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Violence Against Women: Review of Recent Enactments

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Introduction

If oppression were to be tackled by enacting laws, then the last decade (19809) could be declared as the golden era for Indian women, when laws were given on a platter. During this period every single issue concerning violence against women taken up by the women's movement resulted in legislative reform.

The enactments conveyed a positive picture of achievement but the statistics revealed a different story (Table 1). Each year the number of reported cases of rape and unnatural death increased. The rate of convictions under the lofty and laudable legislation were dismal (Table 2) and hence, their deterrent value was lost. Some enactments turned out to be mere ornamental legislation or paper tigers.

The question foremost in the public mind was why the enactments were ineffective in tackling the problem. The answer would lead one to a complex analysis of the processes involved.

First, the laws, callously framed, more as a token gesture than due to any genuine concern in changing the status quo of women, were full of loopholes. There was a wide disparity between the initial demands raised by the movement as well as the recommendations by Law Commissions and the final enactments. Many positive recommendations of the expert committees did not find a place in the Bills presented to Parliament. While one organ of the State, the legislature, was overeager to portray a progressive pro-women image by passing laws for the asking, the other organs, the executive and the judiciary, did not express even this token measure of concern. Their functioning was totally, contradictory to the spirit of the enactment.

The defective laws were welcomed by the movement as a first stepping stone towards women’s empowerment. But the motive beneath the superficial concern of the state went unnoticed. The question as to who

Table 1: Reported Cases of Domestic Violence in the City of Greater Bombay

Year	Murders U/S 302 IPC	Suicides U/S 306 IPC r/w S.304 B IPC	Harassment U/S 498A and U/S 3,4,5 of Dowry Prevention Act
1986	4	38	41
1987	12	45	143
1988	2	56	152
1989	13	103	177
1990	9	72	143

Source: Social Service Branch, CID, Bombay

Table 2: Disposal of Rape in Bombay 19851989

Description	1985	1986	1987	1988	1989
Registered	101	102	85	108	108
Charge Sheeted	93	96	76	104	100
Convicted	8	1	2	1	1
Acquitted	4	3	1	-	2
Pending Trial	81	91	72	102	95

Source: The Lawyers, April 1991.

would ultimately benefit by these enactments was seldom asked. The campaigns with a thrust on law reform could not maintain the pressure, once the legislation was enacted. There was a lull and a false sense of achievement resulting in complacency. Hence, the impact of the enactments in court proceedings was not monitored with the same zeal.

The campaigns themselves were limited in scope. At times, the issues which were raised, addressed only the superficial symptoms and not the basic questions of power balance between men and women, women's economic rights within the family and their status quo within society. The solutions were sought within the existing patriarchal framework and did not transcend into a new feminist analysis of the issue. They seldom questioned the conservative notions of women's chastity, virginity, servility and the concept of the good and bad woman in society. For instance, the rape campaign subscribed to the traditional notion of rape as the ultimate violation of a woman and a state worse than death. It did not transcend the conservative definition of forcible penis penetration of the vagina by a man who is not her husband.

The campaign against dowry tried to artificially link dowry which is property related and death which is an act of violence. If the campaign had succeeded it

could have benefited the woman's brother and father. Neither would it have elevated the woman's status in her matrimonial home nor could it have ended domestic violence. Any remedy, to check the superficial malady, no matter how effective and foolproof, could not effectively arrest the basic trend of violence against women which is the result of women's powerlessness in a male-dominated society. The campaigns and the ensuing legal reforms have certain commonalties. The campaigns were highly visible and had received wide media publicity. Government response was prompt. Law Commissions or expert committees were set up with a mandate to solicit public opinion and submit their recommendations to Parliament. But the recommendations which would have had far-reaching impact and could have changed the Status quo in favour of women, did not find a place in the final enactment. The enactments uniformly focused on stringent punishment rather than plugging procedural loopholes, evolving guidelines for strict implementation, adequate compensation to the victims and a time limit for deciding cases.

The apprehension of legal experts both within and outside the women's movement that stricter punishment would lead to fewer convictions proved right. The question confronting us today is whether social change and gender justice can be brought about merely by enacting stricter laws.

Each law vests more power with the State enforcement machinery. Each enactment stipulates more stringent punishment which is contrary to progressive legal reform theory of leniency to the accused. Can progressive legal changes for women's rights exist in a vacuum, in direct contrast to other progressive legal theories of civil rights? So long as basic attitudes of the powers-that-be remain anti-women, antiminority and anti-minority, to what extent can these laws bring about social justice? At best they can be an eyewash and a way of evading more basic issues of economic rights and at worse a weapon of State co-option and manipulation to further its own ends.

The rape campaign is a classic example of the impact of public pressure on the judiciary. As can be observed from the discussion on the rape campaign, favourable judgements were delivered before the amendment when the campaign was at its peak as compared to the post amendment period. Perhaps public pressure is a better safeguard to ensure justice than ineffective enactments.

The Maharashtra Regulation of Prenatal Diagnostic Techniques Act, 1988, had a greater participation of activists at the initial stage of formulation of the Bill. But it did not involve the activists at the implementation level and has remained only on paper. The, Sati Prevention Bill, a decorative piece of legislation, is a cover-up

for State inaction at the crucial stage of preventing the public murder of a teenaged widow.

The worst among these is the Immoral Traffic (Prevention) Act, 1956 which was amended in 1986. This amendment was not even in response to any demand for change. The Act does more harm to women in general and prostitutes in particular. Under this Act, any woman who is out at night can be picked up by the police. The only aim of the amendment seems to be to enforce more stringent punishment.

Ironically, three of the laws discussed here which are supposedly for protecting women from violence actually penalize the woman. Instead of empowering women, the laws have served to strengthen the State. A powerful State conversely means weaker citizens, which includes women. And the weaker the women, the more vulnerable they will be to male violence. The cycle is vicious.

This paper reviews the laws relating to three areas affecting women's lives, i. e. rape, dowry and domestic violence. It does so against the backdrop of changing perceptions towards penal enactments within the women's movement.

Campaign for Reforms in Rape Laws and Legal Response to Rape

The Campaign. The amendment to rape laws, enacted in 1983, was the predecessor to all the later amendments which followed during this decade. Sections 375 and 376 of the Indian Penal Code, which deal with the issue of rape, had remained unchanged in the statute books since 1860. The amendment was the result of a sustained campaign against these antiquated laws following the infamous Supreme Court judgement in the Mathura case.

Mathura, a 16-year-old tribal girl, was raped by two policemen within a police compound. The sessions court acquitted the policemen on the ground that Mathura was habituated to sexual intercourse and hence she could not be raped. The High Court convicted the policemen and held that mere passive consent given under threat cannot be deemed as consent. The Supreme Court set aside the High Court judgement on the grounds that Mathura had not raised any alarm and there were no visible marks of injury on her body.[1]

The judgement triggered off a campaign for changes in rape laws. Redefining consent in a rape trial was one of the major thrusts of the campaign. The Mathura judgement had highlighted the fact that in a rape trial it is extremely difficult for a woman to prove that she did not consent beyond all reasonable doubt as was required under the criminal law.

The major demand was that once sexual intercourse is proved, if the woman states that it was without her consent, then the court must presume that she did not consent. The burden of proving that she had consented should be on the accused. The second major demand was that a woman's past sexual history and general character should not be used as evidence (Agnes 1990).

The State Response. The government's response to the campaign was prompt. The Law Commission was asked to look into the demands and consequently prepared a report incorporating the major demands of the antirape campaign.
The Commission also recommended certain pretrial procedures that women should not be arrested at night, a policeman should not touch a woman when he is arresting her, that the statements of women should be recorded in the presence of a relative, friend or a social worker and that a police officer's refusal to register a complaint of rape should be treated as an offence.

Based on these recommendations, the government presented a Bill to Parliament in August 1980. But surprisingly, the Bill did not include any of the positive recommendations of the Law Commission regulating police power or about women's past sexual history. The demand that the onus of proof regarding consent should be shifted to the accused was accepted partially, only in cases of custodial rape, i. e. rape by police men, public servants, managers of public hospitals and remand homes and wardens of jails.

