

CHAPTER-II

SEXUAL OFFENCES AGAINST WOMEN: ANALYSIS OF LEGISLATIVE PRINCIPLES

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AN OVERVIEW

Sexual offending is often considered as somehow inherently different from other forms of offending. Sexual offenders occupy a special place in contemporary society's secular demonology. Sexual crime is a mainstay of the tabloid and broadsheet news papers, where offenders become 'monsters', 'beasts' and 'sex fiends.' Concern about sexual crimes has become a panic. The present chapter therefore tries to find out firstly, the offences against women which are in essence sexual offences against women and secondly the relevant law which covers such offences. Since the present chapter deals with sexual offences against women, an attempt has been made to find out whether the present law is gender neutral or not. As consent is the biggest factor in the determination of the fact whether a particular sexual activity is an offence or not, the present chapter therefore, focuses on the aspect of consent. Societies differ as to their perception of morality and with the passage of time human generation also changes its view and behaviour pattern. Consequently changes can take place in the sexual orientation of the human beings and the law may not recognize that change. The present study therefore gives a cursory look in to this aspect to find out the premise of our criminal law relating to sexual offences against women.

A) SEXUAL OFFENCES- CONCEPT ANALYSIS

At the out set it must be said that the law makes no formal distinction between sexual offence and other offences. How one differentiates is therefore largely a matter of individual choice, and the criteria for classification are open to debate.¹ The law may tell us in detail what is sexual offence but an abstract definition remains nebulous. Sexual is any is any unwanted sexual activity (i.e., kissing, groping, oral sex, intercourse, etc.) in which the victim feels forced, coerced, or manipulated. Sexual offence may also be defined as sexual assault i.e. an act in which sex is used as a weapon. Sexual harassment, molestation, incest and rape are all forms of sexual assault. Here one may also suggest that it is the inducement or coercion of adults and children into sexual activities to which

¹ Howard League. "*Unlawful Sex: Offences, Victims and Offenders in the Criminal Justice System of England and Wales.*" (London, Waterlow, 1985). Para. 2.3.

they have not consented or where the real consent is absent. This might include the exploitative use of people in prostitution or other unlawful sexual practices, including the production and publication of pornographic material. The absence of a true consent to sexual activity is the overarching feature of sexual offending.²

i) Typology

Sexual offence may be defined as a form of human sexual behaviour that is crime.³ Someone who commits one is said to be a sex offender. Some sex crimes are crimes of violence that involve sex. Others are violations of social taboos, such as incest, indecent exposure or exhibitionism. There is much variation among the countries and cultures as to what is considered a crime or not, and in what ways or to what extent crimes are punished. Acts regarded as crimes almost universally include the following non-consensual sex crimes:⁴

- a) Lust murder
- b) Rape, sexual assault and other forms of sexual abuse
- c) Incest against children by their parents or other relatives.
- d) Sexual harassment (including voyeurism) is also viewed as a crime in Western cultures.
- e) Child sexual abuse or molestation, including incestuous rapes by elders in responsible roles.
- f) Child pornography.
- g) Western cultures are far more tolerant of acts, such as oral sex or transvestism, that have traditionally been held to be crimes in some other cultures, but combine this with lesser tolerance for the remaining crimes. Many consensual sexual actions or activities are viewed as crimes in some jurisdictions and/or including:
 - h) Adultery
 - i) Anal sex
 - j) Sex by and adult with juveniles (usually as Statutory rape)
 - k) Homosexuality
 - l) Oral sex
 - m) Various Paraphilias/Fetishes (Sexual) such as;
 - n) transvestic fetishism
 - o) Pornography

² Ibid, at p. 3.

³ Because there is no uniformity of laws among the Jurisdictions as to the criminalization or decriminalization of certain behaviour. What amounts to a sexual offence in one country may not be the same in some other countries.

⁴ Sex Crimes. Wikipedia Encyclopedia: For details see, <http://www.wikipedia.org/wiki/sexcrimes>.

- p) Prostitution and/or pimping
- q) Ownership of vibrators and other sex toys.
- r) Incest between close (and consenting) adult relatives up to and including first cousins.

What constitutes a sexual offence against women varies over time and place. An existing offence may be decriminalized at the stroke of a statute, and existing behaviour may be recognized as needing to be criminalized.⁵ Some sexual offence may be committed even when there is consent between the adult parties concerned and most notably when activities are committed in a public rather than a private place, when they are deemed to offend our concept of public decency and morality. Children and young people below the age of consent may be engaged in unlawful sexual intercourse, either with or without their consent. Such offending can take place within a family and may be intra-familial or outside of the family and may be extra-familial. They may be coerced into prostitution against their will. Offences may be committed against women with mental impairment who are unable to give a true consent. It may be committed against women falling within the prohibited degrees of relationship and may be incestuous.

The offender in sexual offences in almost all the cases involves male offender. And the male offender may come from a variety of range of people. Women increasingly see themselves at risk of sexual assault, and rape now heads the list of crimes which the public characterize as serious.⁶ Sexual offence may be committed by any one; from the man who indecently exposes himself, to the anonymous stranger who abduct, assaults and kills, to the man who possesses illegal pornography; from the man who offends only against his own children, to the men who find employment in children's home or school to just to give them access to children and opportunity to offend.

It must be admitted that sex has sometime had significance as a legal category in relation to criminal acts. While criminal law broadly applies equally to women and men, there have been, and still are, some exceptions. Male homosexual acts have at certain times been defined as criminal in most western

⁵ Homosexual activities in England and Wales were decriminalized in 1967 on the other hand male rape was criminalized in 1994: Now a day a similar need is felt in India by several women's organization to criminalize marital rape of every kind.

⁶ Terry Thomas. "*Sex Crime: Sex Offending and Society*." 1st Indian Reprint. (lawman India Ltd.2003). p. 1: See also Sampson. A. "*Acts of Abuse : Sex Offenders and Criminal Justice System*." (London. Routledge, 1994)

countries, while lesbian acts have not. Criminal Code often treats prostitute activities of males and females differently.⁷

ii) Sex Gender & Sexual Orientation

Any probe into sexual offence invariably requires a proper understanding of certain terms i.e. sex, gender and sexual orientation. The Oxford dictionary defines 'gender' as the state of being male or female.⁸ The Longman's dictionary(1984) defines 'gender' simply as 'sex', but for social scientists 'sex' and 'gender' are usually differentiated. According to The Oxford Dictionary 'sex' is what by which human and most other living things are divided on the basis of their reproductive function.⁹ 'Sex' is commonly used to describe the innate biological characteristics of humans, their femaleness or maleness. Gender' on the other hand covers the social characteristic and usages associated with one sex or the other.¹⁰ Since such roles and customs can vary and can be modified it follows that 'masculine' and 'feminine'; the terms applied to the respective genders, are much more flexible than 'female' and 'male'.¹¹

Any probe into the sexual offences against women would necessarily be incomplete without a look in an around; and without perception of sexual orientation prevailing at a particular period, specially in a fast growing civilization with its all gifts and evils and also the sexual orientation of the people of the century. Sexual orientation refers to the sex, sexes, gender or genders, to which a person is attracted and which form the focus of a person's amorous or erotic desires, fantasies, and spontaneous feelings. The alternative terms sexual preference and sexual inclination have similar meanings. Clinicians and those who believe sexuality is fixed early in life tend to use the former term; those believing sexuality is fluid and reflects preference and choice tend towards the latter terms.¹²

⁷ Frances Heidensohn, " Gender and Crime," Maguire, Rod Morgan, Robert Reiner.(ed). " *The Oxford Hand Book of Criminology*," 2nd Edition (Clarendon Press, Oxford, 1997), pp. 577-612. p. 762.

