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# JOURNAL OF THE NATIONAL HUMAN RIGHTS COMMISSION, INDIA

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Chairperson, NHRC

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*Shri Rejesh Kisbore*  
Secretary General, NHRC

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## **Rights of Rape Victims in India: A Legal Analysis**

*Vageshwari Deswal* #

### **Introduction**

Victims are unfortunately the forgotten people in the criminal justice delivery system. Our criminal justice system, like all such systems, stemming from the Anglo-Saxon pattern, tends to take the victim for granted and is more concerned with the offender, his activities, his rights and his correctional needs.' It is a weakness of our jurisprudence that victims of crime do not attract the attention of law **In** fact, the victim reparation is still the vanishing point of our criminal law/ Among the many proposals for reforming criminal justice, the one that attracts universal acclaim relates to the status and role of the victim in criminal proceedings. Today he or she is an informant and possibly a witness for the prosecution depending upon the good sense of the police and the discretion of the public prosecutor. Unlike the accused, the victim has no rights to protect his or her interests in the proceedings, which are supposedly conducted on his or her behalf by the State and its agencies, and when the state agencies fail to do their duty, as has often happened in many cases in the recent past, the victim is left to suffer injustice silently or to take the law into his or her hands and wreak vengeance on the offender.' Crime can leave

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<sup>1</sup> Dr. Justice A.S. Anand, Judge, Supreme Court of India delivering the Shri P. Babulu Reddy Foundation Lecture on *Victims Of Crime - The Unseen Side* (199B) 1 SCC 609

<sup>2</sup> *Rattan Silgh v. State Of Punjab*, (1979) 4 SCC 719

<sup>3</sup> N.R. Madhava Menon *Victim's: rights and criminal justice reforms*, The Hindu, March 27 2006

victims physically injured and emotionally traumatized, with potentially long lasting psychological trauma, all of which can be compounded by severe financial difficulties. The agencies with which victims come into contact, particularly during the period after the crime, do not always understand and respond effectively to their needs. Many victims felt that the rights of the accused of a crime take precedence over theirs in criminal proceedings."

In India victims have been given few legal rights. They cannot claim, as a matter of right to be informed, present and heard within the criminal justice system. There are no legal provisions imposing a duty on the police or prosecution to inform the victim regarding the arrest, court proceedings or release of the defendant. They have no right to attend the trial or other proceedings, and they have no right to make a statement to the court, at sentencing or at other hearings. Moreover, victim assistance programs are virtually non-existent.

### **Who is a Victim?**

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>4</sup> defines the term 'Victims' to mean persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.

Thus under this Declaration, a person may be considered a victim, irrespective of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and

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<sup>4</sup> "Crimina! [usti«: The Way Ahead," A report by the UK Home Department, 2001

<sup>5</sup> Adopted by the General Assembly of the United Nations, vide its Resolution No, 40/34, dated 29.11.1985

persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.<sup>6</sup>

Indian laws define 'victim' as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir,"

### **International Developments**

In 1985, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration recognized the following four types of rights and entitlements of victims of crimes

- (a) Access to justice and fair treatment which includes prompt redress, right to be informed of benefits and entitlements under law; right to necessary support services throughout the proceedings, and right to protection of privacy and safety.
- (b) Right to restitution return of property lost or payment for any harm or loss suffered as a result of the crime.
- (c) Compensation when compensation is not fully available from the offender or other sources, the State should provide it at least in violent crimes that result in serious bodily injury, for which a national fund should be established.
- (d) Personal assistance and support services include material, medical, psychological, and social assistance through governmental, voluntary, and community-based mechanisms.

<sup>6</sup> 2<sup>nd</sup> principle in Annexure to UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Definition of the term '*Victim*' inserted in Section 2(wa) of the CrPC by the Criminal Laws (amendment) Act 2008

<sup>11</sup> N.R. MadhavaMenon: *Victim's rights and criminal justice reforms* The Hindu, March 27 2006

Accordingly many countries enacted laws for victim protection e.g. Canada-Monitoba enacted the *Justice for Victims of Crime Act*, 1986. New Zealand enacted the *Victim of Offences Act*, 1987. United Kingdom enacted the *Criminal Justice Act*, 1988 and made provisions for payment of compensation by the *Criminal Injuries Compensation Board*. Australia also enacted the *Victims of Crime Act*, 1994.

Generally it is seen that Common law does not provide for victim participation in Criminal justice administration and victim's role is limited to that of a witness. Inquisitorial systems, allow some participation of the victim within the trial process. For example Germany permits victims of certain serious offenses or the relatives of a murder victim to act as subsidiary prosecutors. France and Belgium also allow the victim to participate as an independent civil party. Under France's *Framework Justice Act (2002)*, police are obligated to inform victims of their right to apply for compensation and seek a civil remedy. Also, police can register compensation claims on behalf of victims, thus eliminating the requirement for victims to go to court. Victims may initiate prosecution, participate and be heard as a party in any prosecution, and pursue a claim for civil damages in the criminal action. Restorative justice is another concept that is increasingly being used in all types of criminal justice systems, as victims and offenders cooperate in devising the resolution of the harms caused by the offense while holding the offender accountable for the harms.<sup>10</sup>

### **Provisions for Victim Rights in India**

The Malimath Committee appointed by the Government of India (2003) made a series of recommendations to put the victim back at the centre of criminal proceedings through a series of steps designed to empower him and the court. These include:

<sup>9</sup> Rights of Victims available at <http://www.vendvawnow.org/en/articleS/632-rights-of-victims.html>

<sup>10</sup> Doak, Jonathan (2005). *Victims' Rights in Criminal Trials: Prospects for Participation* Journal of Law and Society. 32(2):294-316.