The Bill had certain regressive elements which were not recommended by the Law Commission. It sought to make publishing anything relating to a rape trial non-bailable offence which meant a virtual press censorship of rape trials. This was ironical because the public pressure during the campaign was built up mainly through media publicity and public protests. This provision met with a lot of criticism. Thereafter, the regressive provisions were made slightly milder. For instance, publication of rape trials was made into a bailable offence. The important provisions of the amendment were:

- Addition of a new section which made sexual intercourse by persons in a custodial situation an offence even if it was with the woman's consent.

- Introduction of a minimum punishment for rape: ten years in cases of custodial rape, gang rape, rape of pregnant women and minor girls under twelve years of age, and seven years in all other cases. Even though this was not the major demand, it turned out to be the most important ingredient of the amendment.

Although inadequate, the amendment was welcomed as a progressive move -- a beginning. There was a general presumption within the movement that the

courts would follow the spirit of the amendment and give women a better deal in rape trials.

After the amendment, the campaign lost its alertness. There were hardly any efforts to systematically monitor its impact in rape trials. So the Supreme Court judgement in 1989 in a case of custodial rape by policemen (popularly known as the Suman Rani rape case) came as a jolt. The Supreme Court had reduced the sentence from the minimum of ten years to five years.[2] The review petition filed by women's groups against the reduction of sentence was also rejected.[3] This brought into focus the need to review judicial trends in rape trials since the amendment.

A scrutiny of the judgements during the decade revealed that the judgement in the Suman Rani case was not an exception. It was merely adhering to the norm of routinely awarding less than the minimum mandatory sentence introduced by the amendment. Hence the main component of the amendment, i.e. the deterrent provision of stringent punishment, was rendered meaningless. The amendment also did not bring about a positive change in the attitude of the judiciary despite the well-publicized campaign.

Here are excerpts of some important judgements which reveal the trends in sentencing patterns and expose the inherent judicial biases in rape trials.

The Judgements during the Campaign. It would come as a surprise to many that the settled legal position regarding consent before the Mathura trial was not as adverse as one would assume. In fact, the Mathura judgement had expressed a view which was contradictory to the settled legal position in the Rao Harnarain Singh case where the Supreme Court, way back in 1958 had held:

> A mere act of helpless resignation in the face of inevitable compulsion, quiescence and nonresistance when volitional faculty is either crowded by fear or vitiated by duress cannot be deemed to be consent. Consent on the part of the woman as a defense to an allegation of rape, requires voluntary participation, after having fully exercised the choice between resistance and assent. Submission of her body under the influence of terror is not consent. There is a difference between consent and submission. Every consent involves submission but the converse does not always follow.[4]

This was the settled legal position and was relied upon by many later judgements during the pre-amendment period. But there was no uniformity in court decisions. No one could predict with certainty the outcome of a rape trial. Much would depend upon the views and attitude of individual judges.

The judiciary viewed rape as an offence of man's uncontrollable lust rather than as an act of sexual violence against women. The following Supreme Court judgement of 1979 by Justice Krishna Iyer is an indication of this trend. The description of the offence in the judgement is as follows: 'A philanderer of 22 years overpowered by sex stress hoisted himself into his cousin's home next door in broad daylight, overpowered the temptingly lonely prosecutrix, raped her in hurried heat and made an urgent exit having fulfilled his erotic sortie.'

The reasoning for the reduction of sentence was: 'Youth overpowered by sex stress in excess. Hyper-sexed homo sapiens cannot be habilitated by humiliating or harsh treatment. . . . Given correctional course his erotic aberrations may wither away.[5] This judgement was relied upon in several later judgements to reduce the sentences of young offenders.

But from another judgement of Justice Krishna Iyer delivered a few months later, i.e. in early 1980, a new sensitivity regarding the issue of rape within the judiciary can be discerned which can safely be attributed to the newly evolving antirape campaign. Regarding uncorroborated testimony of the victim it was held: 'The Court must bear in mind human psychology and behavioural probability when assessing the credibility of the victim's version'.[6]

In the same judgement, the court also cautioned against stricter laws and said that a socially sensitized judge was a better statutory armour against gender outrage than long clauses of a complex section. The judgements of the post-amendment period have proved these apprehensions to be correct.[7]

In a judgement case reported in 1981, where a 16-year-old was gang raped, the court held: 'The fact that there is no injury and the girl is used to sexual intercourse is immaterial in a rape trial'.[8]

In 1982, in a case of gang rape, relying upon the Rao Harnarain Singh judgement, the Orissa High Court held that the consent must be voluntary. A mere nonresistance or passive giving in under duress cannot be construed as consent.[9]
In a landmark judgement of 1983 the Supreme Court held that corroboration of a victim's evidence is not necessary: 'In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration is adding insult to injury'.[10]

The judgements reflect the concern expressed by the women's organizations during the antirape campaign. But there was no uniformity and the pendulum swung from one extreme to the other as in the case of Mathura. The amendment was supposed to rectify the situation by bringing a certain degree of uniformity and changing the attitude of the judiciary regarding women during rape trials.

Unfortunately, the judgements in the post-amendment period convey a dismal picture.

The Judgements During the Post-amendment Period

Conservative Notions Regarding Women's Sexuality. The year 1984 started off with a judgement which reflects an extremely negative view of women's sexuality. A school teacher had seduced a young girl but when she conceived he refused to marry her. A case of rape was filed. The Calcutta High Court held: 'Failure to keep the promise at a future uncertain date does not amount to misconception of fact. If a fully grown girl consents to sexual intercourse on the promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity'.[11]

This judgement was relied upon in several later cases where girls were seduced with a false promise of marriage, to acquit the accused. In fact, there is only one positive judgement on this issue which has held that consent given under a promise of marriage is tainted consent and has clarified further that no one should be permitted to reap the benefits of fraud in sexual matters.[12]

In another disturbing judgement reported in 1989, the Bombay High Court set aside a conviction by the sessions court in Kolhapur. The girl who was in love with the accused had voluntarily accompanied him to his friend's house. At night they slept in a small room along with the hosts, The accused overcame the girl's resistance and raped her twice during the night. The medical examination revealed that the girl's hymen was ruptured. The sessions court convicted him as the girl was under 16 years of age and so her consent was immaterial.

In appeal, the High Court held that since there was a discrepancy between the school certificate and birth certificate, the benefit of doubt should go to the accused and hence the girl was deemed a major. Regarding penetration, it held: In a small room in the presence of other people, the girl would have felt ashamed and it is difficult to believe that the accused could have intercourse with her twice[13] Hence it acquitted the accused.

Forcible penetration of finger does not amount to rape, under the patriarchal scheme of things. But in this case, even while the judge admitted that the hymen was ruptured because of forcible finger penetration, it did not even amount to assault. Further, the judge seems to have assumed that in a rape case, the girl can exercise her choice as to when and in whose presence to get raped and the option of feeling shy during the rape.

In another case, a tribal woman was raped by a police constable who entered her house at night while her husband was away at work. The Bombay High Court acquitted the accused by stating that: 'Probability of the prosecutrix who was alone in her hut, her husband being out, having consented to sexual intercourse cannot be ruled out'.[14]

Leniency Towards Youth Offenders. One of the most important ingredients of the 1983 amendment is the clause regarding minimum punishment of ten years in cases of custodial rape and child rape. But it appears that this clause was incorporated merely to appease the activists rather than with, any serious intention of adhering to it, as this provision is in direct contrast with the progressive legal theory of leniency towards offenders.

Usually, in child molestation cases, the offenders are the youth. This brings about a clash between the two theories of minimum mandatory punishment and leniency towards youth offenders. In such a situation, since our criminal jurisprudence grants all advantages to the accused, leniency towards youth offenders will prevail. Hence, the statutory provision of a mandatory minimum sentence is overruled. Some important cases where this clash of legal theories is evident are mentioned below.

