CHAPTER - V
DOMESTIC VIOLENCE: PREVENTION AND PUNISHMENTS

CHAPTER – V
DOMESTIC VIOLENCE: PREVENTION AND PUNISHMENTS

Atrocities against women are being committed all over the world. Whether it is a developed nation or developing country or even in the third world countries the plight of women is same all over the world. She is perceived as the weaker class who is subjugated to the heinous crimes. She is always at the receiving end of the crimes as a victim whether outside the domain of her house or inside it. Although emancipation of women is being done and to some extent the society became successful in emancipating women by providing justice, equality and liberty to the weaker class of the society. However, the focus of the society as well as the legislature has always been on eradicating the violence against women outside their homes by the strangers. But it is also a known fact that the cruelest crime's a woman is subjected to are at the hands of those she trusts and loves. The previous chapter provides the discussion on Dowry, dowry deaths and punishments for committing dowry deaths/murder under a separate legislation specifically for prevention of Dowry i.e. Dowry Prohibition Act, 1961; Indian Penal Code; Indian Evidence Act and the Code of Criminal Procedure. This chapter deals with various forms of domestic violence which a woman has to undergo before her marriage or after it, prevention and punishments for committing such a crime against the women. This chapter will also discuss some of the crimes committed against the women in the domestic household which are not covered under any legislation yet it is committed and the abuser/accused gets

away without being punished. Following are the crimes committed against the women, its prevention and punishments for committing such a crime: -

1. BIGAMY: -

When we go back to history we see that the institution of marriage did not exist among the primitive society. More or less humans used to live life like animals at that period. Man was so much engaged in the satisfaction of his primary needs i.e. hunger and shelter that there was no time or occasion to think of refinement. Sex life was absolutely free. Only after his two discoveries namely discovery of fire and domestication of animals he started to lead some civilized life, although the sex relationship still remained unregulated. As a result of this only maternity of the child was known and paternity of the child couldn't be determined. Gradually a stage came wherein the concept of possession or ownership seized the human mind and now the human male came up with the idea of knowing his children. The quest of a man to know the paternity of children gave rise to the institution of marriage. After the concept of marriage was developed it was seen as exclusive union between woman and man. However, it remained exclusive union for the female sex only and was not strict for the male sex. Due to such differentiation in the concept of the marriage to both the sex, the institution of marriage or the marriage system was basically divided into three kinds namely Monogamy, Polyandry and Polygamy. The term "monogamy" denotes that a person is permitted to have only one wife or one husband at a time. The monogamy marriage system is essentially of Christian origin. "Polyandry" refers to a marriage system which permits a woman to have more than one husband at a time. "Polygamy" denotes a marriage system wherein a man is permitted to have more than one wife simultaneously. Hence, polyandry and polygamy are the bigamous marriage wherein a man or a woman has more than one wife or

husband. However, monogamy is a strict rule for the women though not so strict for men. The reason behind it is that the descent is to be traced through male and hence the fidelity of the wife has to be secured to know the paternity of his children. Hence, it can be said that women are under man's absolute power.

Marriage generally means a legally and socially sanctioned union between man and woman which provides status to them and their offspring and is regulated by laws, rules, customs, beliefs and attitudes that prescribes the right and duties of the partners. Thus, when a spouse marries for the second time when his/her marriage is subsisting than it can be said that he/she is practicing polygamy or polyandry system of marriage. In other words he/she is guilty of bigamy or has committed the offence of bigamy. Thus, bigamy includes both polygamy and polyandry. In the present day society even though the offence of bigamy is punishable by law yet we can see that there are many men who commit this offence against their wives and even if the wife knows she quietly accepts the fact.

Polygamy system of marriage was recognized among the Hindu's from the ancient times till 1955. However, in Bombay it was prohibited by a statute of 1948 and in Madras by an Act of 1949. Polyandry was not recognized by the Hindu's, although it prevailed in some regions by custom in North and South i.e. in Lahaul Valley in Himachal Pradesh and among *Thiyyas* of South Malabar. In India, polyandry and polygamy have been abolished and monogamy has been made a rule for all the Hindus. The Hindu Marriage Act, 1955 under Section 5(i); The Special Marriage Act, 1954 under Section 4(a); The Parsi Marriage and Divorce Act, 1936 under Section 4; as well as the Indian Christian Marriage Act, 1872 under Section 60 provides that a party to a marriage should not have a spouse living at the time of marriage. Hence it is a condition precedent to every marriage. Thus, all these laws prohibit bigamy. If a party to a

marriage has a spouse living at the time of marriage he is guilty of committing the offence of bigamy. It is important to note that the phrase "*spouse living*" means lawfully wedded wife/husband. That the first marriage is not null and void. In *Jaganatham* vs. *Savitramma* [1] a man and a woman belonging to *Parika* and *Yatha* communities respectively were living as husband and wife for a very long time and had children. The man married another woman. Thus, the wife he was living with files a suit against the man. It was held that their marriage was proved and the mere fact that they belonged to different communities is not sufficient to hold their marriage void.

The Hindu Marriage Act, 1955 under Sections 11 and 17 make bigamy and offence. Section 11 of the Act makes a bigamous marriage void as the said provision provides the following: -

"***Section 11. Void Marriages*** *– Any marriage solemnized after the commencement of this Act shall be null and void and may on a petition presented by either party thereto against the other party, be so declared by a degree of nullity if it contravenes only one of the conditions specified in clause (i), (iv) and (v) of Section 5.*"

From the language of the above section it becomes clear that the first wife of the bigamous marriage has no right to file a petition for nullity of marriage as Section 12 clearly lays down that a petition for a declaration that the marriage null and void can be filed only by either party to the marriage as it was held in *Kedar Nath* vs. *Suprava.*[2] However, in *Surjeet Singh* vs. *Mohinder* [3] it was held that the first wife can file a suit a civil court for a declaration under Section 9 of the Code of Civil Procedure read with Section 34 of the Specific Relief Act that

1. AIR 1972 AP 377.
2. AIR 1963 Pat 311.
3. AIR 1988 P&H 156.

the second marriage of her husband is null and void. She can also file a petition for divorce under Section 13(1)(i).

The Hindu Marriage Act, 1955 under Section 17 makes bigamy an offence. It lays down that: -

"***Section 17. Punishment of bigamy*** *– Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had husband or wife living; and the provisions of Section 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly.*"

Under the Hindu Personal law before the codification a Hindu husband could contract a valid second marriage or even polygamy. This privilege was available for only the men; no similar rights were given to a Hindu wife. However, after the codification as already discussed above under Section 5(i), 11 and 17 bigamy is prohibited and offending party is liable for prosecution under Sections 494 and 495 of Indian Penal Code. Similarly, bigamy is considered a barrier in contracting valid marriage even under the Special Marriage Act, Parsi Marriage and Divorce Act and Christian Marriage Act. However, with respect to the Muslim Personal law a Muslim man can marry four wives at a time but marriage by him to a fifth wife is illegal. Although bigamy is not an offence with respect to Muslim law only in case of men. It will be an offence wherein a woman marries another man when her marriage is still subsisting. Thus, it can be said that polygamy to Muslim men is limited to four wives only.

INDIAN PENAL CODE AND BIGAMY: -

The subject relating to the number of spouses a man or a woman could marry was initially in the exclusive domain of religion. Various communities have their own set of rules and guidelines in their religio-legal literature about time. Be it the Hindus, Buddhist and Jain religion or the Muslim

law which was introduced in India by the Mughal's about a thousand years ago, they all incorporate detailed rules and guidelines relating to marriage and its discipline – including the number of spouses they are permissible to marry at a time. Even the Christians, Jews and Parsis had their own religious laws which speak about marriage as well as permissibility of plurality of spouses. The latest religion added to the galaxy of Indian faiths, viz. Sikhism, too treated the issue spiritually, taking as its basis the indigenous religious tradition and local usage in this regard.[4] However, with respect to the number of spouses a person can marry or take at a time varied from one religion to another as the said issue was accepted and acknowledged by different religion differently.

In 1860 finally during the reigns of the Britishers the newly enacted Indian Penal Code was introduced which contained provisions relating to bigamy. Before the enactment of 1860's Indian Penal Code Indian people living in different parts of British India were governed by the Hindu and Islamic criminal laws. With respect to marriage and bigamy the newly enacted Indian Penal Code contained two consecutive Sections 494 and 495 which deal with polygamy. These two provisions were clearly an innovation introduced into Indian law by the British rulers and there were expectedly based on the British law.

Bigamy had been treated as an offence in England long before the enactment of Indian Penal Code. Earlier there were ecclesiastical courts which had jurisdiction to penalize bigamists, although the specific penal legislation was first promulgated in 1603. The said legislation was enacted in the aftermath of the decision in *Rye* vs. *Fuliambe*[5] bringing forth the extent of bigamous marriages in the country. The statute declared bigamy to be an offence except when the first spouse was missing or absenting himself or herself for seven

4. Kiran B. Jain, *Vice of Bigamy and Indian Penal Code: Ramifications of an Archaic Law, 32 JILI 386 (1990).*
5. (1602) Moo. K.B. 683.

years, or in case the earlier marriage had been dissolved or declared void by the ecclesiastical court.[6] When the Indian Penal Code was being drafted by T.B. Macaulay, the Offences against Persons Act, 1828 re-enacted the law on bigamy and sought to enforce it more stringently by making no exceptions for situations where an earlier marriage was subsisting in any form. Again after the IPC was enacted but before its enforcement, England enacted its new Offences against Persons Act, 1861 wherein the law on polygamy was contained in Section 57.

Under the Indian Penal Code bigamy is an offence under Sections 494 and 495. Section 494 provides that –

"*Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.*"

This section, thus clearly lays down bigamy as a matrimonial offence which is punishable by law. It declares that whether the remarriage is done by husband or a wife, in either case it is an offence if it takes place during the life of first husband or wife. Hence, following are the salient features of this section: -

- The section prohibits both the polygamy and polyandry system of marriage.
- The offence is of penal nature.
- The said provision will be applied to the civil law if the said law prohibits the second marriage to the extent of treating it as "void."
- The offence prescribed under the said provision will be established only when the first spouse is living and marriage with him or her is legally subsisting.
- The provision will be attracted only if the second marriage is a marriage in the eye of the law.

---

6. *Ibid* Note 4 at P. 387.

- This provision will not be attracted where the first marriage is declared by a competent Court to be null and void.
- The said provision will also not apply to a case where the first spouse has been missing for seven years or more or in the circumstances in which law of evidence and most of the personal laws would raise presumption of death.

Along with this the Indian Penal Code 1860, under Section 495 provides that wherein bigamy is committed with concealment of former marriage from person with whom subsequent marriage is contracted. It provides that –

"*Whoever commits the offence defined in the last preceding section having concealed, from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extent to 10 years, and shall also be liable to fine.*"

Hence, it can be said that Section 495 of IPC is a special rule under the general law laid down under Section 494. Some essential elements and ingredients of the Offence of bigamy which is applied under Section 494 will also be applied under Section 495 with an additional ingredient i.e. here there is concealment of the existence of an earlier marriage from the person with whom the subsequent marriage is contracted. In other words the offence of bigamy under Section 495 of IPC will be applied under the following circumstances: -

- When a person married for the second time.
- When such person married for the second time by concealing from his/her new spouse that he/she is already married.

Thus, bigamy whether polygamy or polyandry, would attract application of Sections 494 and 495 only if the resulting marriage is void by

reason of its taking place during the life of first husband or wife. Bigamy will be an offence only if the family law governing him/her treats it as void. Hence, where bigamy is permissible by the family law applicable to such person, it will not be an offence under the IPC.

When the Indian Penal Code was enacted in 1860 the communities of India were not governed by the codified laws, rather they were governed by the traditional or conventional laws. The Hindu's, Buddhist's, Sikh's and Jain's had their own religious laws or customary law wherein polygamy was not prohibited; hence they were outside the scope of Sections 494 and 495. Although polygamy was outside the ambit of the provisions of the Code, polyandry among these communities could attract the application of these provisions, except where customary law permitted it. Jews and Parsis too had their custom and usage which did not specifically prohibit polygamy. Similarly, among Muslims polygamy was permitted up to four wives. Hence, they too remained outside the purview of Sections 494 and 495. Although among Muslims too fifth marriage of a Muslim man and Second marriage of a Muslim woman could attract the provisions of the Code if it could be shown that such a marriage was void under the school of Muslim law applicable to a particular case. Hence, only the Indian Christians in British India treated both polygamy and polyandry as void and, thus, they came within the purview of the Sections 494 and 495.

The other communities in India, now in the present circumstances come under the purview of these two provisions. There was process of reforming laws applicable to marriage to invalidate bigamy started in British India within the decade in which IPC had come into force. Parsis were the first ones to prohibit bigamy in 1865.[7] Then the Christian's enacted two statutes of

7. Parsi Marriagge and Divorce Act, 1865, Ss. 4, 5, 9 & 30, replaced by Parsi Marriage and Divorce Act, 1936, Ss. 4, 5, 11 & 32(d).

family law in 1869 and 1872 which declared bigamy to be void.[8] The first law on civil law was enacted in 1872 which prohibited bigamy and which was made available to those who could give up their religion and personal law.[9] The Brahmosamjis too were willingly subjected to an anti-bigamy statute.[10] Later, provincial legislation in Bombay (*Bombay Prevention of Hindu Bigamous Marriage Act, 1946*); Madras [Madras Hindu (*Bigamy Prevention and Divorce) Act, 1949*]; Sourashtra (*Sourashtra Prevention of Hindu Bigamous Marriages Act, 1950*); and Madhya Pradesh (*Madhya Pradesh Prevention of Hindu Bigamy Act, 1955*) wholly prohibited bigamy for Hindus, Buddhists, Sikhs and Jains. After the independence of India Hindu Personal law was codified and finally in 1955 Hindu Marriage Act Prohibited bigamy for all these communities throughout the country. In the State of Jammu and Kashmir too the new law was adopted by local legislation.[11] Now Hindus, Buddhists, Sikhs, Jains, Christians and Jews come under the purview of Sections 494 and 495 IPC. Though Muslims can marry up to four wives but marriage with the fifth wife will attract the provisions of Sections 494 and 495. Even the parties to civil marriages attract the application of the said provisions.

JUDICIAL INTERPRETATION OF SECTION'S 494 AND 495: -

In order to attract the provisions of Section 494 following things has to be established: -

(i) there has been an earlier marriage of the accused;

(ii) it was a valid marriage under the law applicable; and

---

8. Indian Divorce Act 1869, Ss. 10, 18 & 19(4); Christian Marriage Act 1872, S. 60(2).
9. Special Marriage Act 1872, Ss. 2(1), 15, 16 & 17, replaced by Special Marriage Act, 1954, Ss. 4(a), 15, 24(i), 43 &44.
10. Brahmo Marriage Act, 1872, Ss. 2(i) & 15.
11. Jammu and Kashmir Hindu Marriage Act, 1955.

(iii) the same is legally subsisting when the alleged second marriage takes place.

Hence, the most important thing which has to be proved that there has been an earlier marriage of the accused. Where there has been no earlier marriage, the existence of which can be proved to the satisfaction of court, there will be no room for the application of Section 494. The existence of an earlier marriage can be proved with reference to the form of its solemnization and its validity; and both these aspects will be considered under the matrimonial law applicable to the accused. Various personal and customary laws require the performance of necessary ceremonies and rites in order to constitute a valid marriage between the parties. What ceremonies are necessary depends upon the customs of the community to which the parties belong.[12] The Supreme Court in a series of cases emphasized the strict proof of essential ceremonies of marriages in order to prove that the offence of bigamy is committed. In *Bhaurao Shanker Lokhande* vs. *State of Maharashtra* [13] the appellant Bhaurao was married to Indubai in 1956 and again married Kamalabai in 1962 during the lifetime of the first wife Indubai. The facts clearly reveal that the accused was intending to marry Kamala and both of them went through some form of marriage. To defeat the charge of bigamy, validity of the second marriage was challenged by the appellant on the ground that the essential ceremonies for a valid marriage were not performed. On the other hand, it was contended for the state that it was not necessary for commission of the offence of bigamy under Section 494 IPC that the second marriage was a valid one and that a person going through any form of marriage during the lifetime of the first wife would commit the offence even if the second marriage be void according to the law applicable to the person. However, the Supreme Court held that for the

12. V. Raveendra Reddy. M. L, *Law relating to Bigamy – Need for Change*, 16 IBR 34 (1989).
13. AIR 1965 SC 1564.

offence of bigamy both the marriages must be valid according to the law applicable to the parties. The fact of their living as husband and wife and its recognition by the society was irrelevant in the eyes of law as held in *Kanwal Ram* vs. *Himachal Pradesh Administration.*[14] In Himachal Pradesh amongst a community a special form of marriage is in vogue. It is called '*praina*'. In this form the following ceremonies are essential. First some agnatic relation of the bridegroom goes to the bride's home and offers her *suhag*. Then a relation of the bride called *prainu* brings her to the house of the bridegroom there at the door of the bridegroom's house coins are put in a pot and puja and katha are held. The bride then elders the house on picking up the pot and makes obeisance to her father-in-law and mother-in-law and other elders of the family. Lastly, with feasting the ceremonies end. In this case the ceremony of *praina* form of marriage was not proved as a result conviction on a charge of bigamy was set aside. The court in this case also held that the admission of marriage by the accused is no evidence of marriage for the purpose of proving an offence of bigamy or adultery. The decision taken by the Supreme Court in *Kanwal Ram's case* was followed in *Priya Bala* vs. *Suresh Chandra.*[15] Similarly in *Bolaram Barualti* vs. *Surjya Barualti* [16] it was held that mere admission of the second marriage by the accused is not enough. The performance of necessary ceremonies is a vital question in bigamy case. On failure to prove that necessary ceremonies were performed, prosecution for bigamy cannot succeed. In *Bhaurao Shankar Lokhande* vs. *State of Maharashtra* [17] it was held that a marriage is not proved unless the essential ceremonies required for its solemnization are proved to have been performed. Where the evidence of the witness called to prove the marriage showed that the

14. AIR 1966 SC 614.
15. AIR 1971 SC 1153.
16. AIR 1969 A&N 90.
17. AIR 1985 SC 1564.

essential ceremonies had not been performed, the factum of the second marriage held not proved. Another thing which has to be proved is that the second marriage was the sexual relationship between the husband and the other woman. The sexual relationship between the two was considered as a proof of essential ceremonies which is necessary to constitute a valid marriage must be presumed to have been performed as held in *Priya Bala* vs. *Suresh Chandra.*[18] In the case of *Laxmi Devi* vs. *Satya Narayan* [19] although the "*saptapadi*" could not be proved but it appeared that both were living as husband and wife. It was held that merely because the appellant was not able to prove the second marriage, that does not mean that the appellant wife should be left in the lurch. In *Dr. N.A. Mukherji* vs. *State* [20] a physician was prosecuted for bigamy. It was alleged that three ceremonies of marriage at three different times were performed; one was of moon ceremony, second ceremony was of exchange of garlands in the Kali temple after walking seven steps, an imitation of saptapadi, and the third ceremony was performed before the Guru Granth Sahib, an imitation of that performance of such mock ceremonies of marriage does not constitute valid ceremonies, and therefore the prosecution for bigamy failed. It is proved that no valid ceremony was performed as the parties belonged to two different Hindu communities and the marriage ceremonies performed by them were mere imitation of the ceremonies of their respective communities. It is, thus, essential from the above mentioned case that the first marriage should also be a valid one capable of creating a legal marital relationship.

Basically in order to prove the offence of Section 494 IPC it is essential that the first marriage is performed validly. In *Benodini Howladar* vs.

---

18. AIR 1971 SC 1153.
19. (1994) 5 SCC 545.
20. AIR 1969 All 489.

Emperor [21]as well as *Gajja Nand* vs. *Emperor* [22] it has been held that want of guardian's consent will not make an earlier marriage invalid – a woman married with the consent of her father, though in his absence, cannot be married again. Thus, where the first marriage is void under the law applicable to the parties the second marriage cannot be bigamous. In *Puninti Venkataramana* vs. *State of Andhra Pradesh* [23] it was held that marriage performed during minority will be a valid marriage so as to make a fresh marriage bigamous.

In order to attract the provisions of Section 494 IPC another element which is essential is that the second marriage should be void under the personal law governing the parties by reason of its taking place during the life time of the first spouse. Another thing which has to be observed is that the alleged second marriage can be proved only reference to a proper solemnization of the marriage i.e. the second marriage should also be properly solemnized with due rites and personal law or the customary law applicable to the parties; otherwise it would remain out of the ambit of Section 494. In a large number of cases courts insist upon strict proof of the second marriage and, thus, it gives rise to some complicated problems about proving the second marriage. Among Hindus marriage is a sacrament which must take place through *shastric* or customary ceremonies.[24] The High Courts in number of cases have followed the suit that in the absence of strict proof of marital rites having been properly performed, an alleged second marriage cannot be recognized as marriage under Section 494 IPC. However, the Calcutta High Court in *Binapani Debi* vs. *Ajit Banerjee* [25] has apparently been inclined to recognize the existence of a second marriage even on the basis of its established reputation. The view taken by the Calcutta High Court

---

21. AIR 1927 Cal 48.
22. AIR 1922 Lah 19.
23. AIR 1977 AP 43.
24. Section 7, *the Hindu Marriage Act, 1955.*
25. 1983 Cr. L. J. 1440.

seems to be more reasonable as among Hindu's there are many communities and the nature and divergence of marital rites among them makes the judge made law requiring meticulous compliance with them as a pre-condition to prosecution for bigamy rather unreasonable. Another reason is that generally second marriages are performed secretly. Hence, direct evidence of performance of essential ceremonies cannot be expected in such cases. In such situations wherein the Court insists on strict proof in those cases, it is impossible for the prosecution to establish the offence of bigamy. When second marriages are being performed in secrecy knowing full well that it is an offence and the Courts too insist on strict proof, it amounts to encouraging perjury. It is submitted that law should punish not only the act of undergoing a full second marriage in relation to bigamy but also the act of undergoing any form of marriage ceremony though not complete one, but part of marriage ritual. In order to root out polygamy, we must amend the provisions relating to bigamy in such a way that the act of undergoing any form of marriage ceremony by a person during the life time of his/her spouse shall come within the definition of the offence of bigamy.[26]

Bigamy requires *mens rea* as an essential ingredient for constituting the offence of bigamy like any other offence even though it does not specifically speak of intent of knowledge, fraud or deceit. This has been specifically classified by the courts in a number of cases. Thus, where a married person marries again in good faith and without any criminal intent, the provision of Section 494 shall not apply. Along with *mens rea* there must also be *actus reus.* A mere wrong belief that there is a first marriage is not sufficient. There must be proof on the part of the complainant that the accused had gone through a form of legal marriage observing all the requisite formalities. When this is established and

26. V. Raveendra Reddy M.L, *Law relating to Bigamy – Need for change*, 16 IBR 34 (1989) P. 35.

the other spouse is proved to be living, proof of existence of the marriage is only a formality and the evidence of the complainant to that effect may be sufficient. Hence, it is essential that at the time of the second marriage the accused was already a married man or woman and the previous marriage must be legal and existing. For the existence of marriage, it is essential that both husband and wife should be living. Death of one will automatically put an end to the marriage. However, in case of *Santosh Kumari* vs. *Surjit Singh* [27] the court permitted husband to marry again on the application of the first wife. This raised a vital question that whether such decree permitting the second marriage of the husband is valid? In this case both the parties were Hindu and were married according to Hindu rites. There was no allegation that any divorce had taken place between the parties or their marriage had been declared void by any competent court of law. The wife filed a suit for declaration that the husband be allowed to marry another woman during her life time on the ground of non fulfillment of his sexual desire from his weak and ailing wife. On such application a decree was passed permitting the husband to contract second marriage. It was held that such a decree was absolutely wrong and illegal and against the provisions of the Hindu Marriage Act and the Indian Penal Code.

CONVERSION AND BIGAMY: -

India is a secular country wherein people of various religions reside together. The Constitution of India under Part III provides all its citizens right to freedom of religion.[28] The people as per these provisions have freedom to practice and profess any religion which they desire. All these religions have various personal rules in respect of marriage and its essential characteristics. In some religion marrying more than one spouse is permissible on the other hand it is

27. AIR 1990 HP 77.
28. See Article 25-Article 28, *the Constitution of India.*

an offence in other religion. These differences in the marriage system pose a major problem. Although Conversion from one religion to another is permissible. Hence, the future of the first spouse becomes questionable, along with the validity of such marriage which was performed after the conversion. The real problem lies in those cases when a married male belonging to a monogamous religion becomes convert to polygamous religion and remarries without divorcing his first wife. The questions under such circumstances are whether such marriage is valid? Whether such person is guilty of the offence of bigamy?

In *Skinner* vs. *Orde* [29] a Christian widow used to live and cohabit with a Christian male who had already a wife living. To legalise their cohabitation they converted to Islam. Then they got married in accordance with Mohammedan Law. The Allahabad High Court expressed doubts of the legality of this marriage which their Lordships of the Privy Council thought that they were well warranted in entertaining.

In *John Jiban Chandra* vs. *Abhinash* [30] in a suit for succession to property, it was held by the Calcutta High Court that if an Indian Christian domiciled in India marries an Indian Christian woman domiciled in India and subsequently converts to Islam, his second marriage with a Muslim woman under Muslim law is legal.

Again the question of bigamy arose before the Madras High Court in the case of *Marthamma* vs. *Muniswamy*.[31] In this case a Hindu man embraced Christianity and married a Christian woman according to the rites of Roman Catholic Church. Later, he converted to Hinduism and married a Hindu lady. A case of bigamy was filed under Sections 494 and 495 IPC against him. The Madras High Court acquitted him holding that he was not guilty of the

29. 14 MIA 309.
30. AIR 1939 Cal 417.
31. AIR 1951 Mad 888.

offence of bigamy. It was so held on the ground that then under the Hindu law polygamy was allowed. A landmark judgment was delivered by the Apex Court in *Sarla Mudgal, President Kalyani and others* vs. *Union of India and others.*[32] Herein the Court held that a husband already married under the Hindu law committed bigamy punishable under Section 494 IPC on his entering a second matrimonial alliance after converting himself to Islam. Besides this the second marriage taking place under Muslim law is the violation of the Hindu Marriage Act, 1955 which provides for strictly monogamous marriages, the second marriage was also in violation of principles of natural justice, equity and good conscience since both the parties i.e. the husband and the first wife were not Muslims. Again in *Manikyamma* vs. *Sudarshan Rao*[33] Manikyamma the appellant married A-1, the respondent according to Hindu rites. Later A-1 married A-2 according to Hindu rites. On coming to know that the first wife may take action, A-1 and A-2 converted to Islam and again married according to Muslim rites. A-1 and A-2 were prosecuted for the offence of bigamy. It was held by the Andhra Pradesh High Court that the marriage between A-1 and A-2, though performed according to Hindu rites, could not established as the performance of essential ceremony of *saptapadi* is not proved. In this case the parties belonged to Kamma community and therefore *saptapadi* is a must. The court further held that the marriage between A-1 and A-2 as per the Muslim rites is not valid. The Court found that conversion of A-1 and A-2 into Islamic religion is of a doubtful one. There is no evidence about conversion except the admissions made by the accused. They are observing Hindu formalities and they are not observing Muslim faith. They are called by their Hindu names in the villages. The marriage though performed according to Muslim rites, cannot be treated as a valid marriage as the evidence reveals that

32. 1995 SCC (Cri) 569.
33. 1988 (2) ALT 614.

they have no faith and they are not following Mohammadanism prior to or subsequent to the marriage. The marriage between two Hindus according to Muslim rites, therefore is not valid. It was held that as the marriage between A-1 and A-2 either under Hindu law or Muslim law is not valid. Hence, Section 494 is not attracted. From the above case law it can be assumed that the accused cannot be held to be guilty of the offence of bigamy if the conversion is a bonafide one. A person is held to be guilty of bigamy only when the second marriage becomes void as per the personal law of the parties by reason of taking place during the lifetime of the other spouse. As the convert's second marriage under Muslim law is not void, he cannot be convicted of the offence. In *Baby* vs. *Jayant* [34] the question of solemnization of marriage between two persons who previously belonged to scheduled castes in Maharashtra and later converted to Buddhism came up for consideration. According to the sect the following constitutes the essential ceremony of marriages. The bride and bridegroom after taking their bath and wearing new clothes are brought to the marriage hall. In the marriage hall the photographs of Lord Buddha and Dr. B.R. Ambedkar and placed in a chair and those photographs are worshipped and garlanded by them. Thereafter, both the bride and bridegroom stand with folded hands before these two photographs respectfully bowing to those photographs recite the mantras "*Budham Saranam Gachhami; Dharmang Saranam Gachhami; Sangham Saranam Gachhami.*" Thereafter, sacred ceremonial mantras i.e. "*magalasthake*" are recited. The bride and bridegroom garland each other happily, that they shall conduct their family relations with happiness. After this oath is taken the people present shower flowers followed by distribution of betel-leaves and betel-nuts to guests. In the said case ceremonies in respect of second bigamous marriage were proved and the conviction followed.