- Right of the victim, and if *he* she is dead, his legal representative to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years imprisonment or more. In select cases to be notified by Government, this right may even be extended to recognized voluntary organizations as well.
- Right to be represented by an advocate of his choice. In cases where the victim is not able to afford the services of a lawyer than an advocate shall be provided at the cost of the State.
- Participation in criminal trial shall, *inter alia*, include the right to provide evidence, to put questions to witnesses with the leave of the court, to be informed of the status of investigation, to move court to ensure proper investigation, to be heard on issues relating to bail and withdrawal of prosecution, to advance argument after the prosecutor has submitted his arguments, and to participate in settlements of compoundable offences.
- Right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation.
- Explore the possibility of including psychiatric and medical help, interim compensation, and protection against secondary victimization under the ambit of legal services.
- Creation of a victim compensation fund to be administered possibly by the Legal Services Authority.

The above recommendations served as a precursor to the large scale amendments carried out in the CrPC in 2009. Some existing provisions were amended while some new provisions were introduced to incorporate these recommendations. Introduction of Section 2(wa) in the CrPC vide the Amendment Act of 2008 was the first step in this direction. This clause defined the term *Victim* in a broad manner to cover his or her guardian or legal heirs too. In 2009, *Victim Compensation Scheme*<sup>11</sup> was

<sup>11</sup> Section 357A inserted by Section 28 of Criminal Laws Amendment Act 2008 with effect from 31<sup>st</sup> Dec, 2009.



introduced. In 2013 another two provisions were introduced to protect the rights of victims. Section 357C imposes a duty on all public as well as private hospitals to provide free treatment to victims of acid violence and sexual assault and immediately inform the police of such incident<sup>12</sup> and Section 357B clarifies that the compensation payable to victims shall be in addition to the fine imposed as a form of punishment under IPe. Right to appeal against the acquittal of the accused or his conviction for a lesser offence has been also granted to the victim under the proviso to Section 372 CrPC by the amendment act of 2008. Proviso to Section 24(8) provides that the court may permit the victim to engage an advocate of his choice to assist the prosecutor. Legal Aid to victims especially women and children is mandated by Section 12 of the Legal Services Authorities Act, 1987 and the same has been reiterated a number of times by our judiciary.<sup>P</sup> In 2011 a circular<sup>14</sup> was issued by the Commissioner of Police, Delhi as per the orders of the Delhi High Court imposing a duty on the survivor's lawyer to keep the survivor informed about all the proceedings, bailor remand applications filed by the accused.

### **Victims of Sexual Assault**

An act of sexual violence can devastate and derail a victim's life. The impact is long-lasting—months, years, even a lifetime. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity.<sup>P</sup>

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<sup>12</sup> Section 357e

<sup>13</sup> *Delhi Domestic Working Women's Forum v. Delhi Police* 1995 SeC(1) 14

<sup>14</sup> Circular no. 53/Record Branch/PHQ- 2011.

<sup>15</sup> *State Of Punjab v. Ramdev Singh* AIR 2004 SC 1290

Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings. In the case of *Delhi Domestic Working Women's Forum v. Union of India and Others*<sup>16</sup> the SC pointed out the defects of the criminal justice system that, complaints are handled roughly and not given warranted attention. The victims are mostly humiliated by the police. Facing rape trials is a traumatic experience. The experience of giving evidence in court has been negative and destructive for them, as they often say that, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had had to suffer as a result of the rape itself.

After the December 2012 Munirka Gang Rape case, a Committee headed by Justice Verma was constituted to suggest necessary amendments in laws relating to Sexual Offences. In addition to suggesting a broad definition for Rape and higher punishments for the perpetrators of sexual offences, this committee also recognized the important role played by advocates assisting the survivors in their quest for justice. In paragraphs 26 and 27 of its report the Committee suggested that the victim must be given opportunity to engage a lawyer of her choice who would be permitted to assist the prosecutor, examine witness and make submissions to the Court. They also recommended that the victim's advocate should be given a right of audience in his own capacity and not merely as a support to the prosecutor.<sup>17</sup>

<sup>16</sup> *Supra* note 13. In this case four girls belonging to ST category were raped and abused by army personnel on their way to Delhi on Muri Express. A petition was filed by *Delhi Domestic Working Women's Forum* under Art. 32 of the Constitution of India, asking for a fast trial and compensation for victims of rape. The accused were finally charged with the Sections 376B (Intercourse by public servant with woman in his custody) and 341 IPC (wrongful restraint).

