CHAPTER -5

LEGISLATIVE AND JUDICIAL APPROACH BEFORE AND AFTER
CRIMINAL AMENDMENT ACT-2013

1. Introduction

Although several efforts have been made so far to uplift the status of woman in modern India, yet the status of women seems to be in irony. They suffer severe hardships on daily basis. On one hand they are treated at the pinnacle of ladder of accomplishment, on the other hand they suffer the violence afflicted on them by their own family members. Unfortunately even after experiencing a swift professional growth the modern woman in reality, still has to travel a long way to seek personal safety and security. Their path seems to be full of obstructions. The women leave the protected area of their home on daily basis and have to face the battlefield of survival, wholly armoured with their talent however the fear of harassment restricts them from achieving the success they deserve... If we look at the sex proportion of India, we can see that the Indian society is still biased against females. There are 943 female per thousand male in India as per the census of 2015, which is to a great extent lower than the world average of 983 females per 1000 males.

At present, Indian women have excelled in each and every field from social work to visiting space station. There is no area of work, which remained unconquered by Indian women. Whether it is literature, games, entertainment, politics and technology, in all places we hear applauses for them. However, unfortunately the increasing crime rate against women in India has become a matter of grave concern and therefore immediate steps are required to curb this unrest. Some of the igniting criminal acts that woman are subjected to on an ongoing basis such as Rape, sexual assault, eve-teasing and stalking are matter of grave worry.

The 2012 Delhi gang rape case shook the country’s existing legal framework pertaining to laws safeguarding woman. The matter involved rape and fatal assault that occurred in Munirka, a neighborhood in South Delhi. The incident took place when a female physiotherapist accompanying her boyfriend was gang raped, and tortured in private bus. There were six staffers in the bus, including the driver, all of them raped the woman and beat her boyfriend. Thirteen days after the assault, she was transferred to a hospital in Singapore for emergency treatment, but died from her injuries two days later. The incident created extensive national and international reporting and was widely condemned, both in India and abroad. Consequently, public protests against the state and central governments for worsening of security for women took place in New Delhi, where thousands of activists run into with security forces. Similar protests took place in major cities throughout the country. Because India does not allow the press to publicize a rape victim’s name, the victim has become widely known as Nirbhaya, meaning “fearless”, and her life and death have come to symbolize women’s struggle to end rape and the long-held practice of blaming the victim rather than the perpetrator.

It is disgusting to note that even after the shocking incident of gang rape, many political leaders, including MP/MLA’s, religious gurus with huge followings and other prominent persons have been making speech reinforcing the gender bias. Some of them even held the victim responsible for having facilitated the rape by her own conduct. Some of the worst examples are:

**Shri Anisur Rahman** (Communist Party of India (Marxist) – West Bengal): “We have told the chief minister in the assembly that the government will pay money to compensate rape victims. What is your fee? If you are raped, what will be your fee?”

**Shri Asaram Bapu**: “Only 5-6 people are not the culprits. The victim is as guilty as her rapists... She should have called the culprits brothers and begged before them to stop... This could have saved her dignity and life. Can one hand clap? I don’t think so,”
AP Singh, Defense Lawyer “These rapists are not hardened criminals. They need rehabilitation,” he was heard saying. “It is you women, who lead the men in our country astray.”

“...if my daughter was having premarital sex and moving around at night with her boyfriend, I would have burnt her alive. I would not have let this situation happen. All parents should adopt such an attitude.”

Shri Om Prakash Chautala (INLD Haryana): “We should learn from the past... specially in Mughal era, people used to marry their girls to save them from Mughal atrocities and currently a similar situation is arising in the state. I think that’s the reason khap has taken such a decision and I support it.”

Shri Sri Prakash Jaiswal (Congress): “New victory and a new marriage have their own significance. The memory of your victory fades with time, the same way one’s wife becomes old and loses her charm”.

Number of them have reflected this gender disparity opposing to the constitutional mandate after swearing “to bear true faith and allegiance to the Constitution of India”, in accumulation to their fundamental duty “to abide by the Constitution and respect its ideals”. This deep-rooted narrow-mindedness has to be abolished for the effectiveness of any laws on the subject. The time has come to pass laws providing for the subsequent debarment of elected representatives on this ground alone.

UN Secretary-General on Delhi Gang Rape has stated that, “Violence against women must never be accepted, never excused, never tolerated. Every girl and woman has the right to be respected, valued and protected and urged Indian Government to do everything in their power to take up radical reforms, ensure justice and reach out with robust public services to make women’s lives more safe and secure”.2

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Author and activist Eve Ensler said that “the gang raping and the murder of Nirbhaya was a really horrific incident, but a huge turning point in India and the world. And I actually was there for three weeks in the middle of all of it. And I have to say, in my lifetime, having worked every day of my life for the last 15 years on sexual violence, I have never seen anything like that, where sexual violence broke through the consciousness and was on the front page, nine articles in every paper every day, in the center of every discourse, in the center of the college students’ discussions, in the center of any restaurant you went in. And I think what’s happened in India, India is really leading the way for the world. It’s really broken through. They are actually fast-tracking laws. They are looking at sexual education. They are looking at the bases of patriarchy and masculinity and how all that lead to sexual violence”.

Due to the protests, a judicial committee headed by former Chief Justice of India J. S. Verma, one of India’s most highly regarded Chief Justices and eminent jurists, was selected by the Central government to present a report within 30 days to put forward amendments to criminal law to strictly deal with sexual assault cases. The committee urged the public in general and particularly renowned jurists, legal experts, NGOs, women’s groups and civil society to share “their views, knowledge and experience suggesting possible amendments in the criminal and other relevant laws to provide for quicker investigation, prosecution and trial, and also enhanced punishment for criminals accused of committing sexual assault of an extreme nature against women.” The Committee headed by Justice Verma submits its report after going through the 80,000 suggestions received during the time. The report states that inability or non serious attitude of the government and police were the main reason behind crimes against women. In 2013, the Criminal Law

3 http://www.democracynow.org/2013/2/14/one_billion_rising_playwright_eve_ensler
(Visited on 17 February, 2016) 
4 “Shinde calls meeting of Chief Secretaries, police chiefs to review crime against women”. The Hindu (Chennai, India). ( Visited on 17 February, 2016)
(Amendment) Ordinance, 2013 was promulgated by President Pranab Mukherjee, several new laws were passed, and six new fast-track courts were created to hear rape cases. Critics argue that the legal system remains slow to hear and prosecute rape cases, but most agree that the case has resulted in a tremendous increase in the public discussion of crimes against women and statistics show that there has been an improvement in the number of women willing to file a crime report.

2. State Duty to Protect the Rights of Individual

It is the duty of the state to provide a safe environment to the women, who comprise half the nation’s inhabitants; and failing in discharging this public duty render it answerable for the lapse. Thus state’s role is not just reactive to catch and punish the culprits for their crimes but its duty is also to stop the commission of any crime to the best of its ability.

The National Human Rights Commission has also said that the government is answerable and liable for the infringement of human rights within its jurisdiction and observed that “it is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights”.

As rightly pointed out by Justice J. S. Verma in his report on Criminal Amendment act, 2013 said that “the purpose of laws is to prescribe the standard of behaviour of the people and to regulate their conduct in a civilized society. Faithful implementation of the laws is of the essence under the rule of

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5 NHRC Order dated April 1, 2002 in Case No. 1150/6/2001-2002
law for good governance. In the absence of faithful implementation of the laws by efficient machinery, the laws remain mere rhetoric and a dead letter”.

Dr. Rajendra Prasad, while moving the motion for adoption of the Constitution in the Constituent Assembly, had said:

“Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. If the people who are elected, are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it and India needs today nothing more than a set of honest men who will have the interest of the country before them. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country, at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance”.6

The Supreme Court in Bantu v. State of U.P.7 has observed that “the law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of “order” should meet the challenges confronting the society”.