---

34. AIR 1981 Bom 283.

However, motivated conversions create certain problems as the motive for conversion is immaterial for the question of validity of conversion. In such motivated conversion especially in case of bigamy a person by 'sham conversion' from monogamous religion to polygamous religion takes second wife besides the first one without exposing to penalty and thereby the object of monogamous marriage law is defeated. This very act amounts to committing fraud upon the law.

2. CHEATING AND FRAUD IN MARRIAGE: -

Women face another form of atrocities in the hands of men which are generally termed as mock marriages. Under the Indian Penal Code there are two provisions relating to mock marriages which are in fact invalid marriages and they are as follows: -

(a) Cohabitation caused by a man deceitfully inducing a belief of lawful marriage. This is also generally known as cheating in marriage.

(b) Marriage ceremony fraudulently gone through without lawful marriage. This is known as fraud in marriage.

CHEATING IN MARRIAGE: -

The Indian Penal Code under Section 493 provides provision with regards to cohabitation caused by a man deceitfully inducing belief of lawful marriage. This is known as cheating in marriage. It provides that wherein a 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 or have sexual intercourse with him and to cohabit or have sexual intercourse with him in that belief, shall be

punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[35]

In order to attract this provision the following essential ingredients in an offence must be present: -

(i) causation of a false belief in the existence of lawful marriage by a person;

(ii) cohabitation or sexual intercourse with the person causing such belief.

From the above points it is clear that the Section does not penalize mere cohabitation or sexual intercourse with a woman who is not lawfully married to him. It only punishes a man for obtaining the body of a woman by a deceitful assurance that he is her husband. This Section, thus, punishes the offence committed when a man either married or unmarried induces a woman to become his wife, but in reality his concubine.

In India we have various religions as a result of which there are various forms of the marriage ceremonies depending on the race or religion to which the person entering into the marriage belongs. When these races are mixed or when religions can be changed or dissembled in India, the offence prescribed under Section 493 IPC is more easily committed by a person by falsely causing a woman to belief that he is of the same race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which according to the law under which she lives is valid. For example where a person is half English and half Asiatic by blood but calls himself a Mohammedan or Hindu and by deception causes a Mohammedan or a Hindu woman to go through the ceremony of marriage in a form which she deems valid and to cohabit with him, he has committed this offence.

---

35. Section 493, *Indian Penal Code*.

The essence of the section is the deception caused by a man on a woman in consequences of which she is led to believe that she is lawfully married to him, while in fact they are not lawfully married. In order to establish deception there must first be allegation that the accused falsely induced her to believe that she was legally married to him. In a case where both the man and woman fully know that they are not husband and wife and no ceremony of marriage takes place between them, there is no question of one of them believing otherwise.[36]

In *Moideen Kutty Haji* vs. *Kunhikoya* [37] where the allegation was that though they were not husband and wife, they had a sexual union during late hours in the night for a pretty long time and there was only a promise to marry in future, and the further allegation was that one day they went for registering the marriage but the man ran away from there and even thereafter she was submitting herself to him regularly for liaison, the facts could not at all attract Section 493, IPC.

It can be said that Section 493 IPC only punishes a man for obtaining the body of a woman by a deceitful assurance that he is her husband. In order to prove deception by such person it must be established that accused had dishonestly or fraudulently concealed certain facts or made false statement knowing it to be false. In *State of Gujarat* vs. *Batuk Hiralal Mehta* [38] it was alleged that the accused aged 58 years induced N aged then 24 years by performing a form of marriage to believe herself to be lawfully married to the accused and then she surrendered her virtue to him. The case had some peculiar features such as the age difference between the accused and N. The accused had

---

36. K.D. Gaur, *A Text book on the Indian Penal Code*, Universal Law Publishing Company, 2006, 721.
37. AIR 1987 Ker 184.
38. 1974 Guj LR 391.

given N some financial help. She was also promised by the accused that he would maintain her throughout her life. It was in this situation that the relationship between the two was developed into a sort of relationship of a married man living with married woman who was at that time not divorced according to law or whose divorce was doubtful. The facts of the case portray the character of the accused as a man given to sex indiscriminately and wantonly. He stands condemned morally. However, his conduct and character cannot be taken into sole consideration in reaching a conclusion that the accused had deceitfully induced the complainant woman to believe that legal marriage was performed and that on such a belief, the woman was induced to cohabit with him. Hence, it was held that the prosecution failed to make out the relevant ingredients of inducement as a result of this the accused is acquitted.

Similarly in *Raghunath Padhy* vs. *State of Orissa* [39] the petitioner, a married Brahmin boy aged 22 years, entered into some sort of a marriage ceremony with a Brahmin widow residing near his house. The two lived as husband and wife and she became pregnant by him, but later he become tired of her, deserted her, and went back to his first wife. The Orissa High Court held that Section 493, IPC is not attracted because from the mere fact that he made a breach of promise as regards registration of marriage, it cannot be inferred that from the very beginning he had no intention of marrying her at all and he just wanted to practice fraud on her by undergoing some sort of fake marriage ceremony, knowing fully well that such a ceremony would not constitute valid marriage. His subsequent act of desertion of a pregnant woman, however censurable would not suffice to make him criminally liable. However, the decision of the Orissa High Court is criticized on the ground that the accused was already married as a result of which he is debarred from marrying again during the life time of his wife.

---

39. AIR 1957 Ori 198.

Hence, it is obvious that the accused deceitfully induced the widow of entering into some sort of marriage ceremony, which he cannot legally perform unless he divorces his first wife.

In *Sammun* vs. *State* [40] it was held by the Madhya Pradesh High Court that wherein a man promises a woman that he would marry her and presented her as his wife before others does not come within the purview of this Section. Similarly, the Orissa High Court in *Amrita Gadtia* vs. *Trilochan Pradhan*[41] held that where there was no proof that the accused had falsely induced a woman to believe that she was married to him by mere exchange of garlands, and the accused and the woman cohabited, and when she became pregnant the accused promised to marry her shows that he was conscious that no proper marriage between the two had taken place, so there was no deception on his part.

The offence mentioned under Section 493 is purely of personal nature; hence the prosecution could be initiated only by the aggrieved party on a complaint made to the Magistrate of the first class. Section 198 of the Code of Criminal Procedure also states that no court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by the person aggrieved by the offence, and there are certain provisos to it. In *Ashwin* Nanubhai vs. State [42] it was held that where a case against a man was started on a complaint made by the woman victim, but during the pendency of the case the woman died, under such circumstances on the death of the complainant her mother can be substituted as a party and the case would proceed as per law. The offence mentioned under Section 493 IPC is punishable

40. 1988 Cr. L. J. 498 (MP).
41. 1993 Cr. L. J. 1022 (Ori).
42. AIR 1967 SC 983.

up to ten years of imprisonment with fine. The offence under this Section is non-bailable, non-cognizable,[43] and non-compoundable.[44]

FRAUD IN MARRIAGE: -

The Indian Penal Code under Section 496 provides the provision with regards to marriage ceremony fraudulently gone through without any lawful marriage. Such an offence is also termed as fraud in marriage. It states that whoever, dishonestly or fraudulently goes through the ceremony of being married, knowing he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.[45]This Section thus seeks to punish fraudulent or mock marriages. It applies to those situations where a fake ceremony is gone through pretending it to be a valid marriage. Such a marriage would not constitute a valid marriage –

(a) in which one of the parties is deceived by the other into the belief that it does constitute a marriage, or

(b) in which effect is sought to be given by the proceeding to some collateral fraudulent purpose.

For example: I **A** in order to attain **B**'s property enters into a fake ceremony to give a pretext of marriage, which he never intended and meant to perform. **A** is liable under this Section. With regards to the question of bigamy under Section 494, Indian Penal Code such an act will not be covered under Section 494 as no valid marriage is intended. Hence, in order to attract an offence under Section 496 Indian Penal Code following ingredients must be present: -

(i) the accused must have gone through the ceremony of being married;

---

43. Criminal Procedure Code, 1973, Schedule I.
44. *Ibid* Section 320.
45. Section 496, IPC.

(ii) the performance of such ceremony should not constitute a lawful marriage;

(iii) the accused must have known that his going though such ceremony did not amount to his lawful marriage;

(iv) the accused must have acted dishonestly or with intent to defraud.

Therefore, in order to constitute an offence under this Section the prosecution must prove that the accused knew that there was no valid marriage and he had gone through a show of marriage with a fraudulent or ulterior motive. Whether the victim and the accused have cohabited or not is not essential. In *Re Vallai Mudali* [46]while returning home with head-load of fuel the girl was seized by the accused who tied a "*tali*" around her neck and the act was committed to spite the girl and her parents, it was held that the act of the accused in tying the '*tali*' did not in the circumstances amount to going thorough the ceremony of being married knowing that she was not thereby lawfully married within the meaning of Section 496 IPC as the accused must be presumed to have knowingly that according to the custom of the community that act did not constitute a ceremony of being married.

Wherein the marriage ceremony is rendered to be a valid marriage in the eye of law Section 496 IPC is not attracted. In *Khitish Chandra* vs. *Emperor* [47] an accused who belonged to the '*Barna*' sub-caste of '*Brahmins*' representing himself to be a '*Barendra Brahmin*' went through the ceremony of marriage with the daughter of the complainant who was a '*Barendra Brahmin*' and who would not have given her daughter in marriage to the accused for the misrepresentation and on account of the marriage, the complainant was excommunicated and thus suffered harm to her mind and reputation. It was held

46. AIR 1947 Mad 193.
47. AIR 1937 Cal 214.

that the marriage not being invalid the accused could not be convicted under Section 496 IPC but was liable to conviction under Section 419 IPC.

In *Ashwin Nanabhai* vs. *State of Maharashtra* [48] a front door neighbour of a Maharashtrian Brahmin lady fell in love with K, a minor daughter of the Brahmin lady. The appellant K both in 1955 consulted a lawyer in connection with their proposed marriage, the appellant then being aged 19/20 years and K being 14/15. The lawyer suggested in view of the minority of the parties the consent of their guardians should be obtained before the marriage. K had been suffering from enlargement of heart and was advised to give up her studies. The mother of K having been informed about the infatuation between K and the appellant eventually agreed to their marriage despite initial reluctance. On 20th October 1960 the marriage was agreed to be registered before the Marriage Registrar. According to the wish of the appellant no publicity was given to the marriage and even the other members of the two families were not invited. On the 24th at about 4 p.m. the appellant, his close friend J and another gentleman represented to be the Marriage Registration Officer. Thereafter he declared that the appellant and K to be husband and wife though this marriage was performed in secrecy, the couple started living openly as husband and wife from that very night. Later the appellant married another girl P by name and enquiries in the office of the Registrar of marriage revealed that the marriage between K and the appellant had not been registered at all. On these facts the Supreme Court held that appellant guilty under Section 496 IPC. However, in *Kailash Singh Parihar* vs. *Pirti Parihar* [49] the accused entered into a second marriage during the pendency of a special appeal against a decree of divorce in violation of Section 15 of the Hindu Marriage Act, 1955. It was held that since the pendency of the appeal was not kept

48. AIR 1970 SC 1998.
49. 1982 Cr. L. J. 1005 (Raj).

secret from the girl or her parents, the act of the accused cannot be said to be dishonest or fraudulent and hence Section 496 IPC is not attracted.

The main essence of Section 496 IPC is that there should be a dishonest or fraudulent abuse of marriage ceremony and for this complaint by the person aggrieved is necessary as held in *Prasanna Kumar* vs. *Dhanalaxmi*.[50] In this case it was held that wherein the matter relates to the marriage of H with W2 complaint by W1 is not tenable because by the alleged mock marriage W1 is not being deceived.

The offence under this Section is non-cognizable, non compoundable and can be tried by the Magistrate of fist class.

DIFFERENCE BETWEEN SECTION 493 AND SECTION 496 OF THE INDIAN PENAL CODE: -

Sections 493 and 496 IPC are some what alike and both of them deal with mock or fraudulent marriages. However, both the Sections have some basic differences. Section 493 IPC makes it an offence wherein a man deceitfully makes a woman believe that the accused is her lawfully wedded husband and induces her to live with him as husband and wife. Whereas under Section 496 IPC the offence is committed wherein a person dishonestly or with a fraudulent intention goes through a marriage ceremony knowing that his is thereby not lawfully married. Hence under Section 493 IPC performance of marriage ceremony is not essential as it relates to the offence wherein a woman is deceived by a man who make her belief that he is her husband, in fact he is not married to her, and induces her to cohabit and have sexual intercourse with her. On the other hand, under Section 496 IPC a fake ceremony is performed in order to deceive the

50. 1989 Cr. L. J. 1829 (Mad).

victim and the accused is fully aware of this fake ceremony and the validity of their marriage.

Section 493 IPC affects only man. It means that under Section 493 IPC law punishes only a man. Whereas Section 496 IPC affects a person of either sex i.e. both a man and a woman may be held guilty under Section 496 IPC.

Under Section 493 IPC deception is one of the most essential conditions followed by cohabitation or sexual intercourse to hold a person liable for the offence. While under Section 496 IPC no form to symbolize marriage is required. A mere verbal deception that the woman is married is sufficient. In other words, in order to prove the offence under Section 496 IPC deception, cohabitation or sexual intercourse is not a *sine qua non*, but a dishonest or fraudulent abuse of the marriage ceremony is sufficient.

Besides these differences between the two sections of the Indian Penal Code it is essential that in both the cases, a form of marriage which is not valid must have been gone through with a fraudulent intention. If all the forms of a valid marriage have been gone through, even with unwilling bride or bridegroom the marriage cannot be said to be invalid, nor can a subsequent disclaimer of a marriage validly performed makes it invalid. In *K.A.N. Subramanyam* vs. *Ramalkshmi* [51] it was held that it is necessary for an offence under Sections 493 and 496 IPC to establish that the deceit and the fraudulent intention contemplated by the provision should have been there at the time of marriage.

3. SATI OR SELF-IMMOLATION: -

In the Indian society there exists a peculiar system which is discriminatory to women. This system is the traditional practice of Sati which is

---

51. 1971 Mad L. J. (Cr 604).

practiced in the Indian society since ancient period. Sati is described as the traditional Hindu practice wherein a widow immolates herself on her husband's funeral pyre. As per this system the widow is burnt to ashes on her dead husband's pyre. Sati was prevalent among certain sects of the society in ancient India who either took the vow or deemed it a great honor to die on the funeral pyre of her husband. In the ancient Hindu society a widow who practiced Sati by burning herself on her husband's funeral pyre was considered to be a virtuous woman and was believed to directly go to heaven, redeeming all the forefathers rotting in hell, by this "meritorious" act. Basically the custom of Sati was believed to be a voluntary Hindu custom in which the woman voluntarily decides to end her life with her husband after his death. The main purpose of dying in his funeral pyre is that even after her husband's death she can be united him forever. This may be the main reason for such a custom as under the Hindu practices there was no place for divorce or remarriage because marriage under the Hindu personal law (i.e. before the enactment of the Hindu Code) was considered to be a sacramental union by which both the husband and wife are united not only in this life but for seven births to come. Hence, there being no room for divorce or remarriage, this practice was followed by the women in the Hindu society. However, the practice of Sati which was a voluntary one distorted into a criminal practice of forcing women to their deaths to make them chaste.

ORIGIN OF SATI: -

Sati or self-immolation is described as a Hindu custom in India. However, Sati pratha is no where mentioned in the Hindu scriptures as an essential custom to be practiced by a widow which it was made out to be. In fact the first woman known as Sati in the Hindu religions literature did not commit suicide on her husband's pyre. She was the consort of Lord Shiva who burnt

herself in fire as protest against her father who did not giver her consort Lord Shiva the respect which she though he deserved. While burning herself she prayed to reborn again as the new consort of Shiva, which she became and her name in the new incarnation was Parvati.[52] Another famous women in Hindu literature who is titled as Sati was Savitri. When Savitri's husband Satyavan died, the Lord of death, Yama arrived to take his soul. Savitri begged Yama to restore Satyavan and take her life instead, which he could not do. So Savitri followed Lord Yama a long way. After a long way in which Yama noticed that Savitri was losing strength but was still following him and her dead husband. He offered Savitri a boon, anything other than her husband's life. Savitri asked to have children from Satyavan. In order to give Savitri her boon, Lord Yama had no choice but to restore Satyawan to life and so Savitri gained her husband back.[53] These two women along with other women in Hindu mythology were exceptionally devoted to their husband which symbolized the truthful Indian wife who would do everything for their husband, hence, they were named Sati. These virtuous women did not commit suicide on their dead husband's pyre. Therefore it can be said that the custom of burning of widow alive on her dead husband's pyre probably did not evolve from religious background but from social background. However, there is one such incident which is mentioned in Hindu mythology wherein Sati, the wife of Daksha was so overcome at the demise of her husband that she immolated herself on his funeral pyre and burnt herself to ashes. Since then her name 'Sati' has come to be symptomatic of self-immolation by a widow.[54]

Whatever may be the cause of adopting this system by the society, Sati in today's world is considered to be an illegal practice and is punishable by law. There are many theories with regards to the origin of Sati.

---

52. http://adaniel/tripod.com/sati.htm [Visited on 21st September 2008].
53. *Ibid.*
54. http://www.vivaaha.org/sati.htm [Visited on 15th November 2008].

Scholars differ on the origin of Sati practice. Some have dated it back to the period of the *Vedas* (approximately 5500 years old). It is often claimed that *Rig Veda* sanctions or prescribes Sati. It consists of verses to be used at funerals. Whether they even describe Sati or something else entirely is disputed. The hymn is about the funeral by burial and not by cremation. Even *Atharva Veda* offer advice to the widow on mourning and her life after widowhood, including her remarriage. However, the *Manusmriti* which is often regarded as the culmination of classical Hindu law, and hence its position is important. It does not mention or sanction 'sati' though it does prescribe life-long asceticism for most widows.[55]The *Puranas* have examples of women who commit sati and there are suggestions in them that this was considered desirable or praiseworthy. In the *Ramayana* Tara in her grief at the death of husband Vali wished to commit Sati. Hanuman, Rama and the dying Vali dissuade her and she finally does not immolate herself. In the *Mahabharata*, Madri the second wife of Pandu, immolates herself she holds herself responsible for the death of her husband who had been cursed with death if he ever had intercourse. He died while performing the forbidden act with Madri, who blamed herself for not having rejected his advance, although she was well aware of the curse.[56]

Another theory which is prevalent states that Sati was introduced to prevent wives from poisoning their wealthy husbands and marry their real lover. One theory prescribes that Sati began with a jealous queen who heard that dead kings were welcomed in heaven by hundred's of beautiful women called Apsaras. Hence, when her husband died she demanded to be burnt on her dead husband's pyre so as to arrive with him to heaven and to prevent the Apsaras from consorting her husband.

---

55. http://en.wikipedia.org/wiki/suttee [Visited on 21st September 2008].
56. *Ibid.*

Although Sati is considered and Indian custom or a Hindu custom it was not practiced all over India by all Hindus but only among certain communities of India. Immolation was more prevalent among the priestly and martial castes. Brahmins and Kshatriyas were the castes wherein a bride was looked upon as a burden as she represented a drain on the family's income while contributing nothing towards it. Hence, when her status as a bride was such, her miseries double when she becomes a widow. Her presence in the family was dreaded and she was considered to be an object of ill omen. Besides after the death of her husband she was considered on dead weight to her in-laws family. A widow was an unwanted burden. She is considered inauspicious as a result of this a widow is prevented from participating in the house-hold work, her voice, her appearance was considered unholy, impure and something that was to be shunned and abhorred. Thus, without her husband a women's existence was not tolerated. She was tortured and ill-treated by the relatives of her husband. As a result of this an extreme outcome was adopted by the society i.e. immolation of the widow, which the women generally accepted happily.

Another auxillary reason which made self-immolation a prevalent practice is the impossibility of widow re-marriage. Widow re-marriage is no where encouraged in ancient scriptures and was always looked down by the society. It arises from the taboos and prejudices that sanctified virginity of a bride as an important reasons. There was also a belief that a widow, especially a young one would fall into immoral practice for sensual pleasure. Hence, the practice of Sati was adopted by the society. However, the *Vedic* practice was for a widow to marry her dead husband's younger brother. During the sutra period she was allowed to marry any near kinsman, in the earliest *Dharmasutra* (Gautama) without enjoining any restriction and in the later (Bandhayana and Vasishtha) enjoining ascetic practices for a short period only. Later on, however this

asceticism alone remained and became life long. But there is no mention of widow burning. Later on we find *Anumarana* is prescribed for a widow as an alternative to life long asceticism. Another reason is that wife were made to believe to adopt this practice or to undergo this practice on the account that if they do so the wife is believed to raise her dead husband even from hell and make him a participant of her heavenly bliss.

Observing the Caste system in ancient India wherein the society was divided into four castes, viz. Brahmin, Kshatriya, Vaishyas and Shudras. The Brahmins were the superior castes. The practice of Sati existed among the higher castes i.e. among Brahmins and Kshatriyas. As the caste system grew more rigid, the Sati became more strict.[57] The practice of Sati existed among the higher castes mainly because it was given an honorable and prestigious outlook among the masses which is adopted by the higher Castes. Hence, we can say that the practice of Sati must have started for maintained or preserving one's Caste.

Sati practice is considered to be originated in India. However, sacrificing the widow in her dead husband's funeral or pyre was not unique only to India. In many ancient communities it was an acceptable feature. This custom was prevalent among Egyptians, Greek, Goths, Scythians and others. Among these communities it was a custom to bury the dead king with his mistresses or wives, servants and other things so that they could continue to serve him in the next world. Due to this fact another theory which is doing the rounds is that Sati was probably brought to India by the Scythians invaders of India. When these Scythians arrived in India they adopted the Indian system of funeral, which was cremating the dead. And so instead of burying their Kings and his servers they

---

57. K. Jamanadas, *Sati was started for Preserving Caste*, http://www.ambedkar.org/research/Sati_Was_Started_For_Preserving_Caste.htm [Visited on 4th April 2008].

started cremating their dead with his serving lovers. The Scythians were warrior tribes and they were given a status of warrior castes in Hindu religious hierarchy. Many of the Rajput clans are believed to originate from Scythians. Later on other castes who claimed warrior status or higher also adopted this custom.[58]

Whatever might have been the reasons for adopting this practice by the society, Sati was said to be a voluntary act which is evident from many of the incidents of self immolation which have occurred since ancient period. Sati often emphasized the marriage between the widow and her deceased husband as rather than the mourning clothes; the to-be sati was often dressed in marriage robes and other finery. She is often seated or lying down on the funeral pyre beside her dead husband. In ancient scriptures there are many accounts which has described woman walking or jumping into the flames after the fire had been lit, and some describe women seating themselves on the funeral pyre and then lighting it themselves. However, this voluntary act by the widow's because a barbaric act of the society wherein women were physically forced to their deaths. There are various pictorial and narrative accounts which often describe the widow being seated on the unlit pyre, and then tied or otherwise restrained to keep her from fleeing after the fire was lit. Some accounts state that the woman was drugged. One account describes men using long poles to prevent a woman from fleeing the flames.[59]

Sati was a practice, generally which wife used to follow, on death of their husband; however, there are some incidents which mention mothers practicing it on the death of their son. Maharani Raj Rajeshwari Devi of Nepal became regent in 1799 in the name of her son, after the abdication of her husband who became a sanyasi. Her husband returned and took power again in 1804. In

58. http://www.sos-sexism.org/English/sati.htm [Visited on 21st September 2008].
59. http://en.wikipedia.org/wiki/suttee [Visited on 21st September 2008].

1806 he was assassinated by his brother and ten days later on 5th May 1806, his widow was forced to commit suicide. In even more rare cases it has been noted that husbands too committed Sati on their wives pyres.

There exist different communities in India and Sati was performed for different reasons as well as in different manners. The communities where the man married one wife, on his death the wife put an end to her life on the pyre. But even in such communities not all widows committed Sati. The women who committed Sati were highly honored and their families were given lot of respect. Hence, it can be said that Sati was seen as halo of honour.

SATI AND JAUHAR: -

The practice of Jauhar is often confused with Sati and they are considered to be same as both these practices have been practiced in the society living in the territory of modern Rajasthan. However, Jauhar and Sati has some basic differences which differentiate both the practices from each other.

'*Jauhar*' is related with '*saka*' wherein both the men and women of the Rajput caste opt for voluntary death in order to avoid capture and dishonour at the hands of their enemies. *Jauhar*[60] was originally the voluntary death on a funeral pyre of the queens and royal women folks of defeated Rajput castes. It consists of mass suicide carried out in medieval times by Rajput women. Mass self-immolation by women was called *Jauhar*. This was usually done before or at the same time their husbands, brothers, fathers and sons rode out in a charge to meet their attackers and certain deaths, the upset caused by the knowledge that their women and younger children were dead, no doubt filled them with rage in this fight to the death called *saka*.[61]Hence, *Jauhar* in the Rajput caste was followed by *saka*. *Jauhar* and *saka* was practiced by the Rajput castes since the

60. Also spelled jowhar.
61. http://en.wikipedia.org/wiki/Jauhar [Visited on 15th November 2008].

Mughal times. During that period North India was under foreign subjugation. The most powerful kingdom set up by the invaders was the Sultanate of Delhi. In order to escape the ordeals received from the invaders which consist of dishonour, rape of women-folk, slavery, conversion of religion, forced marriage etc *Jauhar* was practiced by the Hindu Kshatriya castes. Rajputs who formed the mobility and ruling classes and castes of Rajasthan and northern India.

