also mentions dowry to bride by brother or parents.\textsuperscript{163}

\textit{Smritikars} Differ from each other as to what items of property constitute her \textit{Stridhan}. \textit{Manu}, the greatest sage enumerates six kinds of \textit{Stridhan} as:

\begin{quote}
\textbf{\textit{Stridhan}}: That which is given over the nuptial fire, that which is given in the bridal possession, that which is given for an act of Love and that which is received from father, mother, brother-
All this called the six-fold property of a woman.\textsuperscript{164}
\end{quote}

To the above list, \textit{Vishnu}\textsuperscript{165} adds gifts made by a husband to his wife on super session (\textit{adhivedanika}), gift given subsequently (\textit{anuodheyaika}), \textit{sulka} and gifts from sons and relatives. \textit{Katyayana}\textsuperscript{166} expressly excluded the property acquired by a woman by mechanical arts and gifts received by her from strangers from the category of \textit{Stridhan}. \textit{Yajnavalkya}\textsuperscript{167} used the word \textit{adya} or ‘the like’ at the end of his text, thereby enlarged the scope and ambit of \textit{Stridhan}.

Among Commentators and Digest Writers there is a divergence of opinion as to what items of property constitute \textit{Stridhan} and what do not? Whereas \textit{Vijnaneshwara} commenting on the words ‘and the rest’ in the Code of \textit{Yajnavalkya} expanded the meaning of \textit{Stridhan}, the \textit{Dayabhaga} restricted to its narrow application. The \textit{Mitakshara} interpreted the term ‘\textit{Stridhan}’ in a liberal sense so as to term every kind of woman’s property as \textit{Stridhan}. While according to \textit{Dayabhaga}, only that property, over which a woman had absolute power of disposal, was ‘\textit{Stridhan}.’ In a case where female was an absolute owner of ‘\textit{Stridhan}’ property, the rules regarding disposal as well as succession to \textit{Stridhan} were not uniform. They varied according to the status of the woman, the nature of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{162} Rigveda X. 85:7; IX. 112. 3; II.17.7
\item \textsuperscript{163} Atharvaveda XIX. 112.
\item \textsuperscript{164} Manu IX 194.
\item \textsuperscript{165} Vishnu, XVIII, 18.
\item \textsuperscript{166} Katyayana, cited in the Dayabhaga, Chap. IV, S 1.4.
\item \textsuperscript{167} Yajnavalkya, II. 144-145.
\end{enumerate}
\end{footnotesize}
the Stridhan and the school of Hindu law by which she was governed. A maiden and widow had absolute rights of alienation provided they were not minors. But if she were a married woman then her right was limited and dependent upon the character of Stridhan. For this purpose Stridhan was divided into two parts, viz., the Saudayika and non-Saudayika. A Saudayika Stridhan considered of gifts received from relatives on both sides (parents and husband’s) whether given before or after marriage. She had absolute right of alienation in respect of Saudayika Stridhan. Rest of the Stridhan was non-Saudayika and could not be disposed of without the consent of husband.

Order of succession of Stridhan also differed from school to school, upon the status of the woman. According to Vijananeshwara, the woman’s property goes to her daughters because portions of her abound in her female children and the father’s estate to his sons because portions of him abound in his male children.\(^\text{168}\) In all schools except Bombay, a female heir who inherited Stridhan got a limited interest in it, which passed on to other heirs of the deceased woman after death.

In 1937, with a view to confer more property rights to Hindu widows and to grant them substantive rights in the property of their husbands, the Hindu Women’s Right to Property Act, 1937 was enacted. The Act, though a reformatory measure, interpretation of the various provisions of it gave rise to a number of anomalies and uncertainties. Learned chief justice Chagla, as he then was, very aptly observed in *Dagdu Balu v. Namedeo Rakhmaji*\(^\text{169}\), that

“Although the Act is a very short one, all questions of interpretation of that Act usually raise serious difficulties. Some judges have observed that the provisions of the act are obscure and more charitable minded judges have said that the drafting of the act is not very happy one.”\(^\text{170}\)

\(^{168}\) Paras Diwan, *Dowry and Protection to Married Women*, p. 113.

\(^{169}\) (1954) 56 Bom.L.R. 5.