6 Constituent Assembly Debates, Volume XI.
7 (2008) 11 SCC 113
Friedman in his “Law in Changing Society” stated that, “State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society”. Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

The observation of the Committee headed by Justice J.S. Verma has also stated that “unless and until the state pursues a policy of avowed determination to be able to correct a historical imbalance in consciousness against women, it will not be possible for men and indeed women themselves, to view women differently and through the prism of equality. It is not enough that women occupy a few symbolic political positions to evidence true empowerment of women in this country. In the view of this Committee, the ethos of empowerment of women does not limit itself to political equality, but also extends, in equal terms, to social, educational, and economic equality. If true empowerment of women were to mean anything, it is necessary that law, as well as public policy, must be capable of engaging substantially with women’s rights, opportunities, acquisition of skills, the ability to generate self-confidence and insist on total equality in relationships, both with society and the State. It is the inability of women to claim equality in society which has led to an incline against women as a consequence of which there has been a latent bias against women in the prosecution of crimes including its prevention.”

One wonders if the following words written by Mahbub-ul-Haq hold true for Indian women:
“As we approach the 21st century, we hear the quiet steps of a rising revolution for gender equality. The basic parameters of such a revolution have already changed. Women have greatly expanded their capabilities over the last few decades through a liberal investment in their education. At the same time, women are acquiring much greater control over their lives through dramatic improvements in reproductive health. They stand ready and prepared to assume greater economic and political responsibilities. And technological advances and democratic processes are on their side in this struggle. Progress in technology is already overcoming the handicaps women suffer in holding jobs in the market, since jobs in the future industrial societies will be based not on muscular strength but on skills and discipline. And the democratic transition that is sweeping the globe will make sure that women exercise more political power as they begin to realize the real value of the majority votes that they control. It is quite clear that the 21st century will be a century of much greater gender equality than the world has ever seen before.”

The Committee Comprised by Justice J.S. Verma, which also included retired judge Leila Seth and leading advocate Gopal Subramaniam, also of the view, that “unless and until each one of these pernicious models is deconstructed by the collective will of not only Parliament, but also of the people of India, gory incidents, such as those which have been reported in recent times and which continue to be reported from across the country, will continue to shake the faith of the people. Each violent incident against an Indian woman is causing greater provocation. It is causing greater provocation not simply because it is a shameful incident, but also because it appears that there is a vast disconnect between equality and respect and the obligations of those who administer the law”.

The need for the hour is of good governance and trustworthy and competent system for law enforcement and justice delivery united with performance of the fundamental duties by every inhabitant.

3. Legislative Enactments to Protect Woman against Crime

In India the woman constitute about half of the population however as far as discrimination and violence they suffer in the hands of the man in silence is from time immemorial. Even though self sacrifice and self-denial are their aristocracy and asset, still they have been made the victims of all inequalities, indignities, injustice and bigotry from time immemorial. These are some of the factors that compel legislature to make various laws to give the women their due share. The Indian constitution which is the fundamental law of the land contains numbers of provisions for the promotion and safety of the women. The concept of equality and non-discrimination finds its due place in Indian constitution. Besides, it also enables the state to adopt measures of affirmative discrimination in favour of women.9 Apart from fundamental rights, some specific provisions to ensure the rights of women have also been incorporated in Directive Principles of State Policy10. However, in spite of constitutional protection and a number of legislations, gender bias and injustices continue to happen. This is mainly because those who implement the laws or infer them do not always fully share the viewpoint of gender justice concept.

There is an exhaustive list of laws passed by the legislature specifically to protect the women from any violence, discrimination, cruelty, stalking, religious and cultural atrocities. Important legislative enactments which specifically deal with violence against woman are following:

1. Indecent Representation of Women (Prohibition) Act, 1986
2. The Immoral Traffic (Prevention) Act 1986
3. Dowry Prohibition Act, 1961

9 Article, 15 and 16, Constitution of India.
10 Art. 38, Constitution of India.
5. The Protection of Women from Domestic Violence Act, 2005  
6. Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994  
7. The Medical Termination of Pregnancy Act, 1971  
8. The Prohibition of Child Marriage Act, 2006  
10. The Sexual Harassment of Woman at Workplace (Prevention, Prohibition and Redressal) Act, 2013  

Apart from the specific legislation for protection of women in India there a number of other legislation which contains provision for the prohibition and prevention of violation of women rights for e.g. The Indian Penal Code, 1860; the Indian Evidence Act, 1872; Criminal Procedure Code, 1973; The Married Women’s Property Act, 1874; The Factories Act, 1948; The Minimum wages Act, 1948; The Hindu Marriage Act, 1955; The Maternity benefit Act, 1961; the Muslim Women Protection of Right on Dowry Act, 1986; National commission of Women Act, 1990; the Protection of Human Rights Act, 1993; Information technology Act, 2000 etc.

There are several areas of concern for women in law and judicial administration. However, it is in criminal law and criminal justice administration that the struggle for justice for woman is more discriminating and intolerable. These problems are partly embedded in substantive law and partly in procedural aspects, i.e., Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 and the way they are administered. In cases of crime against women like sexual violence, stalking, dowry deaths and the like, the victims in most cases do not get justice at all. With regard to women, basic right to get justice is not easily available because of a multiplicity of factors on which they have little control. Indian women are, by and large, handicapped in reverence to the entire fundamental essential for access to justice. The widespread illiteracy, the cultural obstacles and subordination they suffer
from, and unfriendly procedure of law have kept most women, who have problems, away from the law and courts.

The Report of the JCP quoted the observations of Jawaharlal Nehru to signify the role of legislation in dealing with this social evil as under:

"Legislation cannot by itself normally solve deep rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion to give a certain shape."

Ironically, the laws discussed here which are supposed to protect women from violence, actually penalize the women. Instead of empowering women, the laws have served to strengthen the State. A power full State conversely means weaker citizens, which includes women. And the weaker the women, the more vulnerable they will be to male violence. The cycle is vicious. Once a girl child is raped, a social stigma is attached to her. In such case besides other measures there should be social rehabilitation of victim. Due to many reasons the rape victims hesitate to bring the case to the notice of police and resultantly most of such cases go unreported leaving the offenders to roam free to commit more crimes in the society.

Victimized women have different experiences with the national criminal justice system. They cannot always depend on the criminal justice system for safety. In terms of combating crime against women, there often exist gaps and vagueness in the laws criminalizing violence. Laws tend to be progressively, focusing on specific forms of violence rather than dealing comprehensively with all forms of crime against women. When the law is put in place, there is often weak law enforcement. This leads to victims lack of interest, disbelieve and evading the system. In certain situations such as the cruelty and dowry deaths, bribery among police and other enforcement officials works as a major problem. In a large and complex country like India, the magnitude and problems of crime against women do not yield easy
solutions. Setting standards is a first step, and while it is an important and necessary one, it is not enough. There must be effective implementation at every level on national, regional and international scene. The rule of law and recourse to legal remedies for violation of rights and entitlements must be observed.

The law commission through its recommendations made various changes in Indian Penal Code, 1860, Criminal Procedure Code, 1973 and Indian Evidence Act, 1872 and has tried to solve many problems of the victims of rape but these recommendations are not enough. The educated mass should come forward to support the victims of rape and report the matter to the police authorities immediately. Only the law cannot solve the entire social problems. Therefore, in addition to the Governmental authorities; social organizations, women’s organizations, voluntary groups, NGO’s etc. ought to come forward for the cause of rape sufferers. The HRC should play an active role to check such hatred events of rape in India. There is an urgent need to strictly enforce and adhere to the law relating to rape. The guidelines propounded by the Supreme Court from time to time should be followed in letter and spirit. There is an urgent need of change in the approach of the police authorities in the matters of rape cases. They should have a sympathetic attitude towards the victims of rape and the necessary support should be provided to the victims.

4. Judicial approach regarding crime against woman Before Criminal Amendment Act 2013 (A road from gender biased to Sensitive Judiciary)

Laws have taken silent and slow steps in the direction of political participation of women preventing gender biases and removing lacunas in procedural laws and laws relating to evidence. The law cannot change a society overnight, but it can certainly ensure that the disadvantaged are not given a raw deal. The courts can certainly go beyond mere legality insulating women against injustice suffered due to biological and sociological factors.
But all law is not justice; nor is all justice law alone. At times there could be more justice without law and likewise there could be times when strict adherence to, or mindless application of laws, could lead to injustice. Justice is a combination of various factors: enactment of laws responsive to the changing needs of time, their effective enforcement, progressive and proactive interpretation and application so as to fill up any void that is left and not taken care of by statutory enactments. It is the law in action and not just the law which is important. If one were to ask to name a significant single factor which could make the delivery of justice, just and meaningful, the answer would be a sensitized judiciary, a judiciary which views the circumstances and situation in a holistic manner. Judges too have their own philosophy and their own convictions depending on the background wherefrom they come, but then, there is a collective qualitative philosophy of justice dispensation in which personal inhibitions and predilections have no place.