<sup>17</sup> *Report Of the Committee on Amendment to Criminal Law*, available at <http://www.thehindu.com/news/resources/full-text-of-justice-vermas-report-pdf/article4339457.ece>

## **Rights of Victims of Sexual Assault**

In view of International Covenant on Economic, Social, and Cultural Rights 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not traumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy.<sup>18</sup>

### **I Right to Access to Justice Registration of FIR Mandatory in Cases of Sexual Assaults**

Whenever the victim of any cognizable offence gives information to the police, the police are required to reduce the information into writing and read it out to the informant. The informant is required to sign it and receive a copy of the FIR.<sup>19</sup> If the police refuse to record the information, the victim-informant is required to send it in writing and by post to the Superintendent of Police concerned.<sup>20</sup> If the police refuse to investigate the case for whatever reason, the police officer is required to notify the informant of that fact.<sup>21</sup> Alternatively, victims are enabled by section 190 of the Cr.PC to avoid going to the police for redress and directly approach the Magistrate with their complaint.

<sup>18</sup> *Lilu @ Rajesh and Am v. State Of Haryana* 2U13 (6) SCALE 17

<sup>19</sup> Section 154 (1)&(2) CrPC

<sup>20</sup> Section 154(3) CrPC

<sup>21</sup> Section 157(2)

The Criminal Laws Amendment Act, 2013 inserted Section 166A in the IPC<sup>22</sup> which has made recording of FIR's mandatory in cases of rape and failure on part of public servant to record information given to him in cases or rapes will make such public servant liable for punishment.

In cases where the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information is to be recorded, by a woman police officer or any woman officer and in the event that the victim or person against whom such offence was attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be and the recording of such information shall be videographed. "In relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality"<sup>23</sup>

Ordinarily in crimes FIR is to be registered promptly as with delay presumption of correctness goes on decreasing. But in cases of rapes

<sup>22</sup> IPC Section 166A Whoever, being a public servant,

- (a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or
- (b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or
- (c) fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.

<sup>23</sup> Proviso to Sub Section (1) of Section 157 CrPC



delay in lodging of FIR, where such delay is explainable and the reasons for such delay are reasonable do not reduce the credibility of information contained in such FIR. A bench of justices H.S. Bedi and GyanSudha Mishra said that 'delay in lodging FIR by rape victims is understandable'. In incidents of rape, particularly when the victim is assaulted by a gang, it is difficult for the woman to promptly lodge a complaint since she has to consider the social stigma attached to it. A victim of gang rape inevitably suffers acute trauma and it is some time before such a victim is in a position to make a lucid and sensible statement. Moreover, rape itself brings enormous shame to the victim and it is after much persuasion that a rape victim goes to the police station to lodge a report and if some delay is occasioned, that cannot in any way detract from the other credible evidence.<sup>24</sup> If there are no injuries and if there is a delay in filing FIR, it cannot be said that the rape has not been committed.<sup>25</sup> Judicial response to human rights cannot be blunted by legal bigotry.<sup>26</sup>

### **Prompt Recording of Statement**

The newly inserted proviso to S.154(1) as amended by Criminal law (Amendment) Act 2013, states that the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (SA) of section 164 as soon as possible. According to clause (a) of sub-section (SA) of section 164 'in cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against which such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police'.

<sup>24</sup> <http://archive.indianexpress.com/news/fir-delay-in-rape-case-can-be-ignoredsc/827751/>

<sup>25</sup> *State of Himachal Pradesh v. Gian Chand* SC judgment dated 1/5/2001 in Appeal (crl.) 649 of 1996

<sup>26</sup> *Rafiq v. State of UP.*, 1981 SCR (1) 402 at p. 406

Recently on 25<sup>th</sup> April, 2014, a two Judge Bench of the Supreme Court<sup>27</sup> comprising of Justice GyanSudhaMisra and Justice V. Gopala Gowda has issued Guidelines in exercise of powers under Article 142 of the Constitution of India in the form of Mandamus to all the police station in charges in the entire country regarding 'recording statement of Rape Victim'. The Directions are as follows:

1. Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 CrPC. A copy of the statement under Section 164 CrPC should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 CrPC should not be disclosed to any person till charge sheet/report under Section 173 CrPC. is filed.
- ii. The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.
- iii. The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.
- iv. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

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<sup>27</sup> *State Of Karnataka by Vinnavakere Police v. Shivanna@TarkariShivanna*, in the Supreme Court of India criminal appellate jurisdiction Special leave petition (crl.) No. 5073/2011



- v. Medical Examination of the victim: Section 164A CrPC inserted by Act 25 of 2005 in CrPC imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 Crpc.<sup>28</sup>

During investigations no woman shall be required to attend at any place other than the place in which such woman resides for the purposes of giving information. Statements made by witnesses during the course of police investigations and recorded under Section 161 may also be recorded by audio-video electronic means<sup>30</sup> and the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.<sup>31</sup>

Under Section 173 of the CrPC, every police officer is required to complete investigations without unnecessary delay and forward the report to the concerned magistrate and where investigation relates to an offence under sections 376, 376A, 376B, 376C or 376D of the Indian Penal Code, the report must specifically mention, whether the report of medical examination of the victim has been attached along with the report of the police officer.<sup>32</sup>

The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded

<sup>28</sup> Available at <http://indiankanoon.org/doc/2622362/>

<sup>29</sup> Section 160(1) CrPC

<sup>30</sup> Proviso after Sub section (3) to Section 161 CrPC inserted by the Criminal Laws Amendment Act, 2008

<sup>31</sup> Proviso to Section 161 inserted by the Criminal Laws Amendment Act, 2013

<sup>32</sup> Sub-section (2), clause (h), Section 173 CrPC



by the officer in charge of the police station. Section 25(2) of the Protection of Children against Sexual Offences Act, 2012 gives the right to survivors of child sexual abuse or their parents to get a copy of the statements and documents filed with a final report.

