CRIMES AGAINST WOMEN WITH PARTICULAR REFERENCE TO RAPE - LEGISLATIVE POLICY ON SENTENCING

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Sentencing involves various complexities. The legislature in stipulating sentences and the judiciary in pronouncing appropriate sentences have to a large extent to cater to the aspirations of society or to the societal notions of justice[1] even though the concept of justice itself may vary from society to society, primitive, medieval and modern. In India, the legislature, which assumes the major responsibility of enacting sentencing laws, confers on the judge the power to determine adequate sentence within prescribed parameters. The task of justice is to enforce discipline in a society in the interest of the individuals and in the greater interest of the society. It is at this stage that the role of the criminal law assumes significance. One can expect that the legal system, whether ancient or modern, should make reasonable provisions to ensure that the criminal act is dealt with adequately, consistent with the general norms of judicial process so that the legislative command is enforced and the object of deterrence is realised and the punishment imposed which is deterrent to others also. One objective of legal reform would be to promote justice after the offence is committed.

To promote justice, what is the legislative response to offences relating to sexual assaults? A country nurturing high traditional values, has been facing, more so recently, an ever-increasing spurt of violence against women. Ancient history and epics reveal that incidents of assault on women are not a new phenomena but what calls for attention is the fact that it is reaching alarming proportions and assuming new dimensions considering the manner in which it is being perpetrated.

I. CATEGORIES OF CRIMES AGAINST WOMEN UNDER I.P.C.

The Indian Penal Code, 1860 enumerates a series of offences relating to women, though not in a comprehensive manner, but broadly under Chapter XIV dealing with offences affecting the public health, safety, convenience, decency and morals; Chapter XVI relating to offences affecting the human body and Chapter XXII pertaining to criminal intimidation, insult and annoyance. The provisions in the Indian Penal Code with respect to offences against women and the corresponding punishments are as follows:

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1 Flavia Agnes, *JOURNEY TO JUSTICE* (1990), Gender Justice Series Book I, for a reflection on societal notions of justice.

CRIMES AGAINST WOMEN UNDER I.P.C.

Section	Nature of act/offence	Sentence
292	Sale, etc. of obscene books, etc.	2 yrs./Rs. 2000/- (on 1st conviction) 5 yrs./ Rs. 5000/- (on 2nd conviction)
294	Obscene acts and songs (popularly known as eve-teasing)	Fine/ 3 months imprisonment or both
304-B	Dowry death (inserted by Act 43 of 1986)	Not less than 7 yrs., but may extend to life imprisonment
312	Causing miscarriage Aggravated form	3 yrs. or fine or both 7 yrs. and fine
313	Causing miscarriage without woman's consent	Life imprisonment or may extend to 10 yrs. and fine
314	Death caused by act done with intent to cause miscarriage If act is done without woman's consent	Imprisonment which may extend to 10 yrs. and fine Life imprisonment or as above
315	Act done with intent to prevent child being born alive or to cause it to die after birth	May extend to 10 yrs. or fine or both
354	Assault or criminal force to woman with intent to outrage her modesty	May extend to 2 yrs. or fine or both
366	Kidnapping, abducting or inducing woman to compel her marriage, etc.	May extend to 10 yrs. and fine
366-A	Procuration of minor girl	May extend to 10 yrs. and fine
366-B	Importation of girl from foreign country	May extend to 10 yrs. and fine
372	Selling a minor for purposes of prostitution, etc.	May extend to 10 yrs. and fine
373	Buying a minor for purposes of prostitution	May extend to 10 yrs. and fine
375	Definition of Rape	
376(1)	Punishment for Rape	Not less than 7 yrs. but may be for life or for a term which may extend to 10 yrs. and fine Provided for adequate and special reasons a lesser them may be given.
376(2)(a)	Custodial Rape	Not less than 10 yrs., but may be for life and fine. Provided for adequate and special reasons a lesser term may be given

II. PRIMITIVE LAW ON SEXUAL ASSAULTS

One of the significant primitive laws of civil injuries was of wrongful sexual intercourse. The modern law in this regard covers provisions ranging from pornography and the so-called offence of eve teasing to rape. Adultery is again a distinct offence. Whereas in the olden days there was no difference in sanctions for rape and for adultery[4], among some tribes there existed a difference. The chief reasons were probably the disparity between the forms of marriage, from local standards of marital and premarital chastity, etc. as among some tribes rape is a common prelude to marriage.[5] It is sometimes said of primitive people that among them a woman's virtue is an asset of her father or husband and hence there is no difference in the eye of law between rape and sexual intercourse by consent. As the time changed, with the development of tribal law, corporal sanctions were introduced for sexual offences. Corporal sanctions were perhaps twice as frequent for rape as for adultery"[6] and where pecuniary sanctions were found, they were commonly about twice as high in cases of rape as in adultery, and higher where the woman was married than where she was unmarried.

Though in the beginning punishment for sexual offences was taken less seriously, with the change of time, offences of rape were punished with fines and death in default of payment.

A. An Appraisal of the Ancient Criminal Law

In order to appreciate the present law on sentencing in the offence of rape, it is appropriate to look at the development of the law relating to rape from the ancient period.