Judiciary in India has always played a laudable role in eradicating social evils, and to bring social justice to masses. The Supreme Court of India has devised various ways like epistolary jurisdiction, relaxing *locus standi* principle, allowing Public Interest Litigation (PIL) and has played pro-active role for bringing justice to every doorstep.

The Supreme Court in *Mahesh v. State of M.P.*\(^{11}\) has said “It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justice system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative terminology.”

The Supreme Court in *Dhananjoy Chatterjee v. State of West Bengal*\(^{12}\), held that “In recent years, the rising crime rate-particularly violent crime
against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system’s credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.”

Through various cases several guidelines have been provided by the Apex Court to eradicate social evils and specially to curb crimes against women. In this Chapter I have gone through some prominent judgments of the Indian judiciary wherein number of path breaking guiding principle were passed with a view to minimize crimes against women.

4.1 Judiciary on Rape
The Apex Court of India has taken a stern view for crimes against women and specially rape. Time to time various directions has been issued by Court to protect women and penalize the perpetrators of these horrible acts. The Apex Court called for a “complete overhaul” of the system for curbing the spurt in crime against women, including rape and sexual harassment, saying only deterrent punishment will be effective. In this chapter the researcher has cited out leading case laws which highlight the role of judiciary to curb the crime against woman and also issued number of guidelines to protect the victims.

In the *The Chairman, Railway Board & Ors v. Mrs. Chandrima Das & Ors*\(^{13}\) supreme court observed that “it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved., as Smt. Hanuffa Khatoon was a victim of rape.”

In *Bodhisatwa v. Ms. Subdhra Chakroborty*\(^{14}\), the Supreme Court has held “rape” as a crime which is offensive to the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Supreme Court further pointed out that “Rape is a crime not only against the person of a women, it is a crime against the entire society. It destroys the entire psychology of women and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right ‘right to life’ which includes right to live with human dignity, contained in Article 21.”

### 4.2 The Mathura Rape Case\(^{15}\)

The Mathura rape case is a landmark case in the history of Indian women’s rights movement. In 1972, a tribal girl named Mathura was raped by two policemen in the Chandrapur district of Maharashtra. The District court released the accused policemen on the grounds that the 16-year-old girl was “habituated to sex with her boy friend”, and so was not a virgin. The District

\(^{13}\) (2000) 2 SCC 465

\(^{14}\) (1996) 1 SCC 490

\(^{15}\) Tuka Ram And Anr v. State Of Maharashtra AIR 1979 SC 185
judge also remarked that the “marks of violence and resistance” on her body were “inadequate” to prove forced sex. On appeal the Maharashtra High Court set aside the judgment of the Sessions Court, and sentenced the accused to one and five year’s imprisonment respectively. The High Court held that passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse. But justices Jaswant Singh, Kailasam and Koshal in their judgment reversed the High Court ruling and again acquitted the accused policemen. The Apex Court has raised the following pointes before acquitted the accused.

“Firstly, there being no injury on the person of the girl, the alleged affair must have been a peaceful one and the talk of stiff resistance must have been a subsequent fabrication. Secondly, she silently walked back into the police station with Ganpat when he laid his hand upon her. She should have vociferously protested at that time when she was being separated from her party and should have shaken off the policemen’s hand. “Meekly following Ganpat and allowing him to have his way with her to the extent of satisfying his lust in full, makes us feel that the consent in question was not a consent which could be brushed aside as passive submission”. Finally, the burden of proof was on the complainant to prove positively each aspect of the offence. It was for them to prove that her approval had been obtained by putting her in fear of death, or of hurt. They had not discharged this burden.”

This shows the inherent patriarchal mind-set of the Indian judicial system at that time. The judgment of Apex Court has led to widespread public outrage, and four leading lawyers namely Upendra Baxi, Raghunath Kelkar, Lotika Sarkar and Vasudha Dhagamwar wrote a letter of protest to the Supreme Court. The Letter contains following points –

1. To change Indian rape laws so that the burden of proof would shift away from the victim.
2. To escalate punishment for rape,
3. To make sure the real name of a rape victim never appeared in public,
4. To get rid of absurd metrics such as the two-finger test performed on Mathura.

The widespread protest by woman organization resulted in the amendment to the rape laws in 1983.

The main section of Indian Penal Code, Cr.P.C. and Indian Evidence Act which were amended through Criminal Amendment Act 1983\textsuperscript{16} are as Section 228A - Disclosure of identity of victim of certain offences etc., S. 375 and 376, S.498A of Indian Penal Code, 1860, S. 114A, Presumption as to absence of consent, Indian Evidence Act, 1872, S. 327(2) In case of rape trial, in camera proceedings to be conducted; S.327 (3) it shall not be lawful for any person to print or publish any matter regarding proceeding, Code of Criminal Procedure, 1973 and S. 174(3) - Police to inquire and report on suicide, etc., Code of Criminal Procedure, 1973.

The Andhra Pradesh High Court in *P Biksha Pathi v. State of Andhra Pradesh*\textsuperscript{17} observed that “to make known the grievances about atrocities of newly married brides owing to dowry or other such similar demands from their husbands or in-laws, women social worker had taken up the cause in a movement in the country and due to the effective arguments by social compulsions, Section 498-A, I.P.C. and Section 113-A of the Indian Evidence Act have been introduced on 25th December, 1983. The aforesaid provisions as contained in Section 498-A, I.P.C. were obviously intended to heal the existing misdemeanour in the society. The evil many a times resulted in violence on married women and various acts of cruelty were being practiced. No doubt there were some provisions available in the Indian Penal Code, such as Section 306, IPC but the instances were such which could not come to the light due to their occurrence in the house of their in-laws. Naturally the victims could not resort to public authorities to ventilate their complaint. After all social conditions, family traditions etc. prohibited the brides to take any

\textsuperscript{16} The Criminal Amendment Act 1983 (Act 43 of 1983)

\textsuperscript{17} 1989 Cr.L.J. 1186 (A.P.).
recourse to public authorities. They could not even express the atrocities to their parents. It was, therefore, necessary to curb this social evil by incorporating effective provisions in the present Indian Penal Code.”

In *Pawan Kumar v. State of Haryana*18 the Supreme court has made it clear that the cruelty or harassment need not only be physical as it can be mental also. The apex court observed that “Where the prosecution witnesses, sister and brother-in-law of the deceased deposed that the deceased had told them that her husband was abusing her in view of dowry demand and that not being satisfied was harassing her. When on a day before the incident the husband came to take her back, she was reluctant but her sister sent her with her husband. She went with the husband but with the last painful words that ‘it would be difficult now to see her face in the future’. On the very next day i.e. the day after she arrived at her husband’s place, the ill-fated death of the deceased took place. She died admittedly on account of total burn of her body. Admittedly, the incident of quarrel as deposed was only a day before her death. There is direct evidence that on earlier day itself, there was quarrel at the house of her sister with the deceased and her husband. Thus, physical as well as mental cruelty or harassment is sufficient to invoke the Section 498-A of I.P.C.”

Following are the important provision amended through Criminal Amendment Act 1983 of Indian evidence act, 1872 to protect women from crimes against them.

1. Presumption as to abetment of suicide by a married woman (Sec. 113-A).
2. Presumption as to dowry death (Sec. 113-B)
3. Presumption as to absence of consent in certain prosecutions for rape (Sec114-A).

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18 AIR 1998 SC 95.
Basically these provisions are amended to fight crime against women and provide them with legal safeguards so that in future it is become easier to get justice.

Sections 113-A and 113-B of the Evidence Act, have been inserted by Criminal Law Amendment Act, 1983 and 1986 respectively; deal with the presumption as to abetment of suicide by a married woman and presumption as to dowry death. The Legislature with the view to deal with the evil of dowry death and cruelty by husband or relatives of husband, incorporated Sections 304-B and 498-A in the Indian Penal Code. In order to tackle this evil, legal presumptions relating to abetment of suicide and dowry death were inserted in the Evidence Act so that the person responsible for crime cannot take advantage of legislative incompetency for want of proof, because of certain peculiarities of these offences as they are usually committed inside the matrimonial home.