There are many instances of *Jauhar* (and *saka*), however there are not well recorded. King Vijaipal's wife may have committed Jauhar at the fort of Bayana but this is based on ambiguous information from the "Timan Garh." It is now in Karauli district of Rajathan. The women-folk of the family of Silhadi the military power-broker may have committed *Jauhar*.[62]There are number of historical instances of *Jauhar* especially during the Khilji and Tughlag times. However, the best known cases for *Jauhar* are the three occurrences at the fort of Chittor which are as follows: -

(a) First Jauhar of Chittor: - Ala-ud-din- Khilji, the Sultan of Delhi besieged Chittor fort, which was under the control of Rana Rawal Ratan Singh who was allowed one final glimpse of his wife Rani Padmini in a mirror before he was at the gates and held hostage for Padmini. Padmini sent misleading information that she would join Ala-ud-din, but she was to come with 700 women as befitted her status. As a result of this the Rajputs were able to infiltrate about 2000 men into Ala-ud-din's camp. The Rajputs thus, whisked Ratan Singh out from under the Khilji's nose. Ala-ud-din returned to Delhi to come back better equipped early the next year. The Rajput defense failed as a result of this second attack and the men perished on the battlefield while their womenfolk led by Maharani Padmini, performed *Jauhar*. The saga of Rani Padmini and the *Jauhar* she led are legendary.

---

62. *Ibid.*

(b) **Second Jauhar of Chittor:** - In 1528 AD after the Battle of Khanna, Rana Sanga dies. Soon after his death Mewar and Chittor came under the regency of his widow Rani Karmavati. The kingdom was menaced by Bahadur Shah of Gujarat, who besieged Chittorgarh. Without relief from other forces and facing defeat Rani Karmavati along with other women committed *Jauhar* on March 8, 1535, while the Rajput army fought the Muslim army and were perished in the said battle.[63] However, there is one romantic legend of dubious veracity that Karmavati had asked assistance of Humayun by sending him a Rakhi with a request for his help as a brother. The help arrived too late which resulted in the second *Jauhar* performed at Chittor.

(c) **Third Jauhar of Chittor:** - In September 1567, Akbar them Emperor besieged the fort of Chittor. Rana Udai Singh II, his sons and the royal women using secret routes escaped soon after the siege began. The fact was left under Jaimal Rathore and Patta Sisodiya's command. One morning Akbar found Jaimal inspecting repairs to the fort which had been damaged by explosives and shot him. The bullet hit Jaimal in the leg and wounded him seriously. On the same day the Rajputs realizing that defeat was certain, the Rajput women committed Jauhar in the night of February 22, 1568 AD and the next morning, the Rajput men committed *saka*.[64]

From the above incidents it can be said that *Jauhar* along with *saka* which was similar to some extent to Sati system was practiced by the Hindu kshatriya community due to the alien invasions in India during the Medieval period to protect themselves from dishonour, slavery, forced marriages, rape of women, change of religion and other atrocities by the invaders. From the

63. *Ibid.*
64. *Ibid.*

13th Century onwards up to the coming of the British the position of women was insecure due to the arbitrary power structure associated with the feudal society and the rule of the Sultans of Delhi.[65]

Although *Jauhar* and Sati may seems to be same practice as both of them are the voluntary act by the women wherein they burn themselves alive in the funeral pyre. However, there are some differences between them. *Jauhar* is the mass self-immolation by the women in the funeral pyre, on the other hand, Sati is self-immolation by a single women in the funeral pyre of her husband. Jauhar is committed to avoid capture and dishonour of royal women, whereas Sati is committed in order to rescue one's husband from the hell and to be his companion even on his death. *Jauhar* is always related with *saka* wherein the men go to the battlefield to fight the enemies. *Jauhar* is performed before the *saka* i.e. women burn themselves alive in funeral pyre before the death of their men. On the other hand, Sati is performed after the husband dies. *Jauhar* and *saka* were committed by both the partners and only at times of war, while Sati is performed by widowed women only. Despite these differences *Jauhar* and Sati are placed in the same platform wherein self-immolation is performed by the women. Hence, in spite of the difference they are same as both these practices involve self-immolation by the wife whether widowed or married.

RECORDED INSTANCES OF SATI: -

There are no reliable figures for the numbers who died by sati across the country. A local indication of the number is given in the records kept by the Bengal Presidency of the British East India Company. The total figures of known occurrences for the period 1813-1828 is 8,135; another source gives a comparable number of 7,944 from 1815-1828, thus giving an average of about

65. http://www.vivaaha.org/sati.htm [Visited on 15th November 2008].

507-567 documented incidents per year in that period. Raja Ram Mohan Roy estimated that there were ten times as many cases of Sati in Bengal compared to the rest of the country. Bentick, in his 1829 report, states that 420 occurrence took place in one year in the Lower Provinces of Bengal, Bihar and Orissa, and 44 in the Upper Provinces (the upper Gangetic plain). Given a population of over 50 million at the time for the Presidency, this suggests a maximum frequency of immolation among widows of well under 1%.[66]

TABLE – 1

SL. NO.	YEAR	INSTANCES OF SATI IN INDIA
1.	6th Century AD	Kadamba King Raviverma's wife committed Sati after his death.
2.	908 AD	First documented instance of Sati – Heggadetommo's widow Balkka goes Sati
3.	1510	Portugues traveler Barbosa visits the Vijayanagar empire and witnesses Sati prevalent in the Kshatriya community.
4.	1623	Italian traveler Pietro-Della Valle's account of a Sati ritual at Ikkeri by a woman named Girjakkamma who belonged to Terlenga Community.
5.	1805	Dewan Purnayya in Mysore Court of Wodeyars gives consent to a Brahmin widow to undergo Sati. This is historically rare instance of an upper caste woman undergoing Sati.
6.	1850	Colonel Sleeman's account of a Sati ritual wherein he has mentioned that one Umed Singh Upadhyaya passed away in the village of Gopalpur and his wife wanted to go Sati as till then Sati was banned by Lord William Bentick.
7.	1987	In the State of Rajasthan a young widow aged 18 years named Roop

66. http://en.wikipedia.org/wiki/suttee [Visited on 21st September 2009].

		Kanwar committed Sati stirring a social debate on the topic. People who assisted her in suicide are arrested. But Roop Kanwar is idolized and attained the status of a deity.
8.	1997	Police in Northern India prevented a widow from committing sati.
9.	1999	A woman hysterically jumped on her husband's pyre.
10.	2002	Kuttu Bai, a 65 year widow commits sati in the State of Madhya Pradesh.
11.	18th May 2006	Vidhyawati committed Sati by jumping into the blazing funeral pyre of her husband in Rasi-Bujurg Villagae, Fatehpul District in the State of Uttar Pradesh.
12.	21st August 2006	Janakrani burnt to death at the funeral pyre of her husband Prem Narayan in Sagar District.

Besides the incidences stated in Table 1 there are other instances of Sati which had occurred in the country since ancient period which are worth mentioning. The wife of Goparaja, the general of the Gupta King Bhanugupta, is known to have ascended the funeral pyre of her husband in A.D. 510. Some Queens of Kashmir and Queen Rajyavati of Nepal (8th Century) performed the Sati rite. Gundambe, the wife of Nagadeva, a minister of Calukya Satyasvya of the Deccan (10th Century), burnt herself with her husband, who had lost his life in battle. During the reign of the Cola King Rajendra I of South India, a sudra woman named Dekabbe burnt herself at the news of the death of her husband in A.D. 1057.[67] Similarly King Harsavardhana's mother Yasomati burnt herself to ashes as soon as it became definite that her husband would be passing away within a short time. From these instances of Sati it is proved that the practice of Sati was popular in Northern India, some provinces of South India, and in Central India.

67. D.C. Ganguly, *Some Aspects of the Position of Women in Ancient India*, The Cultural Heritage of India, Volume II, P. 598.

HISTORY OF LEGAL BATTLE AGAINST SATI: -

The practice of Sati system since the ancient period was even though a voluntary act of the widow, still the barbarism involved in this system to end a vibrant life to the flames of a funeral pyre has always been a favorite topic to voice one's own views particularly against this system. Banabbratta, a poet who wrote during the reigns of Harshavardhana (the last Buddhist Emperor prior to Palas) was the first author opposing the practice. He was view that –

"*This practice which is called Anumarana is utterly fruitless. This is a path followed by the illiterate this is manifestation of infatuation, this is a course of ignorance, this is an act of fool hardiness, this is short-sightedness, this is stumbling through stupidity, viz. that life is put and end to when a parent, brother, friend, of husband is dead. Life should not be ended, if it does not leave one of itself.*"[68]

In the 17th Century, Medhatiti, who was a commentator on various theological works pronounced that Sati is like suicide and is against the *Shastras/Vedas*, the Hindu Code of Conduct. With respect to the Sati system he said that – "*One shall not die before the span of one's life is run out.*" The first guru of the Sikhs, Guru Nanak Saheb too spoke out against the practice of Sati.

Apart from the renowned scholars the barbarism involved in Sati system also provoked the rulers of India to prevent this horror of self-immolation. Under the Delhi Sultanates some of the Sultans did try to discourage the custom of Sati which prevailed among large section of the Hindu population, particularly the upper classes and the Rajputs who eulogized the practice of Sati under the Brahmanic domination. In fact, the earliest known governmental efforts to halt the practice were undertaken by Muslim rulers. Mohammed-bin-Tughlaq

---

68. Kadambari: Edited by Kashinath Pandurang Parab, Niraysagar Press, 1890, purva-bhag, pp 339-9. [Quoted in http://www.ambedkar.org/research/Sati_Was_Started_For_Preserving_Caste.htm [Visited on 15th November 2008].

was the first medieval ruler who placed restrictions on its observance. Humayun issued a royal fiat against Sati which he withdrew later. It was in fact, Akbar who insisted on a strict rule against the said practice. Akbar issued an order wherein a licence had to be obtained before a widow could immolate herself within his dominions. The law was meant to prevent any compulsion or force used against an unwilling widow. Akbar did not forbid the Sati altogether, he had issued definite orders to the Kotwals that there 'should not suffer a woman to be burnt against her inclination.' Din-i-Ilahi, Akbar's new faith also condemned this practice.[69] The Kotwals were instructed to delay the woman's decision for as long as possible. Pensions, gifts and rehabilitative help were offered to the potential Sati to wean her away from committing the act. Children were strictly forbidden from the practice.[70] It is said that sometimes Akbar have personally intervened to save unwilling widows from the practice of Sati. Once he rescued the widow of Jai Mal from being burnt and put her son in prison for compelling her to burn herself. Various travelers who visited India during the reigns of Mughals have described that the permission of the governor was absolutely essential before a widow could be allowed to be burnt. The later Mughal Emperors did not make any change in the existing law Aurangzeb was the only emperor who issued definite orders (1664) forbidding sati in his realms altogether, but his orders seem to have had no appreciable effect on the populace, who continued to followed the customs as before.[71] Although the Mughals continued to put obstacles in the way but the practice continued to be carried out in the areas outside Agra.

Portuguese the earliest Europeans who established themselves in Goa tried to override local customs and practices including Sati as they

---

69. P.N. Chopra, *Some Experiments in Social Reform in Medieaval India*, The Cultural Heritage of India, Volume II, P. 632.
70. Maja Daruwala, *Central Sati Act-An Analysis*, http://www.pulc.org/from-archives/Gender/sati.htm [Visited on 21st September 2008].
71. *Supra* Note 69, P. 632-633.

attempted to Christianize territories in their control. The Portuguese banned the practice in Goa by about 1515, though the practice of Sati was not prevalent out there. In their own spheres the Dutch and French too banned sati, but their writ ran in and around their factories only. The Dutch and the French banned the practice of Sati in Chinsurah and Pondicherry. However, the efforts to ward off the evils of Sati were formalized only during the British reign. The British who by then ruled much of the subcontinent, and the Danes, who held the small territories of Tranquebar and Serampore, permitted it until the 19th Century. Although attempts were made to limit or ban the practice of Sati by individual British officers in the 18th Century but without the backing of the British East India Company. The first formal British ban was imposed in 1798, in the city of Calcutta only, however, the practice continued in the surrounding regions. Towards the end of the 18th Century the evangelical church in Britain and its members in India started campaigns against Sati. William Carey and William Wilberforce were the leaders of such campaigns wherein both appeared to motivate the Indians to convert to Christianity. These movements put pressure on the company to ban the act, and the Bengal Presidency started collecting figures on the practice in 1813. The Britishers who first entered India through East India Company established their power and ruled India. No matter how abhorrent they found Sati system their approach towards the sati system in its initial stage remained much like the Mughals. Similarly like the Mughal Emperors the British too tried to regulate it by requiring that it be carried out in the presence of their officials and strictly according to custom. It was under Lord William Bentick that a formal legislation was enacted to curb the evils of Sati. When Bentick was made Governor General in Calcutta he found that in response to the claims that the British legalization of Sati (if voluntary) in 1813 had actually increased the number of deaths by Sati, he requested reports from British district officials about the occurrence of Sati and

solicited the opinions of Hindu elites in Calcutta about the legitimacy of the ritual. In November 1829, he circulated a minute or memorandum in which he outlined his reasons for deciding to prohibit the ritual of Sati. In this minute, written a year after his arrival, Bentinck provided reasons why the British first allowed sati, if it were legal and then the justification for his decision to prohibit the practice and thus reverse the policies of his predecessors.[72] After conducting an opinion poll thorough his administrators to discover whether legislation against sati was advisable and whether Hindu resistance could be contained, he found positive response. Thus, in the following month after he circulated his minute Bentinck and his council of three other Britons promulgated a regulation declaring the practice of sati an illegal act and punishable in British Criminal Courts. He finally within 18 months of his appointment as the Governor of Bengal, passed the Sati Regulation, XVII of 1829 on 4th December. The highlights of the said regulation are as follows: -

- Sati was declared illegal and a criminal offence.
- Zamindars, petty land owners, local agents and officers in charge of revenue collection were made accountable to immediate communication to the officers of any intended sacrifice to their nearest police station.
- In case of willful neglect, the responsible officer was liable to fine of Rs. 200/- or 6 months of jail for default.
- On intimidation, the police official was to go to the spot and declare the gathering illegal, prevail upon the crowd to disperse, explain that any persistence was likely to make them all liable to a crime and if necessary prevent the sati from taking place or go and inform the nearest magistrate of the names and addresses of all those present.

---

72. *Sati: Official Documents, Lord William Cavendish Bentinck,* http://chnm.gmn.edu/wwh/p/103.html [Visited on 21st September 2008].

- If the sacrifice was over, a full and immediate inquiry had to be undertaken in the same way as for any unnatural death.
- Aiding and abetting a sacrifice whether voluntary or not was to deemed culpable homicide.
- Punishment was at the discretion of the court according to the nature and circumstances of the case.
- For any violence or compulsion or helping or assisting in burning of a widow while she laboured under a state of intoxication or stupefaction or because any other cause impede her free will, the Court was constrained to pronounce death penalty.

Lord William Bentinck laid down this legislation with the support of some enlightened Indian reformers and the most renowned one is Raja Ram Mohan Roy, a Bengali reformer who started his campaign against the Sati practice from about 1812. He was the founder of Brahmo Samaj. He not only campaigned against the evil practice of Sati but also fought for the right of the Hindu widow to remarry. He was motivated by the experience of seeing his own sister-in-law commit sati. He visited various cremation ground in Calcutta to persuade widows not to commit sati, formed watch group to do the same, and wrote and disseminated articles to show that it was not required by the scriptures.

The regulation passed by Lord William Bentinck i.e. the Sati Regulation; XVII of 1829 was only applicable in the Calcutta Province. But even before the regulation was passed, the orthodox Hindu Petitioned Lord Bentinck to stop the abolition claiming it to be a "privilege" of believers. The orthodox Hindu formed a group and collected funds to petition against the regulation in the Courts.[73] The ban was challenged in the Courts and the matter went up to Privy

73. http://www.nwmindia.org/Law/Commentary/historical_perspective.htm [Visited on 15th November 2008].

Council in England. In the said petition the petitioners argued that the ban went against the basic assurance given in George III Statute 37 whereby the Hindus were assured complete non-interference with their religion. The abolitionists argued that there was really no freedom of religion that could go beyond what was "compatible with the paramount claims of humanity and justice." In 1832 the appeal was heard by the Privy Council. Of the 7 councilors three finally voted against Bentinck's regulation but finally the regulation was upheld. Gradually, Madras and then Bombay followed the suit and passed their own legislation banning the Sati. Sati remained legal in some princely states for a time after it had been abolished in land under the British control. Slowly even the local rulers who came under the yoke of the British also conceded legislation against sati in conformity with the British regulations. The last state to permit it was Jaipur. But the rulers of Jaipur too banned the practice in 1846.

PROVISIONS AGAINST THE PRACTICE OF SATI UNDER THE INDIAN PENAL CODE, 1860: -

The Charter of 1833 to the East India Company empowered the government to make laws for British India with due respect for native custom and usages. As a result of this the Indian Penal Code, 1860 was drafted under the East India Company T. B. Macaulay, brilliant academician and lawyer was given the brief formulating a comprehensive criminal code of universal application through the entire subcontinent. He had no doubt in his mind that Sati was a barbarous practice which could brook no justification. But the administration of 1860 and the Law Commissioners who revised the first draft were unnecessarily alive to the sensitivities of high caste brahminical feeling and watered down the

murder provisions in relation to sati.[74] Instead of penalizing the act of sati an exception was enacted under Section 300 wherein a mitigation was provided for murder when "*the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent.*"[75] Despite this concession under the IPC, taking life is absolutely prohibited to everyone in every circumstance. However, the punishment varies depending on the nature and circumstances of the offence.

However, wherein the ritualistic public burning or burying alive of a woman is shown to be involuntary, it is murder under Section 300, IPC. The IPC also provides a provision wherein even if the woman was a willing participant, her death still amounts to culpable homicide.[76] Even where a Sati is deemed to be a suicide i.e. voluntary self-killing, the presence of any intoxicant or anything which in fact inhibit free will makes the abettor as culpable as if he had helped murder the victim.[77] The punishment for this is exactly is same as that for murder. The act of committing sati can also be punished for abetment to commit suicide.[78] Wherein the act of Sati is incomplete a person helping to achieve it is caught by the attempt Sections of the IPC. Depending upon the circumstances, the crime may be covered under Chapter XVI of the Code such as attempt to murder;[79] attempt to culpable homicide not amounting to murder[80] and attempt to commit suicide which is an offence for the women as well. Although there is no specific provision which directly criminalizes the act of sati but as per the provisions of the Indian Penal Code such act can be brought within the purview of

---

74. Maja Daruwala, *Cental Sati Act-An analysis*, http://www.pulc.org/from-archieves/Gender/sati.htm [Visited on 21st September 2008].
75. *Indian Penal Code*, Exception 5 of Section 300.
76. *Ibid*, Section 299.
77. *Ibid*, Section 305.
78. *Ibid*, Section 306.
79. *Ibid*, Section 307.
80. *Ibid*, Section 308.

the Code. Abetment can take the form of instigation, conspiracy to do an act or make an illegal omission, intentional aiding, or willful misrepresentation or willful concealment.[81] All these acts are punishable under the Indian Penal Code. These acts also constitute in the commission of Sati. Again depending on the facts, the aider could be abetting murder, or culpable homicide. The provisions present under the Code are enough to punish the persons who are guilty of making any human sacrifice including widow burning.

LAWS AGAINST THE PRACTICE OF SATI IN INDEPENDENT INDIA: -

Indian Penal Code, 1860, was the sole legislation which though did not contain direct provisions for prohibiting or criminalizing the practice of Sati but the commission of sati and other acts related to it could be brought within the purview of the Court. Besides this Code in the independent India there were three more laws which were in force till 1987 which regulated sati system in India. These regulations are mentioned hereunder: -

- Bengal Sati Regulation, 1829.
- Tamil Nadu Sati Regulation, 1830
- Rajasthan Sati (Prevention) Act, 1987.

These regulations to some extent were successful in prohibiting the practice of Sati in their respective area of concern. However, an incident of September 4, 1987 in Deorala Village of Sikar District in Rajasthan shocked the whole world as on the said day an 18 year old girl named Roop Kanwar consigned her to flames or burned alive on the pyre of her husband Maal Singh Shekhawat. She was dressed in her bridal finery and walked at the head of funeral procession to the centre of village and ascended the funeral pyre of her husband. The family lit the pyre fully aware that she was sitting on it alive. There were hundreds of onlookers who

81. *Ibid*, Section 107.

watched the proceedings without any attempt to object to it. In fact, the relatives fed a thousand people in honour of "*sati mata.*" This infamous incident came to the referred as "sati case" the first after the independence.

Shocked by this incident women activists filed a petition in the Rajasthan High Court. As a result the High Court ordered the State government to prevent the function of glorifying sati from taking place on the 13th day of Roop Kanwar's death. The ceremony nevertheless was held with much fanfare. In fact, a procession was taken around in which a festive "*chunnari*" was draped over a *trishul* to resemble the form of a woman which was set ablaze in the presence of VIP's, politicians, legislators and thousands of people. Slogans like "*Sati Mata ki Jai*"; "*Jab tak suraj-chand rahega Roop Kanwar tera naam rahega*" were chanted by the people in procession. Devasted by the glorification of Sati the women's groups and the activists pressurized the Rajasthan Government which led to the promulgation of the Rajasthan Sati (Prevention) Ordinance, 1987 on October 1, 1987, prohibiting the glorification of Sati. The Central Government followed it with a legislation called the Commission of Sati Prevention Act, 1987. It is the sole legislation on this issue which applies to the whole of the country except the State of Jammu and Kashmir. As per this central legislation sati or burning or burying alive of widows or women is revolting to the feelings of human nature and nowhere enjoined by any of the religions of India as an imperative duty. It is also an effective measure to prevent the Commission of Sati and its glorification. Following are the features of the Commission of Sati (Prevention) Act, 1987: -

(a) Definitions: - The Central Act which is called the Commission of Sati (Prevention) Act, 1987 provides us with various definitions. It describes the meaning of Sati. The term "sati" is an ancient Sanskrit term, meaning "a chaste

woman" or "a virtuous woman", or "who thinks of no other man than her own husband." However, the term is used principally to refer to the faithful wife who "becomes sati" through self-immolation on the funeral pyre of her husband. The practice by which the wife joins her husband in the flames and became sati is termed as *sahamarana*, "dying together", also known as *shagamana*.[82] The Act defines the term "Sati" as burning or burying alive of any widow along with the body of her deceased husband or any other relative or without any article, object or thing associated with the husband or such relative; or any woman along with the body of any of her relatives, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the women or otherwise.[83]

The Act makes glorification of Sati an offence. It provides the definition of "*glorification*" in relation to Sati as the observance of any ceremony or the taking out of a procession in connection with the commission of sati, or supporting, justifying or propagating the practice of sati in any manner; or arranging of any function to eulogies the person who has committed sati; or to create any trust, to collect funds or to construct temples, or other structure; or to carry on any form of worship or the performance of any ceremony with a view to perpetuate the honour of, or to preserve the memory of a person who has committed sati.[84] With reference to it, the Act also defines "temple" in connection with glorification of sati as any building or other structure, whether roofed or not, constructed or made to preserve the memory of a person who committed sati or which is used or intended to be used to carry on worship or for the observance of any ceremony in connection with the commission of sati.[85]

---

82. Robert L. Hardgrave, Jr., *The Representation of Sati: Four Eighteenth Century Etchings by Baltazard Solvyns*, http://asnic.utexas.edu/asnic/liardgrave/satiact.eft.htm [Visited on 15th November 2008].
83. *The Commission of Sati (Prevention) Act*, 1987, Section 2(c).
84. *Ibid*, Section 2(b).
85. *Ibid*, Section 2(c).

(b) Punishments for Offences relating to Sati: - Part II of the Central Act lays down punishments for Offences relating to sati under the following categories: -

(i) Attempt to commit sati: - The Act states that whoever who attempts to commit sati and does any act towards such commission shall be punished with imprisonment for a term which may extend to one year or with fine or with both. However, the said provision also provides that the Special Court constituted under Section 9 shall before convicting any such person shall take into consideration the circumstances leading to the commission of the offence, the act committed, the state of mind of the person charge of the offence at the time of the Commission of the act and all other relevant factors.[86]

(ii) Abetment of Sati: - The Act provides that if any person commits sati, whoever abets the commission of such sati, either directly or indirectly shall be punishable with death or imprisonment for life and shall also be liable to fine.[87] It also lays down that wherein a person attempts to commit sati, whoever abets such attempt, either directly or indirectly shall be punishable with imprisonment for life and shall be liable to fine.[88]

With respect to abetment of sati, the Act also lays down the acts which may also be deemed to be an abetment as per the said legislation[89] and they are as follows: -

- Any inducement to a widow or women to get her burnt or buried alive along with the body of her dead husband or with any other relative or with any article, object or thing associated with the husband or such relative,

86. *Ibid*, Section 3.
87. *Ibid*, Section 4(1).
88. *Ibid*, Section 4(2).
89. *Ibid*, Explanation (a)-(g) of Section 4.

irrespective of whether she is in a fit state of mind or is labouring under a state of intoxication or stupefaction or other cause impeding the exercise of her free will;

- Making a widow or women believe that the commission of sati would result in some spiritual benefit to her or her deceased husband or relatives or the general well being of the family;
- Encouraging a widow to remain fixed in her resolve to commit sati and thus instigating her to commit sati;
- Participating in any procession in connection with the commission of sati or aiding the widow or woman in her decision to commit sati by taking her along with the body of her deceased husband or relative to the cremation or burial ground;
- Being present at the place where sati is committed as an active participant to such commission or to any ceremony connected with it;
- Preventing or obstructing the widow or woman from saving herself from being burnt or buried alive; and
- Obstructing or interfering with, the police in the discharge of its duties of taking any steps to prevent the commission of Sati.

Along with this Part V of the Act provides that in case of a prosecution of an offence under Section 4 against any person than the burden of proving that he had not committed the offence shall lie on him.[90] The Act also lays down that wherein a person is convicted of an offence under sub-Section (1) of Section 4 in relation to the Commission of Sati than such person shall be disqualified from inheriting the property of the person in respect of whom such sati has been committed or the property of any other person which he would have

90. *Ibid*, Section 16.

been entitled to inherit on death of the person in respect of whom sati has been committed.[91]

(iii) Glorification of Sati: - Glorification of Sati has been prohibited under the said Act and any such act mentioned under Section 2(b) of the Act shall be liable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less that Rs. 5000/- but which may extend to Rs. 30,000/-.[92]

(iv) Special Powers: - The Act prescribes certain special powers to the Collector or the District Magistrate. It lays down that the Collector or the District Magistrate may by order prohibit sati or abetment to the commission of sati by any person or areas specified in the order. The Collector and District Magistrate are also empowered to prohibit the glorification of Sati.[93] The Act also prescribes punishment comprising imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than Rs. 5000/- but shall not exceed Rs. 30,000/- for contravening the order given by the Collector or the District Magistrate.[94]

(v) Removal of Certain Temples or other Structures: - The Central Act prohibits construction of Temples or other Structures for the purpose of glorifying Sati. The State Government under the said Act has power to direct the removal of certain temples or other structures if it is satisfied that such buildings has been in existence for not less than 20 years and is carrying out the worship or performance of any ceremony with a view to perpetuate the honour of or to preserve the

---

91. *Ibid*, Section 18.
92. *Ibid*, Section 5.
93. *Ibid*, Section 6(1) and (2).
94. *Ibid*, Section 6(3).

memory of any person in respect of whom sati has been committed. The Collector and the District Magistrate too have such powers. And if the orders of the State Government or the Collector or the District Magistrate is not complied with than these persons shall cause the temple or other structure to be removed through a police officer not below the rank of a sub-Inspector at the cost of the defaulter.[95]

Leaving aside the above provision, history is evident that *Maha-Sati* Stones (hero stones) were erected in memory of brave women who committed sati and are periodically worshipped. The custom of sati is deeply embedded in Hindu society and immolated widows are commemorated and revered in temples built in the sati sites. In fact, the India's coalition government in 2001 was pressurized by the Historical Sati Temple Preservation Committee to give national monument status to some 300 temples across the country that glorifies the burning of widows. In the independent India the most infamous sati in memory was the suicide of the 18 year old Roop Kanwar on the pyre of her husband in the village of Deorala, Rajasthan on 4th September 1987. Dr. Narasimhan says the brick platform that makes the sati site draws on an average 100 visitors per day and 5 times more on special days. In fact, Rajasthani women in traditional and colourful attire prostrate themselves before the platform seeking the benediction of the *satimata*, the girl who is believed to have become defied through her fiery immolation on the pyre of husband.