⁸ The Concise Oxford Dictionary, 10th Edition, Third Impression, (Oxford University Press, 2000) at p. 590.

⁹ The Concise Oxford Dictionary, 10th Edition, Third Impression, (Oxford University Press, 2000) at p. 1313.

¹⁰ Frances Heidensohn. " Gender and Crime." in Mike Maguire, Rod Morgan, Robert Reiner.(ed). " *The Oxford Hand Book of Criminology*," 2nd Edition (Clarendon Press, Oxford, 1997). pp. 577-612. p. 761.

¹¹ It is possible, for example, to describe a woman's clothing as 'masculine' or a man having a 'feminine sensibility. How ever biological sex can, of course, be altered too, but this usually requires drastice surgical and pharmaceutical intervention as well as presenting the individual concerned with vast social and legal challenges to surmount.

¹² For details pertaining to Sexual Orientation see, Wikipedia Encyclopedia:http://wikipedia: http://wikipedia.org/wiki/sexual_orientation/htm.

Typically a person may be identified as primarily heterosexual¹³, homosexual¹⁴, bisexual¹⁵, or asexual¹⁶. There is sometimes an overlap of opinion as to whether a person is straight/bisexual or gay/bisexual because such a person is technically bisexual¹⁷, but also fits a looser, un-official definition of homosexual (gay/lesbian) or straight/heterosexual as being primarily attracted to the same or opposite sex/gender.

However, this categorization ignores many issues of individuality and culture, and sexuality itself has many different facets. Therefore, even when it seems obvious, identifying sexual orientation is often not as simple as it seems. Terminology about sexual orientation is further complicated by the distinction between sex and gender.¹⁸ Scholars usually make a distinction between sex, the quality of being biologically male, female, or intersexes, and gender, a person's socially defined role as male, female, or neither. Some definitions of "sexual orientation" use both concepts; others use only one.¹⁹ It must be remembered that the term "sexual identity" is also sometimes intended to mean a person's conception of one's own sex or gender identity. This use however is considered highly inaccurate by transgender people, who consider their gender identity to be related to, but separate from their sexual orientation/identity.²⁰ Again Terminology about sexual orientation is further complicated by the distinction between sex and gender. The American Psychological Association and others define sexual orientation strictly in terms of biological sex; whereas sociologist Rodriguez Rust and others argue for a more multifaceted definition.²¹

This understanding is necessary to realize whether a particular behaviour should be acceptable; whether a greater number of people feel for the need of criminalizing or decriminalizing a particular behaviour. This is not going to

¹³ the focus is primarily people of the opposite sex/gender.

¹⁴ people of the same sex/gender.

¹⁵ potentially both or either sexes/gender.

¹⁶ no sexual attraction for either sex/gender.

¹⁷ sexually and romantically attracted to both sexes/genders.

¹⁸ For details pertaining to sexual orientation see, Sexual Orientation. Wikipedia Encyclopedia: http://wikipedia.org/wiki/sexual_orientation/htm.

¹⁹ The American Psychological Association and others define sexual orientation strictly in terms of biological sex: whereas most alternative models of sexuality...define sexual orientation in terms of dichotomous biological sex or gender.... Most theorists would not eliminate the reference to sex or gender, but instead advocate incorporating more complex nonbinary concepts or sex or gender, more complex relationships between sex, gender, and sexuality, and/or additional nongendered dimensions into models of sexuality: <http://www.apa.org/pubinfo/answers/htm>.

²⁰ Sex Crimes. Wikipedia Encyclopedia: For details see. <http://www.wikipedia.org/wiki/sexcrimes>.

²¹ According to them most alternative models of sexuality define sexual orientation in terms of dichotomous biological sex or gender. Most theories would not eliminate the reference to sex or gender, but instead advocate more complex nonbinary concepts or sex or gender, more complex relationships between sex, gender and sexuality, and/ additional nongendered dimensions into models of sexuality: For details see. Wikipedia Encyclopedia: http://wikipedia.org/sexual_orientation/htm.

suggest that tyranny of majority should govern the law. On the contrary, it can be seen as a social acceptance of the behaviour in some cases because of natural, biological or psychological reasoning. After all, it has been a well-established fact, that no law can stand the test of validity unless it has the potential, to accommodate the existing situation and make way for reform. In other words, the transition should be a pointer to recognize or not to recognize a particular behaviour that is seen to be prevalent in the society because of certain proportional changes in the physical and cultural changes in the society due to education, psychological and technological development, as well as availability of choice in the society. In short it may be said that sexual offences encompass a variety range of conduct, therefore it would be very simplification of fact if one classifies sexual offences in one parameter set forth by any particular criminal law. Here lies the importance of judging the whole affairs in the light of human rights jurisprudence. Then it should not be devoid of other social sciences.

iii) Critical Analysis of Sexual offences Under Indian Penal Code

Indian Penal Code in its chapter XVI which deals with offences affecting the human body keeps a place for sexual offences that too mentions only about the offence of rape. This implies two things. Firstly the author of the Code, views rape as an offence which only affects human body. However most of the social scientists, medical practitioner, victimologists say that rape is not only physical assault against women but also a psychological assault. Secondly it seems the framers of the Code either failed to classify all the sexual offences against women or did not think it necessary to identify and keep all the offences which are in essence sexual offence against women, under the same chapter relating to sexual offence. However, in fact, the code in other chapter defines certain conduct amounting to offences, which are in essence sexual offences; either because of the fact that these offences are committed against the weaker sex, and where sex is used as a weapon against women, or has some sexual overtones or overt acts or exploitation of sex or indecency to sex, or is a moral depravation to the society or has a tendency to disrupt the moral of the society or deceit to commit sexual intercourse; or procurement of persons including buying or selling for flesh trade. The Constitution of India, which is the highest law of the country, has been interpreted by the Judiciary favourably to protect the women. The judiciary has even gone to the extent of asserting that Sexual offence violates the basic human rights of the women. Indian Penal Code contains the following offences, which may be regarded as a sexual offence against women:

- a) Rape. [section 375,376(1)]
- b) Custodial rape.[section 376(2)]
- c) Marital rape.(section 376A)
- d) Intercourse not amounting to rape by public servant with women in his custody (section 376B)
- e) Intercourse not amounting to rape by superintendent of jail, remand home (section 376C)
- f) Intercourse not amounting to rape by any member of the managing staff of a hospital (section 376D)
- g) Outraging the modesty of women.(section 509)
- h) Assault or criminal force to women with intent to outrage her modesty (section 354)
- i) Obscenity (sections 292-294)
- j) Marriage ceremony fraudulently gone through without lawful marriage.(section 493)
- k) Bigamy.(section 494)
- l) Adultery (section 497)
- m) Enticing or taking away or detaining with criminal intent a married woman (section 498).
- n) Selling minor for the purpose of prostitution. (Section 372)
- o) Buying minor for the purpose of prostitution. (Section 373)
- p) Procuration of minor girl under the age of 18. (Section 366A)
- q) Kidnapping or abducting in order to subject persons to grievous hurt, slavery or unnatural lust of any person. (section 367)
- r) Importation of girls up to 21 years of age. (Sec. 366-B IPC)?
- s) Unnatural offence. (section 377)
- t) An attempt, to commit any of the aforesaid offence (section 511)

Any probe into the sexual offences against women must look at the definition of 'women' which the legal system gives to it with reference to any offence committed against them. The Indian Penal Code defines the word women as denoting a female human being of any age.²² This presumes that sexual offence may be committed against a female of any age. Although the offence whatever it may be, tells the nature and seriousness of the wrong and the agony which the victim of it may have to suffer, the scheme of the criminal law may indicate the seriousness and gravity of the offence. Our criminal law is a classic

²² Section 10 of the Indian Penal Code, 1860.

example of this indication inherent in the scheme of the Code. The Indian Penal Code Places the aforesaid offences in the following manner :(See Table 2:1)

Table-2:1
Scheme of the Indian Penal Code

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable.
376	Rape	Imprisonment for life or for 10 years and fine.	Cognizable	Non-bailable	Court of Session
376	Intercourse by a man with his wife not being under 12 years of age. ²³	Imprisonment for 2 years or fine or both.	Non-cognizable	Bailable	Ditto
376A	Intercourse by a man with his wife during separation.	Imprisonment for 2 years or and fine.	Ditto	Ditto	Ditto
376B	Intercourse by a public servant with woman in his custody.	Imprisonment for 5 years and fine.	Cognizable but no arrest shall be made without a warrant or without an order of a magistrate)	Ditto.	Ditto.
376C	Intercourse by superintendent of jail, remand home, etc.	Ditto	Ditto	Ditto	Ditto
376D	Intercourse by manager, etc. of a hospital with any woman in that hospital.	Ditto	Ditto	Ditto	Ditto
354	Assault or use of Criminal force to a women with intent to outrage her modesty	Imprisonment for 2 years or fine or both	Cognizable	Bailable	Any Magistrate
509	Uttering word or making any gesture intended to insult the modesty of women,etc	Simple imprisonment for one year or fine or both	Cognizable	Bailable	Any Magistrate
377	Unnatural offences.	Imprisonment for life or imprisonment for 10 years and fine.	Cognizable.	Non-bailable.	Magistrate of the First Class.
292	Sale etc or obscene books etc.	On first conviction with imprisonment for 2	Ditto	Bailable	Any Magistrate

²³ These above entries are substituted by Act No 43 of 1983, section 5(b).

		years and with fine of Rs 2000, and in the event of second or subsequent conviction with imprisonment for 5 years and with fine of Rs. 5000.			
293	Sale etc, of obscene objects to young persons	On first conviction with imprisonment for 3 years and with fine of Rs 2000, and in the event of second or subsequent conviction with imprisonment for 7 years and with fine of Rs. 5000	Cognizable	Bailable	Any Magistrate
294	Obscene songs	Imprisonment for 3 months or fine or both	Cognizable.	Bailable	Any Magistrate
493	A man by deceit causing a women not lawfully married to him to believe that she is lawfully married to him and to co-habit with him in that belief	Imprisonment for 10 years and fine	Non Cognizable	Non-bailable	Magistrate of first class
494	Marrying again during the life time of a husband or wife	Imprisonment for 7 years and fine	Ditto	Bailable	Ditto
497	Adultery	Imprisonment for 5 years or fine or both	Ditto	Ditto	Ditto
498	Enticing or taking away or detaining with a criminal intent a married women	Imprisonment for 2 years or fine or both	Ditto	Ditto	Any Magistrate
366A	Procuration of minor girl	Imprisonment for 10 years and fine	Cognizable	Ditto	Court of session
366B	Importation of Girl from foreign country	Ditto	Ditto	Ditto	Ditto
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, or to the unnatural lust of any person	Ditto	Ditto	Ditto	Ditto
372	Selling or letting to hire a minor for purposes of prostitution etc	Imprisonment for 10 years and fine	Cognizable	Non-bailable	Court of session
373	Buying or obtaining possession of a minor for the purpose of prostitution	Ditto	Cognizable	Ditto	Ditto

	or illicit sexual intercourse, or for immoral purposes				
511	Attempting to commit offences punishable with imprisonment for life or imprisonment, and in such attempt doing any act towards the commission of the offence	Imprisonment for life or imprisonment not exceeding half of the longest term provided for the offence or fine or both	According as the offence is cognizable or non cognizable	According as the offence attempted by the offender is bailable or not	The court by which the offence attempted is triable

The Indian Penal Code, 1860 originally had twenty-three chapters. Three more chapters, namely, offences relating to criminal conspiracy, election and cruelty to married women, have been added later. Thematically, the IPC may broadly be divided into four sections. Chapters I to V contain general matters relating to the extent, definitions, principles of liability, etc. Chapters VI to XV deal with public matters between individuals and the state. Chapters XVI to XXII are primarily concerned with offences committed by individuals against individuals or legal persons other than the state. The last chapter XXIII is residuary in nature, laying down the principle of punishment for attempt to commit an offence if no specific provision has been made therefore. In this scheme of chapters more serious offences precede the lesser offences, e.g. offences relating to state policy precede offences affecting individuals; offences relating to body precede those affecting property, and so on. Placement and the punishment provided for an offence by the IPC indicates the legislative perceptions about its nature and seriousness. Serious offences are classified as cognizable and non-bailable by the Criminal Procedure Code 1973 (Cr. P.C). The classification of offences as cognizable²⁴ means that, the police can initiate investigation into the offence on its own and arrest the accused without a warrant and in the case of a of a non- cognizable offence²⁵ the victim is required to obtain an order from the magistrate for even an investigation to begin. The procedure requires the complainant to be present in the court on all the days of the hearing for the trial to continue. If such an offence is also declared as bailable²⁶, the accused is entitled to be released on bail as a matter of right. The victim may be more afraid to file the complaint for fear of harassment by the accused. The non-

²⁴ Section 376, 366A, 366B, 376B, 376C, 376D, 372, 373, 354, 509, 377, 292, 293 of the Indian Penal Code are placed as cognizable offence meaning that the police can initiate investigation into the offence on its own and arrest the accused without a warrant.

²⁵ Sections 376A, 493, 494, 497, 498 of the Indian Penal Code.

²⁶ Sections 354, 509, 292, 293, 294, 494, 497, 498, 366A, 366B, 367 of the Indian Penal Code.

cognizable and/or bailable offences require the victim to have more perseverance, better resources and greater determination to prosecute.