In *Samir Samanta and others v. State*, The Calcutta High Court observed that "in order to attract presumption of abetment of suicide under Section 113-A the facts and circumstances should be such as can reasonably sustain a presumption about the existence of a nexus of cause and effect between the alleged cruelty and suicide. Where the probability of existence of that nexus suffers set back due to pronounced withdrawal of the contributory syndrome, it will be unsafe and, therefore, unjust to yet invoke a presumption of guilt against the accused under the said section. There however, cannot be any cut and dried formula as to where the presumption under Section 113-A of the Evidence Act should or should not be drawn and it all depends upon the totality of the facts and circumstances of each case."

"When once there is a demand for dowry and harassment against the deceased, and death occurs within 7 years of the marriage, the other
things automatically follow due to the statutory presumption contemplated under Section 113-A of the Evidence Act.”

The Supreme Court in *Hans Raj v. State of Punjab* has pointed out that “no presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty and harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence if the course of conduct relating to cruelty and harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not to state before the death of the woman. In the present case, it has been proved that the death of Sunita Kumari by suicide had occurred within 7 years of her marriage and such death cannot be stated to have occurred in normal circumstances. The term normal circumstance apparently means natural death. The Apex Court further observed that the High Court appears to have adopted casual approach in dealing with a specified heinous crime considered to be a social crime.”

Immediate link must be shown to be present between the conduct regarding cruelty or harassment with regard to dowry demand and consequential death. The term “normal circumstances” means natural death and the term “otherwise than under normal circumstances” means death not in the usual course.

Section 114-A was introduced because of the increasing number of acquittals of accused when the victim of rape is an adult woman because it was very hard for her to prove absence of consent. Due to the amendment in Section 114A in Indian Evidence act, by Criminal Law Amendment Act, 1983, it has brought about a radical change in the Indian Law relating to

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21 2000 (5) sec 207.
custodial rapes. This presumption would apply not merely to rape cases, but also to cases of attempted rape.  

The outcome of the Section 114A is that in cases of custodial rapes, where the issue before the court is whether an intercourse between a man and a woman was with or without consent and the woman states in the court that it was against her consent, the court would presume that there was no consent.  

The burden of proving becomes shifted to the accused. If he is not able to prove that there was consent, he becomes guilty. The requirements of the presumption are:

1. It is a proven fact that there has been intercourse;
2. The issue is whether it was with or without consent;
3. The women states before the court that she had not consented.

The amendment became needed partly because of the rising incidence of rape and partly because of the sensational acquittal in Mathura rape case.  

The startling occurrence of violence against women led the Parliament to enact the Criminal Law (Amendment) Act, 1983 to make the law relating to rape more realistic. Sections 375 and 376, I.P.C. were amended and certain more penal provisions were included for punishing such custodians who molest women under their custody or care. Section 114-A was also added to the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape. The Criminal Procedure Code was also amended to provide for camera trial.

4.3 The Term “Rape”

The Apex Court in Bantu v. State of U.P. has explained the term ‘Rape’ and according to the apex court “the offence of rape in its simplest term is ‘the ravishment’ of a woman, without her consent, by force, fear or fraud, or as the carnal knowledge of a woman by force against her will. It is

25 (2008)11SCC113
the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will. Hence the essential of rape, *rapuit* and *carnaliter cognovit* and both must be present”.

In *State of Punjab v. Rakesh Kumar* the Supreme Court while explaining the meaning of the term Rape has observed that “The essential words in an indictment for rape are *rapuit* and *carnaliter cognovit*; but *carnaliter cognovit*, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape. In the crime of rape, carnal knowledge means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation. Even slight penetration is sufficient and emission is unnecessary. It is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.”

Justice Arijit Pasayat in *State of Karnataka vs. Puttaraja* has cited that “A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, chastity, honour and reputation. The depravation of such animals in human form reach the rock bottom of morality when they sexually assault children, minors and a woman in the advance stage of pregnancy. Section 228-A of the Indian Penal Code, 1860, makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. 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 preventing social victimization or ostracism of the victim of a sexual offence

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26 2008(9) JT 424(SC)
for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, High Court or lower Court, the name of the victim should not be indicated.”

The Apex Court in *Rameshwar v. State of Rajasthan*\(^{28}\) has observed that “It has always been difficult to prove a rape and to punish the rapist. A rapist always tries to locate his victim in circumstances of solitude. There are rare chances of the availability of direct evidence. The only material evidence, therefore, that remain is the statement of the victim and her complaint. The courts have been traditionally treating the statement of a rape victim on the same footing as the testimony of an accomplice. Such testimony usually requires corroboration which means that it should be supported by some other evidence.”

However, the Apex Court in *Krishan Lal v. State of Haryana*\(^{29}\) very seriously reduced the significance of corroboration and held that “to forsake that vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial fabrication called judicial probability. A socially sensitized judge is better statutory armour against gender outrage than long clauses of a complex section with all the protection written into it.”

**4.4 The Padmini Case\(^{30}\)**

The story of Padmini is even more heart rending. Padmini’s husband was taken to the police station purportedly in connection with an investigation into a complaint of theft. Padmini went to the police station for offering food for him. There were police officer’s, both male and female. But the male officers sent the two women police constables out deliberately for a night show movie and gang raped, Padmini, one after another, in front of her husband. When he shouted and screamed for help he was beaten ruthlessly. In a semi conscious state, the husband cried for some water and the battered

\(^{28}\) 1952 SCR 377  
\(^{29}\) AIR1980 SC 1252  
\(^{30}\) 1993 CriLJ 2964
Padmini, covering her body with some clothes strewn over there, crawled towards her husband to give him some water. But the policemen tossed the tumbler, ridiculed her and told her that she should first quench their thirst for sex. She was not even allowed to give her dying husband some water. Padmini who was then repeatedly subjected to sexual assaults by the Police fainted. Padmini’s husband, meanwhile, succumbed to injuries and Padmini did not know it then. By the time she became conscious, the women constables had returned to the station. Padmini painfully narrated her agony to them. She even then did not know about her husband’s death. Meanwhile, she was taken to another police station and was let off. She was informed by the police that her husband was taken to the court and remanded. They also advised her to take him on bail. Padmini went to the court and searched for her husband. She also met Venkatraman, an Advocate from Chidambaram and sought his help for taking him out on bail. By that time the news of the custodial death in the police stations spread and her husband sensing the intensity of the situation advised Padmini to give a complaint to the Revenue Divisional Officer.

She therefore met the RDO and narrated the incident that happened. The RDO and the other officials took Padmini and went to the concerned police station. There was a huge crowd in front of the police station. One of the accused who was roaming in the crowd was identified by Padmini and on seeing him; she got agitated and slapped him with her chapels. After that, Padmini was taken to the hospital and subjected to medical examination.

There commenced the odyssey of Padmini on the road less travelled. In spite of a detailed complaint to the Superintendent of Police, Cuddalore in person, the accused policemen were not arrested.

Though law demands that the past conduct of a victim is irrelevant in the case of a rape, impeaching the character of the victim of rape has become a convention by the accused persons. The case of Padmini is no exception to this archaic rule and therefore within a few days of occurrence, a propaganda assassinating the character of Padmini had begun. The local dailies were used
for this purpose. Padmini recalls, ‘when I saw such baseless stories in those dailies, I felt ashamed of myself though I did not commit any wrong. I was obsessed by the thought that lakhs of people will read the story and form a bad opinion about me. I was therefore shattered into pieces. On those occasions, I made a resolve that I will be alive till the trial of the case ends and after proving the guilt of those policemen I should die’. The then DGP allegedly gave an interview to the Sunday observer ‘stating that it cannot be said that an innocent woman was raped, Padmini’s character was not beyond doubt, it might be possible that those policemen and Padmini would have misbehaved with each other.’ This made the democratic organisations to stage a protest against such indecent and biased comments. The DGP subsequently gave a denial. Padmini had a couple of failed marriages. She was deserted by the first one, and then married a person without knowing that he was already married and she however had a child through him. When he also later deserted her, she found it very difficult to make both ends meet. Once when her child became very sick, she did not have money to attend to it. She underwent family planning for Rs.500/- on the advice of her sister’s husband who signed in the column of patient’s husband. But that money also could not save the child and it died. With feelings of frustration and dejection she started going for construction work where she got Nandagopal’s friendship and married him without knowing about his first marriage.