In a case reported in 1984, a 7-year-old girl was raped by a boy of 18. She was severely injured and was left in an unconscious condition. The appeal to the High Court to enhance the sentence was dismissed on the following ground: 'Although rape warrants a more severe sentence, considering that the accused was only 18 years of age, it would not be in the interest of justice to enhance the sentence of five years imposed by the trial court'.[15]

In another case, a 9-year-old was raped by a 21-year-old youth in a pit near the bus stop. Medical evidence substantiated the rape. The Delhi High Court set aside the conviction of the sessions court on the ground that there was injury to the accused only on the body and not on the penis. The court ruled that in a rape of a minor by a fully developed male, injury to the penis is essential.

While Mathura was expected to put up sufficient resistance to suffer injuries on her own person, the situation seems to have deteriorated and now the victim is expected to put up even more resistance to the extent that the accused also sustains injuries not just on his body but even on his penis! It needs to be pointed out that the girl in question was only nine years old, while her assailant was a robust man of 21 years.[16]

In the cases discussed above, the High Courts had shown leniency towards youth offenders. But in rare cases, the courts express a contrary view and

concern over such leniency in sentencing. For example, in a rape case of a 10-year-old girl, the High Court commented on the lower court's sentence as follows: 'Imposing a sentence of three years is like sending the accused to a picnic. The judge erred in his duty in not imposing a deterrent punishment'.[17]

Concern Over Loss of Virginity and Prospects of Marriage. The rare positive judgements are those where young girls were brutally attacked and had received multiple injuries, so that rape could be proved with relative ease. But even in such cases, the concern of the judiciary is limited to the loss of virginity and prospects of marriage and not to the trauma suffered by the minor girl.

In the following case a young girl was dragged into the forest and was raped. She received severe injuries. While upholding the conviction by the sessions court, the High Court held: 'It is difficult to imagine that an unmarried girl would willingly surrender her virtue. Virginity is the most precious possession of an Indian girl and she would never willingly part with this proud and precious possession'.[18]

In a 1988 judgement concerning a case where a 10-year-old was raped by a 45-year-old man, the court imposed a fine on the accused and ordered that the amount should be paid to the girl as compensation as the amount would be useful for her marriage expenses and if married would wipe out the anguish in her heart.[19]

One wonders whether there is an implicit statement that the marriage expenses would be higher because the girl is a victim of rape. One also wonders why the anguish in her heart is linked to her marriage.

In another case of gang rape, five men raped a 17-year-old. The Kerala High Court imposed a fine on the accused persons, stating that: 'The court must compensate the victim for the deprivation of the prospect of marriage and a serene family life, which a girl of her kind must have looked forward to'.[20] The court, however, reduced the sentence from five years to three years while the stipulated minimum sentence for a case of gang rape is ten years.

The judgement hints that there are certain type of girls who value their chastity more than others than there are good women who need to be protected and the bad women who can be violated. This attitude is expressed routinely in rape cases by all courts including the Supreme Court.[21]

The preoccupation of the judiciary regarding prospects of marriage extends from the victim to the rapist's daughter as the following judgement indicates. The accused had raped two girls aged 10 and 12. The High Court upheld the

conviction of the sessions court. The Supreme Court reduced the sentence on the ground that the prospect of getting a suitable match for the daughter of the accused would have been marred due to the stigma attached to a conviction for an offence of rape.[22]

Further, if the woman gets married while the case is pending in court, the court presumes that the damage caused by rape has been reduced and elicits reduction of sentence. In a case concerning a tribal girl, two persons entered the house in her father's absence and forcibly took her to a nearby jungle and raped her. The High Court upheld the sessions court's conviction for rape, but reduced the sentence on the ground that the rape did not result in any serious stigma to the girl. In a shocking statement the court ruled: 'Sexual morals of the tribe to which the girl belonged are to be taken into consideration to assess the seriousness of the crime.[23] This judgement was reported in the Law Journal in the year 1992.

Categories of Sexual Offences. The judgements discussed above reveal that the campaign has not succeeded in evolving a new definition of rape beyond the parameters of a patriarchal framework.. In fact, the same old notions of chastity, virginity, premium on marriage and a basic distrust of women and their sexuality are reflected in the judgements of the post-amendment period.

Penis penetration continues to be the governing, ingredient in the offence of rape. The concept of penis penetration is based on the control men exercise over their women. Rape violates these property rights and may lead to pregnancies by other men and threaten the patriarchal power structures. The campaign did not succeed in transcending these archaic values.

Within this framework of penis penetration, an offence of sexual assault can be tried under three different categories, i.e. rape, attempt to rape and molestation. The categorization is based on the proximity to penetration. For instance, an unsuccessful attempt to penetrate is categorized as attempt to rape (S 376 r/w S 511 of IPC) which warrants only half of the punishment which can be awarded for a successful penetration.

Further, every case of indecent assault upon a woman does not amount to an attempt to rape. The prosecution has to prove that there was a determination in the accused to gratify his passion at all events and in spite of all resistance. When the accused could not go beyond the state of preparation, it will be viewed as merely an act of violating a woman's modesty.

Violating a woman's modesty (S 354 IPC) is a lesser offence. It is bailable and the trial will be conducted by a magistrate's court. The maximum punishment which can be awarded for violating a woman's modesty is two years. As rape and

attempt to rape are deemed grievous offences, they are nonbailable and the trial is conducted by the sessions court. The maximum punishment for an offence of rape is life imprisonment.

Since the difference between rape, attempt to rape and violating modesty is one of degree only, to prove determination on the part of the accused, the description of the offence has to be graphic bordering on the obscene, as the judgements discussed in this section indicate. The first two judgements were reported in 1927 and the third one in 1933.

1. An 18-year-old youth stripped a five and a half-year-old and made her sit on his thigh. There was no bleeding or redness of the vagina or any other marks of injury. The hymen of the girl was intact and the child had not cried. But the court held that it was an attempt, although unsuccessful, to penetrate and it amounted to an attempt to commit rape and not merely violating the modesty.[24]

2. The accused had slipped into the house of his neighbour through the roof and untied the strings of the salwar of the daughter, aged around 1011 Years, who was sleeping. The accused was struggling with the girl, when her mother, hearing her screams entered the room. At this point the accused ran away. The court held that there was determination on the part of the accused to commit rape and convicted him of the offence of an attempt to commit rape.[25]

3. The accused caught hold of the girl, threw her down, put sand in her mouth, got on to her chest and attempted to have intercourse with her. He could not succeed on account of the resistance offered by the girl. Hearing her screams people arrived on the scene and the accused ran away. The court held that the accused had gone beyond the state of preparation and his act amounted to an attempt to commit rape and not merely violating the woman's modesty.[26]

In order to draw a comparison between the judgements of this era and the later period, here is a judgement of 1967. It gives a vivid description of the difference between attempt to rape and molestation in the following words: Where the accused felled the woman on the ground, made her naked, exposed his private parts and actually laid himself on the girl and tried to introduce his male organ into her private parts despite strong resistance from her, the act amounted to an attempt to commit rape. But when there is no injury found on the private parts or any other part of the body of the woman, but the accused found lying over her, it was held that the act amounts only to an offence under S 354 IPC and not an attempt to rape.[27]

A comparison of the judgements of 1927 and 1967 reveals that if at all there is any change in judicial attitudes it is for the worse. But our concern here is to assess the attitude of the judiciary in recent years. Hence a random sampling of judgements in the last decade is given below:

> 1982: A lady doctor was travelling by bus at night. She felt the hand of a man sitting behind her on her belly. The man was deliberately trying to touch her breasts. The accused was convicted for the offence of molestation with six months' imprisonment.

