CHAPTER 5

RAPE LAWS IN INDIA- A VICTIMOLOGICAL PERSPECTIVE

"For too long, the law has centred its attention more on the rights of the criminal than on the victims of the crime. It is high time that we reversed this trend and put the highest priority on the victims and potential victims."

5.1 General Introduction

5.1.1 For every crime committed, there are at least two victims: society, which suffers a violation of its laws, and the actual victim who suffers an injury to body or property. The former regards a criminal act as essentially disturbing the equilibrium of social order and harmony and therefore takes on it the responsibility of restoring peace by punishing the criminal and/or reforming him. It, therefore, occupies the center stage in the criminal justice system. The second victim, the 'principal affected' in terms of loss of life or limb or property, is relegated to a secondary status with little or no role to play in the complex process of dispensation of justice. He is merely transformed to a witness to watch the entire play being enacted by the accused and the State as the protagonists.

5.1.2 Simply speaking, the victim is a forgotten party to the Criminal Justice System. While the entire focus of the law is on the offender, to protect his rights, to punish him and thereby bring about his reformation and rehabilitation, with all the resources and
goodwill available through courts and other agencies, the victim, more often, is left to fend for himself with little or no assistance coming his way. The violation of his rights, the invasion of his dignity, the actual losses incurred by him do not constitute matters of concern for anyone but himself. Strange, but true, justice fails to redress the wrong perpetrated by the offender on the victim; on the contrary, it aggravates the injustice by focusing solely on the offender, sidelining the victim's minimum needs and requirements.

5.1.3 This apathy of the system towards the victims of crime attracted the attention of intellectuals. They argued that the distancing of the victims from the system has vexed them; it has destroyed their belief in the efficacy of the same. "The victims themselves have become increasingly dissatisfied with a process that denies them a prominent role in bringing the accused offender to justice. They show their dissatisfaction by removing themselves from the system: they fail to report crimes; they fail to appear in court...Victim withdrawal from the criminal justice process creates a public impression that the system is inefficient and unresponsive, and thus exponentially increases the likelihood that more victims will be deterred from reporting crimes and testifying in court." Efforts were therefore on to modify the criminal justice system so as to integrate the victim as a part of the system.

5.2 Understanding Victimology

5.2.1 The concept of 'victim' dates back to ancient cultures and civilizations, such as the ancient Hebrews. Its original meaning was rooted in the idea of sacrifice or scapegoat -- the execution or casting out of a person or animal to satisfy a deity or hierarchy. Over the
centuries, the word 'victim' came to have additional meanings. During the 1940s, victimologists, such as Mendelson, Von Hentig, and Wolfgang, tended to define victims as hapless dupes who instigated their own victimizations. This notion was vigorously attacked by feminists in the 1980s, and was replaced by the notion of victims as anyone caught up in an asymmetric relationship or situation. "Asymmetry" means anything unbalanced, exploitative, parasitical, oppressive, destructive, alienating, or having inherent suffering. In this view, victimology is all about power differentials. Today, the concept of victim includes any person who experiences injury, loss, or hardship due to any cause. Also today, the word victim is used rather indiscriminately; e.g., cancer victims, holocaust victims, accident victims, victims of injustice, hurricane victims, crime victims, and others. The thing that all these usages have in common is an image of someone who has suffered injury and harm by forces beyond his or her control1.

5.2.2 The term "crime victim" generally refers to any person, group, or entity who has suffered injury or loss due to illegal activity. The harm can be physical, psychological, or economic. The legal definition of "victim" typically includes the following:

A person who has suffered direct, or threatened, physical, emotional or pecuniary harm as a result of the commission of a crime; or in the case of a victim being an institutional entity, any of the same harms by an individual or authorized representative of another entity.

5.2.3 Victimology is a new sub field or area of specialization within criminology. Criminology is a broad field of study that encompasses the study of law making, law

1 http://faculty.ncwc.edu/toconnor/300/300lect01.htm(Visited on Dec., 2003).
breaking, and societal reactions to law breaking. Victimology falls into the third of these areas. Ordinarily speaking, Victimology is the scientific study of crime victims and of their relationship with offenders and wider society. It examines not only the physical, emotional and financial harm suffered by the victim and society as a result of their victimisation, but also public and media reaction to the victim, the criminal justice system’s treatment of the victim, and the victim’s recovery and reparation.

5.2.4 Andrew Karmen broadly defined victimology as:

"The scientific study of victimization, including the relationships between victims and offenders, the interactions between victims and the criminal justice system — that is, the police and courts, and corrections officials — and the connections between victims and other societal groups and institutions, such as the media, businesses, and social movements."

5.2.5 From this definition, we see that victimology encompasses the study of:

- victimization
- victim-offender relationships
- victim-criminal justice system relationships
- victims and the media
- victims and the costs of crime
- victims and social movements

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3 Supra., n.l.
5.2.6 Mendelsohn and Von Hentig, are considered the "fathers of the study of victimology." These new "victimologists" began to study the behaviors and vulnerabilities of victims, such as the resistance of rape victims and characteristics of the types of people who were victims of crime, especially murder victims. Mendelsohn (1937) interviewed victims to obtain information, and created a typology of six types of victims with only the first type, the innocent, portrayed as just being in the wrong place at the wrong time. The other five types all contributed somehow to their own injury, and represented victim precipitation.