The commercialization aspect of Sati is prohibited under certain other legislations in India. The Civil Procedure Code provides that where donations has been given at the *satisthal* and is used for an illegal purpose, like building a temple against the public policy than such donations when they are at the hands of a Committee can be diverted away from their illegal purpose.[96] An

95. *Ibid*, Section 7.
96. *The Code of Civil Procedure*, Section 92.

amendment to the Income Tax Act is also made wherein exemption is not granted to those who make charitable donations to temples which commemorate or have come up as a consequence of an ancient or recent sati. Hence, the people will be discouraged to donate to such charitable institutions. This amendment was made specifically to exclude Sati temples from benefits given to charitable institutions.

The Collector or the District Magistrate also have power to seize such funds or property wherein they are satisfied that any funds or property have been collected or acquired of glorification of the commission of any sati or which may be found under circumstances which create suspicion of the commission of any offence under this Act.[97] The seizure of such funds or property shall be reported by the Collector or District Magistrate to the Special Court and shall await the orders of such Special Court as to the disposal of the same.[98] The Act under Section 13 provides that where a person has been convicted of an offence under this Act, the Special Court trying such offence may, if it is considered necessary so to do, declare that any funds or property seized under Section 8 shall stand forfeited to the State.

(vi) Constitution of Special Courts and their Powers: - The Act states that all offences under this Act shall be tried by a Special Court constituted under this Act. Hence, it is clearly stated that the offences can be tried only by the Special Courts. It also lays down that the State Government shall, by notification in the Official Gazette, constitute one or more Special Court for the trial of offences under this Act and such Special Court shall exercise jurisdiction in respect of the whole or such part of the State as may be specified in the notification. The Special Court shall be presided over by a judge to be appointed by the State Government with the concurrence of the Chief Justice of the High Court. A person not below the

97. *The Commission of Sati (Prevention) Act, 1987*, Section 8(1).
98. *Ibid*, Section 8(2).

rank of Session Judge or an Additional Sessions Judge shall be qualified for appointment as a judge of a Special Court.[99]

A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts. A Special Court for the purpose of trial of any offence shall have all the powers of a Court of Session and shall try such offence in accordance with the proceeding prescribed in the Criminal Procedure Code for trial.[100] The Act also lays down that wherein a Special Court is trying any offence under this Act it may also try any other offences with which the accused may be charged under Criminal Procedure Code at the same trial if the offence is connected with such other offence.[101] The Special Court is also empowered to convict the accused person under this Act with any such other offences and pass any sentence authorized by this Act or any punishment thereof.[102] With respect to inquiry or trial, the proceedings shall be held as expediously as possible and in particular where the examination of witnesses has begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, and if any Special Court finds the adjournment of the same beyond the following date to be necessary, it shall record its reasons for doing so.[103]

For every Special Court the State Government shall also appoint Special Public Prosecutor. The qualification for public prosecutor is that he should be an advocate for not less than seven years practice or who has held

99. *Ibid*, Section 9.
100. *Ibid*, Section 11.
101. *Ibid*, Section 12(1).
102. *Ibid*, Section 12(2).
103. *Ibid*, Section 12(3).

any post for a period of not less than seven years under the State requiring special knowledge of law.[104]

(vii) Obligations of Certain persons to report about the Commission of the Offence under this Act: - All officers of Government are required and empowered to assist the police in the execution of the provisions of this Act or any rule or order made there under. All village officers and such other officers who are specified by the Collector or the District Magistrate in relation to any area and the inhabitants of such area shall report any matter if they believe that sati is about to be, or has been committed in the area to the nearest police station.[105]

(viii) Powers of Central Government to make rules: - The Central Government is empowered under Section 21 to make rules for carrying out the provisions of this Act, by notification in the Official Gazette. In exercise of the powers conferred by Section 21 of the Act, the Central Government made Commission of Sati (Prevention) Rules, 1988. Under the said Rules, methods of making order for removal of temples or structures under sub-Section (1) and (2) of Section 7[106] are prescribed. The Rules also defines "prohibitory order" as an order issued under Section 6[107] and how such orders shall be made.[108]

SATI AND JUDICIAL INTERPRETATION: -

Sati is practiced by Indian women since ancient period which became rampant during the invasions by foreign rulers like the Mughals, Portugues, Dutch, East India Company etc. Although these foreign rulers after establishing themselves as the rulers in India made efforts to curb this social evil,

---

104. *Ibid*, Section 10.
105. *Ibid*, Section 17.
106. *The Commission of Sati (Prevention) Rules, 1988*, Rule 5 and Rule 6.
107. *Ibid*, Rule 2(1).
108. *Ibid*, Rule 4.

still the people used to practice it. The practice of Sati was controlled to some extent during the reigns of Britishers in India; however, it was not abolished totally. Even in independent India Sati is practiced. The most highlighted horrified case of widow burning or Sati can be seen in the 18 year old Roop Kanwar's case of Deorala, District Sikar, Rajasthan. On her husband's death on 4th September 1987 she climbed the funeral pyre of her husband and burnt alive in the presence of the whole village in the name of having attained sati hood. In Rajasthan alone it was the 26th of such incident. It was not new incident, but the only difference in this case was that the women's groups went on the streets to agitate and prevent the open violation of law by *firstly* murdering the widow and *secondly* by glorifying this act in the name of Sati. The women's groups moved the Rajasthan High Court and got together to stop this act. They forced the Government to bring in the Rajasthan Sati Prevention Ordinance (RSPO), 1987 by October 1, 1987 and later the Central Government to bring in the Commission of Sati Prevention Act, 1987. The law, thus, made Sati punishable offence and any activity to glorify the commission of Sati. Despite these laws, in the State, in the districts and cities of Jaipur, Alwar, Sikar there was open violation of law and a large number of rallies with naked swords, chanting slogans in praise of Sati and Roop Kanwar were seen in these places. 22 cases were filed by the Rajasthan police in these districts under the RSPO. By November the police had filed the charge sheets in these 22 matters. The accused challenged the charge sheets in the Rajasthan High Court who dismissed the charge sheets by December 1987. The Government of Rajasthan challenged the judgment of the High Court before the Supreme Court. The matter came for hearing in 1991. In January 2003, the Supreme Court reversed the Rajasthan High Court judgment in these cases and sent them back for trial to Jaipur.

Finally by June 2003, the trial began in the Sati Court Jaipur. The first Judge of this Special Court was taken ill and after his untimely demise a second judge called Shiv Singh Chauhan was appointed. The Court concluded the matter by 31st January 2004 wherein it acquitted all the accused in four of 22 cases that underwent trial. The mainb reason for their acquittal was stated to be the absence of eyewitnesses to the immolation which took place in the presence of hundreds of onlookers. In fact the Court declared that the prosecution had not been able to prove that Roop Kanwar was alive when she sat on the pyre and was burnt to death. Those acquitted included former minister and vice president of the Rajasthan BJP, Rajendra Singh Rathore, former Bhartiya Yuja Morcha President, and the nephew of vice president Bhairon Singh Shekhawat, Pratap Singh Kachariawas, president of the Rajput Maha Sabha, Narendra Singh Rajawat, former IAS officer Onkar Singh and advocate Ram Singh Manohar. The judgment came as a big blow to the various movements struggling for women's rights and human rights.[109]

CRITICISM OF THE JUDGMENT GIVEN BY THE SPECIAL SATI COURT ON JANUARY 31ST 2004: -

The judgment given by the Special Sati Court on January 31st 2004 came as a big blow to the various groups who are struggling for women's rights and human rights. It was fully criticized by various people and scholars. Since then groups have been protesting against the government of Rajasthan to act immediately to rectify this miscarriage of justice as they feel that if the government of Rajasthan does not appeal in the Rajasthan High Court against these acquittals, chances of justice in the future are reduced in other pending cases.

---

109. Kavita Srivastava and Prem Krishna Sharma, *Trial by Fire*, http://www.sabrang.com/cc/archieve/2004/mar04/sreport3.html [Visited on 15th November 2008].

Reactionary groups who wish to see the revival of Sati will gain encouragement. These groups and the other scholars who abhor sati criticized the judgment given by the Special Sati Court acquitting 11 accused in four of the cases of 22 cases filed in accordance to the Ordinance passed by Rajasthan Government on the following grounds: -

(i) Misrepresentation of the provision defining 'glorification' of Sati: - One of the most glaring problem with this judgment is the manner in which the Court interpreted the provisions defining 'glorification' of Sati practice as defined under Section 2(b) of the Act and Section 5 of the Rajasthan Ordinance, 1987. The Court held that the offence of glorification must be in relation to a particular incident. Therefore first the incident must be proved in order to hold the accused guilty for the offence of glorification in relation to that incident. Therefore first the incident must be proved in order to hold the accused guilty for the offence of glorification in relation to that incident. This approach of the Court itself is perverse and unacceptable.

(ii) The Supreme Court judgment was misinterpreted: - The Sati Court has also misinterpreted judgments of the Rajasthan High Court and Supreme Court given in the same matter in 1987 and 2003. When the Supreme Court remanded the case back to the trial court, it clearly meant that the decision of the Rajasthan High Court is completely quashed and all the matters are open for trial by the Sati Court. But the Sati Court began with the premise that the Rajasthan High Court had already given judgment with regard to Section 6 and hence, the offences under Section 6 were not worthy of trial.

(iii) Defining Sati: - The definition of "Sati" provided under the Rajasthan Ordinance, 1987 was not taken into account into its true sense as the judgment referred to the mythological character of Sita and Anusuya, calling them sati's and argued that anyone refers to Sita or Anusuya cannot be held guilty of glorifying

sati. This argument by the critiques is held irrelevant and exposes the mindset of the Court. The argument in no way is connected to the legal definition of the practice of Sati. The fact of the case wherein the accused were hailing Roop Kanwar as Sati and raising slogans in her honour is clearly evident of glorifying the practice of sati which is an offence in its legal sense. They were not honouring Sita or Anusuya but were glorifying the burning of Roop Kanwar alive on her husband's funeral pyre.

(iv) Ignorance of Evidence: - The Sati Court ignored to take certain evidence in cognizance which could help the case. The Court while acquitting the accused refused to rely on the statement of the policemen who have consistently supported the prosecution case. The Court even ignored the fact that there is a published document, a pamphlet which glorifies not only Roop Kanwars incident but the practice of Sati. The Court refused to consider this evidence on the mere ground that the portions of the pamphlet that amounted to glorification were not specifically pointed out by the prosecution.

(vi) Failure to proceed the case by Prosecution: - It was also alleged that the prosecution half-heartedly proceeded the case or deliberately by doing so helped the accused persons. Similarly the charge-sheets which were filled within a month of the various glorification incidents in 1987 were an act of mere tokenism to assuage movements that were demanding justice in these cases. Besides this there were major loopholes even in the investigation of the said incident.

Still the prosecution of 18 cases of "sati glorification" is pending in the Sati Court. Devasted by the verdict of Sati Court various women's groups in Rajasthan protested outside the Rajasthan State Assembly and about 700 women from about 12 Districts of Jaipur marched the city streets and protested outside the Secretariat demanding Government to file an appeal immediately in the Rajasthan High Court against the acquittal of the accused as well as to take the

18 cases pending before the Sati Court seriously and a special committee of legal experts to set up to argue the cases.

TABLE – 2: CHRONOLOGICAL LIST OF EVENTS[110]

DATE	EVENTS
4/9/1987	18 years old Roop Kanwar of Deorala Village, District Sikar became a widow
4/9/1987 (Before after Noon)	Roop Kanwar was forced to climb on her husband's funeral pyre and was burnt alive in the name of Sati, in the presence of the whole village.
1/10/1987	Rajasthan Government brought in the Rajasthan Sati Prevention Ordinance and later the Central Government brought in Commission of Sati Prevention Act, 1987.
November 1987	22 cases were filed by Rajasthan Police in the District of Jaipur, Alwar and Sikar under the Rajasthan Sati Prevention Ordinance, 1987.
December 1987	Rajasthan High Court dismissed the charge-sheets which were challenged by the accused in the High Court
1991	The matter was brought before the Supreme Court by the Government of Rajasthan challenging the High Court Judgment.
January 2003	The Supreme Court reversed the Rajasthan High Court Judgment in these cases and sent them back for trial to Jaipur.
June 2003	Trial began in the Jaipur Special Sati Court.
31/1/2004	The trial was hastened up in January and on 31st Jan'2004, the Special Court on Sati Prevention and Sessions Court in jaipur acquitted all the eleven accused in hour of the 22 cases on glorification of Sati.

There are innumerable cases of Sati which are still not reported. The social evil called "sati" is still in existence even after 179 years of passing the first legislation banning Sati. It still continues to haunt the Hindu

110. Source from Kavita Srivastava, *She was burnt alive! But they glorified the murder*, http://www.nwmindia.org/Law/Commentary/sati.htm [Visited on 15th November 2008].

society and endangering the existence and human rights of women to lead a respectable and fearless life. The people of India still cannot convict people for glorifying the heinous and barbaric act like Sati.

Recommendation and Suggestion on Amendment to the Commission Of Sati (Prevention) Act, 1987: -

The Commission of Sati system in India has to some extent been curbed from the society due to the introduction of the Commission of Sati (Prevention) Act, 1987. However, with the recent decision of the Special Court in the Roop Kanwar's Case through light upon the mentality of the public as well as the judiciary that despite it the sati system is followed still in India but now it is not glorified like it used to be in the ancient period or before the enactment of the Act. Various recommendations are proposed by the government in the Act such as omission of the words "*nowhere enjoined by religions to*"; definition of the Sati should include putting an end in whatever manner the life of helpless women; Section 3 to be omitted as attempt to commit sati under it is not an offence; Section 4 to be Sati murder and emphasis should be laid on preventive measures. Besides this NCW recommends the substitution of title An Act to provide for additional, ancillary or incidental matters connected with the prevention of Sati Murder. Preamble to the Act be omitted. Instead of Commission of Sati (Prevention) Act it be called '*Commission of Sati Murder (Prevention) Additional Provisions Act.*' Substitution of '*Sati Murder*' for Sati in Section 2(1) (3). Section 8(2) to be substituted to read as-'*every Collector or District Magistrate acting under sub-section (1) shall report the seizure to the court and shall await the order of such court for the disposal of the same.*' Ss 3-5, Ss 9-14, Ss 16-17 be omitted.

Besides this consequential amendments are suggested in the other statutes. It is suggested that in the Indian Penal Code Section 303A should be inserted as Sati murder i.e. "*(1) who ever burns or buries alive....to prevent the commission of sati murder.*" Section 303 B should also be added for punishing glorification of sati murder. It is also suggested that changes should be made under Section 39(1) (v) with respect to duty of public to give information relating to sati murder and its glorification. Amendment Ss. 303A and 303B – cognizable, non-bailable, and prescribing the punishment, which may extend to Rs. 30,000,00/-. Even in the Indian Evidence Act Section 113AB may be inserted for casting duty on the person charged with an offence under Section 303A with onus to prove otherwise.

4. MARITAL RAPE: -

Women have been facing cruel crimes committed against them in the society. They have always been considered as a weaker class in the society who has always been subjugated from ages. Although lots of attention has been paid on eradicating violence against women outside the home i.e. the crimes committed by the strangers, but the ultimate truth is that she is subjected to the most heinous forms of violence at the hands of the person who she loves and trusts the most. One such violence which a woman has to face is committed by her husband which is termed as marital rape.

People are often heard saying that "marriages are made in heaven." But with this thee is also this fact that although to some extent this saying may be true but here in Earth majority of women go through hell after their marriage which is supposedly made in heaven. Marriages from ancient period have been considered to be a sacramental union i.e. a tie which can newer be broken as it is a relationship which is established birth by birth. According to

Smritikars even death cannot break this relation of husband and wife which is not only sacred and religious but is a holy union as well. The object of marriage was to enable man and a woman perform religious duties and to beget progeny.[111] She is known as *Ardhangini* i.e. half of her husband and union with a woman completes a man. The concept of marriage is all about love, compassion, compromise and mutual consent. Although marriage does sanction having sex but only when both partners are willing. It certainly does not mean that the husband has right to have sex with his wife whenever and wherever he pleases. However, in India, the role of men and women has been socially constructed. Women are given a moral order or "dharma" which is called "Stridhan" – the dharma of women entails devotion to one's husband. A woman's career is her husband. This means a woman's obligation in life is to serve her husband and provide him with children. He is essentially her "Lord" for the very meaning of the word "Pali" means both husband and lord. Obedience to and dependence upon men characterizes women's traditional roles in the family. The ideal wife is one whose sole joy in life is to satisfy her husband. Her only concern is to perform properly any of the services demanded by her husband.[112] Leaving aside the above view it is clear that wherein wife does not consent over having sex than rape is committed. The very fact that it is done by one who lives in the house does not mean that it is not rape; in fact it makes it even more of a crime.[113]

DEFINITION OF MARITAL RAPE: -

Marriage is a sacrosanct union. This is known to the world. Thus, whenever the term "rape" is heard we generally think about a crime committed by a stranger, an evil, malicious person but no of us think it in the

111. B.M. Gandhi, *Hindu Law*, Eastern Book Company, Lucknow, 2008, P. 246.
112. http://www.csuchico.edu/~cheing/syllabi/asst001/spring99/paritta/paer1.htm [Visited on 21st September 2008].
113. Kritika Venugopal, *Criminalisation of Marital Rape*, Cr. L. J. 2006, J. 307.

context of marriage, as the general view is that husband cannot rape his wife. After all, how can a husband be accused of rape if he is only availing his conjugal rights? However, marital rape is prevalent throughout the society irrespective of any cultural barriers, religion or the boundaries of the countries. Women all over are subjected to marital rape which is equally a heinous crime as that of the rape committed by a stranger. Rape is Rape, regardless of the relationship between the rapist and the victim.[114] In this case also women's bodies are outraged, regardless of their educational qualifications, class or status.

Although there is no specific legal definition of Marital rape but it can be used to describe sexual acts committed without a person's consent and / or against a person's will, when the perpetrator (attacker) is the woman's husband or ex-husband. In other words, "*Marital rape is any unwanted sexual acts by a spouse or ex-spouse, committed without consent and/or against a person's will, obtained by force, or threat of force, intimation, or when a person is unable to consent. These sexual acts include intercourse, and or oral sex, forced sexual behaviour with other individuals, and other sexual activities that are considered by the victims as degrading, humiliating, painful and unwanted.*" [115] Marital rape is also called wife rape.

DIFFERENCE BETWEEN STRANGER RAPE AND MARITAL RAPE: -

Regardless of the relationship between the rapist and the victim, rape is a very personal and intimate traumatic experience which a victim has to undergo. Although women who have been raped by their husbands (ex-husband), lovers, colleagues, a friend. Live-in partner feel the same experience and reactions to rape as that by a woman raped by strangers, but there are certain

114. http://www.hiddenhurt.co.uk [Visited on 16th April 2008].
115. Kritika Venugopal, *Criminalization of Marital Rape*, Cr. L. J, 2006, J. 307.

differences between stranger and intimate rape (marital rape). The main difference between stranger rape and marital rape is as follows: -

(i) Stranger rape is committed against a woman by someone she does not know or with whom she does not share any experience or history and thus, when the assault happen women has no doubt about what is happening. In other words she is aware of the crime of rape committed on her. Although in such situations the victim often wonders what she has done to precipitate the assault and blames herself. However, in marital rape the circumstances are very different. Unlike stranger rape wherein the victim suffers from a physical and sexual violence, the victim of marital rape suffers from above along with betrayal of trust. As in case of marital rape the person is known to you, whom you thought you know intimately, and whom you trust or with whom you share a home and often in certain cases children. The same person who was compassionate, loving and with whom you shared your fear and sorrows and whom you believe will not hurt you intentionally has actually hurt you. Thus, marital rape is destructive because it betrays the fundamental basis on which marital relationship is based upon. The women is such situation is generally confused as she cannot understand whether her husband has actually raped her. She feels humiliated and betrayed.

(ii) Stranger rape is a sexual act of violence outside the victim's normal relationship. Whereas, marital rape is the outcome of abusive relationship and is very emotional possibly along with physical abuse.

(iii) Stranger rape generally involve certain degree of physical violence while in case of marital rape certain amount of coercion will be applied which is enough to control the victim.

(iv) In case of stranger rape a woman faces the trauma for once only which is enough to traumatize her throughout her life time. On the other hand, victims of marital rape faces it often day after day as she is living in with a rapist who can apply force and commit rape on her whenever and wherever he wants.

KINDS OF MARITAL RAPE: -

Marital rape is categorized into three kinds by legal scholars which are prevalent in the society which are as follows: -

(a) Violent Rape/Battering Rape: - Rape itself is a violent assault on women. In case of violent or battering rape the women experience both physical and sexual violence in the relationship. Herein the abuser uses enough physical violence upon the victim to cause her injury apart from any injuries due to the rape itself. For example: - injuries to genital area or breasts. It may also include punching his wife or injuring her with a knife. Many abusers generally force their wives to submit to sexual acts after a physical assault where the husband wants to make up or to prove her forgiveness and to further intimidate and humiliate her. In some cases women are battered during sexual violence. The majority of marital rape victims fall under this category.

(b) Force-only Rape: - Generally in this form of marital rape the husband/abuser use only the amount of force to control or to hold the wife in certain position. For example: - holding down the victim by her arms or wrists to prevent her from defending herself or to escape from the hold of the abuser. In this form of marital rape battering may not be characteristic of these relationships. This assault is common wherein woman refuses sexual intercourse. In most cases of force-only rape, coercion plays an important role. The victim may also be so

confused and numbed by constant emotional abuse that she simply does not know how to act or react when sex is forced on her.

(c) Sadistic Rape/Obsessive Rape: - In some cases of marital rape the sadistic/obsessive rape is also present. In this kind of marital rape the victim is tortured and is forced to comply with or undergo deeds designed to further humiliate her or to do perverse sexual acts. These acts are often physically violent. For example: -the abuser urinates on the victim, acting out a fantasy of torture; or using other objects during rape etc. Pornography is frequently involved with sadistic forms of rape.

The above mentioned are the three kinds of marital rape but it is difficult to make a clear-cut lines between them as rape on wife can involve any of the above or a combination of them. For example: -the abuser husband may use coercion along with enough force to control or hold victim wife initially but then may use increased violence if the victim struggles.

EFFECTS OF MARITAL RAPE: -

Despite the historical myth that marital rape is relatively insignificant event causing little trauma to the victim but the research indicates that marital rape often has severe or long-lasting consequences for women. The effects of marital rape can be of two types viz. Physical and psychological.

(a) Physical effects: - Physical effects of marital rape include injuries to private organs i.e. vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who are battered and raped frequently suffer from broken bone, black eyes, bloody noses and knife wounds that occur during the sexual violence. Campbell and Alford (1989) report that one half of the marital

rape survivors in their sample were kicked, hit or burned during sex.[116] The physical effect also include specific gynecological consequences such as vaginal stretching, miscarriage, still births, bladder infections, sexually transmitted diseases, infertility and in some cases HIV.

(b) Psychological Effects: - Women who are raped by their husband, boyfriend, partner or live-in partner, are likely to suffer severe emotional or psychological consequences along with the physical violence. In case of marital rape the women who are raped by their partners often experience not one but multiple assaults, hence it is not surprising that marital rape survivors seem to suffer severe and long-time psychological consequences. Again the psychological effects of marital rape can be classified into the following two categories: -

(i) **Short term psychological effect: -** It include Post-traumatic stress disorder (PSTD), anxiety, shock intense fear, depression and suicidal ideation. Compared to women raped by strangers and those whom they don not know well, marital survivors report even higher rates of anger and depression.

(ii) **Long term psychological effect: -** It includes sleeping disorder, eating disorder, depression, intimacy problem, negative self-assessment, sexual dysfunction, flashbacks of rape and emotional pain.

CAUSES FOR MARITAL RAPE: -

In a marriage wherein women are raped by their husband or partner, their rights are being violated by someone with whom they share their lives and homes and above all trust them. Various scholars have researched over

---

116. Raquel Kennedy Bergen, *Marital Rape*, http://www.vaw.net.org/DomesticViolence/Research/VAWnetDoes/ARmrape. [Visited on 15th January 2009].

the reasons of such behaviour by the abuser and have come to conclusion that all around the world majority of women become victim of marital rape due to following reasons which gives rise to heinous crime of marital rape: -

(i)Since ancient period woman has been considered as the property of man which he possess and has physical as well as non-physical control. Thus, it can be said that marital rape is the result of this patriarchal nature of the society where man has every right to do as he pleases with his wife. This position of women in a famil is very much clear from the ancient scriptures of Tulsidas and Manu. In his *Manusmriti* Manu has said "*Day and night women must be kept in dependence by the males of their families. Her father protects her in youth, and her sons protect her in old age: a woman is never fit for independence.*"[117]Thus, since ancient period woman relegated to private domain and she was excluded from the outside world. In the 19th Century, even the European scholars like John Staurt Mill have stated that – "*A female slave has an admitted right, and is considered under a moral obligation, to refuse her master the last familiarity. Not so the wife, however brutal a tyrant from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.*"[118] These archaic views of the society clearly points out the position of women in the society due to which even husbands violated her rights by committing marital rape on her.

(ii) Rape in a marriage is not always about sex. It is about showcasing power over his victim i.e. about the amount of pain the tormentors can inflict emotionally and

---

117. Manusmriti IX, Verses 2 and 3 as cited from F. Max Muller (ed), *The Sacred Books of the East*, 1964, pp: 327-328. [Quoted in Kritika Venugopal, *Criminalization of Marital Rape*, Cr. L. J, 2006, J. 306-307].

118. J.S. Mill, *The Subjection of Women*, ed. S.M.Okin, Indianapolis, IN: Hacket, 1988, P. 33[Quoted in Vasundhara Goel, *Topic role of Judiciary in untying the knot: Judicial process and Unconstitutionality of 'Marital Rape' Exception under IPC*, Cr. L. J, J. 229.

psychologically upon their victims. Marital rape is about balance of power wherein men want to show their wives that in their relationship he is strong one and by forcing them to have sex with them; they shift the power equation in their power.