The placement of offences namely, rape by husband during separation, deceitfully co-habiting with a woman not lawfully married, bigamy, and adultery, enticing or taking away or detaining with a criminal intent a married woman, in the category non-cognizable offence forces the victim to obtain an order from the magistrate for even an investigation to begin. This also shows how far Indian Penal Code follows private-public dichotomy. The declaration of offences namely, assault or use of criminal force to a woman with intent to outrage her modesty, uttering words or making any gesture intended to insult the modesty of a woman, sale of obscene books etc, sale of obscene to young persons etc, obscene songs, adultery, bigamy, Procurement of minor girl, importation of minor girl from foreign country, kidnapping or abducting in order to subject a person to grievous hurt, slavery or to the unnatural lust of any person as bailable offence, really makes the woman victim, more vulnerable and leaves her at the mercy of the offender and pity of the society where she lives. When the offender is a powerful or wealthy person the life of the poor victim of sexual offences becomes worse.²⁷ The placement of these offences as bailable raises the possibility of destruction of evidence of the crime. The policy of criminal law is open to criticism in view of the nature of sexual offences where possibility of producing independent evidence and witnesses is almost less as compared to other offences.

Again the formulation of some of the offences leads to the presumption that only women below certain age are likely to be the victim of some offences and not women of any age. This has been reflected by section dealing with buying²⁸ of minor for purpose of prostitution or illicit intercourse or selling of minor for the purpose of prostitution or illicit intercourse,²⁹ as because it applies to males or females under the certain age.³⁰ One may reasonably put a question that does the Indian Penal Code presume that such offences are committed only against the women who are below than eighteen years of age?³¹

Again these provisions of the Indian Penal Code which deal with the buying and selling of minors for the purpose of prostitution or illicit intercourse does not

²⁷ In such cases in the Indian societies her life is more likely to become a life in the hell.

²⁸ Section 373 of the Indian Penal Code 1860.

²⁹ See section 372 of the Indian Penal Code 1860.

³⁰ Both the section applies when the victim is under the age of eighteen years.

³¹ It is not only the age that matters most; women being, a vulnerable section of the society has been subjected to such offences. It is her sex that has been exploited irrespective of the fact of age up to certain extent. In most of the cases the impulse of the accused and in some cases the prevailing circumstances has been seen as the cause of such offending though there is no authentic data to prove it. Still the general notions of presumption and experience of a particular generation fuelled by the need of the age that has experienced and experiencing the need of control by the state can not be ignored.

specify the nature of possession, nor its duration, not intensity. They merely specify the object, namely prostitution or illicit intercourse.³² The Calcutta High Court therefore, came to the conclusion that section 373 of the Indian Penal Code has no application to a case where the accused obtains possession of a girl with the intention of having illicit intercourse with her himself. The term 'possession' implies some sort of control. When a girl elopes with another of her own accord and there is nothing to show that she can not leave him at any moment, the man can not be said to have possession of the girl.³³ However the section uses the words "persons under the age of eighteen years with the intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful or immoral purpose" and makes it difficult to prove the intention of the accused in the absence of an overt act.³⁴

In the case of some sexual offences our criminal law has followed the private-public dichotomy and incorporated values ensuring male dominion, power and authority. For example, in case of rape the general principle is that if a man has sexual intercourse with a woman below the age of sixteen years with or without her consent, he is guilty of rape.³⁵ But when the woman is his wife and above fifteen years of age, the act of the husband is not rape.³⁶ A nominal punishment is provided if the wife is between twelve to fifteen years of age³⁷ or is living separately from him under a decree of separation or under any custom or usage.³⁸ The undeniable conclusion is that a wife is presumed to have given irrevocable consent to sexual relationship with her husband even though there is no presumption of consent for any other purpose, including the marriage itself.³⁹ Again our criminal law puts a procedural restriction on a minor wife because a husband can not be prosecuted for committing rape on his minor wife below 15 years of age if more than one year has elapsed from the date of the commission of the offence.⁴⁰

The Indian Penal Code also follows Victorian morality and as a result the availability of legal protection to sexual activity is totally dependent not only on

³² Ratanlal & Dhirajlal, *"The Indian Penal Code,"* 28th Edition, Reprint, (Wadhwa Company, 1999), p. 511.

³³ Ibid: See also Jitendra Mohan Das (1937) 2 Cal 187.

³⁴ In the field of criminal law only intention to commit a crime is not enough in the absence of some overt act in pursuance of that intention. See in case of criminal conspiracy agreement to commit a particular offence plus some overt act is necessary to bring the offence at home.

³⁵ Section 375. Clause sixthly of the Indian Penal Code.

³⁶ Exception to Section 375, of the Indian Penal Code.

³⁷ Section 376(1) lays down imprisonment of either description up to two years or fine or both.

³⁸ Section 376 A lays down imprisonment of either description up to two years or fine or both.

³⁹ Ved Kumari, *"Gender Analysis of Indian Penal Code,"* in Amita Dhanda and Archana Parashar(cd) *"Engendering Law: Essays in Honour of Lotika Sarkar,"* (Eastern Book Company, 1999), at p. 139-160.

⁴⁰ See, section 198 of the Criminal Procedure Code 1973.

the fact whether it is happening in private or in public but whether it meets the traditional standards of morality. Homosexual relations are declared 'unnatural offences'⁴¹ irrespective of whether these are occurring in the private or public sphere. Such a declaration directly imposes a heterosexual marital code of sexuality.⁴² Whereas the reality gives a different picture which shows that women of different age up to certain age has been made a victim of this kind of offence.

Section 497 of the Indian Penal Code defines adultery and makes it a punishable offence. The cognizance of the offence of adultery is limited to adultery committed with married women, and the male offender alone has been made liable to punishment. In consonance with this policy a provision was kept in the Criminal Procedure Code which mandates a court not to take cognizance of adultery unless the aggrieved husband makes a complaint.⁴³ Under the Indian Penal Code, adultery is an offence committed by a third person against a husband in respect of his wife. It is not committed by a married man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it,⁴⁴ or with a married woman whose husband uses his wife in the trade of prostitution. Under the present law the married woman can not prosecute her husband who is guilty of adultery. She can not also prosecute the woman with whom her husband has committed adultery. This section is reminiscent of the Victorian morality and has clearly become outdated.⁴⁵

Various provisions in the Code relating to obscenity, pornography does not reflect any modern development and continues to be limited to traditional narrow moral consideration.⁴⁶ The experience of Denmark demonstrates that when pornography is exposed to the light of day it loses its power, while censorship or suppression of such images brings pornography into existence, gives it power and invites policing.⁴⁷ The criminal law as contained in the IPC and the Immoral Traffic

⁴¹ Section 377 of the Indian Penal Code.

⁴² Ved Kumari, "Gender Analysis of Indian Penal Code," in Amita Dhanda and Archana Parashar (ed) *Engendering Law: Essays in Honour of Lotika Sarkar*, (Eastern Book Company, 1999), at P.139-160.