5.2.7 Von Hentig (1948) studied victims of homicide, and said that the most likely type of victim is the "depressive type" who is an easy target, careless and unsuspecting. The "greedy type" is easily duped because his or her motivation for easy gain lowers his or her natural tendency to be suspicious. The "wanton type" is particularly vulnerable to stresses that occur at a given period of time in the life cycle, such as juvenile victims. The "tormentor," is the victim of attack from the target of his or her abuse, such as with battered women. Von Hentig's work provided the foundation for analysis of victim-precipitation that is still somewhat evident in the literature today.


5.2.8 The emergence of Victimology as a distinct field of study made way for the Victims Rights Movement in the 60s, 70s and 80s. The movement brought increased social and political attention to the poor treatment of crime victims by the Criminal Justice System and challenged the treatment of victims by the system. It recognized that the success of the CJS depends to a large extent on victim participation and community's input.

5.3 Indian Criminal Justice System vis-à-vis Victims of Crime

5.3.1 Indian criminal justice system is not victim oriented but accused oriented. Under our procedural criminal law the accused is treated as privileged person and is provided with all possible help including a defense counsel at the cost of the State. A number of constitutional protections are also available to an accused under Articles 20, 21 and 22 of the Indian Constitution. But only very few legal provisions are there in our Criminal Law and Constitution to afford assistance and compensation to victims of crime. In the public mind, the interests of the offender seem to be receiving greater attention than the interests of the victim. Hence, a strong wind in the form of victimology is blowing in the fields of criminology, the focus of which is placed on restitution or compensation to victims and their dependants.

5.3.2 Legislative and Judicial Approach:

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7 Long K., Community input at sentencing: victim's right or victim's revenge? 1995 75 B.U.L. Rev. 187; See also, Katharine K. Baker, Sex, Rape, And Shame 79 B.U.L. Rev. 663


5.3.2.1 Section 357, Cr.P.C. 1973, empowers a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, *inter alia*, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence. Sub-section (1) of the section reads:

When a Court imposes a sentence or 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 properly incurred in the prosecution;

(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 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\(^\text{10}\) 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 assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any

\(^{10}\) Act 13 of 1855.
_bonafide_ purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

5.3.2.2 The Supreme Court of India while discussing the scope and object of Section 357 Cr.P.C. 1973 in _Hari Krishnan and State of Haryana v. Sukhbir Singh_\(^1\) observed:

“It is an important provision but the courts have seldom invoked it, perhaps due to the ignorance of the object of it. It empowered the courts to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of the accused. It may be noted that this power of the Court to award compensation is not ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he/she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is indeed a step forward in our criminal justice system.”

It further opined: “The payment by way of compensation, must however, be reasonable. What is reasonable may depend on the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the crime, the justness of crime by victim and the ability of the accused to pay. If there are more than one accused, they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary, by instalment, may also be given. The Court may enforce the order by imposing sentence in default.”

\(^1\) AIR 1988 SC 2127.
5.3.2.3 However Section 357 (1) is subject to some limitations as may be stated below:

1. Compensation to victims can be awarded only when substantive sentence is imposed and not in cases of acquittal.

2. Quantum of compensation is limited to the fine levied and not in addition to it or exceed the fine imposed.

3. Compensation can be ordered only out of fine realized and if no fine is realized, compensation to victim cannot be directed to be realized.

4. In very rare cases under IPC, the maximum amount of fine is imposed. Moreover, the maximum fine as prescribed in IPC about 150 years back is now inadequate in terms of real losses to victims.

5. Compensation to victim under this section can be allowed by the Court if it is of the opinion that the compensation is recoverable by such person in a Civil Court.\(^{12}\)

5.3.2.4 The right to compensation has also been recognized as an integral part of right to life and liberty under Art. 21 of the Indian Constitution. As early as in 1983, the Supreme Court recognized the petitioner’s right to claim compensation for illegal detention and awarded a total sum of Rs. 35000 by way of compensation. In delivering the judgment, Chandrachud C.J. observed: “Art 21 which guarantees the right to life and liberty will be denuded of its significance content if the power of this Court were limited to passing orders of relief from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Art 21

\(^{12}\) Supra, n.9, at pp. 9-10.
secured is to mullet its violators in the payment of monetary compensation. In *Sebastian Hongray v. Union of India* two women filed a writ of habeas corpus to produce their husbands who were missing and alleged to have been murdered. The authorities failed to produce them and the Court directed the respondents to pay Rs. 100000 to each of the wives of the missing persons. In several cases thereafter, the apex court has repeated its order, making compensation an integral aspect of right to life.

5.3.2.5 In *Saheli v. Commissioner of Police, Delhi* - Kamlesh Kumari and her husband, Inder Singh, along with their three children were living in one room on the ground floor of a house. Another lady, Maya Devi has also been living in another room of the same house on the ground floor with her husband and children. The husbands of both Kamlesh Kumari and Maya Devi were truck drivers and they often remained away from their home. There was a dispute over the ownership of the house. However, the new owner was evicting all the tenants from the said premises illegally. In their attempt, they succeeded in evicting all the tenants except the two tenants named Kamlesh Kumari and Maya Devi. They tried all methods to do away with them but failed. Then they resorted to pressure tactics with the help of the local police. They beat Kamlesh Kumari, tore her clothes and molested her. Her nine years old son clung to his mother to protect her. He

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14 AIR 1984 SC 1026.