There was a time when *dharma* prevailed but gradually *adharma made* its way, giving rise to innumerable crimes in society. In order to enforce criminal sanctions to discourage crime, Indians from time immemorial gave special power to the ruler of the State. The situation is highlighted in these words:

> *Kamandaka* pointed out the need for danda because he could understand the tendencies of human nature. So he commented, as the world tends to depart from its path of duty because of beings preying upon one another, there follows in the absence of *danda,* the destructive condition, indicated by the maxim of the larger fishes devouring the smaller. The world shelterless, and being caused perforce to sink into hell, by the passions of men is upheld by the King by means of *danda.* In this world which is swayed by the passion of worldly objects it is rare to come across the behaviours of

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4 A.S. Diamond, *PRIMITIVE LAW* 326, 327 (1935).
5 *Ibid.*
6 *Ibid.*

> good men, even the husband who is lean or maimed or diseased or poor is obeyed by the fear of *danda.* The law givers, therefore, prescribed regulations and despised the criminal tendencies.[7]

Hence in Ancient India, *danda*[8] was used to check miscreants. The object of punishment was to keep the social discipline for the welfare of society. In practice, it could be gathered that the object of punishment was not just to keep social discipline but also to prevent repetition of the same or similar crimes by the offender and to create a deterrent effect on others. It was pointed out that punishment was introduced to prevent the wicked from commission of unlawful acts.[9]

Four forms of punishment existed during the ancient period. They were

1. Admonition (*vak danda*)
2. Censure *(dhik danda)*
3. Fine or forfeiture of property *(dhana danda)*
4. Physical punishments *(badha danda).*

Apart from these, other forms of punishments like confiscation and public humiliation[10] were also prevalent.

A significant feature in the ancient criminal sanctions was that law was not uniformly applicable to all castes. The legal policy during this age may be examined with particular reference to the offences relating to *Strisangrahanam.* The offence of *Strisangrahanam* consists of the following:

1. Objectionable talks, movements and behaviour with or directed to a woman;
2. Outraging female modesty;
3. Ravishment;
4. Adultery;
5. Indecent perversions and
6. Unnatural offences.

All these offences have found a place in the Indian Penal Code.

The maximum punishment prescribed for the offence of ravishment was capital punishment and to create a deterrent effect it was to be executed in a public place.[11] Punishments including forfeiture of property, public

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7 Quoting Kamandaka, Sukla Das, *CRIME AND PUNISHMENT IN ANCIENT INDIA* 14 (1977).

8 Danda means a stick, staff or rod, which is a symbol of authority.

9 *Sukra* IV, sl. 6.

10 Public humiliation was one of the punishments for Strisangrahanam i.e. those category of offences affecting the modesty and sexual purity of women. *Infra.*

11 The Islamic countries even today award death penalty for the offence of rape. See for instance. *The Hindu,* July 20, 1992. The Court in this case in fact ordered for the execution to be in a "public place by any convenient means" See *The Hindu,* July 22, 1992.

humiliation, incarceration and other forms of corporal punishments were also prevalent. Capital punishment was ordained for a *nonbrahmin* offender having sexual intercourse with a Brahmin female against her Will[12] If a Brahmin woman was ravished against her will by a Kshatriya or Vaishya man, the law provided that he should be burnt to death. But if a non-brahmin woman was ravished against her will by a man of a different caste, he was to be punished with severance of his genital organ. If the offender was a Brahmin this punishment could not be inflicted as Brahmins were generally exempted from corporal punishments.[13] If a Brahmin woman was ravished by a shudra. capital punishment was not awarded but severance of his genitals was the punishment. Here even if the sexual intercourse was with the consent of the woman, the man was considered to be an offender. the punishment being any kind of physical punishment, particularly if the man was of lower caste. However, if both were Brahmins a fine of 500 *panas* was awarded and if she was ravished against her will the fine was doubled.[14]

A significant approach taken by *Manu* was that where there was consent of the woman, leniency was shown towards the male. In fact, the justification for it might have been the fact that a woman was competent to lead a life of her choice, when her guardians did not protect her.[15] In this regard there was a conflict of opinion in the writings of *Yajnavalkya* and *Manu.* Unlike *Manu, Yajnavalkya* did not show leniency towards the offender in cases where the woman was a willing party. This approach could have been the result of an anxiety to protect women from atrocities and because he held the view that a woman cannot be independent in any situation to give such a consent.

In any case a prominent feature during the said times when "unequal justices," prevailed was the discriminatory treatment based on caste especially towards the Brahmins. The reason for this could be that law making was the monopoly of Brahmins. Hence, they naturally protected their ideologies while drafting the law, safeguarding their prestige and hence reserving some advantages for themselves.

However, with the change in time and the social set up the law relating to sexual offences also underwent changes. The old vedic laws which were discriminative in character were reframed. An overall change relating to law reform probably was responsible for the new trends wherein the then existing unequal justice policy had to be reframed within the Constitutional frame work.

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12 Manu ch. VIII, sl. 359.

13 *Id.*, sl. 364.

14 *Id.*, sl. 378.

15 There was a view that women could never be independent when she was a child she was protected by her father, when she entered youth, by the husband, and in the old age by her sons. Yajnavalkya was an advocate of this theory.

B. Codification in India

During the British rule the unsatisfactory state of the law in the Indian continent became quite obvious. The co-existence of English law, Muslim law, Hindu Law, usage and vedic commands made the administration of justice extremely difficult. Hence, the British Parliament enacted the Charter Act of 1833. This Act introduced several changes in the Indian legal system. One of the most important provisions of the Act was section 53 which provided for the appointment of the First Indian Law Commission stating that it was expedient to enact such laws as may be applicable in common to all classes of the inhabitants of the territory. By this appointment, the British Parliament tried to achieve "uniformity where it was possible, diversity where it was necessary, but in all cases certainty."[16]

The First Law Commission headed by Lord Macaulay submitted several reports on various laws based on a detailed study primarily of the English Law. As a result, the codification of various laws including the Indian Penal Code[17] took place. Thus, the English notions of law and justice were introduced in India. In the Code, apart from defining the various offences, punishment for each offence was also provided. Subsequently, the Code underwent several amendments[18] to make it relevant to the changing societal norms.