Since he would have lost his job because of the conviction, he filed an appeal, which resulted in an acquittal on the following grounds: Merely putting a hand on the belly of a female cannot be construed as using criminal force for the purpose of committing an offence or injury or annoyance. Use of criminal force or assault against a woman is essential for the purpose of outraging her modesty. There should also be an intention to outrage the modesty of a woman. The court held that the touch could have been accidental or with an intention to draw her attention.[28]

1984: A young college student attempted to rape his neighbour. But while opening the strings of her salwar, she grabbed a kulhari and gave him a blow on his thighs. The boy ran away. The high court reversed the sessions court's order of conviction on the ground that: Since the wounded accused did not come back, he was not determined to have sexual intercourse at all events. Hence it was not an attempt to rape but merely violation of a woman's modesty.[29]

> 1989: The accused dragged a 9-year-old near the bushes and tried to penetrate. The girl was severely injured. Due to the pain the girl did not permit the doctors to carry out an internal examination. Hence the exact extent of the vaginal tear could not be determined. Giving maximum benefit of doubt to the accused, the trial court convicted the accused only of an attempt to commit rape. On appeal the High Court commented that the accused had erroneously escaped punishment for rape but held that since the State had not appealed against it, it was not proper to look into this question.[30]

1990: Two persons went to a school, dragged a girl, kicked her, slapped her and snatched her watch. The High Court reversed the sessions court's order of conviction for violating the girl's modesty and held that it is not enough if the woman was pushed or beaten. The assault should be with the intention to outrage her modesty or knowing it would outrage her modesty.[31]

The offence which is termed attempt to rape is precariously perched between successful penetration and beyond the stage of preparation, which is extremely difficult to prove as the following case reported in 1991 indicates. The accused had loosened the petticoat cord of the woman and was about to sit on her waist, when she woke up and cried out for help. The sessions court had convicted the accused for attempt to rape. But on appeal, the high court acquitted him on the ground that the act had not advanced to the stage of attempt to rape but was only at the stage of preparation for the same.[32]

In another case, while the girl and her mother were asleep, a police officer entered the police barracks and attempted to rape the girl. The girl gave the accused blows and he fled. The sessions court convicted the accused. The high court acquitted him on the ground that despite an intention or expression, an indecent assault upon a woman would not amount to attempt to rape unless there is determination on the part of the accused to fulfil his desire in spite of resistance.[33]

Absurd Notions of Modesty and its Violation. One can observe from the above discussion that the categorization of sexual offences with the centripetality of penis penetration is not only absurd but also results in grave injustice to women. The ridiculous extent to which this absurdity can be stretched is emphasized by the following judgement. The range of opinions within the judiciary towards women and their sexuality are also revealed in it.

The case concerned the molestation of a sevenandahalfmonth old by one Major Singh. The sessions court convicted the accused. On appeal, a full bench (three judges) judgement of the Punjab High Court acquitted the accused. The views of the judges, however, differed.

Majority View. Appellant having fingered the private parts of the victim girl causing injury to those parts did not commit an offence under S 354. There is no abstract concept of modesty which can apply to all cases. Modesty has relation to the sense of propriety of behaviour in relation to the woman, against whom the offence is committed. In addition to the intention, knowledge and physical assault, a subjective element, as far as the woman against whom the assault is committed, is essential.

Minority View (which perhaps offers the most sound analysis amongst the range of opinions expressed). Any act which is offensive to the sense of modesty and decency and repugnant to womanly virtue or propriety of behaviour would be an outrage or insult to the modesty of a woman. It will not avail the offender to contend that the victim was too old or too young to understand the purpose or significance of this Act.

The State appealed against the acquittal to the Supreme Court. The three judges who heard the case expressed three different viewpoints.

First View. When the action of the accused in interfering with the vagina of the child was deliberate he must be deemed to have intended to outrage her modesty. The intention or knowledge is the crucial factor and not the woman's feelings.

Second View. (which supported the first view but on a totally different basis). The essence of a woman's modesty is her sex. From her very birth, a woman possesses the modesty which is the attribute of her sex and hence it can be violated.

Third View. (expressed by the Chief Justice, which differed from the other two judges). To say that every female of whatever age is possessed of modesty capable of being outraged seems to be laying down a rigid rule which may be divorced from reality. There obviously is no universal standard of modesty. A female baby is not possessed of womanly modesty. If she does not, there could be no question of the respondent having intended to outrage her modesty or having known that his act was likely to have that result.

And after the long and tortuous journey, finally when there was a conviction by the Supreme Court, the maximum sentence that could be awarded is two years imprisonment!

Towards a New Definition. Today, the women's movement is in the process of evolving a definition which is broad enough to encompass the range of sexual violence to which women and children are subjected. But embarking on this task, certain factors will have to be kept in view.

Basic Premise of the Criminal Legal System. In a criminal trial, the State is the party which is prosecuting. The accused is the defendant. Since an individual who is vulnerable and powerless has to fight against the allpowerful State machinery, the Criminal Procedure Code and the Evidence Act lay down strict procedural rules so that there is no abuse of power resulting in the denial of justice to the individual. All advantages during the trial have to be granted to the accused. This is the basic premise upon which the civil society rests.

To protect the individual against the might of the State power, the burden of proving the offence beyond reasonable doubt rests entirely upon the prosecution. If the prosecution fails in this venture, the benefit of doubt must go to the accused. While redefining the offence of sexual assault, the challenge before the women's movement is to ensure that the delicate balance between the State and

the individual is not tilted in favour of the State and simultaneously, strict adherence of the rules of natural justice do not result in miscarriage of justice to victims of sexual offences.

Voyeurism and Titillation in Rape Trials. Unfortunately, in a rape trial, the accused, his advocate, the public prosecutor and the trial judge share a similar attitude of voyeurism and a rape trial becomes a titillating sexual farce. A slogan coined during the Mathura campaign in the early 1980s Mathura was raped twice, first by the police and then by the courtis as relevant today as then. Very few judgements comment upon the humiliation and indignity a woman faces in a rape trial. The following is one such rare judgement, which indicates the level to which the defence lawyers can stoop. 'The mark of civilization of our system is reflected in the way the witness is treated. I can see no reason why the victim was asked as to which organ is used to copulate, how she felt when accused No. 1 inserted his organ, whether she felt warmth of seminal discharge of all five accused and so on". The case concerned the gang rape of a 17-year-old suffering from epilepsy by five men while she was sleep walking.

Sexual Assaults of a Varied Range. In all criminal offences, injury and hurt caused by using weapons is more grievous than the one caused by the use of limbs but in the case of rape, the injury caused by the use of iron rods, bottles and sticks does not even amount to rape. Many Western countries have totally abolished the term, rape and renamed it as sexual offences. The British Parliament passed a Sexual Offences Act in 1956. Through this, the distinction between rape, attempt to rape and violation of woman's modesty is abolished and these are treated as offence of a similar category and punishment is based on the severity of the offence. But in India we have continued with the archaic British definition of the Victorian era.

Social Accountability and Compensation. The amendments to the rape laws focused mainly on increasing sentence and laying down a minimum sentence which was meant to act as a deterrent. But as can be ascertained from the judgements discussed above, when there is a clash between two modern theoriesleniency towards youth offenders and strict punishment for sexual offenders, the former will prevail over the latter, The judgements of the post-amendment period have proved that more stringent punishment would result in fewer convictions.

An individual should be made accountable for the offence not merely by imposing a very high sentence but by evolving relevant forms of social accountability. One way of dealing with the issue would be to impose a fine which would be given to the woman as compensation. Some judgements discussed above have resorted to this measure.

Reversing the Convictions only in Exceptional Cases. While the High Courts in appeal express great caution in enhancing the sentence or reversing the order of acquittal, reversing the order of conviction and reducing the sentence is routinely done. Out of the sixtyfive cases reported during the period 19809 there was conviction in the trial court in fiftyfive cases (Table 3). But in appeal, the High Court upheld the conviction only in thirtynine cases. In seventeen of these cases, while upholding the conviction, the court reduced the sentence. There was hardly any case where the court awarded the minimum sentence stipulated by the amendment. Regarding acquittals by the higher judiciary, Justice Krishna Iyer has commented: 'Unless very strong circumstances can be shown to reject the verdict of the trial courts, confirmation of conviction by courts below should be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry.'

Delays in Court Rooms. Usually it takes around five to ten years for a rape case which has resulted in conviction to be decided by the high court. If the purpose of the rape trial is to act as a deterrent, rather than a prolonged sentence of life imprisonment, a less severe sentence within a stipulated time limit would serve the purpose.

While there are delays, the benefit of such delays is awarded to the accused as the sentence is reduced on this ground even when the conviction is upheld. This is adding insult to injury.