16 (1990) 1 SCC 422.
was taken and forcibly thrown on the floor. Kamlesh Kumari was dragged away to the police station and a criminal case was imposed upon her of trespass. She was sent to Tihar Jail and her lawyer got her released. Kamlesh Kumari, on her release, came back and found that her child, Naresh was in a very bad condition. Naresh was admitted to Ram Manohar Lohia Hospital where he subsequently died.

5.3.2.6 On the basis of these facts, the Court directed the Delhi Administration to pay compensation to Kamlesh Kumari, mother of the deceased, Naresh a sum of Rs. 75,000/- within a period of four weeks. The Delhi Administration was asked to take appropriate steps for recovery of the amount paid as compensation or part thereof from the officers who will be found responsible.

5.3.2.7 Nilabeti Behra v. State of Orissa\textsuperscript{17} is another case wherein the apex court granted compensation within the Public Law domain. Suman Behera, the victim, was taken from his home in police custody at about 8 a.m, on 1-12-1987, by the Assistant Sub-Inspector of Police in connection with the investigation of an offence of theft and detained at the Police Outpost. At about 2 p.m. the next day on 2-12-1987, the petitioner, Smt. Nilabeti Behra, came to know that the dead body of her son Suman Behera was found on the railway track near a bridge at some distance from the Jaraikela railway station. There were multiple injuries on the body of Suman Behera when it was found and obviously his death was unnatural, caused by those injuries. The allegation made was that it was a case of custodial death, since Suman Behera died as a result of the multiple injuries inflicted to him while he was in police custody; and thereafter his dead body was thrown on the railway track. The prayer made in the petition was for award of compensation to the

\textsuperscript{17} 1993 2 SCC 746.
petitioner, the mother of Suman Behera, for contravention of the fundamental right to life guaranteed under Art. 21 of the Constitution.

5.3.2.8 The apex court while ordering payment of compensation opined\textsuperscript{18}: “This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course, has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law — through appropriate proceedings...It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental rights of a citizen under Article 21 is concerned.”

As regards the quantum of compensation, the Court held, the deceased Suman Behera was aged about 22 years and had a monthly income between Rs. 1,200/- to Rs. 1,500/-.

\textsuperscript{18} \textit{id.}
Hence, a total amount of Rs. 1,50,000/- would be appropriate as compensation to be awarded to the petitioner in the present case.

5.3.2.9 The Law Commission of India, expressing its concern for crime victims, has suggested a few proposals, substantive as well as procedural, for reforms. The Fifth Law Commission of India, in 1971, thought it felt ‘unwise’ to create a legal right in favor of victims of crime to join criminal proceedings as a third party \(^{19}\) and failed to see any ‘great advantage’ in providing for ‘duty to make amend for the harm caused’ or ‘payment of compensation’ to them as an additional punishment, favored the payment of compensation, presumably provided under sec. 545 of the then prevailing Criminal Procedure Code of 1898, to crime victims out of fine imposed on the offender \(^{20}\) With a view to giving prominence in the Indian Penal Code 1860 (IPC) to the payment of compensation out of fine imposed and to conferring substantive powers on trial Courts to this effect, it recommended insertion in IPC of the following substantive provision:

62. **Order to pay compensation out of fine to victim of offence** -

Whenever a person is convicted of an offence punishable under Chapter 16 [Of Offences affecting the Human Body, ss. 299-377], Chapter 17 [Of Offences against Property, ss. 378-462], or Chapter 21 [Of Defamation, ss. 499-502], of this Code or of an abetment of such offence or of a criminal conspiracy to commit such offence and is sentenced to fine, whether with or without imprisonment, and the Court is of opinion that compensation is


\(^{20}\) Id. at p.53.
recoverable by civil suit by any person for loss or injury caused to him by that offence, it shall be competent to the Court to direct by the sentence that the whole or any part of the fine realized from the offender shall be paid by way of compensation to such person for the said loss or injury. 

*Explanation* :- Expenses properly incurred by such person in the prosecution of the case shall be deemed part of the loss caused to him by the offence.21

5.3.2.10 However, Justice R. L. Narasimham, a distinguished member of the Commission, doubting efficacy of the compensatory scheme provided under the old CrPC (1898) suggested deletion of sec. 545 from the old Cr.P.C and insertion of the following clause in IPC:

70A. (1) In the case of conviction for an offence against the human body, and offence against property, defamation or an offence against privacy, the court may direct that the person convicted shall pay compensation to the person mentioned in sub-section (4).

(2) Such compensation need not necessarily be monetary and it may be in any form which the court considers to be a sufficient recompense to the injured party. But while passing the order for compensation, the court shall estimate its monetary value for the purpose of execution of the order.

(3) ---

(4) An order under sub-section (1) may be made-

21 *id.* at pp.53-54.
(a) in addition to any other punishment to which the person convicted may have been sentenced;

(b) in substitution of fine, where the offence, not being a capital offence, is one punishable with fine.