⁴³ See section 198(1) of the Criminal Procedure Code 1973 says that no court shall take cognizance of an offence under Chapter XX of the Indian Penal Code 1860, except upon a complaint made by some person aggrieved by the offence: Further section 198(2) of the same Code says that no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the Indian Penal Code 1860.

⁴⁴ Ratanlal & Dhirajlal, "The Indian Penal Code," 28th edition reprint. (Wadhwa & Co. Nagpur, 1999), p-673.

⁴⁵ S.P. Sathe, "Gender, Constitution and the Courts," in Amita Dhanda and Archana Parashar (etal) *Engendering: Essays in honour of Lotika Sarkar*, (Eastern Book Company, 1999), at p128.

⁴⁶ See section 292-294 of the Indian Penal Code.

⁴⁷ Comments by the Centre for Feminist Legal Research on the First Report of the UN Special Rapporteur on Violence Against Women, Centre for Feminist Legal Research, New Delhi, 1995 at p. 7.

Prevention Act 1956 perceive prostitution as a necessary evil which should be contained but not be completely prohibited. The laws do criminalize the outward manifestations like soliciting, brothel-keeping, trafficking in women for prostitution, but do not ban prostitution per se.⁴⁸ Formulated in this manner; women in prostitution are exposed to harassment by the police and exploitation by pimps and customers.⁴⁹

The law still has not responded to women's demands for recognizing that women in prostitution have made the best economic choice possible in the circumstances and that prostitution should be decriminalized to protect their legal rights. It continues to view prostitution as a necessary social evil nurtured by immorality and illicit relationships.⁵⁰

This identification rather than classification of the sexual offences against women in our country may be seen as an over simplification of sexual offences against women in view of the need of the present decade as well as for acknowledging the fact of emergence of and recognition of certain sexual behaviour throughout the world.⁵¹ This is not going to suggest that certain sexual orientation has emerged and therefore, it is to be recognized rather than to be punished. But the fact remains that what option is available to a certain group of person,⁵² especially when we recognize that the law should be responsive to the growing reality of the age or culture that has been considerably transformed due to several factors of advancement and technological progress with its all good and bad effects. Violation of self, personal liberty and freedom, autonomy, dignity of person has been our sole concern but the fact still remains that – the law which is gradually responding to psychological trauma of the victim, also to response to the psychological need of the age formulated and shaped through the developmental process and 'mutation'⁵³ of the person who is a

⁴⁸ See Sections 5,6,7 and 8 of the Immoral Traffic (Prevention) Act. 1956.

⁴⁹ Ved Kumari, "Gender Analysis of Indian Penal Code," in Amita Dhanda and Archana Parashar (ed) "Engendering Law: Essays in Honour of Lotika Sarkar," (Eastern Book Company, 1999) . p.139-160.

⁵⁰ See Submissions pertaining to the Discrimination Against Women in response to the Government of India Third Periodic Report under the International Covenant on Civil and Political Rights. Centre for Feminist Legal Research, New Delhi, 1995 at 4-5.

⁵¹ The homosexual and lesbians are still punished in our society although they we accede to the demand of the International society that freedom of marriage is a fundamental right of a person. We deny the freedom of choice as to the life partner in the pretext of something.

⁵² Including the minority: Law recognizes the other rights of minorities specially in view of the fact that certain international convention recognizes the rights of the national, ethnic, and linguistic minorities: See International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992:It speaks for the protection of the minorities but fails short to realize others, who are really minorities in terms of sexual orientation, though the fact remains that they are emerging in a growing number. Specially growing number of homosexual and lesbians in our country puts a question mark in our legislative policy.

⁵³ This is perhaps a biological term but has the potential to mould the structure of mind.

product of the experience and circumstances.⁵⁴ The law can not be unresponsive to all this emerging facts and incidents which are unusual for some and usual for other people.

iv) Sexual Offences under Special Criminal Legislation

There are other tools in our country under which a particular act or conduct may amount to an offence; which is in essence a sexual offence. The Indecent Representation of Women Act 1986⁵⁵ makes publication, selling, hire, distribution, production, circulation etc of books, pamphlet, paper, slide film, writing drawing etc. containing indecent representation of women, an offence.⁵⁶ Further the Immoral Traffic (Prevention) Act 1956⁵⁷ prohibits the commercial vice namely traffic in women, men and children for the purpose of prostitution as an organized means of living.⁵⁸ Sexual exploitation for commercial purpose, or to make a living there on is an offence under the Act.

B) THE ASPECT OF CONSENT IN SEXUAL OFFENCES

This is another area which may give some clue to classify sexual offences but depicts a divergent situation where and when; not due to the absence of consent a particular behaviour may amount to a sexual offending or not. More over in most of the sexual offences consent is raised as a defence by the defendant. Ifs and buts has always been a factor in the province of criminal law, but the humanistic jurisprudence of constitutional law interpreted and applied by the Apex Court of India, supplemented it in a various way to protect the cherished values of civilization.⁵⁹

Consent generally means free agreement. Circumstances in which a person does not freely agree to an act include where:⁶⁰

⁵⁴ These circumstances includes non availability of the opportunity to have sex in a healthy way (people working in military and other likely profession) as well as some security/fear factors leading to avoidance of the opposite sex (some devastating experience may also lead a person to avoid sex from opposite gender due to the trauma. and still feel the sexual desire; may choose her life partner from the same sex).

⁵⁵ Though there is a debate as to which right is to prevail the right to livelihood or the morality of the society in a given circumstances.

⁵⁶ Section 4 of the Indecent Representation of Women Act, 1986.

⁵⁷ Again the old age profession of prostitution may really pose a question in view of the population explosion and unemployment and poverty whether prostitutes are to be held liable for their sexual exploitation or people helping them to earn livelihood by giving a place to stay innocently: Obviously the person who is earning from it must be held liable.

⁵⁸ Section 4 of the Immoral Traffic (Prevention) Act, 1956.

⁵⁹ In several decisions the judiciary insisted that in case of rape the presumption of law is that women victim did not consent.

⁶⁰ Legal Definitions of Sexual Offences, South Asian Centre Against Sexual Assault.

- a) a person submits because of force, or is afraid of the use of force against her or someone else (including forms of harm other than physical force)
- b) a person submits because of fear of harm of any type to that person or someone else:
- c) a person submits because of being held captive (which is also against the law);
- d) a person is asleep, unconscious, or so drunk or under the influence of another drug as to be incapable of freely agreeing;
- e) a person does not understand the sexual nature of the act;
- f) a person is mistaken about the sexual nature of the act or about who the person is who is performing it;
- g) a person believes mistakenly that the act is being performed for medical or hygienic purposes.

