CHAPTER – II

RAPE LAWS IN INDIA - CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

"Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things and not as a result only of learning to read and write. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over woman which they do not deserve and ought not to have. Many of our movements stop half way because of the condition of our women."

- Mahatma Gandhi[106]

[106] M. K. Gandhi, Speeches and Writings. G. A. Natesan & Company, Madras, 1933.

CHAPTER – II

RAPE LAWS IN INDIA - CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

Under this chapter, the researcher has made extensive study of the constitutional and legislative provisions regarding the offence of rape. The term "law" has been given a wide import under Article 13[107] of the Constitution which encompasses not only parliamentary Acts but also includes rules, regulations, byelaws, notifications and orders. Hence, all rules, regulations and schemes regarding any or every aspect of rape has been analysed under this chapter.

2.1. The Constitution of India

2.1.1 Preamble[108] of COI

The term preamble is the opening of the any statute or constitution which lays down the object and purpose of the act. Thus, preamble is always in consonance with the

[107] 13. Laws inconsistent with or in derogation of the fundamental rights
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void
(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas
(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality.

[108] WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION

statute. In case of any ambiguity with regard to its interpretation, preamble is the guiding star.

The preamble of the constitution was formulated by the constituent assemble in the last after drafting the whole constitution. It contains the ideals which are the soul of the constitution and enlightens the path of the assembly.

In **Kesavananda Bharti** case[109], it has been described as the significant part of the constitution which contains the "basic structure" of the constitution.

IT PROVIDES FOR-

a) **Social Justice** - It quests to remove inequalities prevailing in the society by enacting relevant laws.

b) **Liberty –** It seeks to impart freedom of choice to individuals which are significant for the overall wellbeing and growth of the individual and curtails undue interference with the same by the state.

c) **Equality of Status –** It intends to abolish all grounds of discrimination or biasedness prevailing in the society on certain grounds such as color, creed, gender and other and treat everyone with equality and provide equal opportunities to earn livelihood.

d) **Dignity of the Individual -** It provides that all individuals irrespective of their gender shall be treated with equality and be given equal means to live decent life.

2.1.2 <u>The Fundamental Rights</u>

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

\- **Article 21 of the Constitution of India**

Article 21 of the Constitution of India provides right to life and personal liberty to all person. It is also known as "**heart of the constitution"**. The meaning of the term

[109] Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461

"life" was not restricted to mere animal existence rather it has been expanded to include all those rights which are essential to live life with dignity and comforts which make it more meaningful such as right to food, shelter, clean water, health, education, livelihood, pollution free environment and others. It not only covers physical aspects but also provide those which have a bearing on the mental wellbeing of the person like right to dignity, reputation, social security and many more. Similarly, the term "personal liberty" has been widely interpreted and has given meaning which is more than mere freedom from physical restraints. But it does not give someone right to use it against the law. Thus, it must be exercised within permissible limits. Through judicial elucidation, the following vital rights were given place under Article 21:

2.1.1 Right to privacy

The term privacy is neither used nor defined in the constitution. As per **Black laws dictionary**[110] has defined it as "to be left alone" which elaborately means non-intrusion at the hands of state and non-state entities in the personal sphere of the individual. Thus, a person should have full autonomy over personal matters either its physical relating to body, property, family, sexuality, marriage and other life choices or it can be informational as it prevents other from disseminating any personal information or particulars about him. The breach of it has direct impact on the mental wellbeing of the person. In **M.P.Sharma v.Satish Chandra**[111]**,** for the first time, the issue was dealt by 8 judge bench of apex court. [112] In **Kharak Singh v. State of UP**[113]**,** it was contended that surveillance of a person at the hands of police infringes his fundamental right to privacy. The seven judge bench of apex court gave broader meaning to the term "personal liberty" and has observed that mere freedom from bodily restraint is not sufficient to give effect to the term personal liberty under

[110] Black laws dictionary, 7th ed., 1999

[111] AIR 1954 SC 300

[112] The case related to search and seizure of documents of some Dalmia group companies following investigations into its affairs. Following an FIR, the District Magistrate issued warrants, and searches were consequently conducted. In writ petitions before the Supreme Court, the constitutional validity of the searches was challenged on the grounds that they violated their fundamental rights under Articles 19(1)(f) and 20(3) — protection against self-incrimination. The Supreme Court held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right of privacy. They opined that the Constitution does not include language similar to the Fourth Amendment of the US Constitution, and found no justification to import the concept of a fundamental right to privacy in search-and-seizures, through what they called a 'strained construction'.

[113] AIR 1963 SC 1295

Article 21 of the constitution. It must include all freedom which is necessary for the individual besides given under Article 19 of the constitution. Thus, domiciliary visits by police under UP Police regulations were held unconstitutional as there was no provision in the Police Act which justifies the formulation of the above-mentioned regulations. With respect to right to privacy, the court observed that it was not made part of the constitution and hence, can't be treated as fundamental right under Part-III.

In the case of **Gobind v, State of M.P.**[114]**,** the MP police regulations which provides for surveillance of person who are habitual criminals or can lead a life of crime. The same is challenged as violation of right to movement under Article 19(1) and right to personal liberty and right to privacy under Article 21. The three judge-bench of the Apex Court after referring to the **Kharak Singh case** has observed that surveillance is the intrusion into the peaceful existence of individual in his house. House is the safest and the happiest place of an individual. It is the place where he needs not to pretend or project anything. He can be his own self. Thus, intrusion into his castle amounts to violation of privacy which is the facet of personal liberty. The court further observed that this right is not an absolute right. It is subject to restrictions. The same can be limited if it goes against the state interest. The decision is given contrary to judgement of the larger bench (given in kharak singh case) and hence it is per incuriam.

In the case of **R. Rajagopal v. State of Tamil Nadu**[115], the court discussed the infringement of right to privacy at the hands of state and by private person. In the former case, the remedy lies under constitutional law as being facet of right to life and personal liberty under Article 21 and in the latter, the victim is entitled to claim damages under the law of tort. The court further provides that the right cannot be enforced in case

A) The objectionable material is a part of public record as the information is already in public domain and hence privacy with regard to it cannot be claimed. But this exception is not applicable on female victims of sexual offences as disclosure of their identity would be a cause of further victimisation.

[114] AIR 1975 SC 1378
[115] AIR 1995 SC 264

B) There is a publication of content with regard to the actions and conduct of the public officials while discharging their duty. Similarly, judiciary and legislators and other officials of government and local authorities also fall within the exception.

In the year 2012, the issue again cropped up in the case of Justice **K.S.Puttaswamy (Retd.) v. UOI**[116] where the Aadhar project and provisions of The Aadhaar Act[117] were challenged as it amounts to violation of right to privacy and give rise to surveillance of an individual at the hand of the state. The case was referred to nine judge bench as the matter has already been dealt by 8 judges' bench. The court after analysing the aspect of privacy in length has observed that it is one of the core facets of right to life and personal liberty and thus, it is the fundamental right which is protected under Article 21 of the Constitution irrespective of the fact that it has not been exclusively enumerated under Part III of the constitution. Thu it overruled the judgement given in **M.P.Sharma** and **Kharak Singh** case. The court while exercising restrain has not elaborated the term privacy and left it unto the court to decide in factual scenario. The right is not unabridged but has been subjected to limitations imposed under Article 19(2-6) and also to ones which govern the application of Article 21. The state can thwart it by law provided the law must be just, fair and reasonable. The law must be enacted with an objective to achieve state interest provided there must be a reasonable nexus between the object achieved and the manner opted.

Sexual Autonomy is that right of the individual which gives him freedom to decide about sexual indulgence that is when and with whom and the manner by which he want to establish sexual relations. This is the most intimate to any individual and hence it has great bearing on right to privacy. Sexual autonomy being a facet of right to privacy is observed by apex court in K.S.Puttaswamy case. It was mere obiter dicta and not the ratio decidendi. The Court has further augmented it in the case of **Navtej Singh Johar v/s Union of India**[118] and held that sexuality, sexual autonomy and sexual orientation are all articulations of right to privacy and hence protected under Article 21 of the Constitution.

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116 2018(1)RCR(Civil)398

117 The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016)

118 (2018) 10 SCC 1

The offence of rape is the violation of the right to sexual autonomy of the victim as the accused indulges in sexual intercourse against the wishes of the victim. And hence it bridled her freedom to choose her intimate partner.

2.1.2 Right to health

Good Heath is not mere absence of disease or disablement. It is much more than that. That it is broader than physical fitness and thus includes mental well-being within its ambit. Right to "Life" can't be enjoyed in isolation without well-being of the person. All amenities of life lost its significance if the person infirm or unwell. Initially, right to health was not specifically provided as fundamental right. Only under directive principles, state was obligated to take measures to provide better health facilities as at the time of independence, our health system was not really developed. Article 41, 43, 45 and 47 mandated the state to take steps for providing better health care as otherwise justice in true sense cannot be achieved. But the drawback of the same is that the directive principles are not enforceable against the state. Hence, state can't be order to take action in this regard.[119]

2.1.3 Right to Dignity

Human dignity is a gift of nature to humans for being associated with the clan of Homo sapiens. The evolution of the concept lies on the fact that human being is the peerless creation of God and is separate from other living creatures due to its faculty of reason. They can analyze and understand the nature, faith and creation of God differently from other living creatures, thus it is inherent and invaluable aspect of human being.

The word "dignity" is derived from the Latin word "**dignitas**" which means deserving respect and worthiness.[120] The meaning of the term "human dignity" is not precise as the same is not defined in any instrument, national or international. But the same is construed by making in-depth study of cross-cultures and historical accounts. The evolution of it can be inferred under three sects-

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[119] Justice R.K. Abichandani, "Health as Human Right- Role of Courts in realisation of the right", available at: https://gujarathighcourt.nic.in/hccms/sites/default/files/articles_files/Health%20as%20Human%20Right.pdf

[120] Oxford Dictionary, 7th ed., 2007

A) The initial concept of dignity is more religious than modern. Catholic scriptures provide that all Homo sapiens are offspring of god and are considered as god's best creation. Thus irrespective of our race, birth or sin, we are bestowed with human dignity and the same cannot be taken away by anyone.

B) The other considered it as privilege enjoyed only by elite class of western society. Thus, it is not uniformly available to all individuals. It was a status enjoyed by a few.

C) But with the advent of the era of international human rights, human dignity is not merely considered as one of such right. Rather to its contrary, it is the foundation of all other human rights to which a person is entitled. Thus the same is considered as jewel adorned by each and every individual.

Thus the intrinsic value of human dignity has been revived with the dawning of the era of human rights.

The reference of the term can be found in various international declarations and covenants such as the preamble[121] of UN Charter and Article 22[122] of Universal Declaration of Human Rights. It is also given uniform application and thus

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[121] **WE THE PEOPLES OF THE UNITED NATIONS DETERMINED**

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

[122] Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

discrimination is prohibited on any ground such as caste, religion, race, gender, color or any other. Thus it is one which cannot be granted or taken away. It is inalienable.

It is also imbibed in various national laws as it is an essential ideal which they are seeking to achieve. In India, the term found its place in the preamble of the constitution not in Part III of the constitution. Thus it is not acknowledged as one of the Fundamental right. But the same is taken to the pedestal of fundamental right through various court decisions as the apex court in the case of ***Francis Coralie Mullin v. The Administrator, UOI***[123] has held that the right to life includes the right to live with human dignity and all that goes along with it. Thus, any act which breaches right to dignity and is not done under due procedure then it amounts to violation of right to life.

2.1.3 The Directive Principles of State Policy[124]

The directive principles[125] are given under Part-IV of the Constitution which accumulates Article 36 to 51. These principles are the directions to the government which are to be followed while formulating law and policies. These principles are non-enforceable as the people of India cannot move to court for their enforcement. The relevant DPSPs are:

a) Promotion of social order – The state shall make law with an aim to remove inequalities prevailing in the society especially with regard to status or income for the welfare of people.[126]

b) To protect children from abuse and exploitation.[127]

c) Development of children must take place in healthy manner and with dignity.[128]

d) Free Legal Aid – this seeks to provide equality in the sphere of dispensing justice. Party should not suffer and fails to present its side freely due to

[123] 1981 SCR (2) 516
[124] Hereinafter referred as DPSPs
[125] The Directive Principles of State Policy
[126] Article 38
[127] Article 39(e & f)
[128] Article 39(f)

economic constraints. Hence, free legal aid be provided at the expense of the state.[129]

2.1.4 The Fundamental Duties

The intent of inculcating Part – IVA which deals with fundamental duties is to remind the citizens of their obligations toward the state. They are not entitled to enjoy their fundamental rights only. They are equally bound to observe their duties. The relevant duties are:

a) It eschews practices which are against the dignity of the women.[130]

b) To develop the spirit of humanity.[131]

c) To abstain from committing violence.[132]

2.2 Substantive Law

2.2.1 Definition

Rape is the most heinous sexual offence committed against women. It not only affects her sexuality or dignity but also destroys her very individuality and reduces her to animal existence. The term "**rape"** is derived from the Latin term "rapier" which means to seize or snatch or grab or carry away by force. Thus, ravishing of a woman against her will or consent amounts to rape. It is not a medical or biological term. Medical science can only discern whether any sexual activity or relation has been made out with the person or not but to determine Whether rape has been committed or not is to be adjudged from legal parlance. The law regarding rape in India is substantially swayed by English law. In England, the term rape is defined under Section 1(1)[133] of the Sexual Offences Act, 1956 as "unlawful" intercourse without the consent of the woman.

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[129] Article 39A
[130] Article 51A(e)
[131] Article 51A(h)
[132] Article 51A(i)
[133] In Section 1(1) of the Sexual Offences (Amendment) Act, 1976, which defines rape as having 'unlawful' intercourse with a woman without her consent, the word 'unlawful' is to be treated as

On similar avenue, law regarding rape has been mounted in India. Originally, the term rape is defined outwardly as coherent and precise under Section 375 as sexual intercourse by man against woman under given seven circumstances. From the definition, it is apparent that the central point of an offence lies in the phrase "sexual intercourse". Similar term is used under Section 377 of IPC, 1860 which punishes "carnal intercourse" against the order of nature. But the phrase sexual intercourse or carnal intercourse is not defined.

Dictionaries define "sexual intercourse" forms of intercourse involving heterosexual and hence restricted it to penetration of vagina by penis.[134]

Thus, Indian courts also literally interpreted the term and hence, limited the ambit of the term "to penile- vaginal intercourse only. The term has been further substantiated by Explanation 1 of Section 375 of IPC, 1860 which provides that to constitute sexual intercourse, penetration of vulva by penis is essential irrespective of degree. Thus, even the slightest penetration is sufficient to constitute the offence of rape. Conception or rupture of hymen or emission of semen is not sine qua non. As opinion expressed in **Modi's textbook**[135] and in **Parikh's textbook**[136], "rape" can be committed without causing any physical injury to genitals.[137] Thus, other sexual acts were made punishable with lesser degree of punishment under other sections of the code. Like acts of oral penetration or penile-anus penetration were covered under "carnal intercourse" against the order of nature and hence made punishable under Section 377 of the Code whereas other acts like insertion of finger or other body part or foreign objects either into vagina or anus of women then a person can be made liable for outraging the modesty of the women under Section 354 of the IPC.

Time and again, the demand to redefine the antiquated definition of rape as given under Section 375, IPC has arisen due to rise in cases of child sexual abuse and the inadequacy of Section 377 and 354 to redress the grievance in an absolute manner.

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mere surplusage and not as meaning 'outside marriage', since it is clearly unlawful to have sexual intercourse with any woman without her consent."

134 2004(6) SCALE 15

135 J.P.Modi, "*Modi : a textbook of Medical Jurisprudence and Toxicology for India*", Butterworths & Co. (India), Ltd., 1920

136 B V Subramanium, "*Parikh's textbook of Medical Jurisprudence and Toxicology*", CBS publication, 7TH ed., 2015

137 Ram Jethmalani and DS Chopra, The Indian Penal Code, 1860, 1583, Thomas Reutar, Mumbai, 2nd Ed., 2018

The issue has been considered by the Law Commission in its 156th Report[138], and following recommendations has been suggested:

a) Section 354 and 377 are sufficient to deal with these issues.

b) To curb the rise in cases of sexual abuse on women or female children, the punishment provided under Section 354 be enhanced from 2 years to 5 years.

c) It also prescribed minimum mandatory punishment of 2 years which can be extended to 7 years where the victim is of 18 years or less under Section 377 of the Code. But at the same time, it gives the power to court to give lesser punishment then the prescribed one provided reasons are recorded by the court in the judgement.

d) There is no need to amend or widen the definition of "sexual intercourse" used in Section 375 of the Code.

Once again, in the case of **Smt. Sudesh Jhaku v. K.C.J. and others**[139], it was contended that the term "sexual intercourse" and "carnal intercourse" as used in Section 375 and 377 respectively are not defined and if the term "penetration as explained or used in both the provisions are used in conjunction with these terms then the meaning of these terms should be given a wider meaning to include not only acts of penile vaginal penetration but also penetration of any female organ or part of body by male organ or part of his body or any foreign object. If the act is done by male with consent of the woman then it must be covered under Section 377 of IPC and if committed without the consent then it must be punishable under Section 375 of IPC. To vindicate its contention, law of various countries such as South Africa has been quoted where the definition of rape includes all types of penetration and has been given wider scope. It was also urged to court that though construction of a provision in a literal manner is the first and foremost principle of interpretation and the penal provision be construed in a strict manner so that only those acts shall be made punishable which distinctly falls within its extent but if the rule results in more injustice than justice and makes the provision redundant or superfluous in coming time then the grammatical rule should be disregarded and purposive rule should come into picture and the provision be interpreted in a constructive manner keeping in view

[138] Law Commission of India,156th Report on The Indian Penal Code (August, 1997)
[139] 62 (1996) DLT 563

the social development which has taken from the time of enactment and be given a meaning which will cater the future needs. But the court while upholding the present scenario refused to give a wider meaning. While exercising the doctrine of 'self-restraint', the court held that the task to change law is the sole authority of the legislature. So the required change can be brought by the parliament and not by the court. Again, in the year 2000, an NGO named Sakshi has raised the similar issue by filling writ petition in the apex court in **Sakshi v. UOI**[140] and prayed to issue a writ in the nature of declaration or any other writ, order or direction to declare that the term 'sexual intercourse" under Section 375 includes all forms of penetration such as penile-vaginal or penetration of ay part of body with penile or other parts of his body or penetration by foreign objects as it humiliates/ degrades the sexual autonomy of the woman. But court gave similar observation as given by Delhi High Court in the above case but directed the Law Commission to examine the suggestions made by the petitioner and their feasibility to adopt such changes in the criminal law so that loopholes can be mastered/ conquered. The Law Commission has pointed that the issues raised by the petitioner has already been dealt under 156th Law commission report but the same has not been tabled before the parliament. The matter has been adjourned by the court for three months and during the time the report has been placed before the parliament. It has also been highlighted by the then law commission that the suggestions recommended in 156th report are differed to great extent from the viewpoint of the petitioner. As a result, the apex court has directed the law commission to look into this matter afresh.

The law commission in its **172nd Law commission Report**[141] discussed the above issue in the light of rising child sexual abuse and the adequacy of the Section 354 and 377 to dealt with the issue. It was contended that it is wrong to overlook the impact of the act of sexual abuse on child and cover it within the ambit of Section 354 and 377 respectively. Secondly, it is wrong to juxtapose victims of child sexual abuse on par with homosexuals where act is committed consensually under Section 377 of the Code. Hence, it opposed the view or recommendation of 156th law commission report of covering acts of sexual abuse under Section 354 and 377 of the code and recommended that –

A) The term "rape" is substituted by the term "sexual assault"

[140] (1999) 6 SCC 591

[141] Law Commission of India, 172nd Report on Review of Rape Laws (March 2000)

B) The other forms of sexual abuse such as oral sex, penetration of anus or urethra or vagina by penis or other body part or foreign object be made punishable if committed under given circumstances.

Again in 2003, **Malimath committee Report**[142], on the line of 156th report[143] has suggested that the other forms of penetration other than penile-vaginal shall not be incorporated under Section 375 of the code but these acts should be covered under a separate Section and be punishable with adequate sentence in tune with Section 376 as it affects the sexual autonomy of the women.

But nothing turned up till 2013. The historic event of Delhi Gang Rape, 2012 led to drastic change in the criminal law of India. On the fateful night of 16th December, 2012, in the heart of national capital Delhi, a physiotherapy intern was gang raped by six individuals including driver when she was travelling with her male friend in a bus. She was not only raped but also brutally tortured. Her genitals were also penetrated by other body parts of the assailants such as hand and objects like iron rod. The insertion of rod was to such an extent that it damaged the large intestine of the victim. This brutal act of the assailants has been condemned and led to hue and cry both in India and abroad. As a result, 3 member committee has been constituted under the chairmanship of Justice J.S.Verma to put forward revisions in the criminal law with regard to sexual assault against women on 23rd December, 2012. The urgency of the issue forced the committee to submit the report in a short span of just 30-days. A 2013 report[144] has been submitted on 23rd January, 2013.

To meet exigency of the situation and to quieten public outcry, the president has exercised its ordinance making power given under Article 123 of the Constitution of India, 1950 and enacted the Criminal Law (Amendment) Ordinance, 2013 which came into force on 2nd February, 2013. Eventually, the Criminal Law (Amendment) Act, 2013 has received assent from the president on 2nd April, 2013 and it has given retrospective effect and deemed to have been enforced from 2nd February, 2013. It has amended the provisions of Indian Penal Code, 1860, The Criminal Procedure Code,

142 Government of India, *Report: Committee on Reforms of Criminal Justice System* (March, 2003)
143 Law Commission of India, 156th Report on Indian Penal Coode, Vol. I (August 1997) supra
144 Government of India, Report of the Committee on Amendments to Criminal Law (January, 2013)

1973, The Indian Evidence Act, 1872 and The Protection of Children from Sexual Offences Act, 2012.

The committee has referred the laws of various countries such as England, south Africa, Canada and reports of UN and concluded that the term "rape" is of narrow connotation and has served less purpose. It is restricted to mere sexual intercourse which covers only penile vaginal connection and excludes other penetrative and non-penetrative sexual connections and thus doing more harm than benefit. Thus, the committee recommended that we should adopt Canadian approach and should expand the ambit of Section 375 of the IPC nad the term "rape" shall be replaced by the term "sexual assault" and the all form of sexual connections be covered within its ambit.

By affirming to the recommendations of 84th[145] and 172nd[146] and 2013[147] reports, change was brought in Section 375 of IPC as the definition of 'rape' has been expanded to inculcate following acts such as:

a) Penetration of vagina by penis and other body parts

b) Oral sex

c) Insertion of foreign objects to anus, vagina or urethra.

d) Manipulation of body parts in order to cause above mentioned penetration

2.2.2 Who can be raped (a rape victim)?

Ever after undergoing multitudinous of amendments, Indian rape laws remain the same as regressive and antiquated and stagnant in many respects. As per Section 375[148] of IPC, only a woman can be the victim for the offence of rape. Thus, no man

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145 Law Commission of India, 84th Report on Rape and allied offences some questions of Substantive Law, Procedure and Evidence, (April 1980)

146 Law Commission of India, 172nd Report on Review of Rape Laws, (March, 2000)

147 supra

148 **375. Rape.**-- A man is said to commit "rape" if he--
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

or third gender can get relief or be claimed to have been raped. Though Article 15(1)[149] of the Constitution of India prohibits discrimination on the ground of sex, caste, religion and others but Clause (3)[150] of it allows making laws in favour of children and women. The objective behind this provision is to support the marginalized and the most vulnerable section (women and children) of the society.

Section 375 of the Code is gender specific as the offence of rape can be committed only against women (irrespective of age). Thus as per it, no man or transgender can be raped. But Section 375 of IPC, 1860 has been considered constitutionally valid as per Article 372[151] of the Constitution of India. It has been enacted to protect the fundamental rights of the women such as right to life, privacy and human dignity.