In accordance with the earlier notions, the purposes of punishment were retribution, deterrence and prevention through incapacitation. Therefore the punishments prescribed by the original Code reflected such aims, though, whether such a purpose was adequately reflected and achieved continues to be a debatable issue. Various schools propounded various theories for punishing a law breaker. Subsequently, the reformative or rehabilitative trend crept into the judicial attitude towards a criminal. It is at this stage that the individualisation of sentencing gained prominence. But whether individualisation of sentencing has led to sentencing discrepancies and inconsistencies and at the cost of sacrifice of uniformity or certainty in the legal system, is an open question, This has to be understood in the background of the legislative frame work. Hence a perusal of the provisions of the Code is necessary with particular reference to rape laws.

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16 Lord Macaulay as cited by V.D. Kulshreshtha, *LANDMARKS IN INDIAN LEGAL HISTORY AND CONSTITUTIONAL HISTORY* 334 (1969).

17 It is important to note that even though the draft of the IPC was ready in the year 1837 it did not become law till 1860.

18 The Indian Penal Code was amended in the years 1891, 1925, 1929, 1940, 1978, and 1983.

III. PUNISHMENT FOR RAPE UNDER IPC PRIOR TO THE AMENDMENT

The substantive criminal law as reflected in the Indian Penal Code defines an offence and prescribes punishments for an offender. Our criminal law system traces the offender and punishment is given after the offence is completely established. The legal system is expected to make reasonable provision to ensure that the criminal act already committed is dealt with adequately.

Under the original Code of 1860 section 376 provided for the following punishments:

1. Transportation for life and
2. Imprisonment of either description which may extend to 10 years and fine.[19]

Further, by virtue of section 4 of the Code apart from the above mentioned punishments, the offender, if not a first offender, could also be subjected to whipping.

A reading of the section apparently gives one an idea of the seriousness with which the offence has been weighed by the framers of the Code.

IV. THE LAW COMMISSION RECOMMENDATIONS

In suggesting an amendment to section 376, the Law Commission in its 42nd Report recommended[20] that in place of the punishment then provided in the section, viz, imprisonment for life or imprisonment of either description for ten years, rigorous imprisonment for fourteen years may be substituted.

The Law Commission in its 42nd report also considered whether a minimum sentence of 3 years imprisonment should be provided, but then decided against it, with an observation that "adequate punishments" are imposed by Sessions Courts by which this offence is ordinarily triable. The Law Commission was of the opinion that the section should accordingly read as follows:

376. Punishment for rape - whoever commits rape shall be punished with rigorous imprisonment for a term which may extend to fourteen years and shall also be liable to fine.[21]

The Commission suggested a dual system of sentence in penalising a man having sexual intercourse with his child wife, where the wife is under twelve years and in the case of a wife above twelve but under fifteen years of age. If

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19 See John D. Mayne, *COMMENTARIES ON THE INDIAN PENAL CODE*, as translated by P. John (1967) at 377.

20 Law Commission of India, *42nd Report* (1971).

21 *Id.*, para 16.118.

she is under twelve years of age, with rigorous imprisonment for a term which may extend to seven years and fine and in any other case with imprisonment of either description for a term which may extend to two years or with fine, or with both.

The Commission distinguished the case of illicit intercourse by a man with a girl under sixteen years of age, though with her consent providing a punishment for a term which may extend to seven years and fine adding that "it shall be a defence to a charge under this Section for the accused to prove that he in good faith believed the girl to be above sixteen years of age".

The Commission further recommended for penalising:

(1) Illicit intercourse by a public servant with woman in his custody;
(2) Illicit intercourse by a Superintendent etc. with an inmate of a women's or children's institution; and
(3) Illicit intercourse by a manager etc. of a hospital with a mentally disordered patient

The punishment prescribed being imprisonment for two years or fine in all these three situations.

The Commission found it desirable to have another provision prescribing punishment for illicit intercourse with a girl between twelve years and sixteen years.[22]

The suggestion of the Law Commission which ultimately found a place in the Code can be seen by a perusal of the relevant provisions in this regard.

V. THE MATHURA CASE AND THE LAW COMMISSION

The impact of the criminal justice system on victims of rape and other sexual offences was felt both in legal circles and amongst Social Welfare Organisations with the decision rendered by the Supreme Court in the *Mathura* case.[23]

Following the decision of the Supreme Court in the above case, there was a widespread reaction in the country, which compelled the Parliament to enact the Criminal Law (Amendment) Act, 1983 as a result of which rape committed on a woman while in custody or in certain fiduciary capacities has been made punishable under Sections 376 B, C and D. In this connection, Section 114 A was also incorporated in the Indian Evidence Act, 1872, which provides that on the basis of the statement of the prosecutrix that she did not consent, the court would presume so and the burden of proof would shift on the accused.[24]

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22 *Id.*, para 16.120, where the Commission included section 376B. This offence will not fall as rape as it is committed with the consent of the girl.

23 *Thukaram* v. *State of Maharashtra*, AIR 1979 SC 185.