In *Birju Ram v. State of Rajasthan*,<sup>34</sup> the Court cautioned Magistrates to be more vigilant and sensitive to ensure that the provisions of law are not abused, to perpetuate injustice to victim. Ruling that statements under Section 164 are to be recorded only at the instance of the the police and not the accused, the Rajasthan High Court observed, "The statement of a witness under Section 164, CrPC can be recorded when a person is sponsored by the investigating agency. When it is not sponsored by the investigating agency the concerned Magistrate should look to the Police Diary and give sufficient time for reflection and also ascertain the bona fides of the parties concerned. If door is opened to such persons to get in and if the magistrates are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the magistrate Courts for the purpose of creating record in advance for the purpose of helping the culprits". The police is required to adopt follow up steps in the matter of investigation and that in the scheme of the said provisions there is no set or stage at which a magistrate can take note of a stranger individual approaching him directly with a prayer that his statement may be recorded in connection with some occurrence involving a criminal offence. **If** a magistrate is obliged to record the statements of all such persons who approach him the situation would become anomalous and every magistrate court will be further crowded with a number of such intending witness brought up at the behest of accused persons.<sup>P</sup>

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<sup>1</sup> Sub Section (1), Clause (IA), Section 173, CrPC

<sup>34</sup> 2006 CriLJ 1794

<sup>35</sup> *JogendraNabak&Ors v. State Of Orissa &Ors* Judgment delivered by SC on 4 August, 1999

## Right to Receive Notice of Filing of Police Report under Section 173 CrPC

The Supreme Court in *Bhagwant Singh v. Commr. of Police*<sup>36</sup> followed in *Union Public Service Commission v. S. Papaiah*<sup>37</sup> has read into the requirements of Section 173 CrPC, the necessity to issue such a notice. This Court said: "There can, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(z) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(z) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report.,,38

## II Rights During Trial

### Right to Legal Aid and Fair Trial

Article 39A of the Indian Constitution directs the State to provide legal aid to ensure that legal system dispenses justice without discrimination. Under Section 12 of the Legal Services Authorities Act, 1987 all women and children are entitled to legal aid. Legal Aid would include legal services such as giving legal advice, guiding the record of statements, making the victim aware of their rights and protecting the rights and interests of the victim at all stages of legal proceedings.

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<sup>36</sup> (1985) 2 See 537 See

<sup>37</sup> (1997) 7 See 614

<sup>38</sup> *Bhagwant Singh v. Commr. of Police* (1985) 2 See 537 See pp. 542-43, para 4

When a complaint of a woman disclosing a cognizable offence is not investigated by the police under Section 156(1) CrPC and the case is closed after preliminary investigation without registering an FIR, the victim is entitled to legal aid in order to pursue the remedy of a Magisterial order under Section 156(3) of the CrPC.

In *Delhi Domestic Working Women's Forum v Union of India and Others*<sup>39</sup> the SC indicated some broad parameters for assisting the victims of rape as follows, "The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance<sup>40</sup>. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station should represent her till the end of the case; Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her; The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed; A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable and an advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay,

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<sup>39</sup> *Supra* note 13

<sup>40</sup> *Ibid* at para 15



advocates would be authorized to act at the police station before leave of the court was sought or obtained."<sup>41</sup>

The complaints of victims are many. They often complain that they are ill-treated or harassed. Another grouse is that the police do not truthfully record the information. Investigations being exclusively a police function, victims have a role in it, only if the police consider it necessary. There is no special provision for support to victims of rape to enable them to overcome the trauma and hurt. Another allegation is that the prosecution can seek withdrawal at any time during trial without consulting the victim.<sup>42</sup> This leaves the victim with a limited right to prosecute the case as a private complainant.

Section 301(2) CrPC enables the victim's private counsel to assist the prosecution and also submit written arguments with the leave of the Court. According to Section 301 of CrPC such assistance is to be given at the enquiry, trial or appeal in a criminal case. When a party cannot be impleaded in criminal proceedings as held by this Court, he cannot be permitted to come in under the guise of an intervener. But at the same time, bearing in mind the wholesome observation of the Supreme Court, the right of a party to represent matters before the court cannot be whittled down into a strait-jacket formula of *locus standi*. Thus a pleader privately engaged can instruct and act under the directions of the Public Prosecutor.<sup>43</sup> Even otherwise the Court may permit the victim to engage an advocate of his choice to assist the prosecution.<sup>44</sup>

### **Right to be Heard in Matters of Accused's Bail**

In the granting and cancellation of bail, victims have substantial interests though not fully recognized by law. Section 439 (2) allows a victim to move the Court for cancellation of bail; but the action thereon depends

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<sup>41</sup> *Ibid*

<sup>42</sup> Section 321 CrPC

<sup>43</sup> *All India Democratic Women's v. State, And Gibers* 1998 Cri11 2629

<sup>44</sup> Proviso to sub section (8) of Section 24 CrPC

on the stand taken by the Prosecution. Earlier the Complainant or informant could not oppose the accused's plea for bail and their counsel could at best, act under the instructions of the Public Prosecutor. P but in *Puran v. Rambilas*<sup>46</sup> the Supreme Court recognized the rights of even a private party to move the court for cancellation of bail. The court observed, "When ignoring the material and evidence on record, a perverse order of bail is passed in a heinous crime, such order would be against the principles of law and not only the State but any aggrieved private party may move the Court for cancellation of bail."