In all the cases of violence against women, especially in cases of sexual assaults, the victim also viewed as an accused. The society perceives that it is the victim who indirectly instigated the accused to indulge in the commission of crime. Therefore the victim and her character are highlighted as the trigger factor for the crime.

Another challenge faced by Padmini was that when the offenders realised that the victim could not be intimidated or bought over, the persons who gave her protection targeted. Since Padmini had to narrate her trauma to various officials repeatedly, this multiplied her agony. In the test identification
parade, the police deliberately changed the attire of the 5 accused policemen including their hairstyle and facial identities. Since by then she was aware of the legal procedures and her rights in this regard and was supported by the All India Democratic Women’s Association. She complained to the magistrate and requested him to direct the accused to be brought with their uniform. When the identification parade was done accordingly, she clearly identified the culprits. This would highlight the institutional loyalty of the officialdom and also throw light upon the hardships to which a victim is subjected to.

In fact, Padmini had to be kept in different places for safety by AIDWA and Whenever She was to attend court or meet the investigation officer at Chennai, protection was given only by the organisation and not by the State.

Thanks to the intervention by the Madras High Court, investigation was transferred to the CB CID led by its Superintendent of Police Latika Saran. After initial enquiry, she filed a report in the High Court finding a prima facie proof for rape but not for murder of Nandagopal as the second post mortem did not disclose any injuries on Nandagopal’s body and she opined that it was a suicide. Though Padmini requested before the one man commission of Mr. Palaniappan, a district judge appointed by the State as a commission of enquiry, for a third post-mortem, it was rejected though there were discrepancies between the first and second post mortems.

Assuming that Nandagopal committed suicide in police custody, as found out by the Investigating Officer and in spite of the admission by the State that Padmini’s rape was committed inside the police station where Nandagopal was also placed, it is a matter of common knowledge that the circumstances that prevailed in the Police station could have made, Nandagopal to terminate his life. But the State did not prosecute the offenders for the death of Nandagopal which happened in the police custody.

Venkatraman was appointed as the Special Public Prosecutor as per the request of the AIDWA. Padmini withstood her cross examination by the
defence counsel. Finally in 1997, the session’s court convicted all the 5 accused. The bail granted by the Madras high court was cancelled on the application of CB CID and along with the intervention of AIDWA and Women Lawyer’s Association, Madras. Subsequently the criminal appeals filed by the policemen were dismissed and the verdict was also confirmed by the Apex Court. The Supreme Court completely believed the evidence of Padmini given before the trial court and observed “ordinarily no self-respecting woman would come forward in court to falsely make such a humiliating statement against her honour”.

Padmini was given Rs. one lakh as compensation. The State took a long time to disburse the amount. AIDWA’s request for rehabilitating Padmini was subsequently accepted by the government and she was provided with an employment and was also, allotted a house for residence.

The injustice caused to Padmini by an organ of the State namely, the police; was vindicated to some extent only by the sustained support, emotionally and legally given to her by AIDWA. Padmini’s biological family doesn’t stand by her during her time of crisis and instead, her husband Nandagopal’s family stood by her till the end. The High Court of Madras also rightly intervened more than once. The Investigating Officer and her team worked in an impartial manner without any patronage to their brethren.

Usually, in cases of custodial violence, the Government will immediately react denying the occurrence itself and indirectly assist the accused. Though the State may not have any personal grudge against the victim it takes a hard stand against her interest probably with a view to protecting its image. The State is oblivious to the logic that instead of a knee-jerk reaction of denying the commission of every such crime, they would have their image enhanced if they immediately swing into action.

4.5 Bhanwari Devi Gang Rape Case (Vishaka Guidelines)

Bhanwari Devi is dalit social-worker from Bhateri, Rajasthan, who was allegedly gang raped in 1992 by higher-caste men infuriated by her efforts to put a stop to child marriage in their family. Her following treatment by the police, and court acquittal of the accused, attracted widespread national and international media attention, and became a landmark episode in India’s women’s rights movement.

The Gender bias at that point of time prevalent in Indian Judiciary at that point of time that is shown with the verdict in Bhanwari Devi case. Judge Jagpal Singh’s in his 26 page verdict has stated that “It isn’t possible in Indian culture that a man who has taken a vow to protect his wife, in front of the holy fire, just stands and watches his wife being raped, when only two men almost twice his age are holding him.”

The Verdict also states that “the accused, there were three brothers and an uncle, and it’s highly improbable that an uncle and his nephews would commit rape together.”

The judge also observes that gangs in rural areas are not usually multi-caste and, therefore, the accusation that they acted together is highly impossible. Moreover, he endorses the defence counsel’s view that Indian rural society couldn’t have sunk so low that a villager would lose all sense of age and caste and “pounce upon a woman like a wolf”.

The Statement like these by the Judge has prompted women’s organizations to brand it the “personification of gender bias in the judiciary”. This lead a women’s rights group called ‘Vishaka’ that filed PIL in the Apex Court of India.³²

The PIL has been filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the existing environment in which the violation of these rights is not unusual. With the increasing understanding and importance on gender justice, there is increase in the effort to guard such infringement; and there is lack of

³² Vishakha and others v State of Rajasthan. AIR 1997 SC 3011
sympathy towards incidents of sexual harassment is also increasing. The current appeal has been brought as a class action by certain social activists and NGOs with the aim of focusing attention towards this communal deviation, and assisting in finding appropriate methods for recognition of the true concept of gender parity; and to stop sexual pesteriong of working women in all work places through judicial practice, to fill the void in existing legislation.

The Supreme Court also stated that “Each such incident results in violation of the fundamental rights of Gender Equality and the Right to Life and Liberty. It is a clear violation of the rights under Arts. 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under Art. 19 (1) (g) to practice any profession or to carry out any occupation, trade or business. Such violations, therefore, attract the remedy under Art. 32 for the enforcement of these fundamental rights of women. This class action under Art. 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a safe working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Arts. 14, 19 and 21 are brought before us for redress under Art 32; an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.”

In the year 1997, the Supreme Court passed a landmark judgment and set down guiding principle to be followed by establishments in dealing with grievances about sexual pesteriong at workplace. The Supreme Court also stated
that these rule were to be implemented until legislation is passed to deal with the issue.

Thus, the journey from Mathura to Vishaka, spread over a period of two decades was long, arduous and exposed the weaknesses in our system of administration of justice, especially in relation to crime against women.

After that the Vishaka Case (Supra) the Supreme Court in Medha Kotwal’s case\(^{33}\), the Hon’ble Supreme Court directed that the Complaints Committees shall be deemed to be the “Inquiry Authority” for the purpose of Central Civil Services (Conduct) Rules, 1964 and that the report of the Complaints Committees will be deemed to be the Inquiry Report under the Rules.

The Supreme Court also in Seema Lepcha v. State of Sikkim & Ors\(^{34}\) upholding the judgment in Vishaka Case (supra) and Medha Kotwal Case (Supra) given following direction/guidelines regarding implementation of the guidelines by the state government.

(i) “The State Government shall give comprehensive publicity to the notifications and orders issued by it in compliance of the guidelines framed by this Court in Vishaka’s case and the directions given in Medha Kotwal’s case by getting the same published in the newspapers having maximum circulation in the State after every two months.

(ii) Wide publicity be given every month on Doordarshan Station, Sikkim about various steps taken by the State Government for implementation 10 of the guidelines framed in Vishaka’s case and the directions given in Medha Kotwal’s case.

(iii) Social Welfare Department and the Legal Service Authority of the State of Sikkim shall also give wide publicity to the notifications and orders issued by the State Government not only for the

\(^{33}\) (2013) 1 SCC 311
\(^{34}\) (2013) 11 SCC 647
Government departments of the State and its agencies / instrumentalities but also for the private companies.”

Till 2013 these guidelines protect the rights of individuals against sexual harassment at the workplace when the government of India passed “The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013” which seeks to protect women from sexual harassment at their workplace. The basic objective of the act to provide protection against sexual pesterling of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters associated with or related to.

4.6 Provisions for Legal Help and Compensation to Victims of Sexual Assault

In Shri Bodhisatwa Gautama v. Ms. Subdhra Chakroverty the Court observed that the jurisdiction to pay compensation (interim and final) has to be treated to be a part of the overall jurisdiction of the Courts trying the offences of rape which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and Life. Interim award of Rs. 1,000 per month was awarded to the complainant herein from the date of filing of complaint till pendency of the trial of the criminal matter.