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under the circumstances falling under any of the following seven descriptions:
First. Against her will.
Secondly. Without her consent.
Thirdly. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
Fourthly. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly. With or without her consent, when she is under eighteen years of age.
Seventhly. When she is unable to communicate consent.
Explanation 1.For the purposes of this section, "vagina" shall also include labia majora.
Explanation 2.Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
Exception 1.A medical procedure or intervention shall not constitute rape.
Exception 2.Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape

149 The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

150 Nothing in this article shall prevent the State from making any special provision for women and children.

151 **Continuance in force of existing laws and their adaptation**
(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority
(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be

Law is always considered as living law as the same can't be made stagnant. So with the change in conditions, the law should also be altered. Not only legal but social myths have also created hurdles for man to get justice. Some of the hurdles are:-

A) **Social Reasons** - in the patriarchal society where man is considered stronger than women and has the ability and capacity to overcome the women physically as well as emotionally. And rape being an offence of power and control, thus considered that it can be committed only by the man over woman and vice versa is unthinkable and unachievable.

In the present time, the woman has touched the sky. There is no field where a woman has not reached. She is holding dominant positions in various fields. This has given her the power to take advantage of that position. Now there are instances where the woman abuses man by using her position. But the same is not highlighted due to legal and social constraints.

B) **Medical Reason -** There are some biological reasons which backed this stand. As for the offence of rape it is necessary that there must be penetration, slight it may be. But for that ejaculation on part of man is necessary. It is hard to believe that when a man is forced to indulge in sexual intercourse without consent then under such

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specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law

(3) Nothing in clause (2) shall be deemed

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas **Explanation II** Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect.

Explanation III Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force

Explanation IV An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

circumstances he can ejaculate. The ejaculation on his part is considered consent on his behalf. This is another major reason for not covering rape of a man under Section 375 of IPC. But it is to be remembered that act of sexual intercourse amounts to rape if committed in any given circumstances. Consent and will are just two circumstances. Thus, under other circumstances, rape of man can be straightforwardly covered. Secondly, after 2013 criminal law amendment act, the definition of rape has been expanded and the term "sexual intercourse" has been expanded to include other sexual connections. Thus, with this definition, the rape of a man by a woman is quite possible.

C) **Legal Reasons** – They are:

(i) Burden of proof

Woman is always viewed as subordinated to male and thus it will be hard to believe and impossible to prove that a woman can rape a man. And if law regarding rape is made gender neutral than it would be hard for the prosecution to prove its case as counter case of rape will be filed against the women. Thus, dual burden of proving the commission of rape by him and refuting the case of raping the accused will shift upon the prosecutrix. It will greatly knock down the conviction rate in rape cases which is already piffling. As per NCRB data 2020, the conviction rate of rape cases is merely 33.3% and it will be greatly affected if the law is made gender neutral and thus made the access of justice to the victim a real time hurdle.

But isn't it irrational to protect one gender at the cost of another? In 172nd Law Committee Report[152], it has recommended to make the offence of rape a "gender neutral" law and the same was again supported by 2013 Justice Verma Committee Report[153] and it was also recommended that the term 'rape' be altered by the term 'sexual assault'.

To avoid misuse of the provision against women, the need to impose certain parameters as developed by apex court in various cases to avoid misuse of the provision by women.

(ii) Section 377[154] v/s Section 375

[152] Supra 141
[153] Supra 144
[154] Supra 43
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The other argument against enactment of gender neutral laws is Section 377 of IPC, 1860. It penalizes unnatural offences i.e. intercourse which is against the course of nature. The jurisprudence available on this aspect held that natural intercourse is penile-vaginal intercourse as the same is done for procreation. Any sexual act which is done for any purpose other than this is considered as unnatural. Such as oral sex. Section 377 is gender neutral as it is equally applicable on man, woman and Trans genders.

But the issue arises in those cases where woman imposes herself upon man or transgender and indulges in carnal intercourse. Now the act does not fit in the criteria laid down under section 377 of the act and thus a women can be set free due to deficiency in the law.

Further, there are n numbers of protections which are available to the victim of rape such as compensation, camera proceedings, recording of statement by magistrate under Section 164(5)[155] of CrPC but same protections are not available to the victim of unnatural offence. Thus it is not right to juxtaposed section 375 with Section 377

2.2.3 Circumstances of Rape

The act of rape would be an offence only if the same is committed under any of the given circumstances:

2.2.3.1 Against her Will

The concept of will has been taken from English law. Though it is rarely applicable but still hold good. The aspect of "will" and concept" are entwined because every act against will can be called against consent as well. But both have varied application under the penal code.

The term "will" means choice or inclination to do or not to do an act. There is no particular manner from which the will of the person can be ascertained. The conduct of the person at the time when act is taking place can guide the court to determine its

[155] Any statement (other than a confession) made under sub- section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

existence or non-existence. When an act is committed despite resistance of the person then it is amounted to be done against the will. But mere non-resistance does not amount to "willingness" but it is one of the factor by which the will of the person can be found out.[156]

Where the person does not resist or oppose the act but submits to it on account of fear or threat then in that case, it is difficult to prove or say that the act is committed against the will of the person but the same is held to be done against the consent of the person.

Thus, to encompass all circumstances and to prevent any guilty person to go free on account of language barrier, the law makers have used both expressions**.**

2.3.2 Consent

To decide the liability of the person under criminal law, mens rea plays a vital role except in offences of strict liability. The mens rea or culpability of person deems to be compounded if the person suffering the act has "consented" for the act or for the sufferings. This is based on a legal maxim **volenti non fit injuria** which connotes that where a person consented to undergo a suffering or injury then he cannot complain of an injury that flows therefrom. The defence of consent is expressly inculcated under the Chapter of General Defences[157] of IPC,1860.

The act of sexual connection amounts to rape under Section 375 IPC provided it is committed under one of the circumstances enumerated thereunder. One of the largely invoked circumstances is "without consent". Thus, on similar philosophy of defence of consent, it has been connoted that an act of sexual intercourse amounts to rape if the same is committed without the consent of the victim. The concept of consent was not defined for the purpose of the Section 375 and consequently it is the biggest stumbling block in conviction for rape as it is difficult to determine certain facets of it such as when a person can be considered competent to give consent, how much he

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[156] *Dr. Hari Singh Gour's ,Penal Law of India, (Law Publishers (India) Pvt. Ltd., Allahabad,11th ed., 2008)*

[157] Section 87-92 of IPC

needs to be aware about the act for which he is giving consent and others. Resultantly, it has been construed in a manner that it serves the powerful.[158]

As per **Jowitt's Dictionary of English Law[159]**, the term is the deliberated act which is accompanied with reasons. Thus, the decision is taken after weighing both the good and evil sides of the action. As per Indian Contract Act, Consent is consensus-ad-idem which means meeting of minds. Thus, a person is said to be consented to an act if the person agrees over the same thing in the same sense.

Thus, it is the autonomous and free willed decision of the person taken after proper projections. To have better grasp over the concept of consent, it is necessary to discern and learn the similar meaning term i.e. submission.

Stroud's Judicial dictionary[160] has defined consent as an act which involves the act of submission but it is not true in every case that mere submission means consent. To understand this definition it is better to differentiate the term 'consent' from "submission". 'submission' means to agree with the act but mere agreement does not mean consent for the same. Thus, where a lady submits to sexual intercourse out of fear or coercion, there is submission but that does not amount to consent because it is not voluntary.

Hence, consent must not only be the deliberated act but must also be given freely. Thus, to be valid under law, consent must be free. The term "free consent" is defined under Section 14 of the Indian Contract act, 1872 which provides that a consent is said to be freely given if a it is not given under coercion, misinterpretation, fraud, undue influence or mistake. The term being given under civil law is not applicable to criminal law but on similar lines, Section 90 of IPC and clause third, fourth and fifth of Section 375 of IPC, 1860 provides the circumstances under which a consent is not operative. But it does not cover all circumstances which are given under Section 14 of the Indian Contract Act, 1872 and thus the expression "free consent" has been avoided. Section 90 provides that if the consent is given under fear or misconception or if given by a person who is insane or a child then it is no consent. Thus, under

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158 *Louise Du Toit, "The Contradiction of Consent in Rape Law", available at:*

159 Jowitt's Dictionary of English Law 7th ed., Vol II, 2007

160 Stroud's Judicial Dictionary, 9TH ED., Vol 3, 2008

criminal law, it is not defined what consent is but it clearly enumerates circumstances when it is not considered consent. Thus, it covers cases such as –

a) <u>Consent under Fear of Injury</u> - Section 90 and Clause Third of Section 375

One of the factors provided by Section 90 which can vitiate consent is "fear of injury". The term "injury" is defined under Section 44[161] of the Act which is broad enough to include all acts which can harm "any" person's body, mind, reputation or property provided it is caused illegally. Thus, as per Section 90 read with Section 44, it is clear that consent of a person is vitiate if

A) It is given under fear of harm. Thus, actual harm is not necessary.

B) Section 44 used the term "any person". Thus, to vitiate consent harm under Section 90, it is not necessary that harm will be caused to a person whose consent is procured. It is sufficient if the terror is created in that person that harm can be caused to him/ her or to any other person. It is not necessary that the person to whom harm can be caused must be closely related to the person in question.

C) The type of injury covered under Section 90 read with Section 44 is wide to cover harm either to person or to property.

But to vitiate consent for the offence under Section 375, it is specifically provided under third clause that the consent will not be operated if fear is given to prosecutrix either of causing death or of any hurt. Thus, the Section has narrowed down the ambit of the term injury and restricted it to death or to hurt. The term "hurt" as defined under Section 319 dealt only with bodily harm. And the term "death" as defined under Section 45 means death of a human being. Hence, third clause just covers cases of physical harm to the person. It excludes cases of injury either to the mind or reputation or property. Further, under Section 90, benefit can be given if the harm is given either to person in question or to anyone in whom that person is interested or any other person. But under Section 375, it was initially confined to prosecutrix only but in 84th LC Report, it has been suggested that it is added that fear of death or hurt

[161] "Injury".—The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

can be caused to her or "to anyone who is present at that place". But the same has not been adopted in verbatim as it would expand the ambit to great extent and consent can be deemed to be vitiated even if it is given under fear of injury to accused himself. Thus, the legislature has amended third clause to some extent and added that fear can be caused to her or "to any person whom she is interested". The expression "any person whom she is interested" has not been defined by the legislature. It has been left upon the discretion court to decide upon facts and circumstances that who all will cover under this expression.

Thus, in the case of **State of Maharashtra v. Prakash& Anr[162],** the court held that the consent of the victim in this case will not be a ground of defence as the same has been obtained by a police constable and the businessman after beating her husband and a threat that he can be put to remand. Thus, the court held them liable under clause three of the Section.

Whether to bring the case under clause three of the Section, it is necessary that resistance must be provided by the prosecutrix to the act of the assailant. Though it is not imperative under legislative provision that resistance must be provided by the victim but in numerous judicial pronouncements, the court opined that non-resistance on the part of the victim was amounted to consent of the victim. The major reason behind these notions were the stereotypes prevailing in the society where the dignity or sexuality of women was considered more pious and valuable than life and women was expected to protect it by all means even if it is at the cost of her life. The historic case which highlighted this plight of the victims was **Mathura Rape case[163]** The court disbelieved the narration of the victim and acquitted all the offenders due to lack of resistance which the court interpreted as consent and hence held that the act was consensual.

This ruling of the apex court has led to hullabaloo across the country and the demand to change the law and make it victim friendly has been aroused by all sections of the society. The chain reaction of it was The Criminal Law (Amendment) Act, 1983 which brought humongous change in the chief criminal laws- IPC, CrPC and the Indian Evidence Act, 1872. With regard to the aspect of "Consent", a presumption has

[162] AIR 1992 SC 1275
[163] Tukaram v. State of Maharashtra, 1979 AIR 185

been added by inserting Section 114A under the Chapter relating to "Burden of Proof" of the Indian Evidence Act, 1872. It provides that court shall presume absence of consent whenever the aspect of consent is in question provided it has been proved that the accused has indulged in sexual intercourse with the prosecutrix and she denied to have given consent for the same. Thus, the provision has shifted the burden of proving the absence of consent on the part of the prosecutrix from prosecution to the accused by presuming it in favour of the victim. This change has brought enormous relief to the victims of rape and helps to reduce their humiliation and misery to a great extent.

b) **Consent under Misconception of facts – Section 90[164] and Clause Fourth of Section 375**

Section 90 provides that consent is not valid if it is given under "misconception of fact". For its application, 2 essentials need to be fulfilled- first, a person gives consent under misconception of fact and Second, the person to whom consent is given (the offender) is aware (knows or has reason to believe) that the consent is given under misconception of fact. Both the requirements need to coexist for the application of Section 90. The term "misconception of fact" is a broad term which covers all cases of misrepresentation provided it can amount to misconception of fact if the same is related to a fact with regard to which consent is given.[165] The term "fact" as defined under Section 3[166] of the Indian Evidence Act, 1872 includes both physical as well as psychological facts. Thus, is a person has certain kind of "intention" then also it amounts to fact.[167] It is necessary that the misrepresentation must be related to an existing fact[168] and have an immediate relevance. Thus, if it is for some future act or

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164 **Consent known to be given under fear or misconception**.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

165 **Re: N. Jaladu And Anr. vs Unknown**, (1913) ILR 36 Mad 453

166 "Fact".— "Fact" means and includes — (1) anything, state of things, or relation of things, capable of being perceived by the senses; (2) any mental condition of which any person is conscious.

167 Re: N. Jaladu And Anr. vs Unknown, (1913) ILR 36 Mad 453

168 *"a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: There must be a misstatement*

event then it does not amount to misconception under Section 90 of the Code.[169]

Clause Fourth of Section 375 of IPC also deals with misconception of fact but that is more precise and specific and narrower than Section 90 of the Code. Clause 4th provides that consent is not operative if the victim consented to indulge in sexual intercourse on the error of belief or knowledge that the other person is her husband but the other person is conversant of the truth or actuality of the existing fact.[170]

The issue with regard to application of Section 90 in cases falling under Section 375 has been raised in cases where the prosecutrix indulged in sexual activity on the pretext of "promise of marriage" by the accused. Thus, the question arises whether the "false promise to marriage" amounts to misconception of fact under Section 90 or not? The Calcutta High Court in the case of **Jayanti Rani Panda vs State Of West Bengal And Anr**[171] has dealt with this issue and observed that 'a false promise to marriage' is not misconception of fact under Section 90 which can vitiate consent for sexual intercourse as for vitiating consent for the purpose of Section 375 misconception or misrepresentation must be related to intercourse. The case would have been otherwise if the consent has been obtained on the ground of fake marriage or under the illusion that the offender is the husband of the victim. Secondly, only those facts can make consent inoperative which has a direct and proximate bearing on decision of indulging in sexual intercourse. The misrepresentation of facts which have no relevance at the time of giving consent or which are related to future fulfilment or commitment will not invalidate the consent for the purpose of Section 375 of the Code.

In the case of **Uday v. State of Karnataka**[172], the prosecutrix was having love affair with the offender. He came to meet her late at 12 o' clock in the night and prosecutrix accompanied him to his under constructed house where they expressed love and embraced each other. The boy promised to marry her. They indulged in sexual

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of an existing fact.Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Section 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact." It was observed in Uday vs State Of Karnataka

169 Pradeep Kumar v. State Of Bihar, AIR 2007 SC 3059

170 S.N.Mishra, *Indian Penal Code,* (Central Law Publications, Allahabad,19th ed., 2013)

171 1984 CriLJ 1535

172 2003(2) SCALE 329

intercourse. This happened at number of occasions. The girl conceived a baby out of this relationship. The boy on different occasions promised to marry her once the construction of their house would complete. But when girl was 8 months pregnant, she refused to believe the boy which was not liked by him and thus he started ignoring her. A girl lodged FIR against boy for raping her on the pretext that she indulged in sexual intercourse on misconception of fact of marriage.

The apex court after referring the above-mentioned case and other cases such as **Vijayan Pillai vs. State of Kerala**[173], **Arjan Ram vs. The State**[174], **Gopi Shankar vs. State**[175]and **Bhimrao Harnooji Wanjari vs. State of Mahrashtra**[176] held that accused is not held liable for rape as from the facts and evidence of the case it appeared that the prosecutrix consented to indulge in intercourse not on the misrepresentation but out of sheer love and affection which she had for the boy as from inception she was well aware that due to caste constraints, their marriage might not take place. Thus, sexual indulgence is not solely on the pretext of marriage. Secondly, it does not appear that the boy never intended to marry her. Due to pregnancy of the prosecutrix, the things got complicated and he failed to get the courage to disclose his desire to his parents. Thirdly and most importantly, for the application of Section 90, it is imperative that two conditions must be fulfilled i.e.- one that the accused must misrepresented the fact and the prosecutrix gave consent by relying on it and second that the accused must knew or had reason to believe that the prosecutrix has consented under misconception of fact. In the present case, it is not proved from facts that prosecutrix has consented to sexual intercourse by solely relying the promise of marriage and out because of love and intimacy for the accused. Even if the fact is taken true that prosecutrix consented for act only because of the promise of marriage made by the accused but from the facts and circumstances it is still not proved that the assailant had knowledge or is aware of the fact that prosecutrix is ready to indulge in sexual intercourse only because of his promise of marriage. Hence, the act was consensual. The court refused to discuss the second issue that whether Section 90 is applicable when specific circumstances are enumerated under Section 375 of the code.

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[173] 1989 (2) K.L.J.
[174] AIR 1960 Punjab 303
[175] AIR 1967 Raj. 159
[176] 1975 Mah. L.J. 660.

But from the discussion made by the court in the judgement, it is clear that section 90 still plays vital role to decide whether act is consensual or not.

The court added another aspect to this prevailing view in the case of **Pradeep Kumar v. State of Bihar and Anr**[177] where the Court held that the "a false promise to marry" would not iso facto called that it would not constitute misrepresentation of fact under Section 90. What the court needs to determine is the time when the offender has required mens rea for the same. Thus, if he initially intended to marry the prosecutrix but later in future due to change of circumstances he fails to keep his promise then it would not constitute misrepresentation. But the cases where the offender acting had clandestine motive just to fulfil his sexual gratification then in that case, it shall amount to misconception of fact and thus vitiate the consent of the prosecutrix and hence, can be held liable for rape.

The test laid down by the apex court in the case of **Pradeep Kumar** has further complicated the aspect of misconception of fact and made it difficult to apply in the practical situations. How about those cases where the accused initially intended to marry and then after some time decide not to but continue to lie to the prosecutrix? The law is lacking on this aspect.

c) **Consent by Insane –** under this, two categories of people are covered whose faculty of mind is affected either permanently or temporarily due to unsoundness of mind or intoxication. The person's consent will not amount to cnsent only if he, Due to unsoundness or intoxication, fails to

i. Understand the nature of the act and

ii. Understand the consequences of it.[178]

d) **Consent by Child**

As per Section 90, the age of consent for criminal law is 12 years. Thus, a child of 12 or above years can give consent for the commission of any criminal act. But the provision is preceded by the expression "unless the contrary appears from the context" which means if otherwise is provided under any other provision or law then

[177] AIR 2007 SC 3059

[178] KD Gaur, *Textbook on Indian Penal Code,* (Universal Lexis Nexis, Gurgaon, 7th ed., 2021)

that provision will apply and not Section 90 as the maxim **"generalibus specialiabus non derogant**t" guided that special law prevails over general law.

For the offence of rape, it is expressly and specifically provided under Section 375 of IPC the age below which women is considered incompetent to give consent. Thus, Section 375 will prevail over Section 90 with respect to facet of age.

Clause 6th of Section 375 prescribes the age below which the person is considered not competent to give consent for indulgence in sexual acts. A person is competent if he able to understand the nature and consequences of the act for which he is giving consent. Thus, the consent of the person below that certain age is irrelevant and the offender can be held liable even if act is done with the consent of the person.

Under different laws, different age is prescribed for different acts. The age to exercise adult franchise in India the age is 18, for marriage it is 18 for girls and 21 for boys, for contract it is 18 and under criminal law, section 90 of IPC prescribes 12 years of age for consent if not otherwise provided. Thus, generally a child of 12 years is considered competent to give consent for any act or an offence under IPC but for the offence of rape, the age is 18 years (now).

Initially, when the law regarding rape has been codified, the age for sexual intercourse was pegged at 10. But the same has been raised to 12 years due to historic case of queen v. Emperor of Calcutta HC where a husband killed his wife of 11 years and 3 months after committing rape. But he has been convicted only for the offence of grievous hurt by act endangering life under Section 338 of IPC as at that time the age for statutory as well as marital rape was 10 years. Thus, he was acquitted from the charge of rape on technical grounds.

Eventually, the age has been raised to 14 to 16 to 18 years in tbe year 1925, 1940 and 2013 respectively.

The law regarding age has been criticised constantly on the ground that age is not sole criteria to decide the maturity of the person. Sometimes a person becomes mature before the prescribed age due to environmental factors and there are also cases where a person does not become competent to decide even after passing of statutory age.

Thus, the criteria to decide competency of the person to give consent is his maturity level and not his age.

Secondly, statutory rape is a strict offence thus the mens rea of the person is of no relevance. Thus, even if the act is committed with consent of girl or girl is the one who wants to indulge in the act and she is the abettor or when she lied about her age, the act of the man amounts to rape and he can't take defence on these grounds. This issue has been dealt by the court in the case of ***R v. Prince***[179], where the court laid discussed the following propositions to determine the guilt of the person in case of strict offences:

1.	Where the act is apparently criminal in nature and becomes punishable with higher punishment due to presence of certain facts which were not known to the accused then ***person doing such act will take the risk of higher punishment***
2.	Where the act is apparently innocent but becomes punishable due to presence of certain facts which were not known to the accused then he shall be entitle to the defence.
3.	Where the act is apparently wrong & opposed to morals of society and becomes punishable due to presence of certain facts which were not known to the accused then ***person doing such act will take the risk of punishment.***
4.	If accused is absolutely ignored about the existence of the fact which alters the character of the act than ***he can take the defence***.

In the case of statutory rape, the proposition three will apply and hence the person cannot take the defence of the ignorance of the fact of age.

Affirmative Consent

No affirmative definition of consent was given under IPC before 2013. It was the biggest stumbling block in the road of convicting a person in sexual offences. On the recommendation of Justice Verma Committee, the parliament has added explanation 2 in Section 375 which defines consent in a positive manner. The essentials of the term consent are –

[179] 1875

a) **Unequivocal** means clearly and precisely. It means there is no doubt or confusion regarding the fact that a person is consenting for the act.

b) **Voluntary and willingness – the** term "voluntary" is defined under Section 39 of the Code[180]. A person is doing any act "voluntarily" if he has either the intention of doing it or he has knowledge or reason to believe in indulging that act. It means the decision of the person is deliberated one taken after analysing nature and consequences. And willingness stresses on the fact that the person consenting for the act has desire to indulge in it. so due to that desire only, he consented for the act. No coercion or undue influence or threat or force or fraud has been played on the person.

c) **Agreement and Communication –** It centred on the point that he is ready for such indulgence and has communicated it to the other party.

d) **Specific sexual act –** It is necessary that the parties indulge only in acts for which the person has consented. No inferences or implications be inferred from consent with regard to other acts. Example – If the girl consented for kiss then the same cannot be implied for sexual intercourse.

From these, it is evident that consent must be clear and unambiguous. If it is ambiguous then there is no consent. 'willingness' shows that the person wants to indulge in the act wholly and there is no sign to refute it. The consent is given for specific act only. If you indulges in another act than the one for which consent is given then it amount to act without consent.[181]

For example- if you allow person to kiss you or to touch you , then the permission does not safeguard you against sex or oral sex.