24 See Law Commission of India, *84th Report*, April 1980.

In view of the discussions that took place in the press and in other fora subsequent to the decision in the *Mathura* case, regarding the inadequacy of the law to protect women who have been victims of rape and other atrocities against women, the Government requested the Law Commission[25] to conduct a special study of law relating to rape. Apart from the reference made by the government, the Commission also received suggestions[26] for considering certain changes in the law of rape. It also received information[27] that women in villages and Harijan women were molested and that cases of rape of women were increasing in the country and offered suggestions[28] including amendment of the law. In these circumstances, the Law Commission suggested modification in the punishment of rape.

Further, the Commission considered the desirability of imposing a minimum sentence but decided against it ultimately.[29] This was done in the light of the judicial trends, which were in consonance with the notions of 'modern penology'. The Commission was of the opinion that by imposing a minimum punishment, it would fetter the discretion of the sentencing judge. This kind of a discretion they thought was essential, considering the peculiar circumstances in which the offence of rape was committed and hence individualisation of sentencing was an inevitable outcome.

VI. WHY AN AMENDMENT TO THE CRIMINAL LAWS? PARLIAMENTARY RESPONSE

Subsequent to the controversies centred around the decision rendered by the Supreme Court in the *Mathura* case, a proposal was brought before the Lok Sabha to change the law relating to rape. The issue was taken up when a question was raised "whether the Government had under consideration any proposal changing the law regarding rape, and if so, the details of such proposal, and as to the steps taken to strictly implement s.160(l) of the Cr PC

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25 D.O letter No. PS/LS/LA/ 80 dated 27th March 1980 from the Secretary, Dept. of Legal Affairs Ministry of Law to the Member Secretary, Law Commission of India (letter of references) and a supplementary letter D.O No. 1482/80A, dated 31st March 1980 from Joint Secretary and Legal Advisor Dept. of Legal Affairs to the Member Secretary, Law Commission of India.

26 From the *Lawyer's Collective,* Bombay letter- No. IJ/ES/22/80 dated 18th March 1980.

27 The Commission also received from the Ministry of Law a copy of a letter addressed by the Bhagini Samaj Bombay to the Minister for Law (Endorsement No. 1807/ 80 dated 16/4/80 from Shri. P.K. Kartha, Joint Secretary and Legal Advisor, Deptt. of Legal Affairs forwarding a copy of letter dated 7th April, 1980 addressed by the Bhagni Samaj, Bombay to the Minister for Law).

28 One such suggestion was to the effect that women police should interview and interrogate women who were molested, and that the trial should be held in Camera.

29 Law Commission of India, *84th Report,* (1980), paragraph 2.27.

which states that no woman can be called to the police station for interrogation.[30] In replying, the then Minister of State, for Home Affairs and Department of Parliamentary Affairs, stated that in response to the request of the Government, the Law Commission has submitted its 84th Report in April 1980, in which it has made recommendations for the amendment of the law relating to rape and allied offences, and that these recommendations are being examined and further, the Government has already addressed the States and requested them to strictly enforce the provisions of s.160 (l) of the CrPC.

VII. INCIDENCE AND PATTERN

A perusal of the Lok Sabha Debates subsequent to the year 1979, (when the *Mathura* case was decided) and prior to the criminal law amendment in 1983 will bring to light the fact that atrocities against women was very often a key issue raised before the House.

The pattern and incidence of rape and the class character of rapists and victims is to the extent evident from the discussions introduced in the Lok Sabha on this issue. To illustrate a few the reports read:

1. Increase in rape cases in Delhi[31]
2. Harijan girl raped in Narsinghpur, Madhya Pradesh,[32]
3. Reported rape of a sweeper's daughter at Chandigarh[33]
4. Petitions on mass rape by police officials[34]
5. Married woman raped in Bandra,[35]
6. Rape on women[36]
7. Incidents of rape and atrocities against women (discussion)[37]
8. Rape on women[38]
9. Rape deaths[39]
10. Incidents of rape of Harijan and Adivasi woman[40]
11. Housewife raped in Nangloi, Delhi[41]
12. Central team to Baghpat to investigate rape cases[42]

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30 Shri Chhitjbhai Ganiit, M.P. See *Lok Sabha Debates,* Vol IV, column 100, dt 11/6/80.

31 *Lok Sabha Debates,* Vol. IV, column 73, dt. 11/6/80.

32 *Id.*, column 309, dt. 13/6/80.

33 *Id.*, column 309, dt. 13/6/80

34 *Id.,* Vol. V, column 111-112, dt. 26/6/80.

35 *Id.,* column 545-546.

36 *Id.*, column 592.

37 *Id.*, Vol. VI, Column 303-364. dt 10/7/180. Infra.

38 *Id.*, Vol. VII, column 44-45. dt. 231/7/80.

39 *Id.*, column 49.

40 *Id.,* Vol. VIII, column 42, dt.6/8/80,

41 *Id.,* column 75.

42 *Id.*, column 243.

13. Mass raping by outside hoodlums at Talcher Railway Colony[43]
14. Gang rape of an Adivasi woman in Madhya Pradesh[44]
15. Rape of two *adivasi* girls in Madhya Pradesh[45]
16. Death and rape cases in police station[46]
17. Incidence of rape by policemen[47]
18. Atrocities on girls and rape cases[48]
19. Rape cases in Uttar Pradesh[49]
20. Rape by athletes at Bangalore[50]
21. Rape of S.C./S.T. women[51]
22. Rise in rape cases[52]
23. Alleged police collusion with rape accused[53]

Further, there was a report on publishing of false rape incidents in the press[54] and a discussion on compensation to rape victims.[55]

In pursuance of numerous reports on atrocities against women, particularly rape cases, a session in the Lok Sabha Debates[56] was devoted exclusively to discuss the said issue and statements which emerged during the discussion highlighted the enormity of the problem and the seriousness with which the members of the Lok Sabha viewed the offence.

