CHAPTER-VII

CONCLUSIONS AND SUGGESTIONS

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"That inferno is a picture of human society in a state of sin and corruption, every body will readily agree. And since we are today fairly well convinced that society is in a bad way and not necessarily evolving in the direction of perfectibility, we find it easy to recognize the various stages by which the deep corruption is reached. Futility, lack of a living faith, the drift into loose morality, greedy consumption, financial irresponsibility, and uncontrolled bad tamper; a self-opinioned and obstinate individualism, violence, sterility, and lack of reverence for life and property including one's own; the exploitation of sex, the debasing language by advertisement and propaganda, the commercializing of religion, the pandering to superstition and the conditioning of people's mind by mass-hysteria and spell-binding of all kinds, venality and string-pulling in public affairs, hypocrisy, dishonesty in material things, intellectual dishonesty, the fomenting of discord (class against class, nation against nation) for what one can get out of it, the falsification and destruction of all the means of communication, the exploitation of the lowest and the stupidest mass-emotions, treachery even to the fundamentals of kinship, country, the chosen friend, and the sworn allegiance; these are the all-too-recognizable stages that lead to the cold death of society and extinguishing of all civilized relations." **-Dorothy Sayers**

The acknowledgement of the above truth of the present decade dictates the righteous people to feel that what we need is a new paradigm, a new vision or reality, a fundamental change in our thoughts, perceptions and values. Unless we remould the cultural structure of the world we would not be able to reach nearer to our higher aspirations. The history then reminds us that where we were and how we are now in comparison to the past. This reality of the present day world which has become excessively consumerist, commercialist, exhibitionist, individualist and more horridly hedonist with full booming of materialism makes the task of criminal justice system more difficult especially in the matter of sexual offences against women. All most the entire people of the present day civilization are running after money, sex, enjoyment and satisfaction by whatever means they come. However, the root cause of the problem has always been common in certain matters of the past and uncommon in matters that are and have been the result of the modern complexities supplemented, regimented by the scientific development & blooming technologies and complimented by the western impact of education & culture and resultant change of attitude towards life and

consequential transformation of the less hedonist self into more hedonist and pleasureist humankind.

It may be submitted that in almost all the societies whether ancient or contemporary, the status accorded to women has been more or less discriminatory and prejudicial. The status of women varied to a great extent from time to time. Whereas the Vedic and Puranic tradition ascribed a divine status to women in terms of Lakshmi, Durga, and Saraswati, the latter development diluted this position of women. Their position started deteriorating visibly in pre-independence and early post independence period. Women were denied the right of ownership of property and inheritance. They were treated as objects and kept together with the retarded and deformed. The patriarchy started keeping women illiterate economically unrecognized, socially inferior and legally helpless. Their image in public life had been negatively influenced due to their unvalued and under valued work in economic terms.

At the international level, the emergence of human rights paved the way for women's right. In the late nineteen hundred sixties women's issues became more specific and were clearly visible at the international level. Various international convention and declaration at least acknowledged equality of status and opportunity for women is a must for the development of a nation and for the peace, progress and prosperity of the universe. Much of the credit goes to the international body namely the United Nations for its relentless endeavour for the realization and protection of human rights-that also encompasses the human rights of women. The United Nations along with its various specialized agencies through various convention, conferences, declaration and action plan made it clear that the rights of women are central to their vision of a democratic society.

At the national level it is only the constitution which became the sole repository of the protectional rights and status of the women. During post independence period, our legislature has been a late starter with regard to the women's status and rights. It was only during 1990's separate legislations dealing with women's issues came to be passed by the legislature and separate bodies were established or constituted for the protection of women's rights. At the national level the real reprieve for the women with regard to their status and rights came from the highest court of the country which had taken various clues from the constitution and various international instruments to which India was a signatory. The application of human rights jurisprudence by the judiciary not only clarified the status and position of women but also raised their equality of status and opportunity. Now the Indian society acknowledges that women also

contribute in nations building. The position of Indian women is no better compared to their counterparts in other parts of the world.

At the international level the human rights of women and of girl child have been emphatically verbalised. The human rights of women and girl child have been highlighted; the full and equal participation of women in political, civil, economic, social, and cultural life, at the national, regional and the international levels and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. But at the national level, one must say that the sorry factors are emerging and discernible. Indian women have largely remained bereft of the advances in science and technology basically due to the pariah status historically accorded to them. Various macro indicators related to their education, employment, health and participation in economic activities attest that gender inequalities and women's vulnerability stand stark, numerous initiatives notwithstanding.

While violence against women continues to increase in India, the law and the criminal justice system have in many ways failed to respond or deal effectively with this. Indeed the rate of conviction is reported to be less than 10% in crimes against women.[1] Infact apart from paying lip service to issues of sexual violence against women from time to time, very little effort has been made in the past few years by the state to curb or deal with this kind of violence, both in terms of making the law more sensitive to women and in terms of enforcing it. Women therefore continue to suffer without adequate legal or other redress. Although some amendment took place in the early eighties, the substantive laws relating to sexual offences against women are yet to be amended and the present laws are still remaining as inadequate and ineffective to combat sexual offences against women.