Lapses in Investigation. Most rape cases do not result in conviction due to lapses in investigation and medical reports. Slipshod investigation, delayed and indifferent medical reports and lack of vigilance during the trial are the major causes of acquittals in rape trials.

The burden of conducting the prosecution is the sole responsibility of the State. Only in a rare case will the woman be appointed a public prosecutor of her choice. Hence, a victim has absolutely no control over the judicial processes in a rape trial. Unless the procedural lapses are plugged, merely enhancing the sentence will not have any value as a deterrence. This fact has been amply proved by the cases cited here.

Custodial Rape. The amendment of 1983 tried to address the issue of custodial rape by shifting the burden of proof. But the section which has laid down a new category of sexual offences has gone unnoticed by the judiciary. Even in wellpublicized cases like the Suman Rani rape case, the discussion has been more on the conduct and character of the girl rather than the issue of custodial gang rape. This trend is disturbing. Unless specific case law is evolved by the higher judiciary, this new offence will be of no use while dealing with rape trials in trial

courts. In a span of ten years since the amendment, hardly any case has commented upon this section, which is rather perturbing.

Table 3: Acquittals and Convictions in Apeal, Courts in the Decade 1980 to 1989 in Bombay

	80	**81**	**82**	**83**	**84**	**85**	**86**	**87**	**88**	**89**
Reported Cases	5	6	4	5	5	2	3	11	7	17
1. Sessions Court:										
a. Acquittal	-	-	-	-	2	-	1	3	1	3
b. Convction	5	6	4	5	3	2	2	8	6	14
2. High Court:										
a. Acquittal upheld	-	-	-	-	2	-	-	1	1	1
b. Acquittal reversed	-	-	-	-	-	-	1	2	-	2
c. Acquitted	-	2	1	2	1	1	-	1	2	5
d. Conviction upheld	5	4	3	3	2	1	2	7	4	8
e. Sentence recuded/modified	1	2	1	1	-	1	1	3	1	6

Source: The Lawyers, February, 1990.

Rapes in Situations of Emotional and Economic Dependency. The 1983 amendment defined custodial rape Only in reference to the State Power and has excluded a whole range Of sexual offences committed by family members from its purview. Between 1991 and 1993, in six of the reported cases the accused persons were fathers, or persons in authority. Unless these offences are defined under a special category, it will be difficult to secure conviction in cases of rape committed by persons in authority, both within the family and outside.

Many countries have defined marital rape as an offence. But in our country, the definition of rape excludes marital rape in specific terms, i.e. forced sexual intercourse by husband does not amount to rape. The 1983 amendment laid down that a rape by a husband who is legally separated amounts to rape. But surprisingly, while in other cases the minimum sentence was seven years, in this case the Act laid down a sentence of two years under a strange and perverse logic that it (i.e. forced sexual intercoursean act against which the woman has registered a criminal case!) might lead to reconciliation.

Rape of Minor Girls Aged Between 16 and 18. Proof of age of the rape victim is crucial since the consent of the victim immaterial in cases where she is below 16. The burden of proving the age is squarely placed on the prosecution. If the prosecution fails to prove that the girl was below 16, it would have the additional burden of proving that the girl did not consent to the sexual intercourse. Difficulty arises in proving the age in cases where no birth certificate can be produced. Courts have given contradictory opinions on the weightage to be given to school certificates, ossification tests (approximate determination of age based on development of the bones) and the like. The difficulty is further heightened by the judicial pronouncements that ossification tests carry a margin of error of two years and the benefit of doubt is to be given to the accused. As a result, unless the girl is clearly below 14, no conviction can take place without irrefutable proof of absence of consent.

This results in grave injustice to teenage girls bordering on the age of majority. Hence determination of the girl's age should not be left to judicial discretion.
Further, there is a discrepancy between the age of majority for all other legal purposes (18 years) and for the offence of rape (16 years). This has led to an anomalous situation in which a girl is presumed to be incapable of taking independent decisions in other matters unless she is 18, but is capable of consenting to sexual intercourse if she is above 16.

Salient Features of the Proposed Bill. Some of the concerns discussed above are reflected in a draft prepared by a committee, on behalf of the National Commission for Women. Some salient features of this draft Bill titled 'Sexual Violence Against Women and Children Bill 1993' are stated below.

The committee, which consisted of members of women's organizations, expressed concern regarding the grievous injuries caused by a variety of sexual assaults on minors and the need to expand the definition of rape to include a range of assaults.

Violations in Addition to Actual Penetration. The committee has proposed renaming S 375 IPC as Sexual Offence and defining it as penetration into any orifice by a penis or any other object as well as the touching, gesturing and exhibiting of any part of the body. If the persons to whom these acts are done are minors then the act in and of itself is an offence and punishable under the provisions of the proposed law. If the person is an adult it my be proved that the act was done without the consent of that person.

A new section, i.e. S. 375A, further defines categories of sexual offences as grievous offences and includes sexual assaults committed by those in positions of

power or authority. Some of the salient features of the proposed legislation relate to the following:

Sexual assaults on a minor, mentally or physically disabled person or a pregnant woman. Two members, however, expressed concern regarding treating pregnant women per se as a more vulnerable category rather than sentencing according to the degree of harm a woman, pregnant or nonpregnant, may suffer.

Sexual assault which causes grievous bodily harm. Protracted sexual assault is also deemed aggravated form of sexual assault. This section aims to address the vulnerability of children and women who are trapped in a situation of economic dependency upon their assaulters within family situations.

The proposed Bill has raised the age of consent to 18 and has further distinguished between children under 12 regarding punishment. The Bill proposes that rape of children under 12 and protracted sexual assault are to be punished with a sentence of life imprisonment.

The most important area which the Bill proposes to cover is to plug procedural loopholes in rape trials in the following areas:

Conduct and Character of the Woman. At present under Section 155(4) of the Indian Evidence Act, a woman's past sexual history can be used as evidence to discredit her evidence, The Bill seeks to delete this clause. Further under Section 146, the Bill proposes to forbid any questions regarding the woman's character, conduct or previous sexual experiences. Through an amendment to Section 54 of the Evidence Act, the character of the accused is made relevant in a rape trial.

Recording of Evidence. The Bill also lays down protective measures regarding the correct recording of the woman's evidence. It stipulates that in cases where the victim is under 12, her evidence should be recorded by a female officer or a social worker in the presence of a relative or friend, at her home or a place of her choice. For the violation of this procedural rule a maximum punishment of one year is proposed. Similarly, nonrecording of the medical evidence by a registered medical practitioner in cases of sexual assault would be a penal offence.

Guidelines for Medical Examination. Immediate examination of victim by a registered medical practitioner (RMP) is stipulated. The report should give

explicit reasons for each conclusion and also include the address of the victim and the persons who brought her, the state of the genitals, marks of injuries, general mental condition of the victim and other material factors. The report should be forwarded by the RMP to the investigating officer who must then forward it to the magistrate. The same procedure to be followed by the RMP for the accused.

These amendments, if and when they are brought about, may help to plug some of the lacunae in the existing rape law. But patriarchy has a resiliency to remould and adopt itself to changing conditions. With the introduction of newer factors like liberalization and a boom in the tourist and sex trade, sexual assaults on women and children are bound to take a new turn. The recent sex scandal of Jalgaon and other places in Maharashtra is perhaps an indication of this trend. Whether the reformed law will be adequate to meet these trends and will arrest the trend of increasing sexual violence upon women is anyone's guess.

Campaign Against Dowry and Legal Response

The ActA Paper Tiger. The Dowry Prohibition Act of 1961 is a very small Act which consists of only eight sections (two more sections were added later during the amendments), full of contradictions and loopholes and not meant to be taken seriously. The Act laid down a very narrow definition of dowry as 'property given in consideration of marriage and as a condition of the marriage taking place'. The definition excluded presents in the form of cash, ornaments, clothes and other articles from its purview. The definition also did not cover money asked for and given after marriage.

Both giving and taking dowry was an offence under the Act. The offence was noncognizable and bailable. In legal parlance, this makes it a trivial offence. The maximum punishment was six months and/or a fine of Rs 5,000. To make matters more complicated, prior sanction of the government was necessary for prosecuting a husband who demanded dowry. Complaints had to be filed within a year of the offence and only by the aggrieved person.