Throughout the proceedings the rape victim's lawyer is duty bound to inform her about the remand or bail application filed by the accused.<sup>47</sup>

### **Victims to be Screened from the Offender**

Where ever the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.<sup>48</sup>

The evidence of a witness (recorded by magistrate in warrant cases) under sub-section (1) of Section 275 CrPC may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.<sup>49</sup>

### **Trials to be Fast Tracked**

Trials in rape cases are required to be conducted on day to day basis and unnecessary adjournments should not be permitted. In every inquiry or trial the proceedings shall be continued from day-to-day until all the

<sup>45</sup> *InduBala v. Delhi Administration* 1991 CrLJ 1774 (Del)

<sup>46</sup> AIR 2001 SC 2023

<sup>47</sup> *Supra* note 14

<sup>48</sup> Proviso to Section 273 CrPC inserted by Criminal Laws Amendment Act, 2013

<sup>49</sup> Proviso to Sub Section (1) of Section 275 CrPC inserted by Criminal Laws Amendment Act, 2008.

witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.<sup>50</sup>

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.<sup>51</sup> Such a direction was necessary to prevent unnecessary delays and adjournments due to technicalities or procedural formalities. Completion of trial gives closure to the victim's ordeal and she is able to surge ahead in life by putting the past behind.

Recently in Jan, 2014, hearing the plea of the accused for transfer of the *5hakti Mills case*)<sup>52</sup> a bench comprising of Hon'ble G.S. Patel, J refused to stay the trial in the lower court. The three accused in this case pleaded for transfer of proceedings to another court alleging that the trial judge was not properly recording the defence plea in the evidence. The defence advocates requested for time to prepare the applications. The judge told the advocates that they should make a proper representation after seeking instructions from their clients but meanwhile, staying the trial was out of question. The trial will proceed on a day-to-day basis. It is up to the accused and their advocates to decide whether they want to continue with the cross-examination and if they choose not to cross-examine any, they do so at their own peril. The Court observed that the only purpose of these applications seemed to be to somehow completely derail the trial that has been specifically fast-tracked and requires to be decided in the shortest possible time.

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<sup>50</sup> Sub section (1) to Section 309 CrPC as amended by Criminal Laws Amendment Act, 2013

<sup>51</sup> Proviso to Subsection (1) to Section 309 CrPC

<sup>52</sup> *Mohd.SaliJJ Abdul Kuddus Ansari v. State Of M'harashtra*, Criminal Application No. 697 of 2013, decided on January 3, 2014

Right to bail is regarded as a right of the accused but there is no corresponding right available to the victim or his heirs to oppose bail. It is left to the State only to oppose or not to oppose the grant of bail. Neither at the stage of the framing of a charge or passing an order of discharge are the views of the victim ascertained, let alone considered.

### **Right to Appeal**

Victims have the right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal can be filed in the Court to which an appeal ordinarily lies against the order of conviction of such Court.<sup>53</sup>

### **Right to Privacy**

Ordinarily trials in criminal cases are held in open courts i.e. where the public generally has access. Sections 327 (2) & (3) of the CrPC are in the nature of exception to the general rule of an open trial. This is to ensure transparency of proceedings in criminal trials. Owing to sensitivity of rape cases Sub sections (2) and (3) of Section 327 Cr.PC<sup>54</sup> prescribe that trial of rape cases are to be conducted in camera and as far as practicable by a woman judge or magistrate. This would enable the rape victim to depose frankly and freely without facing any kind of embarrassment as

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<sup>53</sup> Proviso to Section 372 CrPC inserted by the Criminal Laws Amendment Act, 2008.

<sup>54</sup> CrPC Section 327 *Court to be open*.

- (1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.
- (2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.
- (3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court

she would be facing in an open court or in the presence of male judges. The name and identity of rape victims is to be kept confidential and no matter in relation to such proceedings can be published without the previous permission of the court and where such permission is granted the reporting has to be done subject to the maintenance of confidentiality of the name and address of the parties.

In *Sakshiv. Union Of India*<sup>55</sup> the Supreme Court laid down the following guidelines to be followed in holding trial of child sex abuse or rape:

- A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
- The questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
- The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

For victims of sexual assault under POCSO, special courts have been established having special powers and following specific procedures for ensuring safety and comfort of the minor victims.