(iii) Sociologists say that wherein the financial status of wife is stronger than her husband, the men are always threatened by their wife's financial independence as they feel that the sole bread earner gives women a sense of power. Hence, in order to sub-side this sense on women men see that they should punish their wives by using force and debase her dignity. Due to this factor women in a marriage are subjected to marital rape.

(iv) The social evils like infanticide of female child and dowry system in our society which is still prevalent in today's India can also be seen as one of the causes for marital rape as the girl child due to both these practices of the society are not considered important member of the society. The husbands often rape their wife for not bringing enough dowries as a way of punishment or for not begetting sons.

(v) One of the most important reasons for marital rape is that women, specifically in India, are generally married off at a very young age and are inexperienced about sexual activities. These girls can be easily exploited and face marital rape without knowing it to be a wrong infringing their rights.

(vi) Marriage in various religious scriptures has been considered as a sacramental union. Most of the women and even literate ones believe this and despite being raped by her partner continues to succumb to her husbands need due to fear that she may be rejected by the society if she will revolt against it or if she will refuse

her husband, the husband will move towards the greener avenues for satisfying his need or for pleasures.

(vii) Another reason of marital rape is that often a woman does not fight back her husband as not to disturb children sleeping nearby, thereby risking them witnessing the rape; moreover shock or confusion at what is happening paralyses her and real concern for her abuses (husband), which results in her not wanting to do anything which may harm or injure her rapist even to the detriment of herself.

PROBLEMS IN PROSECUTING MARITAL RAPE: -

Marital rape is a very intimate crime committed by husbands on their wife's or is committed by partners of the women which generally occurs behind closed door and are hidden behind the sacrosanct curtain of marriage. Hence, it becomes quite difficult to prosecute the abuser for marital rape. Following are the problems which come up while prosecuting an abuser/husband/partner for marital rape committed on his wife: -

(i) Many women who are victim of marital rape have great difficulty in defining it a rape because the traditional idea which is prevalent in the society is that it is impossible for a man to rape his wife. The reason for this is that during their marriage, vows are exchanged and one such vow is that the other spouse has right over your body and sexuality i.e. we have abdicated any say over one own body and sexuality. A marriage, thus, sanctions having sex. When wife is raped she often question her right to refuse sexual intercourse with her husband because she believes that once she ties the knot of marriage it is her duty to succumb to the wants of her husband even if she does not want it.

(ii) Generally the survivors of marital rape are less likely to report marital rape as the woman feels that reporting rape in marriage may become even more complicated because of woman's relationship to her assailant. Women who has been victim of marital rape is hesitant to report the matter because of family loyalty, fear of the abuser's retribution, inability to leave the relationship due to dependence upon the abuser, or they may not know that rape in marriage is against the law.

(iii) Women who have been victim of rape in marriage feel uncomfortable in discussing the sexual violence experienced with their partner as by disclosing such incident she thinks her private life will be disclosed to the public and will be talk of the town. Thus, disclosing or reporting it will further cause her more humiliation.

(iv) Women are reluctant to report such incident because many women who experience forced sex in marriage do not define it as rape. To them, rape can only be committed by a stranger and sex in a marriage is seen as an obligation and they define forced sex as their "wifely duty" and not rape. Due to this view, women who experience marital rape are unlikely to seek outside assistance to stop the violence.

(v) One of the most important problems which is faced in prosecuting the abuser for marital rape has been the reluctance of the various legal systems to recognize it as a crime at all.

(vi) Another problem is prosecuting the abuser for rape in marriage arises during the procedural level. While the law in theory may hold no difference between a spouses or other person, in practice when the case comes to the court there will be

difficulties in proving that rape in fact took place. The main reason for it is that it in a marriage, sexual relations are to be expected and if the defense claims consent, then the evidential burden is a very difficult burden for the prosecution to discharge.

(vii) Research indicates that even if when women gather courage to report marital rape, there is often a failure on behalf of others including police officers who provide inadequate response; religious advisors who give emphasis upon wife's duty to obey their husband; battered shelter advocates who fails to adequately address the problem of marital rape; and rape crisis centers.

LEGAL POSITION OF MARITAL RAPE IN OTHER COUNTRIES: -

The World Health Organisation in a study conducted in 1997 has reported that one in five women have been a victim of rape or attempted rape in her lifetime and most of these rapes are committed by family members. Various researches prove that at least 20-50% of women in the world are victims of wife abuse and marital rape. In India itself 14-36% of men admit to have forced their wives to have sex with them. Despite these revealing facts the law still remains deficient with respect to criminalize marital rape. Till now, marital rape has been criminalized in fifty one countries in the world and unfortunately India is not one of them.

The United States Department of Justice in its National Violence against Women Survey examined the prevalence of different types of rape; they found that marital rape account for approximately 25% of all rapes. They also estimated that 10% to 14% of married women experience rape in marriage. The problem relating to marital rape has received relatively little attention from social scientists, practitioners, the criminal justice system and larger society as a whole, despite the prevalence of marital rape at this rate. Till 1970's

the society was reluctant to acknowledge the fact that husband can rape his wife as generally the society believe that husband cannot be convicted of raping his wife as with the marriage husband is entitled to have sexual intercourse with his wife, which is implied under the contract of marriage. It also shows the archaic understanding that wives are still treated as the property of their husbands and marriage contract is entitlement to sex (with or without the consent of his wife). In 1993, marital rape became a crime in all fifty States, under at least one section of the sexual offence codes. However, it is remarkable that only a minority of the States has abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, resistance requirements still apply. In seventeen States and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in thirty-three States, there are still some exemptions given to husbands from rape prosecution. When his wife is most vulnerable (for example she is mentally or physically impaired, unconscious, asleep etc) and is legally unable to consent, a husband is exempted prosecution in many of these thirty-three States.[119]

In England, the principle in the form of Judicial Dictum, was given by Chief Justice Sir Mathew Hale when he said that "*By their mutual matrimonial consent and contract the wife hath given up herself in this unto her husband, which she cannot retract*" in the year 1763. [120] From this it is clear that earlier in England the general rule was a man could not be held guilty of rape upon his wife for the wife is in general unable to retract the consent to sexual intercourse which is a part of the contract of marriage. The position in England, earlier to the Sexual Offences Act, 1956 rape is an offence. However, the decision

119. http://www.ebc-india.com/lawyer/articles/645.htm [Visited on 21st September 2008].
120. History of the Pleas of the Crown (By Chief Justice Matthew Hale) 1 Hale PC (1736) 629. [Quoted in C.S. Raghu Raman, *Matrimonial Rape-exemption from prosecution for Husband-State of the law in England*, Scotland and India, Cr. L. J. 2005 J 357.

of House of Lords in *DPP* vs. *Morgan* [121] that a man may have the belief that the woman had agreed to have sex with him even if that belief was unreasonable, created much resentment in England which led to changes in the law. Hence, in 1976 a change was brought in the Sexual Offences Act wherein it was declared that "*a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of intercourse does not consent to it...*" The House of Lords while delving into the propriety of the Common Law rule pertaining to marital rape exemption in the 20th Century ruled in *R* vs. *R* [122] that marital rape exemption is not in tune with the modern "marriage" and marital partnership of spouses. The House of Lords was of opinion that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common law fiction, which no longer represented the position of wife in present day society, and that it should no longer be applied. Thus, marital rape exemption was abolished in its entirety in 1991. This judgment was also affirmed by the European Court of Human Rights in the case of *SW* vs. *U.K.* [123] Amendment to the statutory was made through Section 147 of the Criminal Justice and Public Order Act, 1944. Recently in *R* vs. *C* [124] the Chief Justice Judge, Nelson and Mecombe critically examined Sir Hale's principle. In the said case the accused Mr. Barry C was married to his wife in 1967 and it came to end in 1971. The incident of rape took place while they were married. The husband wanted to have sexual intercourse but she did not agree as she was discharged from hospital after unwanted miscarriage and was very weak. She was raped by her husband. Rape took place in 1970. The jury accepted her evidence

121. (1975) 2 All ER 347.
122. (1991) 4 All ER 481.
123. (1996) 21 EHRR 363.
124. (2004) All ER 1.

and rejected his denial and convicted him for raping his wife. Thus, now marital rape is a criminal act in U.K.

The legal position of marital rape in Scotland was similar to that of England. Even in Scotland the ancient proposition which had governed Courts in Scotland for many years was similar to CJ Hale's principle. There also it was a general rule that husbands could not be convicted for raping their wives. However, in *H.M. Advocate* vs. *Duffy* [125] and *H.M. Advocate* vs. *Paxton* [126] it was held by the Justices that the exemption did not apply where the parties to marriage was not cohabiting. The High Court held that the exemption if it had ever been part of the law of Scotland was no longer so.

Again Lord Emslie, the Lord Justice General in *S* vs. *H.M. Advocate* [127] held that a wife is not obliged to obey her husband in all things nor to suffer excessive demands on the part of her husband. Nowadays it cannot be seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays that whatever the position may have been in earlier centuries that it is an incident of modern marriage that a wife consents to intercourse in all circumstances including sexual intercourse obtained only by force. Hence, husband is guilty of raping his wife and shall go on trial. Lord Emslie also held that the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections is no longer acceptable. Thus, in Scotland, as observed by Lord Emslie that rape had always been essentially a crime of violence and aggravated assault and doubted whether it was ever contemplated by the common law that a wife consented to intercourse against her will and obtained by force.

---

125. 1983 SLT 7.
126. 1984 JC 105.
127. 1989 SLT 469.

In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 of the Crimes Act 1961 was enacted. Now sub-section 4 of the said section provides that a person can be convicted of sexual violence in respect of sexual connection with another person not withstanding that they are married at the time of the sexual connection occurred. In *R* vs. *D* [128] it was held that the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence. Therefore, now there is no distinction in principle to be drawn between sexual violation in marriage and outside of marriage.

In Mexico, the country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists could be imprisoned for 16 years. In Sri Lanka recent amendments to the Penal Code to pass judgment on rape in the context of partners who are actually living together. There are some countries that have begun to legislate against marital rape as they refuse to accept marital relationship as a cover for violence in the home. For example: the Government of Cyprus, in its contribution to the Special Rapporteur, reports that its Law on the Prevention of Violence in the Family and Protection of Victims, passed in June 1993, clarifies that "*rape is a rape irrespective of whether it is committed within or outside marriage.*"[129]

LEGAL POSITION OF MARITAL RAPE IN INDIA: -

Wife since ancient period has been considered as the property of her husband. By consenting to a marriage a woman/wife is considered to have given her irrevocable consent to sexual intercourse to the husband, hence, the husband cannot be guilty of rape which he may commit upon his wife. It is, in fact, the general conception of the society that husband cannot be convicted for

128. (1987) 2 NZLR 272 (CA).
129. http://www.ebc-india.com/lawyer/articles/645.htm [Visited on 21st September 2008].

committing rape on his wife. In the 17th Century Sir Matthew Hale, C.J, made a statement that "*the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind into the husband, which she cannot retract.*"[130] From this statement he made it clear that a woman does not have the right sex with her husband. Thus, the husbands has right to sexual access over their wives which is in direct contravention of the principles of human rights and provides husbands with a licence to rape the wives.

India Penal Code, 1860 operates in India as a substantive criminal law of India. This Code was drafted by T.B. Macaulay and his colleague Law Commissioners. It inherits its legacy from the common law rules and sexual mores which prevailed in the United Kingdom during the first half of the 19th Century and criminalizes 'rape'. Rape has been defined under Section 375 IPC as a coercive non-consensual sexual intercourse with a woman "without her consent" or "against her will." It states that a man is said to commit 'rape' under six circumstances which are as follows: -

(i) against her consent;

(ii) without her consent;

(iii) with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death;

(iv) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;

(v) with her consent, when at the time of giving such consent, she is of unsound mind or intoxicated or the administration by him personally or through another of any stupefying or unwholesomeness substance, she is

130. 1 Hale, *History of the Pleas of the Crown* 629 (1778) [Quoted in *Ibid* Note 129].

unable to understand the nature and consequences of that to which she gives consent; and

(vi) with or without her consent, when she is under 16 years.

However, Exception to Section 375 IPC provides that Sexual intercourse by a man with his own wife, the wife not being under 15 years of age is not rape. The Exception is, undeniably, based on the traditional common law definition of rape i.e. rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear or fraud and the term 'unlawful' in this context means sexual intercourse outside the bond of marriage.

There is another provision under the Indian penal Code which prohibits/punishes a man for having sexual intercourse with his wife. Section 376-A, IPC states that whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. This provision was added in the Indian Penal Code, 1860 in 1983. The said provision was amended based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India. The Section punishes a man for raping his wife only under the circumstances that the spouses should be living apart under a decree of separation or under any custom or usage applicable to their caste or community. The section clearly indicates that the husband cannot be prosecuted for rape on his wife even when the husband has intercourse with her against her will. However, this section is silent when the wife is living separately from her husband on the strength of a mutual agreement for the purposes of Section 125 (4) of the Code of Criminal Procedure, 1973 and the husband has committed rape upon her. Section 376-A, IPC is also not clear about the situation wherein the husband commits rape on his wife during the period

when the spouses are living separately for a minimum period of 1st year or more prior to the presentation of a petition for divorce by mutual consent under the Hindu Marriage Act. Again the Section does not clearly states that can a husband be prosecuted for rape upon his wife wherein she is living separately from her husband under circumstances given in Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956.

The Indian Penal Code under Section 376 prescribes punishment for rape. It provides that when a husband is found guilty of matrimonial rape when his wife is below 12 years of age, he shall be punished with imprisonment for a mandatory minimum period of 7 years, as in ordinary cases of rape since no special dispensation is found guilty of rape on his wife who is between 12 to 15 years of age, he can be punished with imprisonment which may extend to 2 years or with fine or with both.

Hence, in India marital rape is recognized in the following two categories: -

(i) when the wife is under the age of 15 years; and

(ii) when both are living separately under a decree of a Court.

Under the above circumstances if the husband has sexual intercourse with his wife he commits rape and is punishable by law. Except these circumstances husband cannot be held guilty of committing rape on his wife if he has sexual intercourse without the consent of his wife as the general view is that when a man marries a woman, sex is also a part of the package. The provisions of IPC too makes it clear that it is the right of the husband to have sexual intercourse with his wife as by marrying him she has consented to sex and it is the duty of the wife to have sexual intercourse with her husband even if she is unwilling. Since sexual relations are part of the marriage set-up, a woman cannot refuse to have sex with her husband. Similarly, a husband cannot be said to have raped his wife. Even the Law

Commission refused to recognize marital rape apart from the above two circumstances and instead recommended that the exception should not be deleted since that may amount to excessive interference with the marital relationship.[131]

MARITAL RAPE AND THE CONSTITUTION OF INDIA: -

The Constitution reflects the national soul of a country. Constitution of India is one such document which organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the culture and experiences of the country and operates as a vehicle for national progress and unity. Hence, Constitution is not to be construed as a mere law, but as the machinery by which law are made. Laws passed in the country should be in conformity with the principles and ideals enshrined in the Constitution. In relation to marital rape the Indian Penal Code, 1860 provides certain provisions by which the husbands can be prosecuted and punished for committing rape upon their wives under two circumstances as discussed above and apart from these two circumstances husbands cannot be prosecuted or punished as when a man marries a women, sex is also a part of the package. However, in a study that was done in New Delhi it was seen that numerous young, married women are faced with the problem of non-consensual sex. The study shows that between 3-23% of married women are faced with the problem of marital rape. In Uttar Pradesh, one-third of men aged 30 or less and one-fourth of older men reported ever perpetrating non-consensual sex on their wives. Another study in Uttar Pradesh similarly reports that young men are significantly more likely to have recently perpetrated sexual violence on their wives than those married longer. In three states in India (Punjab, Rajasthan and Tamil Nadu), about two-third of

---

131. The Law Commission of India, 172nd Report on Review of Rape Laws, Para 3.1.2.1, March 2000. [Quoted in Sudhanshu Roy and Iti Jain, *Criminalizing Marital Rape in India: A Constitutional Perspective*, Cr. L. J, 2008, J.81 at 85].

men aged 15-24 and 43% of men 36-50 had perpetrated violence on their wives in the 12 months preceding the study.[132] Despite this fact the Law Commission refuse to lift the exemptions provided under Section 375 and Section 376-A IPC.

The Constitution of India under Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India. The equality clause enshrined in Article 14 of wide import. It states that equals should not be treated unequally and unequal are not treated equally. In other words, Article 14 does not prohibit legislation from making a classification or giving differential treatment or having a limited goal, provided such classification is reasonable and based on a objective criterion. The Supreme Court in *State of West Bengal* vs. *Anwar Ali Sarkar* [133] has laid down two requisites of a valid classification which are as follows: -

(i) The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others.

(ii) The differentia must have a rational relation to the object sought to be achieved by the legislation.

It was, thus, held that any law which makes a classification which is unnecessary or irrelevant to the purposes of the legislation, is deemed to be outside the framework of the Constitution. What is a reasonable classification will however depend upon what the judges think to be reasonable. With respect to the landmark judgment of the above case it is submitted that the doctrine of marital exemption to rape does not satisfy the test of equality as it fails to meet the above mentioned requirements of a valid classification on the following grounds: -

(a) The doctrine of marital exemption to rape is not founded on a intelligible differentia. Section 375 IPC protects a woman against forceful sexual intercourse

---

132. http://www.jhuccp.org as visited on 19th May, 2005 as Quoted in Kritika Venugopal, *Criminalization of Marital Rape*, Cr. L. J. 2006, J. 307 at 309.
133. AIR 1952 SC 75.

against her will and without her consent. It, thus, criminalizes the offence of rape. Thus, the Section grants women the right of protection from criminal assault on their bodily autonomy and protects their right of choice as autonomous individuals capable of self expression. It regards rape as a crime wherein the choice of an individual is violated. However, Section 375 IPC provides an exemption which does not regard a forceful sexual intercourse in a marriage as rape. Thus, this exemption withdraws the protection granted by Section 375 IPC from a married woman on the basis of her marital status. This differential treatment of a married women and classification between married and unmarried woman it can be assumed that such exemption is based upon the fact that in a marriage the wife is presumed to have given an irrevocable consent to sexual relationship with her husband. However, such assumption is not correct and is not based on any intelligible differentia as provided by the aforesaid judgment. Such assumption is irrational. Like any other person married woman too have their right of choice and bodily autonomy. She too needs protection of the law in their private spheres. Such exemption, thus, takes away or woman's right of choice and indeed deprives her of autonomy and personhood. Thus, the classification made under Section 375 IPC is unnecessary, unintelligible and violates the mandate of Article 14 of the Constitution of India.

(b) The classification made under Section 375 IPC between married and unmarried women has no rational relation with the object of the Section to protect women from criminal assault on their bodily autonomy. Thus, withdrawing the protection of Section 375 IPC from the victim of rape solely on the basis of the fact that she is married is irrelevant for the purposes of the legislation and thus, violated the test of classification under Article 14 of the Constitution of India.

The Constitution of India under Article 21 confers on all persons the fundamental right to life and personal liberty. After the decision of the

Supreme Court in *Maneka Gandhi* vs. *Union of India* [134] Article 21 now has become source of all forms of rights aimed at protection of human life and liberty. In *Maneka Gandhi's case* the court gave a new dimension to Article 21. It was held that the right to 'live' is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. The same view was elaborated by the Apex Court in *Francis Coralie* vs. *Union Territory of Delhi* [135] wherein it was held that the right to live is not restricted to mere animal existence. It means something more than just physical survival. This was further affirmed by the Supreme Court of India in *Bandhua Mukti Morcha* vs. *Union of India.*[136] In the light of the expanding approach of Article 21, the doctrine of marital exemption to rape violates a host of rights of a woman which have emerged from the expression right to life and personal liberty under Article 21 which are as follows: -

(a) Right to live with human dignity: - As discussed above the right to live is not merely confined to physical existence but includes within its ambit the right to live with human dignity i.e. it is not restricted to mere animal existence but to lead a life with human dignity and all that goes along with it i.e. the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human being. Thus, the right to live with human dignity is one of the most inherent qualities of the right to life which recognize the autonomy of an individual

The Supreme Court in a landmark judgment in the case of *Bodhisathwa Gautam* vs. *Subhra Chakraborty* [137] held that "*women also have the right to life and liberty; they also have the right to be respected and reacted as*

134. AIR 1978 SC 597.
135. AIR 1981 SC 746.
136. AIR 1984 SC 802.
137. (1996) 1 SCC 490.

equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life." It was also held that rape is a crime against basic human rights and is violative of the victim's most cherished of the fundamental right i.e. the right to life contained in Article 21. Rape is not merely an offence under the Indian Penal Code, but it is a crime against the entire society. Rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. In *Chairman, Railway Board* vs. *Chandrima Das* [138] it was held by the Court that rape violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. Thus, the exemption provided under Section 375 IPC is also violative of a woman's right to live with human dignity as it legitimizes the right of the husband to compel his wife into having sexual intercourse against her will and without her consent which goes against the very essence of right to life under Article 21 and is hence unconstitutional. The marital exemption to rape as provided under Section 375 IPC draw a distinction between rape victims on the basis of their marital status which indirectly portrays that married women do not have aright to live with human dignity in a marriage. Thus, the exemption strikes at the fundamental rights of a married woman as provided under Article 21 of the Constitution.

(b) Right to Privacy: - The Indian Constitution does not mention anywhere the right to privacy, however, in a series of cases, the Supreme Court has recognized that a right to privacy is constitutional protected under Article 21 of the Constitution. In *Govind* vs. *State of Madhya Pradesh* [139] it was held that right to privacy is a part of Article 21. In *R. Rajagopal* vs. *State of Tamil Nadu* [140] which is popularly known as "*Auto Shankar case*" the Supreme Court has expressly held

138. AIR 2000 SC 988.
139. AIR 1975 SC 1378.
140. (1994) 6 SCC 632.

that right to privacy under Article 21 includes the right to be let alone. Hence, wherein a woman is raped or any form of forceful sexual intercourse by the husband violates the right to privacy of the wife. Hence, the doctrine of marital exemption to rape violates a married woman's right to privacy by forcing her to enter into a sexual relationship against her wishes. In *State of Maharashtra* vs. *Madhukar Narayan* [141] the Supreme Court held that every woman was entitled to sexual privacy and it is not open to for any or every person to violate her privacy as and when he wished. Thus, even in a marriage there exists a right of privacy to enter into a sexual relationship. Marriage does not give right to the husband to access his wife's body as or whenever he pleases. Thus, the exemption provided under Section 375 IPC violates the right of privacy of a married woman and is unconstitutional.

(c) Right to bodily self-determination: - Like the right to privacy, the Constitution does not expressly recognize the right of bodily self-determination, although such right also comes within the framework of Article 21 of the Constitution. The right to self-determination means that an individual is the ultimate decision maker in matters associated with his/her body or well being. In this light the consent to sexual intercourse is one of the most ultimate and personal choices of a person. Women too have this personal choice. It is a form of self-expression and self-determination. Any law which takes away the right of expressing and revoking such consent deprives a person of this Constitutional right protected under the legal framework of right to life and personal liberty under Article 21. Thus, the marital exemption deprives a married woman her right to bodily self-determination in respect of one of the most intimate and personal

141. AIR 1991 SC 207.

choices which include the consent to sexual intercourse. Hence, the marital exemption as provided under Section 375 IPC is unconstitutional.

(d) Right to good health: - The right to good health is recognized as a part of right to life under Article 21 of the Constitution. In a historic judgment in *Consumer Education and Research Centre* vs. *Union of India* [142] the Supreme Court held that the right to health is a fundamental right under Article 21 of the Constitution and it is essential for making the life of a person meaningful and purposeful with dignity of person. Again the Supreme Court in *State of Punjab* vs. *Mohinder Singh Chawla* [143] held that right to health is an integral part of right to life. However, the marital exemption doctrine of rape violates the right of good health of a victim as it causes serious psychological as well as physical harm. The Supreme Court in *Bodhisattwa Gautam* vs. *Subhra Chakraborty* [144] held that rape destroys the psychology of a woman and pushes her into a deep emotional crisis. The right to good health of a woman is also violated in a marriage wherein the wife is subjected to forceful sexual intercourse in a marriage which may lead to the communication of a Sexually Transmitted Disease (STD). Thus, the marital exemption doctrine of rape under Section 375 IPC violates the Constitutional guarantee of right to good health as provided under Article 21 of the Constitution, and hence such provision is unconstitutional.

From the above argument it can be submitted that the marital exemption doctrine of rape as provided under Section 375 IPC is violative of the doctrine of classification under Article 14 and various rights emanating from Article 21. It also does not pass the test of a "*just, fair and reasonable law.*" It is, thus, unconstitutional.

---

142. (1995) 3 SCC 42.
143. AIR 1997 SC 1225.
144. (1996) 1 SCC 490.

CRIMINALISATION OF MARITAL RAPE: SOME ARGUMENTS: -

The above discussion regarding the marital exemption doctrine of rape puts emphasis upon the criminalization of marital rape. However, there are many people who are against the criminalization of rape and have advanced various arguments for not criminalizing marital rape. The argument by the people against its criminalization is attacked by some constructive arguments which support the cause of the actual criminalization of marital rape and they are as follows: -

1. One of the most common arguments put against marital rape is that in a marriage the wife is presumed to have given an irrevocable consent to sexual relationship with her husband. This justification is based on Mathew Hale's notion that marriage implies permanent consent to sex. It means that by marrying a woman man has right over her body and by criminalizing marital rape, it may lead to the break up of homes. This argument is fatally flawed as in a marriage woman do not consent to be assaulted by their husband. It is unreasonable to assume that women voluntary consent to being raped by their husband simply because they have entered into a marriage. This is further supported in an unanimous decision of the House of Lords in *R* vs. *R* [145] wherein the Court held that – "*.....marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale's position involves that by a marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of her health or how she happens to be feeling at that time.....A wife is not obliged to obey her husband in all things nor suffer excessive sexual demands on the part of her husband.*" As regards to the question of breaking up marriages ..... the situation wherein the

145. (1991) 4 All ER 481 at 484.

wife is facing marital rape how is it possible for her to continue to live in such marriage wherein she is facing the physical and mental trauma subjected by her husband where he forces himself upon her. A marriage where the husband forces himself upon his wife is as good as finished.

2. It is argument that by criminalizing marital rape a husband can be prosecuted for raping his wife which will violate the sanctity of marriage and obstruct marital privacy. It is propounded that a line has to be drawn between public and private life and the executive and the judiciary cannot enter the four walls of a domestic household.

This argument has been criticized on the ground that although marital relationship between husband and wife is private matter but it is impossible to extend marital privacy of acts which are non consensual. The proponents argue that marriage is a sacrament and its integrity should be protected at all costs. But wherein the husband forces his wife into sexual intercourse against her wishes the sanctity of marriage becomes iniquitous. Thus, it is hard to imagine that charging or prosecuting husband for raping his wife is more disruptive of a marriage than the act of violence by the husband.

With regards to the argument that the criminal law should not include into matters within a marriage, such argument has overlooked the fact that in India, criminal law does intrude into family affairs under Section 498-A IPC wherein husband and his relatives are liable for prosecution on the grounds of cruelty. This argument indicates the double standard of the Indian legal system only in context of rape laws which is unjust and unfair towards married women.