The ineffectiveness of the Act was manifested at different levels. First, there were hardly any cases filed under this Act and there were less than half a dozen convictions in the period between the enactment and the amendment. So the purpose of the enactment as a deterrent factor was totally lost. The Bombay High Court in Shankar Rao v. L V. Jadhav held that a demand for Rs 50,000 from the girl's parents to send the couple abroad did not constitute dowry.[34] The judgement held that since the girl's parents had not agreed to give the amount demanded at the time of marriage, it would not be deemed as 'consideration for marriage'. Anything given after the marriage would be dowry if only it was

agreed or promised to be given as consideration for the marriage. The absurd interpretation was in total contrast to and defeated the very the spirit of the Act Purpose for which it was enacted.

Secondly; in total defiance of the Act, the custom of dowry has Percolated down the social scale and communities which had hitherto practised the custom of bride price are now resorting to dowry. Thirdly, all the violence faced by women in their husband's home is being attributed to dowry and the term 'dowry death' has become synonymous with suicides and wife murders.

A Misplaced Campaign. During the early 1980s, most cities in India witnessed public protests against the increasing number of dowry deaths, which received wide media coverage. It was accepted both nationally as well as internationally that dowry death or brideburning as it was termed, was a unique form of violence experienced by Indian women, more specifically Hindu women and that a more stringent law against dowry would, in effect, curb domestic violence and stop wife murders. An oversimplified analysis of domestic violence which is a far more complex and universal phenomenon was put forward by activists and responded to by lawmakers.

The media coverage of dowry deaths also led to further presumptions. One among them was that while in other cultures men murder their wives for more complex reasons, i.e. stress of a technologically advanced lifestyle or breakdown of the support of joint family due to urbanization, etc., in India men burn their wives for dowry.

It needs to be mentioned here that since a Hindu marriage is not .required to be registered either within a religious institution or a civil registry, it is relatively easy for a Hindu man to commit bigamy, although it is legally prohibited. So in order to take a second wife, a man need not murder his first one. He can either divorce her or just merely desert her, which is quite common. And further, in a culture where arranged marriages are still the norm, why would another man offer his daughter in marriage to a wife murderer and further offer a huge amount of dowry? The rationale for the economic motive of the dowry deaths does not sound very convincing. Before we discuss the premise upon which the legislation was based, however, we need to take a look at the legislation itself.

The Dowry Prohibition Act, enacted in 1961, was full of loopholes. To plug some of these, a Bill was introduced in Parliament in June 1980, and was referred to a joint committee of both Houses. The findings of the Committee, inter alia, were as follows (Singh 1986a):

- The definition of 'dowry' was too narrow and vague.

- The Act was not being rigorously enforced.

- The stipulation that complaints could be filed only by the aggrieved party within a year from the date of the offence.

- Punishment of imprisonment for six months and/or fine up to Rs 5,000 is not formidable enough to serve as a deterrent.

- The words 'in consideration for the marriage' ought to be deleted from the definition of dowry.

- The explanation which excluded presents from the definition of dowry nullified the objective of the Act.

- Gifts given to the bride should be listed and registered in her name.

- In case she dies during this period, the gifts should revert to her parents. In case she is divorced, the gifts should revert to her.

- The presents could not be transferred or disposed of for a minimum period of five years from the date of marriage without the prior permission of the Family Court on an application made by the wife, to ensure the bride's control over the gifts.

- Dowry Prohibition Officers should be appointed for the enforcement of the Act.

Retrospectively, it appears that the recommendations were based on an erroneous premise that girls can exercise a choice either at the time of marriage or later, in their husband's home. It also did not take into account the parents' desperation to get their daughters married and keep them in their husband's home at all costs. It glossed over the fact that most women in this country are not aware of their legal rights.

A Stringent Law No Solution. Unfortunately, the Bill introduced in 1984 failed to consider some positive recommendations of the committee. The main feature of the Act was that it substituted the words 'in connection with marriage' for the words 'as consideration for the marriage'. It was felt that the omission of the words 'as consideration for the marriage' without anything more would make the definition too wide. The suggestion of imposing a ceiling on gifts and marriage expenses did not find a place in the Act.

The important features of the amended Act are as follows:

- Increase in punishment to five years and a fine up to Rs 10,000 or the value of dowry, whichever is more. (The section excluded presents given to the bride or the bridegroom.)

- Removal of the one year limitation period.

- Introduction of provision for the girl's parents, relative or a social work institute to file a complaint on her behalf.

- Removal of the requirement of prior sanction of the government for prosecuting a husband who demands dowry.

- Making dowry a cognizable offence.

Before the impact of the amendment could be gauged, the Act was amended again in 1986 with the aim of making the Act even more stringent. The main features of the 1986 amendment are as follows:

- The fine was increased to Rs 15,000.

- The burden of proving the offence was shifted to the accused.

- Dowry was made a nonbailable offence.

- A ban was imposed on advertisements.

- If the woman died an unnatural death, her property would devolve on her children and in the event of her dying childless, it would revert to her parents.

In fact all the loopholes pointed out by the committee were now plugged. So the stage was all set to abolish 'dowry death'. [The Act also amended the IPC and created a new category of offences called Dowry Death (S 304B).]

The Process of Requestioning. Despite these amendments, nothing changed. Women continued to get burnt in their homes and dowry demands continued. Reported cases of suicides and murders spiralled in every major city (Table 1). Parents of girls, who would not spend money on educating them or in making them independent, spent huge amounts of money on lavish weddings in the hope that the girl would never return to the native home and become a 'stigma'.

The young girls, suddenly discovering that they had no place left in their parents' home, resorted to suicide in a desperate bid to escape the humiliation and violence. At times when they had a premonition of the impending disaster, and had sought the parents' help just before the murder, the parents had sent them back, which had resulted in the murder.

The cases were filed not at the time of the marriage but only after the girls had died, to avenge their death and retrieve the gifts. The daughter's death did not in any way change the reactionary and conservative approach to marriage and the parents were all set to marry their next daughter with an equal amount of dowry to a boy of their choice. Tremendous pressure would be exerted on girls who wished to acquire professional skills, live independently or marry a boy from a different class, caste or religious background. In such cases the parents who cried hoarse against dowry would go all out and disinherit their daughter (Kishwar 1985).

The protests against dowry were held at the instance of people who conformed to this value system. They would usually have a total contempt for the ideology, values or lifestyle of the members of women's organizations whose help they sought to organize the dowry protests.

These factors made the activists reassess their stand on the issue of dowry. The articles in Manushi by Madhu Kishwar 'Rethinking Dowry Boycott' created a lot of controversy and a public debate (Kishwar 1988). Women's organizations began questioning the role of the girl's parents in driving her to death. Organizing dowry protests was no longer a simple issue. Individuals and groups began to think that the campaign against dowry was wrongly formulated because it did not link the issue of dowry with that of a woman's property rights in her parents' home. If violence is a manifestation of a woman's powerlessness, not receiving any money or gifts from her parents would make her even more vulnerable to violence and humiliation.

A movement for protecting women's rights cannot align itself with parents who would go to any extent to disinherit their daughters, deprive them of education and equal opportunities in life under the pretext of preserving the 'family honour', force them into marriage alliances for their own vested interests or worse, willingly kill their daughters even before they are born in order to save the expenses of their marriage later in life!

Domestic Violence and the Vacuum in Law

The Crying Need for a Law. The discussion on the two amendments to the criminal laws (with a specific context to Sections 498A and 304B of the Indian

Penal Code) are usually carried on as an appendix to the discussion on dowry. But here a conscious effort is made to evaluate them within the framework of domestic violence because, they in fact deal with (or at least ought to deal with) the issue of domestic violencecruelty, harassment and murder of wives.

In criminal offences it is the State which is the procecuting body. Hence it is extremely important to safeguard the right of an individual accused against the State machinery during a criminal trial. So strict procedures of investigation have to be followed and the rules of evidence have to be strictly adhered to.