\(^{170}\) Ibid.
Thus, the Hindu law reformers were not satisfied by passing of the Hindu Women’s Right to Property Act, 1937. Ultimately laws relating to marriage, adoption and succession were enacted in piece meal. The Hindu Succession Act\textsuperscript{171}, 1956 was passed with the object to bring uniformity in the law relating to succession among Hindus and to give the woman the same rights in matter of succession as available to a male, thereby, making a material change in their rights to inherit and alienate property.

4.13.1 The Hindu Succession ( Amendment) Act, 2005

The Hindu Succession Act, 1956 is a landmark in the history of the Hindu law and has affected far reaching changes in old Hindu law. The most important being equal rights of succession between male and female heirs of the same category i.e. brother and sister, or son and daughter. The Act has also simplified the law by abolishing the \textit{Mitakshara} and \textit{Dayabhaga} Schools of Hindu law relating to succession. Its most progressive features are the right of women to inherit and abolition of woman’s limited estate, thus, making a Hindu woman absolute owner of the property. The Act also gave to certain female heirs to succeed to the interest of the deceased in the coparcener property.

Still some sections of the Act came under criticism evoking controversy as being favourable to continue inequality on the basis of gender. Section 15\textsuperscript{172} of the Act, 1956 further reflects the patriarchal assumptions of a dominant male ideology. After her own children and husband who are class I heirs, the property of a female Hindu dying intestate devolves not her own heirs but upon the heirs of her husband. Thus it is not her father or brother or sister or other relatives specified in class II heirs who would get the property but her husband’s father, brother, sister, nephew and nieces and other relatives.

Thus, whilst in case of property of a male dying intestate, his mother is entitled to an equal share along with his wife and children as class I heirs, the position is completely unfair and different in the case of female’s property where

\textsuperscript{171} Act XXX of 1956.

\textsuperscript{172} General rules of Succession in the case of female Hindus.
though mother is class I heir under the schedule but property goes to the mother only in absence of her (daughter) children, husband and heirs of the husband.

Section 15 of the Act, 1956 only allows for property of a Hindu female dying intestate to devolve upon her mother and father, when none of the heirs as mentioned under sub-section (1) clause (a) and under (b) are existing. Therefore, the existing anomaly must be cured by bringing an amendment in Section 15 by proposing that if the property belongs to the female and she dies leaving behind property then it must be ensured that the parents (mother and father) of the female are given an equal right over such property along with her children and husband (Section 15(1) (a) ) The amendment must be such that clauses (d) and (e) are merged and read as one clause; or, the property of the Hindu female dying intestate must devolve in the following manner:

(d) upon the heirs of the father if the property was inherited from the father, and upon the heirs of the mother if the property was inherited from the mother; or in the alternative upon the heirs of the father and upon the heirs of the mother equally. Drawing an analogy from Section 8 of the Act wherein the Law Commission has made suggestions to included Father under Class I heirs it can be said that under Section 15 (1) (a) the heirs of the female should also come to include the parents of the female instead of they being third in the line of succession. It is important that the parents of the women are put on the same pedestal as the parents of the father. Given that women today earn a living and are owner’s of property in their own right, it is imperative that the women’s parents are also given an equal right to succeed to the property which she leaves behind at the time of her death. There should be no anomaly or discrepancies in terms of the line of succession. However, the anomaly in Section 15 of the Hindu Succession Act is that it goes against the basic feature of the Constitution, which guarantees equality to all. Section 15 of the Act must therefore be repealed and Section 8 must include and apply to both male and female who die intestate thus upholding Article 14 of the Constitution.

THE SCHEDULE under the Act must come to include under Class I along with “father”, “widower” in order to establish the line of succession in an
equitable manner. This will not only negate the anomalies but also bring about uniformity in the manner in which property of a Hindu who dies intestate devolves.

The provision of Section 15(2) of the Act also manifests gender inequality. It states that any property inherited by a female heir from her father or mother devolves in the absence of her children, upon the heirs of her father and not on the heirs of her mother. But does not deal with the situation where suppose the relationship of her father and mother does not subsist. If we go by the existing provision, the property would still go to the heirs of the father, that is the deceased’s step brothers and sisters, which is certainly unacceptable.

One such another provision had been the retention of *mitakshara* coparceners with only males as coparceners. Since a woman could not be a coparcener, she was not entitled to a share in the ancestral property by birth. Thus non-inclusion of women as coparceners in the joint family property under the *mitakshara* system as reflected in Section 6 of the Act had been violative of the equal rights of women guaranteed under the Constitution in relation to property rights. If a joint family gets divided, each male coparcener takes his share and females get nothing. Only when one of the coparceners dies, a female gets share of his interest as an heir to the deceased.