(5) The compensation under this section may be directed to be paid-

(a) to any person who has incurred expenses in prosecution, for defraying expense properly incurred;

(b) to any person 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) in the case of a conviction of any offence for having caused the death of another person or of having abetted the commission of such an offence, to the persons who are, under the Fatal Accidents Act, 1855, entitled to recover damages from the person sentenced, for the loss resulting to them from such death; or

(d) in the case of a conviction for 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, to 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.22

5.3.2.11 The Indian Penal Code (Amendment) Bill 1972, modeled on the recommendations made by the Fifth Law Commission in its 42nd Report, had a provision (cl. 19), premised on the majority view of the Law Commission, for payment of compensation. The 1972 Bill, for nearly four and half years, was scrutinized by a Joint Parliamentary Committee. The Committee, though it revised the Indian Penal Code (Amendment) Bill, 1978, also proposed the insertion of sec. 74B in IPC. The proposed sec. 74 B provided for the payment of compensation, in addition to any other punishment, by a person convicted for committing an offence punishable under Chapter XVI (offences against human body), Chapter XVII (offences against property) or Chapter XXI (defamation) of the Penal Code. Further, clause 18 of the 1978 Bill, substituting existing sec. 53, IPC, (dealing with 'punishment'), also, probably influenced, to some extent, by approach of Justice R. L. Narasimham, suggested that the payment of compensation, inter alia, be made a new form of 'punishment' provided under (sec.53) IPC. But unfortunately the 1978 Bill could not become effective as it, though was passed in the Rajya Sabha in November 1978, was not passed in the Lok Sabha due to dissolution the Lok Sabha in 197923.


22 id. at pp.381-82. (Emphasis supplied). Clauses (5) and (6) of the proposed section is almost verbatim at literatim of ss. 545 (1) (a) to (c) and 546 of the Cr.P.C, 1898 respectively. Also compare with s. 357 (1) (a) to (d) of Cr.P.C of 1973.
23 K.I. Vibhute, Compensating Victims of Crime: An Indian Perspective (Under Publication).
of Criminal Procedure for framing a Victim Compensation Scheme by the respective State Governments and realizing that the payment of compensation not only requires an inquiry into a variety of circumstances but also a few cases may not warrant compensation by way of punishment, however, opined that it is not appropriate to include order of payment of compensation in sec. 53, IPC, by way of punishment.24

5.3.2.13 The proposed Section 357 A suggested by the Fourteenth Law Commission in its 154th Report on Cr.P.C. suggested a comprehensive victim compensation scheme to be administered, on recommendations of a Trial Court, by the Legal Services Authorities constituted at the District and State levels under the Legal Services Authorities Act, 1987. However, the Law Commission desires the District and State Legal Services Authorities to have special considerations while compensating victims of custodial crimes, & of child abuse; rape victims, and physically and mentally disabled victims of crimes. The recommended sec. 357A, which devises the proposed ‘Victim Compensation Scheme’ and which is self-explanatory, runs as under:

Section 357A-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 compensating the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

24 Law Commission of India, One Hundred and Fifty Sixth Report on the Indian Penal Code (Government of India, New Delhi, 1997), para. 2.16. For text of the clause 18 (draft sec. 53, IPC) see para. 2.11.
(2) Under the Scheme the District Legal Services Authority at the district level and the State Legal Services Authority at the State level shall decide the quantum of compensation to be awarded whenever a recommendation is made by the trail court to that effect.

(3) If the trial court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 (3) is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may recommend to the District Legal Services Authority if the compensation in its view is less than Rs.30,000/-, or to the State Legal Service Authority if the compensation is more than Rs.30,000/-. 

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place it is open to the victim or his dependents to make an application under sub-section (2) to the District Legal Services Authority at the district level and the State Legal Services Authority at the State level for award of compensation.

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

(6) District Legal Services Authority or the State Legal Services Authority, as the case may be, to alleviate the suffering of the victim may
order immediate first aid facility or for 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.\textsuperscript{25}

5.3.2.14 However, like other suggestions of the Law Commission, the proposed compensation scheme has not been given effect to.

5.3.3 Judicial approach towards rape victims

5.3.3.1 The nineties witnessed a new awakening so far as victims of rape are concerned. The judiciary seemed to have realized the fact that the victim is an integral part of the criminal justice system; it is she who suffers most and therefore, her cry for justice must be adequately met, not by merely punishing the accused, but by compensating her, to enable her to start life afresh.

\textsuperscript{25} ibid., Chapter XV : Victimology, para 17. It is further pertinent to note that the Supreme Court of India also urged the National Commission for Women to prepare a Compensation Scheme for compensating rape victims. It, against the backdrop of Art. 38(1) of the Constitution, also pleaded for setting up of Criminal Injuries Compensation Board for the purpose. See Delhi Domestic Working Women’s Forum v. Union of India, (1995) 1 SCC 14 and Bodhisattwa Guatam v. Subhra Chakraborty, AIR 1996 SC 922. For comments, see infra. K. I. Vibhute, Victims of Rape and their Right to Live with Human Dignity and to be Compensated : Legislative and Judicial Responses in India.
5.3.3.2 In 1995, a public interest litigation was filed to espouse the pathetic plight of four domestic servants who were raped in a moving train by some military personnel. To put in details-

On 10-2-1993, six women, by name, Usha Minz, Shanti, Josphine Kerketta, Rosy Kerketta, Nilli and Lili, domestic servants, were travelling by the Muri Express. The journey was from Ranchi to Delhi. One of the victims Miss Lili described the incidence as follows:

"I was coming from my home town to Delhi by the Muri Express. I slept on Berth No. 50. Our friend, Shanti, woke up and told that some persons were teasing her. When, I and my remaining friends got up, we saw that about 7/8 army 'jawans' had come near us. Then we all friends got up and sat on our respective seats, Then all those army men began to molest us. First they -- two Sikhs and 6 clean-shaved men made me and my five friends sit on lower seats and then kissed and hugged us and lured on our body and breasts. On our objection they caught us from our hair and began to beat us. When we tried to cry, they shut our mouths. Then they threatened me and my friends that in case we will make any hue and cry they will throw us out of the running train and will kill us. On this we got frightened and sat there. From these 8 army men -- two

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Sikhs and 6 clean-shaved, one Sardar and one clean-shaved man forcibly made me to lie down on the lower berth and on the other adjacent lower berth, another Sardar took another girl and one clean-shaved fauji took Rosy to bathroom. Two other army men made Shanti to lie down on the nearby seat. Another two men tried to take Usha and Nilli but both sat under the seat to hide themselves. Thereafter, first Sardar fauji forcibly put off my clothes and raped me. After him, another clean-shaved fauji raped me. My friends, Shanti and Rosy were also forcibly raped by remaining army men."