The three major Acts which govern criminal trials are: (1) the Indian Penal Code (IPC), which lays down categories of offences and stipulates punishment; (2) the Criminal Procedural Code (CrPC), which lays down procedural rules for investigation and trial; and (3) the Indian Evidence Act, which prescribes the rules of evidence to be followed during a trial.

Before 1983 there were no specific provisions pertaining to violence within the home. Husbands could be convicted under the general provisions of murder, abatement to suicide, causing hurt and wrongful confinement. But these general provisions of criminal law do not take into account the specific situation of a woman facing violence within the home as against assault by a stranger. The offence committed within the privacy of the home by a person on whom the woman is emotionally dependent needs to be dealt with on a different plane.

It was extremely difficult for women to prove violence by husbands and inlaws 'beyond reasonable doubt' as was required by criminal jurisprudence. There would be no witnesses to corroborate (support) their evidence as the offences are committed behind closed doors. Secondly, even if the beating did not result in grievous hurt, as stipulated by the IPC, the routine and persistent beatings would cause grave injury and mental trauma to the woman and her children. So different criteria had to be evolved to measure injury. All the existing laws and statutory provisions that are Stateempowering rather than peopleempowering need to be undertaken.

Generally, complaints can be registered only after an offence has been committed. But in a domestic situation a woman would need protection even before the crime, when she apprehends danger to her life, as she is living with and is dependent on her assaulter.

Even when provisions of the IPC could be used against the husband for assaulting the wife, it is very seldom done. The police, being as much a part of the value system which condones wife beating, would not register a complaint against a husband for assaulting the wife even when it had resulted in serious

injury under Sections 323, 324 of IPC. It is generally assumed that a husband has a right to beat his wife/ward.

On the contrary, a wife who actually mustered courage to approach a police station would be viewed as brazen and deviant. Instead of registering her complaint, the police would counsel her about her role in the house, that she must please her husband and obey him. She would be sent back without even registering a complaint. So a special law was needed to protect a woman in her own home (Kishwar and Vanita 1985a).

Placing Dowry Violence on a Pedestal A Wrong Strategy. There were public protests in cases of rape and dowry deaths in all major cities and towns in India during the early 1980s and a large number of women came out of their cloistered silence and started seeking help to prevent domestic violence. Since the police refused to register their complaints under the existing provisions of the IPC, a demand was raised for a special enactment to deal with the issue.

Many Western countries had passed laws against domestic violence in the 1970s. Unfortunately, in India, the women's movement did not raise the demand for a similar law. Initially, only dowryrelated violence was being highlighted during the campaign. And all violence faced by women within homes was being attributed to dowry, both by activists and the State. So the initial demand was for a law to prevent only dowry related violence. This was a narrow, shortsighted and wrongly formulated strategy. Placing the dowry violence on a special pedestal, the general violence faced by women of every class, community and religion was denied recognition and legitimacy.

Cruelty to Wives Added on to a Sexist Provision. While the State was overeager to pass laws even when there were adequate provisions within the IPC for crimes such as Sati, obscenity and procuring minors for prostitution, in the case of domestic violence, instead of a new legislation, the State was content to amend the provisions of the Criminal Acts. The Criminal Acts were amended twice during the decadefirst in 1983 and again in 1986, to create special categories of offences to deal with cruelty to wives, dowry harassment and dowry deaths. Prior to the amendments, although the IPC did not specifically deal with violence in a domestic situation, it had a chapter which dealt with offences against marriage. Another chapter dealt with offences affecting the human bodymurder, suicide, causing hurt, etc. The relevant chapters are briefly discussed here:

Offences Related to Marriage

- S 493 Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

- S 494 Marrying again during the lifetime of husband or wife.

- S 495 Concealment of former marriage from person with whom subsequent marriage is contracted.

- S 496 Going through a fraudulent marriage ceremony without lawful marriage.

- S 497 Adultery (Only a man is punishable under this section for committing adultery with a married woman).

- S 498 Enticing or taking away or detaining with criminal intent a married woman.

Chapter XVI of the IPC deals with offences affecting the human body. This is further divided into offences affecting lifemurder, suicide, abatement to murder and suicide, abortion, etc. Sections 299 to 318. The next part deals with hurt which includes simple and grievous hurt with or without weapons (Sections 3238); wrongful restraint and wrongful confinement (Sections 3418); assault, indecent assault (molestation), kidnapping, abduction of minors, buying or selling a minor for the purpose of prostitution, unlawful labour, rape and unnatural sex etc. (Sections 35277).

Within the IPC, the first amendment cruelty to wivesis placed not within Chapter XVIoffences affecting the human bodyor under the sections dealing with assault, where it would have been more appropriate, but as an appendix to Section 498, an obnoxious and derogatory provision which treats women as the property of men. The section gives the husband a right to prosecute any man who takes away his wife even though this has been done with the wife's consent, Sections 497 and 498 are a constant reminder to women about their subordinate status within the IPC. Terming this new and important section as Section 498A ought to have been a cause for protest. Surprisingly, it did not raise any criticism from legal experts within or outside the movement.

Application to Domestic Violence by Default. Fortunately, through some lapse, the section was wide enough to apply to situations of domestic violence, The section is worded thus:

Whoever, being husband or the relative of the husband of a woman, subjects such women to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

ExplanationFor the purpose of this section 'cruelty' means

a. any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or death whether mental or physical of the woman; or

b. harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security on account of failure by her or any person related to her to meet such a demand.

So although the aim was to deal with dowry harassment and suicide, explanation (a) does not use the word dowry to define cruelty. It also includes mental cruelty. Hence it is wide enough to be used in situations of domestic violence and mental cruelty. Where it falls short is by the use of 'grave' in explanation (a). This precludes the everyday violence suffered by the majority of women. Even with this limitation, the section can be an effective deterrent to violent husbands if only the judiciary and the police had interpreted and enforced it in the right spirit.

Initially, the police refused to register cases under this section unless specific allegations of dowry harassment were made. But through constant agitations and interventions with the police it is now accepted that the section ought to be used in all situations of cruelty and domestic violence. This was a small victory to those who have been campaigning for a law on domestic violence. The refusal of the police to register a complaint under this section unless dowry harassment is specifically mentioned, has affected the women adversely. Vague allegations of dowry demands are added on to genuine complaints of wife beating which tend to caste aspersions on the credibility of the whole complaint. The case cannot then stand through the legal scrutiny in a criminal court and results in acquittal of the husband. At the other level, statistics compiled by the police department erroneously convey the impression that all violence is dowry related, which leads to a false premise that if dowry is curbed, violence on women will end.

The Myth of the Misuse. There is a misconception among the police and the lawyers that the section is misused by women. While it is true that a significant number of cases filed under this section are subsequently withdrawn, the complexities of women's lives, particularly within a violent marriage, have to be

comprehended beyond the context of popular ethics. The conviction of the husband may not be the best solution to her problems.

The various alternatives that she has to choose from, each one in itself a compromise, may make it impossible for her to follow up the criminal case. Let us examine some of them. Since the. section does not protect a woman's right to the matrimonial home, or offer her shelter during the proceedings, she may have no choice but to work out a reconciliation. At this point she would be forced to withdraw the complaint as the husband would make it a precondition for any negotiations. If she has decided to opt for a divorce and the husband is willing for a settlement and a mutualconsent divorce, again withdrawing the complaint would be a precondition for such settlement.

Thirdly, if she wants to separate or divorce on the ground of cruelty, she would have to follow two casesone in a civil court and the other in a criminal court. Anyone who has followed up a case in court would well understand the tremendous pressure this would exert, specially when she is at a stage of rebuilding her life, finding shelter, job and child care facility. Under the civil law she would at least be entitled for maintenance which would be her greater priority. So if she has to choose between the two proceedings, in most cases, a woman would opt for the civil case where she would be entitled to maintenance, child custody, injunction against harassment and finally a divorce which would set her free from her violent husband.

Because of these complexities, most cases filed by women under S 498A are subsequently withdrawn. The cases which are followed up are the ones where the woman has died and the case is followed up by her relatives, and where the issues involved are not so complex.