Further as per Section 23 of the Act married daughter is denied the right to residence in the parental home unless widowed, deserted or separated from her husband and female heir has been disentitled to ask for partition in respect of dwelling house wholly occupied by members of joint family until the male heirs choose to divide their respective shares therein. These provisions have been identified as major sources of disabilities thrust by law on woman.

The Law Commission had taken up the subject *suo-motu* in view of the pervasive discrimination against women in relation to laws governing the inheritance *viz-a-viz* succession of property amongst the members of a Joint Hindu Family. This Amending Act of 2005 is an attempt to remove the discrimination as contained in the amended section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu *mitakshara*
coparcenary property as the sons have. Simultaneously, Section 23 of the Act as
disentitles the female heir to ask for partition in respect of dwelling house was
omitted. This is a great step of the government so far the Hindu Code is
concerned.

4.14 Conclusion

As a mother, sister, daughter or wife, the role of the woman in the
development of human beings personality in particular and growth and progress
of society in general, cannot be either denied or undervalued. But for the
centuries, man, that is the male of the species, had kept under his thumb, allowing
her own development to stagnate. He treated her like property and she lived her
life under the domination of her man, even if she was ill-treated, abused or
tortured.

It is disheartening to note that despite all constitutional guarantees and
express provisions, position of women remain almost unchanged. The slogan of
equality is far fetched, women need protection from the same male chauvinistic
attitude, which is outcome of gender bias, and has made the mandatory provisions
of Constitution meaningless.

The above discussion makes it clear that the question of gender injustice
under our personal laws can be easily resolved. Recently the implementation of
Constitutional directive of Article 44 has assumed great significance. We are
aware that implementation of Article 44 is sure to take some time due to the
resistance offered by obscurantist, religious bigots and political man oeuvres. So
if we want to achieve the objective of gender equality, the easiest course is to give
a legal challenge to the obnoxious provisions of our personal laws under Articles
13,14 and 15 of the Constitution in the Courts of law.
Chapter five

JUDICIAL RESPONSE TO GENDER LAWS

Laws alone cannot make justice available to citizens in society. Seeking equality in an unequal society is a task demanding concerted action on the part of the individuals, the community, government and the judiciary on a continuing basis. That is what women as a class must realize in their struggle for equal justice in the democratic republic of India.

Gender justice is a concept understood differently in different cultures and at different periods in history. In this process the Indian Courts have played a significant role in the evolution of a right-based approach towards the empowerment of women. With the support of the liberal provisions of the Constitution, with the aid of a series of pro-women international human rights instruments and an increasingly assertive women’s movement within and outside country, the Indian Courts have given a push to the unfinished agenda of gender justice.

The judiciary is the sentinel of justice. It has to eke out justice to every individual whenever it has been breached and thereby correct the wrong which has been perpetrated. Impartiality and neutrality are the hallmarks of the judicial system. In our country the substantive law is mainly coded in Indian Penal Code. Some of the sexual offences like rape, illicit intercourse, sexual harassment, obscenity; trafficking and prostitution have already been discussed in the previous chapter. It has studied the weaknesses in the present law and submitted certain suggestions. The present part of the study concentrates upon the role of Indian judiciary played towards achieving the goal of gender protection against those sexual offences and thus seeking out justice and equality to the second sex. Landmark decisions delivered by the judiciary bear testimony to the fact that the judges cannot be accused of gender insensitive and injustice.
5.2 Pre-Mathura’s Era: Glimpses of a Restrictive Approach

A glance at the case law on rape decided before Mathura’s trial clearly reveals a restrictive interpretation. Where the rape of minor girls only resulted in the conviction of the accused, the rape of the victim crossing the specified age limit of sixteen years gives her a suspicious look. Majority of such cases had held that every rape on major girls and married women had been done with their consent and thus had set aside the convictions.

In Siddheswar Ganguly v. State of West Bengal, the accused, the secretary of Nari Kalyan Ashram was charged with rape on two girls. One of them was found to be below 16 years of age and accused found guilty of statutory rape. But with respect to another girl named, Narmaya, the court said that:

“Narmaya may well have been above 16, and that, therefore, the accused could not be convicted for rape on her.”