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43 *Id.*, Vol XII, column 89, dt.5/3/8l.

44 *Id.*, Vol XIII, column 298, dt.10/3/81.

45 *Id.*, column 276-277, dt.11/3/81.

46 *Id.*, Vol. XV, column 251-252 dt. 1/4/81. See also the observation of Shri A.K Roy: "When we are in distress we seek the protection of the police But who will protect us *from,* police? ... the system has started tearing its garb, fearing its own police its own protector *id* Vol. VI col.252.

47 *Id.*, Vol. XVIII, column 160, dt.19/8/81.

48 *Id.*, column 219.

49 *Id.*, column 224 - 226.

50 *Id.*, column 247 - 248, dt 20/8/81.

51 *Id.*, Vol. XXX, column 78-79. dt.281/7/82.

52 *Id.*, Vol. XXXIII, column 172 – 173, dt.20/110/82.

53 *Id.*, Vol. XLI column 233 – 234, dt 24/8/83.

54 *Id.*, Vol VIll col. 257 dt.6/10/82 It is interesting to note the observation of Shri Yogendra Makwana, Minister of State in the Ministry of Home Affairs that many of the allegations appearing in the news papers have been totally ill-founded or highly exaggerated, and hence he would rely only on the reports of his officials. vide *id.* Vol. VI col.341-347. In reply to this Mr. A. Neelalohithadasan expressed that the officials of the Minister are the police officials and some of these officials are also accused in the incidents, "If the Home Minister is going to rely on them "how is justice going to be done?". *Id.*, col. 347.

55 *Id.*, Vol. XXXII, colm, l 152 dt. 16/10/82.

56 Discussion on large scale increase in the incidents of rape and atrocities on women, *Lok Sabha Debates*, seventh series, Vol. VI, No.25, column 303-364 dt 10/7/1980.

Opening the discussion Shri Jyotirmoy Bosu[57] observed

> This is not a debate which really gives us much pleasure to raise on the floor of the House but we have to do it because we have been shaken badly by the recent spade of crimes, The rise is alarming and is increasing everyday....

Further, so as to give an authentic report of the atrocities committed on the women especially on the Scheduled Caste and Scheduled Tribes, he quoted[58] from the Report of the Commissioner of Scheduled Caste and Tribes.

> One has to hang his head in shame over the inhuman atrocities committed on Scheduled Castes and Scheduled Tribes during the last few years, persons belonging to these communities continue to be subjected to assault, rape, arson and other forms of brutality....

He then criticised the involvement of the custodians of law and order, the police and civil administration in perpetrating these atrocities.[59] He said:

> Rape, gang rape, stripping nude, displaying women with her nudity by the police even within the police station have very few parallels in the history of this country. I was so grieved to read in the paper that even in the private organ of the woman a stick was inserted and chilli powder was put... I am sorry to say this, one wanted the minor son to have sex with his mother. Our head hangs in shame and the international press has picked it up. They will not only report it to the entire world but they have illustrated profusely. I have come to know that photographers have gone there and they have taken photographs of all these incidents.

In another case in Haryana, near Bhiwani, under the orders of the then Chief Minister, a brother was forced to have sex with his sister within the police station.

Continuing the discussion Shrimati Geeta Mukherjee[60] observed that :

> [T]hree of our State Assemblies had to discuss this subject of heinous crimes against women during the course of the past one week, and now the supreme legislative body of this country has to discuss the same subject. From this, one can understand the gravity of the situation.....

Commenting on the observation of the 84th Report of the Law Commission, that when a woman complaints of rape, the Courts should presume that she is telling the truth, the member observed:[61]

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57 *Id.*, column 304.

58 *Ibid.*

59 *Id.* cols.304, 305, See also the observation of Shrimati Geeta Mukherjee on police atrocities on women, *id.* cols 325-327.

60 *Id.*, colm. 325.

> It should not be doubted by the Court and the benefit of doubt should not be given in favour of the accused, Now this is a serious thing which we have to consider.

Another suggestion put forth by her was the setting up of a statutory Women's Commission[62] or a special machinery at the centre which should constantly go into cases of atrocities against women and monitor them from time to time and report to the House as to the action taken in such cases. The member concluded[63] her remarks by expressing her anguish over the issue in the following words:

> Sir, I am an old woman now, but even now I wish I had a gun in my hand so that I could go and shoot down those persons who are perpetrating henious crimes on women, come what may... I hope this august house will consider this matter very seriously and find an appropriate solution to this burning problem.

Another member[64] who spoke on the issue categorically stated that the "issue should not be politicised", and expressed the opinion that the police people are primarily responsible for the increase in such inhuman crimes."

In order to deal with the situation it was suggested:

> We must take the most stringent action against such persons who are obsessed by sex and passion. We should not politicise the issue and should rise above party politics when we discuss the violation of feminine dignity. The problem must be handled at administrative and social levels.[65]

With respect to the administrative measures which should be taken to solve the problem, Shri Mhaigi suggested[66] that the "law to punish those who perpetrate atrocities on women must be made more stringent."