3. The proponents against the criminalization of marital rape argue that marital rape is less serious and traumatic than non-marital rape as the offender is known to the victim and it is very uncommon offence. However, this argument is also

criticized on the basis that the fact that the women are subjected to non-consensual sexual intercourse is enough to prove the serious nature of the crime. In fact, marital rape is more a serious offence than the non-marital rape because here the victim is subjected to violence by someone whom she trusts and relies upon. On being raped by such person she is traumatized to an extent that she is unable to trust him or live with him. The non-marital rape is an offence which the victim faces once but in marital rape a woman is subjected to violence everyday as she lives with the offender. Thus, to exclude instances of non-consensual sex when the partners are married from the scope of Section 375 IPC is arbitrary and unfair towards victims of rape in marriage.

The offence is uncommon which is argued by the proponent not in favour of criminalization of marital rape has also been criticized as it is highly under reported crime because of social stigma attached to it that a woman has regular sexual relationship with her husband and a few instances of non-consensual sexual intercourse are not as serious and traumatic as a rape by a complete stranger. Moreover, the wives are made to believe that it is their duty to provide husbands with sex otherwise, the husbands would look in different avenues and commit adultery.

4. Another argument which puts justification to continue with the marital rape exemption is that an offence like marital rape is very tough to prove and it may also lead to false charges leveled against the husband. However, it is argued that just because the offence of marital rape is difficult to prove should not deter the policy maker as only after passing a law we will be able to know the difficulty in prosecuting for rape. The first step should be to criminalize marital rape than only the question regarding lack of proof or consent will arise. Moreover, even just passing a law would definitely act as a deterrent to husbands and would not give

them a free rein to do as they please with their wives. The mere reason that the crime is difficult to prove gives no reason to not to pass a law.

Regarding the fabrication of false charges against husbands by the wives it is argued that such a reason for not criminalizing marital rape is baseless on the ground that although women are considered to be vindictive liars as a result of which the disgruntled wives may try to prosecute their husbands on false charges. But can we guarantee that there is no chance of fabricating false charges by unmarried women, yet they are protected by the law. Moreover, in India marriage is a sacred institution and women will voice their rights only if they are being violated. Hence, the policy maker should not deter in criminalizing marital rape for the fear of stray cases of fraud.

5. There has been an argument that passing a law criminalizing marital rape would lead to hurting the sentiments of various religious sections. However, it has to be noted that every religion talks of upholding the dignity of a woman. Recognizing marital rape as a offence will only further the objective of religions which speaks of upholding the dignity of woman. Moreover, religious considerations have never been a deterrent in laws being passed otherwise laws against sati; child marriage etc would have never been passed.

MARITAL RAPE AND THE ROLE OF JUDICIARY: -

With regards to the law relating to marital rape there has been massive legislative and judicial activity around the world for the past three decades. In the landmark judgment of *People* vs. *Libereta* [146]the New York State's highest Court abolished the marital rape exemption. It observed that there was "*no rational basis for distinguishing between marital rape and non-marital rape. The various rationales which have been asserted in defense of the exemption are either*

146. 474 N.E. 2d. 567 (N.Y. 1984).

based upon archaic notions..... or are unable to withstand even the slightest scrutiny." Further the Court observed that "*rape is not simply a sexual act to which one party does not consent. Rather it is degrading violent act which violates the bodily integrity of the victim and frequently causes severe, long lasting physical and psychic harm..... A married woman has the same right to control her own body as does an unmarried woman.*" The Court, thus, went on to hold that marital exemptions present in the New York Statutes were unconstitutional. By striking down the exemption of marital rape the court did not create a new crime but expanded the scope of the criminal statute.

Similarly the House of Lords in *R* vs. *R*[147] while recognizing the offence of marital rape observed that husbands impunity as expounded by Hale CJ can no longer exist. The Court held that "*this is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is only duty having reached that conclusion to act upon it.*" Australia,[148] Canada,[149] New Zealand,[150] Ireland[151] and Scotland[152] have abolished the marital rape exemptions from their penal statutes. The Supreme Court of Nepal recently declared that husband who forces their wives to have sex can be charged with rape.[153] From these changes it is clear that in various countries around the world a violent crime as rape, whether inside or outside marriage should be regarded as a crime. Unfortunately, India has been a stranger to the

147. (1991) 1 All ER 747.
148. The exemption to marital rape in Australia came to an end by the decision of the High Court of Australia in *The Queen* vs. *L*, 66 ALR 36 (Austl 1991).
149. Marital rape was abolished in Canada, 1983.
150. Marital rape was abolished in New Zealand in 1985 when Section 128 was enacted to the Crimes Act, 1961.
151. The change in Irish law was brought by two highly publicized cases in early 1990's.
152. The marital rape exemption was abolished by the decision of the High Court of Justiciary in *S* vs. *H.M. Advocate*, 1989 SLT 469.
153. http://www.isiswomen.org/womenet/lists/we/archive/msg0111.htm [Visited on 7th January 2009].

event. The Indian judiciary in number of cases have laid down that rape is the most hatred crime against the basic human right and violative of the woman's life. Yet in the context of the marital rape the judiciary has turned a blind eye. One of the reason is that the Indian judiciary is highly influenced by the principle of strict construction of the Indian Penal Code. The legislature and the law commission too refuse to recognize the offence of marital rape under the pretext of not interfering with the family life. The Kerala High Court in *Sree Kumar* vs. *Pearly Karum* [154] wherein there was a dispute on divorce which was going on between the husband and wife and parties agreed to continue to reside together. The wife stayed with the husband for two days during which she alleged that she was subjected to sexual intercourse by her husband against her will and without her consent. It was held that because wife was not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent, offence under Section 376-A will not be attracted. Hence, husband was not guilty of having raped his wife. Thus, the Indian judiciary is of view that rape within marriage is not possible. Recently in *Sakshi* vs. *Union of India* [155] SAKSHI an organization which is involved in issues on women and children, filed a case under Article 32, Constitution of India, by way of PIL asking for directions concerning the definition of rape in the IPC. It requested to include all forms of penetration as sexual intercourse contained in Section 375 IPC. However, it was held that the definition of rape contained in Section 375 IPC cannot be enlarged to include all forms of penetration. Thus, it can be said that law is the reflection of the patriarchal mindset wherein women has no sexual autonomy. She has no right over her bodily integrity. It is pity that wherein all over the world the legislature

154. MANU/RE/0660/1998.
155. AIR 2004 SC 3566.

and the judiciary are criminalizing marital rape, the Indian legislature and the judiciary still view it from the old mind set which still believes that the husband cannot commit rape on his wife.

Changes proposed in the Criminal Law (Amendment) Act, 2006 with respect to certain provisions in IPC, Code of Criminal Procedure and Indian Evidence Act:-

The Supreme Court in *Sakshi* vs. *Union of India*[156] recognized the inadequacies in the law relating to rape and had suggested that the legislature should bring about the required changes. The Law Commission thus examined the entire law relating to rape and sexual assault in Indian Penal Code and suggested a complete overhauling of the law. It felt the need for a new law on sexual assault as the existing law does not define and reflect the various kinds of sexual assault which women are subjected to in our country. On the basis of 172nd Report of the Law Commission a Bill was drafted to amend the laws relating to sexual assault in Section 375, 376, 354 and 509 of the Indian Penal Code and the relevant Sections of the Code of Criminal Procedure 1973 and the Indian Evidence Act, 1872. This Bill is called the Criminal Law Amendment Act, 2006. However it is yet to be enforced. Following are the changes prescribed under the said Act: -

I. Changes in the Indian Penal Code, 1860:- The Amendment Act, 2008 prescribed certain changes in the Indian Penal Code by substitution the existing Sections. Firstly, it states that Section 375 of the IPC be substituted by the following: -

"Section 375. Sexual Assault: Sexual assault means-

---

1. AIR 2004 SC 356.

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

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

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

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

In circumstances falling under any of the six following descriptions:

Firstly – against the complainant's will;

Secondly – without the complainant's consent;

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

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

Fifthly – with the consent of the complainant, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the complainant is unable to

understand the nature and consequences of that to which such complainant gives consent;

Sixthly – with or without the complainant's consent, when such complainant is under eighteen years of age.

Provided that consent shall be valid defense if the complainant is between sixteen years and eighteen years of age and the accused person is not more than five years older.

Explanation: Consent means the unequivocal voluntary agreement by a person to engage in the sexual activity in question."

It also provides that recasting of Section 376 IPC should be done. However, only the relevant portions applicable for the purpose of criminalizing marital rape and punishing sexual assault are mentioned below: -

"Section 376. Punishment for Sexual Assault: 1(a) whoever, except in the cases provided for by sub-section (2) commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to 10 years and shall also be liable to fine.(b) if the sexual assault is committed by a person in a position of trust or authority towards the complainant or by a near relative of the complainant, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine....

2(f) commits sexual assault on a person when such person is under 16 years of age.....

2(j) while committing sexual assault causes grievous bodily harm, maims disfigures or endangers the life of a woman or minor.

2(k) commits persistent sexual assault

Shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may be for life and shall also be liable to fine."

The Act contains insertion of a new section i.e. Section 376 D in the IPC which provides provision with respect to unlawful sexual contact and punishment thereto in the following words: -

"*Section 376D. Unlawful Sexual Contact –(1) Any man who with a sexual purpose touches, directly or indirectly, with a part of the body or with an object, any part of the body of a woman, without the consent of such woman, shall be punished with simple imprisonment for a term which may extend to three years or with fine or with both.*

Provided that, if the man is related to the woman, he shall be punished with imprisonment of either description for a term which may extend to 7 years and with fine.

2 *(a) Whoever, with a sexual purpose, touches, directly or indirectly, with a part of the body or with an object any part of the body of a minor, or*

(b) Whoever, with a sexual purpose, invites, counsels or incites a minor to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites or the body of the minor,

Shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine.

3. *Whoever being in a position of trust or authority towards a minor or being a person with whom the minor is in a relationship of dependency,*

(a) touches, directly or indirectly, with a sexual purpose, with a part of the body or with an object, any part of the body of such minor or

(b) with a sexual purpose, invites, counsels or incites a minor to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites or the body of the minor

Shall be punished with the imprisonment of either description which may extend to seven years and shall also be liable to fine."

The amendment Bill suggests to delete Section 354 IPC and Section 377 IPC. A new Section 377 shall be inserted which provides the following:-

"*Section 377. Any adult person who has sexual intercourse with another adult person against the will and without the consent of the other adult person shall be punishable by imprisonment of either description up to seven years and with fine.*

Explanation 1: Penetration is necessary to constitute an offence under this section.

Explanation 2: Penetration of the anus or mouth by the penis or penetration by an object or part of the body into the anus or vagina is necessary to constitute the sexual intercourse necessary for the offence described in this section.

Explanation 3: No consent is obtained for the purpose of the above section if it has been obtained by coercion or under undue influence or if the person giving the consent suffers from intoxication or unsoundness of mind or mistake or to the identity of the offender."

The amendment Bill also proposed to amend Section 509 IPC in the following words: -

"*Section 509. Word, gesture or act with a sexual purpose or with the intention to insult a woman: Whoever, with a sexual purpose or with the intention to insult any woman, utters any word, makes any sound or gesture, or exhibits any object or a part of the body intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the*

privacy of such woman, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine."

Apart from this new Sections 509A and 509B is added in the IPC and they cover the following offence and provide punishments for the same:

"Section 509A. (i) Whoever, with a sexual purpose utters any word, makes any sound or gesture or exhibit any object or a part of the body intending that such word or sound shall be heard or that such gesture or object shall be seen by a minor, or

(ii) Whoever makes a minor witness any sexual activity,

Shall be punished with an imprisonment of either description for a term which may extend to 5 years but shall not be less than 3 years.

Explanation 1: "Minor" for the purpose of this section will be any person under the age of sixteen years.

Section 509B. Any person who stalks a woman with the intention to cause, (a) serious harm or injury to that woman or a third person or (b) apprehension or fear of serious harm or injury to that woman or to a third person shall be punished with imprisonment of either description which may extend to 7 years or with fine or with both.

Explanation 1: For the purpose of this section a person shall be taken to stalk a woman if, on at least 3 occasions, that person

(a) follows or approaches the woman or

(b) loiters near, watches, approaches or enters a place where the woman resides, works or visits or

(c) keeps the woman under surveillance or

(d) interferes with the property in possession of the woman or

(e) gives or sends offensive material to the woman or leaves offensive material where it is likely to be found by, given to or brought to the attention of the woman or

(f) acts covertly in a manner that could reasonably be expected to arouse apprehension or fear in the woman or

(g) Engages in conduct amounting to intimidation, or an offence under Section 509.

Explanation 2: "harm" means physical harm as well as mental harm."

II. Changes in the Code of Criminal Procedure: -The Amendment Bill also recommends changes to be brought in the Code of Criminal Procedure, 1973 by inserting two sub-sections in Section 160 i.e. "*(3) Where under this chapter, the statement of a female is to be recorded either as first information of an offence or in the course of an investigation into an offence and she is person against whom an offence under sections, 375, 376, 376A, 376B, 376C,376D, 377 or 509 of the India Penal Code is alleged to have been committed or attempted, the statement shall be recorded by a female police officer and in case a female police officer is not available, by a female government servant available in the vicinity and in case a female government servant is also not available, by a female authorized by an Organisation interested in the welfare of women or children.*

(4) Where in any case none of the alternatives mentioned in sub-section (3) can be followed for the reason that no female police officer or female government servant or a female authorised by an organisation interested in the welfare of women and children is available, the officer in charge of the police station shall, after recording the reasons in writing, proceed with the recording of the statement of such female victim in the presence of a relative of the victim."

Modification to the proviso to sub-section (1) of section 160 is also recommended by raising the age from 15 years to 16 years. In addition to the modification, the said provision should be substituted in the following words:

"Provided that no male person under the age of 16 years or woman shall be required to attend at any place other than the place in which such male person or woman resides. While recording the statement, a relative or a friend or a social worker of the choice of the person whose statement is being recorded shall be allowed to remain present."

Insertion of a new section is recommended i.e. Section 164 A which will be inserted in the Code of Criminal Procedure. It provides the following:

"Section 164A.(1) Where, during the stage when any offence under section 376, Section 376A, section 376B, section 376D, is under investigation and it is proposed to get the victim examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of the complainant or of some person competent to give such consent on his/her behalf. In all cases, the complainant should be sent for such examination without any delay.

Provided that if the complainant happens to be a female, the medical examination shall be conducted by a female medical officer, as far as possible.

(2) The registered medical practitioner to whom the complainant is forwarded shall without delay examine the person and prepare a report specifically recording the result of his/her examination and giving the following details:

(i) The name and address of the complainant and the person by whom he/she was brought,

(ii) the age of the complainant,

(iii) marks of injuries, if any, on the person of the complainant,

(iv) general mental condition of the complainant and

(v) Other material particulars, in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the complainant or of some person competent to give such consent on his/her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(6) Nothing in this section shall be construed as rendering lawful any examination without the consent of the complainant or any person competent to give such consent on his/her behalf."

The insertion of new sections 53A in the Code of Criminal Procedure is also recommended in the following words:-

"*Section53A.(1) When a person accused of any of the offences under sections 376, 376A, 376B, 376C, 376D or 377 or of an attempt to commit any of the said offences, is arrested and an examination of his/her person is to be made under this section, he/she shall be sent without delay to the registered medical practitioner by whom he/she is to be examined.*

(2) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:

(i) the name and address of the accused and the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused, and

(iv) Other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

Consequent to the proposed amendments in the IPC, the existing entries in respect of section 376 C to 376 D, 377 and 509 will have to be substituted in the First Schedule to the Code of Criminal Procedure 1973. Similarly, consequent upon proposed amendment of Section 376 of IPC, sub-section (6) of Section 198 Cr. P.C shall be amended in the following manner: -

"The words "sexual intercourse" shall be substituted by the words "sexual assault" and the word "fifteen" shall be substituted by the word "sixteen"."

Apart from this a new sub-section shall be added in Section 164 of the Cr. P. C. which is as follows:-

"(b) Any statement made under sub section (a) by a young person under the age of eighteen years who is a victim of sexual assault under Section 375, 376 or Section 509 shall, except in exceptional circumstances be video taped."

A proviso to the following effect shall be added under Section 273 above the Explanation clause therein-

"Provided that where the evidence of a person below eighteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court shall, take appropriate measures to ensure that such person is not confronted by the accused. These measures may include video taping the evidence of the complainant in a place to be decided by the Court, or placing a

screen between the complainant and the accused and others. Provided further that the cross examination of a young person below eighteen years shall be carried out by the court on questions put to it by the accused or his counsel."

One of the most vital recommendations made in the amendment Bill is amendment in Section 309 Cr. P. C. which provides the following: -

"Section 309 Cr.P.C – sub-section (1) of section 309 a proviso to be added that provided that where the inquiry or the trial relates to an offence under section 376 to 376 E (both inclusive) of the IPC the judgment shall, as far as possible be delivered within a period of 6 months from the date of commencement of the trial."

III. Changes in the Indian Evidence Act: - The Law Commission also recommended changes in the Indian Evidence Act, 1872. With respect to Section 45 of the Evidence Act it shall be amended to add a clause (d) under illustrations as under:-

"Where the question is whether a child who is unable to talk of sexual abuse has been subjected to sexual abuse as defined in S.375 IPC or S. 376 IPC or elsewhere the opinion of an expert that the symptoms and behaviour of the child are such that they show that the child has suffered from such abuse are relevant."

The recommendations are made for the modification of Section 114A of the said Act which is as follows: -

"Section 114A: Presumption as to absence of consent in certain prosecutions for sexual assault. – In a prosecution for sexual assault under (a) or clause (b) or clause(c) or clause (d) or clause (e) or clause (g) or clause (h) (i) or (j) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted

and such other person states in his/her evidence before the court that he/she did not consent, the court shall presume that he/she did not consent.

Explanation: "Sexual intercourse" in this section and sections 376A to 376C shall mean any of the acts mentioned in clause (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

It also recommends that after section 53, the following Section be inserted:-

"Section 53A. In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

It is also recommended that clause 4 in section 146 should be added and should provide the following:-

"(4) In a prosecution for an offence under section 376, 376A, 376B, 376C or 376D or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his/her general immoral character, or as to his/her previous sexual experience with any person for proving such consent or the quality of consent."

A new Section will be inserted in the Indian Evidence Act to make the video tapped or other statement of the minor complainant of sexual assault admissible in evidence as follows: -

"In any trial or inquiry related to the sexual assault of a minor under Section 375, 376 and 509 of the Indian Penal Code, the video taped statement of the minor made to a Magistrate is admissible in evidence if the complainant while testifying adopts the contents of the video taping."

5. WIFE BATTERING: -

Women face unique problems in our society and majority of these heinous crimes against women are committed by people who are respected members of the society. These crimes committed against women cannot be proved under the existing Indian Evidence Act as the crimes alleged to be committed against them are not considered criminal acts by the society at large. Wife beating/battering is one such crime. Wife battering is not something new to our society as the history is evident that it occurred in various ages. Wife beating was present even in the primitive societies. In fact, in primitive India women were treated as chattels. Even the eminent scholars like Saint Tulsi Das declared in his famous epic "*Ram Charit Manas*" that "*Dhol ganwar shoodra pashu naree sakal taadana ke adhikaaree.*" According to him the women deserves beating or punishment like an animal. Wife battering is not common to any particular class, religion or community, it exists in every class, religion and community. No matter to what class, religion or community a woman belongs she is subjected to this heinous crime. Although wife battering has become the most appalling crime yet it has emerged as one of the least recognized crime. In fact, it is a crime which is not even reported. Due to this the exact statistics of wife battering is not known.

REASONS FOR NOT REPORTING THE CRIME OF WIFE BATTERING/BEATING:-S

The women who are subjected to the crime of wife beating/battering do not report this crime due to the following reasons: -

(i) Absence of Specific law: - One of the main reasons is absence of any particular law under which woman can bring an action against her husband for this crime. Although under the criminal justice system there are provisions under

which the crime relating to wife battering can be brought, however, the criminal justice system is lenient at this point as the husband is immune from being sued by his wife for assault and battery. Even if the complaint is made the police fail to make arrests; the prosecutors fail to bring such cases to trial and in most of the cases a victim is denied crime compensation for injuries if she is related to the offender. Even the senior counsel and prominent women's rights activist Indira Jaisingh is convinced that the reason for the reluctance of women to access criminal justice system is lack of adequate remedies for the victims. The convoluted procedures and the limited benefits that the criminal justice system offers to women are the major hurdles that prevent women from taking action against perpetrators of domestic violence.[157]

(ii) Psychological factor: - In our society role of husband and wife has been prescribed. From time immemorial women are treated as chattels and property of her husband. Wife, thus, has obligation to obey her husband. Due to this gender role played by both the husbands beat their wife with utter impunity as they are convinced that wives will accept the beating as their fate and will not disclose it to anyone. Even if she protest against it or disclose it, no one will interfere i.e. neither the neighbours nor the relatives as it is considered as private matter.

(iii) General mentality of the Society: - Generally the crime in relation to wife battering is not a crime which is openly discussed in the society. In fact wherein a woman is a victim of general violence like wherein a man assaults a woman on the street, it will be taken seriously. The police and the people around and afterwards the Courts would promptly intervene. But wherein a husband assaults his wife the people treat it as a family matter. Even if there are witnesses of wife beating the

---

157. Shobha Saxena, *Wife Beating – Need for effective and Realistic Legislation*, Cr. L. J. 2000 J 94 at 95.

neighbours, relatives and friends leave apart informing or reporting the matter to the police no one comes forward to rescue such women as the general mentality of the society is that it is the private matter between the husband and his wife which will be solved in no time and any intervention by the neighbours, relatives and friends would further complicate the issue and create problems. It is also believed that even if they intervene both the husband and wife will patch up and those who intervene will be the odd man out. As a result of this the parties who intervene will have to face the wrath of the husband and spoil their good relationship.

(iv) Role of the Police in such cases: - In the case of wife battering even when informed the police does not intervene as it will not earn them any laurels and will only be a waste of efforts because even if the wife complains initially for battering but there are large number of cases in police records where the wives have withdrawn complaints after the police started the investigations and found positive evidence against the husbands. There are several cases wherein wives initially make formal complaint but later on not only withdrawn the complaint but have also given an application asserting that the charges were false and she has o grievance against the husband. Moreover, even if a case is made against the husband the leniency by the criminal justice system makes the policemen lenient for the future cases too as most of the time the husband is acquitted or the charge is dismissed for want of evidence and even if convicted receives probation or suspended sentences. Rarely, the husbands get punishments. All these circumstances affect the policemen to play an active role in case of wife beating.

(v) Lack of support from the family members and others: - In case of wife battering even if the woman initiates the case against her husband, she literally receives any support from her relatives, leave apart from her in-laws even her parents don't support her. Even if the family members, relatives and sometimes

N.G.O's provide initial support to the victim of wife battering, with the passing period she is left alone with very few friends and well wishers. Ultimately she is left to fend for herself and continue to live with the abuser and relive the tragedy that has befallen her. Hence, women hardly report the matter.

(vi) Religious and Cultural Belief: - Religion and cultural belief is one of the reasons due to which woman faces wife battering at the hands of her husband. The society in India is based upon patriarchal structure. Due to this the cultural heritage makes most of the woman very tolerant and submissive. Thus, when women face this criminal act they do not initiate a case instead they blame themselves and their fate for their sorry state and hope that everything will become all right. Religion is one of the major source of law in India and it is also one of the major agent in the oppression of woman and inequality in the society. All religion in the World has restricted the rights of women. It prescribes unequal moral obligations between husband and wife. There are number of texts of various religions which emphasize the subordination of women in India. This incorporates the idea of male dominance in all spheres of life and makes the woman feel that they are not independent and self-determining persons. Thus, in our culture women are taught to be passive, dependent and submissive since her childhood and be economically and emotionally dependent upon them even if the husband behaves in harsh and brutal manner. These prove that women are prepared since childhood to face coercion, sexual assaults and violence both within and outside the family circle.

(vii) Lack of education and economic inequality: - Although the incidents of wife battering cut across all social barriers of caste, class, religion etc and women from every section of the society are exposed to such form of crime, the main reason for such crime in India is the higher rates of illiteracy and unemployment

among women. It is very evident from various surveys that instead of immense career options in medicine, science, technology, business and other fields, still large number of women in India pursue traditional subjects in the colleges and universities. They are encouraged by all to develop their skills in household chores no matter what her field of employment is. Since our society wants women to be dependent upon her husband, there is economic inequality between men and women which contributes towards this crime. In India majority of women is dependent upon their husbands for financial support as she lacks education due to which she cannot avail any job. She is economically inactive. This has placed them at the whim of their husbands who might not look after their economic needs if she complains of any marital conflicts. She does not have her own residence which puts her in disadvantage to bring a case against her husband as she cannot leave her matrimonial home due to financial dependence upon her husband or her parent's family. Thus, women do not report such crimes.

(viii) Criminal Justice System and delayed judgment: - In India although there are various legislation which protects the married women, yet the women does not initiate a case against her husband as she believes that the criminal justice system will not help her condition. Although our justice system is impartial but due to lack of education and unemployment (financial dependence upon her husband) the battered wives have inadequate resources to have the services of the private lawyers. Along with this the corruption of the police and Courts, the huge expenses of the Courts as well as the inadequate poor legal aid programmes have made the justice system inaccessible to illiterate and dependent women. Even if she initiates or has means to proceed with her allegation due to procedural delays and innumerable adjournments of the case, the witnesses who are willing and enthusiastic are driven away. This is also one of the reasons that the husbands

often dupe their wife by apologizing upon their deeds and promise to conduct good behaviour. Trusting the words of their husbands wives often withdraw the case. Wherein the women are reluctant to withdraw the case the husband create pressures on the women by threatening her or using muscle power to withdraw the case or not to contest it in the court. Moreover, the cases relating to wife beating are regarded as problems of mutual adjustment or just a passing phase of marital relations which will solve by itself with time. In fact in the empirical survey of the prevailing social realities 109 judges were questioned out of which 99% said that they would not opt for legal redress in a case of domestic violence involving their own daughter or other female relatives.[158] In most of the cases of wife beating the criminal justice system is not invoked because the victim fears that the Court testimony will expose her personal life and she will be blamed for another crime simply for the purpose of harassment or to make a good bargain.[159]

WIFE BEATING AND LAWS AGAINST IT – ITS EFFECTIVENESS:

Women hold an inferior status in the society irrespective of any cast, class, religion or even a nation whether it is developed, developing or third world country. Since primitive period she is seen as the property which a man possesses and is treated as chattels. With the advancement of civilization the thoughts of man are changing as a result of which legal protection is granted to women against various atrocities which the woman faces in the society. The ancient scriptures in India places women in high pedestals and compare her to Goddesses who should be worshiped. It even contains that the society which respects women will God. Even then all sorts of exploitation, harassment, cruelties

158. Shobha Saxena, *Wife Beating – Need for effective and realistic legislation*, Cr. L. J. 2000 J 94 at 95.
159. Subhash Chandra Singh, *Protection of Battered wives: A Searching look for some alternative ways*, Cr. L. J. 1996 J 129 at 130.

and other atrocities are committed on women in our society. One such crime is wife beating which is present in our society since primitive period.