5.3.3.3 This formed the basis of the first information report for offences under Section 376 read with Section 34 IPC. The Apex Court highlighted the ordeals of the victims of rape and the defects in the criminal law system in vogue.

5.3.3.4 "It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often at times such cries eclipse the real plight of the victim. Rape is an experience, which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behavior and values and generating
endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings.

5.3.3.5 "We will only point out the defects of the existing system. Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in Court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had had to suffer as a result of the rape itself. As stated in Modern Legal Studies -- Rape and the Legal Process by Jennifer Temkin: "It would appear that a radical change in the attitude of defense counsel and judges to sexual assault is also required. Continuing education programs for judges should include re-education about sexual assault. Changes in the substantive law might also be helpful in producing new ways of thinking about this type of crime." Kelly writes: "The most common cries were for more compensation and personal treatment from police officers. Victims remarked that, while they recognized officers had many cases to handle, they felt the officers did not seem sufficiently concerned with their particular case and trauma." Shapland concludes: "The changes in the criminal justice system necessary to approximate more closely to the present expectations of victims are not major or structural. They are primarily attitudinal. They involve training the professional participants in the criminal justice system that the victim is to be treated courteously, kept informed and consulted about all the stages of the process. They involve treating the victim as a more equal partner .... This might include a shift in working practices of the professional participants that might initially appear to
involve more work, more difficulty and more effort, but paradoxically may result in
easier detection, a higher standard of prosecution evidence and fewer cases thrown out at
court."

5.3.3.5 In this background, we think it necessary to indicate the broad parameters in
assisting the victims of rape.

(1) The complainants of sexual assault cases should be provided with legal
representation. It is important to have someone who is well-acquainted with the
criminal justice system. The role of the victim's advocate would not only be to
explain to the victim the nature of the proceedings, to prepare her for the case and
to assist her in the police station and in Court but to provide her with guidance as
to how she might obtain help of a different nature from other agencies, for
example, mind counseling or medical assistance. It is important to secure
continuity of assistance by ensuring that the same person who looked after the
complainant's interests in the police station represents her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim
of sexual assault might very well be in a distressed state upon arrival at the police
station, the guidance and support of a lawyer at this stage and whilst she was
being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to
representation before any questions were asked of her and that the police report
should state that the victim was so informed.
(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials, anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue in employment.

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth, if this occurred as a result of the rape”.

5.3.3.6 It recognized their right to legal representation and assistance, right to speedy trial, right to anonymity in trials, right to receive civilized treatment during trials and their right to compensation. With regard to the last one, the Court
drawing inspiration from the Criminal Justice Act, 1972 of U.K. as amended in 1988 and 1991 has opined that it is necessary to set up a Criminal Injuries Compensation Board in order to compensate the victim who frequently incur substantial financial loss. The proposed Board has to take into consideration the pain, suffering and shock as well as the loss of earnings due to pregnancy and the expenses of child birth if it occurred as a result of the rape. For the purpose, it directed the National Commission for Women (NCW) to evolve a scheme within 6 months from the judgment date. But the directions have not received any positive response either from NCW or the Government.

5.3.3.7 In the meantime, the judiciary has delivered several judgments reinforcing its views with regard to compensation.

5.3.3.8 In the case of *Gudalure M.J. Cherian v. Union of India* 28, a compensation of two lakhs fifty thousand rupees was awarded to the victims of rape. In this case, some miscreants had entered a convent and committed rape on nuns. The case was investigated in a perfunctory manner and vital clues and evidence was lost. The Supreme Court, while ordering the government to suspend the police officers and initiate disciplinary action against them, also directed it to pay compensation to the victims.