In the case of ***Mahmood Farooqui v State (Govt. of NCT of Delhi)*** [182], the high court of Delhi has failed to give meaning to the definition. In the case, the prosecutrix was acquainted with the accused and had flirted with him before. On the date of incident both were intoxicated and had casual conversation when the accused asked for sex to

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180 IPC

181 *Anupriya Dhonchak, "Standard of Consent in Rape Lawin India: Towards an Affirmative Standard", available at*

182 243 (2017) DLT 310

which the lady has refused. He forced himself upon her to which the prosecutrix submits her in the fear of violence. The court observed held that the sexual act does not amount to rape as they were acquainted and flirted with each other and thus in those cases even a 'feeble no means yes'.

The decision has been severely criticized as the court failed to fully appreciate the meaning of the term consent.

2.2.4 Exceptions

2.2.4.1 Medical Treatment

Exception 1 has been added by 2013 amendment. The reason of inculcating it is widening the definition of the term rape. As with the expansion, the acts of treating a female patient internally through instruments especially in the case of gynaecologists would fall within the parameters of rape. The doctor needs to perform such act without the consent of the patient in the case of urgency. Hence the exception is inculcated to protect the doctors who are acting in good faith. Hence, if the doctor examining the patient internally, which can amount to rape, though the disease or condition of the patient does not require the same as per the prevailing practice in that profession then the doctor cannot take immunity under this exception.

2.2.4.2 Marital Rape

Marriage is the most sacrament institution of society and is the nucleus of this world. It is an intimate relationship between two individuals who come together to experience the worldly affairs, together as one entity. This relationship is the one which is based on love, trust and partnership in which both partners have equal but distinct role. It is the relation where both parties come together voluntarily and with free consent. That's why in few parts of the world, it is considered as "contract". Legally also, it is governed by the principles of contract. It persists till the 'consent' subsists. Thus the bond of marriage can be broken easily merely by revoking consent by either partner.

India is diverse as it is a blend of various distinct cultures and religions. The concept of 'marriage' is governed by personal laws. But there is uniformity with regard to the nature of marriage irrespective of great diversity. Marriage was not a destructible union in India as it is not merely a contract but a sacramental union where husband is

considered as natural guardian of his wife. As it is believed that he can protect her from all evils.

In Ancient times, it was believed that God has created 'man' and 'woman' so that they can come together and procreate and cast this world. Thus the ultimate aim is to beget children and to establish a civilised society. But unfortunately, it has been linked with "sexual pleasures". This results into commodification of "woman". Wife becomes the property of man and he has all rights over wife's body & mind. Sexual gratification is regarded as the right of the husband and duty of the wife. Any act against the sexuality of wife is not considered as an offence against wife but an offence against husband.

Concept of Marital Rape

"A man is a man; an act is an act; rape is a rape, be it performed by a man the 'husband' on the woman 'wife'." - Karnataka High Court[183]

The term "Marital Rape" has not been used under Indian Penal Code, 1860. The reference of the term can be found in Domestic Violence Act, 2005 and various judgements. It is covered under Exception 2 of Section 375 of code, 1860 which provides that husband cannot be punished for committing rape of wife if she is not below 15 years of age. But the exception does not define it. Thus the "marital rape" means rape committed by husband with his own wife against her consent. Husband is immune from punishment provided wife should be above 15 years of age. In the case of **Independent Thoughts v/s UOI[184]**, the court observed that in India, the age for marriage and for giving consent for sexual intercourse is 18 years. Thus to bring uniformity in law and to remove anomaly, the apex court has held that the age in exception two of section 375 of IPC, 1860 will be read as 18 years.

England has ruled number of countries of the world during 15th to 19th century. India was also one of its colonies for a period of 200 years and got independence only after a struggle for a long period on 15th August 1947. The impact of the colonial rule can be witnessed on the historical and power structure of the colonized countries. Even in post-colonial period, the cultural and societal norms of colonial country have

[183] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371, decided on 23-03-2022
[184] (2017) 10 SCC 800

impacted the modern day legislation of the colonized. Indian law either its civil, criminal or family or other has been greatly influenced by the English law. Even after 75 years of independence, we still follow the law formulated by Britishers and our courts follow the rulings of English courts.

The exemption with regard to spousal rape has been adopted from common law and is in existence in Indian Penal Code, 1860 since the date of its enactment.

In England, immunity to marital rape is based on the theory propounded by **Lord Hale** where he observed that there is an implied consent of wife for sexual intercourse which is given at the time of marriage. As marriage, being a contract, continues, the consent will also continue. Wife cannot retract it. But the court in the case of **R v. Clarke**[185] for the first time prosecuted husband for raping his wife and it was provided that wife is not bound to co-habit with her husband and she is also entitled to retract` her consent and thus can refuse to have sexual intercourse. In later decisions, court also developed other exceptions where husband can be convicted for raping his wife such as when wife obtains injunction against her husband for molesting her or on obtaining a decree nisi of divorce. Thus, Husband can only be held liable for rape when wife has obtained a decree of divorce or has retracted her consent by living separately from her husband.[186]

In the year 1991, House of Lords has made a remarkable change in common law in **R v. R**[187] as they abolished the immunity to the husband and recognized marital rape as an offence.

Post-Independence, Constitution of India becomes the grundnorm and all laws were made in accord with it. Article 372 grants constitutionality to all the pre-independence laws which has been adopted without any change. Section 375 of IPC is also constitutionally valid as Article 15(3)[188] allows legislature to make law in favor of women.

The Constitution of India has does not grant any inferior or subordinate status to the women as contrary to pre independence period. . It also treats wife equivalent to

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185 [1949] 2 All ER 448

186 KD Gaur, *Criminal Law: cases and materials,* (Lexis Nexis,Gurgaon,8th ed./2015*)*

187 [1992] 1 AC 599

188 Nothing in this article shall prevent the State from making any special provision for women and children.

husband and institution of marriage as an institution where both husband and wife plays an equal role. No one is hold superior to the other. In all aspects, it treats women with equality to that of man and guarantees all rights and protection equally to women such as right to dignity, right to freedom of speech and expression, right to equality and sexual autonomy. Rather, efforts were made to ameliorate the position of women in society resultantly, number of laws were enacted such as –

a) Reservation of Seats in local government[189]

b) Dowry Death[190]

c) The Dowry Prohibition Act, 1961[191]

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189 **Art. 243T of The Constitution of India, 1950 - . Reservation of seats**

(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality

(2) Not less than one third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes

(3) Not less than one third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens

190 **Section 304B of IPC, 1860 - Dowry death**.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.—For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

191 The object of this Bill is to prohibit the evil practice of giving and taking of dowry. This question has been engaging the attention of the Government for some time past, and one of the methods by which this problem, which is essentially a social one, was sought to be tackled was by the conferment of improved property rights on women by the Hindu Succession Act, 1956. It is, however, felt that a law which makes the practice punishable and at the same time ensures that any dowry, if given does ensure for the benefit of the wife will go a long way to educating public opinion and to the eradication of this evil. There has also been a persistent demand for such a law both in and outside Parliament. Hence, the present Bill. It, however, takes care to exclude presents in the form of clothes, ornaments, etc., which are customary at marriages, provided the

d) Subjecting women to Harassment and cruelty by husband or his relatives[192]

e) Provisions with regard to miscarriage[193]

f) The National Commission for Women[194]

g) The Indecent Representation of Women (Prohibition) Act, 1986[195]

h) The Hindu Succession (Amendment) Act, 2005[196]

i) The Protection of Women from Domestic Violence Act, 2005[197]

But exception 2 of Section 375 of the Code is in violation of the two fundamental rights of the women:

1. Right to Equality

Article 14[198] of the Constitution provides that all persons are equal before law. Thus, this right is available to all irrespective of gender or sex.[199] This Article strikes also at inequalities which arises either due to economic or social factors.[200]

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value thereof does not exceed Rs 2000. Such a provision appears to be necessary to make the law workable." Gazette of India, 1959, Extra., Pt. II, S. 2, p. 397. See Joint Committee Report at id., pp. 1191-93.

192 **Section 498-A IPC,1860 -Husband or relative of husband of a woman subjecting her to cruelty**.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purposes of this section, "cruelty" means— (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

193 Of the causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the concealment of Births – Section 312-318 of IPC, 1860

194 The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 (Act No.20 of 1990 of Govt.of India) to review the Constitutional and legal safeguards for women; recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women.

195 An Act to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto.

196 The Hindu Succession (Amendment) Act, 2005 (39 of 2005) was enacted to remove gender discriminatory provisions in the Hindu Succession Act, 1956. Under the amendment, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. The daughter shall now have the same rights in the coparcenary property (ancestral property of the Hindu undivided family) as a son.

197 An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and formatters connected therewith or incidental thereto.

198 Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

Due to diversification, it is impossible to opt the concept of "absolute equality" as in that case it will cause more harm than benefit. Thus, to achieve the objective behind Article 14 of the Constitution, it is necessary that "reasonable classification" should be allowed. The criteria to classify people into categories is said to be "reasonable" if–

a) Classification is on the basis of intelligible differentia and

b) The differentia should have direct nexus with the object.

Thus, both conditions must be fulfilled only then it is called a "reasonable classification". Marital rape is made a separate category and is exempted from the purview of Section 375 of the Code, 1860. The basis of classification is marital relationship between the accused and the victim. Section 375 of the Code punishes an offence against body which affects her physically and mentally and violates her fundamental right of privacy, human dignity and sexual autonomy. Thus the classification does not have any rational with the objective of the provision as rape committed by stranger or by husband has similar effect on the body and mind of the victim. Rather rape by husband has more adverse effect on the mind of the woman as husband is considered as protector of wife and both shared relationship based on trust. Thus when husband rapes his wife then not only it affects her body but also betrays her trust. Thus, it is more personal in nature and had long term negative impact.

2. Right to Sexual Autonomy

Article 21 of the Constitution provides Right to life and personal liberty which is the foundation of human existence and heart of the constitution. It has been widely construed to enable an individual to develop fully and dwell on its worth and potential. Under Article 21, numerous rights of person have been recognised such as human dignity, privacy and sexual autonomy. All these rights are available to all individuals irrespective of gender, sex, status or religion. No restriction or exemption is made with regard to its application.

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[199] National Legal Services Authority v. UOI, AIR 2014 SC 1863

[200] Secretary, H.S.E.B. v. Suresh, AIR 1999 SC 1160

But the access of these rights is denied to married women on the pretext of marriage and social obligations. It is believed that woman surrenders all her rights to her husband at the time of marriage and becomes the slave of the husband.

Recently, in the case of **Jospeh Shine v. UOI**[201] , the apex court has struck down the provision of adultery given under Section 497 of IPC on the pretext that husband can't be considered as the master of the wife. Hence, her decision to indulge sexually shall be the sole decision of the woman and it must not be decided by the husband. As under proviso of Section 497, the offence of adultery is not an offence if the act of the lady is approved or permitted by her husband. This proviso contravenes the right of dignity and sexual autonomy of the woman.

Prevalence of marital rape in India

In India, marital rape is not recognised as an offence. Thus, no data is available with regard to reporting of commission of such offence. But the data collected by National Family Health Survey[202] has bring out in light the horrendous truth which is committed in the darkness of four walls. NFHS is a survey conducted country wide by Ministry of Health and Family Welfare, GOI. It was started in the year 1992-93 with the aim of collecting vital information on certain aspects such as population, fertility, infant and child mortality rate, family planning methods, health and violence. Till today, NFHS conducted five rounds.

The data collected by National Family Heath Survey during the year 2015-16 is the fourth round in the series. It has unveiled the alarming data on spousal rape such as:

- Nearly, 7% of women who were ever married had faced **sexual spousal violence**[203] with 5% in the past 12 months.
- Out of ever married women in the age group of 15-49 years who undergone sexual violence in their lifetime reported their current husband in 83% case and former husbands in 9% cases as perpetrators.

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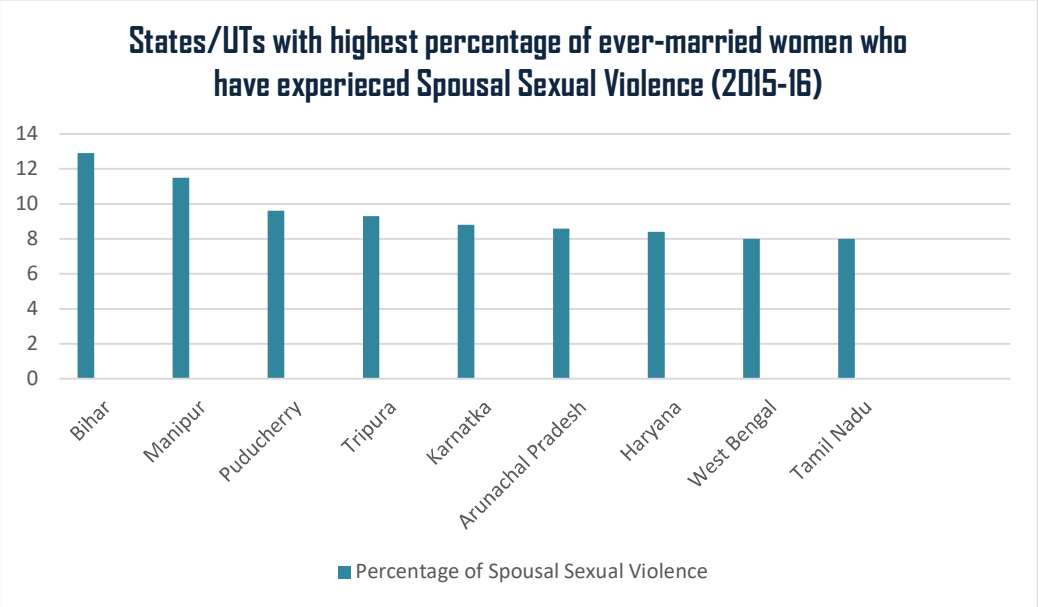
201 2018 SCC OnLine SC 1676

202 National Family Health Survey-5, 2019-2021, Ministry of Health and Family Survey, http://rchiips.org/nfhs/NFHS-5_FCTS/India.pdf

203 Sexual spousal violence: physically force you to have sexual intercourse with him even when you did not want to; physically force you to perform any other sexual acts you did not want to; force you with threats or in any other way to perform sexual acts you did not want to.

- 6% women disclosed that their husbands use physical violence to obtain sexual intercourse whereas 4% women reported that their husbands use some type of threat or other means to obtain sexual acts.
- 3% women revealed that their husband forced them to indulge in other forms of sexual acts.
- The rate of spousal sexual violence is high in rural area (5.8%) than in urban area (4%) in the past 12 months preceding the survey.



Source: NFHS-4

NFHS-5 has been conducted during 2019-2021. It is the last and the recent most data available

Worldwide Prevalence of Marital Rape

There is an immense contrast cross culturally with regard to the exemption of marital rape all over the world. At some places, it is regarded as "wifely unquestioned duty" and at some it is considered as the aggravated form of rape. In countries like India, the exemption is extended only to the legally wedded husband whereas in other, the same covers husband as well as intimate partners. Irrespective of criminality or the offender, the women in an intimate partner violence struggle with emotional and health aspect including forced sex, degradation, HIV infection, cuts, bruises, dislocation and other.

- The country which took the first step in the criminalisation of spousal/intimate partner rape was Soviet Union in the year 1922.[204]
- There are nearly 52 countries globally which criminalised marital rape.
- As per 2018 data, nearly 13% of women (i.e 1 in 7 women) between age 15-49 years in the past 12 months has faced spousal physical or sexual violence from an intimate partner.
- Whereas one in five women aged 15-49 years experienced physical or sexual abuse in the previous year.

Types of Marital Rape

Studies show that the victims of marital rape feel pressurised to have sex as they are financially dependent on their husbands and due to social constraints. The plight of this offence is that it is committed within the four walls of the house which is considered as the safest abode of any person. As a result, it is recognised only by few as others take it as their marital duty. In majority cases, marital rape is accompanied with physical abuse and force. On the basis of abuse, marital rape can be categorised as following: -

1. Battery Rape

The term 'battery" means beating or of giving blows. Thus this form is evident from the name itself. In this kind of rape, husbands beat and injure his wife at the time of sexual intercourse. The extent of abuse is so high that it causes serious harm and in few cases it results into mutilation. This is accompanied with tongue lashing and verbal abuse. This is also known as "anger rape".[205]

The NFHS-4 has revealed that spousal sexual violence is accompanied with physical injuries such as cuts, bruises, broken bones, dislocation, burns and other injuries. It is utterly shocking that rate of injuries while committing spousal sexual violence is high in urban areas (42.4%) than rural areas (40.6%)

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[204] A history of the movement to criminalise marital rape across the world, *available* at: https://indianexpress.com/article/research/a-history-of-the-movement-to-criminalise-marital-rape-across-the-world-7753164/

[205] Marital Rape, Kersi Yllo, Ph.D, 1996, Battered Women's Justice Project, *available at:*

2. Obsessive Rape

This form of marital rape is uncommon but more noxious. This occurs when husband derives pleasure or feel aroused when sex is accompanied with violence and force. Thus, husband seeks contentment from wife's pain and sufferings. This is in addition to use of objects for rape, taking lewd and lascivious photographs of the victim and maintaining written record of the acts executed. In few cases, the accused lacerate private parts of the victim to seek more pleasure. The whole scenario is cruel, traumatic, gut-wrenching and intolerable.

3. Force-only Rape

This form is less gruesome but more prevalent form of rape. In this case, husband uses only such amount of force which is necessary to overpower the resistance of wife. This can be achieved by taking advantage of their physique such as body size, weight and strength. This is committed to feel authoritative and dominant as it is all about power struggle. This is also known as "power rapes".

It is arduous to penalise husband for this kind of rape due to absence of any kind of marks of injury.

Section 376B[206] of IPC, 1860 - Partial recognition of marital rape

Section 376B penalises the action of forced sex of the husband against his wife during the period of separation observed either under a decree of court or otherwise. The term "otherwise" includes all customs and mutual agreements. It is based on the notion that during the period of separation, the consent given by the wife during marriage has been withdrawn. Thus, it recognises marital rape as an offence but partially that is if committed during separation only and not otherwise. Thus, the plight of the wife has not been addressed appropriately.

[206] 376B. Sexual intercourse by husband upon his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.
Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

The Section was not a part of the Code (IPC,1860) when it was originally enacted. Thus, husbands enjoyed complete immunity for a period of 120 years irrespective of separation undergone by couples. Only in the year 1983, it has been added as an offence under Section 376A but the punishment for the offence was very less as husband can be imprisoned only for a period of maximum 2 years and with fine. At that time, the mode of separations was precisely defined in the Section that is either under a decree of court or custom or usage. In the year 2013, by the Criminal Law Amendment Act, 2013, Section 376A has been renumbered as Section 376B. it not only amended Section number but also introduced certain changes. The mode of separation has been confined to decree of court or otherwise. By using the term "otherwise", they give wide discretion to the court. Further the punishment has been enhanced as 2 years of imprisonment has been made the mandatory punishment and which can be extended up to 7 years.

The term used in Section 376B is "Sexual assault" which has same meaning as given to the term "rape" under Section 375 of the IPC, 1860. The reason behind using an alternative term to rape is not to put the act of the husband parallel to rape and to keep it out of the ambit of section 375 of the IPC, 1860. The objective of the legislature to put the act of the husband under Section 376B on different stand is evident from the huge gap in the punishment prescribed under the two Sections. The punishment for rape is minimum 10 years of rigorous imprisonment up to life imprisonment and fine whereas the punishment under Section 376B is merely of 2 years to seven years and fine.

The legislature is circumspect to make husbands accountable for their acts as it fails to back Section 376B with rationality. The reason behind the immunity to marital rape was based on the concept of "implied consent" given by the women during marriage. This "implied consent" is deemed to be retreated when women separated from her husband either temporarily (under a decree of separation or otherwise) or permanently (divorced). Hence, when there is no consent for sexual intimacy during separation then why legislature is giving benefit to the husband and not treating them same as other offenders.

Offences by husband against wife/ other recourses available with wife to redress her grievance

The act of sexual assault by the husband against his wife is not recognised as an offence under Section 375 IPC if the wife is not below 15 years (now 18 years). As discussed earlier, the reason for the immunity is the consent given by the wife at the time of marriage which deems to be continued till the marriage subsists. The reason given by the legislature for not criminalising the act of the husband is the non-interference or non- intrusion by the law/ government in the institution of marriage. Thus, the law is trying to uphold the sanctity and privacy within marriage at the cost of sexual autonomy and dignity of the women. But the stand of the lawmakers is dubious as there are number of provisions under civil and criminal law where the law interferes in the most intimate and private matters of the marriage. Some of the provisions are-

1. **Section 354 of IPC** - It penalises outraging the modesty of women. The term modesty is linked with sexuality of the women and thus cover acts like kissing violently in public, raising skirt, taking off her clothes and stripping her naked. For imposing liability under Section 354 IPC, 1860, it is essential that the act must be committed without the consent of the women. Thus, consent being an essential element of the offence, it raises an issue that whether husband can be held guilty for outraging the modesty of his wife as in the institution of marriage, consent of wife is implied for sexual acts.

The issue has been dealt in one of the Burmese case of **Mi Hla So v. Nga Than**[207], where the man pulled the hair and hand of the woman publicly. The court refused to hold the man liable for outraging the modesty of the woman on the ground that the man and woman are in "conjugal terms" and thus further observed that the man cannot be held guilty of outraging the modesty of his wife if the act is an act of love and affection contrary to cruelty or infidelity.

Section 354 of IPC, 1860 has used the expression "any women" which encompasses even the legally wedded wife of the person. But to demarcate the act of affection and outraging the modesty of women, the following position has been culled out:-

a) Firstly, it is to be found out whether the act has been done in public or in private.

[207] Mi Hla So v. Nga Than (1912) 13 Cri.L.J. 53 (Burma)

b) If the act is done in public, then the nature of the act is another important criteria. If the act is found to be affectionate and loving such as hugging, holding hands and neither go against public morality nor fall within the ambit of indecent behaviour then the same does not amount to outraging the modesty of the woman. If the act is highly affectionate that the same may objected by wife to be committed in public and might go against public morality then in that case it will fall under Section 354 of IPC, 1860.

c) If certain acts are done in private by the husband who might not be acceptable in public, then they shall not fall within Section 354 as these might considered significant for a healthy conjugal relationship provided wife has not objected for the same.[208]

Thus, husband can be held equally guilty for the offence of outraging the modesty of his wife like any other offender and there is not exemption carved out in favour of husband.

2. **Section 377 of IPC** – it penalises unnatural carnal acts which are against the order of nature. This section is applicable to all irrespective of gender. Thus, male, female, and transgender, all fall within its ambit.

Its application on inter-spousal relationship can be studied under two time periods – before 2013 and after 2013.

Before the passing of the Criminal Law (Amendment) Act, 2013, section 375 penalises only acts of sexual intercourse committed under any one of the circumstances enumerated thereunder. The meaning of the term "sexual intercourse" was restricted only to penile-vaginal intercourse. Exception 2 of Section 375 gives immunity to the husband against indulgence in such act provided the wife is above 15 years of age. For the offence of rape, consent is an essential ingredient and in case of marital rape, consent for sexual act is implied on the part of the wife. The other forms of sexual acts such as oral sex, insertion of any other body part or foreign object into the vagina, urethra or anus of the woman were considered unnatural and fall within the ambit of Section 377 of the IPC, 1860 and no immunity was carved out in favour

[208] Surendra Chaher, "***Outraging The Modesty Of A Woman: Inter-Spousal Perspective***", Indian Law Institute, 1990, vol.32, No. 4, https://www.jstor.org/stable/43951283

of inter-spousal relationships. As a result, if the husband indulges in any act against the order of nature then he could be penalised under Section 377 of the Code. Consent in the matter of Section 377 is irrelevant.

After the enactment of the Criminal Law (Amendment) Act, 2013, the definition of rape under Section 375 has been widened to include all sexual acts, such as penile-vaginal, oral sex, insertion of foreign objects or any other body parts, committed either against the will of the woman or without her consent. As a result, acts which used to come within the ambit of Section 377 not fall with the definition of rape. Now the core or cruicial question arises that whether husbands can be prosecuted under Section 377 of the IPC or they can take the benefit of exception 2 of Section 375 of the IPC.