Section 228-A of the Indian Penal Code, 1860 makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. Though the restriction does not relate to printing or publication of judgment by High Court or Supreme Court, But keeping in view the

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<sup>55</sup> (2004) 5 SC 518



social object of preventing social victimization or ostracisms of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of High Court or lower Court, the name of the victim should not be indicated<sup>56</sup>. The Courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. Sometimes the Courts may lift the ban on printing or publication of trial proceedings in relation to an offence of rape subject to maintaining confidentiality of name and address of the parties.<sup>57</sup> The anonymity of the victim of the crime must be maintained as far as possible throughout.<sup>58</sup>

### III Trials in Cases of Rapes and Sexual Assaults to be Conducted in a Sensitized Manner

#### Presumption as to Absence of Consent

Section 114A<sup>59</sup> Indian Evidence Act, 1872: Presumption as to Absence of Consent in Certain Prosecutions for Rape- In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (j), clause (g), clause (h), clause (i), clause (k), clause (f), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court. That she did not consent, the court shall presume that she did not consent. Section

<sup>56</sup> *Bhllpinder Sharma v. State Of Himachal Pradesh* 2003 Supp(4) SCR 792

<sup>57</sup> Proviso to Sub section (3) of Section 327 CrPC

<sup>58</sup> *State Of Punjab v. Gurmi:Singh &Ors* 1996 SCC (2) 384; also see *Delhi Domestic Working Women's Forum v Union of India and Others*, JT 1994 (7) 183

<sup>59</sup> Section 114A Indian Evidence Act, 1872: Presumption as to Absence of Consent in Certain Prosecutions for Rape- In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (j), clause (g), clause (h), clause (i), clause (k), clause (f), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court. That she did not consent, the court shall presume that she did not consent.

Explanation. In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375



114A was inserted in the Indian Evidence Act, 1872 in 1983 and recently amended by the Criminal Laws Amendment Act, 2013. The controversy sparked off by the Supreme Court judgment in *Tukaram v. State of Maharashtra*<sup>60</sup> was the reason behind this provision. In this case two constables were tried for raping a 16 year old tribal girl within the premises of the police station. The Sessions Court acquitted them and said that "Mathura (the name of the victim) was a lair who was habituated to sexual intercourse as proven by her medical examination. She had sex voluntarily with the police constables as there were no marks of any injury on her person from which it could be deduced that she had resisted or that the act was done without her consent." The High Court reversed the judgment and held that the sexual intercourse in question was forcible and amounted to rape. The High Court also remarked that the learned judges of the trial court had erred in making a distinction between consent and mere passive submission. When the accused went in appeal the Supreme Court overruled the judgment of the High Court and agreed with the trial court that it was a consensual and peaceful affair. This case was highly criticized by the media and all sections of society held wide-spread demonstrations against the injustice meted out to Mathura. Same year in September, eminent law teachers of the country wrote an open letter to the Chief Justice of India criticizing the judgment and asking the court to review its judgment. All this did lead eventually to amendments in rape law in the year 1983. Several categories of rape such as custodial rape, gang rape, rape of a pregnant woman etc. were introduced in the Indian Penal Code. These categories of rape were made heavily punishable and simultaneously a provision Section 114A, relating to presumption as to absence of consent in prosecutions for rape was also inserted in the Indian Evidence Act.

According to this clause if the prosecutrix deposes that she did not consent to the act, it will be taken as conclusive evidence. The court shall presume that she did not consent and the burden would be on the accused

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<sup>60</sup> AIR 1979 SC 185

to rebut the same. Therefore, in cases where there is no evidence to show that the victim consented and she states before the Court that she was raped without her consent and against her will, the Court shall believe her testimony".

### **Cross Examinations of Victims to be Handled Sensitively**

Some times defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The Court, therefore, should not sit as silent spectators while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the Court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings, what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.<sup>62</sup>

### **Relevance of Testimony**

A rape victim is a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured witness in cases of physical violence. The same degree of care and caution must attach in

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<sup>61</sup> *Hanumanthu Rama Rao v. State Of A .P.* 2001 (2) ALD Cri 522, 2001 (2) ALT Cri 317

<sup>62</sup> *Ibid*

the evaluation of her evidence as in the case of an injured complainant or witness and no more.<sup>63</sup>

In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations".

#### **IV Right to Medical Examination**

Law provides for medical examination of both the rape accused<sup>64</sup> as well as the rape victim<sup>65</sup>, as soon as possible after the registering of an FIR in rape cases in order to determine the truthfulness as well as veracity of some sexual contact having taken place between the parties to the case. However medical examination is not conclusive evidence of rape, as rape is a question of law and depends on the consent of parties involved except in case of minors where consent is of no relevance.

Under Section 164 A of the CrPC, Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a

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<sup>63</sup> *State Of Maharashtra v. ChandraprakashKewalchand Join* 1990 (1) SCC 550

<sup>64</sup> *State Of Uttar Pradesh v. Munshi*, AIR 2009 SC 370

<sup>65</sup> Section 53A CrPC

<sup>66</sup> Section 164A CrPC

registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of a such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence. The examination should be conducted preferably by a woman medical officer and if by a Male Medico then in the presence of another female attendant.