Section 160(1) of the Cr.P.C. which is often violated by police was also brought to the notice of the House by the member. He observed that in spite of the prohibition that no woman must be taken to a police station for

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61 *Ibid.* See also the observation of Shri Jagjivan Ram, *id.*, 337, on the question of burden of proof.

62 Today, a National Commission for Women and State Commissions have been set up in New Delhi and other States respectively.

63 *Id.*, col. 327.

64 Sliri. T. Nagaratnam, *id.*, col, 330-331.

65 Siri. R.K. Mhaigi. The member was making the suggestion in the light of a news paper report that a father raped his 16 year old daughter. (The original speech was delivered in Marathi), *id.*, .col. 331-333.

66 *Id.*, col. 332.

interrogation, police do take women to the police station. "Actions against such policeman is a must". Another suggestion was:[67]

> Investigation of crimes against women must be carried on by women officials. Medical examination of a rape victim should invariably be conducted by a lady doctor. It would be better if only lady judges are appointed to try such cases.....

Holding the society also responsible, he said[68]

> (U)nfortunately in the so called modern age the attitude towards women is strange. We forget that she is a mother, sister and a daughter, but remember only that she is an object of sexual gratification. As long as this attitude remains, administrative measures, however stringent, would fail to make a dent in this problem. Both the administrators as well as society as a whole must co-operate to preserve the honour of womanhood in our country.

The member highlighted the apparently ineffective measure of protecting women by employing the police. According to him when a woman is under any threat by antisocial elements, society as a whole should stand to aid and assist her. In this regard, the responsibility and role of the press was exposed[69] in observing that:

> The names and photographs of those who commit crimes against women must be published to make them objects of censure for the whole of society. A proper reporting of such cases would go a long way in rooting out this social evil.

With respect to judicial safeguards in cases of rape and other atrocities on women, Shri Jagjivan Ram observed:[70]

> It has been suggested that deterrent punishment should be given to those who violate the honour of ladies in this country, Violation of a lady's honour is worse than her murder. The punishment therefore should be for that of murder.

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67 *Ibid.* In this context it is significant to note that observation of Shri R.K. Khargi that lady constables should take care of such crimes. *Id.*, col. 333. However, a note of caution was raised by Shri Jagjivan Ram in leaving such issues with lady constables as there were instances when lady constables in fact perpetrated atrocities against women. One such instance was where a lady constable in the State of Madhya Pradesh, forced a son to violate his mother. The suggestion of the member was to allow an advocate to accompany a lady to the police station and if any cost has to be borne, it should be borne by the government. See for details, *id.*, col. 336.

68 *Ibid.*

69 *Id.*, col.333.

70 *Id.*, col.337.

In this connection, it is pertinent to note the observation of Shri. A.K. Roy, "Perhaps that law is the best where a man is stoned to death, if he is accused of rape. Why don't you bring that law?"[71]

The member referred to the nature of the Indian Society treating a lady who has been 'violated' as a 'fallen lady'. Hence he was of the opinion that the statistics available on the occurrence of rape represent only a proportion of the actual incidents as any lady who has been violated will try to hush it. Apart from this social reason, the member identified a jurisprudential reason for this silence of women. In our system, which is based on English jurisprudence a lady who has been violated has to prove that she has been violated beyond all reasonable doubt. If she succeeds in this, very often she will become a social out caste. Even otherwise the offence being committed within closed doors is difficult to prove. Therefore the member suggested:

> We have changed in some cases the concept of British jurisprudence... that the accused is innocent until proved guilty ... I will suggest... that it should be done (in the case of rape) at the earliest opportunity. The responsibility of proving his innocence should be that of the person who is charged with a crime of rape.[72]

All the members expressed the opinion that the honour of women should be protected at every cost. Shri Jagjivan Ram wanted the government to take stringent action against the violators of women. He also suggested that the Government should open a cell in the Ministry, "so that these cases may be watched bit by bit and the progress noted ..." if we claim to be civilised, we will have to rouse the conscience of the nation that at all costs the honour of the ladies be protected." Another member who spoke on the issue opined that law cannot protect the honour of women. "It requires", according to him." a social revolution in which women themselves will have to take a lead.[73]

As a consequence of the heated debates and discussions on the large scale increase in the incidents of rape and atrocities on women particularly the working class women, *Harijan* and *Adivasi* women, the involvement of police officials in such crimes and the receipt of a memorandum and other letters to this effect, the Government referred the matter to the Law Commission and in the Eighty Fourth Report of the Law Commission, amendments were suggested to the Indian Penal Code, Criminal Procedure Code and the Indian Evidence Act. For this purpose. a Joint Committee on the Criminal Law (Amendment) Bill further to amend the said legislation was thereby appointed and requested to submit a report in this regard.

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71 *Id.*, col. 353.
72 *Ibid.*
73 *Id.*, col.338.

The Joint Committee on the Bill having undertaken the onerous task, sought extension of time[74] for presentation of the Report several times. The significance of the issue and the enormity of the problem was brought to light when the question of extension of time for presentation of the Report of Joint committee was moved[75] before the Lok Sabha and Shri Ram Jethmalani one of the members emphatically voiced his opinion, observing:

> This important committee of Parliament is seeking the fifth extension of time to make its report on a very important measure i.e. a Bill to amend the Penal Code, the Code of Criminal Procedure and some provisions of the Evidence Act. I do not wish to say anything that will detract from the meticulous case with which the Committee has been going about its task ever since it has come into existence. I am prepared also to concede its desire to hear any individual, organisation or group, which has anything to say on the subject, which the committee is deliberating upon. For that purpose, I even appreciate their perambulations all over the country. They are going to every part of the country, and recording evidence on the spot. All this is good. It is inevitable that this motion will have to be allowed and time given to them. While it is inevitable I have some misgivings which I want to share with the House so that the Committee should now expedite its work and let this extension be the final extension.