The issue has been cropped up in the case of **Nimeshbhai Bharatbhai Desai v. State of Gujara[209]t** and **Hrishikesh Sahoo v. State of Karnataka[210]**, where both the Gujarat and Karnataka High courts respectively answered it in affirmative and observed that no express exception is carved out in favour of husband under Section 377 of the Code. Thus, if the case is made out under Section 377 of IPC then husband can be prosecuted for the same irrespective of the fact that for the same act, husband is immune from the charges of rape.

3. Section 498A of IPC

The provision is added way back in the year 1983 under Chapter XX-A of the code. The provision showed the keenness of the parliament to enact a law to terminate the sufferings and agony of the married women in her matrimonial house. Thus, it penalises the acts of cruelty or harassment committed against the woman by her husband or his relatives. The term cruelty is defined as any act which either causes or likely to cause injury to the life or limb of the woman or such acts which forced wife to commit suicide. Thus, it covers both physical as well as mental cruelty. With respect to harassment, the acts are limited to one which are related to unlawful demand of dowry.

The issue arises whether the indecent, perverted and deviant sexual demands or acts on the part of the husband can be called cruelty under Section 498A of the IPC. The

[209] 2018 SCC OnLine Guj 372
[210] 2022 SCC OnLine Kar 371

issue has been dealt by the Gujarat HC in the case of **Nimeshbhai Bharatbhai Desai v. State of Gujarat**[211] and held that healthy sexual relation is the foundation of the strong marital relation but when the act leads to physical or psychological trauma or demand has been made for such sexual acts which cannot be approved by the wife then it would definitely amounts to physical as well as mental cruelty under Section 498A of IPC. Thus, marital rape irrespective of age of the wife amounts to cruelty and is punishable under 498A of the code.

4. The Protection of Women from Domestic Violence Act, 2005

The Act has been enacted by the parliament to prevent violence committed within the four walls of the house. It is applicable on persons who are related either by consanguinity, by marriage or are in a relationship in the nature of marriage or has lived together as a family. The term "domestic violence" has been given a wider meaning under Section 3[212] of the Act as it includes all forms of abuse such as

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[211] Supra 209

[212] **Definition of domestic violence.**—For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section,—

- "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;
- "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;
- "verbal and emotional abuse" includes— (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested;
- "economic abuse" includes— (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited 5 to, house hold necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared house hold and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction

economic, physical, sexual, verbal and emotional abuse. It also covers dowry demand as form of domestic violence. The Act provides number of remedies to prevent and protect the women from domestic violence as the magistrate can pass Protection orders, Residence orders, Monetary reliefs, Custody orders and Compensation orders.

The Act has compassed the aspect of marital rape within its sweep. As the same is form of sexual abuse as defined in Explanation 1 (ii) of Section 3 of the Act. The Act does not criminalises the act of marital rape but merely provided a civil remedy. Apart from its various loopholes, the Act has been appreciated as it took step to curb the instances of abuse and trauma and showed the bent of the parliament to recognise the sufferings of the woman in the institution of marriage instead of following the policy of non-interference.

From the above provisions, it is evident that the stand of the legislature for not criminalising marital rape on the policy of non-interference is fallacious/ distorted as there are number of provisions where the husband is made punishable or held liable for committing sexual acts against the wishes of the wife. Thus, this paradox led to violation of the fundaments rights of the married woman and profuse the sufferings of women and left her remediless. Therefore, the change regarding marital rape is inevitable and the legislators should recognise it.

Recommendations of Various Committees

1. The 42nd Law Commission Report has been submitted in June 1971. The report reviewed the provisions of IPC, 1860 in length. The commission while going through the provisions of rape has found that the husband can be punished for rape only if the wife is under 15 years of age and not otherwise. At that time, the age for statutory rape was 12 years thus the husband can be penalised for statutory rape if the wife is below 12 years and be given the same punishment but if the wife is above 12 years and less than 15 years then in that case, husband gets the benefit of the exception and the punishment is merely upto 2 years or fine or both. The commission

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to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.
Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

recommended that the offence of raping wife below 15 years shall be taken out of the ambit of Section 375 and be made a separate offence.

Further, the commission examined that the husband is entitled to take the benefit of the exception even if the rape is committed by him at the time of judicial separation or when parties are living separately by mutual agreement as even at that time also, they are technically married in the eyes of law. This approach has been doubted by the commission and thus it recommended that the same should be considered as rape and be made punishable.

2. The 84th Law Commission Report has scrutinised the provisions of rape and allied offences in the year 1980. The Report discussed the recommendations of 42nd Law Commission report and held that the provision of rape does not need restructuring due to wide change taken place after that report. The report recommended certain changes in the provision of Section 375 which were considered necessary to make it alive with the current scenario. Thus, the commission recommended that the age of the wife given under exception shall be raised from 15 to 18 years to make it in consonance with other laws.

3. As per 172nd Law Commission Report, "Sakshi" recommended that the absolute and partial immunity given to husbands under Section 375 and 376 A should be taken back as rape committed by husband should be taken equivalent to any other offence committed by husband against his wife and is punishable either under IPC or any other law. Justice Leela Seth, being representative of NCW has also recommended on similar lines and added that to overcome the misuse of this provision, what can be done is that the burden of proving a fact that there was no consent for sexual act may be placed on the wife.

The commission after perusing the above suggestions, recommended -

a) That the exemption in favour of husbands must not be disturbed as it might lead to overindulgence in marital relationship.

b) They merely suggested to raise the age of the wife from "fifteen" to "sixteen" as it brings uniformity with regard to age of the victim of rape.

4. The Justice Verma Committee Report submitted in 2013 has analysed the stand of various countries on marital rape along with its historic background and observed that the countries from which the immunity has been taken has itself criminalised it way back in the year 1991. The committee thus recommended that the rapist should be treated as rapist irrespective of the relation it has with the victim. The committee has taken the support from the decision of the European Commission of Human Rights which give primacy to the fundamental human rights of the individual such as dignity and freedom.[213] Secondly, they referred the judgement of the Canadian Supreme Court delivered in the case of **R v. J.A.[214],** where the court emphasised that the consent for sexual activity should not be implied on the ground of relationship between the perpetrator[215] and the victim and thus it should not be a ground of defence.

The committee further accentuated that mere legal prohibition on marital rape will not serve the purpose as data of other countries revealed the fact that ever after criminalising it, the number of reported cases are very less as people does not considered it as serious offence. Thus, repeal of exemption must be accompanied with awareness of public with regard to sexual autonomy, dignity and other rights of the woman.[216]

Why Marital Rape should not Be criminalized?

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213 Our view is supported by the judgment of the European Commission of Human Rights in C.R. v UK, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.

214 [2011] SCJ NO 28 (QL)

215 In the Canadian 2011 Supreme Court decision in R v. J.A., Chief Justice McLachlin emphasised that the relationship between the accused and the complainant 'does not change the nature of the inquiry into whether the complaint consented' to the sexual activity.91 The defendant cannot argue that the complainant's consent was implied by the relationship between the accused and the complainant.

216 In South Africa, despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion.94 Rates of reporting and conviction also remain low, aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.95 Changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in Vertido v The Philippines, a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasised the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.

The stand of those who oppose criminalisation of marital rape is that it will affect the sanctity of the relation of husband and wife and hence will break the institution of marriage. Secondly, like other woman oriented provisions (Section 498A), it will also be misused and will be used as weapon to harass the men. Thirdly, the legislators are shirking from deleting this provision because the grievance of the woman is adequately addressed under other provisions as marital rape is a ground of divorce and is also punishable under 498A as well as under DVA. Hence, no concrete change will come with the removal of this exception. Rather, dire consequences will ensue.

On the other hand, feminist protests against this exception on the ground that this immunity gives right to the man to ignore the wishes or consent of the wife and to indulge in sexual intercourse. Thus, this provision not only provides immunity to the husbands but also gives them right over their wives. The protection under others laws cannot be equated to the one given under Section 375 of the Code as it has higher punishment and in the procedural aspect, certain rights or safeguards are given such as recording of the statement by the judicial magistrate, camera trial and others. thirdly, the fundamental right if sexual autonomy, reproductive rights, right to dignity and health and other are inconsistent with this exception.

2.2.5 Aggravated Forms of Rape under IPC

A rape is said to be aggravated if it is committed under special circumstances or due to position of victim or status of offender or due to outcome of the act. Under IPC, the forms of aggravated rape are penalised with higher punishment than the rape under Section 376(1).

Under Section3 76(2), rape is aggravated if it committed either

- by person holding govt. position such as

(i) police officer

(ii) public servant

(iii) member of armed forces

(iv) being in management of any institution established under law to keep a person in custody

- with women lacking physical or mental faculty either

(i) due to age as she is below 16 years or

(ii) because she is not capable to give consent or

(iii) suffering from any physical or mental disability

(iv) due to pregnancy

- by a person who is

(i) in a position of authority or trust such as teacher, guardian or relative

(ii) in a position of dominance

(iii) holding position of management or being in staff in any hospital

- when

(i) it is committed during communal violence

(ii) it is committed on same woman repeatedly

(iii) it results into grievous hurt or otherwise endangers life

Section 376A penalises a situation when an act of offender results into death or puts the victim into persistent vegetative situation. Persistent Vegetative Situation is a stage when a person is alive but does not respond to people or things[217] as happened in the case of Aruna Shanbaug Case.[218]

Section 376AB is applicable to cases where the victim is below 12 years

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[217] https://www.nhs.uk/conditions/disorders-ofconsciousness/#:~:text=A%20vegetative%20state%20is%20when,hand%20when%20it%27s%20squeezed%20hard)

[218] Aruna Ramchandra Shanbaug was a staff nurse employed in King Edward Memorial Hospital, located in Mumbai. One of the sweepers of the hospital attacked her on 27th November 1973. He choked and strangulated her via a dog chain in order to restrain any movement from her end in an attempt to rape her. Upon realizing that Ms. Aruna was menstruating he sodomized her. The very next day, on 28th November 1973 Ms. Aruna was found lying on the floor with blood everywhere and all over her. One of the cleaners found her in an unconscious condition. The strangulation via the dog chain ceased the supply of oxygen to her brain causing severe damage to the cortex of the brain. She sustained brain stem contusion too along with cervical cord injury. A petition for the case was filed under article 32 of the Indian Constitution by a friend of Ms. Aruna in the year 2009, after as many as 36 years of the incident. For so many years Ms. Shanbaug has been in a "Permanent Vegetative State". She has become extremely feeble and infirm.

Section 376D applicable to situation when more than one person is indulged in commission of rape. The Section provides that all people shall be deemed to be to have committed rape even if it is committed by or more persons from the group.

Section 376DA and Section 376DB provides punishment for gang rape where the victim is below 16 years and 12 years respectively.

Section 376E cover cases where a person is a habitual offender.

Section 376B and Section 376C are applicable to situations where the act does not amount to rape but has been made punishable to position held by the offender.

Section 376B is applicable to cases where the husband commits rape of his wife during separation. Now the act does not amount to rape due to exception 1 of Section 3 75 but has been made punishable if it is committed during separation under decree of court or otherwise. The theory behind penalising this act is discussed in detail under topic of Marital Rape.

Section 376C covers cases where the women indulges in the act with consent but that consent has been obtained either by inducement or by seducing her using his dominating or fiduciary position.

2. 2.6. **<u>Punishment for Rape</u>**

The punishment for the offence of rape is provided under Section 376(1) of IPC. It has undergone a sea change after 2013 amendment. Before 2013, it was minimum 7 years and can be given upto life imprisonment or 10 years with fine. The nature of imprisonment was the discretion of the judge. The judge has the power to give punishment below 7 years after recording special reasons.

In case of rape of a wife who is 12 years or above but below 15 years, the punishment is merely upto 2 years with fine. If she is below 12 years then the punishment is same what is given in any rape case. For the aggravated form of rape covered under sub

section (2) of Section 376, the minimum punishment was 10 years and can be given upto life imprisonment.

After 2013 amendment, the minimum punishment of rape under sub-section (1) is 10 years and maximum is life imprisonment. The discretion to give punishment below minimum punishment and the difference in punishment in case of rape of a wife below 12 years and above has been omitted. After 2013 & 2018 amendment, the punishment has been enhanced for certain offences such as:

Offences	Punishment
Rape of woman below 16 years	Minimum 20 years and maximum upto LI
When rape results either in vegetative state or death	Minimum 20 years and maximum upto LI or Death
Rape of woman below 12 years	Minimum 20 years and maximum upto LI or Death
Rape by person in authority	RI of minimum 5 years and upto 10 years with fine
Gang rape	Minimum 20 years and maximum upto LI & fine
Gang rape of woman below 16 years	LI & fine
Gang rape of woman below 12 years	LI & fine or Death
Repeated Offenders	LI or Death

The sum/ aggregate of punishment depend not upon the social status of the accused or of the victim. The deciding factors are the nature of act and its gravity, age of the victim and conduct of the offender at the time of incident. Besides these factors, the court while determining the sentence must kept in mind the outcry of the society in such heinous offences and impose sentence which will create deterrence effect among the society.

2.2.7 Attempt to Commit Rape

Attempt is an inchoate crime which is made an offence to prevent the offender from committing the act. It is a preceding stage of the commission of an offence. It occurs when the commission of an offence is prevented or has not been accomplished due to circumstances which are beyond the control of the assailant.

Any offence passes through four stages before completion- Intention, preparation, attempt and commission. A person can be held liable for the offence when the fourth stage is succeeded. To curb the crime rate, it is imperative to stop the commission at initial stages because if the same is not done then we are indirectly insinuating the person for the commission. Hence, the third stage i.e. attempt is also made punishable. Only for grave and serious offences, second stage i.e. preparation stage constitutes an offence such as dacoity, waging war against state and others.

It is difficult to determine when preparation stage ends and attempt starts. The apex court evolved different tests for the same such as "*proximate test*", "*locus poenitentiae"* and the "*penultimate act"* test. The provision of the offence of attempt is covered under both general and special laws. The major bifurcation of it is:

i. Attempt of an offence is a specific offence and covered under separate provision. Example – Murder (Section 300 r/w 302 of IPC) and Attempt to Murder (Section 307 of IPC)

ii. Attempt of an offence is a separate offence but covered under same provision in which commission of an offence is provided. Example – Robbery (Section 390 r/w 392) and Attempt to Robbery (Section 393)

iii. Attempt to commit suicide (Section 309)

iv. But if the attempt is not covered under any of the above then it is punishable under general provision of offence covered under Section 511 of the IPC.

The attempt to commit rape is not a separate offence hence the same is punishable under Section 511 of IPC. Earlier, the act was punishable if the step has been taken in the direction of commission and thus, a person can be held guilty of rape. But after 2013 amendment, certain new offences have been formed. Thus, an act like trying to disrobe a woman to commit rape was earlier treated as attempt to rape if the act is not

finished but now he would be liable either for attempt to disrobe or disrobing or outraging the modesty of rape. Only if the prosecution is able to make out a case that he was doing the act with intent to commit rape, only then a person can be held liable for attempt to commit rape.

2.2.8 Non-Disclosure of Identity

Victimisation of a victim springs with the act of the offender. The suffering of the victim can be personal or with regard to property.[219] Personal victimisation can be physical, psychological, sexual, emotional or otherwise depending upon the nature of offence. But the act of rape encompasses all. It is palpable from the first generation theory as given by criminologists like Hans Von Hentig and Benjamin Mendelsohn who termed it as "Victim blaming" because they believed that victims played a major role in commission of a crime/ offence by equally contributing with the accused through their conduct. Thus culpability is also inflicted upon the victim.[220]

The torment or agony of the rape victim does not come to an end with the end/cessation of an act as it has trickle down/ **crippling** effect. The misery multiplies once a person encounters society after the act. Thus, when we talk about the offence of rape, the plight of rape victim is not different then in 1980s. The society and the various non-state entities and institutions of criminal justice system either its police or judiciary, still blame victim for the occurrence of such heinous crime irrespective of the fact the it wrecked the very existence of the women and reduced it to animal state.

When society and various other entities such as media and health workers come across a rape victim, they afflict more suffering than providing any relief to the victim. Contrary of providing any strength or compassion to the victim of rape, society starts questioning the character and conduct of the victim itself such as what she was doing late outside, why she was wearing short clothes, her make up overdo is the reason behind all this and others. When victim was taken to hospital or any medical institution for health care, it is the responsibility of the service providers to give timely and quick aid to the victim. It has been noticed that they try to shirk from their duties in apprehension of harassment at the hand s of police or court visits. And

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220 S.M. Afzal Qadri, *Ahmad Siddique's Criminology Penology and Victimology,* (EBC, New Delhi, 7th ed., 2019)

in cases of sexual offences, as medical examination of the victim is sine qua non for collection of chief evidences with regard to commission of an offence, but victim of rape suffer humiliation and discrimination there also. Despite government and court guidelines against conducting two-finger tests, it is found that doctors still undertook it to verify the fact whether victim was habitual to sexual intercourse or not. This test has enhanced the adversities of the victim by manifolds. The institution of Media, the fourth pillar of democracy, is one of the most powerful institutions as it has the power to mould the thinking of the public at large. But in order to have high TRPs and to make sensational news, these media houses deflect from their calling rather acts insensitively and irresponsibly. They not only reveal the particulars of the victim of sexual offences but flashes the animated content of the act repeatedly without giving a thought to the consequences of this on the victim and her family members.

The authorities of Criminal Justice System are not different. They also act ignorantly and irresponsibly towards the victim.[221] This has been observed by Hon'ble Justice Krishna Iyer[222] when he remarked that

"**Tears shed for the accused are traditional and 'trendy' but has the law none for the victim of crime, the unknown martyr?"**

The first entity of CJS with whom victim has encounter is police. The main task of the police authorities is to investigate the matter in length. But they dodge their duties either by refusing to lodge FIRs or by coercing the victim not to pursue the case and in extreme cases, they distort the facts of the case by indulging with the offender. Thus, it makes it difficult for the victim to seek justice in the hostile environment. After suffering all that what is attributed to the police, the ordeal of the victim does not end. It rather begins afresh with the presenting of the charge sheet in the court where she has no place of its own. This is evident from the following lines:

"In our courtrooms we have seen judge has a place to sit,
Lawyers have place to sit, the accused has specific place and witness has witness box,
But unfortunately, the victim does not have any place inside the court room,

[221] Dr. Deepa Singh, Dr. Malvika Singh, et. al., *Criminology, Penology & Victimology*, (The Bright Law House, New Delhi, 2nd ed./2019)
[222] Justice Krishna Iyer, "The Criminal Process and Legal Aid", *IJC*

Though criminal justice system all are meant for victim's plight.[223]

The victim's stand in the court is merely as one of the witnesses of the case. Thus, the victim neither gets opportunity to represent its case of its own nor get any opportunity of hearing on certain aspects like adjournment of hearing or granting bail to the offender. In case of sexual offences, the plight has more deteriorated as the court sits as a silent spectator and does not forbade the defence counsel from asking unethical and scandalous questions to the victim. Sometimes the court also indulges in practice which is antithetical to the position they hold. As, in the historic Mathura Rape case, the judges disbelieve the testimony of the prosecutrix on flimsy grounds such as lack of resistance on the part of victim,, indulgence in pre-marital intercourse and others and does not hold out from passing remarks on women's character.[224] The Punjab and Haryana HC, while hearing bail application has also passed following remarks on the conduct of the victim which was not apposite especially when the trial court has convicted the accused with 20 years' imprisonment.[225]

"The entire crass sequence actually is reflective of a degenerative mindset of the youth breeding denigrating relationships mired in drugs, alcohol, casual sexual escapades and a promiscuous and voyeuristic world…..

What is equally worrisome is how to retrieve the youth who have dragged themselves and their families into an abysmal situation, be it the victim or the perpetrators."

The high court called the victim's behaviour as a "perverse streak". The court doubted the victim's testimony and used it as "compelling reasons" to rule in favour of the accused, holding that:

"The testimony of the victim does offer an alternate story of casual relationship with her friends, acquaintances, adventurism and experimentation in sexual encounters and these factors would therefore, offer a compelling reasons to consider the prayer for suspension of sentence favourably particularly when the accused themselves are young and the narrative does not throw up gut wrenching

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[223] G.S.Randhawa, "Victimology & Compensatory Jurisprudence", 136 (Central Law Publication, Allahabad,1st ed, 2015)

[224] Supra 163

[225] The high court in **Vikas Garg and other v. State of Haryana**, (2017) P&H HC held that:

violence, that normally precede or accompany such incidents. We are conscious of the fact that allegations of the victim regarding her being threatened into submission and blackmail lends sufficient diabolism to the offence, but a careful examination of her statement again offers an alternate conclusion of misadventure stemming from a promiscuous attitude and a voyeuristic mind."

With the objective of curbing the hostility and harassment of rape victim, it is imperative to protect the identity of the rape victim so that social pariah and ostracization can be shunned.

For that the legislature has inserted Section 228A[226] in IPC in the year 1983which penalises the disclosure of the identity of the rape victim. It provides that except in certain circumstances, the disclosure of any particulars of rape victim which reveals her identity is made punishable with imprisonment which may extend to 2 years and fine. Similar provision has been inculcated under Section 23 of POCSO to protect the privacy of child victim.

The term "identity" as used under Section 228A has not been defined either in IPC or CrPC or in any other criminal law. Thus, the gap has been used by the media houses recklessly and restricted/limited its meaning to the "name of the victim". The Apex

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[226] **Disclosure of identity of the victim of certain offences, etc.—**(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.
(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is— (a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or (b) by, or with the authorisation in writing of, the victim; or (c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim: Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation. Explanation —For the purposes of this sub-section, "recognised welfare institution or organisation" means a social welfare institution or organisation recognised in this behalf by the Central or State Government.
(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. Explanation —The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

Court in the case of **Nipun Saxena and Another v. Union of India and others**[227] has widened its ambit and observed that the term "identity" is not confined only to the name of the victim but incorporate any fact or substance from which the identity of the victim can be inferred or disclosed either its the information of an exam which she has cracked or the pictures of the relatives, neighbours or of the locality or village. [228]

There are three exceptions situatins when the identity of the victim can be disclosed such as

a) **In the interest of the victim**[229] - The identity of the person can be disclosed where it is necessary to protect the interest of the victim. But nothing has been categorised/ classified which can be considered as "interest of victim". The court while discussing Section 24(5) of POCSO Act has allowed the publication of the picture of the victim both under POCSO and IPC, when the identity of the victim cannot be established by any other cogent means provided the nature of the offence committed against the child or rape victim should not be disclosed. The court also discussed the issue/ aspect of disclosure of identity to raise "public opinion and sentiment" as time and again the demand has been raised in this regard. The court answered it in negative and held that disclosure to raise public opinion or sentiment is not considered as "interest of the victim" and thus the same is not allowed during lifetime or after death of the victim.

b) Authorised by the victim

c) Authorised by kin of the victim

d) Supreme Court and High Court judgements – Section 228A of IPC is not applicable on publication of Supreme Court and High Court judgements. Thus, the lower courts of subordinate and superior judiciary fall within the ambit of Section 228A of IPC. The judges of lower courts should be cautious while writing judgements and thus, ensure that any fact must not result in disclosure of identity of the victim. But the same rule is not applicable over the constitutional courts and immunity is provided to them due to the superiority and the experience they hold. But we all are

[227] (2019) 2 SCC 703
[228] Para 11 of the judgement
[229] Both in IPC, 1860 & POCSO Act, 2012

familiar with the fact that the judgements of the constitutional courts are widely published and referred. Thus, the impunity given to judges under Section 228A of IPC has a disastrous effect and led to great injustice as it aborted the whole purpose which the legislature intended to achieve. This has been observed by the apex court in the case of **Bhupinder Sharma v. State of Himachal Pradesh**[230] where the court opined that irrespective of the fact who disclosed the identity of the victim (media or the judges), the social purpose which the provision tries to achieve becomes redundant. Thus, they shirk from using the name of the victim and opted to refer her as "victim".[231]

e) Judicial Attitude

Section 228A is silent on the aspect of disclosure of name of the victim while filling appeal memo under proviso of Section 372 of CrPC, 1973. The Supreme Court in the case of **Nipun Saxena and Another v. UOI and others** has harmoniously construe the substantive[232] and procedural[233] law and laid down the procedure which needs to be followed by the victim at the time of filling appeal. The victim can choose pseudonymous name in appeal memorandum in such manner that the same should not be identified with other person. Along with appeal memo, an application for non-disclosure of name should be attached. The documents where it is mandatory to disclose the name of the person as per rules such as affidavit, in that case a person should send those documents in enclosed envelop along with appeal memorandum and application. Further it is the bounden duty of the court that those documents should not be put into public domain.