The Supreme Court, in the instant case, enumerated that a girl who is a victim of an outrageous act, is generally speaking, not an accomplice though the rule of prudence requires that the evidence of a prosecutrix should be corroborated before a conviction can be based upon it. If the judge has been apprised of the necessity of corroboration of the evidence of the prosecutrix, it is for the judge to decide whether or not he will convict on the uncorroborated testimony of a prosecutrix in the circumstances of the case before it. Herein, the testimony of the two girls had been corroborated by another inmate of the ashram and there was enough evidence of the fact that the accused was in habit of having him massaged at night by girls. Despite such conclusive corroboration and

1 Tukaram v. State of Maharashtra (1979) 2 SCC 143: 1979 SCC (Cri.) 381. As the victim of the rape was a girl called Mathura, this case came to be known as Mathura case.

2 AIR 1958 SC 143.

3 Ibid., p.148.

4 Ibid., p.147.
evidence, the court failed to hold the accused guilty of rape on *Narmaya*, as she was above 16 years of age.

Another case which shows the judicial behaviour is that of *Dr. AN Mukherjee v. State*,\(^5\) where justice was denied to a married woman because the court refused to step out of the boundaries drawn around itself. The victim, *Harbans Kaur*, was a married woman with four children. She came under the evil influence of the accused, a doctor, who was treating her of some illness. He performed some fake marriage with her in the Hindu and Sikh forms and induced her to believe that he was her legally wedded second husband. In this belief, the woman cohabitated with the man for almost 15 years. The question arose before the court was whether clause (4) of Section 375, IPC would be attracted and if so, whether the accused could be convicted of rape.

The *Allahabad* High Court absolved the penal liability of the accused. It gave the reason that complainant was not an illiterate, rustic, unsophisticated village girl, ignorant of the ways of the world. Her husband was an officer in Railways and she had mixed in the society of railway officers and had come for her treatment to *Calcutta*, all by herself. The Court opined that it was unbelievable that she could have been persuaded by the accused to believe that she could be the wife of another man. She was enjoying an extra-marital relationship which had developed from love and infatuation. Here what the Court failed to perceive that the prosecutrix might have visited some of the hotels and parties and participated in social functions but all in the safe company of her husband. The Court failed to perceive that mere socializing did not make her sharp enough to prepare and protect against the evil forces of the world. The Court concluded that:

>“The accused was the paramour and the prosecutrix his concubine and her allegation that she was induced to cohabit with him in the belief that she was lawfully married to him is wholly incredible.”\(^6\)

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\(^5\) AIR 1969 All. 489.

\(^6\) Ibid., p.500.
There is yet another peculiar judgment of the Apex Court, wherein a girl of 17 years was held to be a consenting party to the offence of rape merely because of the fact that she was found habitual to sexual intercourse and the rupture of the hymen was old.\textsuperscript{7} The victim, a student of ninth standard was induced by her classmate to go to the accused’s house, who was a medical practitioner and a teacher of the school, to know the marks secured by them. He took advantage of the situation and raped her. Thereafter, she was threatened and taken to several places and raped by numerous men, including the accused. The Supreme Court concluded that no doubt the accused had exploited his position, but since, she was ‘used to sexual intercourse’ and her age was above 16, it could not be believed that there was any inducement, threat or compulsion on the part of the accused towards the prosecutrix. She had willingly accompanied him and enjoyed carnal relations with different men.\textsuperscript{8} Ironically, in this case the honourable Supreme Court denied the protection of law to a girl since she was not a virgin. The mere fact that she had a sexual history should not have been made a sole ground for refusing justice to her.

One of the cases which in researcher’s view suffers from serious discrepancies and illogical reasoning given by the Apex Court is \textit{Pratap Mishra’s} case.\textsuperscript{9} Herein, a pregnant woman about 23 years was raped by some NCC cadets. Few days after the incident, the prosecutrix had an abortion which was caused because of the rape committed by the three appellants. While the offence of rape was upheld by the Session Court and High Court, the Hon’ble Supreme Court negated it.

According to the court, the offence of rape had been committed with the consent of the woman and the connivance of her husband. The court gave the reason that the woman was a fully-grown up lady and habituated to sexual intercourse. \textit{Firstly}, the Court opined that it was impossible for any person to rape

\textsuperscript{7} \textit{Ram Murli v. State of Orissa} AIR 1970 SC 1929.