Two or more persons are said to consent when they agree upon the same thing and in the same sense.⁶¹ Consent is said to be free when it is not caused by: a) coercion, b) undue influence, c) fraud, d) misrepresentation, or e) mistake.⁶²

The concept of consent is central to the definition of sexual offending. Sexual activities are expected to be consensual, and in this area we speak of consenting adult. Consent is invalidated if it is given under duress that is where the consent is negated by the presence of force, fear or fraud. Consent can also be depicted as a continuum, with a positive consent at one end through to a reluctant agreement or submission at the other end. The latter can also be given without consent at all, which would mean a sex offence has been committed. A growing number of rapes are being reported that have been committed by people known to the victim and are sometimes referred as 'acquaintance' or 'intimate' rape as opposed to 'stranger' rapes.⁶³

Consent still may not be regarded as vital in some sexual offences e. g, prostitution in the vicinity of public places even though between two consenting adult will be an offence.⁶⁴ Consent may become irrelevant; and a sexual intercourse by a man with a woman may amount to the offence of rape when, the woman is under 16 years of age.⁶⁵ But the same principle does not apply when the man has sexual intercourse with his wife; above 15 years of age; his act

⁶¹ Section 13 of the Indian Contract Act 1872.

⁶² Section 14 of the Indian Contract Act 1872.

⁶³ Terry Thomas, "Sex Crime: Sex Offending and Society," 1st Indian Reprint. (Lawman India Pvt. Ltd. 2003), p. 7.

⁶⁴ Section 7 of the Immoral Traffic (Prevention) Act 1956.

⁶⁵ Clause six of Section 375 of the Indian Penal Code.

would not amount to a rape even if there is no consent on her part.⁶⁶ Consent for sexual intercourse may be given by a woman to a man under a mistaken belief that he is the person to whom she is lawfully married. And if the man knows that he is not her husband it would amount to rape.⁶⁷

Consent to sexual activities is largely gender specific and socially constructed. The law may recognize the crime of male rape or sexual activities between two male.⁶⁸ But when it comes to consent we are mostly talking about women saying 'yes' or 'no' to heterosexual activity.⁶⁹ The children and young people are held to be unable to give a full autonomous consent because they lack the competence to make the decision until they have reached a certain age in many countries.⁷⁰ In the Indian Penal Code there is no such reference as to the age of a person which is required for giving a valid consent to any heterosexual activity. However sexual intercourse with a woman below certain age (16 years) whether with or without consent has been described as an offence.⁷¹ Section 366A which, deals with Procurement of minor girl (inter alia) for the purpose of illicit intercourse with another person fixes the age of minority for the offence to the age of 18 years. The offence of kidnapping or maiming a minor for purposes of begging defines the word minor to include: a) in the case of a male, a person under 16 years of age and b) in the case of a female, a person under 18 years of age.⁷² However the fixation of the age of the minority changes to 18 years for an offence under the Code when it deals with the offence of buying or selling of minor for the purposes of prostitution etc.⁷³

For many years sexual offence was synonymous with prostitution, which in turn was described as the 'crime without victim'. The argument was that consent for this financial transaction was forthcoming on all sides, yet it was still circumscribed by laws forbidding, soliciting, procuring or allowing premises to be used as a brothel.⁷⁴ However, more recent feminist approaches have argued that

⁶⁶ Exception to Section 375 of the Indian Penal Code.

⁶⁷ Clause 4 of Section 375 of the Indian Penal Code.

⁶⁸ Section 377 of the Indian Penal Code covers such activities as unnatural offence and makes it an offence.

⁶⁹ Terry Thomas, "*Sex Crime: Sex Offending and Society*," 1st Indian Reprint. (Lawman India Pvt. Ltd. 2003) p. 8.

⁷⁰ The age of consent for heterosexual activities in England, Scotland and Wales was fixed at 10 in 1285, raised to 13 in 1875 and to 16 in 1885, where it still stands (Section 6 of the Sexual Offences Act 1956); The Age of consent for homosexual activities was fixed at 21 for England and Wales by the Sexual Offences Act 1967, (section 1), with the same age being brought into Scottish Law in 1980 and Northern Ireland in 1982.

⁷¹ See section clause six of section 375 of the Indian Penal Code and exception to Section 375 of the Indian Penal Code.

⁷² See Clause 4 of Section 366A.

⁷³ Section 373 and Section 372 of the Indian Penal Code.

⁷⁴ See section 4, 5, 6, 7, 8 of the Immoral Traffic (Prevention) Act 1956.

the women's consent is often not real because she has been driven to her actions by poverty and lack of income. From this perspective prostitution becomes a form of abuse against women and even against those under 16, who are legally incapable of giving a real consent.⁷⁵

Consent though important, may not be regarded sine qua non for some sexual offences if the act is immoral or obscene or indecent.⁷⁶ Again consent of the woman to sexual activity may be immaterial when she is suffering from unsoundness of mind. Consent, however, is often used as a defence by the accused in most of the sexual offences. But then it is not that consent may be used as a ground of defence without any limitation.⁷⁷

Indian Penal Code does not define consent but describes what not consent is.⁷⁸ Section 90 of the Code says that:

"A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear or injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or,

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or,

unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age."⁷⁹

The above section of the Indian Penal Code explains as to when consent may not be treated as consent for the purposes of condoning a man from criminal liability. The section makes it clear that a consent is no answer to a charge of crime where it has been obtained by putting a man under fear of injury, or under misconception of fact, or the consent is given by a person, who by reason of unsoundness of mind, or intoxication, or immaturity of age (namely a child below 12 years of age) is incapable of understanding the nature and consequences of the act to which he gives his consent.⁸⁰

⁷⁵ Terry Thomas, "*Sex Crime: Sex Offending and Society*," 1st Indian Reprint. (Lawman India Pvt. Ltd. 2003), p. 10.

⁷⁶ See section 292-294 and section 372-373 of the Indian Penal Code: See also the Immoral Traffic (Prevention) Act 1956.

⁷⁷ Section 87 to 89 and 92 of the Indian Penal Code lay down the law relating to consent as a defence to a criminal charge.

⁷⁸ Ratanlal & Dhirajlal, "*The Indian Penal Code*," 28th Edition Reprint, (Wadhwa Company, 1999), p. 102.

⁷⁹ Ibid.

⁸⁰ K. D. Gaur, "*Criminal Law: Cases and Materials*," 1999, Third Edition. (Butterworths India New Delhi, 1999), p. 149.

State of H.P v. Dharam Dass,⁸¹ is a classic example of how consent operated as a defence in our criminal law. Here the prosecutrix accompanied the accused to the house of someone and stayed there for about a week and did not disclose the incident to anybody even without being under any threat; the court held that inference could be drawn that she was consenting party and she being not a minor, the accused was held to be entitled to acquittal. In **Biram soren v. State of West Bengal**,⁸² the prosecutrix did not disclose the name of the accused to her parents early though she knew him. She disclosed the name only when the doctor found that the profuse bleeding from her private part was due to sexual intercourse. The FIR was lodged after ten days without any satisfactory explanation. It was held that the prosecutrix being a consenting party and she being not a minor, it was not a case of rape. In **Bharat v. State of M.P.**,⁸³ the prosecutrix was alone in the house when the accused entered her house and was caught red handed having sexual intercourse with the prosecutrix by her mother when she returned. No injuries were found on the person of the prosecutrix to suggest any resistance. It was held that the offence of rape was not proved and the accused was entitled to acquittal. These decisions betray the presumption that; Indian women should not accompany a man and go to someone's place and stay there, and if she goes she consents to the sexual intercourse; undue influence has nothing to do in such case given the fact of gender imbalance in the country where men is place in a superior position to control the mind and will of an woman. These decisions also ignores the fact that in the Indian society pre-marriage sexual intercourse is a matter of shame and therefore the prosecutrix may hesitate to report the matter. More over due to lack of education and ignorance one may not realize the problem that an offence has been committed against her which is redressible; she may not realize the danger of becoming pregnant. Again no mark on the body of the victim does not in all the cases imply her real consent. One may be raped by keeping her at a gun point and due to fear the victim may completely surrender to the accused.