2.3 Procedural Law (CrPC & IEA)

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230 (2003)8 SCC 551

231 We do not propose of mention name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short the 'IPC') 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. True it is, the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of presenting 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. We have chosen to describe her as 'victim' in the judgment.

232 Section 228A

233 Procedure of making appeal memo

2.3.1 Register FIR or Making complaint

Whenever the incident of rape occurs, victim has two ways to put criminal justice into action- one is lodging FIR and second is making a complaint. The term FIR stands for First Information Report. The term is not defined either under CrPC or IPC. Section 207 of CrPC has expressly used the term referring to the statements recorded under Section 154 of CrPC.

Thus, FIR refers to a document which has been formulated by police officer containing the information regarding the commission of a cognizable offence. The essentials of the FIR are-

a. The offence must have been committed. If the offence is yet to be committed or there is a suspicion that the offence might be committed then FIR is not lodged rather entry regarding the same is recorded as DDR.

b. Offence must be cognizable. The term "cognizable offence" is defined under Section 2(c) of CrPC as those offences where police can arrest person without warrant. Whether offence is cognizable or non-cognizable is to be determined from schedule first of CrPC where column 4 talks about the nature of offence. If offence is non- cognizable then the report is recorded as DDR and the person is forwarded to the magistrate with a copy of it for further action.

c. It can be given by any person irrespective of the fact that he has no interest in the incident.

d. FIR can be made in written or orally form either by personally visiting the police station or by telephone or telegraphically.

e. It must be signed by the informant so that the authenticity of the report can be established.

f. It is read over to the informant and a copy of it is provided to him free of cost.[234]

[234] Dr. KN Chandrasekharan Pillai, *R.V.Kelkar's Criminal Procedure* (Eastern Book Company, Lucknow,5th ed., 2011)

The purpose of the FIR is to initiate the criminal justice process and to record all the available information regarding the incident clearly and precisely so that the same cannot be challenged later on. Though it is not necessary that FAR should include all information With regard to the act like name of the criminal, where it has occurred, the instrument which has been used to commit the crime and others because FIR is not the encyclopaedia of the crime. It is sufficient if it discloses the commission of cognizable offence.

FIR can be lodged anywhere in India. It is not mandatory that it must be recorded at the place of incident. If it is made at the place where the act has not occurred then it is recorded as "zero FIR" and then it is to be forwarded by the police officials to the police station under whose jurisdiction the act has occurred. The police official has no power to refuse to lodge the FIR on any pretext if the offence is cognizable. The refusal by police official has been made punishable act under Section166A of IPC. In case of refusal the informant has the right to approach The superintendent of police with regard to lodging of FIR through post. If he finds that the Offense is cognizable then he can order the concerned station house officer to register the same. A person can also approach the magistrate directly or when police refuse to lodge FIR under section 156 sub-section (3) by making a private complaint.

The term complaint is defined under Section 2(d) of CrPC as telling the concerned magistrate, orally or in writing, about the commission of an offence with an objective of his taking action on it. On receiving complaint, the magistrate if appeased to the fact that prima facie is made out then he can either take cognizance of an offence after following the procedure of Section 200 of CrPC or he can ask police officer to investigate if the offence is cognizable.

Irrespective of duty imposed upon police officer to record FIR in cognizable offences, the reality shows different picture. Rape is a cognizable offence thus FIR must be lodged. The severity of under reporting is highlighted in the report of National Family Health Survey (NFHS) 2015-16 as it help us to compare the data collected by NFHS and those compiled by NCRB. NFHS made a survey of 79, 729 women with regard to sexual and physical violence faced by them during this period. If assault or

rape by current husband is excluded even then the sexual assault by any other person is meagrely reported i.e. 15% only.

The major reason for such high under-reporting is non-adherence of law by the police. The Human Rights Watch report titled "**Everyone Blames Me"** has revealed that police refuse to register FIR either due to economic or social status of the assailant[235] or due to maintain low crime record. Sometimes, police also imposed pressure on the victim to compromise with the accused or to change her stand or statement or refuses to give a copy of FIR.[236]

2.3.2 Investigation by Police

After FIR, police officer investigates the offence without further permission or order from the magistrate. Section 160 of CrPC provides that the police officer shall examine the woman at the place of her residence. The purpose of the provision is to provide comfort and to save her from harassment and trauma. Thus, she cannot be called in police station for the purpose of examination. This provision does not apply on suspects.

There is no time period prescribed to complete the investigation. Section 173 sub-sec (1) merely prescribes that it must be completed without delay. Section 167(2) provides that if police fail to file chargesheet within a period of 60 or 90 days with respect to offences punishable with imprisonment up to 10 years or above respectively then the accused will get right of bail after that. Thus, to defeat the right of the

[235] Police in Lalitpur district in Uttar Pradesh state refused to file a complaint after 22-year-old Barkha and her husband were attacked by three men from their village around midnight in their home on January 30, 2016. Barkha said two men beat her husband and took him away while the third, belonging to a dominant caste, raped her, abused her using caste slurs, and threatened to kill her if she went to the police. Barkha says the police were reluctant to act because the main accused is a local leader of the ruling political party. Finally, after Barkha approached the judiciary, on March 2, the courts ordered the police to file an FIR and take appropriate action. However, the police took another eight months to register the FIR. Meanwhile, Barkha and her husband had to flee the village and and move hundreds of miles away after repeated threats and harassment from the accused and others in the village.

[236] After Kajal, 23, filed a complaint of gang rape on September 14, 2015, the police in Madhya Pradeshshall state refused to give them a copy of the FIR, asking them to return the following day so that their statements could be recorded by a magistrate. Kajal told Human Rights Watch that when they arrived at the police station, the police detained her father, and asked her to tell the court that she filed a false complaint of rape at her father's behest. Kajal says the police also made her sign several blank pages, slapped her, and beat her with a stick. Police also allegedly threatened to arrest Kajal's father on false charges if he did not sign a statement that his daughter had filed a false complaint. Kajal says that out of fear she gave a false statement to court.

accused police tries to file chargesheet within that period. But it is not obligatory. But in case of rape of a child, it is incumbent to complete investigation within a period of three months.[237]

Magistrate takes cognizance on police report filed by police officer after investigation of an offence.[238] If it discloses that no offence has been committed or magistrate decides not to take cognizance then before closing the case, the magistrate is bound to inform the informant so that he can file protest petition. If the magistrate decides to take cognizance on the basis of protest petition, then petition is treated as complaint and the procedure of complaint is followed.[239]

2.3.3 Medical Examination

To uphold the rule of law in the court of law, evidence plays a very significant and crucial role during civil as well as criminal trial. Forensic evidence helps to prove or disprove a connection between individual and objects or places. In rape trials, heavy reliance is placed on evidence collected from medical examination of victim as well as of accused. The provision is added by Criminal (Amendment) Act, 2009.

Medical examination of rape victim - section 164A

On registration of FIR or of complaint of rape or attempt to rape, the victim is taken for medical examination, accompanied with guardian or parent and on the basis of which medico-legal report is prepared. The procedure for the same has been laid down under Section 164A of CrPC which is as follow-

1. It must be conducted within 24 hours from the incident. The delay of more than 24 hours will result into extinction or destruction of evidence.
2. It must be done by a registered medical officer of a government hospital or Hospital Run by a local authority. In case of absence of such medical officer it can be conducted by any other registered medical practitioner.

[237] Section 173(1A)
[238] Section 190(1)(a)
[239] Batuk Lal, *The Code of Criminal Procedure Code,* (Central Law Publications, Allahabad, 2nd ed., 2011)

3. It must be done with the consent of the victim or of the person who is competent to give consent on her behalf. If not taken, then whole examination becomes farce and is not admissible in court.

The report shall contain the particulars which are enumerated under the section[240] and also mentioned in the medical examination form.

As it provides examination of the "person" of the victim and not merely body thus it implies examination of body as well as of apparels and other articles wearable by her. The whole process must be conducted with utmost decency.

It is prevalent practice of conducting “two-finger test” of the victim while examining her. It is also known as Per Vaginal (PV) Examination. It is an age-old practice undertaken in various cultures for several reasons.[241] It determines the virginity of the woman. In this test, two fingers are inserted by the doctor in the vagina of the woman to examine the presence of the hymen[242] and to know the laxity of the vagina. It is believed that hymen ruptures or vagina becomes flexible only due to sexual intercourse. Thus, if there is no hymen or the vagina is flexible then it is opined that woman is habitual to sexual activity. It is conducted in violation of Article 5 of UDHR, Article 7 of ICCPR, Article 12 of ICESCR, Article 6 of CAT and of CEDAW to which India is a signatory. It also violates right to privacy and dignity given under Article 21 of COI and right to equality given under Article 14 of COI as it is

[240] Section 164A (2)

[241] It is defined as “the thin membrane of skin that may stretch across part of the vagina opening” .

[242] In 2004, a Zimbabwean village chief, Naboth Makoni, stated that he would adopt a plan to enforce virginity tests as a way of protecting his people against HIV. He explained that he focuses on girls because he believes they are easier to control than boys [3]. In South Africa, where virginity testing is banned, the Zulu tribe believes that the practice prevents the spread of HIV and teenage pregnancy [4]. In Zulu culture, there is a tradition in which girls of a certain age can perform a dance for the king. However, only virgins are allowed to participate [4]. If a girl is tested and declared a virgin, she brings honor to her family. If a girl is found not to be a virgin, her father may have to pay a fine for ‘tainting’ the community and the girl may be shunned from the ‘certified’ virgins [1]. Because of the ramifications that being considered impure have for the girls and their families, virginity testing has the potential to be a life-changing event. The United Kingdom had the policy to use virginity testing on women who said they were immigrating to marry their fiancées who were already living in the country [5]. The British government believed that if the women were virgins, they were more likely to be telling the truth about their reason for immigrating to the country. The policy ended in 1979

conducted only on women and not on male victim. It also undermines the significance of the consent of the victim as requisite under Section 164A of CrPC.[243]

The test does not have any legal basis but medical protocol has justified it germane to determine the virginity especially in rape cases as provided in the Modi's textbook (Modi, A Textbook of Medical Jurisprudence and Toxicology).[244]

But the change has come as in 26th ed. of Modi textbook which provides that the test is demeaning to the dignity of women and it infringes the fundamental right of privacy of the victim.[245]

The test is unscientific, as medically there is no rule that rupture of hymen is due to sexual intercourse. It can occur due to various reasons such as exercises like cycling, swimming or masturbation or use of typhoons etc. On the other hand, intact hymen does not rule out sexual assault.[246] Thus, examination of hymen is not relevant for the purpose of trial. Similarly, per vagina examination is irrelevant as it does not prove beyond doubt that victim is accustomed to sexual intercourse because it depends upon the size of fingers inserted.[247] (1994 case)

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[243] Ateriya N and NK Aggarwal, "The validity of Two finger test in india:Is it a violation of women's Human Rights?", 6(4) IJFP417-419 (2019)

[244] There is a chapter on Virginity, Pregnancy and Delivery and on Sexual Offences where it is stated that the question of virginity arises in case of rape. In terms of the 24th Edition of Modi's Textbook, the question of virginity is relevant and can be ascertained through an inspection of the status of the hymen, even though he states that an intact hymen is not an absolute sign of virginity. Modi's Textbook also provides the methodology for the examination of the hymen and justifies the same on the strength of establishing whether or not the victim is a virgin. He emphasized on the concept of false charges which is common in rape cases, hence it is necessary to examine the veracity of the victims statement by checking her virginity.

[245] It is demeaning to the status of a woman to be forced by orders of Court to carry out test of virginity of woman and must be taken as a grave threat to privacy, a cherished fundamental right. The testimonial compulsions for DNA testing described elsewhere the book with reference to judgments of the Supreme Court shall apply, a fortiorany virginity tests also. Unlike a DNA test which is scientific and assures 99.99 percent accuracy, virginity test, where there is no pregnancy or child birth, could never be conclusive. While Section 53 Cr.PC which allows for taking samples of blood or urine the course of criminal investigation, there is no scope for clinical violation of a women body on specious grounds of unraveling truth. Another instance where Courts have refused any medical practice that is invasive of privacy and regarded as despicable, requiring to be discarded is 'the two finger test' to assess past sexual conduct of the woman in cases of sexual abuse. For the same reason, virginity test shall also be discarded. (emphasis added)

[246] *Nisreen Khambati, "India's two finger test after rape violates women and should be eliminated from medical practice", BMJ, avilable at:*

[247] Narayanamma (Kum) v. State of Karnataka & Ors., (1994) 5 SCC 728

The test victimize the prosecutrix as the insertion of finger is very painful and emulate the act of rape. Thus, it smashes the physical and mental well-being of the victim.[248]

India is still governed by myths. It is commonly seen in rape trials where the testimony of the unmarried victim is not relied upon and the act is considered consensual on the ground that the hymen of the lady is already ruptured or the two finger test is passed and hence she is habitual to sex and the case lodged by her is false. Earlier (before 2002 amendment), the test was relevant as Section 155 sub-section 4 of IEA permits the evidence with regard to past sexual history of the prosecutrix. Thus, defence lawyer heavy relies on medico-legal report to discredit her testimony and believe that woman has filed false case of rape against the accused. But after 2002 Amendment, the test becomes irrelevant as it omitted Section 155(4) as well as Section 53A added by 2013 Amendment has excluded evidence with regard to character of the rape victim and Section 114A provides with regard to the presumption of consent in favour of the prosecutrix. Also, in the case of **Lilu @ Rajesh & Anr v. State of Haryana[249],** the SC has held that the two-finger test violates right to privacy, dignity and of physical and mental integrity. Thus, the test, even if conducted, cannot be relied and will not amount to consent of the victim for the act of rape. In the year 2014, the Ministry of Health Affairs and Family welfare has also issued guidelines with regard to medico-legal examination in case of sexual violence. It provides that two-finger test must not be conducted while making medical examination of rape victim. It also prohibits doctors from making any comment with regard to laxity of vagina or sexual history of victim.

Irrespective of legal development and guidelines, the test and biasedness is prevalent in India as apparent from Human Rights Watch Report "everyone blames me".[250] Thus, the medical examination of victim is always a harrowing experience. The reasons behind the continuation of this tormenting practice are:

a) In Federal structure of India**, health is a state subject**. As a result, 2014 guidelines issued by Centre are not per se applicable on states. They need to pass their

[248] Debayan Bhattacharya and Dhaval Hemesh Sheth, "The Two finger test, the failure of forensics and the predicament of indian rape victims", available at:

[249] AIR 2013 SC 1784

[250] Human Rights Watch, Report: *Everyone Blames Me* (2017)

own directions. But only nine states of India have issued guidelines in congruence of 2014 guidelines. There are certain states who issued guidelines even before 2014 but the guidelines found obsolete and lack sensitivity and precision of 2014 guidelines.[251]

b) Either due to **lack of infrastructure** or paucity of time, doctors do not use SAFE[252] kit while examining the victim as mandated by central guidelines. They also shirk from filling complete form of medical examination as issued by government and opt an out-dated form which does not contain full particulars which are required to be filled by the doctor.[253]

The DNA examination is also inadequate due to lack of forensic labs in the country. Merely three out of six labs are working in the country. Even there is a great scarcity of professionals to conduct such tests. All these resulted in huge backlog of cases at investigating stage and thus have catastrophic implications in a country where every 15 minutes a rape is committed.[254]

c) Biasedness - Rape victim does not only suffer at the hands of accused but the formidable setback/plight comes from society and criminal justice system which is male centric and is dominated by preconceived notion and cultural values where women's conduct is always judged through a narrow prism of misogynist thinking. Thus doctors, police personnel and judges are not left untouched from such patriarchal thinking. Thus, the o medical practitioner is prejudiced while making medical report of rape victim which is highly based on victim's sexual history. This is the result of lack of training as per new medical protocols.

Police personnel can play a positive role in reducing the sufferings of the victim as they are the first ones in whose contact victim comes. But reports show that they are not adequately sensitised. They also mishandled the case and also creates hindrance in

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[251] Victims of Rape in South Asia face further violation from the courts, *available* at: https://www.economist.com/asia/2018/06/30/victims-of-rape-in-south-asia-face-further-violation-from-the-courts

[252] Sexual Assault Forensic Evidence

[253] Madhya Pradesh: SAFE kits for rape survivors absent in most private hospitals, *available* at: https://timesofindia.indiatimes.com/city/bhopal/safe-kits-for-rape-survivors-absent-in-most-pvt-hospitals/articleshow/73163039.cms

[254] The Two-Finger Test, the Failure of Forensics and the Predicament of Indian Rape Victims, by By Debayan Bhattacharya and Dhaval Hemesh Sheth, OCTOBER 11, 2021 ~ JILSBLOGNUJS, The Two-Finger Test, the Failure of Forensics and the Predicament of Indian Rape Victims – The Journal of Indian Law and Society Blog.pdf (last accessed on 7th August, 2022)

conducting medical examination of victim by asking unessential questions to the doctor.

Judges are the backbone of our society. They are considered equivalent to God after doctors. They not only impart justice but are the ones who mould the way of thinking of the society. While discharging their duties, their decisions should be based on facts and law and must not be affected by any kind of biasedness or prejudice. But when it comes to trial of sexual offences, "judicial stereotyping"[255] is the part and parcel of the courts. Thus, even judges do not shirk from discussing or passing decisions on the basis of prosecutrix's conduct or character.[256]

Medical examination of rape accused - 53A

If a person is apprehended on the accusation of rape or attempt to rape then the police officer can get him examined medically for procuring evidence which will connect him with the offence committed. At the time of examination, the medical practitioner can take sample of anything which is useful for the purpose of matching DNA. The term 'examination' is given same meaning which is explained under Section 53 of the Code.

A legal issue arises that whether taking samples from the accused is violation of Article 20(3) of the constitution which provides protection against self-incrimination. The issue has been tackled by the court in the case of ***Kathi Kalu Oghad case*** where the court differentiated between furnishing evidence and testimonial evidence. The court held that Article 20(3) prohibits evidences which are testimonial in nature. Secondly, the samples taken for the purpose of examination fall under "furnishing evidence and not testimonial evidence and the constituent assembly never intends to hinder the investigation of offences. Hence the taking of sample does not violate the fundamental right of self-incrimination.

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[255] It referes to the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group (e.g. women). It is used, also, to refer to the practice of judges perpetuating harmful stereotypes through their failure to challenge them. – defined by Apex Court in the case of ***Aparna Bhatt v. State of MP, 2021(2) RCR (Cri)787 (SC).***

[256] The Two-Finger Test, the Failure of Forensics and the Predicament of Indian Rape Victims, by By Debayan Bhattacharya and Dhaval Hemesh Sheth, OCTOBER 11, 2021 ~ JILSBLOGNUJS, The Two-Finger Test, the Failure of Forensics and the Predicament of Indian Rape Victims – The Journal of Indian Law and Society Blog.pdf (last accessed on 7th August, 2022)

In the case of Selvi v. state of Karnatka, the apex court dealt with the legality of scientific tests such as beep test, lie detector and other tests. The issue was whether these tests fall within the ambit of "other tests" as used in the Explanation of "examination" under Section 53. The court held that these tests

3.4 Law regarding Bail

Indian Criminal Law is based on fundamental principle of "presumption of innocence" which begets "right to fair trial". To effectuate this right, innumerable rights of the accused are acknowledged/ recognised by the Apex Court. One of such right is 'right to bail'.

Bail is a temporary release from jail during the pendency of a case. It is governed by provisions covered under Chapter XXXIII[257] of the Criminal Procedure Code, 1973 (CrPC). In bailable offences, bail is an absolute right. Thus, Court has no power to refuse it. But in non-bailable offences, it is discretion of the Court.

a) Victim's right of hearing in bail applications

Whether offence is bailable or non-bailable is determined from Column 5 of Schedule 1 of the Code[258]. The offence of rape as per Schedule is a non-bailable offence. While deciding an application for bail in non-bailable cases, the court hears the accused and public prosecutor. The victim has no legal right to put forward his standing. Section 301[259] of CrPC has given the right to the victim to appoint a lawyer but it applies only at the stage of trial. The lawyer appointed by victim can only assist the public prosecutor. Thus, he cannot present his case independently. At the most, he can present a copy of written arguments after closure of evidence. It is to be done with the permission of the court. Court has discretion to allow it or not. Thus, the right of the victim is not absolute. Hence in bail matters, the victim has no legal right to present

[257] Provisions as to Bail and Bonds

[258] The Criminal Procedure Code, 1973

[259] **Appearance by Public Prosecutors.** - (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.
(2) If in any such case, any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

his case. The courts in few cases allow it on the ground of natural justice. He can only apply for cancellation of bail after the same is granted.[260] Cancellation of bail cannot be granted in a mechanical manner. Cogent reasons are must to set aside the bail granted. Rejection and cancellation of bail stands on different footing. Court may grant or refuse bail keeping in view the antecedents of the offender, the nature and gravity of the offence, among other considerations. Whereas in case of cancellation, conduct of accused posts the grant of bail is the determining factor. Thus if the accused tries to abscond or tamper with the evidence or tries to intimidate the victim or witnesses or evade the administration of justice and others, then the court may cancel the order of bail. The list of these grounds is not exhaustive. Along with these, the court can also revoke the order of bail in case the lower court has illegally passed the order of bail without appraising the pertinent factors.

In the case of **Jagjeet Singh & Ors v. Ashish Mishra @ Monu & Anr[261]**, the Apex court dealt with the issue regarding the right of hearing the victim at the time of bail proceeding. The apex court after pondering over the extremity of the victim and her right of representation held that the rights of victim are not brutum Fulmen. The victim has exclusive independent rights which cannot be made ancillary to the right of the state as victim is the primary suffer of the crime as against the state whose victimisation is secondary in nature. Thus, the victim has a right to represent at all stages of criminal justice system after the lodging of FIR till final disposal of the case. Thus, court shall hear the victim while deciding the application of bail of the accused. Mere appearance by public prosecutor is not sufficient.

a) <u>Extraneous Bail Conditions – a cause of victimisation</u>

Right to fair trial is one of the fundamental rights recognised under Article 21 of the Constitution. Under its garb various rights of the accused have been recognised such as right to open court, taking evidence in his presence, right to legal aid and others. One such right is right to bail which is based on the presumption of innocence as it provides that person shall be presumed innocent till proved guilty. Chapter 33 of CRPC dealt with provisions of Bail. As per section 436, bail in bailable offences which are less serious in nature is the right of the accused where as in non-bailable

[260] Mahesh Pahade vs State of MP (2018) MP HC
[261] SLP (Cri.) No. 2640 of 2022

offences, which are heinous and more serious in nature, the court has discretion either to grant or refused bail. If the court decides to grant bail then the court has power to impose conditions enumerated under sub-section (3) of Section 437 of CRPC. Despite providing certain conditions, the sub section provides free hand to the court to impose any condition in the "interest of justice". The court used this provision recklessly and imposed harsh and sometimes irrelevant conditions such as to act as Covid warrior[262] and act on front line or to enter into mediation with the victim[263] or on the pretext of marriage with the victim. In the case of OP Jindal case, the Punjab and Haryana HC has passed remarks on the conduct and character of the victim irrespective of the fact that the accused has been convicted for the offence of rape for a period of 20 years of imprisonment. in the case of **Aparna Bhatt v. State of MP[264]**, the MP HC has imposed condition on the accused to visit the house of the victim and get tied himself rakhi from the victim and give shagun also. The court has not only undermined the sanctity of the relation of brother and sister but also failed to apply the law in right spirit as the purpose of the provision is to impose condition by which the administration of justice does not hamper[265] and the accused turned up for trial. Thus, this is the means to balance the interest of the accused and the criminal justice system. On the other hand, the conditions imposed by courts are not in consonance with the object of the provision. The apex court while affirming the misogynist attitude and stereotypes prevailing

In the judicial system especially with respect to offence against women and more particularly in sexual offences, the court issued the following guidelines to ameliorate the system:

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[262] In the case of ***Ravi Jatav v. State of M.P.***, MCRC No. 13734/2020 order dated 19.05.2020 passed by Madhya Pradesh High Court., where the Court has directed the accused to present himself as covid warrior and in other cases, the Court granted temporary or interim bail in sexual offences for the purpose of solemnising marriage with the victim.