In all the developed societies sexual offending and the policies to combat it has been a rapidly moving terrain over the last four decades. However, our country has been a late starter in this respect and it is only 1980's the legislature brought certain amendments to the existing laws relating to sexual offences. The fact still remains that the present 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

[1] Crimes in India, National Crime Record Bureau, Ministry of Home affairs, Government of India, 1997.

time. The law must be brought up to date, both to take on broad human rights and gender issues.

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 abuses, therefore we now have the understanding of those patterns. The law needs to formulate provisions to deal with those abuses.

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.

The criminal law has failed to realize the true nature of the offence of rape by merely recognizing it only as an offence affecting human body. It is still to recognize the trauma which the victim of rape suffers and the pain which it feels. 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.

The law stresses on the element of consent, however it has no definite definition in the armoury of law. It appears that the policy of law is to limit rape to acts done by force or threat for force or fraud or by deception, although, there is little difference between sexual access gained through the actual or threatened use of physical violence and that gained through the actual or threatened use of economic organizational , or emotional, or social violence. **Tukaram v State of Maharashtra,**[2] 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 375[3] IPC speaks of is negatived 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'. In **Uday.v.**

[2] AIR 1979 SC 185.

[3] 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.

State of Karnataka,[4] the complainant was deeply in love with the accused, and on a promise that he would marry her on a later date the 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. 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 in adequacy 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.

The law lays stress on penetration which is required to constitute sexual intercourse. The meaning of sexual intercourse is confined in narrow terms to include penile/vaginal penetration only and can not be enlarged to include penile/anal, penile/oral, finger/ vaginal, finger/anal or object/vaginal penetration. It also leaves penetration through some object. The law therefore leaves a vast majority of child sexual abuse cases where the penetration is other than penile/vaginal. The present legal policy seems to give an impression that 'the neutral hazard of life meant that children are always at risk from illness and disease, as well as injury from accident and drug abuse. Risk from adult offenders outside and inside the family seems to have been relatively rare,' whereas the

[4] (2003) 4 SCC 46.

reality is otherwise. The problem of adult court hearing evidence from a child victim is another area that needs to be sorted out immediately.

The present law does not even cover all kinds of rape. Further more the law omits all those instances where the wife is obliged irrespective of her own desire. Marital rape therefore, finds partial recognition in the criminal law. But this recognition does not extend its protection to women of all the ages.

Attempt to commit rape' has not been specifically incorporated as an offence in our Penal Code. The authority to punish the 'attempt to commit rape' has been derived by the Indian Courts from section 511 of the Indian Penal Code, 1860 which is a general provision to punish all attempts towards offences. The present legal policy and judicial behaviour gives an impression that attempt to rape and indecent assault which falls within the meaning of section 354, IPC are the same thing, although in reality they are not. On the whole it can be said that the reality is that in most of the cases the offender is punished under section 354 IPC which attracts two years imprisonment due to judicial interpretation, which is a proof of reliance in the old decision and adherence to the age old belief. It is only in a very few cases the offender is held guilty of attempt to rape and punished sufficiently.

It is true that a woman, who is raped, undergoes two crises, the rape and the subsequent trial. While the first seriously wounds her dignity, curbs her individual, destroys her sense of security and may often ruin her physically, the second is no less potent of mischief, in as much as it not only forces her to re-live through the traumatic experience, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her.

There are many defects in the criminal law which prescribes procedure for investigation, trial and the victim's evidence. Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than no, are humiliated by the police. The victim invariably finds rape trials a traumatic experience. The experience of giving evidence in Court is negative and destructive. The victims often considers the ordeal to be even worse than the rape it self. Undoubtedly, the Court proceeding adds to and prolongs the psychological stress the victim had to suffer as a result of the rape itself. In effect, the focus of the law upon corroboration, consent and character of the prosecutrix and a standard of proof of guilt going beyond reasonable doubt results in an increasing alienation of the general public from the legal system, who find the law and legal language difficult to understand and who think that the courts are not run so well as one would expect.

The trial courts and in some cases the High Courts forgets the well settled rule that corroboration as condition for judicial reliance on the testimony of a prosecutrix is not a matter of law but a guidance of prudence under given circumstances and acquits the accused when there is no corroborative evidence. Some times they test the evidence of prosecutrix with same amount of suspicion as that of accomplice. They even do not follow the guidance given by the Apex Court that although medical evidence is relevant to establish the factum of occurrence of sexual intercourse, it is to remain restricted only to the factual aspect of the offence. The legal aspect whether rape was committed has to be established in the light of testimonial evidence, including the statement of the victim. Sometimes the Trial Court searches for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version.

On the whole it may be submitted that the defective and callous investigation, improper collection of evidence and samples, delayed medical examination, inconclusive report, and wrong appreciation of the evidence by the courts altogether helps the accused which in turn acts like an insult to an injury that the victim has already suffered. The confidence of the victim erodes simply because the whole criminal justice system operates against the interest of the victim of rape.