The Indian legal system treats the women as a special group and protects them from various atrocities. The Constitution of India promotes and provides special provision in the interest of women. The Constitution provides that "*The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*"[160] It also provides that "*Nothing in this Article shall prevent the State from making any special provision for women and children.*"[161] Thus, Article 15 (1) directs the State not to discriminate against a citizen on grounds only of religion race, case, sex or place of birth or any of them. Women and children require special treatment on account of their very nature. Article 15 (3), thus, empowers the State to make special provisions to ameliorate their special condition and provide political, economic and social justice. As a result of this the State in the field of Criminal law along with other s has granted protection to the women which have been upheld by the Courts too. The Constitution also provides that "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*"[162]

Despite the constitutional protection and various legislature woman suffers at the hands of their husbands. However, in the last few decades attempts have been made to improve the status of women in the family and society. With a view to give legal protection to battered wives the Criminal Law (Second Amendment) Act, 1983 introduced Section 498-A to the Indian Penal Code. The said provision defines the term "cruelty" and prescribes punishment to the husband and his relatives if they subject women to cruelty. This provision seeks to curb atrocities on women including those arising out of dowry demands.

---

160. *The Constitution of India,* Article 15(1).
161. *Ibid,* Article 15(3).
162. *Ibid,* Article 21.

The Criminal Law (Second Amendment) Act, 1983 also brought a significant change in the traditional presumption theory of proof, to give a better protection to battered women. The said Amendment Act inserted Section 113A to the Indian Evidence Act so that the Court could draw an inference of abetment of suicide under Section 306 IPC. The Criminal Law (Second Amendment) Act, 1983 also amended Section 174 of the Criminal Procedure Code which makes a postmortem compulsory on the body of a woman who died within seven years of her marriage.[163]

Keeping in view the principles of the Constitution, the legislatures enacted new laws and made amendments to the existing ones. Still the intra-family violence is rising which depicts that the laws and the criminal justice system is not effective in breaking the cycle of violence against women. The present provisions are not sufficient enough to punish the husband who batters his wife. Section 498-A IPC does not attract every form of harassment or every form of cruelty as in order to prosecute husband it must be established that beating and harassment was with a view to force the wife to commit suicide or to fulfill illegal demands of the husbands and in-laws. A complaint under Section 498-A IPC will only succeed if there is an "unlawful demand" by the husband for some money or valuables. Similarly, the presumption under Section 113A of the Indian Evidence Act as to the abetment of suicide arises only where the woman has been subjected to cruelty by her husband or his relatives just before she attempted to commit suicide. Again Section 174 (3), Criminal Procedure Code is attracted wherein women dies within seven years of her marriage. Wife battering is such a crime against women wherein there can be no demand for dowry by the husband and in-laws, yet the woman is subjected to it on daily basis. In fact, she is beaten up without any specific reason by her husband. Such torture at the hands of the most

163. sub-section 3 to Section 174, Cr. P. C was added.

trusted person may drive her to commit suicide which can happen even after seven years of marriage and sometimes beating is so severe that may even cause death which may occur at any phase of her marriage. Under these circumstances the provisions of Indian Penal Code, Indian Evidence Act and Criminal Procedure Code will remain ineffective as the crime will not attract the said provisions. Thus, even if cases are brought forward the husbands are either acquitted or had the charge dismissed for want of evidence. Even if convicted receives probation or suspended sentences. Moreover, wife beating is not seen as a crime. It is seen as a private matter between husband and wife which will come to an end at some point. Even the wife feels so. Any complaint against it may cause permanent disharmony between the law and eventually lead to divorce. Hence, there is a need to recognize wife battering as a specific crime by differentiating it with cruelty as defined under Section 498-A of the Indian Penal Code.

6. CHILD SEXUAL ABUSE IN THE FAMILY: -

Human beings are rational beings. They are born equal in dignity and right. By virtue of their being human they possess certain basic rights which are inalienable. Such rights or claims are known as human rights. In today's world these rights are violated in various ways and in different directions. The principle of equality as envisaged by the International Covenants/Conventions and various constitutions of the world are grossly violated by way of social-political exploitation by the superior of the inferior. Since the rise of the civilization the most vulnerable group in our society i.e. children face various forms of exploitations and discrimination in their day to day life. "Children are citizen's of tomorrow" – this saying is universally accepted, yet they are the ones who are in the most disadvantageous position due to their being children which makes them defenseless and easy targets both mentally and physically.

Children are the most important assets of a nation as they are considered as future of a country. It is the responsibility of the society to look after their well being and provide them with appropriate and healthy environment to develop their individuality which will result in not only the growth and development of a nation but will also built a healthy society. Though the above mentioned things are accepted notion in the world, yet in our society the basic rights of the children are violated. Children are exposed to all forms of exploitation and discrimination. One such form is the sexual abuse of a child which is not only shameful and shocking to know that the person involved in such crimes are not only violating the fundamental rights of the children but is also responsible for destroying the future of the entire nation. Childhood means a carefree time filled with love and joy which becomes ugly and frustrated for the children who undergoes sexual abuse.

Child sexual abuse is the term used in reference to sexual activity involving a child that has at least one or two characteristics. The said crimes occurs within a relationship where it is deemed exploitative by virtue of an age difference or care taking relationship which exists between the abuser and the child by using threat, coercion or force. Sexual abuse is faced by children to whatever class, caste, creed, religion or sex they belong. Finkelhol's study reveals that 20% of the female and 10% of male students had been sexually abused children. Survey conducted by international statistics on child sexual abuse reveals at least two out of four girls and one out of six boys are victims of sexual abuse.[164] Child sexual abuse is a global phenomenon. It is common to both developed and developing countries though degree and intensity may differ.

---

164. Surekha Raman, *Violation of Innocence, Child Abuse & the Law*, Vol 10, Lawyers Collective, October – November 1995, P. 6.[Quoted in Sunil S. Hosamani, *Protection of Girl Child Against Sexual Abuse*, I B R Vol XXXIII (1 to 4) 2006, P. 222.

CHILD SEXUAL ABUSE: MEANING AND DEFINITION: -

Child Sexual Abuse[165] is a complete violation of a child's dignity and their human rights as prescribed by the International instruments and Constitution of various countries. CSA gas definitional problem as the sociological analysts and legal experts lacks mutual support and acceptance. Some studies limit the term "child abuse" to "*children who have received serious physical injury caused willfully rather than by accident*" (Garden and Gray, 1982: 5).[166] The said definition was vehemently criticized by the sociological analysts as the term "*serious*" in the definition is ambiguous and "*physical injury*" can be of diverse nature. Kempe & Kempe (1978) have defined child abuse as "*a condition having to do with those who have been deliberately injured by physical assault.*"[167] This definition too has limited scope as it restricts abuse only to those acts of physical violence which produce a diagnostic injury. Hence, the acts of neglect and maltreatment of children which do not produce an injury could not be covered under the said definition but which are equally harmful. Burgess (1949:143) has given a wider definition of child abuse as "*any child who receives non-accidental physical and psychological injury as a result of acts and omissions on part of his parents or guardians or employees.....*"[168] Hence, this definition includes verbal abuse, threats of physical violence and excessive physical punishment which do not require medical attention are also included in the definition of child abuse. Legally CSA can be defined as *any physical and mental injury, sexual abuse, negligent treatment or maltreatment of a child under circumstances which may indicate that a child's health or welfare is harmed or threatened thereby.* CSA is thus, an act which exposes a child to, or involves a child in, sexual processes

---

165. Hereinafter referred as CSA.
166. Ram Ahuja, *Child Abuse and Child Labour*, Social Problems in India, Rawat Publication, Jaipur & New Delhi, 2004, P. 219.
167. *Ibid.*
168 *Ibid*, P. 220.

beyond his or her understanding or contrary to accepted community standards. CSA includes implying, using, inducing or coercing, any child to engage in illicit sexual conduct, it also includes the use of children in assisting with other person to engage in explicit sex.[169] CSA covers the sexual maltreatment of both infants and adolescents. The conduct vary from acts constitution incestuous abuse to rape to a mere sexual assault of a varying intensity starting from mere caressing to fondling of the private parts of the child causing disturbances to the child's well being, it also can include child pornography, exposure of genitals to the child, making indecent overtures to the child.[170] UNICEF has defined CSA as "*the involvement of a child in a sexual activity to which he or she is unable to give informed consent (and may not fully comprehend), or for which the child is not developmentally prepared and cannot give consent, or which violates the laws or social taboos of society.*" In other words CSA means different kind of behaviour such as touching and playing with a child's sexual parts. It can mean forcing the child to have sex. It also includes exposing children to adult sexual activity or pornographic movies and photographs. It can mean having children pose, or undress in a sexual fashion in a film or in person.

CSA has been defined by different persons in different manners. In order to understand this sensitive and complicated term each word in CSA needs a categorical consideration. *Firstly*, the word "*child*" should specify specific age. In India there are various legislations which have been enacted for attaining different objectives and goals. These legislations adapt various limits of age to define child. The said term is used in different context while defining a

169. P.D. Mathews, *Sexual Abuse to the Children and the Law*, Legal News and Views, 1996, October, P. 30 [Quoted in Bhavani Prasad Panda and Minati Panda, *Child Sexual Abuse: Problems of Definition and Proof in the Criminal Justice Administration*, Law and Child Part – I, R. Cambray & Co. Pvt. Ltd, 2004, P. 234].

170. Bhavani Prasad Panda and Minati Panda, *Child Sexual Abuse: Problems of Definition and Proof in the Criminal Justice Administration*, Law and Child Part – I, R. Cambray & Co. Pvt. Ltd, 2004, P. 234.

relationship be it incapacity, infancy or need for special protection. There are different conceptual image of the child with regards to the right of the child to be maintained, children undergoing temporary disabilities claiming special treatment and protective discrimination etc. The Convention on the Rights of Child provides that "..... *a child means every human being below the age of 18 years*..... ....."[171] The Government of India has thus directed that all legislations need to comprehensively adapt the definition of child as per the Convention. As a result of this, recently the Juvenile Justice (Care and Protection of Children) Act, 2000 makes effort to uniformly adopt the age range of the child falling below 18 years of age. *Secondly*, the word "*abuse*" has to be understood to understand CSA. As per Black's Law Dictionary the word "*abuse*" means everything which is contrary to a good order established by usage, departure from reasonable use, improper use, physical or mental maltreatment, deception. The Oxford Advance Dictionary defines "*abuse*" to mean wrong or bad use or treatment, exploit, unjust or corrupt practice, acts which are insulting and offensive. Chambers Dictionary defines abuse as to make a bad use of, to take undue advantage of, to betray, to misrepresent, to deceive, to revile, to maltreat, to violate, an evil or corrupt practice, deceit, hurt, betrayal, ill usages, outrage etc. Hence, as per dictionaries "*abuse*" is an evil or corrupt practice, deceit, betrayal, molestation, violation and comes in many form. The word "*abuse*" does not refer to any one specific type of act, but covers a wide spectrum of behaviour. The term "*child abuse*", thus, covers a very wide range of acts and maltreatment of children which may include child battering, extreme punishment, hard labour, emotional abuse, sexual abuse, incest, abandonment etc. As a whole, CSA includes child molestation, incest and rape. CSA is the physical or mental violation of a child with sexual intent, usually by an older person who is in some position of trust/power vis-à-vis the child. The term

171. *The Convention on the Rights of Child*, Article 1.

paedophile refers to any adult who habitually seeks the company of a child children for the gratification of his/her sexual needs.

KINDS OF CHILD SEXUAL ABUSE: -

Children are often abused at the hands of the State, society and family in the most shameful and objectionable ways. Child abuse is usually classified into four major types of abuse: -

(a) Child neglect;

(b) Physical Abuse;

(c) Emotional Abuse; and

(d) Sexual Abuse of a Child (CSA).

Out of these four major kinds of child abuse, CSA is the least frequently reported form of child abuse i.e. only 6% of CSA is reported. CSA has been defined as "*the involvement of dependent and immature children in sexual activities they do not fully comprehend to which they are unable to give informed consent*" (Kempe 1978: 127).[172] CSA includes incest, rape, buggery or any paedophile activity for the gratification of the abuser. The abuser usually has a sexually dysfunctional or unsatisfying relationship with their partner, sexual relations may be violent or inadequate or non-existent, and the child becomes a convenient substitute.[173] Sexual abuse has many forms. Sometimes it can be so subtle that a child may not even be aware that the abuse is taking place. The child just feels uncomfortable with it. CSA is not often identified through physical indicators alone. Like any other kind of abuse, CSA can be verbal, physical or emotional. CSA includes a variety of sexual offences can be classified under the following groups: -

---

172. Ram Ahuja, *Child Abuse and Child Labour*, Social Problems in India, Rawat Publication, Jaipur and New Delhi, 2004, P. 220.
173. http://www.byllyonline.org/related/abuse.htm [Visited on 6th January 2009].

1. SEXUAL ASSAULT: - In this form of CSA the abuser usually touches a minor for the purpose of sexual gratification for example incest, rape, sodomy and sexual penetration with an object. Sexual assault is defined as sexual actions or advances without the consent of one party. However, slight the penetrative contact of a minor's body, if the contact is performed for the purpose of sexual gratification will amount to sexual assault.

2. SEXUAL MOLESTATION: - The form of CSA wherein the abuser engages in non-penetrative activity with a minor for the purpose of sexual gratification i.e. through exhibitionism which includes exposing a minor to pornographic material or to sexual acts of others, adult sexual activity, touching and fondling child's genitals, exposing or showing one's genitals to the child, having a child pose, undress or perform in a sexual fashion or to peep into bedroom or bathroom of the minor, will be covered under sexual molestation.

3. SEXUAL EXPLOITAION: - The CSA wherein the abuser victimizes a minor for advancement, sexual gratification or profit i.e. by prostituting a child and trafficking a child for the purpose of child pornography is called sexual exploitation of a child.

4. SEXUAL GROOMING: - It is the form of CSA wherein the social conduct of a potential child sex offender who seeks to make a minor more accepting of their advances for example by developing a friendly and trusting relationship with the minor or through on line chat room etc.

Leaving apart Sexual Exploitation, CSA in its other forms are not even identified as often the case go unreported. One of the main reason for this is that in contrary to the popular myth about CSA that it takes place at the hands of strangers on the street, statistics have revealed that maximum number of children

who are victims of CSA are abused at home by the adults who are related to them or known to them or their families. Generally, the abuse occurs at the home of the perpetrator. CSA by family members of victims is also known as incestuous abuse. In conservative societies like ours incest is less likely to be reported to the police out of fear and social disgrace. Families often choose to resolve the issue privately because according to them it is not a criminal matter. However, the truth is incest may be more traumatic than rape by strangers as such sexual abuse can be continued over a period of time and due to fear and social disgrace the victim remains helpless to protect herself from such abuses. The abuser is someone known to the child, and may be part of her day to day life such as father, brother, cousin, servant or friend.

Approximately 20% to 25% of women and 5% to 15% of men are sexually abused when they were children. Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often fathers, uncles or cousins; around 60% are other acquaintances such as friends of the family, babysitters, or neighbours; strangers are the offenders in approximately 10% of child sexual abuse cases. Most child sexual abuse is committed by men; women commit approximately 14% of offences reported against boys and 6% of offences reported against girls. Most offenders who abuse pre-pubescent children are pedophiles.[174] WIN News (1999) reports that in Mumbai, 60% of rape victims are between the ages of three and sixteen, with 50% below the age of ten.[175] Tata Institute of Social Sciences found that 30% of girls and 10% of boys had been sexually abused, with 50% happening at home.[176] Virani (2000) states that 50% of sexual abuse cases involved family members and close family members and close relatives and occurred at home. Samvada in 1996

174. http://en.wikipedia.org/wiki/Child_sexual_abuse [Visited on 22nd December 2008].
175. http://www.pandys.org/csaindia.pdf [Visited on 22nd December 2008].
176. *Ibid.*

conducted a study wherein it was revealed that 75% of the serious sexual abusers were adult family members.

When we hear of CSA by family members, it is often assumed that it happens in low-class and uneducated families. However, various studies have revealed that CSA by family members does not belong to one strata but it come from all strata of the society and the reasoning in believing such is that CSA by family members receive the most attention. As reported above men as found in most cases are responsible for CSA but women too can be perpetrators.

CAUSES OF CHILD SEXUAL ABUSE: -

Children have been abused through out the human history. One of the major violation to which children are exposed to is the CSA. Sexual exploitation of children is known worldwide and the world society has stood up together to curb this evil. In comparison to it CSA by the family members has been recently recognized. CSA is painful and unprovoked acts of violation against children. However, recognition of this crime is only in particular countries and cultures which sees it as a major social problem. The abolition of incest was accomplished at the beginning of human culture. Its prohibition on incest is universally accepted rule which is found in every country and every religion. The taboo on incest within the immediate family is one of the few known cultural universals. In fact, it is said that the society which approves of incest serve to emphasize rather than to disprove the universality of intra-family incest taboos. Despite this CSA is a serious problem all over the world including India. Incidences of incest or CSA by family members in India is not a unique problem, it existed in our society since a very long period. In India it is recently recognized as a grave social as well as curb this evil and protect the rights of the children to help them develop as healthy individuals it is important for us to know the causes

of CSA by family members or incest. Following are the causes which lead to this crime against children: -

(i) Status of women in Indian society: - In Indian society more girls are victims of CSA and incest in comparison to the boys. One of the major reasons is that from the beginning of Indian civilization women in India are treated as second-class citizens who should be kept in house. Women face discrimination in every field be it schooling where the girls are kept away from the schools, or wherein the girls are treated as curse on the family or burdens a because during marriage family has to part with huge sum of family property as a price for her dowry. Women are considered as weaker member of the society who are subjugated to men and various crimes are committed against them to prove their second-class citizenship. One such crime is CSA or incest wherein women are sexually abused since their childhood within their family by the family members. These family members can be their father, brother, cousins, uncles and other relatives.

(ii) Population and poverty: - In case of population India stands in second position next to China. It is also one of the poverty-stricken countries. These two factors often compel the people live in close quarters. Young girls of the family, thus, have to live with dozens of male family members which puts them at extreme risk in their own house.

(iii) Indian Preference for Virgin Bride: - In the patriarchal Indian society one of the major criteria for marriage is the desire of the brides groom for only a pure and virgin bride. Hence, wherein a girl child is abused it makes nearly impossible for her to get married. This leads to refusal of the child to disclose the crime. Even if the child discloses it to her parents, they do not report the crime to the police for fear and social disgrace. They fear that it might become public which will hinder

their family's reputation in the society. Moreover, if the case is brought before the criminal justice system and even if the victim wins the case, part of the punishment has to be suffered by the victim because she will require a high dowry if she can get married at all.

(iv) Conservative Indian Society: - In our conservative society subjects relating to sex and personal safety are not discussed. It is considered as a taboo to talk about sex. This leads men to feel that they can fulfill their sexual gratification from any source available or possible. Sadly these sources include even the children. Another reason is the lack of sex knowledge and refusal to discuss the issue. Since talks relating to sex are a taboo in the conservative Indian society, children are not educated regarding sexual abuse when they are young. Due to their lack of knowledge about sexual abuse they are being subjected to it. In fact, as the statistics revealed that children who are very young i.e. between 1-10 years of age are exposed to this crime. Belonging to the young age they don't even understand the gravity of crime committed against them. Hence, these children are unable to tell their parents about the said crime. Even if the child knows about the nature of crime he is exposed to, yet due to the social taboo on sex talks such child is not confident to disclose the act to someone who might be able to help.

(v) Unreported cases of CSA and Incest: - Often CSA and incest go unreported. In fact, children rarely report these cases with the intention of doing so. *Firstly*, the child is so young that he/she does not fully understand the nature and effects of those actions. In such crimes the children are abused by the people they know and even be fond of. This is another reason for them to keep quiet about the abuse. In some cases the abused children identify with their abusers and start seeing them as their protectors. A victim of CSA or incest is, thus, gratified by the attention showered on him/her by the abuser or has strong feelings towards the abuser. Due

to their tender age the child cannot understand the gravity of the abuse which can hurt them in the long term. Moreover, even if the child is not comfortable during his abuse, he/she is incapable of reporting the matter to the Police Officers or judges themselves. They generally disclose the matter to their close ones (often parents or relative) who fully understand the impact of reporting the matter and report the case. However, in our conservative society even the parents do not report the matter out of fear and social degradation. The result is increase in CSA and incest in our society.

Secondly, in India CSA has unfortunately has not been viewed as a separate offence which causes physical and emotional damage to the child. This is despite the fact that all personal laws in India make incestuous relationship prohibitive. CSA and incest is viewed in the context of child labour, child prostitution and child trafficking for which legal provisions have been made. *Finally*, the extent and application of the existing legal and constitutional provisions do not appear adequate to address the issue of child abuse, yet in the absence of any legislative measures specially addressing the issues of child abuse cases with regards to it is being dealt under the provisions of the said provisions only. Moreover, the matter relating to difficulty in proving the offence becomes a major hindrance in prosecuting the case.

(vi) Problems in identifying CSA and incest: - CSA and incest are such crimes which are committed in great secrecy and due to family intimacy. It is the incidence which is committed by an adult wherein the child is abused without his/her consent and also without the knowledge of other family members. Often the abuser uses threat, coercion or force upon the child for not disclosing it to others. The child is thus exposed to repeated sexual abuse at the hands of the abuser. It is seen that in most cases the abuser is father, step-father, brother,

cousins or other relatives and under such circumstances it is seen that even if the child complains of the matter it is ignored or brushed aside or is not taken seriously. The person to whom the child discloses the matter that the child is cooking up the matter to crave attention or simply lying. Sometimes the child is ridiculed by such person for lying. The child feels it useless to inform such matter to any body as nobody is going to believe him/her. Even if the other family member comes to know about the incident they keep quiet about the matter as reporting it would mean ridiculing the family's reputation in the society. Ultimately the child remains silent and suffers at the hands of his/her abuser. Thus, there is no appropriate statistical data which can be prepared to show the number of children who are victims or has been victims of CSA and incest in our society. This is one of the major reasons due to which CSA and incest remains unidentified in our society.

(vii) Criminal Justice System and CSA: - In case of CSA or incest the victim faces several traumas and one of the traumas which a child faces after sexual assault is by the criminal justice system of our country. First of all as mentioned above there is no legislation which defines the term "*Child Sexual Abuse.*" Due to the absence of any standardized definition different meanings may be attached to it which may affect the result of any research conducted. Secondly, the laws are too weak which affects prosecution of matters relating to CSA and incest. The cases become weak as there is inadequate investigation and insufficient medical evidence to prove the case. Even the witness of the child who is victim of CSA and incest is often questioned on the grounds of not understanding the nature of question put to them along with problems regarding the competency and credibility of a child witness. The NCW too is of view that the existing law does not address the increasingly visible offence of CSA and contains serious

contradictions that inhibit women as well as children from reporting crimes of sexual abuse.

(viii) Children do not transmit disease: - In the world of HIV and AIDS viruses the adults fears to go to the brothels to satisfy their sexual gratification as the fear that the prostitutes in the brothels may transfer them not only sexually transmitted disease but may also pass on deadly HIV and AIDS viruses which may cost them their lives. Thus, in order to satisfy their sexual gratification they look for targets at home who are easy to find, vulnerable, can be controlled by imposing threat, coercion or fraud and most important of all cannot pass them on any such viruses. The abusers find children more suitable for their need as the basic assumption is that children are not HIV infected and do not spread AIDS. Another myth attached to such belief is that having sex with a virgin child can cure AIDS and other sexually transmitted diseases.

(ix) Family disorganization: - The family environment and family structure also play a vital role in CSA and incest. Various analysis of family environment has revealed that conflict between parents and weakening of inhibitions leading to neglect of the children; absence of affectionate parent-child relationship within the family that fails to give support and protection to child; alcoholism of the earning male member, his lack of accountability; lack of control on the children; adulterous relation of either parents; dominance of step father; and social isolation of the family (i.e. not participating in social networks or community activities) were factors which exposes a child to CSA and incest.

(x) Psychological disorders of the Abuser: - CSA and incest is all about corruption. The abusers are psychopaths or mentally ill persons who want control over the other person. Several studies have revealed that the abusers of CSA and incest are generally those persons who have themselves been victims of child

abuse. However, not all victims go on to become abusers. It depends upon individual predispositions and situational factors.

CONSEQUENCES OF CHILD SEXUAL ABUSE AND INCEST: -

Child Sexual Abuse and incest describes criminal as well as civil offences wherein an adult engages in sexual activity with a minor or exploits a minor for the purpose of sexual gratification. An adult who indulges in sexual activity with a child is performing a criminal as well as immoral act which is not considered normal or the behaviour which is not socially acceptable. Depending upon the seriousness, the duration of abuse and the sort of abuse which the children faces at the hands of their abusers, the trauma or problems faced by them can broadly be divided into following categories: -

(i) Psychological effect: - The children who face CSA and incest usually suffer from short-term as well as long-term psychological harm. The children who have been victim of such crime suffers from fear, panic attacks, sleeping problems, night mares, irritability, outburst of anger and sudden shock reactions when being touched. The victims of CSA and incest suffer from little confidence and self respect, and respect for one's own body may change. They have poor self image which affect their self-esteem. Through nightmares, sudden memories or unexplainable physical problem they are unintentionally confronted with memories of the abuse as a result such children relive the event of the abuse. Such children also suffer from disturbing behavioural pattern that harms the body as it is found that they can get easily addicted to alcohol and other substances and suffer from depression in which they may try to end their life. They lead a self-destructive life and often lead towards prostitution.

(ii) Social Effects: - The Children who are victims of CSA and incest have poor communication and coping ability; failure in developing social relationships; mistrust and have little confidence in other people; isolation and withdrawal from interactional settings especially talks about the period of sexual abuse and the abuser. Such persons hesitate to go to school, work or even outside their home and isolate themselves. They experience learning problem in school as they feel after abuse that they are weak in every field especially studies. Such persons are not satisfied by their work they are engaged in. A high percentage of victims do not feel self-reliant and hence depend upon others for their emotional and social support. They usually fear loss of control in their relationships. Usually the persons who have been victim of sexual abuse may develop anti-social behaviour.

(iii) Sexual Effects: - The victims of CSA and incest suffers from sexual problems like loss of interest in love making with one's partner as such spouse may get confused by certain remark, touch or behaviour of his/her partner which brings back memories of the abuse and the abuser. Such person might feel pain while making love, not wanting to make love and problems in getting aroused. A good number of child victims had a feeling that their physical needs were not being met to their satisfaction.

(iv) Physical Effect: - The victim of CSA and incest may suffer from some short-term as well as long-term physical injury. Usually the victim suffers from abdominal pain, menstrual pain; pain while making love, intestinal complaints, nausea, headache, back pain, painful shoulders etc i.e. all kinds of chronic pain. The pain is often inexplicable. CSA may cause internal laceration and bleeding. In severe cases it causes damage to internal organs which may even cause death. CSA may cause infections and sexually transmitted diseases. Depending on the

age of the child, due to lack of sufficient vaginal fluid, chances of infections are higher. Eating disorders can also be experienced by the victims of CSA and incest.