[263] As in the case of ***Samuvel v. Inspector of Police[263]*** where the Madras High Court has ordered mediation in the case of rape of minor, who delivered child as an aftermath. The only ground of ordering mediation is that the accused has agreed to marry prosecutrix. The Court in the case has failed to make analysis with regard to initiation or factors that led to the order of compromise as the order of the Court is silent on this aspect.

[264] 2021 (2) RCR (Cri) 787

[265] These decisions are contrary to the judgement of ***Kunal Kumar Tiwari v. State of Bihar[265],*** where the Apex Court has defined the expression "such other conditions in the interest of justice" used in Section 437(3)[265] of CrPC. The Court observed that the expression "interest of justice" is capable of wide interpretation and can be used in an arbitrary manner but the same should be interpreted keeping in view the purpose or objective behind the provision that is to advance administration of justice and the trial process.

i. The court shall not impose conditions which necessitate the contact between the accused and the victim as it re-traumatizes the victim.[266]

ii. Victim shall be give police protection on the basis of report forwarded by police after making due inquiry and prevent the accused to make any contact with the victim.[267]

iii. The fact of granting bail to the accuse shall be intimated to the victim/complainant within a period of 2 days so that required appropriate action, if any, be taken.[268]

iv. Judges and state prosecutors shall be trained over a subject of sensitivity[269] and the syllabus of the law and AIBE shall be reformed to inculcate the aspect of gender sensitivity.[270]

2.3.5 Statement of Victim

The statement of the victim of the offence is one of the vital evidence in the trial. The statement is recorded by the police which undergoes into three stages of examination in the court of law during trial. In case of sexual offences, the statement of the victim is recorded by the magistrate under Section 164(5A) of the CrPC and not by the police. The provision has been inculcated to give protection to the prosecutrix from the harassment and to give authenticity to the statement. In case the victim is physically or mentally disabled, then the statement is video graphed as well the help of the interpreter is also taken and the statement so recorded shall be considered as examination –in-chief. Hence, the victim is not called again for the purpose of giving testimony again. It will protect the victim from the agony she will undergo due to reiteration of the details again and again.[271]

It is a rule of prudence that the testimony of the prosecutrix can be acted on and it can be the sole basis of conviction[272] as under evidence Act it is nowhere mentioned that it must be corroborated on material facts by an independent evidence as in the case of

[266] Guideline (a)
[267] Guideline (b)
[268] Guideline (c)
[269] Guideline (f & g)
[270] Para. 45-48 of the judgement
[271] *Ram Jethmalani and DS Chopra, Jethmalani & Chopra's The Law of Evidence, (Thomson Reuters, New Delhi, 2nd ed./ 2016)*
[272] State (NCT of Delhi) v. Pankaj Chaudhary, (2019) 11 SCC 575

an accomplice. The prosecutrix cannot be equated with accomplice as like accomplice she has not played an affirmative role in commission of an offence.[273] This rule of law is hardened with number of case laws. It is developed on the ground that the Indian women is not likely to open up or come forward regarding the disclosure of acts which raises question on her chastity. Thus, bringing up these cases into light gives ingrained assurance of there being true and genuine.[274] Secondly, being a competent witness under Section 118 of the Act, same weightage should be given to her evidence which is given to any other witness unless it is infirm and lack trust.[275]

2.3.6 Assistance during Trial

When the victim reaches court after crossing all obstacles on the path of seeking justice for injustice committed against her and solace from all grief and agony, she expected the temple of justice to be fair and supportive and not cruel and despotic. Contrary to her expectations or surmises and conjectures, the victim is treated horrendously. The provisions which are formulated to provide comfort and to reduce intimidation and harassment of the victim are:

a. **camera trial**

The principle of fair trial demands that the hearing of the case must be conducted in

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[273] In ***State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550***, this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under: (SCC p. 559, para 16) '16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent 8 witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.'

[274] Moti Lal v. State of M.P, Arising out of SLP (Crl) No. 4751 OF 2006, decided on 15th July, 2008

[275] State of Maharashtra v. Chandraprakash Kewalchand Jain (1990 (1) SCC 550).

an open court to which apart from interested parties, general public should also have an access as justice not only be done but it appears to have been done. It also enhances the confidence of people and integrity of the institution. Section 327 lays the general of open court. But the proviso provides exception to it. It lays down that trial in rape cases[276] shall be conducted in camera due to sensitivity and intimacy involved in the matter as the victim might feel scared and ashamed in disclosing or giving testimony in the open court. But the reports formulated after collecting statistics from various courts, it has been found that the court the provision is not followed in right spirit.

b. **Non-exposure to accused**

The accused has a right to fair trial. To ensure the same, Section 273 provides that the all evidences must be taken in front of accused in the court. There are two exceptions:

i. One, when the accused is prevented or allowed to not to be present in court in person.

ii. Second, when the trial of rape is going on and the testimony of rape victim who is below 18 years is to be recorded.

In both the above cases, the evidence taken in the presence of pleader of the accused is sufficient. The second exception given protection to the victim against sufferings which she would undergo after encountering the accused again as the whole incident will backpedal or get refreshed. But the above exception is limited to cases where the victim is below 18 years and not above.

c. Cross-Examination of Rape Victim

When a witness is called by the party to give evidence in its favour and his testimony is recorded by the court, it is called examination in chief. It can be in the form of question answer or narration. The purpose of it is to bring relevant facts about the case before the court.[277]

To check the credibility and authenticity of the witness, a person is put to cross – examination by the opponent party.[278] A witness can be cross-examined, with the permission of the court, by the party who called it for examination if the witness

[276] Covered under Section 376, 376A, 376AB, 376B, 376C, 376D, 376DA & 376DB
[277] Section 138 of IEA
[278] Ibid

turned hostile.[279] The stage of cross-examination is succeeded by examination in chief. The party who is cross-examining the witness has a right to question anything which is said in the examination-in-chief or beyond provided it is relevant to the case or has any impact on the opinion formulated by the court.

Section 148 to 152 of the IEA has put check on the unfettered power of cross-examination and is the duty of the court that these sections are applied in true spirit and the cross-examination does not turn into a source of harassment and agony.

The restrictions on cross-examination enumerated are:

i. Section 148[280] provides that the court shall not allow party to question any question which has no relevancy or significance on the case in hand except on reasonable grounds[281] and tell the concerned witness that he has a right to refuse to answer any improper question.[282]

ii. Section 151 and 152 prevents indecent and scandalous questions or those which has the potential of insulting or annoying the witness. The court is empowered under these sections to determine the nature of question and forbid the same if found in violation of these sections.

In rape trials, it has been found that despite these provisions, the rape victim when appeared in dock for the purpose of cross-examination then the defence council asked all irrelevant and inappropriate questions which is difficult for the victim to answer.

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279 Section 154 of IEA

280 Court to decide when question shall be asked and when witness compelled to answer.—If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

281 Section 149

282 Section 148

The cross-examination results in re-traumatization of the victim and sometimes became more brutal then the actual act. The questions are of such nature that it looks that the victim is the real culprit then the accused. The court fails to maintain the balance between the right of the accused to cross-examine the victim and the right to dignity of the victim. It sits as a silent spectator and does nothing to stop the mockery of the system.

2.3.7 Right of the Victim to Appeal

Appeal is a way of scrutinising the decision of the lower court by the higher court. Chapter-XXIX (Section 372-394) of CrPC deals with appeals. It provides when and by whom appeal can be filed in criminal cases. Section 372 provides the basic rule that appeal is not an inherent right of the person as the same is a statutory right exercised by the person under the provisions of law (Code[283] or any other law). The appeal can be filed in case of –

A) Conviction[284]

B) Inadequacy of sentence[285]

C) Acquittal[286]

Before Criminal Procedure Code (Amendment) Act, 2008, the right to appeal was given only to accused, in case of conviction and to the state and central government, in case of inadequacy of sentence and acquittal. The right of complainant is also provided in case of acquittal. But that right was not an absolute right. It is subject to special leave taken from High Court. Thus, initially victim has no standing in the appellant court. His rights were ancillary to the state or central government. Thus, if he is not content with the decision of the trial court, then he has no other option then to wait for the government to take action/ appeal against the same. If the government decides not to file appeal against the decision of the lower court, then it is end of victim's journey for justice. Thus, appeal was the prerogative of the state.[287]

[283] CrPC
[284] Section 374
[285] Section 377
[286] Section 378
[287] Section 372 of CrPC: The need to allow a victim to seek enhancement of punishment, available at:

Before 2008, victim was a silent spectator in the criminal justice system. He has no role to play except witnessing the whole process. On the contrary, accused was the child of the criminal justice system. His rights were duly recognised and a whole jurisprudence was laid down. Later, a movement started to protect and strengthen the position and rights of the victim in the criminal justice system. The glimpse of it can be seen in the recommendations of various reports. The 154th Law Commission report has talked about the necessity of rehabilitation in length and how the same can be ensured. Compensation might not adequately help the victim to recover from the aftermath of the offence but it helps the victim to cope with it effectively. Thus, the report recommended the establishment of victim assistance fund and to provide compensation and rehabilitation of the victim.

In 2003, the Malimath committee has exposition the need of the rights of victim and suggested means to provide congenial position to victim in CJS. it proposed to build cohesive witness protection, found ways to rehabilitate the victim, recognise the victim's independent right of representation and the right to appeal.

All This is fructified with 2008 Amendment Act when various rights of the victim got statutory status. By this Act, a proviso was added to Section 372 which conceded the right of victim to file appeal in case of acquittal or conviction for lessor offence or inadequacy of compensation. As this is subjected to the main provision thus the victim does not have absolute right to challenge decision of trial court in all cases. Thus, he has no right to appeal in case of inadequacy of sentence. Only in the given circumstances, victim can file appeal. The amendment came into force on 31st December, 2009. Thus the issue arises whether it is acted upon in cases where incident occurs or impugned decision is given before this date. The P&H HC has observed that right to appeal being a substantive right should be given a prospective effect and not retrospective. Thus, victim can file appeal under proviso of section 372 only against those decisions which have been passed on or after 31st of December, 2009. The date of incident is not the determining factor. The court also adhered that the revision applications filed by victim against the order of acquittal or inadequacy of compensation or conviction for lessor offence before 31st of December, 2009 cannot be converted into appeal under Section 401(4) CrPC after the passing of Amendment

Act[288]. The Court in **Mallikarjun Kodagali (Dead) v. The State Of Karnataka[289]** has affirmed the view of the HC and held that holding contrary to it would go against the intention of the legislature and would superfluous the right.

It is also a question of debate that whether victim, like state or complaint, is also required to take leave to appeal while filing appeal against the order of acquittal. Sub-section (3) of Section 378 provides that the State government and central government shall take leave to appeal while challenging the order of acquittal. Similarly, under sub-section (4) the complainant needs to take special leave to appeal. Section 378(4) is applicable only in complaint cases and not in cases instituted on police report. The legislature has intentionally used the term "complainant" and not informant". Person who lodges the FIR is called informant. Both has different standing and rights under the Code, the issue has cropped that whether victim is also required to take special leave to appeal like the complainant. The position of the complainant and the victim and their right to appeal has been juxtaposed. The term "complainant" is not defined specifically under CrPC. Section 2(d) defines the term "complaint". Thus, complainant is the one who files the complaint. It is distinguished from the victim. The term victim as defined under Section 2(wa) is the one who suffers injury or loss as consequence of an offence. Thus, it is not necessary that victim is always the complainant. As evident from proviso of Section 2(d) and Section 378(6), public servant can also be the complainant though he might not be the victim. With regard to sub-section (4) of Section 378, the Gujrat HC in the case of **Bhavuben Dineshbhai Makwana v. State of Gujrat & Ors[290]** opined that if the victim is the complainant then sub-section(4) applies on him and he needs to take special leave to appeal. A proviso to Section 372 merely lays down the substantive right. It does not elaborate the procedure to be followed. The procedure is given in the subsequent provisions. Under Section 378 both the government (State/ Central) and complainant are obligated to take leave to appeal. The purpose of taking leave to appeal is that the presumption of innocence of accused, which is the fundamental principle of criminal law, has been strengthened with the passing of the acquittal order. Filing of appeal against such order will further harass the accused and also waste his time and money as adjudication of appeal is a time taking process. Thus, it is mandated that the before

[288] The Criminal Procedure Code (Amendment) Act, 2008
[289] (2019) 2 SCC 752
[290] 2012 SCC OnLine Guj

filing appeal the court should apply its mind to decide whether the decision needs reconsideration or not. The idea behind using two different expressions "leave to appeal" and "special leave to appeal" is to differentiate the right of the government from the complainant. Victim in police report cases and of complaint cases were set apart. Thus, where FIR was lodged, victim needs not to take special leave. Hence, Section 378(4) is exclusively applicable on complainant.

Whereas the full bench of P&H HC in the case of **Tata Steel v. Atma Tube Products Ltd.**[291] opined that while imparting rights to the victim, the legislature was conscious of the provision of sub-section (4) and has deliberately decided not to put victim equivalent to the complainant. If the intention of the legislature was to put them on same position, then they would have amended the provision and subjected the right of the victim to special leave to appeal. But no such inclusion has been done. And to give full effect to the rights of the victim that the legislature has shunned this condition in case of victim.

Finally the issue has been settled by the Apex court in **Mallikarjun case** where the court has discussed this aspect in length by referring to the above mentioned judgements and then upheld the view of P&H HC and observed that the legislature has intentionally not imposed any fetters upon the right of the victim. Thus, the judiciary should not dilute the right of the victim as it will amount to rewriting of law which is not the function of the courts.

2.3.8 Compensation

The criminal justice system is set into motion by victim but the whole system is more concerned about accused than victim. A whole jurisprudence is laid down with respect to the rights of the accused where the victim plays no other role than merely witnessing it. The imparting of justice is left upon the mercy of police and public prosecutor.

The victim does not get justice solely with the punishment of the accused but the true essence of it can be achieved by restoring the victim to his pre crime position. Thus, the penology has marked shift from retribution to restoration. But achieving complete restoration is impossible as the psychological, emotional and sometimes physical harm can't be cured entirely. Restoration can be achieved by compensating and

[291] CRM-790-MA-2010

rehabilitating the accused as it aspires the accused to empathise with the victim and comprehend the pain and agony undergone by the victim. Though giving monetary compensation does not provide complete solace to the victim but compensation helps to rehabilitate the victim.

Compensation by Accused

Section 357 provides for compensation to victims by accused. Similar provision was provided under Section 545[292] of 1898 Code[293] which provides for compensation to victim in cases where the accused is held liable for offence punishable with fine.

It provides that the court may, in such cases, order that the part of fine be used;

a) To pay the expenses of prosecution

b) In case of injury, if a victim is entitled for "substantial" compensation under civil law then compensation should be paid to the victim which means that the act must constitute a tort also.

The Law Commission in its 41st report while reviewing the Code[294] has opined that the use of the word "substantial" has reduced the application of the Section in those cases where the victim is entitled for only nominal compensation. Secondly, the amount of compensation is otherwise within the discretion of the court, thus the word "substantial" serves no purpose and the same should be omitted. But this recommendation has not been acted upon by the parliament.

In the year 1973, when new Code[295] was enacted, Section 357[296] of it provides for compensation to the victims of crime. The section was drafted on the lines of Section

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[292] (1) Whenever under any law in force for the time being, a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the out of fine. Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-.
(a) in defraying expenses properly incurred in the prosecution ;
(b) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit.
(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for prosecuting tile appeal bas elapsed, or, if an appeal be presented, before the decision of the appeal,

[293] The Criminal Procedure Code, 1898

[294] The Criminal Procedure Code, 1898

[295] The Criminal Procedure Code, 1973

[296] **Order to pay compensation.**—(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—
a) in defraying the expenses of properly incurred in the prosecution;

545 of the old Code but it is made more elaborative. In the new Code, the recommendation of the Law Commission was opted and thus the word "substantial" has not been used. In addition to the above provision, the section also provides for compensation in cases where the death was caused. In that case, the persons who are entitled to compensation under Fatal Accident Act, 1855 are also entitled for compensation under this Section.[297] In cases where fine does not for part of the sentence, the court has discretionary power to order the accused to pay compensation to the victim.[298] The determinative factors to decide the quantum of compensation are nature of crime, capability of accused to pay and the ration of victim's claim. But the provision is seldom invoked.[299]

Though the provision is progressive in a manner that it has recognised the right of the victim to be compensated and rehabilitated and marked a shift from the brutal retributive theory to restorative theory. It also provides for compensation in offences where fine does not form part of the punishment. But it has failed to achieve its purpose in all respects as:

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b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal. (3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

297 Sub-section(1)(c) of Section 357

298 Sub-section(3) of Section 357

299 Hari Singh v. Sukhbir Singh (1988)4 SCC 551

a) It is not mandatory to award compensation in all cases. It is discretion of the court to award it or not.

b) The amount of fine in majority of offences is minimal and the court has power either to give whole or part of fine as compensation. Thus, the compensation awarded is nominal or negligible.

c) In cases where the accused fails to pay fine then normally, he has to undergo imprisonment in default. Thus, in cases of default, the right of compensation becomes nugatory.

d) There is no provision of interim compensation as the compensation can be given only at the time of judgement. The trial in India usually takes five to ten years. And if the case is appealable then the right is suspended till limitation period or till the appeal is disposed of. It delays the right of the victim and thus adds to the sufferings of the victim instead of curtailing it.

e) The provision becomes superfluous when the accused absconds or the trial results into acquittal of the accused.[300]

Compensation by State

In earlier times, when an offence is committed, the justice is procured by the victim himself by taking law into his hands. This boosts the sense of revenge among people and promotes lawlessness in the society. To latch this state of affairs, state comes into picture and has taken the charge to maintain law and order in the society and to protect people against crime. Thus, whenever an offence occurs, it is surmised to be committed against the State and not against the individual. The repercussion of this shift is that the victim lost his standing in the criminal justice system. Now whenever offence is committed, it is considered failure on the part of the State to protect its citizens. It also violates their right to life and justice. Thus, State is bound to redress the breach of their rights.

The State compensation is not a new concept. The traces of it are found in 1775 BC in Babylonian Code of Hammurabi which make territorial governor liable in robbery case if the state fails to recover the property. The governor is bound to replace the

[300] Dr. Sunaina, *Victimology and Compensation to Victims of Crime, (Arun Publishing House(P) LTD., Chandigarh, 2012)*

property to the true owner. In murder cases, he was bound to compensate the heirs of the deceased with silver. But in middle Ages, the victim lost the significance and thus the concept of state compensation vanished and the victim has to knock the doors of civil court for relief. In Anglo-Saxon system, the concept was advocated by an English magistrate. Due to her constant efforts, Britain set up programme for compensation in the year 1964. But there was no statutory scheme for the same. The compensation was provided on ex-gratia basis. But on the suggestion of Inter-Departmental Working Party, a new chapter was added to Criminal Justice Act, 1988 to give statutory recognition to the scheme. In the year 1995, a tariff system was introduced by the Criminal Injuries Compensation Act, 1955. It replaces the earlier Act of 1988. In Indian Criminal law, this aspect received recognition much later in the year 2009. Before that compensation under Criminal law was the obligation of the accused and not that of the state. Thus, the standing of the aggrieved patty in the civil suit was better than the victim in criminal trial.

In the cases of **Rudal Shah**[301], **\ Chandrima Das**[302] and **Nilabati Behera**[303] **cases** , the SC recognised the duty of the state to compensate the victims of crimes and thus order the payment of compensation against the various instrumentalities of the State. These are the cases where the State bodies play an active role in commission of crime.

In the case of **S.S.Ahluwalia v. UOI**[304], the court has expressly laid down that the under Article 21 state is bound to compensate the victims where it fails to protect its people.

The Law commission in its 152nd report[305] has recommended the addition of Section 357A in the Code which provides for compensation to the victims of custodial crime. The recommendation has not been acted upon. In 154th Report[306], the commission discussed the scheme laid down by Tamil Nadu government to compensate the victims of certain crimes and rupees one crore is allocated for fund and also 152nd report and thus opined to broaden the aspect of state compensation and hence, recommended the insertion of 357A in the code to provide compensation to the

301 Rudal Shah v. State of Bihar and Anr., (1983) 4 SCC 141
302 Chairman, Railway Board v. Chandrima Das (2000) 2 SCC 465
303 Nilabati Behera v. State of Orissa (1993) 2 SCC 746
304 (2001)4SCC452
305 Law Commission of India, report on "Custodial Crimes" (1994)
306 Law Commission of India, report on "Code of Criminal Procedure" (1997)

victims of offences irrespective of the fact the whether perpetrator is arrested or not and whether the offence is proved again him or not.

After adopting the principles laid down in above cases and the recommendations of the Law Commission, the parliament added Section 357-A in CrPC, 1973 by the Code of Criminal Procedure (Amendment) Act, 2008. It came into force on 31st December, 2009.

Section357A[307] provides for framing of compensation scheme by the state govt after consulting the central government. The compensation is provided to benefit the victim or his dependants in two manner- firstly on the recommendation of the court and secondly, on application by the victim to the State or District Legal Service Authority. The amount of compensation is decided on the basis of enquiry made by SLSA/DLSA. To expedite the matter, Section provides that SLSA/DLSA shall complete the enquiry within a period of two months. The compensation can be made in cases where a) the amount of compensation awarded under Section 357 is insufficient in case of conviction or b) where the accused is acquitted or c) where the accused is discharged or d) where he is not apprehended. It also made provision for interim compensation. Thus, the Section has removed the shortcomings of Section 357 to great extent. The Section is wider in scope as it not only provides for compensation but also made available free medical facilities to the victim on the

[307] **Victim compensation scheme.**—(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) 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 the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

certificate of station officer or magistrate of the concerned area. As a result, states formulated victim compensation scheme under Section 357A of CrPC. The setback for this initiative is because:

- Firstly, only four states finalised its' scheme till 2011.
- Secondly, the amount of compensation under this scheme varies a lot. Example- for the offence of rape, Goa State provides maximum 10 lakhs rupees whereas seven union territories provide merely 3 lakhs maximum. Thus, amount of compensation does not depend upon the nature of offence but upon the place of occurrence.
- Thirdly, in many cases, victims do not get relief and if they get, the amount varies from Rs. 50,000 to one victim to Rs. 5 lakhs to other. Thus, there is an arbitrary disposal of fund under such schemes.[308]
- There is no fixed method to categorize victims. As some states decides compensation on the basis of nature of offence committed whereas others decide it keeping in view the age of the victim.
- Fourthly, there is a great delay in disposal of applications.[309]

The Government also set up a **Nirbhaya Fund** after the tragic incident of Delhi Gang Rape in 2012 to support projects which aim to improve and secure women safety and security. It is governed by Ministry of Finance[310]. It's a non-lapsable[311] corpus fund. But the same has been criticised on the ground of non- utilisation of funds

Thus, to avoid the above criticism and to back and encourage victim compensation scheme of states and to bring uniformity with regard to the amount of compensation provided for similar crime in different states, the Centre Government in the year 2015 has set up a CVCF[312] The first grant[313] of Rs. 200 crore for the fund was issued from Nirbhaya Fund. The Fund can also receive contribution from the public. For

[308] Scenario in Rajasthan in Compendium
[309] Delhi
[310] Department of Economic Affairs
[311] A non-lapsable fund would mean the unspent amount from capital budget of the ministry will not lapse, and will continue in the next fiscal.
[312] Central Victim Compensation Fund
[313] One time grant

effective implementation of it, the Ministry of Home Affairs has issued guidelines[314]. The bottom line of the guidelines is:

A) That the fund will be manages by the Empowered committee[315] which will be headed by the Additional Secretary of Ministry of Home Affairs.