Immediately after conducting examination, a report is to be prepared consisting of the victim's name, age, marks of injury, description of material taken from the woman's body for DNA profiling. The conclusions arrived at by the examining officer should be reasonably explained. Such report shall without delay be forwarded to the investigation officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

Section 357C of The Criminal Procedure Code imposes a mandatory duty on all hospitals whether public or private and local bodies to immediately provide first-aid or medical treatment, free of cost, to the victims of rape and they shall also be bound to immediately report all such cases to the police. Noncompliance with the provisions laid down under Section 357C of the CrPC is punishable with imprisonment up to one year under Section 166B of the IPC. Reference to past sexual history was banned in rape trials in 2003, but the two finger test<sup>67</sup> leading to formation of medical opinion regarding consent allows past the sexual history of the rape survivor to prejudice her testimony. Section 155 of the Indian Evidence Act, does not allow a rape victim's credibility to be

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<sup>67</sup> The *Two finger Test* refers to a vaginal examination of rape victims to figure out the laxity of vaginal muscles and whether the Hymen is distensible or not. This is used to determine whether the woman being examined has had regular previous sexual experience. The test itself is one of the most unscientific methods of examination used in the context of sexual assault and has no forensic value. Whether a survivor is habituated to sexual intercourse prior to the assault has absolutely no bearing on whether she consented when the rape occurred.

compromised on the ground that she is "of generally immoral character". In the case of *Lilu @ Rajesh and Anr v. State of Haryana*<sup>68</sup>, The Supreme Court ruled that the two finger test is unconstitutional. It violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, give rise to presumption of consent

In March, 2014 The Union health ministry, has drawn new guidelines for treating rape victims, and has asked all hospitals to set up a designated room for forensic and medical examination of victims besides outlawing the two-finger test performed on them, dubbing it as unscientific, The Department of Health Research (DHR) along with Indian Council of Medical Research (ICMR) with the help of experts formulated this set of national guidelines for dealing with criminal assault cases, which will hopefully put an end to the horrendous medical process, which the victims are subjected to after the sexual abuse. The DHR has also drafted a new manual to address the psycho-social impact of sexual violence including counseling that the victims should receive to alleviate her woes.<sup>70</sup>

## V Right to Compensation

The Hon'ble Apex Court has time and again observed that sexual offences are offences against the basic human right and violative of Article 21 of the Constitution of India. Thus the subordinate Courts trying the offences of sexual assault have the jurisdiction to award compensation to the victims. Their jurisdiction to pay compensation (interim and final) has to be treated to be a part of the overall jurisdiction of the Courts trying the offences of rape which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and Life.<sup>71</sup> In the case of

<sup>68</sup> 2013 (6) SCALE 17.

<sup>69</sup> DHR guidelines available at <http://www.icmr.nic.in/dhr/pdf/1%20DHR%20Forensic%20Medical%20Manual%20Sexual%20Assault.pdf>

<sup>70</sup> <http://timesofindia.indiatimes.com/india/Govt-issues-fresh-guidelines-on-medical-care-to-rape-victims-ends-two-finger-test/articleshow/31393118.cms> last visited on 20th August, 2014 at 11pm.

<sup>71</sup> *Bodhisatva GaJlam v. Subhra Chakraborty*. AIR 1996 SC 922

*Gudure M.J. Cherian and Orsv. Union of India and Ors*<sup>72</sup> the State of UP. was directed to pay a sum of Rs.2,50,000/- as compensation to two Sisters on whom rape had been committed by unidentified assailants. This was notwithstanding the fact that the persons who had been arraigned as accused were found by the CBI not to be involved in the offence. The report pointed out grave lapses on the part of the investigating officers. In the *De/hi Domestic Working Women Forum Case*<sup>73</sup>, the court directed payment of Rs.10,000 as ex gratia to each of the victims. Similarly in *Chairman Railway Board v. Chandrima Das*<sup>74</sup> the Supreme Court awarded Rs. 10 lakhs as compensation to the victim who was raped in Yatriniwas by railway employees.

Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In *HariKishan & State of Haryana v. Sukhbir Singh & Ors.*<sup>75</sup> The Court observed that, "Sub-section (3) is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent a constructive approach to, crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way. The payment by way of

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<sup>72</sup> (1992) 1 SC 397

<sup>73</sup> *Supra* note 12

<sup>74</sup> (2000) 2 SC 465.

<sup>75</sup> AIR 1988 SC 2127

compensation must be reasonable. What is reasonable may depend upon the facts and circumstances of each case, e.g. the nature of crime, the justness of claim by the victim and the ability of the accused to pay etc.<sup>76</sup>

Section 376D of the IPC makes provision for imposition of a fine on the rape convict and also lays down that such fine is to be paid to the victim. The amount of fine fixed must be sufficient to compensate her for the expenditures incurred in her medical treatment and rehabilitation. The compensation payable to a rape victim by the State Government under section 357A of the CrPC shall be in addition to the payment of fine to the victim under section 376D of the IPC.<sup>77</sup> Section 357A was inserted in the Code of Criminal Procedure, 1973 by the Criminal Laws amendment act of 2009 and provides that the State Government in consultation with the Central Government should prepare schemes for victims and their dependents that have suffered loss or injury as a result of the crime and require rehabilitation. In Malimath Committee Report many experts had pointed to the Criminal Injuries Compensation Scheme (2001) implemented in the UK as an example to learn from. The fifth law commission of India in report submitted in 1971 had recommended the inclusion of payment of compensation to victims, as one of the prescribed punishments under Section 53 of the IPC, 1860.

The award of compensation is not dependent on the identification of the accused. Even in cases where the offender is not traced or identified, but the victim is identified and where no trial takes place, the victim or his dependents may make an application to the State or District Legal Services Authority for award of compensation." The trial court may recommend payment of more compensation if there is a need for rehabilitation of the victim and the amount awarded initially is not sufficient for the rehabilitation process.<sup>79</sup> Whenever the Courts recommend payment of

<sup>76</sup> *Ibid*

<sup>77</sup> Section 357B CrPC inserted by the Criminal Laws Amendment Act, 2013.