PROTECTION OF CHILD UNDER THE INTERNATIONAL INSTRUMENTS:-

The development and growth of the entire community of the world depends upon the health and well-being of its children. Children are the national assets and future of a nation, hence, their welfare is of utmost importance to every nation. Justice V. R. Krishna Iyer in his "*Jurisprudence of Juvenile Justice: A Preambular Perspective*" has rightly remarked that –

> "*The hallmark of culture and advance of civilization consists in the fulfillment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to its full stature, physical, mental, moral and spiritual. It is the birth right of every child that cries for justice from the world as a whole.*"[177]

However, all these wishful and optimistic saying remains worthless when we see all kinds of atrocities committed against children due to their vulnerable nature and as an easy target to all. Such incidences cast a shadow on the promises made to improve and provide them their rights. The problems relating to children and their rights gained international concern. Kofi A. Annan, Secretary-General of the United Nations in 'The State of the World's Children 2000' observed that –

> "*There is no trust more sacred than the one the world holds with children. There is noduty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.*"[178]

---

177. Quoted in Mamta Rao, *Law Relating to Women and Children*, Eastern Book Company, Lucknow, 2005, P. 388.
178. *Ibid.*

In the international field the attention grabbed by the problems of children to various forms of exploitation led to the passing of various instruments to protect the rights of children. The beginning of the movement to protect the rights of the children can be traced back to the mid 19th Century wherein an article was published in June 1852 by Slagvolk titled "The Rights of the Children." This was followed by "Children's Rights" in 1892 by Kate Kliggins. The articles contained the human working conditions of the children. Due to these articles legal position of children in England began to change with the introduction of factory laws which concentrated on the amelioration of working conditions of employees especially children. In 1923 the Council of the newly established non-governmental organization i.e. "Save the Children International Union" adopted a five-point declaration on the rights of the child. This was the beginning of international concern over the situation of children. Following are the international instrument which protects the rights of the Children from various forms of atrocities committed against them: -

(i) Universal Declaration of Human Rights, 1948: - The General Assemble of United Nations Organisation adopted the Universal Declaration of Human Rights[179] on December 10th 1948. It provides some protection for the safeguarding of the rights of the children and protects them from exploitation. The UDHR recognizes not only inherent dignity but also equal and inalienable rights of all members.[180] The Declaration states that everyone has the right to life, liberty and security.[181] It also prescribes that no one be subjected to torture or to cruel inhuman and degrading treatment or punishment.[182] As per the Declaration childhood is entitled to special care and assistance. Children, whether they are

179. Hereinafter referred to as UDHR.
180. *UDHR*, Article 1.
181. *Ibid*, Article 3.
182. *Ibid*, Article 5.

born in or out of wedlock, enjoy same social protection.[183] It also contemplates that everyone has the right to education. Parents of the child have a right to choose the kind of education that shall be given to their children.[184]

(ii) International Covenant on Civil and Political Rights, 1966: - This Covenant was adopted by the General Assemble in 1966. The Covenant[185] provides that every human being has the inherent right to life which shall be protected by law.[186] It also provides that every person has right to liberty and security of person.[187]The Covenant also prescribes that every child shall have without any discrimination related to sex, caste, creed, religion etc the right to such measures of protection as are required by his status as a minor, on the part of his family society and the State.[188]

(iii) International Covenant on Economic, Social and Cultural Rights, 1966: - The International Covenant on Economic, Social and Cultural Rights[189] was adopted by the General Assembly in 1966. Family is responsible for the healthy development of a child. Hence, the Covenant emphasizes the protection and assistance to the family which is the natural and fundamental group unit of the society and particularly for its establishment as it is responsible for the care and education of the dependent children.[190] It also provides that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage and other conditions.

---

183. *Ibid*, Article 25(2).
184. *Ibid*, Article 26.
185. Hereinafter referred to as ICCPR.
186. ICCPR, Article 6.
187. *Ibid*, Article 9(1)
188. *Ibid*, Article 24.
189. Hereinafter referred to as ICESCR.
190. ICESCR, Article 10(1).

The Covenant speaks about protecting children from various forms of exploitation.[191] The Covenant also puts burden upon the State parties to recognize the right of everyone to education as it is necessary for the full development of the human personality and sense of its dignity.[192]

(iv) Declaration on Social Progress and Development, 1969: - The United Nations General Assembly adopted Declaration on Social Progress and Development in 1969. It promotes the growth and well-being of the family members and also discusses the importance of the family as a basic unit of society. Particularly the children and youth should be assisted and protected.[193] It also under Part II speaks about the protection of the rights of the child.[194]

(v) Declaration of the Rights of the Child, 1959: - The General Assembly of United Nation adopted a new declaration on 20th November 1959 for child welfare and protection. Through this Declaration the United Nation reaffirmed their faith in the fundamental human rights and in the dignity and worth of human being. The Declaration states that the child by reason of his physical and mental immaturity must be provided with special safeguards and case along with appropriate legal protection before as well as after birth.[195] It states that the child shall enjoy all the rights without any discrimination on the basis of race, colour, sex, creed, religion, birth, status etc.[196] It prescribes special protection to children and enable them to develop physically, mentally, morally, spiritually and socially in a normal manner and in conditions of freedom and dignity by providing them appropriate

---

191. *Ibid*, Article 10(3).
192. *Ibid*, Article 13.
193. *Declaration on Social Progress and Development*, 1969, Article 4,
194. *Ibid*, Article 11(b) and (o).
195. *Declaration of the Rights of the Child, 1959*, Preamble.
196. *Ibid*, Principle 1.

(c) The right to development which includes right to education, support for early childhood development and care, social security, and the right to leisure, recreation and cultural activities.

(d) The right to participation containing the views of the child, freedom of expression, access to appropriate information, and freedom of thought, conscience and religion.

The Convention for the first time provides a uniform definition of "child." It states that 'child' means any human being below the age of 18 years under the law applicable to the child.[203] It states that the State Parties is under an obligation to take appropriate measures to ensure that the child is protected against all forms of discrimination.[204] The State Parties should undertake to protect and ensure the best interests of the children.[205] The State Parties as per the Convention are under obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the case of parents, legal guardians or any other person in whose care they are.[206] It also directs the State Parties to recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.[207] It is the duty of the State to recognize the right of the child to education.[208] The Convention provides that the State Parties shall undertake appropriate national, bilateral and multilateral measures to protect the child from all forms of sexual exploitation and sexual abuse.[209] The State Parties shall protect the child against all other forms of exploitation

---

203. *Convention on the Rights of the Child*, Article 1.
204. *Ibid*, Article 2.
205. *Ibid*, Article 3.
206. *Ibid*, Article 19.
207. *Ibid*, Article 27.1.
208. *Ibid*, Article 29.
209. *Ibid*, Article 34.

prejudicial to any aspect of child welfare.[210] It also levies duty upon the State Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse; torture or any form of cruel, inhuman or degrading treatment.[211] The Convention also sets up a Committee on the Rights of the Child to monitor the implementation of the provisions of the Convention by the member States who have ratified it.[212]

These instruments protect the rights of the child and their protections against exploitation have been provided at international level and are considered as the basic international instrument regarding protection of children against their exploitation.

PROTECTION OF CHILD AGAINST SEXUAL ABUSE IN INDIA: -

Violation of the rights of the children is not new to our society. Children being the most vulnerable section of the society become victims of exploitation and ill-treatment easily. Since ancient period children in India have been succumbed to the various atrocities committed against them in our society. As the Member State of the above mentioned international instrument, India has pledged to protect its children against all forms of crimes committed on them, including Child Sexual Abuse. In order to curb all forms of violation against children and having been ratified the international instruments following protective measures are available in India: -

---

210. *Ibid*, Article 36.
211. *Ibid*, Article 39.
212. *Ibid*, Article

(A)CONSTITUTIONAL PROVISIONS: -

"*Children are the future of a nation*" – The Constitution makers knew this and their vision of India would not be a reality if the children of the country are not nurtured and educated. Being the most vulnerable group of the society, children become easy targets for exploitation. The rising trends of violation of the rights of the children and various forms of atrocities committed against them, the makers of the Constitution have provided certain provisions to safeguard their interests which are as follows: -

(i) The Preamble: - The Preamble to the Constitution of India sets out the main objectives of the Constitution which it intends to achieve. The Preamble to the Constitution of India promises: -

> "..... *to secure all its citizens: justice, social, economic and political,*
> *Liberty of though, expression, belief, faith and worship;*
> *Equality of status and of opportunity; and*
> *To promote among them all*
> *Fraternity assuring the dignity of the individual and the unity of Nation....*"

Hence, the Preamble to the Constitution of India provides positive direction to be taken by policy makers for the protection of weaker sections of the society. The Constitution of India recognizes and guarantees equal rights to all its citizens.

(ii) Fundamental Rights: - The Constitution of India provides fundamental rights to its citizens. There are certain fundamental rights which provide protection of children from exploitation and abuse. The Preamble to the Indian Constitution speaks of equality of status and of opportunity hence it provides that the State shall not deny to any person equality before the law or the equal protection of the laws

within the territory of India.[213] Children require special treatment on account of their very nature hence; the Constitution empowers the State to make special provisions for women and children. [214] It prescribes that no person shall be deprived of his life or personal liberty except according to procedure established by law.[215] Hence, every person has fundamental right to life and personal liberty. The expression "life" assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in workplace and leisure. In *Francis Coralie* vs. *Union Territory of Delhi* [216] Bhagwat J. held that "*the right to life with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being.*" Again Bhagwati J. relying on Francis Coralie's case held in *Badhua Mukti Morcha* vs. *Union of India* [217] that -

> "*It is the fundamental right of everyone in this country..... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life and breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article's 41 and 42 and at least, therefore, it must include protection of the health and strength of workers men and woman, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and*

213. *The Constitution of India*, Article 14.
214. *Ibid*, Article 15 (3).
215. *Ibid*, Article 21.
216. AIR 1981 SC 746 at 753.
217. AIR 1984 SC 802.

maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State..... has the right to take any action which will deprive a person of the enjoyment of these essentials."

Hence, Article 21 protects children from all forms of exploitation including child sexual abuse and incest as such crimes committed against children not only violates their right to live with human dignity and exposes them to various health hazards.

Education is basic human rights as it enables a person to live life with human dignity that develops him as well as contributes to the development of his country. Thus, Article 21-A[218] of the Constitution has recognized education a fundamental right for all children of age 6-14 years. The Constitution also provides that the Parliament shall have the power to make laws for prescribing punishments for those acts which are declared to offences under Part III of the Constitution or the acts which violates the fundamental rights of the citizens.[219] Hence, the Parliament has power to make legislations prescribing punishments for the violation of rights of the children due to child sexual abuse and incest as these acts hits at the fundamental rights of the children.

(iii) Directive Principle of States Policy: - Directive Principle of States Policy is contained under Part IV of the Constitution. It sets out the aims and objectives to be taken up by the States in the governance of the Country. Article 39 under it provides certain principles of policy to be followed by the State. It states that the state shall direct its policy towards securing the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or

218. Inst. By the Constitution (86th Amendment) Act, 2002, Section 2.
219. *The Constitution of India*, Article 35 (a) (ii).

strength.[220] With this provision the Constitution provides that child can be protected from the abuse of dignity of life, which may include sexual abuse. Article 39 also provides that the State shall direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.[221] Through these provision, the Constitution of India provides protection of children and development of their personality may be secured; and the children may be protected from exploitation and abuse committed against them.

The Constitution also provides that the State shall within the limits of its economic capacity and development, makes effective provisions for securing the right to education.[222] It also states that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.[223] This Article has substituted the old one by the Constitution (86th Amendment) Act, 2002. The old provision provided the provision for free and compulsory education for children until they complete the age of 14 years. The Constitution also prescribes that it is the duty of the State to raise the level of nutrition and the standard of living and to improve public health.[224] These provisions under Part IV of the Constitution of India are actually providing the protection of human dignity of children.

(iv) Fundamental Duties: - The Constitution of India while providing fundamental rights has also prescribed certain fundamental duties to every citizen.

---

220. *Ibid*, Article 39 (e).
221. *Ibid*, Article 39(f); subs. By the Constitution (42nd Amendment) Act, 1976, Section 7, for clause (f) [w.e.f. 3-1-1977].
222. *Ibid*, Article 41.
223. *Ibid*, Article 45.
224. *Ibid*, Article 47.

Fundamental duties are provided under Part IV-A which was inserted by the Constitution (42nd Amendment) Act, 1976. With relation to the protection of children it states that it is the duty of the person who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.[225] This provision was added to this part by the Constitution (86th Amendment) Act, 2002.

(B) INDIAN PENAL CODE: -

Child Sexual Abuse is the gross violation of the human rights of the children to live their life with human dignity. It has become one of the most pressing international as well as national problems. The rising cases of child rape, molestation etc proves that children being the most vulnerable group of the society are facing various forms of offences committed against them. CSA and incest has proved that children are neither secured outside their home nor inside it as they are subjected to sexual exploitation both inside and outside their house.

With regards to CSA there is no comprehensive law to deal with; however the Indian Penal Code lays down certain provisions which can bring the offences relating to CSA and incest under its ambit. The Indian Penal Code states that whoever induces any minor girl under the age of 18 years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to 10 years and shall be liable to fine.[226] It also prescribes for punishment wherein minor girls are imported from foreign country or the State of Jammu and Kashmir for the purpose

225. *Ibid*, Article 51A(k).
226. *Indian Penal Code*, Section 366-A.

of forced intercourse or illicit intercourse. The punishment prescribed under it is imprisonment which may extend to 10 years, and fine.[227]

The Indian Penal Code defines "rape." The CSA and incest can be brought under its ambit. The said provision provides various circumstances wherein sexual intercourse by a man with any woman may amount to rape.[228] It also provides punishment for the rape of the child with the imprisonment fro a term which shall not be less than 10 years but which may be extended for life and shall also be liable to fine.[229]

"Woman" is described under the Indian Penal Code as a female human being of any age.[230] Hence, a minor girl is also described as woman. CSA and incest against a girl child, thus, can be brought within the ambit of outraging the modesty of the children. Modesty is the attribute to female sex and she possesses it from her very birth. The Indian Penal Code punishes any assault or use of criminal force to any woman intending to outrage the modesty of a woman with imprisonment of either description for a term which may extend to two year or with fine or with both.[231]

(C) CODE OF CRIMINAL PROCEDURE, 1973: - The Criminal Procedure Code, 1973 provides that no child under the age of 12 years should be required to attend any place other than the Place where he/she resides for the purpose of interrogation by the police.[232] It also provides that the report of a police officer on completion of investigation into the assault of child rape or indecent sexual assault on the child should include the medical examination report of the child victim and

---

227. *Ibid*, Section 366-B.
228. *Ibid*, Section 375.
229. *Ibid*, Section 376.
230. *Ibid*, Section 10.
231. *Ibid*, Section 354.
232. *Code of Criminal Procedure*, Section 160.

the accused. The medical report should include the age of the child; injuries to the body of the victim; general mental conditions of the victim; and the exact time of examination.[233] If the magistrate thinks it fit the trials can be conducted in camera for an offence under Section 376-Section 376D of IPC.[234] If the Court conducting the trial finds that the examination of witness is important for the ends of justice and their attendance cannot be procured without unreasonable delay, expense or inconvenience, the court may dispense with their attendance and issue a commission for their examination.[235] It also empowers the magistrate to whom commission is issued to summon the witness before him and take down evidence.[236] Parties to the trial may forward written interrogatories to the Commission Magistrate, in which case the Commission Magistrate shall examine the witness on such interrogatories. The parties can also appear in person or by pleader and examine the witness.[237] The Commission Magistrate is required to return the Commission along with the deposition of witnesses examined to the Court which issued the commission. The Commission along with the depositions shall be open to inspection by the parties and be read in evidence by either party. It shall also form part of the record.[238] It also states that Courts can grant compensation to the witnesses.[239]

(D) INDIAN EVIDENCE ACT, 1872: -

The Act states that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by

233. *Ibid*, Section 173.
234. *Ibid*, Section 327.
235. *Ibid*, Section 284.
236. *Ibid*, Section 286.
237. *Ibid*, Section 287.
238. *Ibid*, Section 288.
239. *Ibid*, Section 357.

tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind.[240]

(E) THE IMMORAL TRAFFIC (PREVENTION) ACT, 1986: -

The Act although is not directly related to CSA and incest but it prevents and punishes any person for procuring or attempt to procure a child with or without his consent for immoral purpose with rigorous imprisonment fro a term not less that 7 years but may extend to life.[241] It also punishes a person who detains a child or minor in any premises with an intent to have sexual intercourse with imprisonment not less than seven years but which may extend to 10 years and shall also be liable to fine.[242]

(F) THE INFORMATION TECHNOLOGY ACT, 2000:

The Information Technology Act, 2000 provides publication and transmission of pornography as an offence. It states that 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 person who are likely 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. In case of second conviction with imprisonment of either description for a term which may extend to ten years and with fine which may extend to two-lakh rupees.[243]

---

240. *Indian Evidence Act*, Section 118.
241. *The Immoral Traffic (Prevention) Act, 1986*, Section 5.
242. *Ibid*, Section 6.
243. *The Information Technology Act, 2000*, Section 67.

(G) THE CHILD MARRIAGE RESTRAINT (AMENDMENT) ACT, 1978: -

Child marriage is also a form of CSA and violates a child's freedom to enjoy childhood. There are thousands of child marriages reported throughout the country. In order to prevent it the Child Marriage Restraint (Amendment) Act, 1978 was enacted. The said Act lays down the minimum age for marriage. Now the marriageable age for girls is 18 years and for boys 21 years.

(H) THE GOA CHILDREN'S ACT, 2003: -

Childhood is the most precious stage of a person's life, however, incidents such as CSA and incest makes not only their childhood but their entire life a hell. The constitution has prescribed that it is the duty of the guardians of the children as well as the government to ensure them right to life. In order to curb the offence of sexual abuse against children Goa is the only State in India which has taken the initiative in making certain rights available to children as they are empowered to do so under the Directive Principles of State Policy. Goa has, thus, enacted the Goa Children's Act, 2003, which contains certain provisions that address the sexual abuse of children in general.

The Act provides certain definitions which are essential to curb this evil. It defines "child" as any person who has not completed the age of 18 years.[244] "Child in need" is also defined as the children whose rights are being violated or who need special attention or protection.[245] Child Sexual Abuse is not defined under any legislation in India. The Act defines "child abuse" as maltreatment of the child which includes psychological and physical abuse, neglect, cruelty, sexual abuse, emotional maltreatment; any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a

244. *The Goa Children's Act*, 2003, Section 2(d).
245. *Ibid*, Section 2(l).

human being; and unreasonable deprivation of his basic needs for survival such as food and shelter, or failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death.[246] "Sexual offence" is defined as all forms of sexual abuse[247] and has been classified under three categories,[248] namely: -

(a) Grave sexual assault: It covers all forms of intercourse; vaginal, oral, anal, use of objects, forcing minor to have sex with each other, deliberately causing injury to the sexual organs, making children pose for pornographic photos or films;

(b) Sexual Assault: It covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language.

(c) Incest: It is the commission of a sexual offence by an adult on a child who is a relative or is related by ties of adoption.

The Act also lays down punishments for all the above three forms of sexual offences.[249] The punishment prescribed for grave sexual assault is 7-10 years imprisonment and a fine of Rs. 2 lakhs. The punishment for sexual assault is a sentence of up to three years and a fine of Rs 1 lakh; and the punishment for incest is imprisonment for a period of one year and a fine of Rs. 1 lakh. Three months from the commencement of this Act, any adult staying with an unrelated child is required to register with the Director, Women and Child Development.[250] If the Director deems necessary, he/she will authorize the District Inspection Team to

246. *Ibid*, Section 2(m).
247. *Ibid*, Section 2(x).
248. *Ibid*, Section 2(y).
249. *Ibid*, Section 8(2).
250. *Ibid*, Section 8(4) &(5).

inspect the case and submit a report with recommendations.[251] Failure to inform the Director beyond the period of 3 months can attract the fine of Rs. 1 lakh and imprisonment for a year.

The Act is a welcome measure which provides provision for setting up of one or more Victim Assistance Units which shall facilitate the child to deal with the trauma of abuse and assist the child in process involved with appearing as a witness before any Court or authority handling a case of abuse of child.[252] The Act also prescribes that the State shall carry out child sensitization programme for police officers at all levels and sensitization training for all those involved in the healing, rehabilitation and other assistance programme for child victims.[253] The Act also prescribes for setting up of a Children's Court to try all offences against children.[254] The setting up of a child friendly court will help to minimize the double trauma that abused children are subject to in courts. Thus, it can be said that the Goa Children's Act, 2003 is a unique and unusual legislation which prescribes punitive measures against the offenders who sexually exploit the children.

(I) THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) 2000: -

The Act substituted the old Act of 1986 and came into effect on 1-4-2001. The Act in the definition of 'child in need of care and protection' includes the child who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts.[255] It also prescribes that if any person who has actual charge of a juvenile assault, abandons, exposes or

---

251. *Ibid*, Section 8(6).
252. *Ibid*, Section 8(19).
253. *Ibid*, Section 8(20) &(21).
254. *Ibid*, Section 27.
255. *The Juvenile Justice (Care and Protection of Children) Act, 2000*, Section 2(d)(vi).

willfully neglects the juvenile; or causes or procures him to be assaulted, abandoned, exposed or neglected in any manner likely to cause such juvenile or the child unnecessary mental or physical suffering, he shall be punishable with imprisonment up to six months or fine or both.[256] In order to discharge the duties towards the 'child in need of care and protection' the State Government under the Act is empowered to constitute for every districts one or more Child Welfare Committee.[257] There is also a provision for the establishment of Children's Home under the Act for the purpose of reception of child in need of care and protection during the pendency of any inquiry and for their care, treatment, education, training development and rehabilitation.[258] Shelter Homes are also set up to provide shelters to the children in need of urgent support.[259]

(J) THE COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005: -

To protect, promote and defend the rights of the child as prescribed by the United Nations Convention on the Rights of the Child, 1989 recently a new legislation is enacted i.e. the Commission for Protection of Child Rights Act, 2005. This Act came into force on 15th February 2007. The main purpose of this legislation is to set up a National Commission for Protection of Child Rights.[260] The Act provides provision for setting up NCPCR in the Country.[261] It is a statutory body to protect, promote and defend the rights of the child. The main functions of the Commission is to examine the safeguards as provided by or under any law and recommend measures for their effective

256. *Ibid*, Section 23.
257. *Ibid*, Section 29.
258. *Ibid*, Section 34.
259. *Ibid*, Section 37.
260. Hereinafter referred to as NCPCR.
261. *The Commission for Protection of Child Rights Act, 2005*, Section 3.

implementation; to inquire into violation of child's right and recommend initiation of proceedings in such cases; inquire into complains and take *suo motu* notice of the matter relating to violation of child's right, non-implementation of laws, non-compliance of policy decision, etc.[262] In relation to the inquiries under clause (i) of Sub-Section 1 of Section 13, the Commission shall have all powers of a Civil Court as provided under the Code of Civil Procedure.[263] The Commission may recommend the concerned government to initiate proceeding for prosecution against such person; approach Supreme Court or the High Court for their direction; and to recommend the concerned government for grant of interim relief to the victim or members of his family.[264] The Commission has to submit annual report to both the Central Government and the State Government.[265] Like the Goa Children's Act, this Act too sets up Children's Court for the purpose of speedy trials of offences against children or of violation of their rights.[266]

However, despite these legislations and their provisions protecting the rights of the child and punishing the offenders violating their rights, the crimes against children are raising especially Child Sexual Abuse. There is no stoppage of such incidents wherein children are exploited and abused. In fact, such crimes are increasing at the alarming rate.

JUDICIAL ACTIVISM TO PROTECT CHILDREN AGAINST CHILD SEXUAL ABUSE AND INCEST: -

We happen to cross news in our day to day life about children being victims of rape and other forms of sexual abuse. Despite the aforementioned legislative enactment along with the Constitutional provisions which prescribes

---

262. *Ibid*, Section 13.
263. *Ibid*, Section 14.
264. *Ibid*, Section 15.
265. *Ibid*, Section 16.
266. *Ibid*, Section 25.

prevention and protection of exploitation of children and their sexual abuse are still increasing. One of the reasons for this may be lack of implementation of the legislative and constitutional mandates by the implementing authorities as well as lack of co-ordination between policy making and implementation. Under these circumstances the judiciary has intervened to protect the rights of the children from various forms of exploitations, specifically Child Sexual Abuse.

In *Ganshyam Mishra* vs. *The State* [267], the victim was a young girl of 10 years and the offender was an adult of 39 years. The offender was the victim's school teacher. Taking advantage of his position he induced her to come inside the schoolroom where he raped her. The appellate Court ordered for enhanced punishment for 3 years to 7 years rigorous imprisonment. The modesty of a woman is her sex and whoever uses criminal force with intent to outrage it commits an offence under Section 354 IPC. "Women" means female human being of any age, hence, a girl child is covered under the ambit of Section 354 IPC. This was highlighted by the Apex Court in *State of Punjab* vs. *Major Singh.*[268] In this case a female child of seven and a half months was raped by the accused. The Supreme Court considered the female child to be a woman under Section 354 IPC and held that the accused had outraged and intended to outrage her modesty. The accused had walked into the room where the child was sleeping and committed rape on her.

In *Gorakh Daji Ghadge* vs. *The State of Maharashtra* [269] a 13 year old girl was raped by her own father in his home. The High Court stated that crimes in which women are victims need to be severely dealt with and in extreme cases such as wherein the accused is the father of the victim who thought it fit to deflower his own daughter to gratify his lust, such a person should get the most

267. AIR 1957 Ori 78.
268. AIR 1967 SC 63.
269. 1980 Cr. L. J. 1380.

deterrent sentence for such crime. In *Jagdish Prasad Sharma* vs. *State* [270] a girl child aged three and a half years old was sexually abused by the accused. The Court convicted the accused for rape and sentenced for rigorous imprisonment for life. The Supreme Court in its landmark judgment in *Gaurav Jain* vs. *Union of India* [271]held that protection of basic human rights and dignity of life of the children and prevention of sexual abuse of children is essential. Children too have the right to equality of opportunity, dignity and protection by the society. It is the duty of the State to take appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, including sexual abuse. The State parties are under an obligation to ensure protection of children as every child has the inherent right to life, which is granted by the Constitution under Article 21.

In *Sakshi* vs. *Union of India* [272] the petitioner contended that with the rising cases relating to CSA the interpretation of Sections 375 and 376 IPC and other sections are not consistent with the current state of affairs in society. It was also submitted that there is the need for a law on CSA. It was also submitted that the expression sexual intercourse contained in Section 375 IPC should include all forms of penetration as the narrow understanding and application of rape under Section 375 and Section 376 IPC runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade child sexually, which in turn effects the sexual integrity and autonomy of children. Moreover, even if a case of sexual abuse is filed the child who have been the victim of such an offence has to undergo the ordeal in the trial before the Court. Hence, it requested the Supreme Court to lay down certain rules for holding the trial of child sexual abuse and amend the trial procedure and taking witness of the victim in the

---

270. 1995 Cr. L. J. 2501.
271. AIR 1997 SC 3021.
272. AIR 2004 SC 356.

Court. As per the directions of the court the Law Commission of India reviewed the laws relating to the statement of the victim of sexual abuse.