\textsuperscript{8} Ibid., 1032.

such a woman single handedly without meeting stiffest possible resistance from her. The Court was driven to believe that the absence of mark of injuries on her body as well as the body of the accused, indicated non-resistance, meaning thereby, sexual intercourse took place with consent. In fact, this observation leads to grave miscarriage of justice. The court at this point was very well aware of the hard fact that the lady was carrying five months pregnancy. Her physical condition couldn’t allow her to offer any resistance. Secondly, the court reasoned that the accused person had raped her one after the other. There was a time lag of 5-6 minutes between each occurrence. The lady, after the first brutal attack could have closed the doors to prevent the entry of others. Omission on her part to do such a natural thing demonstrated that the whole thing was a ‘pre-arranged show’. Thirdly, the victim’s inability to identify the clothes of the accused worn at the time of the incident went against her. The court branded it as ‘another important circumstance which proves the theory of consent’. Lastly, the fact that the man was cohabiting with the lady at the time he had a legally wedded wife made her a concubine who doesn’t deserve any respect from the society and court felt that it was her so called husband who had willingly given consent to her being ravished by other men.

The above case is a glaring example of conservative approach of our Indian judiciary. Rape is such a heinous crime which renders any female in a state of emotional trauma. Not getting up and closing the doors after the first accused had gone in no situation implies lady’s consent. The Hon’ble Court lost sight of the fact that it is highly improbable for any woman to act in the spur of the moment while undergoing such a shameful and disgraceful act. And to test the memory of the victim regarding the minute details like the clothes of the accused worn at that time is unacceptable to any rational man. It is not justified to expect from a lady to remember every detail, every moment and especially when she was undergoing so great a trauma as rape.

The accused were absolved of their penal liabilities and freed. The decision not only retracted the faith of people in the judicial system but is also

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make out that justice was for a particular section of the society—the men and that it was grossly gender biased.

5.3 Mathura’s Trial: Beginning of a Rebellious Approach

The trend of judicial indifference evident in the earlier period attained its heights in the Mathura Rape Case. In 1978, the Supreme Court pronounced a judgment against a conviction of the Bombay High Court under Section 375, IPC and acquitted the accused in *Tukaram v. State of Maharashtra*, popularly known as the Mathura trial. Here, the Session Judge found the evidence insufficient to convict the accused. The Bombay High Court reversed the finding and sentenced the accused to rigorous imprisonment.

The Supreme Court reversed the decision of the Bombay High Court and held the accused not guilty on three grounds:

1. There were no injuries shown by the medical report and thus “stiff resistance having been put by the girl” is false. The alleged intercourse was a peaceful affair;
2. The Court disbelieved the testimony that she had raised alarm;
3. The Court held that under Section 375 of IPC, only fear of death or hurt can vitiate consent for sexual intercourse. There was no such finding recorded and therefore since the girl was “habituated to sexual intercourse” there was consent.

This judgment was not accepted silently. There were marked protests and it was highlighted that, *firstly*- there were inadequate laws to protect women who are victims of rape and *secondly*- there were not enough legal safeguards to protect women who are summoned to a police station.

The case piloted the voice for amendment in the existing penal provisions to make them more effective in providing justice to the victims. The presumption that if no physical injury is evident on the victim, no sexual intercourse has taken place or rape has not been committed ignores the fact that

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11 AIR 1979 SC 185.
Rape is not only an offence involving physical violence, but also psychological violence. This trauma seems to have been recognized by Apex Court a year later when it was held that the absence of injuries on private parts of the prosecutrix would not rule out her being subjected to rape. In *Rafiq v. State of U.P.*\(^{12}\) the decision of the Supreme Court resulted in the conviction of the accused despite non-existence of any injury on the victim who was raped while she was sleeping.

Keeping pace with the changing times and its changing requirements, the Supreme Court of the country changed its attitude towards the offence of rape, as well as, its helpless victims. It realized that: ‘rape is violation, with violence, of the private person of a woman- an outrage of all canons.’\(^{13}\) It is an act of violence that uses sex as a weapon. Such a crime often has a devastating effect on the survivor, described as ‘beginning of a nightmare.’ In a similar spirit the Supreme Court in *Sheikh Zakir v. State of Bihar*,\(^{14}\) has held:

> “The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance, she cannot be disbelieved.”\(^{15}\)

*BB Hirjibhai v. State of Gujrat*\(^{16}\) is another case which depicted a socially sensitive and responsive judiciary moulding and evolving the laws, so as to meet the demands of time. In the words of the court, ‘And whilst the sands were running out in the time-glass, the crime graph of offences against women in India has been scaling new peaks from day to day. That is why an elaborate rescanning

\(^{12}\) (1980) 4 SCC 262.