<sup>76</sup> Section 357A(4) CrPC

<sup>79</sup> *Delhi Domestic Working Women's Forum v Union of India and Others*, JT 1994 (7) 183



compensation to the victim, the District or State Legal Services Authorities have to conduct due enquiry within two months, decide the quantum of compensation to be awarded to such victim and award the same to the victim. It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue in employment. The Legal Services Authorities may also provide free medical treatment or any other interim relief to the victim if required.

In 2013 budget, the then Government of India had announced 'Nirbhaya Fund' which is a fund with a corpus of Rs. 10 billion. This fund was named 'Nirbhaya' meaning the fearless as a tribute to the brave heart that fell prey to monsters in the 16th Dec 2012 gruesome rape incident that had shocked the collective conscience of our country. The fund was launched amidst much fanfare with the objective to support initiatives taken by the Government and NGO's regarding ensuring safety of women against crimes against their dignity and safety. The fund is to be used to enhance safety and security of women in both the public as well as the private domain. In November 2013 the Ministry of Urban Development had sent requisitions to all States for proposals to implement new projects to be financed by the Nirbhaya Fund. Ministry of Women and Child Development (WCD) were also contemplating the formulation of a scheme for vulnerability mapping, opening of response centers and creating awareness for enhancement of safety and security of women. The NCW had also asked for Rs 100 crore funds to run massive awareness drives to bring a change in the mindset of the people towards women and rehabilitation programs which could help to bring down instances of violence against women, but their demand was turned down. In February this year, the Government has allocated additional Rs. 1000 crore to this fund. However, what is depressing is that not a single penny has been allocated out of this fund till date as the Government is yet to take decisions on proposed projects where it may be utilized. These funds need to be

put to proper use and decisions regarding their allocation should be taken fast

Compensation to *victim* is also payable under the Probation of Offenders Act, 1958. While releasing an accused on probation or with admonition, the Court may order the offender to pay compensation and cost to the victim under Section 5 of the Act.

### Victims of Marital Rape

In India the institution of marriage grants the husband, an unlimited sexual access to the wife, recognizing the implied matrimonial consent to cohabit unless the wife is below fifteen years of age<sup>80</sup> or where the wife is living separately under a decree of separation or otherwise<sup>81</sup>. However non-consensual sexual acts with the wife are recognized as sexual violence under the Protection of Women against Domestic Violence Act, 2005 and cruelty (physical and mental) under Section 498, IPe. Victims of sexual abuse within the institution of marriage are entitled to the following rights

- a. Protection orders can be claimed under Section 18 of the Domestic Violence law, preventing the husband from committing, aiding or abetting any act of violence against the woman;
- b. Every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.<sup>82</sup> Thus she cannot be evicted or excluded from the shared household except in accordance with the procedure established by law;
- c. Right to claim divorce on the grounds of cruelty.<sup>83</sup>

<sup>80</sup> Exception 2 to Section 375 IPC

<sup>81</sup> Section 376B IPe

<sup>82</sup> Section 17 Protection of Women against Domestic Violence Act, 2005.

<sup>83</sup> Cruelty is legally recognized as a ground for seeking divorce (See Section 13 of the Hindu Marriage Act, 1955; Section 2 of the Dissolution of Muslim Marriages Act, 1939; Section 10 of the Indian Divorce Act, 1869)

## Concluding Remarks

Rape is not only an offence against the person of a woman. It is a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely.<sup>84</sup>

"It would appear that a radical change in the attitude of defence counsel and judges to sexual assault is also required. Continuing education programs for judges should include re-education about sexual assault. Changes in the substantive law might also be helpful in producing new ways of thinking about this type of crime.,<sup>85</sup>

Victim reparation is the next important step and is not achieved by compensation alone. The basic principle of justice in the civilized society is that a person committing crime is punished and not the victim. Indeed, the victim is compensated and rehabilitated. Apart from the fundamental right of a woman of right to life, to live with dignity free from cruel degrading treatment, there is also a duty cast on every citizen by Article 51 (e) of the Constitution to renounce practices derogatory to the dignity of women. It must be realized that the security of a woman is essentially a law and order problem, which is the State subject.<sup>P</sup>The object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done.<sup>87</sup> Victims need to be more actively involved in the criminal justice system for better administration of justice. Only a vindicated victim can put a closure to her ordeal and lead a normal life. The State should also focus on restitution to restore the victim to her pre-victim status by

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<sup>84</sup> *ShriBodhisatwaGautam v. Miss SilbbraChakraborty* AIR 1996 SC 922

<sup>85</sup> Jennifer Temkin *Modern Legal Silldies Rape and the Legal Proem*, 1987 Edition, page 7

<sup>86</sup> *Birjill Ram and Anr. Ete. v. State Of Rajasthan and Ors.* 2006 CriLJ 1794

<sup>87</sup> *Bber» Singh v. State Of Rajasthan* (1994) 2 SCC 467 p. 481, para 28

ensuring her safety so that she may resume her education, employment or any other daily activities. Physical, medical, social as well as psychological rehabilitation of victims is a must and State should ensure future security of the victim by guaranteeing her of non-repetition or prevention of future abuses.