The present criminal justice system is accused centric. The policy of law as it appears that the duty of the state ends with the trial and where possible with the conviction of the accused. The accused has been convicted so justice is done to the victim. This policy it is submitted fails respond to the cries of the victim and hesitates to adopt and accommodate the compensatory jurisprudence which is being followed by most of the advanced jurisdictions. Under the present system the victim has the right to be medically examined, judicially heard, and her right to demand conviction for the accused and nothing more than that. It is submitted that only one or two judicial pronouncement entitling her to a meagre interim compensation can not console the victim of rape. A separate fund and machinery for victim's right to assistance therefore, is the need of the hour, which cannot be and should not be neglected by a country that has a constitution which proclaims justice for all and declares it a democratic, socialist, republic and vouchsafes to protect its entire citizens. The sad plight of a ravished girl and the child born as a result of the offence of rape is far too well-known in our conservative society. In the Indian society for no fault of their own both the mother and the child become social outcaste. In such a case to completely wipe out the stigma of illegitimacy sticking on to the forehead of an unfortunate child an appropriate legislation on the line of section 16 of the Hindu Marriage Act, 1955 is a must and mostly

required.[5] In this regard provision should be made to confer on the mother as well as the child the right to get maintenance from the offender where he is identified, and convicted. Where the accused remains untraced or where the accused could not be convicted the state must take up the responsibility of their maintenance and upbringing till they stand on their own feet.

Victims attract an unprecedented level of interest, both as a subject of criminological enquiry and focus of criminal justice policy only at the academic level and to some extent at the judicial level. So far as the implementation of the science of victimology is concerned western countries had been the first to implement it. However in case of our country the academics first, the judiciary second to raise the voices for and on behalf of victims and the policy makers(legislature) were the last to respond, in our country. The whole polity although silent seems to be confused including the judiciary which is an organ of the state. The judiciary which has and had tried to raise the victims profile, ensured victims needs and the importance of the victim right to assistance and services, has been sceptical by pronouncing ' it is the duty of the legislature'. At a time when the impulse to punish dominates, it remains doubtful whether reorientation towards the victim will in fact foster reintegrative or reparative ends. However there is one danger that concerns for the victim may be used to justify the pursuit of punitivisim in their name and the promotion of victim's interest over those of the offender.

Our sentencing policy and the decisions of courts in various level of the country is bound to misled one, specially in view of the fact that, in most of the cases there has been a complete 'U Turn" of the decision starting from the lower trial court to the highest court of the state. Moreover the lower judiciary, the higher judiciary including the Supreme Court has been in a dilemma as to the exact punishment which is necessarily to be imposed in sexual offences against women. Whether we should retain death sentence or not is a different matter. But going by the Supreme Courts own logic which it applied to consider whether a case falls within the 'rarest of the rare' category it may be submitted that the court has failed to consider the vulnerability of the victim and enormity of the crime in many cases. For example in **Mohd Chaman.v. State,**[6] (NCT of Delhi), in **State of Maharashtra.v. Bharat Fakira Dhiwar,**[7] in **Bantu v State of M.P,**[8]

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[5] Section 16 of the said Act gives justice to the child of a bigamous marriage by declaring him to be legitimate even when the marriage proves to be a nullity in law.
[6] (2001) 2 SCC 28.
[7] (2002) 1 SCC 622.
[8] (2001) 9 SCC 615.

and in **State of Maharashtra v Suresh.**[9] In all these cases[10] the victims were more helpless than the victim in **Dhananjay Chatterjee's**[11] case. It has also failed to properly consider the motivation of the perpetrator and the execution in State **of Maharashtra.v. Bharat Fakira Dhiwar,**[12] in **Bantu v State of M.P,**[13] in **Raju v State of Haryana.**[14] It must be submitted that child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It is a crime against humanity. Where the case is one of rape of a child coupled with murder or one rape of women coupled with murder the responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to future generation of children by punishing the offender sufficiently. In many cases the Highest Court had altered the death sentence imposed by the courts below it, and imposed only life imprisonment which in the opinion of the researcher was not proper. This is not going to suggest that the court should have imposed death penalty. Whether the case falls in the 'rarest of the rare' category or is one perilously near the same; the victim's agony is same. Therefore the court could have opted for the imposition of rigorous life imprisonment in view of the admitted fact that anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. It is also submitted that some times the judicial behaviour have been harsh, sometimes they have been liberal. As to what are the rarest of the rare cases for imposing death sentence the decisions lacks uniformity. In certain rape cases acquittals gave rise to public protests. One way to solve the problem in sentencing sexual offences could be the prescription of minimum sentence for each sexual offence by the legislature and strict adherence to the prescribed punishment by the judiciary at all levels of the country. Our legal policy has failed to bring about certain regulation and predictability in the matter of sentencing in this regard. In order to bring about certain regulation and predictability in the matter of sentencing, a statutory committee is therefore required to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.

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[9] (2000) 1 SCC 471.
[10] Specially when we consider the age of the victim in all these cases ranging from one and half years to 14 years of age.
[11] (1994) 2 SCC 220: Here the victim was 18 years old school going girl.
[12] (2002) 1 SCC 622.
[13] (2001) 9 SCC 615.
[14] (2001) 9 SCC 50.