The Amendment Bill was introduced because "there was an agitation, amongst the women of this country arising out of an undeserved acquittal in the case of a rape against an innocent young lady, who went to a police station and had been raped by a constable while at the police station itself. It was a shocking case and acquittal by the Supreme Court was equally shocking. But the blame was laid at the door of the law and it was said that the law required to be amended". Shri Ram Jethmalani was of the opinion that the judgment of the Supreme Court on facts, was wrong. He observed that since it was decided that the law must take care of the situation, it is imperative that the law must be brought into existence at the earliest, possible opportunity.

The eloquent address by Shri Ram Jethmalani brought home the fact that the need for an amendment of the said law was felt as a consequence of the heated debates on the Mathura decision. However by an amendment, what was sought to be achieved? This fact can be understood by a perusal of the Statement of Objects and Reasons attached to the Bill.

After the report of the Joint Committee was presented,[76] the Criminal Law Amendment Bill was introduced in the Parliament.[77] and later published.[78] The

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74 *Id.*,col.353, per Shri. A K.Roy.

75 *Lok Sabha Debates*, Vol. XVIII colunm 279, dt.20-8-81; *id.*, Vol. XXI column 317, 318, dt. 27-11-81 and *Id.*, Vol XXX, column 268 dt. 5-8-82.

76 *Id.*, Vol.XXX, column 268. dt.5-8-82.

77 *Lok Sabha Debates*, Vol XXXIII, column 299, dt. 2-11-82.

Statement of Objects and Reasons reveals that "there have been pressing demands inside and outside Parliament for the amendment of the law relating to rape, so that it becomes more difficult for the offenders to escape conviction and severe penalties are imposed on those convicted." It is also mentioned that the recommendations of the Law Commission were examined in consultation with the State Governments. Various suggestions on the subject were received. In the light of these it was proposed to make suitable changes in the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act with respect mainly to the offence of rape.

However, the law was also amended to incorporate relevant provisions with respect to dowry death (Section 304 B) and the offence of cruelty by a husband or the relatives of the husband (Section 498 A).

The changes proposed were formulated principally on the basis of the following considerations:

(1) The law should be made more stringent without jeopardising considerations of fair trial.
(2) The definition of rape should be amended to remove certain loopholes and inadequacies and to ensure that consent should be vitiated unless it is real and given out of free choice.
(3) Minimum punishment for rape should be prescribed.
(4) The prosecutrix should be protected from the glare of embarrassing publicity during the investigatory as well as trial stages and any information leading to identification of the victim should not be disclosed.
(5) In the case of rape by a police officer or by a group of persons having a custodial control by virtue of his special position over the victim, once it is proved that sexual intercourse has taken place, the onus should be on the accused to prove that the sexual intercourse was with consent of the victim. Hence, when a Bill as it mentions "seeks to achieve the above objects" it is necessary to probe whether with the present amendment, the above objects are being achieved .
(6) In the matter of dowry deaths or large-scale instances of bride-burning, the law would presume that the husband or relative would be deemed to have caused her death, if such death occurred within seven years of marriage, not under normal circumstances and where it could be shown that prior to her death she was subjected to cruelty. Here it may be noted that the punishment provides for a mandatory minimum sentence of seven years but which may extend to life imprisonment.
(7) The gravity of the offence of cruelty by a husband or the relatives of the husband was taken note of and the punishment provided is imprisonment for a term which may extend to three years and fine.

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[78] *Id.*, on 5-11-82, vol XXXVII, column 294.

VIII. SENTENCING - LEGISLATIVE POLICY

If justice is an ethical value or a social value, to what extent is the State machinery, involved in imparting justice, living up to the expectations or aspirations of the society or to the prevailing notions of justice?

How has the legislature viewed a particular offence before prescribing a punishment for the same? Are there any policy guidelines? The legislature is an important wing of the political process and in the policy decision making. The legislative organ is important in the behavioural studies especially with reference to what is called an "authoritative allocation of values in a society."[79] The legislature has a significant role in evolving structured sets of behavioural pattern.

Generally, the legislature confers a very wide discretion on the judge in fixing the appropriate punishment. In India this is evidenced by the varied punishments prescribed by the Indian Penal Code, providing a maximum penalty. It is the policy of law to fix a maximum penalty that is intended for the worst of such cases and the discretion is vested with the judge to recede from the maximum limit in appropriate cases. As a matter of principle. exercise of discretion is a matter of prudence and not of law. Even though this is the general rule, there are instances in the Indian Penal code wherein a minimum penalty has been prescribed as in the case of dowry death.

The Indian Penal Code as it was then re-enacted contained very few offences for which a minimum punishment was prescribed."[80]

At this stage one must pause to enquire as to what are the policy guidelines which weigh with the legislature so as to identify certain offences as requiring a minimum sentence. It certainly would not be an arbitrary decision. Therefore, is this decision based on:

1. The gravity of the offence?
2. The number and incidence of the offence?

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[79] The Bill No.162 of 1980 was published in *Gazettee of India, Extraordinary* Part II, S. ii, pp. 958-965, dt. 12-2-1980. David Easton, *THE POLITICAL SYSTEM* at 129.

[80] Originally there were only five sections in the IPC which prescribed a minimum penalty.