5.3.3.9 In *Bodhisattwa Gautam v. Subhra Chakraborty* 29 -

27 *ibid.*, at p.20.
28 *1995 SCC (Cr) 925*.
29 *AIR 1996 SC 922*.
Subhra Chakraborty was a student of Baptist College, Kohima, where the accused, Shri Bodhisattwa Gautam was a lecturer. The accused often used to visit Complainant's residence, as a teacher. He was respected by the complainant as well as all the members including her parents. In course of such visits once in the month of Nov. 1989 the accused voluntarily told the complainant that he was already in her love. Thus, there developed a love affair between themselves since 1989. The accused gave false assurance of marriage to the innocent complainant and thereby the accused dishonestly procured sexual intercourse with the complainant. The accused often used to induce the complainant to have biological contact with him, but whenever he was approached by the complainant to complete the marriage ceremony, the accused very tactfully used to defer the marriage sometimes saying that he was waiting for his parents' formal consent and sometimes saying to cooperate with him till he got a Govt. Service. In course of continuation of the affairs between the complainant and the accused, the complainant got pregnant twice, once in the month of September, 1993 and secondly, in the month of April, 1994 out of her cohabitation with the accused person. The complainant being worried about her said pregnancy created pressure upon the accused to marry her immediately and to save her from being ruined, but the accused on the plea of his parents' permission went on deferring the marriage. As a result there was a quarrel, in between the complainant and the accused, where after the accused lastly opined for secret marriage to avoid social gathering as he was waiting for his parents' permission. The complainant being pregnant was placed in a very awkward position, and agreed to the said secret marriage. Accordingly the accused on the 20th September, 1993, married the complainant in front of God by putting Vermilion (sindur) on the complainant's forehead.
and accepted the complainant as his lawful wife and thus the complainant was consorted and consoled. But the complainant faced further corporal punishment, as the accused kept on insisting the complainant to be refrained from giving birth to the baby and was pressurizing her to undergo operation/abortion despite her refusal for the same. The accused with fraudulent intention to deceive the complainant proposed the said abortion on the plea that birth of the baby would be a barrier to convince his parents to accept the complainant as their daughter-in-law and such event would lead the complainant to a path of unhappiness. The complainant being an innocent lady failed to understand the accused's wicked and mischievous plan whereby the accused succeeded and dishonestly motivated the complainant for abortion and compelled the complainant to undergo operation in the Putonou Clinic, Kohima and aborted in October 1993. The complainant was forced to undergo abortion even second time in the month of April 94, in the Carewell Nursing Home at Dimapur with the pretext that if the complainant gave birth to any child before the accused could convince his parents she would never be accepted by Bodhisatta's parents and relatives. Further their marriage being a secret one, the developed stage of the complainant would hamper the dignity of her own parents and other paternal relations irreparably and thus taking the privilege of complainant's innocence the accused exploited the complainant in a very pre-planned way. The accused even furnished a false name in the said Nursing Home and signed the consent Register/Paper as BIKA SH GAUTAN concealing his real name BODHISATTA GAUTAM which fact was unknown to the innocent complainant until the 2nd week of February, 1995 when the complainant went to obtain a certified copy of the abortion consent paper of the accused. On hearing the message that the accused would go to
Silchar, the complainant on 4th Feb. 95 went down to Dimapur and visited the accused to take the complainant permanently with the accused to Silchar as he was going to Silchar to join as a lecturer in a Government College named Cachar College which both of them actually waited for. But the wicked accused forgetting the consequences of his all fraudulent activities in total disregard of their marriage and their relationship refused to accept the complainant as his wife and abandoned the complainant asking her to forget all her dream. A complaint was registered against him when he abandoned his wife, under Sections 312, 420,496 and 498A IPC. These were mainly offences relating to marriage. But, in its judgment, the Supreme Court equated the plight of the woman to that of a victim of rape and gave an eloquent exposition of the heinousness of the offence and the need to assist the victim to overcome the physical, psychological and financial loss suffered by her. In its opinion, rape is a crime against the entire society. It shatters the equilibrium of the social order. At the same time, it is a devastating experience for a woman and pushes her into deep emotional crisis. It is of paramount importance to rehabilitate the woman who has suffered such a trauma in rape. Referring to the decision in Delhi Domestic Working Women’s case, the Apex Court pointed out that\textsuperscript{30} “This decision recognizes the right of the victim for compensation by providing that it shall be awarded by the court on conviction of the offender subject to the finalization of Scheme by the Central Government. If the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should also be pervaded in the Scheme. [T]he jurisdiction to pay interim compensation shall be treated as part of the overall jurisdiction of the court trying the offences of rape which ...is an offence against the basic human

\textsuperscript{30} Supra. n. 26, at p.928.
rights as also the fundamental right of personal liberty and life." Accordingly, the accused was ordered to pay an interim compensation of Rs.1000 per month during the pendency of the case. Some have argued that the amount ordered to be paid was not by way of compensation, but merely a sort of maintenance payable to a wife under section 125 Cr.P.C., 1973. Nevertheless, the legal mandate appears quite clear and well established that compensation as well as interim compensation are payable by the accused to the victims of rape in the interest of justice.

5.3.3.10 Similarly, in Jarnail Singh v. State of Punjab\textsuperscript{31} where the appellant was convicted under Section 376 IPC, for raping a girl below 16 years, the Apex Court directed him to pay an amount of twelve thousand rupees as compensation to the victim.

5.3.3.11 In yet another landmark decision, Chairman Railway Board v. Chandrima Das\textsuperscript{32} a Bangladeshi woman was raped by some railway officials in the railway yatri niwas. The apex court asked the railways to pay Rs. 1000000 as compensation for the infringement of her right to life under Art. 21 of the Constitution. In the opinion of the Court- "Smt. Hanuffa Khatoon, who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as "Right to Life" was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of

\textsuperscript{31} (1998) 8 SCC 629
\textsuperscript{32} MANU/SC/0046/2000
Govt. employees who outraged her modesty. The Right available to her under Article 21 was thus violated. Consequently, the State was under the Constitutional liability to pay compensation to her."