It may be submitted that most of the offences relating to marriage, namely a) cohabitation caused by a man deceitfully inducing a belief of lawful marriage (section 493, IPC) b) marriage ceremony fraudulently gone through without a lawful marriage by a person (section 496, IPC), c) marrying again during the lifetime of wife (Section 494,IPC) d) enticing or taking away or detaining with criminal intent a married woman (Section 498, IPC) e) sexual intercourse by a person with a married woman knowingly that she is the wife of another person(section 497,IPC) are in essence sexual offences against women. In all the first three cases consent plays a very significant place though law does not take any such notice. In all these cases the consent of the victim is obtained to certain act which either implies or legalizes sexual intercourse. The purpose of the offender in all these cases is to gain sexual access. The offender therefore in the first case inducing a belief of lawful marriage (infact when there was not marriage at all in the eye of law) or goes through a fraudulent ceremony marriage in the second case. And in the third case he gains sexual access by marrying victim. However, the victim may or may not have the knowledge that the offender is having the spouse of an earlier marriage. In all the above four cases the offender if successful gains sexual access and commits sexual intercourse with the woman victim who is unaware of the legality of the marriage. In the first three cases it is always the woman victim losses her precious thing. In some cases she losses even more than what is lost by a victim of rape. She looses her virginity, she looses her faith and confidence reposed in the person. In some cases she is left with the children born to them and the person releases himself from all responsibility. In the first three cases the elements are common; one her consent in that relation which legalizes sexual intercourse which was obtained by fraud or deceit and sexual intercourse which was the intention of the offender. In all the above four cases she becomes victim because of her sex and because of the sexual desire of the offender as such these offences are nothing but in essence sexual offences against women. In the last case namely adultery the offender is not required to gain sexual access through some fraud, deception or marriage and obviously there they are the consenting party to the sexual intercourse. But since law prohibits sexual intercourse outside marriage and chief element being the sexual intercourse, the offence in essence becomes a sexual offence. However, all these offences have been kept under Chapter XX of the IPC which deals with offences relating to marriage. It is submitted that this kind of placement of these offences does not recognize the very nature of the offences. It is submitted that they are essentially sexual offences against women and therefore they should be placed under the chapter which exclusively deals with

sexual offences. It is also submitted that this has been a legislative fallacy of the author of the code and the continuance of the same policy by the successive government is a failure on their part to realize the true nature of the offence.

Section 498 has prescribed for punishment of a person who takes away, entices, conceals or detains a married woman with intent that she may have illicit intercourse with any person. The policy of the law seems to protect the interest of the husband, as it is only the husband who can institute the prosecution proceedings for offences committed under this section. Even the consent of the woman does not give the accused any protection from the mischief of this section if the accused by his action and conduct, though not directly, had encouraged the woman, to leave her husband's place. When construed in this way one must see that this section also leaves a possibility of punishing an innocent where the married woman voluntarily leaves her husband's place for some or other reasons and stays away from him and takes the shelter of an innocent person. The innocent man may be prosecuted as because the married woman's consent is immaterial for the purpose of this section. The law contained in section 498 IPC thus ignores the entity of the wife and makes her the property of the husband. It may be submitted that in view of the change in the general outlook and social status of woman and emphasis for equal rights and obligations for both husbands and wives a rethinking of the legal policy in this regard is called for.

Our law relating to bigamy bears an unusual and uncommon feature which is not generally seen in case of other public law. This is because 494, IPC makes the offence dependent on the personal laws of the parties. The result is that it is applicable to all with the exception of Mohammedan males. Even it does not apply to all Hindus uniformly because of custom. If one deliberately keeps a small lacuna, e.g. instead of taking the seven steps, takes only six steps while celebrating the second marriage, he can easily avoid the penalty prescribed by the sections even though by doing so he will be ruining the lives of two women. In order to attract Section 494 IPC the prosecution has to prove that the second marriage was validly performed as per the customary rights of either party under their personal laws. If there is any lapse in following the customary rules, the second marriage would be regarded as void. It is not always easy to prove long after the marriage that all the rituals were duly performed. To overcome these practical difficulties a suitable provision be incorporated to the effect that if the man and the wife were living as husband and wife for a reasonably long period they shall be deemed to have married in accordance with customary rites of either party thereto. This shall be rebuttable presumption and the finding shall not be binding in civil proceedings. In a number of cases admissions of marriage

by the accused was not considered as evidence of it for the purposes of proving marriage in an adultery or bigamy case. It is submitted that mere observance of the laws of evidence with flaws led to injustice to many women.

The present legal policy relating to bigamy punishes an offender with imprisonment of either description for a term which may be seven to ten years, and also fine. The present policy also operates with the assumption as if there is one victim i.e., the first wife although the offender of the offence of bigamy virtually destroys the life of two different women. Both of these women invariably are dependent on the offender of the offence. It is submitted that the present legal policy is accused centric as because it fails to take account the miseries of the victims of bigamy, especially their economic plight. The present policy also operates blindly with the assumption as if there is one victim i.e. the first wife.