The facts were that the accused not only persuade the complainant and share a house with her, giving her a false promise of marriage but also fraudulently got certain wedding rituals performed knowing full well that the marriage was void. The accused even committed the crime of miscarriage by convincing the appellant to go through abortion twice against her free will. The way the accused exploited the complainant and abandoned her is nothing but an act of grave cruelty as the same has caused serious injury and danger to the complainant’s health both mentally and physically, as such, the accused

35 Act No. 14 of 2013
36 AIR 1996 SC 922
above named has committed Criminal offences punishable under Sections 312/420/493/497/498A of IPC\textsuperscript{37}.

The Apex Court emphasized about the crime of rape and affirmed the view of many feminists and psychiatrists that “rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women”. It further, stated that “It destroys the entire psychology of women. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in disrespect and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21”. The Supreme Court stressed upon the inefficiency of the rape law in India and stated that “The rape laws do not, unfortunately, take care of the social aspect of the matter and are useless in many respects.”

Herein the Supreme Court observed that Right to Life would, therefore, include all those aspects of life which go to make a life meaningful, complete and worth-living. “Unfortunately, a woman, in our country, belongs to a class or group of societies who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are Mother, Daughter, Sister and Wife... They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.”

\textsuperscript{37} Indian Penal Code, 1860 (45 of 1860)
Delhi Domestic Working Women’s Forum had filed a PIL under Article 32 of the Constitution of India in *Delhi Domestic Working Women’s Forum v. Union of India*\(^\text{38}\), at the instance of the petitioner to take up the pathetic plight of four domestic servants who were subject to vulgar sexual assault by seven army persons. The apex court held “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 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 behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings. 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.”

The Apex Court judged that it is obligatory that the broad parameters should be placed in supporting the victims of rape. The apex court has given following direction and guidelines -

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

\(^{38}\) 1995 (1) SCC 14
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 authorized 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.”

The NCW was asked by the Apex Court to evolve such scheme as to wipe out the tears of such unfortunate sufferers and the plan was required to be
planned within six months from the date of this ruling. Thereupon, the Union of India would study the same and should take essential steps for the execution of the plan at the earliest. The schemes were also formulated by the NCW which is being implemented though very slowly.

4.7 Sensitive approach in cases of Sexual Assault of Children

In State of Rajasthan v. Om Prakash\(^{39}\) the Supreme Court herein observed that “It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39 which, inter alia, stipulates that the State shall, in particular, direct its policy towards securing that the tender age of the children is not abused and the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment.”

In the present case, the victim at the time of occurrence of rape was a child aged eight years. The accused was youth aged 18 years. The house of the accused was quite close to that of the prosecutrix. The FIR was registered in this case on the next day of the occurrence of the incident. Herein the Court reiterated the proposition while referring to the cases of State of Punjab v. Gurmit Singh and Ors\(^{40}\), and State of Maharashtra v. Chandraprakash Kewal Chand Jain\(^{41}\), that the conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim. In the abovementioned cases the Supreme Court held that, “it must not be overlooked that a women or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person’s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.”

\(^{39}\) (2002) 5 SCC 745
\(^{40}\) (1996) 2 SCC 384
\(^{41}\) (1990) 1 SCC 550
Justice A.S. Anand speaking for the court was referred stating that “the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook.”

The Court disapproved of the approach taken by the High Court and held that “The High Court has clearly committed a serious illegality in assuming that in natural course of events if rape had been committed, the young child girl and her mother would have shouted so as to collect others and they would have visited her house. The prosecutrix was unconscious. There was no question of prosecutrix shouting as assumed by the High Court. Too much was made by the High Court on account of non-examination of persons other than the family members. The cases involving sexual molestation and assault require a different approach a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under penal laws.”

The Court negated the contention that the revenge on account of alleged dispute regarding exchange of land would be taken by the father of the prosecutrix by foisting on the accused a false case of rape involving his young daughter particularly in the setting of a village environment. The conviction could not be set aside for the non examination of independent witness. Thus his conviction was reinstated for offence under Section 376, Indian Penal Code and rigorous imprisonment for seven years was imposed with fine of Rs.1,000/- and in default of payment of fine to further undergo six months rigorous imprisonment.

4.8 Court cannot disgrace the character of a victim

In *State of Punjab v. Gurmit Singh & Ors*42 the Supreme Court in this landmark judgment come out with numbers of observation stated below-

“Crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women’s rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human

42 AIR 1996 SC 1393
dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspirers confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

“The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime.”

The Supreme Court while coming heavily on trial court and setting aside the judgment said that “The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as a girl of loose morals or such type of a girl.”
What has surprised our judicial beliefs all the more is the conclusion drawn by the court, based on no proof and not even on a denied submission, to the effect:

“The more probability is that (prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for the reasons best known to her she does not do so and she preferred to give company to some persons.”

The Apex Court strongly criticised the approach of the trial court and stated that “the observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reductant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole-where the victim of crime is discouraged. The criminal encouraged and in turn crime gets rewarded. Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of loose moral character is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone had everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.”

“The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) Cr.P.C and hold the trial
of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. “

“Wherever possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix.”

4.9 Digital rape and Change essential in rape laws

In State v. Pahlad 43 a case of digital rape, where a 19-year-old used a wooden stick to criminally assault an 80-year-old destitute woman, The Additional Session Judge Dr. Kamini Lau awarded 10 years rigorous imprisonment to the convict, while exhorting the legislature to expand the definition of rape to include digital rape, male rape, oral rape, anal and rectal rape.

The Additional Session Judge Dr. Kamini Lau observed that “There is growing demand world over for inclusion of Digital Rape/ Male Rape/ Oral

43 FIR No.: 155/11 Police Station: Keshav Puram Under Sections: 376/366/326/307/354 IPC
Rape/ Anal & Rectal Rape within the definition of Rape and the fact that it is
the cases like the present one which sometimes reflects the Institutional
culplessness in appropriately dealing with the crime on account of the lag in
law. Section 377 Indian Penal Code to a large extent does cover case of carnal
intercourse committed by a person against the order of nature but technically
its applicability is limited and by operation it becomes difficult to include
certain category of cases where the offence has been committed by the
offender on another with an object. It is only to cover all kinds of penetrations
without a person’s consent in any manner, that the need for a re-look at the
existing laws has been necessitated. The present case is an eye opener and it is
time that the Legislature take a serious note of the extent of depravation which
exists in the Indian Urban Society, victims of which are usually small children
and senior citizens being easy targets; the cause of which could be the X-rated
material easily available in the market and internet. This case sounds a wakeup
call for the Indian Legislators to step in and think about having a re-look at the
definition of Rape so as to specifically include the instances of Digital Rape/
Male Rape/ Anal Rape and make the offence Gender Neutral or to formulate a
separate exhaustive legislation covering all categories cases of sexual assault.”

Dr. Lau also pointed law-makers to exhaustive legislation covering all
categories of sexual assault enacted by Scotland, Ireland, Australia, US,
Victoria and Queensland (both in Australia). “The definition of rape in the
Criminal Code of Queensland has been now enlarged to include the instances
of digital rape…and the maximum penalty provided for the offences of rape/
digital rape/oral rape is life.”

Counsel for the Delhi Commission for Women also argued in court
that there was no reason why a victim of digital rape should not be treated at
par with a victim of rape.

In Sakshi v. Union of India44 the writ petition under Article 32 of the
Constitution has been filed by way of PIL by ‘Sakshi’ organisation. The relief

44 2004 Cri.L.J. 2991 (2892) (SC)
claimed under the writ petition is to amend the rape laws to include & issue direction declaring that “sexual intercourse” as contained in section 375 of the Indian Penal Code shall include “all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration finger/vaginal and finger/anal penetration and object/vaginal penetration”.

The Petitioner herein pointed out that the increase of violence, in particular sexual violent activities against women and children as well as the execution of the provisions of IPC namely Sections 377, 375/376 and 354 by the system. The present trend of the system is to treat sexual crime, other than penile/vaginal penetration, as lesser crimes falling under either Section 377 or 354 of the IPC and not as sexual crimes under Section 375/376 IPC. It has been pointed out that crimes such as sexual exploitation of minor children and women by penetration other than penile/vaginal penetration, which would take any other form and could also be through use of stuff whose impact on the sufferers is in no manner fewer than the suffering of penile/vaginal penetration as conventionally understood under Section 375/376, have been treated as crimes falling under Section 354 of the IPC as offending the modesty of a women or under Section 377 IPC as unnatural offences.