Consent is an act of reason, accompanied with deliberation, the mind weighing as in balance, the good and evil on each side. It implies an active will in the mind of a person to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to consent to an act.⁸⁴ There is difference between consent and submission. Every

⁸¹ 1992 Cr. LJ 1758 (HP).

⁸² 1992 Cr.LJ 1666(Cal).

⁸³ 1992 CrLJ 3218(MP).

⁸⁴ Ratanlal & Dhirajlal, "The Indian Penal Code," 28th Edition Reprint. (Wadhwa Company, 1999). p. 103.

consent involve, a submission although, by no means it, can be said that a mere submission involves true consent.

Tukaram v State of Maharashtra,⁸⁵ brought forward the fact that, the parameters of consent in rape cases are open to argument, where the Supreme Court held that the fear which the clause 'thirdly' of section 375⁸⁶ IPC speaks of is negated by the circumstances, i.e. the victim's failure to appeal to her companions and her conduct in meekly following the accused (constable) and allowing him to have his way to the extent of satisfying his lust rules out 'passive submission'. The facts of the case are briefly as follows:

Mathura is the girl who is said to have been raped. On 26 March 1972, Gama, brother of Mathura lodged a report at police station Desai Gunj, alleging that Mathura had been kidnapped by Nushi, her husband Laxman and Ashok. The report was recorded by Head Constable Baburao. After Baburao had gone away, Mathura, Nushi, Gama and Ashok started leaving the police station. The appellants, however, asked Mathura to wait at the police station and told her companions to move out. The direction was complied situated at the rear of the main building, loosened her underwear, lit a torch and stared at her private parts. He then dragged her to a chhapri which serves the main building at its back verandah. In the chhapri he felled her on the ground and raped her in spite of protests and stiff resistance on her part. He departed after satisfying his lust and then Tukaram, appellant, who was seated on a cot nearby, came to the place where Mathura was and fondled her private parts. He also wanted to rape her but was unable to do so for the reason that he was in a highly intoxicated condition. Mathura was examined by Dr. Kamal Shastrakar at 8 pm on the 27 March 1972. The girl had no injury on her person. Her hymen revealed old ruptures. The vagina admitted two fingers easily. There was no matting of the public hair. The age of the girl was estimated by the doctor to be between fourteen and sixteen years. A sample of the public hair and two vaginal smear slides were sent by the doctor in a sealed packet to the chemical examiner who found no traces of semen therein. Presence of semen was however, detected on the girl's clothes and the pyjama, which was taken off by Ganpat, the appellant.⁸⁷

The learned Sessions judge found that there was no satisfactory evidence to prove that Mathura was below sixteen years of age on the date of the occurrence. He further held that she was 'a shocking liar whose testimony is

⁸⁵ AIR 1979 SC 185.

⁸⁶ Clause *thirdly* of section 375 IPC says that a man is said to commit rape who has sexual intercourse with a woman with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

⁸⁷ AIR 1979 SC 185.

riddled with falsehood and improbabilities'. But he observed that 'the farthest one can go into believing her and the corroborative circumstances, would be the conclusion that while at the police station, she had sexual intercourse and that, in all probability, this was with accused no 2'. He added however that there was a world of difference between 'sexual intercourse' and 'rape' and that rape had not been proved in spite of the fact that the defence version, which was a bare denial of the allegations of rape, could not be accepted at its fact value. He further observed: 'Finding Nushi angry and knowing that Nushi would suspect something fishy, she (Mathura) could not have very well admitted that of her own free will, she had surrendered her body to a police constable. The crowd included her lover Ashok and she had to sound virtuous before him. This is why- this is a possibility- she might have invented the story of having been confined at the police station and raped by accused no 2'.

The High Court agreed with the learned Session's judge in respect of his finding with regard to the age of Mathura but then held that he erred in appreciating the difference between a consent and passive submission. In coming to the conclusion that the sexual intercourse in question was forcible and amounted to rape, the High Court remarked:

"Besides the circumstances that emerge from the oral evidence on the record, we have to see in what situation Mathura was at the material time. Both the accused were strangers to her. It is not the case of the defence that Mathura knew either these accused or any of them since or before the time of occurrence. It is therefore, indeed, highly improbable that Mathura on her part would make any overtures or invite the accused to satisfy her sexual desire. Indeed it is also not probable that a girl who was involved in a complaint filed by her brother would make such overtures or advances. The initiative must, therefore, have come from the accused and if such an initiative comes from the accused, indeed she could not have resisted the same on account of the situation in which she had found herself especially on account of a complaint filed by her brother which was pending inquiry at the very police station. If these circumstances are taken into consideration it would be clear that the initiative for sexual intercourse must have come from the accused or any of them and she had to submit without any resistance.... [M]ere passive or helpless surrender of the body and its resignation to the other's lust induced by threats or fear cannot be equated with desire or will, nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition ... [O]n the other hand, taking advantage of the fact that Mathura was involved in a complaint filed by her brother and that she was alone at the police station at the dead hour of night, it is more probable that the initiative for satisfying the sexual desire must have proceeded from the accused, and that the victim Mathura must not have been a willing party to the act of the sexual

*intercourse. Her subsequent conducts in making a statement immediately not only to her relatives, but also to the members of the crowd leaves no chance (manner) of doubt that she was subjected to forcible sexual intercourse.*⁸⁸

The main contention which has been raised before the Court on behalf of the appellant was that no direct evidence being available about the nature of the consent of the girl to the alleged act of sexual intercourse, the same had to be inferred from the available circumstances and that from those circumstances it could not be deduced that the girl had been subjected to or was under any fear or compulsion such as would justify inference of any passive submission and this contention appears to us to be well-based.

The Supreme Court further observed that:

*"While coming to the conclusion that the consent of the girl was a case of passive submission, the High Court mainly relied on the circumstances that at the relevant time the girl was in the police station where she would feel helpless in the presence of the two appellants who were persons in authority and whose advances she could hardly repel all by herself and inferred that her submission to the act of sexual intercourse must be regarded as the result of fear and therefore as no consent in the eye of law. This reasoning suffers from two errors. In the first place, it loses sight of the fact which was admitted by the girl in cross-examination and which has been thus described in the impugned judgment: She asserted that after Baburao had recorded her statement before the occurrence, she and Gama had started to leave the police station and were passing through the front door. While she was so passing, Ganpat caught her. And if that be so, it would be preposterous to suggest that although she was in a company of her brother (and also perhaps of Ashok and her aunt Nushi) and had practically left the police station, she would be so overawed by the fact of the appellants being persons in authority of the circumstance that she was just emerging from a police station that she would make no attempt at all to resist. On the other hand, her natural impulse would be to shake off the hand that caught her and cry out for help even before she noticed who her molester was. Her failure to appeal to her companions who were no other than her brother, her aunt and her lover, and her conduct in meekly following Ganpat appellant and allowing him to have his way with her to the extent of satisfying his lust in full, makes us feel that the consent in question was not a consent which could be brushed aside as passive submission.*⁸⁹

The Court further reminded of the fact that:

"It has to be borne in mind that the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and that such onus never shifts. It was therefore, incumbent on it to make out that all the ingredients of s 375 of the IPC were present in the case of the sexual intercourse attributed to

⁸⁸ Ibid.