A woman in a second marriage is not entitled to claim maintenance as in law a second marriage during the subsistence of the first marriage is not legal and valid. Such a woman though she is de facto the wife of the man, in law she is not his wife. Quite often the man marries for the second time suppressing the fact of earlier marriage. In such a situation the second wife can't claim the benefit of Section 125 for no fault of hers. The husband is absolved of his responsibility of maintaining his second wife. It is submitted that this is manifestly unfair and unreasonable. The man should not be allowed to take advantage of his own illegal acts. Law should not be insensitive to the suffering of such women. Therefore the definition of the word 'wife' in Section 125 should be amended so as to include a woman who was living with the man as his wife for a reasonably long period, during the subsistence of the first marriage. Compulsory registration of marriage and pre-registration verification of the male person would be a good measure of prevention of the recurrence of the offence. Uniform Civil Code with regard to marriage, divorce, inheritance has been suggested by many including our judiciary. But until that stage arrives we may opt for economic sanction against the offender. The policy may also prescribe for the attachment of the valuables and properties and rational distribution of the same among the victims of bigamy.

Our legal policy relating to adultery which is incorporated in section 497 of the Indian Penal Code and section 198 of the Code of Criminal Procedure 1973 signifies the unequal status of husband and wife in the institution of marriage in India. This policy declares that man is a seducer and the married woman is merely his helpless and passive victim; he trespasses upon another man's marital property that is his wife by establishing a sexual relation with the married woman with her consent but without the consent or connivance of her husband. It also gives immunity to a married man, who may seduce and establish sexual liaison

with an unmarried woman, a widow or a divorcee, as because in that case he will not be considered guilty of adultery. Although this type of sexual link is equally potential to wreck the bond of marriage between him and his wife and therefore the policy itself may act like a boomerang and destroy one of its chief object i.e. the matrimony.

Not only has the legislative policy viewed male as a seducer, the judiciary confirmed it by its pronouncement. Truly the whole law of adultery implies that; a) it confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery, b) it does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, c) it does not take in its ambit the cases where the husband has sexual relations with unmarried women, or a divorced women, with the result that the husbands have a free licence under the law to have extramarital relationship with unmarried women or divorced women. d) It also betrays the idea that a woman is not eligible to have such an exclusive right and claim over her husband. It must be submitted however that the Apex Court's reasoning "in defining the offence of adultery so as to restrict the class of offenders to men only, no constitutional provision is infringed and that Section 497 could not be struck down on the ground that it is desirable to delete it," defies the rules of prudence and the reason itself, is the humble submission of the researcher. This is because no adultery would be committed unless a woman was a party to it and that here the different treatment was not on the basis of biological difference but due to a gender biased perception of sexuality. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man other than her husband. In this regard it may be submitted that the court has failed to adopt the meaning of penal statute to changing social milieu. It failed to realize that Indian Penal Code fabricated in the imperial foundry well over a century ago has not received anything but cursory parliamentary attention in the light of the higher values of the National Charter which is a testament of social justice, right to life, equality. So the court must permeate the Penal Code with exalted and expanded meaning to keep pace with constitutional values and the increasing enlightenment of informed public opinion. A nineteenth century text, when applied to twentieth century conditions, cannot be construed by signals from grave. So, when the legislature fails the court can not deny its duty to innovate beyond the law. The researcher vehemently puts forward the argument that the criminalization of adultery in India is discriminatory on its face and

violates Articles 3 and 26 of the ICCPR guaranteeing equality under and equal protection of the law.

The present policy provides for the punishment of the adulterous husband with imprisonment which may extend to five years or with fine or with both. Consequently a guilty husband if convicted would be sent to jail and fined and his innocent wife would suffer for no offence. This is because of the Indian condition of the society as most of the women in our country economically still dependant on the husband. So the present legal policy which on the one hand protects the rights of the husband over his wife by punishing the adulterous man also hits indirectly though severely the innocent wife of the adulterous man if he is married. This policy of protecting one's rights at the cost of another who had no role in snatching those rights needs serious rethinking. It may be submitted that the provision of section 497 are inconsistent with the modern notions of the status of woman and of the natural rights and obligation under marriage. Efficiency in marriage, as in partnership, requires that there be a proper legal remedy for adultery, and bigamy.

The present policy which punishes the offender of these offences with imprisonment along with fine or without fine, is only accused centric and fails to address the problem arising out of these offences which the victim or victim or even the issues of the victim of these offences suffers. In both the adultery and bigamy each individual woman should be allowed to initiate proceedings whether civil or criminal. The law should make way for the adoption of the system of 'plea bargaining' which would allow settlement of cases between the accused and the victim through various measures including compensation or some financial arrangements. Our stand on criminal justice system should not be meek and weak but positive and powerful from the perspective of victim's sufferings. Our perspective in such offences should be against punitive cruelty form victims socio-economic position simply because oftentimes the present policy is curative futility.