\(^{15}\) Ibid.

\(^{16}\) AIR 1983 SC 753.
of the jurisprudential sky through the lenses of ‘logos’ and ‘ethos’ has been necessitated.’\textsuperscript{17}

At another place, the court laid down that, ‘minor discrepancies in the evidence must be overlooked because a witness cannot be expected to possess a photographic memory and to recall details of an incident. It is not as if a videotape is replaced on the mental screen. A witness is liable to get confused or mixed up when interrogated later on.’ \textsuperscript{18}

Thus, the above decisions reflect a remarkable change in the attitude of the Indian judiciary. It recognized that non-resistance on the part of the victim signified only helplessness or passive submission and thus could not be equated with free consent. Secondly, it established that the promiscuous character of a girl did not, in the least, indicate that she consented to an alleged forcible sexual intercourse. The past sexual history of the victim, alone cannot be taken as the sole factor for determining whether the offence had been committed or not. But in the wake of this two aspects went neglected even in this phase-the question of severity of sentence and compensation to victims. It was left solely to the discretion of the judges. With the coming into force of Criminal Law (Amendment) Act 1983 there arose a new hope which sought to modernize the provisions of the archaic rape laws in order to meet the demands of the changed socio-economic conditions of the country and check the increase in crimes.

\textbf{5.4 Sentencing Policy of Judges: Era of Judicial Contradictions}

Despite this judiciary accepted the view of the legislators that the crime of rape was heinous and degrading and the accused deserved no sympathy or pity. But unfortunately, the courts failed to inflict even the prescribed minimum sentences for the offence as laid down under the law. Our judiciary continued to follow the conservative path. In \textit{Suman Rani’s} case the Supreme Court reduced the minimum sentence from 10 years for rape to 5 years, to two police constables

\textsuperscript{17} AIR 1983 SC 756.

\textsuperscript{18} Ibid.
accused of raping a woman in the police station, on the ground that the woman was of questionable character and easy virtue.\textsuperscript{19}

This decision caused a stir, an agitation and a movement by woman’s organizations led to severe criticism of the Supreme Court. The Supreme Court clarified that in its judgment delivered, the court has used the expression ‘conduct’ in its lexicographical meaning, for the limited purpose of showing as to how the victim had behaved or conducted herself in not telling anyone for about five days about the sexual assault perpetrated on her and commented that the peculiar facts and circumstances of the case coupled with the conduct of the victim girl do not call for the minimum sentence under Section 376(2) of IPC.

Following the furor over this decision the Supreme Court in \textit{State of Haryana v. Prem Chand} \textsuperscript{20} asserted that factors like character and reputation of the victim are wholly alien to the scope and object of Section 376 of IPC.

The judgment of the Apex Court in of \textit{State of Maharashtra v. Madhukar Narain Mardikar},\textsuperscript{21} was appreciated. The Supreme Court in this case held that even a woman of easy virtue is entitled to the right to privacy and none can invade it as and when he likes. She is entitled to protect her person if there is an attempt to violate it against her wishes. She is equally entitled to the protection of law. Merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.

A strange problem faced by the judiciary during this era was whether sexual intercourse on promise of marriage could vitiate ‘consent’ as enumerated in Section 90, IPC and thereby amount to rape. It arose in the case of \textit{Jayanti Rani Panda v. State of West Bengal}.\textsuperscript{22} The accused, a school teacher used to visit the house of the prosecutrix and made her believe that he was deeply in love with her and wanted to marry her. On this belief, the girl started cohabiting with the

\textsuperscript{19} AIR 1989 SC 957.

\textsuperscript{20} 1989 Supp (1) SCC 286: 1989 SCC (Cri.) 418.

\textsuperscript{21} (1991) 1 SCC 57.

\textsuperscript{22} (1984) Cr L.J. 1535.
accused and eventually conceived. The accused suggested that she should undergo abortion. The girl refused and, as may be expected, the accused disowned her.