In Brijesh v. State of Haryana\textsuperscript{33} where a 18 year old girl was gang raped by three young men, the High Court ordered compensation to the tune of Rs. 50000. In the words of the Court, since, the Fundamental Right of the prosecutrix- Nisha under Article 21 of the Constitution of India, i.e. right to life which included right to live with human dignity, has been violated, so it will be in the fitness of the circumstances, if a sum of Rs. 50,000/- is awarded as compensation to Nisha which shall he shared jointly and severally by all the 3 appellants

In Chandradevi Kamalanantha & others v. State of Tamil Nadu\textsuperscript{34} a sensational news item appeared in the Indian Express which captured the attention of its readers. It spoke of the rape of 13 minor girls by the Swami of an ashram. Subsequently on investigation, the case came up before the court and it was revealed that Swami Premananda, who was running an orphanage in the name of Boopalakrishna Ashram, Mathalai at Sri Lanka, came over to India in the year 1984. About 12 young Tamil girls and a few women, who were in the ashram in Sri Lanka, were also brought to Tiruchy through Rameswaram and Vedaranyam by boat. Initially, Swami Premananda set up an ashram in a rented building at Tiruchy and then shifted and constituted it into a big institution at Fathima Nagar in the year 1989 in a sprawling space spread over nearly 150 acres. The ashram had in itself,

\textsuperscript{33} MANU/PH/0482/2003
\textsuperscript{34} MANU/TN/2335/2002
laid out areas for residence, eating place, press, school, etc. Admittedly, about 100 girls and 100 boys, mostly orphans, were staying in the ashram. During the period between 1990 and October 1994 Swami Premananda (A-1) committed rape on 13 girls. A-1 used to commit rape immediately some time after the girls attained puberty while they were put on guard duty during nights and at other odd hours and places. The Court ordered life imprisonment in addition to payment of fine. It opined, “While imposing the fine amount on A-1, the learned Sessions Judge has taken into consideration the age of the victim girls, the trauma which they have undergone and the damage which they have suffered and hence ordered a fine of Rs.5,00,000/- on A-1 to be paid as compensation to each of the victim girl. We find that the fine imposed is commensurate with the crime and the capacity of A-1 to compensate. It is not in dispute that A-1 is holding a Joint Account … to a tune of Rs.89,00,000/- and the operation of this account had been frozen under the orders of the court. Though an attempt had been made by a third party to represent that this amount represents the amount of a Trust and that it cannot be utilized by A-1 for paying the fine ordered to be paid by him, we have no hesitation in rejecting such a representation made without any pleading and records. It only fortifies our apprehension that the appellants are trying to see that the fine amount is not recovered and thereby deprive the victim girls of their due compensation. As the amount in the bank is in the joint account of A-1, the said amount is liable to be utilized for payment of the compensation. Therefore, we direct the concerned, including the Bank and the Revenue Authorities, to permit and release the fine amount of Rs.61,30,000/- (Rs.61,20,000/- + Rs.10,000/-) and the compensation as ordered by the court, viz., Rs.5,00,000/- be paid to each of the victim girls.
5.4 The Required Move

5.4.1 While the above case laws depict a bright picture drawn in favor of victims, the reality remains that rape victims in India are still a poor lot. They have as yet not received the sympathetic treatment they deserve; rather they have time and again been discarded and ostracized for a wrong committed against them. The State as well as its machinery has seriously failed in its task of providing care and protection to the hapless victims of such brutality. Either in terms of passing legislation or in terms of functioning of the concerned authorities, the State has only blatantly shown its inefficiency and ineffectiveness in arresting the problem and offering a solution. As per the recommendations of the Supreme Court of India in *Delhi Domestic Working Women’s Forum*\(^{35}\), a Criminal Injuries Compensation Board is yet to be constituted. What results from such laxity is the dependence of the victims on their own resources, if any, to tide over the problem and/ or begging before the State authorities for any support which it may or may not provide. The need of the hour is to devise measures, by means of State legislation, whereby the victims are ensured the bare minimum of care and protection. To draw up an entire list of the facilities to be provided is quite a difficult task but the researcher might herein try to enumerate a list of certain basic facilities that may be accorded to them.

5.4.2 In the first place, compensation to victims of rape must be drawn up as a matter of right. Rape involves infliction of wounds on the body as well as the soul of the woman.

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\(^{35}\) *Supra* n. 26.
Hence, it requires years to recover from the traumatic experience. In fact, victims have opined that in most cases it is difficult to forget the nightmarish experience of rape. It overshadows the happiness of the entire life. Whether married or unmarried, a woman is never again able to enjoy the thrills of sexual life; she suffers from anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress disorder. Long-term effects also include disordered eating, sleep problems, sexual dysfunction and increased negative feelings about themselves. Apart from the psychological part, in forced or violent rapes, the victim may have severe injuries over her body. Recovery from the deep-seated problem involves long-term treatment involving lakhs of rupees. The State must provide for payment of adequate compensation to the victim. Furthermore, payment of compensation should not be dependent on the conviction and/or acquittal of the offender. In all cases where an allegation of the commission of such offence is made by the victim and it prima facie appears from medical reports and/or otherwise to the concerned authorities that such an act has taken place, payment of compensation may be ordered. Immediacy in payment of compensation is a dire requirement since much of its efficacy/need may be lost with the passage of time. Thus, a payment of money after two or five years of the incident, would be of no utility; rather, its immediate access would benefit the victim to tide over the physical as well as mental distress through proper medical/psychological care and treatment.