Section 377of the Indian Penal Code, punishes unnatural offence. One may run riot after the word "unnatural." The section gives no clue but leaves it to the interpretation of some people. It expresses as well conceals certain things. In doing so it neglects a domain that is constituted by homosexual or people of alternative sexuality; who existed in the world since ancient period. This domain which is constituted by the people of alternative sexuality is also raising their voices around the world is gaining momentum not merely because of the fact that they are increasing in sufficient number. Our law is technically silent on lesbianism, but presumably not, on gay sexuality. The reason is that "Section

377, IPC de hors the Explanation appended to it consists of the following ingredients; a) a person accused of this offence had carnal intercourse with man, woman, or animal; b) such intercourse was against the order of the nature ;and c) such act by the person accused of the offence was done voluntarily." These being the essential ingredient of the offence, it may be interpreted in a way whereby consensual sexual intercourse between two adult male or between two adult female would become an unnatural offence. But technically consensual sexual intercourse between two male adult would come within the ambit of the section. This is because of the fact that the section makes it clear that penetration would be sufficient to constitute the carnal intercourse necessary to the offence described in the section. In other words since man can practically penetrate, sexual intercourse is possible between two male persons and would be considered as an offence under the section. On the other hand since women can not practically penetrate, this section technically keeps them outside its ambit. To put it differently women can not penetrate and therefore a consensual sexual intercourse between two female would not be an offence under the section. So what emerges is that the section says a homosexual relation between two adult male would be an offence. It remains silent as to whether homosexual relation between two female would be an offence in view of the technicality.

Section 377, IPC punishes homosexuality, a practice of the sexual minority. The presumption of law is clear, that hetero-sexuality is permissible practice, but the assumption of law about sexual orientation is open to questionability. Though section 377 IPC no where uses the term 'homosexual or homosexuality.' It thus seems that the existence of a domain which is constituted by the homosexuals e.g., gay or lesbians are neither named nor prohibited within the economy of law. Even beyond silencing, s. 377 goes on to create the binary categories of natural and unnatural, and which category lesbianism would fall into is not in doubt. Even though section 377, IPC ostensibly it excludes lesbians from its ambit, it has been read expansively by State authorities to harass and intimidate lesbian women as well

The universality of Human rights demands that prevailing and dominant cultural and social norms cannot be invoked in a manner as to circumvent or restrain fundamental and constitutional rights. The legislative silence on lesbianism and antipathy toward homosexuality together with the repulsive societal attitude make these people suffer from identity crisis, and leave them in a vulnerable situation. It also fails to recognize the importance of protecting all families. It therefore, risks losing its normative power as a force for promoting equality. This is not going to suggest that deletion of section 377 IPC would do

justice to all. It may be necessary for the protection of minors. But to the extent to which it prohibits voluntary sexual intercourse between two adult of the same sex, the law requires to be changed for recognizing and for giving space to certain categories of people having alternative sexuality. Right to marry and freedom as to the choice of one's mate or life partner can not be restricted in this way to the exclusion of a good number of people, especially in view of the changing scenario of this world. Law should not remain silent about a domain which is coming out with increased visibility of the people having alternative sexuality. The law should acknowledge their existence, entity and allow them to marry; live with those they love. Let us acknowledge the fact that like heterosexuality, homosexuality is an orientation, which is not unnatural. The present law contained in section 377, IPC, is therefore, a clear negation of the unified voice 'we,' 'the people of India,' enshrined in the Preamble of the Constitution.

The concept of obscenity has always linked with the concept of morality in the society. Law and morality are almost similar but not identical concepts. Where morality prescribes the standard code of conduct, law prescribes punishment for its violation. Thus law and morality are concepts; complimentary to each other. They strengthen and reinforce each other. In fact morality is the blood, which runs through the portals of law. The concept of obscenity or indecency is also a part of the larger body of our system of social morality. Social morality is something, which has the vocal and tacit approval of the society. What is beyond the accepted and established norms of society becomes immoral. Law comes into play, only to contain and eradicate this growth of indecency and obscenity in the society. However the excessive commercialization of sex, people's attraction to sex exhibition, marketization of sex in the form of advertisement through mass media and beauty shows virtually raises the hunger of modern men not only for a beautiful female body but a bare, beautiful and sexy body. Women who are actively engaged in modelling, pop shows, Television serials, film and advertising industry may find themselves in an awkward position if the obscenity laws are applied strictly. It is submitted that the whole law of obscenity is not uniformly applied in the country. Closure of dance bars and prohibition on bar dancer's performance in some part of the country is reflective of a particular policy of the criminal law. But the silent entry of World Wide Web along with all its gifts and evils through different websites showing nudity and pornography and its non-regulation is reflective of a different policy of law relating to obscenity. This dualism of policy it is submitted requires a rethinking and reform. The criminal law has to draw a balance between the fundamental freedom of trade or

profession and the rights which the criminal law seeks to protect and enforce. In this regard it may be submitted that unless a minimum of conformity between legal order and social effectiveness is maintained by various processes of legal evolution, a revolution will ultimately destroy the existing dubious legal order and substitute a new one.