A complaint was filed against the accused and it was pleaded that the consent obtained in the case was vitiated by reason of Section 90, IPC, as it was based on a misconception of fact. The Calcutta High Court came to two conclusions. Firstly, ‘the failure to keep a promise at a future uncertain date due to reasons not very clear does not always amount to misconception of fact. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance.’ Here, the accused might have had the intention of keeping his promise and subsequently he might have felt otherwise. So it could not be said with emphasis that he had no plans of marriage at any point of time and held out a false promise with a view to sexual intercourse. Secondly, the high court, pointing its finger at the unfortunate girl said:

“If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on the part and not an act induced by misconception of fact.”

The consent in the case was established to be real and the accused was set free. Thus, this era can, very well, be termed as a period of judicial contradictions. On the one hand, the judiciary had taken a step forward, towards realizing the full potential of human rights of one-half of the population, comprising the entire woman folk; on the other, it had taken two steps backward by denying them in particular instances their basic right to live with human dignity. It was only in the nineties, that the real change came, and all possible efforts were made to protect and shield woman against the evil forces of the society. It was realized and recognized that they also have the right to lead an honorable and peaceful life. Women, in them, have many personalities combined. They are Mother, Daughter, Sister and Wife and not play things. They must have the liberty, the freedom and,

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24 Ibid.
of course, independence to live the roles assigned to them by Nature so that the society may flourish.

In an important case of this period *State of Punjab v. Gurmit Singh*\(^{25}\), the Supreme Court brought a logical conclusion to the controversy over the rules of corroboration and prudence. This case is in essence the culmination point of the evolution of law discussed so far on this matter. The Supreme Court, in this case, has clearly explained the importance of the victim’s testimony:

“The courts must, while evaluating evidence, remained alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honor such as is involved in the commission of rape on her. The testimony of the victim in such cases is vital unless there are compelling reasons which necessitates looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. The evidence of a victim of sexual assault stands almost on par with the evidence of an injured witness and to an extent is even more reliable.”\(^{26}\)

The accused were held guilty and sentenced to five years rigorous imprisonment and a fine of Rupees 5000. Further, the Supreme Court made some important observations with regard to the manner in which the judiciary should deal with victim of sexual offences. It stressed that the court should not be a silent spectator, when the victim is cross-examined. It should interfere as and when necessity arises, that is, when cross-examination becomes a means of harassment or causing humiliation to the victim of crime. Moreover, trials of rape cases should be held in-camera. It would enable the victim to answer the questions comfortably and at ease. Lastly, as far as possible, cases of sexual assaults should be tried by lady judges, who could feel the grief and agony of the victim and


\(^{26}\) Ibid., pp.393-396.
deliver judgments in the correct perspective, without undue harshness and insensitivity.

5.5 Captivating Areas in the law of ‘Rape’: Demanding Approach

The most problematic area in the offence of rape is penetration of penis into vagina. The present law on rape is extremely inadequate to meet the demands of the times where sexual abuse is not merely confined to rape and molestations, as are understood in common language, they are often made to indulge in oral sex, or are tortured through insertion of artificial objects into vagina. Hence, the Law Commission has expressed its opinion in favour of incorporation of new provisions in the Penal Code and the 172nd report of the Commission has been drafted. However, the entire matter originated in the famous case of Sudesh Jhaku v. KCJ and others.27

In this case, the question arose to whether ‘rape’ as defined in Section 375 IPC was confined only to penile penetration of vagina. A girl of six years was forcibly made to indulge in indecent and nefarious sexual acts by her own father. The accused was charged for offences under Section 354, 377 and 506 of the Indian Penal Code 1860. The mother of the child wanted an additional charge to be made against him under Section 376 of the Code. It as argued that the words ‘sexual intercourse’ and ‘penetration’ as used in Section 375 should be interpreted to mean penetration of any part of the body of a man into any part of the body of a woman, including vagina. In view of alarming increase in the incidence of sexual abuses and the radical changes taking place in the rape laws, all around the globe, it was pertinent that judiciary should give a go-bye to the traditional approach which reflected only male views and male standards.