5.4.3 Determination of the quantum of compensation must be a matter of discretion for the Court/Board. However, in no case should it fall below the bare minimum fixed by the State or be a mere token amount for the satisfaction of the court and the accused. Having
regard to the heinousness of the crime, the Court should be stern in ordering a hefty amount as compensation. The nature of injuries caused, the gravity of the injuries, the impact of the incident on the victim, the present situation of the victim etc. should be factors for the Court to consider in the matter of fixation of compensation.

5.4.4 The next important aspect is the setting up of Rape Crises Centers all over the country. These centers would operate as after care institutions for the victims as well as place of temporary stay and comfort. To be run primarily by NGOs with the financial assistance of the State Governments, these centers would employ trained women as doctors, nurses, counseling experts, psychologists to enable the victims to tide over their physical problems and mental stress. Rehabilitation of the victim would be the final goal of such institutions. While it may not be compulsory for all victims to take recourse to these centers and the facilities offered by them, those who desire and or approach must necessarily be extended the services. The Court may also, having regard to the condition of the victim in specific cases, direct that she be treated or kept at the centers for a substantial period of time.

5.4.5 India, being a tradition bound conservative society, rape victims are treated with much intemperance and brutality. Once a woman is raped, she is discarded by her relatives and left to fend for herself. It is also true that in India, most women are still brought up as homemakers, with little or no education to rescue them in times of distress. In such scenario, the researcher, as well as the writer, may well imagine the plight of the victim. With minimum education and no skills whatsoever, she is left with no alternative
but to beg and/or die. To avert such misfortune, the State may provide for vocational training programs, financial assistance for small-scale business opportunities etc. A slight liberal and sympathetic approach from the part of the authorities would help in devising better means vis-a-vis the victim.

5.4.6 Rape victims should not be made to relive their experiences in court. In other words, the court should not be a forum for re-enactment of the drama of rape. As psychologists have revealed, victims prefer to remain silent in fear of the shameful and indecent treatment they would have to face during trials. This has to be done away with. The hostile treatment meted out to the victims by the defense counsel, in particular, and the Judge, at times, should be greatly discouraged. A pre-determined prejudicial mental set up has to be completely wiped out. Thus, the basic notion that the victim is also responsible for the occurrence must not haunt the Honorable justice. He must consider the facts and the evidence adduced before him impartially, not with an eye of suspicion. In line with the thought, he must regulate the questions put forward by the defense counsel. Any attempt to hurt the dignity of the woman, standing as a victim, must not be tolerated; rather, all questions directed at her must be carefully scrutinized so as not to offend her sensibilities.

5.4.7 A hostile climate inside the court must necessarily be avoided. The victim must be made to feel at ease; she must be kept out of the public gaze. Hence, trials must compulsorily be held in camera; identities of victims must necessarily be withheld. The victim may also be given the opportunity to decide on whether to face her attacker as it
may have, in cases, severe effects on her psyche. In other words, while she must be present in the Court for examination and cross-examination, arrangements may be made whereby she does not come face to face with her attacker. A screen separating the accused and the victim, while enabling the Judge to see both of them, may be made use of.

5.4.8 The victim must not be a left out party in the entire trial procedure. As her interests are of prime concern, she must be given the opportunity to intimately associate herself with the trial, if she so desires. She must be allowed to provide a counsel of her choice, in addition to the State counsel, as in criminal proceedings, the aggrieved party is the State. This, in many cases, may improve the effectiveness of the entire process and in turn secure conviction. She must also be intimated of the day-to-day progress in the trial. She must be consulted and taken into confidence in every matter and/or argument that the State proposes to bring up before the court. Such an approach would reassure the faith of victim in the system and help to create a full-proof trial procedure.

5.4.9 As suggested by the Malimath Committee:

The victim may be made a party to assist the court in discovering truth. He may be permitted to put questions or suggest questions to be put by the court to the witnesses produced by the parties. He can also point out the availability of other evidence that would assist the court in discovering truth. On the victim furnishing such information the Court may cause production of such evidence as it considers necessary to discover truth.

36 Recommendations of the Malimath Committee on reforms of Criminal Justice System, para. 2.20.2.
It has further reiterated\textsuperscript{37} Active participation of the victim during investigation would be helpful in discovering truth. He can assist investigation in finding out the real offender and in collecting evidence to prove the commission of the offence by the assailant. He can also offer suggestions for proper investigation of the case. When the investigation proceeds on wrong lines the victim can move the Court for appropriate directions to ensure proper investigation of the case.

5.4.10 Victim’s right to appeal is another important aspect which may be incorporated. As suggested by the aforementioned Committee\textsuperscript{38} The victim or his representative who is a party to the trial should have a right to prefer an appeal against any adverse order passed by the trial court. In such an appeal he could challenge the acquittal, or conviction for a lesser offence or inadequacy of sentence, or in regard to compensation payable to the victim. The appellate court should have the same powers as the trial court in regard to assessment of evidence and awarding of sentence.

5.4.11 Finally, and most importantly, ‘speedy justice’ should be the motto of the criminal justice system. Speedy disposal of cases would help the victims, since they would not made to relive their experiences for years in court rooms. That would also help build the confidence of the victims in the system.

\textsuperscript{37} ibid., at para. 2.203.
\textsuperscript{38} Supra n. 36, at para 2.21.
5.4.12. The above are few aspects that the present writer would like to be incorporated in the system. After all, as emphasized before, the system is not only to deliver justice to an accused, but to see that the victims thereof are also delivered the fruits of the same. It is the accused and the victim, who make the 'penal couple' and all efforts should be towards their reformation and rehabilitation.