An individual's status in society depends upon the totality of the legal rights available to and enjoyed by him or her in different aspects of life whether it is marital, social, political or economic. In other words women often face multiple barriers to being free and equal in the societies. Some barriers are based on their gender and some are on their sex. Sexual harassment and sexual exploitation of women operates as a barrier to their free and equal participation in the society in a dignified way, and make them an object or item of sex which can fulfil the unwelcome and unwanted lust or desire of the physically, economically or otherwise strongly placed masculine gender. It is submitted that sexual harassment and exploitation of women are incompatible with the dignity and worth of human person, and must be eliminated by legal measure, national and international co-operation in such fields such as economic and social development, education, health care, poverty alleviation and social support.

The latest development of law relating to sexual harassment of working women has raised the concern of the working women to some extent. The protection is no doubt available to the women working in the public and private sector. But it is doubtful whether the present law can prevent sexual harassment of women working in various un-organized sector. So far as sexual harassment is concerned the role of the Apex Court has been significant for many reasons. Firstly the Court in **Vishaka**[15] recognized the fact of sexual harassment as a true phenomenon. Secondly the court recognized openly that there were legislative vacuum in the field of law to deal with the problem of sexual harassment. Thirdly it recognized the structural and systematic nature of sexual harassment at the workplace. Fourthly by declaring sexual harassment as the violation of fundamental right the Apex Court raised the protectional aspect of women from such harassment at least theoretically. Fifthly it directed for setting up of machinery for the prevention of sexual harassment of working women. Sixthly the Apex Court in the instant case issued guidelines in response to a gang rape of a social worker in the State Development Programme.[16] This active and

[15] (1997) 6 SCC 241: AIR 1997 SC 3011.

[16] Some people consider this as the biggest irony as the remedies suggested by the court in the instant case was of little use to the victim. For details see, Sheba Tejani, "Sexual Harassment at the Workplace: Emerging Problems and Debates," Economic and Political Weekly, Vol-xxxix, no-41,(October 9, 2004) at p.4491.

progressive legal realism must be given credit in a country which is riddled with so many things namely, gender bias, historical and religious myth, illiteracy superstition, and above all corruption, that starts from womb to the tomb. Sixthly the Court in the absence of any legislation and explicit though not identical statutory provision had taken the recourse of provisions of progressive international law. This is silent averments that the legislature should follow not blindly but wisely.

The Apex Court delivered its judgment in Vishaka in the year 1997. It is submitted that this declaration that sexual harassment is a violation of fundamental rights is of little practical relevance to women in the private and un-organized sectors, as they are not provided with an affordable and expedious remedy in the form of writ petitions. It is difficult to visualize the implementation of the Vishaka machinery in situations of migrant labour, sole proprietorships, piece rate work and different form of unorganized labour. In spite of various decisions of the Apex Court favouring and protecting women, the position of women in India did not change much and they continue to suffer from sexual harassment at the workplace. In most of the cases it was found that the Complaint Committees were not properly constituted and also being manipulated by the accused who happens to held a higher rank or had a higher position of authority.

The National Crime Record Bureau's report in 2005 shows that reported incident of work place sexual harassment were 12325 in 2003 and 10001 in 2004.[17] This proves that even after Vishaka[18] nothing has changed. Women's in India are and will be raising complaints of sexual harassment in an extremely hostile environment with the risk of backlash, humiliation, injury whether mental or physical and a complete loss of confidentiality. The post Vishaka development reflects the scenario of the reaction of most institutions; trying to bury the matter, vilify and target the women or hurriedly convene a committee to conduct a token slipshod or completely adverse investigation. It also reveals that plight of the complainant of sexual harassment specially when the accused is the owner or part of management, or occupies a position of authority which curtails the possibilities of an impartial inquiry.

The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Bill, 2006', if translated into law and implemented would do justice to many working women of this country. This is because of the fact that the Bill if translated in to Act would mean and imply the following; a) the

[17] National Crime Record Bureau, 2005, Ministry of Home Affairs, Government of India.
[18] Supra note 6.

coverage that the Bill gives, b) the prohibition and definition of sexual harassment in workplace, and the explanation that the Bill gives, c) the protection that the Bill gives to a variety of women working under different umbrella, d) the coverage that the Bill includes in terms of employees and employers, e) the definition of sexual harassment and the accompanying explanations as to what it means and what it includes, f) the ambit of the Bill that brings within its ambit i.e., the contractual service, unorganized sectors, g) the clarity of definition as to women and employer and employees for the purposes of the Bill, h) the proposal as to the establishment of various authorities and complaint committees and the rules thereto as to the constitution and their power, i) the detailed provision as to who is an aggrieved women and the jurisdictions of the authorities and complaint committees; their powers, duties of the workplace, procedure for lodging and dealing with complaint, j) the widening of the concept of workplace and the duty of the workplace and also the duty of the employer in the respective workplace.