⁸⁹ Ibid.

*Ganpat appellant. The section itself states in clauses thirdly and fourthly as to when consent would not be consent within the meaning of clause secondly. For the proposition that the requisite consent was lacking in the present case, reliance on behalf of the State can be placed only on clause thirdly so that it would have to be shown that the girl had been put in fear of death or hurt and that, which was the reason for her consent. To this aspect of the matter the High Court was perhaps alive when it talked of passive submission but then in holding that the circumstances available in the present case make out a case of fear was shown to be that of death or hurt, and in the absence of such a finding, the alleged fear would not vitiate the consent. Further, for circumstantial evidence to be used in order to prove an ingredient of an offence, it has to be such that it leads to no reasonable inference other than that of guilt. The fear which clause thirdly of s. 375 speaks of is negated by the circumstances that the girl is said to have been taken away by Ganpat right from amongst her near and dear ones at a point of time when they were all leaving the police station together and were crossing the entrance gate to emerge out of it. The circumstantial evidence available, therefore, is not only capable of being construed in a way different from that adopted by the High Court but actually derogates in no uncertain measure from the inference drawn by it.*⁹⁰

This judgment of the Supreme Court invoked much criticism from the legal fraternity.⁹¹ This has been described as an extraordinary decision sacrificing human rights of women under the law and constitution. Question has been raised how could the Apex Court expect that a young girl 14-16 years old, when trapped by two policemen inside the police station, to successfully raise an alarm for help? Does it seriously expect the girl, a labourer, to put up such stiff resistance against well-built policeman so as to have substantial marks of physical injury? Does the absence of such marks necessarily imply absence of stiff resistance?⁹²

From the facts of the case, all that is established is submission, and not consent. Could not their Lordship have extended their analysis of 'consent' in a manner truly protective of the dignity of women? One may suspect that the court gathered an impression from Matura's liaison with her lover that she was a person of easy virtue. In fact one may see it as premarital-sex prevailing as a taboo so strong so as to provide a license to Indian Police to rape young girls or to make them submit to their desire in police stations.⁹³

In **Uday.v. State of Karnataka**,⁹⁴ the complainant was deeply in love with the accused, and on a promise that he would marry her on a later date the

⁹⁰ Ibid.

⁹¹ An open letter to the Chief Justice of India. (1979) 4 SCC (JUR) 17.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ (2003) 4 SCC 46.

prosecutrix gave her consent to sexual intercourse. They continued to meet and often having sexual intercourse and the prosecutrix became pregnant. She then lodged a complaint on failure of the appellant to marry her. The Court held that, the consent cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Penal Code for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact. The Court further observed that:

" There is no straitjacket formula and each case has to be decided considering the evidence and surrounding circumstances of that case- where(i) the prosecutrix (aged 19 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage with the appellant was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix,"⁹⁵

In view of the above the Court then held that the appellant's conviction under section 376 of the IPC was liable to be set aside. As to the question whether in a case of rape the misconception of fact must be confined to the circumstances falling under section 375 IPC fourthly and fifthly, or whether consent given under misconception of fact contemplated by section 90 IPC has a wider application so as to include circumstances not enumerated in section 375 IPC the, Court held it was not necessary to be considered therein.⁹⁶

The Court further explained its opinion in the following words:

"The consensus of judicial opinion is in favour of the view that consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. The circumstances show that she freely, voluntarily and

⁹⁵ Ibid.

⁹⁶ Ibid.

*consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.*⁹⁷

It is unfortunate that the Learned Court failed to realize the consequences of this reasoning; which will virtually give a free hand to the people who cheats or makes a false promise and commits sexual intercourse with young girl and then escapes the responsibility. In the instant case there was no doubt that the promise to marry induced the prosecutrix to consent to sexual intercourse. The appellant was in a superior position considering; the gender imbalance in our country; the promise to marry the prosecutrix. In other words the accused was in a position to exercise an undue influence on the prosecutrix. The Court overlooked this aspect. More over this judgment also brings forward the inadequacy of the law which does not cover situations like in the instant case. The prosecutrix in the instant case has been thrown in to indignity, there was violation of the self of the person (the girl), although realization came on the breach of promise to marry her by the accused. Becoming mother of a child without actually being married is a constant indignity and agony in our society that would follow her till she dies; should be realized by a gender sensitive Court. The Court missed a chance to make a judicial legislation making 'cohabitation with a woman by making false promises to marry her' an offence. The above parameter of consent however does not answer the question whether the act of the accused is socially and morally desirable.

In cases of rape especially in custodial and intimate rape it is really almost impossible to get any independent evidence to corroborate the testimony of the prosecutrix.⁹⁸ It is a matter of hope that the Indian Evidence Act now raises a presumption as to the absence of consent in cases of custodial rape, rape on pregnant women and gang rape as in clauses (a), (b),(c), (d),(e) and (g) of subsection 2 of section 376 of the Indian Penal Code 1860.⁹⁹ This removed the infirmity from the evidence of a victim of rape.

C) A Sum Up

1. The law on sexual offences is confused and confusing, incoherent and has many anomalies that need resolving. Many of the offences were created long ago and reflect the social and legal system of their time. The law must be brought up to date, both to take on broad human rights and gender issues.

⁹⁷ Ibid, Paras. 21 & 23.

⁹⁸ Sec. R. Dec. "Offences Against Women," *Criminal Law Journal* (May, 1985), at p.9-16.

⁹⁹ See, Section 114 A of the Indian Evidence Act: This section was introduced by the Criminal Law (Amendment) Act, 1983.

2. The present criminal law fails to categorize comprehensively the sexual offences; particularly which are committed against women. The present day societies are witnessing various patterns of sexual abuse, therefore we now have the understanding of those patterns. The law needs to formulate provisions to deal with those abuses.
3. The criminal law should not intervene in the private lives of citizens. But it should not also ignore and keep outside of its ambit certain sexual behaviour that takes place in private if that is injurious to the victim. The law relating to marital rape in this regard requires a rethinking and reformation. The criminal law should not only take the notice of the contemporary developments of the society within its territorial limit but also beyond it so that it can get a clue for reformation and changes.
4. Sexual offences against women should not be viewed only as offences affecting human body. Sexual offences often involves, gender violation, physical violence, psychological assault, and gross violation of human rights of the people of weaker sex, and therefore requires a separate placement, significant attention, and reformation in the criminal law in order to meet with the challenges of the materialistic and fast changing society of the country.