B) It provides the pre-requisites[316] which the states need to fulfil to get grant from this fund.

C) It furnishes the procedure for the release of funds to states and UTs.[317]

D) It lays down the activities which can be undertaken under this fund.[318]

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[314] Central Victim Compensation Fund (CVCF) Guidelines. It comes into force with effect from 21°' August 2015. http://uphome.gov.in/writereaddata/Portal/Images/CVCF.PDF

[315] Empowered Committee consists of:
(a) Joint Secretary, Department of Expenditure, Ministry of Finance
(b) Joint Secretary, Ministry of Women and Child Development
(c) Joint Secretary, Ministry of Social Justice and Empowerment
(d) Chief Controller of Accounts, Home
(e) Director (Finance), Ministry of Home Affairs
(f) Joint Secretary (UT Division) MHA.
(g) Joint Secretary (CS Division) MHA, Convenor.

[316] **7. Essential Requirements to access funds from CVCF**
a. The State/ UT must notify the Victim Compensation Scheme as per provisions of Section 357A of CrPC
b. The quantum of compensation notified should not be less than the amount mentioned in Annexure I.
c. State/UT must first pay the compensation amount to the eligible victims of crime from its own Victim Compensation Fund and then seek reimbursement of funds from CVCF.
d. Any expenditure incurred from the State Victim Compensation Fund to assist the victims will be treated to be first spent from the non-budgetary resource available in the State Fund. Budgetary grant received from the state Government/UT Administration will be used only after consuming the non-budgetary resource.
e. Details of every victim compensated must be maintained electronically in 'Victim Compensation Module' in Citizen portal of CCTNS project

[317] **9. Approval and Release of Funds**:
a) States/UTs will first implement the victim compensation schemes notified by them and first pay compensation to the eligible victims following the procedure and timeframe provided in their respective schemes.
b) The State Govts/UT Administrations shall submit proposals for seeking financial assistance from CVCF (preferably once a year after completion of the financial year) as per Annexure- II attached.
c) The Empowered Committee shall normally meet once in every quarter, or sooner, if required, to assess and approve the proposals as received in Annexure II.
d) UT Administrations shall route their proposals through UT Division, MHA.
e) The Empowered Committee shall have the power and the Authority to approve/reject/return the proposals.
f) In case a proposal is sanctioned, funds will be transferred electronically to the bank account of the State victim compensation fund as maintained either by the State Legal Services Authority (SLSA) or by the nodal department of the state Government.
g) Utilization Certificate from the State Governments/UT Administrations shall be furnished as per provisions of GFR 19(A).

E) It lays down the minimum amount of compensation for certain offences.[319] The state cannot fix compensation amount less than the provided amount if it wants to avail the benefit of the CVC Fund.[320]

After analysis, it was noticed that the disbursement of funds to the state does not have any rational. As the highest amount disbursed under the fund is Rs. 28.1 Cr. to Uttar Pradesh and Rs. 21.8 Cr. to Madhya Pradesh. There are certain states like Odisha, Maharashtra, west Bengal and Rajasthan among other states which received funds of more than 10 Cr. It is not known which criterion is followed by the concerned ministry while releasing funds to the states - whether its population of the states or the female ratio or the rate of crime against woman. The Madhya Pradesh state received second highest amount whereas its population or female population is at 6th place on the other side Nagaland and Lakshadweep received same amount of fund whereas the population of Nagaland is 30 times of Lakshadweep. The crime against women is highest in Delhi and Assam but the amount of fund released is minuscule.

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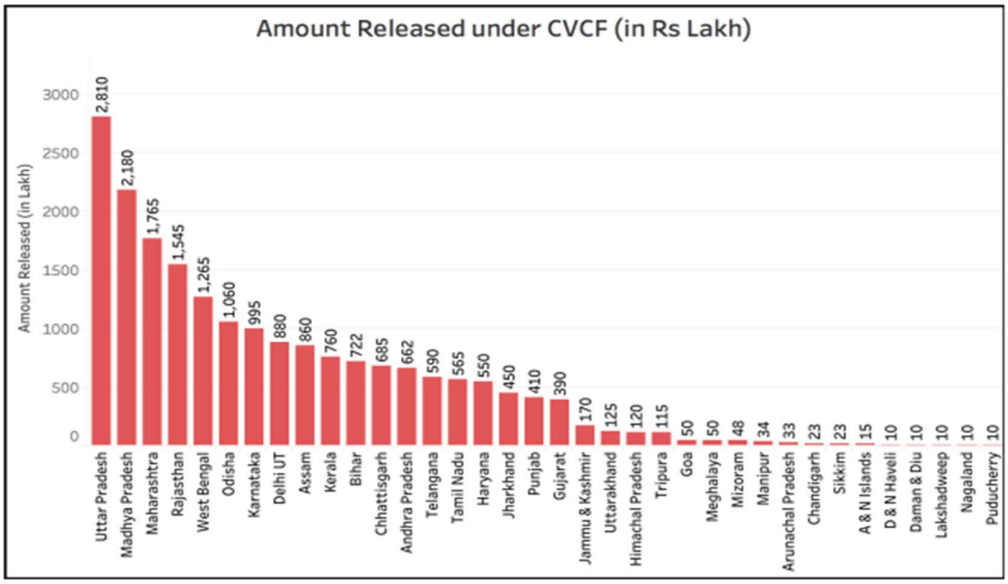
[318] **Admissible Activities of CVCF**:
a) To obtain a Corpus of funds in MHA.
b) To supplement the Corpus in MHA through contributions from Corporates and the Public.
c) To supplement and support the Victim Compensation Schemes notified by the States/UT Administrations on a matching share basis (to the extent of actual expenditure made from the State/UT Administrations Budget component to the State Victim Compensation Fund in that particular year)
{Explanation. It is expected that the Stare *Victim Compensation Fund will consist of fees, fines, compensation amount paid/recovered from the perpetrators of crime and also budgetary support from the State Government/ UT Administration. Support from CVCF to the State/UT will be limited to* //ie *actual expenditure made from the State/UT Administration budget component of the State Victim Compensation Fund in the particular year and only if the victims of crime are being compensated as per the* objectives of *the state/UT victim compensation scheme. In case State/UT Budget Component is not* fu//y *spent in a particular year but carried forward and spent in the subsequent year, the State / UT will be eligible for recurring matching share from CVCF for this component of fund also subject to meeting other eligibility requirement)*
d) To provide special financial assistance up to Rs. 5.00 lakhs to the victims of Acid attack to meet treatment expenses over and above the compensation paid by the respective States/UT Administrations. Using this provision, a cashless treatment mechanism for victims of Acid Attack will be formulated in consultation with the states/UTs.

[319] Annexure 1

[320] Point 7 (b)

Another major drawback is the lack of awareness regarding the scheme among the beneficiaries as in case of Delhi, merely 483 victims applied for compensation out of 3000 cases and only 383 victims got compensation out of 483 applicants.

Rehabilitation of victim is a tedious task due to delay in disbursal of compensation. The Delhi HC took notice of this matter and directed the government to release compensation within two weeks from the date of order and otherwise the amount to contempt of court.[321] The reason for the long delay is lack of awareness among the victims and the government entities, involvement of multiple agencies[322] or officers sitting over files for months[323].[324] Another major reason for delay is that there is no limitation period provided for final disposal of compensation.



Source: Implementation of Victim Compensation Scheme leaves a lot to be desired (factly.in)

The Apex Court in the case of **Nipun Saxena v. UOI**[325] has directed the NALSA to formulate Model Rules with regard to compensation for the victims of sexual offences and acid attacks. The rules drafted by NALSA have been approved by the court and it

321 Compendium jhslsa pg 47
322 Police, SLSA/DLSA
323 Divisional Commissioner-who often blame each other for delay and files keep shuttling among agencies or police fail to forward cases to DSLSA, the sanctioning body or Files get stuck with divisional commissioner who is responsible for disbursing funds.
324 Compendium jhslsa pg 48
325 (2019) 2 SCC 703

commanded all the states and UTs to enforce the same. The scheme is added as separate Chapter in the existing scheme and is known as **Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018.** The scheme provides that

a) It is applicable for offences committed against women either under IPC or any other law.

b) Victim female and her dependents are eligible to claim compensation under the scheme.

c) It provides for setting up of **"Women Victim Compensation Fund"[326].**

d) To claim compensation under the scheme, it is mandatory to lodge FIR as the copy of it will be attached with the application.

e) The amount claimed under other schemes shall be taken into consideration while deciding quantum of compensation under this scheme.

f) It also provided for immediate first aid facility as well as medical benefits along with interim monetary compensation.[327]

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[326] **3. WOMEN VICTIMS COMPENSATION FUND**— (1) There shall be a Fund, namely, the Women Victims Compensation Fund from which the amount of compensation, as decided by the State Legal Services Authority or District Legal Services Authority, shall be paid to the women victim or her dependent(s) who have suffered loss or injury as a result of an offence and who require rehabilitation.
(2) The 'Women Victims Compensation Fund' shall comprise the following:-
(a) Contribution received from CVCF Scheme, 2015.
(b) Budgetary allocation in the shape of Grants-in-aid to SLSA for which necessary provision shall be made in the Annual Budget by the Government;
(c) Any cost amount ordered by Civil/Criminal Tribunal to be deposited in this Fund.
(d) Amount of compensation recovered from the wrong doer/accused under clause 14 of the Scheme;
(e) Donations/contributions from International/ National/ Philanthropist/ Charitable Institutions/ Organizations and individuals permitted by State or Central Government.
(f) Contributions from companies under CSR (Corporate Social Responsibility)
(3) The said Fund shall be operated by the State Legal Services Authority (SLSA).

[327] **12. INTERIM RELIEF TO THE VICTIM**— The State Legal Services Authority or District Legal Services Authority, as the case may be, may order for immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief (including interim monetary compensation) as deemed appropriate, to alleviate the suffering of the victim on the certificate of a police officer, not below the rank of the officer-in-charge of the police station, or a Magistrate of the area concerned or on the application of the victim/ dependents or suo moto.
Provided that as soon as the application for compensation is received by the SLSA/DLSA, a sum of Rs.5000/- or as the case warrants up to Rs. 10,000/- shall be immediately disbursed to the victim through preloaded cash card from a Nationalised Bank by the Secretary, DLSA or Member Secretary, SLSA.
Provided that the, interim relief so granted shall not be less than 25 per cent of the maximum compensation awardable as per schedule applicable to this Chapter, which shall be paid to the victim in totality.

g) The maximum period within which a claim for compensation under the scheme can be made by the victim or by the dependent is three years.[328]

h) Period of appeal is 30 days in case victim or dependent does not feel satisfied with the quantum of compensation awarded.[329]

2.3.9 Witness Protection

In adversarial system, the justice system heavily reliance on the evidence produced in the court. As per Evidence act, evidence can be broadly categorised as oral and documentary evidence. Oral evidence is the evidence given by the witnesses in the court who can be eye witness, injured witness, interested witness, expert witness or other. The outcome of the case depends upon the sanctity and veracity of the witnesses as they are the eyes and ears of the court. This rule applies with more vigour in criminal matters as majorly the decision of the case lies on the testimony of the witnesses produced especially the eye witnesses as the court give priority to the eye witnesses over medical or expert or circumstantial evidences.

But over a period of time it has been found that the witnesses are reluctant to come forward and depose before the court because being a witness has numerous repercussions such as:

a) Multiple hearings and waiting for hours to get their statement recorded, thus becomes a source of harassment.

b) Threats or inducements

Provided further that in cases of acid attack a sum of Rs. One lakh shall be paid to the victim within 15 days of the matter being brought to the notice of SLSA/DLSA. The order granting interim compensation shall be passed by the SLSA/DLSA within 7 days of the matter being brought to its notice and the SLSA shall pay the compensation within 8 days of passing of order. Thereafter an additional sum of Rs.2 lakhs shall be awarded and paid to the victim as expeditiously as possible and positively within two months.

328 **16. LIMITATION** - Under the Scheme, no claim made by the victim or her dependent(s), under sub-section (4) of Section 357A of the Code, shall be entertained after a period of 3 years from the date of occurrence of the offence or conclusion of the trial.
However, in deserving cases, on an application made in this regard, for reasons to be recorded, the delay beyond three years can be condoned by the SLSAs/DLSAs.

329 **17. APPEAL** - In case the victim or her dependents are not satisfied with the quantum of compensation awarded by the Secretary, DLSA, they can file appeal within 30 days from the date of receipt of order before the Chairperson, DLSA. Provided that, delay in filing appeal may be condoned by the Appellate Authority, for reasons to be recorded, in deserving cases, on an application made in this regard.

c) Numerous Adjournments

d) No remuneration is paid which affects them financially

e) If they turn hostile then they are tried for the offence of perjury

Resultantly, witnesses turns hostile[330] as happened in the case of **zahira habubuala[331], jassica lal[332], sanjeev nanda[333] and other**[334]. The primary reason for the same is lack of witness protection scheme or law in the country. This hampers the justice delivery system. It occurs mostly in cases where accused is powerful either by muscle, money or due to political links.

If it is the pious duty of the citizens to assist courts in case they have any knowledge about the crime[335] then the state has equivalent duty to protect its citizens. It is utmost in case of witnesses. The need to enact a witness protection scheme is suggested by law commission in various reports such as 14th, 154th, 178th, 198th and 4th national police report and 2003 Malimath committee report also pressed the need of protection programme. Few provisions were enacted under general and special laws but those were not adequate to achieve the underlying object. The ministry of home affairs, finally in the year 2018 after the Supreme Court judgement in **Mahender Chawla v. UOI[336]** , has notified the Witness Protection Scheme, 2018. The scheme targets to provide protection at all the stages of the case- from investigation to conclusion of the case. The important aspects of the scheme are:

a) **Classification of threat** – under scheme, protection can be provided according to the kind of threat a witness or his family is facing. And threat is majorly classified under three heads-

   i. Category A - it is the one where there is life threats.

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330 A hostile witness is a witness who appears to be refusing to fully testify in support of the person who called them or testifies in a way that significantly differs from their pre-trial statement.

331 Zahira Habibulla H Sheikh and others v/s State of Gujarat and others, 2004 (4) SCC 158

332 State (Gnct Of Delhi) v/s Sidhartha Vashisht, Crl.A. 193/2006

333 State v/s Sanjeev Nanda (2012) 8 SCC 450

334 State of Maharashtra v/s Dr. Praful B. Desai, 2003 (4) SCC 60), State of Punjab v/s Jit Singh, AIR 1994 SC 549, Swaran Singh v/s State of Punjab, (2000) 5 SCC 68 and Talab Haji Hussain v/s Madhukar Purushottam Mondka AIR 1958 C 374

335 State of Gujarat v. Anirudh Singh (1997) 6 SCC514

336 2018 SCC 0nLine SC 2678

ii. Category B – it cover cases where the threat is with regard to the destruction of reputation or property.

iii. Category C – it covers moderate threats such as harassment or intimidation.

b) **Types of Protection Provided** – the following are the means provided in the scheme to protect the witness and his family:

- Prevent encounter of the witness and the accused
- Provide security
- Change of identity and residence
- Witness friendly court infrastructure

c) **Procedure** – the following procedure if prescribed:

- An application shall be made to competent authority[337] as constituted in each district for protection.
- The authority shall ask for threat analysis report and made the order after making analysis of the same. In case of imminent danger, the authority can pass interim order as well.
- The proceedings be conducted in camera and it is mandatory for the authority to contact the witness and his family to determine their needs.
- The application needs to be decided within a period of 5 working days.
- The major responsibility of executing the order of authority is upon the police department.
- The follow up report is also made after a month.

d) **Constitution of Fund** – it provides for the constitution of a fund named "witness protection fund". The all expenses to bear witness protection shall be paid out of this fund. The source of capital of this fund is annual budget paid

[337] 2(c) "Competent Authority" means a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary.

by state government, cost or fines order to be paid by courts in this fund, charities and donations and all funds which form part of CSR[338].

3.10 Sexual Offences committed by Judges

Judiciary is the key organ of the state. It is vital not only to govern law and order of the state but also to keep both other organs within control. Even the constituent assembly placed heavy reliance upon courts to keep the sanctity of the constitution. But it disrupts when the judges or the judicial officers themselves indulges into illegal or unlawful activities. The question arises whether they will be governed by the same procedure by applying the principle of equality before law or special protections need to be given to uphold the independence of judiciary as otherwise wrong or false cases might be filed against them to prevent them from performing their duties.

i. **Misconduct or Incapacity** - Article 124 of the Constitution relates to appointment and removal of judges. Clause (4)[339] lies down that a judge of a supreme court can be removed on grounds of proved "misbehaviour" and "incapacity". The term "misbehaviour" has not been defined. But the same is used in a wider sense as it is not restricted only to unlawful or illegal activities but also cover cases which does not strictly falls under specified offences or wrongs but has great bearing both in private or public life. Thus, it cover cases antithesis of "good behaviour" such as acts of moral turpitude or non-disclosure of assets and liabilities or using of office for ulterior purposes or not following judicial conduct and others which hampers the integrity of the institution as a whole. But it is necessary to differentiate it from minor behavioural issues which require sanctions less than removal. Thus, there is a need to juxtapose bad behaviour and impeachable behaviour under Article 124. Incapacity covers both physical and mental incapacity along with others. These allegation need to be proved beyond reasonable doubt for removal. The procedure to remove can be initiated only after passing of motion in the house as given under Article 124(4) On acceptance of the motion in either house, the speaker or chairperson shall constitute

[338] Corporate Social Responsibility

[339] A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two - thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

committee as per Section 3 of the judicial Inquiry Act, 1968 and they submit report as per Section 5 read with rules. The motion has been initiated against many Supreme Court and court judges but none has been removed.

If the motion has not been moved but complaint has been made regarding acts of the High court judge or Chief Justice of any high court, the apex court in the case of **C. Ravichandran Iyer v. Justice A.M.Bhattacharjee & Ors**[340] has laid down the in-house procedure to be followed. A 5-member committee of Supreme Court has finalised the procedure to be followed against judges who either misconducts or has failed to adhere the judicial life in a true manner.[341] To maintain the sanctity of

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340 (1995) 5 SCC 457

341 Three different sets of procedure for taking such suitable remedial action against judges were laid down: (i) relating to Judges of the High Courts, (ii) relating to Chief Justices of the High Courts, and (iii) relating to Judges of the Supreme Court.
The "in-house procedure" for taking such suitable remedial action against judges of the High Courts is as under: **HIGH COURT JUDGE:**
A complaint against a Judge of a High court is received either by the Chief justice of that High Court or by the Chief Justice of India (CJI). Sometimes such a complaint is made to the President of India. The complaints that are received by the President of India are generally forwarded to the CJI. The Committee suggests the following procedure for dealing with such complaints:-
(1) Where the complaint is received against a Judge of a High Court by the Chief Justice of that High Court, he shall examine it. If it is found by him that it is frivolous or directly related to the merits of a substantive decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file the complaint and inform the CJI accordingly. If it is found by him that the complaint is of a serious nature involving misconduct or impropriety, he shall ask for the response thereto of the Judge concerned. If on a consideration of the allegations in the complaint in the light of the response of the Judge concerned, the Chief Justice of the High Court is satisfied that no further action is necessary he shall file complaint and inform the CJI accordingly. If the Chief Justice of the High Court is of the opinion that the allegations contained in the complaint need a deeper probe, he shall forward to the CJI the complaint and the response of the Judge concerned along with his comments.
(2) When the complaint is received by the CJI directly or it is forwarded to him by the President of India the CJI will examine it. If it is found by him that it is either frivolous or directly related to the merits of a substantive decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file it. In other cases the complaint shall be sent by the CJI to the Chief Justice of the concerned High court for his comments. On the receipt of the complaint from CJI the Chief Justice of the concerned High court shall ask for the response of the judge concerned. If on a consideration of the allegations in the complaint in the light of the response of the Judge concerned the Chief justice of the High Court is satisfied that no further action is necessary or if he is of the opinion that the allegations contained in the complaint need a deeper probe, he shall return the complaint to the CJI along with a statement of the response of the Judge concerned and his comments.
(3) After considering the complaint in the light of the response of the judge concerned and the comments of the Chief justice of the high court, the CJI, if he is of the opinion that a deeper probe is required into the allegations contained in the complaint, shall constitute a three member Committee consisting of two Chief justices of High Courts other than the High Court to which the Judge belongs and one High Court Judge. The said Committee shall hold an inquiry into the allegations contained in the complaint. The inquiry shall be in the nature of a fact finding inquiry wherein the Judge concerned would be entitled to appear and have his say.

judiciary and keeping in view the sensitivity of the matters, the SC in the year 2014 ruled that the proceedings of in-house procedure can't be made public as it will hamper the credibility of the institution[342] and the confidence of the public in the institution will shake. But the importance of the procedure demands that the procedure be put into public domain and hence the registry of the apex court was directed to put the procedure on official site of the court.[343]

After the allegations are found true, despite the removal of a judge and taking out judicial work and powers, the trial can be conducted in the court of law.

The above procedure becomes deficient in the case of Chief justice of India. The issue cropped up when the allegations of sexual harassment has been filed by the employee of the CJI against him. In that case, the CJI constitute a panel of three judges headed by senior most judge after CJI. The committee has been criticised on the ground of fair hearing as the accused is the colleague of the members of the committee and the

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But it would not be a formal judicial inquiry involving the examination and cross-examination of witnesses and representation by lawyers.

(4) For conducting the inquiry the Committee shall devise its own procedure consistent with the principles of natural justice.

(5)(i) After such inquiry the Committee may conclude and report to the CJI that (a) there is no substance in the allegations contained in the complaint, or (b) there is sufficient substance in the allegations contained in the complaint and the misconduct disclosed is so serious that it calls for initiation of proceedings for removal of the Judge, or (c) there is substance in the allegations contained in the complaint but the misconduct disclosed is not of such a serious nature as to call for initiation of proceedings for removal of the Judge.

(ii) A copy of the Report shall be furnished to the judge concerned by the Committee.

(6) In a case where the Committee finds that there is no substance in the allegations contained in the complaint, the complaint shall be filed by the CJI.

(7) If the Committee finds that there is substance in the allegations contained in the complaint and misconduct disclosed in the allegations is such that it calls for initiation of proceedings for removal of the Judge, the CJI shall adopt the following course:-

(i) the Judge concerned should be advised to resign his office or seek voluntary retirement;

(ii) In a case the judge expresses his unwillingness to resign or seek voluntary retirement, the chief justice of the concerned High Court should be advised by the CJI not to allocate any judicial work to the judge concerned and the President of India and the Prime Minister shall be intimated that this has been done because allegations against the Judge had been found by the Committee to be so serious as to warrant the initiation of proceedings for removal and the copy of the report of the Committee may be enclosed.

(8) If the Committee finds that there is substance in the allegations but the misconduct disclosed is not so serious as to call for initiation of proceedings for removal of the judge, the CJI shall call the Judge concerned and advise him accordingly and may also direct that the report of the Committee be placed on record."