The petitioner argued that the narrow perceptive and application of rape under Section 375/376 IPC only to the cases of penile/vaginal penetration runs opposing to the existing modern understanding of rape as an intent to disgrace, infringe and humiliate a woman or child sexually and, therefore, unfavourably influence the sexual integrity and independence of women and children in violation of Article 21 of the Constitution.

The view of Brown Miller Susan45 in his Article ‘Against Our Will’, 1986, reported and relied in this case. Following extract is brain storming-

"in rape the intent is not merely to take, but to humiliate and degrade sexual assault in our day and age is hardly restricted to forced genital copulation, nor is it exclusively a male-on- female offence. Tradition and

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biologic opportunity have rendered vaginal rape a particular political crime with a particular political history, but the invasion may occur through the mouth or the rectum as well. And while the penis may remain the rapist’s favourite weapon, his prime instrument of vengeance, it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the natural thing. And as men may invade women through other orifices, so too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral or rectal penetration as a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self.”

The Apex Court forwarded the matter to the Law Commission of India for its view on the main subject raised by the petitioner. The Law Commission had considered a few of the issues in its 156th Report forwarded to the parliament regarding amendment in the laws related to crime against woman.

The Hon’ble Supreme Court after dismissing the Petition observed that “….the definition of rape in Section 375 cannot be enlarged so as to include all forms of penetration such as penile/ vaginal penetration, penile/ oral penetration, penile/ anal penetration, finger/ vaginal and finger/ anal penetration and object/ vaginal penetration, as it may violate the guarantee enshrined in Article 20 (1) of the Constitution of India which says that no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charges as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence...”

The Apex Court also suggested that “to advance the cause of justice and in the larger interest of society, the cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required.” The Supreme Court optimist that the Parliament will give serious consideration to the issues raised by the petitioner in this case and makes suitable legislation with all the rapidity which it warrants.
Justice Arijit Pasayat in *State of Punjab v. Ram Dev Singh* 46 has observed that “Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim’s most cherished of fundamental rights, namely, the right to life contained in Article 21. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge is better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.”

In the above case, The Supreme Court has also held that two finger test is illegal and unconstitutional being against the dignity of women. It has directed not to conduct such test in future during investigations, and if the test has been conducted, further directed the courts at its threshold not to rely upon this evidence.

**4.10 Rehabilitation of sex workers**

Retired Justice Markandey Katju, and Gyan Sudha Misra in the case of *Budhadev Karmaskar v. State Of West Bengal*47 observed that “the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually

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47 (2011) 10 S.C.R. 577
abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed.”

As affirmed “a woman is compelled to indulge in prostitution not for pleasure but because of abject poverty. If such a woman is granted opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body.”

“Hence, we direct the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India. The schemes should mention in detail who will give the technical/vocational training and in what manner they can be rehabilitated and settled by offering them employment. For instance, if a technical training is for some craft like sewing garments, etc. then some arrangements should also be made for providing a market for such garments, otherwise they will remain unsold and unused, and consequently the women will not be able to feed her.”

The petitioner in Gaurav Jain v. Union of India48 prayed for establishing separate educational institutions for the children of the fallen women. The SC observed that “segregating children of prostitutes by locating separate schools and providing separate hostels would not be in the interest of the children and the society at large”. The Supreme Court did not accept the plea for separate hostels for children of prostitutes, but it felt that “accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified”.

48 AIR 1990 S.C. 292
In its judgment, the Supreme Court quoted the Fundamental Rights of women and children from the Constitution of India and relevant international instruments. The court deliberated on the reasons for prostitution and the continuation of the victims in profession and recognized that the victims are the poor, illiterate and ignorant sections of the society who are the target group in the flesh trade; rich communities exploit them and harvest at their misery and humiliation in an organised way, in particular, with police nexus. The court held that women found in the flesh trade, should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. Equally, the right of the child is the concern of the society so that fallen women surpass trafficking of her person from exploitation; contribute to bring up her children; live a life with dignity; and not to continue in the foul social environment. Equally, the children have the right to equality of opportunity, dignity and care, protection and rehabilitation by the society with both hands open to bring them into the mainstream of social life without pre-stigma affixed on them for no fault of her/his.

The SC stated that three Cs, viz., Counselling, Cajoling and Coercion were necessary to effectively enforce the provisions of various statutes. The role of NGOs in rehabilitating and educating the children of the fallen women was emphasized. Detailed directions were given for rescue, rehabilitation of prostitutes and children of prostitutes. The SC held that society was responsible for a woman becoming a victim of circumstances therefore; society should make reparation to prevent trafficking in women, rescue them from red light areas and other areas in which the women were driven or trapped in prostitution. Their rehabilitation by socio-economic empowerment and justice is the constitutional duty of the State. Their economic empowerment and social justice with dignity of person are the fundamental rights and the Court and the Government should positively endeavour to ensure them.
The Hon’ble Supreme Court in Vishal Jeet Vs Union of India\(^{49}\) explained the pathetic situation of the victims:

“No denying the fact that prostitution always remains as a running sore in the body of civilisation and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large.”

“It is highly deplorable and heart-rending to note that many poverty stricken children and girls in the prime of youth are taken to ‘flesh market’ and forcibly pushed into the ‘flesh trade’ which is being carried on in utter violation of all cannons of morality, decency and dignity of humankind. There cannot be two opinions, indeed there is none, that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps.”

The Hon’ble Supreme Court has directed certain guidelines for eradication of the problem:

“This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Courts in such cases have to always take a serious view of this matter and inflict consign punishment on proof of such offences. Apart from legal action, both the Central and the State Government who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction.”

\(^{49}\) AIR 1990 SC 1412
4.11 Judiciary and Khap Panchayat diktat (Honour Killing)

The words ‘honour killings’ and ‘honour crimes’ are being used loosely as convenient expressions to describe the incidents of brutality and pesting caused to the young couple planning to marry or having married against the desires of the society or family members. They are used more as catch phrases and not as appropriate and accurate expressions. The so-called ‘honour killings’ or ‘honour crimes’ are not peculiar to our country. It is an evil which haunts many other societies also. The belief that the victim has brought dishonor upon the family or the community is the root cause of such violent crimes. Such violent crimes are directed especially against women. Men also become targets of attack by members of family of a woman with whom they are perceived to have an ‘inappropriate relationship’. Changing cultural and economic status of women and the women going against their male dominated culture has been one of the causes of honour crimes. In some western cultures, honour killings often arise from women seeking greater independence and choosing their own way of life. In some cultures, honour killings are considered less serious than other murders because they arise from long standing cultural traditions and are thus deemed appropriate or justifiable. An adulterous behaviour of woman or pre-marital relationship or assertion of right to marry according to their choice, are widely known causes for honour killings in most of the countries.50

The rising incidence of commission of murders of persons marrying outside their caste or religion and other serious offences perpetrated or hostility generated against them and also causing harm to their close relatives or a section of the community on considerations of caste and ‘gotra’ are matters of grave concern. Those who may be directly involved in the actual commission of acts of violence or murder are either part of a community or section of the people and may also include members of the family concerned

in the case of objected marriages. Very often such incidents and offences are not even taken cognizance at the threshold. The domineering position and strength wielded by caste combinations and assemblies, silence or stifle the investigating and prosecuting agencies.

The pernicious practice of Khap Panchayat and the like taking law into their own hands and pronouncing on the invalidity and impropriety of Sagotra and inter-caste marriages and handing over punishment to the couple and pressurizing the family members to execute their verdict by any means amounts to flagrant violation of rule of law and invasion of personal liberty of the persons affected.\(^{51}\)

The Apex Court in \textit{Lata Singh v. State of U.P.}\(^{52}\) Observed and directed “The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-

\(^{51}\) Ibid
\(^{52}\) 2006, 5 SCC 475
religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law. We sometimes hear of ‘honour’ killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honorable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.”