1. *Section 121* - the offence of waging war against the State shall be punished with death or imprisonment for life.
2. *Section 302* - the offence of murder shall be punished with death or imprisonment for life.
3. *Section 303* - A person committing murder while undergoing life imprisonment shall be punished with death. See *Mithu* v. *State of Punjab*, AIR 1983 SC 473.
4. Section 397 - Robbery or dacoity with attempt to cause death or grievous hurt shall be punished with imprisonment which shall not. be less than seven years.
5. *Section 398* - Attempt to commit robbery or dacoity when armed with deadly weapon be punished with imprisonment which shall not be less than seven years.

See also K.N. Chandrashekara Pillai, "Minimum Sentence: vis-a-vis Justice", 1979 *CULR* at 369.

3. Intensity of threat to life/property/public security?
4. The alarm caused and terror as a consequence?
5. Gender?
6. Age of victim?
7. Reputation of the accused/repeated offender?
8. Possible deterrence/reformation?

For instance, for the offence of dacoity,[81] a minimum mandatory sentence of seven years is provided where robbery or dacoity is accompanied by an attempt to cause death or grievous hurt. In Section 396, which relates to dacoity with murder, the punishment could even extend to death penalty. Did the said offence at any point of time create an alarm in society thereby calling for stringent punishment? At this point of time, was the offence of rape or other forms of crimes against women viewed with a lesser gravity? or was the incidence of the said offences of a lesser magnitude in comparison with the offence of dacoity?

By Amendments of the Indian Penal Code in 1983 for the Offence of Rape, a minimum punishment has been prescribed by the legislature. However, the legislature does not seem to have viewed this offence that severely as to prescribe mandatory minimum sentence as has been done in the case of dowry death and dacoity. Probably in the matter of rape, the legislature envisages situations when the circumstances call for even a lesser punishment than the minimum prescribed Therefore, how has the legislature viewed this offence in comparison with other offences for which a mandatory minimum sentence has been laid down? As we can see that under S.376 in spite of the minimum of seven years, the proviso states that "the Court may, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than seven years". Hence discretion is vested with the judge to reduce from the minimum prescribed in appropriate cases.

The pre-amended IPC did not have a provision regarding minimum sentence. By the amendment in 1983, a seven years minimum sentence was introduced in section 376 and a minimum of ten years for custodial rapes and other aggravated forms of rape. In both cases the imprisonment can extend to life imprisonment However, after prescribing a minimum punishment, the legislature has given the judiciary a discretion to relax the punishment for "adequate and special reasons" to be recorded in writing. What constitutes adequate and special reasons is not spelt out in the Code, thereby leaving the decision to the individual judge's perception. Hence the judge's notion or penal policy will play a role in the decision making, overriding the statutory wisdom, To a certain extent, it may be possible for the trial judge to spell out the special or adequate reasons for a reduction of the sentence for the case at hand. However when the case goes in appeal before the High Court or the

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[81] Indian Penal Code. section 397.

Supreme Court, in the absence of a thorough fact analysis through trial, the Appellate Judge has only a narrative picture of the incident. Therefore, the exercise of discretion by the Appellate Judge could be guided by several extraneous considerations, which could be interpreted to fall within the meaning of adequate and special reasons as provided under the Code.[82]

According to a critique,[83]

> This discretionary power embodied under section 376 has not only left the rape victim in lurch, and provides a conventional tool to the rapist to escape the harsher punishment by engaging the best legal talent, and by pleading various other emotional factors, but this discretionary power has unnecessarily brou ght criticism of the judiciary and judges as well, and might result in loss of judicial credibility.

It has thus been suggested at various levels that this discretion currently involved in the sentencing process must be eliminated and the length of judicial confinement be made more certain by the legislature or at least that the minimum sentence prescribed be made mandatory as flexible sentences produce injustice and sentencing disparities.

Nevertheless, if the legislature provides for sentences, which are totally mandatory, the Courts may not be able to respond to individual fact situations, which call for a separate treatment, based on varying circumstances. Moreover, the judicial process in the absence of a certain amount of discretion. would resuls in a mechanical process of decision making.

Hence, discretion coupled with appropriate sentencing guidelines may be a better strategy to avoid sentencing disparities and inconsistencies inorder to achieve the ultimate legislative goal and to ensure uniformity in judicial practice.

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82 *Prern Chand v. State of Haryana*, JT 1989 (I) .SC 158. *Suman Rani's* case is an example of such discretion by the Appellate Court, In this case a young Woman was raped by two policemen. After five days of the incident she filed a complaint and the trial followed. The Sessions Court awarded the minimum sentence of 10 years imprisonment to the accused. In appeal the High Court confirmed the Sentence. Both the Courts did not find any adequate and special reasons to deviate from the minimum sentence. However, the Supreme Court of India, in appeal noted an adequate and special reason to reduce the sentence. In its judgement the Supreme Court gave the 'conduct' of the victim (who was accused to be of questionable character and easy virtue with lewd and lascivious behaviour) as the ground for an adequate reason for a reduction of the sentence. This observation of the Supreme Court attracted much criticism and various organisations and activists demanded clarification from the Court. As a result, the Court in the review petition clarified that the word 'conduct' had no bearing on the victim's character and that it merely referred to her inaction of reporting the crime late by five days. The review petition filed before the Supreme Court was turned down.

83 Pawan Sharma, "Women and Rape Laws - Pressing Need for Amendments" in Shamsuddin Shams (ed.), *WOMEN, LAW AND SOCIAL CHANGE* 165 (1991).