342 *Indira Jaising versus Supreme Court of India, (2017) 9 SCC 766*

343 *Additional District and Sessions Judge 'X' vs. Registrar General, High Court of Madhya Pradesh and others* [Writ Petition (Civil) No. 792 of 2014]**,** decided on 18 December 2014 by a two-judge bench of the Supreme Court

chances of fairness has been reduced to minuscule. This was observed[344] by Justice Kehar in a case[345] with regard to High Courts. Similar view held true in respect of Supreme Court as well.

If any wrongful act or conduct is committed by any judicial officer or judge while performing his official duties, then the protection is given under following laws-

i. The Judicial (Protection) Act, 1985

The Act has been enacted with the objective of providing protection to all those who act judicially and the one on their orders or directions. It provides complete immunity from filling of civil suits against the above mentioned officers provided they acted in good faith and believes that they possess such powers to act. [346]

Similar form of defense in criminal matters is given under Section 77[347] & 78[348] of IPC if the act committed under its judicial power is otherwise an offence.

ii. The Judges (Protection) Act, 1985

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344 Participation in the investigative process, at the hands of any other judge of the same High Court, was sought to be excluded. The exclusion of judges of the same Court from the investigative process, was also well thought out. In certain situations it may be true, as pointed out by the learned counsel for the petitioner, that judges of the same Court being colleagues of the concerned judge, would endeavour to exculpate him from his predicament. It is not as if, the position could not be otherwise. Animosity amongst colleagues is not unknown. Reasons of competitiveness, jealousy and the like are known amongst colleague judges, specially from the same High Court. By excluding judges of the concerned High Court (as the judge complained against), is bound to be beneficial, in both the situations, referred to above. https://thewire.in/law/cji-ranjan-gogoi-allegations-panel-investigation

345 ***Supra***

346 **Section 1** - Non-liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders.—No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

347 **Act of Judge when acting judicially**.—Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

348 **Act done pursuant to the judgment or order of Court**.—Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice; if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Section 3[349] of the Act provides additional protections besides the one given under other laws. It lays down that the courts either civil or criminal shall not take or proceed with case filed against a judge[350] for the act which are done or purported to be done while performing his functions. Only courts were averted from taking actions against judges. The government, either central or state, is not prevented from taking any kind[351] of measure against them for the wrongful act or inaction.

iii. The Criminal Procedure Code, 1973

Section 197 of the code provides security against unnecessary and false prosecutions against judges and public prosecutors. It provides that if any case is lodged against sitting or retired judge or magistrate regarding acts which are done while discharging his official duties or believing to be done in his official capacity, then the same can be prosecuted after obtaining prior permission from the appropriate authority which is either central or state government.

A judge cannot have two facets – one while discharging official duties (in the court0 and the other in outside world (private life). He has to maintain a set of standard in both public and private life while serving on such auspicious post. If he commits any act outside his office then he can be held liable under relevant law as well as disciplinary proceedings can be initiated against him under state service rules. As per state of Haryana rules[352], the matter regarding discipline, penalties or appeals are governed by The Punjab Civil Services (Punishment and Appeal) Rules, 1952. It provides that the appropriate authority may suspend the employee if criminal case is

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[349] Additional protection to Judges.—(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section (2), no court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function. (2) Nothing in sub-section (1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge.

[350] **Section 2** - —In this Act, "Judge" means not only every person who is officially designated as a Judge, but also every person— (a) who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or (b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in clause (a).

[351] Civil, criminal , disciplinary or any other

[352] The Punjab Civil Services (Judicial Branch) Rules as applicable to State of Haryana

filed against the employee. A suspension is also deemed if the employee is either detained or convicted exceeding 48-hours.

After the filling of FIR, a police cannot make arrest of a judge automatically even in cognizable cases as it will affect the judicial independence. This becomes evident in the case where a judge was made drunk and then arrested by the police after inviting them in the police station for inspection. Then he was taken in that state before the media. This was all done to prevent the judicial officer from exercising their duties. Then a case was lodged before the apex court to lay down guidelines which are to be observed while making arrest of judicial officer. The apex court ruled that whenever arrest is to be made of any judicial officer, the same is to be done in a technical manner after due intimation to district judge or The High Court as the case may be. After arrest also, the district judge the CJ of High Court needs to be informed. Neither he must not be taken away to police station nor he be handcuffed unless resistance is made in violent manner. Arrangements be made so that he can communicate with his family and can seek legal advice from legal advisors or his colleagues including district and session judge. No panchnama or medical examination be conducted or statement be recorded except in the presence of abovementioned.[353]

2.4. The Protection of Children from Sexual Offences Act, 2012

2.4.1 Introduction

"Let's raise children who won't have to recover from their childhoods."

Pam Leo[354]

It is traditionally believed to be the responsibility of families to look after their children. Also, children are the greatest human resource of every nation and thus it is the obligation of the nation to nurture and protect their childhood.

India, a country having 4 billion children below 18 years comprises 26% of world child population. India realised that to become developed and progressive country, it is necessary to have healthy, educated and happy childhood as they are the biggest

[353] Delhi Judicial Service Association v/s State Of Gujarat And Ors. , 1991 AIR 2176

[354] Pam Leo is an independent scholar in human development, a parent educator, a certified childbirth educator.

assets of any robust country. While fulfilling its foremost responsibility of nurturing children, it guaranteed several rights to children such as right to health, education, food and others under Constitution of India and several schemes. And being the signatory to CRC, it enacted number of child centric legislations[355] to protect them. Various acts have been made punishable under criminal and civil law. Despite these efforts, it failed to safeguard their childhood completely.

The draconian side has been revealed in the case of **State v. Shri Freddy Albert Peats & Anr,** when it has been found that a German running gurukul in Goa has made the inhabitants of the institution to lay naked at night and also sodomised them. He also forced them to do so with the foreign visitors of the gurukul.

In the year 2006, ministry of women and child has been set up to protect the interest of the most vulnerable sections of the society i.e., women and children. In the year 2007, the ministry undertook the survey on child abuse to fulfil its foremost commitment of safeguarding the children. The barbarous and diabolic side of abuse has been reflected through it. It surveyed children below 18 years including both boys and girls with regard to physical, emotional, sexual abuse and neglect. The major findings of the survey were: -

Specifically, child sexual abuse is something about which either most people are unaware about its existence or don't want to talk about it due to the taboo attached with sex and sexuality in our culture. Due to this ignorance, the extent of sexual abuse touched its peak. It has been revealed by the survey that

- Both boys and girls are affected by it and the extent of it is higher among boys (53%) than girls.
- all age group between 5 to 18 years are affected by it but the statistics showed that it started at the age of 5 and gained momentum at the age of 10 years. It is at its zenith between the age of 12 to 15 years and then it started declining after that.
- State wise data revealed that the most vulnerable states were Delhi, Andhra Pradesh, Assam and Bihar.

[355] The Child Labor (Prohibition and Regulations) Act, 1986, the Child Marriage Restraint Act, 1926, Prohibition of Child Marriage Act, 2006, Juvenile Justice (Care and Protection) Act,2000, Juvenile Justice (Care and Protection) Act, 2015, The Immoral Traffic (Prevention) Act,1986

- The survey classified that sample into 5 categories/ groups and found that the children who go out for work are the most

Endangered ones followed by those who are in institutional care and are on streets.

Those who either go to school or live in family environment are the safest ones as the percentage of abuse among them is 2.90% and 4.04% respectively.

- In 50% cases, the accused or abuser is known to the victim.
- In case of child sexual abuse, the victim in majority cases (72.1%) decides to keep quiet and not to reveal the matter to anyone.

This eye-opening revelation has shocked the conscience of the nation and has unveiled the monstrous and inhuman side of the humanity.

2.4.2 Need of POCSO

- To celebrate the international year of children in the year 1979, the Poland suggested enacting convention to protect the rights of the children. Before the year 1979, there was a declaration dealing with the same subject. But the declaration is not binding on the states. Thus to make it obligatory, Convention is adopted. The Convention on Rights of Children, 1989 (CRC) and other optional protocols has asked the countries to lay down law to prevent abuse of children. The obligation of a state under convention is that the law enacted by a state should be in consonance with convention and protocols or be more stringent than the convention. Article 19[356] and 34[357] of the Convention specifically talk about prevention of sexual abuse of children. the steps to prevent and protect children from sexual abuse has taken a long

[356] 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

[357] States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.

period of 20 years. In the year 2012, while fulfilling its international commitment of protecting children, this Act has been enacted.

- The rate of Child abuse in the year 2011 has increased up to 29.7% as compared to 2010.[358]

- Before 2012, the sexual abuse is covered under provision of general law such as IPC, Trafficking Act and others. These laws have limited scope as Section 375[359] of IPC is applicable only on women of all ages but is not helpful to prevent sexual abuse of boys. Similarly, sexual abuse by women of boys through natural intercourse without consent does not fall within the ambit of Section 377 of IPC.

- Another major drawback is that law is scattered. As law regarding prostitution, cybercrimes and sexual abuse are all covered under different laws which make it difficult to implement.

2.4.3 Salient features of POCSO

All these hurdles are overcome with enactment of POCSO Act, 2012. The salient features of the Act are:-

A. **Application of Law** - The Act is applicable on children. The term "child" is defined under Section 2 clause (d) of the Act as person below 18 years. The Act is gender neutral with regard to victim as well as perpetrator thus takes into account male, female and transgender. Thus, it has opt progressive stand and for the first time recognized male victim of sexual offence as IPC was applicable only on female victim and does not penalize the rape or sexual assault of male victim.

B. **Offences** – Under POCSO Act, offences are of two types. First are sexual offences and other is one which penalises certain kind of act or omission on part of an individual or official.

Sexual Offences – the act has widen the aspect of sexual abuse as it cover both kind of abuses- one which involve physical touch and those do not. It includes following

[358] National Crime Record Bureau, "Crime in India 2011" , 95, (Ministry of Home Affairs, December 2012) available at https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf (last visited on 8th December, 2020)

[359] Supra

kind of offences -

i. **Sexual Assault** - It divides assault into two categories- penetrative and non-penetrative. A person is said to commit sexual assault if he touches the private parts of the body of the victim such as penis, breast, anus or urethra or make the child to do it with him or her or with another person or tries to make any non-penetrative physical contact with the child with sexual intent.[360]

ii. **Penetrative Sexual Assault [361]**- The Act has defined the offence on identical lines on which the act of rape is defined under Section 375 of IPC. thus if a person either

iii. **Aggravated form of penetrative[362] and non-penetrative sexual assault[363]** - Sexual assault either penetrative or non-penetrative amounts to aggravated form if committed either

- By person holding government position such as
  - (i) Police officer
  - (ii) Public servant
  - (iii) Member of armed forces
  - (iv) Being in management of any institution established under law to keep a person in custody
- With women lacking physical or mental faculty either
  - (i) Due to age as she is below 16 years or
  - (ii) Because she is not capable to give consent or
  - (iii) Suffering from any physical or mental disability
  - (iv) Due to pregnancy
- By a person who is
  - (i) In a position of authority or trust such as teacher, guardian or relative
  - (ii) In a position of dominance

[360] Section 7 & 8
[361] Section 3 & 4
[362] Section 5 & 6
[363] Section 9 & 10

(iii) Holding position of management or being in staff in any hospital or educational or religious institution

- When

(i) It committed gang sexual assault

(ii) It is committed during communal violence

(iii) It is committed on same woman repeatedly

(iv) It results into grievous hurt or otherwise endangers life

(v) Committed using coercive means such as deadly weapons or fire or other

iv. **Sexual Harassment**[364] - A person can be held liable for the offence of sexual harassment under Section of the Act if he indulges in any of the given acts with -

Mere actus reus is not sufficient for punishment. The act must be done with sexual intent and the question whether sexual intent is present or not is to be decided on the basis of facts.

v. **Use of child for pornographic purpose**[365] - the offence is committed if the child is used either to represent sexual organs or is shown while indulging in sexual acts or is indecently or obscenely represented in any kind of media. These acts must be done to obtain sexual gratification.

Other offences – It includes

1. Failure by adults to report or recording of an offence under POCSO.[366]
2. Disclosure of an identity of child victim.[367]
3. Giving any false information or lodging false complaint by adult with regard to commission of an offence in order to either humiliate or extort or defame or threaten the child.[368]

[364] Section 11 & 12
[365] Section 13 & 14
[366] Section 19 & 21
[367] Section 23 (2)
[368] Section 22

4. Prohibit commenting or reporting in any media form which will affect either the reputation or privacy of the child.[369]

5. Abetment f an offence.[370]

6. Attempt of an offence.[371]

C. <u>Punishment</u> - The extent of punishment for the acts depends upon the type of offence committed. For some offences, minimum and the maximum limit of the punishment is prescribed and for others only the maximum limit is provided and it is left upon the special courts to decide the extent of punishment which is to be given. But the courts can give punishment only within the range provided. They do not have discretion to reduce or to enhance the punishment from the limit provided. It provides punishment which varies from 3 years to life imprisonment.

In addition to imprisonment, fine is also provided for offences penalized under Section 4, 6, 8,10,12,14 & 15. Special court being a session court has no limit on the amount of fine which it may order. The court also has power to order the offender to pay either the whole or portion of the fine to be paid as compensation to the victim.

Section 42[372] has overriding effect as it provides that if the act constitutes offence under this Act as well as under any other law than the law which provides higher punishment will be applicable. In 2018, Criminal (Amendment) Act was enacted. It introduced changes under Section 375 to 376E of IPC. The Amendment provides for higher punishment for the offence of rape of girls below 16 years and 12 years. This discriminates between sexual abuse of girl and boy below 16 years of age. It is contrary to Article 14[373] of the Constitution of India which lays down the rule of equality. There is no close nexus to provide higher punishment for abuse of girl child

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369 Section 23(1)

370 Section 16 & 17

371 Section 18

372 **Alternate punishment.**-- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [2][376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], 376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

373 **<u>Equality before law</u>** - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

as the impact of sexual abuse is equal upon boy and girl. Few law makers support the amendment on the ground of pregnancy of girl child. But this consequence does not ensue in every case. Thus it could be made a separate offence instead of generalizing it for all.

In 2019, an amendment[374] was made in POCSO to remove inequality and to bring uniformity in law. After this amendment, the purpose behind 2018 amendment became redundant.

D. **Nature of an Offence –** The Act does not stipulate the nature of an offence i.e whether the offence is cognizable or not or bailable or not. Section 19[375] read with Rule 4(2)[376] of POCSO Rules and Section 154[377] of CrPC imply that sexual offences under the Act are cognizable as the police officials are bound to register the FIR with regard to an offence and furnish a free copy of it to the informant.

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374 The POCSO (Amendment) Act, 2019

375 **PROCEDURE FOR REPORTING OF CASES**

19. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,--
(a) the Special Juvenile Police Unit, or (b) the local police.
(2) Every report given under sub-section (1) shall be-- (a) ascribed an entry number and recorded in writing;
(b) be read over to the informant;
(c) shall be entered in a book to be kept by the Police Unit.
(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.
(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.
(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.
(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.
(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (7).

376 If any such information regarding the commission of an offence under the provisions of the Act is received by the child helpline-1098, the child helpline shall immediately report such information to SJPU or Local Police.

377 Supra

To determine whether the accused has a right to bail or not for commission of offences under the Act, first schedule of CrPC needs to be referred. At the end of the table it is provided that under any law, if the offence is punishable with imprisonment less than 3 years than it is bailable and if the imprisonment given for the offence is three years or more than it is non- bailable offence.

Punishment for sexual offences under POCSO is imprisonment 3 years or more and these are non-bailable offences.

E. **Compulsory Reporting**[378] - the Act has made it obligatory for a person to report a case if he come across information with regard to either that the offence under the Act has been committed or is likely to be committed and for a police official to lodge it. If a person or police official fails to report or record the same then he or she is punishable with imprisonment up to 6 months or fine or both. But the provision is not applicable on child.

If a person gives or police official records false information or complaint with ulterior objective then he shall be punished either with imprisonment up to 6 months or fine or both.

F. **Recording of statement of a Child** – The statement of the victim under Section 161[379] of CrPC shall be recorded at the place of his convenience which can either be home or any place of his choice by a woman police officer who must not be below the rank of sub inspector. Police officer must not wear uniform while recording statement of the child so that child does not get intimidated by police and give his testimony freely. Police shall make efforts that child must not come in contact with

[378] Section 19

[379] **Examination of witnesses by police.**—(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case. (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.
[Provided that statement made under this sub-section may also be recorded by audio-video electronic means:]
[Provided further that 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 (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.]

accused at any point of time during investigation.[380] While recording statement of victim by magistrate under Section 164(5A)[381] CrPC, the magistrate must record it in the presence of parent or relative of the victim. The copy of the statement recorded by magistrate must also be provided to the victim and his parent or representative.[382] If necessary the assistance of interpreter, translator or special educator can be taken.[383]

G. **Medical examination of a Child** - To procure evidence of the offence, medical examination of the victim shall be conducted as per Section 164A[384] of CrPC irrespective of the fact that whether FIR or complaint of the offence has been recorded or not.[385]

H. **Special Courts** - The Act provides for special courts with an aim to provide speedy trial. It follows child friendly process in recording evidences, investigation and trial to save children from traumatic experience as the presiding officers and other staff members are specially trained in this regard. In each district, the state government shall designate a Session Court to be a special court for the purpose of this Act. But this is not requisite if session court is already notified as children's court under 2005 Act. As in that case, children's court will try offences under POCSO Act also.[386] Unlike Section 193[387] of CrPC, the Special Courts are empowered to take cognizance of an offence without committal. The objective behind designating special

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380 Section 24 of POCSO Act, 2012

381 (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, subsection (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 whom 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: Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement: Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed. (b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

382 Section 25

383 Section 26(3)

384 Supra

385 Section 27

386 Section 28

387 Cognizance of offences by Courts of Session. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

courts is that the sensitive matter of child sexual abuse must be dealt by well trained professionals who are well versed with law regarding child sexual abuse and also to conduct trial in a child friendly manner so that child victim can be protected from further victimisation

It has jurisdiction to try followings offences

a) Committed under POCSO Act

b) Offences under other laws which are committed by accused

c) Offences under IT Act, 2005

I. **Child Friendly Procedure**- Section 33 sub section (4) provides that there should be child friendly atmosphere in the courtrooms and for that parent, relative or guardian should be allowed to accompany child during trial in the courtroom. To prevent harassment and traumatization of child during the trial, the court shall ensure that –

i. Trial to be conducted in camera.

ii. Child shall not be called into court repeatedly.

iii. The child is not exposed to the accused but at the same time make suitable arrangements so that the accused is able to hear the testimony of the child and communicate with his advocate.

iv. The council of accused does not confront the child directly at any stage of examination. Thus, if there is any question he wants to ask from child, the same shall be supplied by the council to the court and the court in turn ask them from the child.

v. Assistance of interpreter, translator or special educator can be taken when required.

It imparts comfort to the child and to bear the courtroom proceeding in a better manner. It also ensures that the child shouldn't be victimatised further by recalling the incident again and again. But the provision does not elaborate with regard to physical or structural changes such as the manner to avoid encounter of the child with accused

or to provide separate washrooms or waiting areas or other infrastructural changes to meet the needs of children with disabilities.

J. **Special Public Prosecutors**[388] - it is requisite for the state government to appoint SPP to conduct cases under POCSO before special courts. The SPP requires to have 7 years of experience. The government is required to maintain pool of those personnel. The intention is to have prosecution at the hands of the person who is well versed with the provisions of POCSO and the procedural mandate. They are expected to communicate with the child and built a relationship and orient the child with court environment. All this will help to strengthen his trust in the criminal justice system.

K. **Speedy trial -** To ensure speedy trial in POCSO cases, the Act has provided that the cognizance of the offence can be taken directly by the special courts without following committal proceeding as given under Section 209 of CrPC.[389] It also provides time limit to complete recording of the statement of the victim which is 30 days[390] and for completing the trial within a period of one year from the date of taking cognizance respectively[391]. The time to record statement can be extended but only after recording reasons.[392]

2.4.4 Drawbacks of POCSO

The major drawbacks of POCSO Act are –

- The Act prescribes what kind of offences can be tried but does not give exclusive jurisdiction to the court for those offences. Thus special court is empowered to try other kind of offences as well. As a result, the courts are overburdened and the objective of having speedy trial becomes redundant. Additionally, the child also suffered due to exposer to other hard-core criminals, police and lawyers. It also makes it difficult to maintain structural modification that is separate room or waiting areas for the child or use of screens or one sided mirrors etc. in such scenario. It also makes

388 Section 32
389 Section 33
390 Section 35(1)
391 Section 35(2)
392 Section 35(1)

it difficult for presiding officers to have one set of mind as it keeps on shifting from POCSO cases to another.[393]

- There is great breach of Section 33(1) of the Act as in 14.39% cases in Delhi, 54.65% in Assam were committed by the magistrate to the special court.

- The study of various courts shows that courts which is designated special under POCSO that majority of them does not have separate washrooms or waiting areas or entrances or facilitate the movement of the persons with disabilities. This not only makes it highly improbable for the child to avoid encounter with the accused but also make it arduous for them to access justice.

But the courts established in Goa, Hyderabad and Bengaluru in the year 2004, 2016 and 2017 respectively are exemplary culmination of establishing child friendly courts. These courts have separate entrances, lifts and waiting rooms. They have facilities of video conferencing, of screens, and of one way glass. All these prevent intimidation of child at the hands of accused. The judges do not sit on dais and victim sits along with the judge and the officials do not wear uniform as all these provide solace to the child. Goa special court also had victim assistance Unit where the law students help the victim and his family to be acquainted with the process of the court which makes access to justice convenient and effortless.

- PPs are overburdened with work and they were allotted cases not only those under POCSO but other also. Resultantly, they fail to spend requisite time with the vic5im and fail to make a bond with the victim. Rather in majority cases, they meet the child on the day of hearing only. They are neither fully trained to deal with sensitive matters of child sexual abuse nor how to commune with children efficiently.

- There are several cases where recording of statement took more than 30 days due to delay in submission of certain reports such as forensic report. The completion of trial also took more than one year in number of states as data

[393] *National Law School of India, Report on: Implementation of The POCSO Act, 2012 By Special Courts: Issues and Challenges (Cetre for Child and the Law, 2018)*

shows that there are only 69% in Delhi, 37% in Mumbai and merely 29.06% in Assam were disposed of within a year.

- The Act is silent with regard to the police protection of the victim.

- The Act provides of non-exposure of the child to the accused during trial but it does not make provision for non-exposure during investigation stage or out of court. Thus, the lacunas in the law lead to vast opportunity to the accused to traumatise or intimidate the accused.

- In violation of Sec 33(2) of the Act, questions were directly asked to the child by the prosecution as well as by defence lawyer. The judge intervenes only when the questions are scandalous or when the child fails to understand it.

- The Act aims to provide comfort and assistance to the child victim by laying child friendly procedure. It never intends to punish child for any act. It is evident from Section 21(3) & 22(2) where the Act expressly excludes child from its ambit. But in A case , the trial court while acting contrary to the heart and soul of the Act, initiated the perjury proceedings against the victim as she has turned hostile during cross examination and admitted that she has filed false allegations against her father. The court has turned a blind eye to the intrusive and offensive cross examination in which she was continuously asked about her relationships and to the fact that she might have succumbed to the pressure built during cross examination.[394]

- The courts neglected Section 33 and thus child is called multiple times for recording of his testimony as courts give easy and frequent adjournments on the request of defence.

- The identity of the victim has been compromised in more than 70% cases studied either by disclosing the particulars of the victim or any of his family member.

[394] A Case of Perjury Against a minor: The POCSO Act and its implementation, LiveLaw, https://www.livelaw.in/case-perjury-minor-pocso-act-implementation/

- The provision of recording evidence in camera is partially observed. It is strictly followed only when the evidence of victim or of material witnesses is recorded. In case of other witnesses such as investigating officer, doctors or any other expert witness, they are usually examined in open court.