Sexual exploitation of the women and child, namely the prostitute is another area which suffers the neglect of our legal policy. At various levels it has been considered that women also have human rights. The need of the hour is the identification and a proper realization of the reasons both traditional as well as emerging factor that are contributing towards the unabated rise of prostitution. The menacing march of materialistic culture, out of which prostitution now derives strength, support and sustenance, needs to be refashioned through carefully crafted programmes of moral regeneration, poverty alienation, and other programme so that no new victim joins this profession of exploitation. It is submitted that criminalization of prostitution would be a remedy worse than the disease until a complete and full proof rehabilitation programme is made and effectively implemented. The brazen marketization of sex needs to be prevented and controlled through vigorous law enforcement measures backed and buttressed by preventive action initiated by governmental agencies, NGOs. A proper health care programme is also necessary for those victims who have already fallen prey to this menace.

The role of the Apex Court has been appreciable in as much as the court has realized that this malignity (prostitution) cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout. The Court therefore issued various directions to the Central and State Government and other bodies to take immediate action for

the eradication of child prostitution. It has appointed a Committee which it studied not the problem of the children of the fallen women but also the route cause of the menace of child prostitution and the prostitution as such and the need for its eradication.

Governmental protective homes have their problem with institutionalization and the. Most of the homes do not provide a decent and healthy standard of living for them. Not only the suitable legislation, but allocation of sufficient fund, better management and administration is required in this regard.

The voices against sexual harassment of working women were raised considerably but only to protect a particular class of women. Consequently it was overlooked that prostitutes who are also entitled to enjoy human rights of the women, have their right to livelihood. It is in the brothel or the place where they carry on their profession they regularly become the victim of sexual harassment, including unnatural lust. More over the status which they carry in our mind due to their profession make them no entity and thus no case of sexual harassment of the prostitute is reported and they also do not dare to report it. In the absence of any authentic data one can argue that their profession being prostitution they offer sex in return of money as such no possibility of sexual assault or harassment is imaginable. But if one turns to the so called civic society, he would see that in spite of having laws to prevent sexual harassment of working women, such incidents are happening. Consequently it can not be denied that the evil which takes place in the sphere which is under regulation of law is surly to take place in the sphere which is yet to be regulated or brought under the regulation of law.

It is submitted that there are many defects in the present Criminal Justice System. Under the present system victims do not get at present the legal rights and protection they deserve to play their just role in criminal proceedings which tend to result in disinterestedness in the proceedings and consequent distortions in criminal justice administration. The resultant damage of the system is the loss of confidence of the people in the present criminal justice system. Secondly, victims feel ignored and are cry for attention and justice. The right of the victim under the present system does not extend to prefer an appeal against any adverse order passed by the trial court. The appellate court should have the same powers to hear appeals against acquittal as it now has to entertain appeal against conviction. There is no credible and fair reason why appeals against acquittals should lie only to the High Court. There is need for developing a cohesive system, in which, all parts work in co-ordination to achieve the common goal.

Adoption of French criminal justice system is therefore suggested as an effective measure that would help the victims of sexual offences. Under the French system, all those who suffer damage on account of the commission of an offence are entitled to become parties to the proceedings from the investigation stage itself. The victim can assist investigation on proper lines and move the court for appropriate directions when the investigation gets delayed or distorted for whatever reasons. Victim's active participation during trial greatly helps the court in the search for truth without inconveniencing the prosecution. He may suggest questions to the court to be put to witnesses produced in court. Under the French system victim may conduct the proceedings if the public prosecutor does not show due diligence. She can supplement the evidence adduced by the prosecution and put forth his own arguments. She can adduce evidence in the matter of loss, pain and suffering to decide on his entitlement of interim reliefs and compensation by way of restitution.

It is submitted that if the criminal proceedings have to be fair to both the parties and if the court were to be properly assisted in its search for truth, the law has to recognize the right of victim's participation in investigation, prosecution and trial. If the victim is dead, or otherwise not available this right should vest in the next of kin. It should be possible even for Government, Welfare bodies and voluntary organizations registered for welfare of victims of sexual offences, child victims, those in charge of the care of aged and handicapped persons to implead themselves as parties whenever the court finds it appropriate for a just disposal of the case.

On the whole it must be said that in our country, the incorporation of large number of common law and civil law in the nineteenth century followed by a reception of new constitutional models in the twentieth century and by post-independence wave of reform and rationalization did very little good for the women of the country. The present criminal justice system is the out come of this type of borrowing, consolidating and modernizing our national legal system which involved application of laws over wider spatial, ethnic and class areas. The present criminal justice system heavily relies on a plethora of persons for its enforcement, often there is no connection between agencies involved and misunderstanding or lack of understanding prevalent in the system. Misguided objectives of criminal justice, exertion of undue influence on authorities involved in meeting out justice, lack of sincerity and expertise, deep rooted corruption, accused centric nature of the system, are some of the problems which are plaguing our criminal justice system. A balancing act between the codified aims and socio-economically desirable aim of granting compensation to women victim

of sexual offences for the loss suffered is the requirement of the age. While the Apex Court has depicted a trend of compensatory justice, it is fissiparous and fragmented. It is high time that the legislature should revise the whole policy relating to sexual offences against women.