Learned judge of the Delhi High Court, Jaspal Singh J, while acknowledging the need for expansion of the ambit and scope of rape laws, expressed his inability to do so in the present case. He said, and rightly so, that the definition of ‘rape’ in Section 375,IPC was entirely based on common law, wherein ‘penetration’ meant the act of inserting the penis into the female organs of generation and ‘sexual

intercourse’ confided itself to natural intercourse. He however, did not omit to comment that:28 ‘The concept of crime undoubtedly keeps on changing with the change in political, economic and social set-up of the country. The Constitution, therefore, confers powers both on Central and State legislatures to make laws in this regard. Such rights include power to define a crime and provide for its punishment. Let the legislature intervene and go into soul of the matter.’

It is heartening to note that Indian Judiciary has shown a quite appreciative approach towards combating a heinous crime against woman i.e. rape. It has started recognizing the fact that rape is not only an offence involving physical violence, but also psychological violence. The victim of rape besides physically ravished is psychologically wounded.

In Krishan Lal v. State,29 the Supreme Court cast a duty on courts while dealing with rape cases. “In rape cases, courts must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim’s version. The inherent bashfulness, the innocent naive to and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimonies which warrant credence. To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called ‘judicial’ probability.’30

The Supreme Court has asserted that it is wrong that while we are celebrating woman’s right in all spheres, we show little or no concern for her honour. It is a sad reflection and it must be emphasized that the courts must deal


29 AIR 1980 SC 1252.

30 Ibid., p. 1253.
with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation.  

(i) Considering Rape as an Psychological Assault: An Activist Approach

The Supreme Court while adding life to otherwise a ‘dead provision proclaimed that right to life under Article 21 of the Constitution of India includes the right to life with human dignity. Article 21 assures everyone the right to live with human dignity including all those aspects of life that make it meaningful and worth living.’ Recently in Kapila Hingrone v. State of Bihar, the Apex Court approved the following observations of Field J. in Munn v. Illinios on the meaning of the term ‘life’, “Something more than mere animal existence and the inhibition against deprivation of life extends to all those limits and faculties by which life is enjoyed.”

In Bodhisattwa Gautam v. Subhra Chakraborty, the Apex Court categorically declared that a non-consensual sexual assault on a woman violates her right to dignified life guaranteed under Article 21. Lamenting that the Indian rape law does not recognize the right of the women to live with dignity, the Hon’ble Court opined:

“Rape is thus not only a crime against the person of a woman; it is a crime against the entire society-Rape is, therefore, the most hated crime. It is a crime against basic human rights and is violative of the victim’s most cherished of all the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and


32 PUDHR v. Union of India AIR 1982 SC 147; Bandhu Mukti Morcha v. Union of India AIR 1984 SC 802.


34 94 U.S.113(1876).


36 Recently in State of M.P. v.Munna Chowbey, (2005) 2SCC 710, the Apex Court has reiterated that rape affects the dignity of woman.
psychiatrists rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects.”

In *State of Punjab v. Ramdev Singh*, the Supreme Court reiterated its approach and enticed the judges to be more sensitive towards sexual offences:

“Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is helpless innocent child or a minor it leaves behind a traumatize experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. The courts are, therefore, expected to deal with cases of sexual crimes against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge is better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.”

Moreover, the Indian Courts has recognized that ‘right to life’ extends to even foreigners. It has relied on international instruments and referred thereto as to find and enlarge the meaning and content of the Constitutional rights.

In *Chairman, Railway Board v. Chandrima Das*, the Supreme Court held that a petition for compensation by a victim against the government is

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37 AIR 1996 SC 923.

38 AIR 2004 SC 1290.

39 Ibid., at p.1292.

maintainable even though the victim is not a citizen of India. The Supreme Court held:

“Relief can be granted to her under public law as there was violation of fundamental rights firstly, on ground of domestic jurisprudence based on constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948 which has international recognition as the ‘Moral Code of Conduct’ having been adopted by the General Assembly of the United Nations. The International Covenants and Declarations as adopted by the United Nations have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.”

The Court further held:

“Even those who are not citizens of the country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have a right to ‘life’ in this country. Thus, they have a right to live so long as they are here with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under on obligation to protect the life of the persons who are not citizens.”

Recently in *Pratap Singh v. State of Jharkhand,* S.B. Sinha, J, asserted:

“Some provisions of the international law although may not be a part of our municipal law but the courts are not hesitant in referring thereto as to find new rights in the context of Constitution. Constitution of India and other ongoing statutes have been read consistently with the rules of international law.”

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43 Ibid., 2746.