But this is not to imply that S 498A, IPC, has no use for women. Most women find it extremely useful as a deterrent. Women may not be in a position to see their complaint through, to its logical end. But this is not to deny its usefulness in bringing husbands to the negotiating table. Since the offence is nonbailable, the initial imprisonment for a day or two helps to convey to the husbands the message that their wives are not going to take the violence lying down.

Positive JudgementA Welcome Respite. In this context the recent judgement of the Bombay High Court comes as a welcome respite. In a case where the husband had initiated criminal proceedings against the wife and made baseless allegations against her character, the wife filed a complaint under S 498A, IPC, stating that it amounted to cruelty. The husband was convicted by the judicial magistrate, Pune, and was awarded six months' imprisonment and a fine of Rs 3,000.

On appeal, the sessions court set aside the imprisonment and enhanced the fine to Rs 6,000. The wife filed an appeal in the Bombay High Court against the reduction of sentence on the ground that it had resulted in miscarriage of justice. Herself an advocate, she appeared in person and argued that the degree of leniency shown to the husband could not pass the test of judicial scrutiny and that it would be a mockery of justice to permit the accused husband to escape the penalty of law when faced with evidence of such cruelty. To reduce the sentence would render the judicial system suspect and the common man would lose faith in its course, she submitted.

The high court upheld the conviction but considering the age of the husband (around 50) did not impose imprisonment but enhanced the fine to Rs 30,000. This amount was awarded to the wife as compensation. Subsequently, the Supreme Court upheld the judgement and commended the Bombay High Court for the progressive stand on woman's issues (Agnes 1987).

Law on Dowry DeathLimited in Scope. But this comes after a series of negative judgements in interpreting S 498A, delivered by various high courts, including the Bombay High Court.

Before analysing the judgements, it is necessary to mention the second amendment to the IPC which was enacted in 1986. Both the amendments have also amended the CRPC and Evidence Act (see Appendix 3 for exact provisions). The amendment of 1986 introduced a new offence of dowry death. S 304B IPCDowry death:

> "Where the death of a woman is caused by any bums or bodily injury or occurs otherwise under normal circumstances within seven years of her marriage and if it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any other relative of her husband for or in connection with any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death".

The offence is punishable with a minimum of seven years and a maximum of life imprisonment. The presumption of guilt is on the accused and he would have to prove that he is innocent.

This section, unlike S 498A, gives no scope to be used in situations where the violence is not linked to dowry. Since no record is maintained and no complaints are made at the time, of meeting the dowry demands, while the girl is alive, it is extremely difficult to prove a dowry death under this section. The section also

presumes that women are harassed for dowry only within the first seven years of marriage. So overall, this section is not likely to benefit women to deal with domestic violence.[35]

The other sections of the IPC which have been used in cases of wife murder are S 302punishment for murder, and S306abetment to suicide. Here are some judgements where these sections as well as S 498A have been negatively interpreted by the courts in cases of wife murder.

Negative Judgements. In the case of abatement to suicide under S 306 IPC, the Punjab and Haryana High Court set aside the conviction and acquitted the husband on the ground that presumption as to abatement to suicide is available only if the husband is proved guilty of cruelty towards wife.[36]

In another case, the Madhya Pradesh High Court set aside the conviction of three years and acquitted the motherinlaw. The court held that since the deceased ended her life by selfimmolation when neither of the inlaws were present in the house, suicide in all probability was commmitted out of frustration and pessimism due to her own sensitiveness. It held that harassment and humiliation was not proved.[37]

In a case under S 498A IPC, the Bombay High Court held that it is not every harassment or every type of cruelty that could attract S 498A. It must be established that beating and harassment was with a view to force the wife to commit suicide or to fulfil illegal demands of husband or inlaws, which, in the court's opinion, the prosecution failed to prove in this case.[38]

In the Manjushree Sarda case, the sessions court, Pune, convicted the husband of murdering his wife by poisoning. The Bombay High Court upheld the conviction. But the husband was acquitted by the Supreme Court on the ground that the husband's guilt was not proved beyond reasonable doubt and that the wife might have committed suicide out of depression.[39]

In other wellpublicized case, the woman, Vibha Shukla, was found burnt while the husband was present in the house. A huge amount of dowry was paid at the time of the wedding and there were several subsequent demands for dowry. Vibha's fatehrinlaw was a seniour police office in Bombay. When Vibha had delivered a daughter, the family did not accept the child and she was left behind in her parents' house. The Bombay High Court set aside the order of conviction of the sessions court, acquitting the husband of the charge of murder and harassment under S 498A. The court held that the offence of murder could not be proved beyond reasonable doubt and that occasional cruelty and harassment cannot be construed as cruelty under the section. [40]

In another case decided by the Bombay High Court in March 1991Geeta Gandhi's death, the court set aside the conviction by the session court, Nagpur, and acquitted the husband and fatherinlaw of the charge of murder under S 203 IPC. Geeta Gandhi's body was burnt beyond recognition and the flesh was roasted and charred right up to the bones. Her body was recovered from the bathroom at around 5:30 a.m. The fatherinlaw and the husband who were admitted sleeping in the very next room had made no attempt to extinguish the fire. (Instead the brotherinlaw had called the fire brigade.)

Geeta, a postgraduate in microbiology, who stood first in the M.Sc examination, was in the process of setting up her own pathology clinic. She was married in January 1984 and died in April 1985. At the time of her death she was four months pregnant. She had a previous miscarriage when she had jaundice and also occasionally suffered from minor ailments. The court, while acquitting the husband and fatherinlaw, presumed that Geeta might have committed suicide because of depression caused by her illhealth (Sethi and Anand 1988).

Growing Complexity. While laws have proved inadequate to deal with this blatant violence, newer forms of violence against women are coming to light. The debate can no longer be restricted to violence by husbands and mothersinlaw. The decade has witnessed not only newer forms of killing female children through sophisticated means like sex determination tests but also the wellplanned suicide pact by the Sahu sisters of Kanpur (Singh 1986a), followed by similar instances in other parts of the country. The wellknown case of the Thakkar sisterstwo unmarried women killing their married sisterinlawindicates yet another facet of the issue of domestic violence (Kishwar and Vanita 1985b). These incidents are an indication of the complexities of domestic violence and the need for a new approach to tackle the issue.

Two more cases may be highlighted here as possibly relevant while planning future strategy. In the first instance, a man was sentenced to death by the Jaipur High Court in a case of wife murder and it decided that he be publicly hanged. The judgement received widespread approval. It was generally felt that women's organizations would see this as a victory. Manushi, a women's journal, expressed its shock at the judgement and was highly critical of it. It expressed the view that the solution to domestic violence does not lie in death sentence to the accused but in creating alternatives for women whereby they are strengthened.

The second case concerns a woman who strangulated her husband with a rope when he was attempting to rape their 14-year-old daughter. The woman, her daughter and the younger son were convicted under S 302 of IPC by the sessions court. In appeal the Madras High Court acquitted them and held that the murder was committed in selfdefence. If the courts and society fail to protect women and

children trapped within a violent marriage and in a vicious cycle of violence, it may only lead to escalation of this phenomenon which our legislators and the judiciary need to take note of.

Concluding Observations

Rape, dowryrelated violence and other forms of domestic violence against women are different manifestations of the same malaise. To the extent that judicial decisions and their implementation on the ground continue to be coloured by patriarchal values, the effect of legal reform will necessarily be unsatisfactory. The campaign for legal reform by the women's movement has so far attacked primarily superficial symptoms. The thrust in the campaign has to be reoriented at this point of time if better results are to follow.

Abbreviations Legal Cases Referred

AIR	All India Review	AP	Andhra Pradesh
Bom	Bombay	CAL	Calcutta
CrLJ	Criminal Law Journal	CrPC	Criminal Panel Code
DMC	Divorce and Matrimonial Cases	HC	High Court
IPC	Indian Penal Code	Mad	Madras
Mah	Maharashtra	MP	Madhya Pradesh
NOC	Notes on Cases	Ori	Orissa
Ors.	Others	Raj	Rajasthan
S	Section	SC	Supreme Court
r/w	read with		

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