In Pradeep Kumar Singh v. State of Haryana the High Court of Punjab and Haryana has laid down the guidelines to pertaining to the handling of the complaints against the runaway couple and their parents. The direction issued in the judgment is following-

“(i) Whenever any intimation is received by the SSP/SP of concerned District regarding the marriage of a young couple with a threat and an apprehension of infringement of the right of life and liberty by the police at the instance of the family members of one of the spouses, the SSP/SP concerned will consider the representation and will himself/herself look into the matter and issue necessary directions to maintain a record of the said intimation under Chapter 21 of the Punjab Police Rules.

(ii) On receipt of above said intimation of marriage by any police officer, necessary directions will be issued to the concerned Police Station to take necessary steps in accordance with law to enquire into the matter by contracting the parents of both boy and girl. The matter regarding age, consent of the girl and grievance of her family will be determined. In the eventuality of any complaint of kidnapping or abduction having been received from any of the family members of the girl generally the boy (husband) will

53 2008(3) RCR (Criminal) 376
not be arrested unless and until the prejudicial statement is given by the girl (wife). Arrest should generally be deferred or avoided on the immediate receipt of a complaint by the parents or family members of the girl taking into consideration the law laid down by Hon’ble Supreme Court in Joginder Kumar’s case (supra);

(iii)If the girl is major (above 18 years), she should not forcibly be taken away by police to be handed over to her parents against her consent. Criminal force against the boy should also be avoided.

(iv)So far as the threat to the young couple of the criminal force and assault at the hands of the private persons is concerned, it would always be open to the police to initiate action if any substantive offence is found to have been committed against the couple;

(v)In case of any threat to the breach of peace at the hands of the family members of the couple it will always be open to the State authorities to take up the security proceedings in accordance with law;

(vi)It will not be open to the “runaway couple” to take law in their hands pursuant to the indulgence shown by the police on the basis of their representation sent to the SSP/SP of the concerned District;

(vii)If despite the intimation having been sent to the SSP/SP there is an apprehension or threat of violation of right of personal life and liberty or free movement, the remedy of approaching the High court should be the last resort;

(viii)In case there is an authority constituted for issuance of marriage certificate as per the law in the concerned districts, the couple of so called ‘run away marriage’ should get the marriage registered in compliance with the directions of the Supreme Court and a copy of the same should also be forwarded to the police along with the representations or anytime subsequent thereto.
(ix)Nothing said here-in-above will prevent the immediate arrest of a person who fraudulently entices a girl with false promises and exploits her sexually as per the statement of the girl.”

In Arumugam Servai vs. State of Tamil Nadu54, The Supreme Court strongly condemn the practice of khap panchayats and stated that “in recent years ‘Khap Panchyat’ (known as katta panchayats in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out.”

“Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.”

Retired Justice Markandey Katju and Justice Gyan Sudha Mishra has state that “honour killings have become common place in many parts of the country, particularly in Haryana, western U.P., and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. In our opinion honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal

54 (2011) 6 SCC 405
practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate ‘honour’ killings should know that the gallows await them.”  

4.12 Legal Aid is Constitutional Right

By the 42nd Amendment to the Constitution of India, effected in 1977, Article 39-A was inserted. This Article provide for free legal assistance by suitable legislation or system or in any other way, to ensure that vision for securing justice are not deprived of any inhabitant on the grounds of economic and others. Article 39-A of the Constitution reads as follows “The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

In Hussainara Khatoon v. Home Secretary, State of Bihar, The Supreme Court has held that “free legal service is an inalienable element of “reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21”. It was noted that this is “a constitutional right of every accused person who is unable to engage a lawyer and secure free legal services on account of reasons such as poverty, indigence or in communicado situation.” It was held that “the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, subject of course to the accused person not objecting to the providing of a lawyer.”

In Khatri v. State of Bihar, The Supreme Court Expressing displeasure over disregard of the decision of the Supreme Court by the State of Bihar held that

55 (2011) 6 SCC 396  
56 Constitution of India 1950, Art. 39A  
57 (1980) 1 SCC 98  
58 (1981) 1 SCC 627
1. “The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. The State should provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. It cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liability.

2. The State is under a constitutional obligation to provide free legal services not only at the stage of trial but also at the stage when the accused is first produced before the magistrate as also when he is remanded from time to time.

3. But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The magistrate or the session’s judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unless he is not willing to take advantage, every other State in the country should make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or in communicado situation. The only qualification would be that the offence charged against the accused is
such that on conviction it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State.

4. The State and its police authorities should see to it that the constitutional and legal requirement to produce an arrested person before a judicial magistrate within 24 hours of the arrest is scrupulously observed.

5. The provision inhibiting detention without remand is a very healthy provision which enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try to enforce this requirement and where it is found to be disobeyed come down heavily upon the police.”

In Suk Das v. Union Territory of Arunachal Pradesh, 59 The Supreme Court had reiterated that “the requirement of providing free and adequate legal representation to an indigent person and a person accused of an offence. In that case, it was reiterated that an accused need not ask for legal assistance – the Court dealing with the case is obliged to inform him or her of the entitlement to free legal aid. This Court further observed that it was now “settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21 of Constitution of India.”

4.13 Direction to Govt regarding Implementation of Laws

59 (1986) 2 SCC 401
In CEHAT & Ors v. Union of India\textsuperscript{60} The Supreme Court admitting the lapse in implementation of laws banning sex selection/sex determination directed the central Government has ordered that “It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence; foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.”

4.14 Court has to analyse the connection between demand of dowry/Cruelty and Death

In Bansi Lal v. State of Haryana\textsuperscript{61} the Supreme Court observed that “In each case, the court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. that in Section 113B of the Indian Evidence Act, 1872 the legislature in its wisdom has used the word ‘shall’ thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. It is unlike the provisions of Section 113A of the Evidence Act where discretion has been conferred upon the court wherein it had been provided

\textsuperscript{60} (2001) 5 SCC 577
\textsuperscript{61} AIR 2011 SC 691
that court may presume to abatement of suicide by a married woman. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113B relatable to Section 304 IPC, the onus to prove shifts exclusively and heavily on the accused. Further, the SC stated that, in each case, the court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death."

In *Sunil Bajaj v. State of M.P.*, the Apex Court held that “We have given our attention and consideration to the submissions made by the learned counsel for the parties. Normally this Court will be slow and reluctant, as it ought to be, to upset the order of conviction of the trial court as confirmed by the High Court appreciating the evidence placed on record. But in cases where both the courts concurrently recorded a finding that the accused was guilty of an offence in the absence of evidence satisfying the necessary ingredients of an offence, in other words, when no offence was made out, it becomes necessary to disturb such an order of conviction and sentence to meet the demand of justice. In order to convict an accused for an offence under Section 304-B IPC, the following essentials must be satisfied: (1) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances; (2) such death must have occurred within 7 years of her marriage; (3) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband; (4) such cruelty or harassment must be for or in connection with demand of dowry.”

Further stated that “It is only when the aforementioned ingredients are established by acceptable evidence such death shall be called dowry death and such husband or his relative shall be deemed to have caused her death. It may be noticed that punishment for the offence of dowry death under Section

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62 (2001) 9 SCC 417
304-B is imprisonment of not less than 7 years, which may extend to imprisonment for life. Unlike under Section 498A IPC, husband or relative of husband of a woman subjecting her to cruelty shall be liable for imprisonment for a term which may extend to three years and shall also be liable to fine. Normally, in a criminal case the accused can be punished for an offence on establishment of commission of that offence on the basis of evidence, maybe direct or circumstantial or both. But in case of an offence under Section 304-B IPC, an exception is made by deeming provision as to nature of death as dowry death and that the husband or his relative, as the case may be, is deemed to have caused such death, even in the absence of evidence to prove these aspects but on proving the existence of the ingredients of the said offence by convincing evidence. Hence, there is need for greater care and caution, that too having regard to the gravity of the punishment prescribed for the said offence, in scrutinizing the evidence and in arriving at the conclusion as to whether all the above mentioned ingredients of the offence are proved by the prosecution. In the case on hand, the learned counsel for the appellant could not dispute that the first two ingredients mentioned above are satisfied.”

The Supreme Court in Hira Lal & Others vs. State (Govt. of NCT), Delhi63, Clarified Section 304B of Indian Penal Code, 1860 and 113-B of Indian Evidence Act in Context of dowry Death and considered and read the dowry death as “304-B. 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 purpose 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

63 (2003) 8 SCC 80
shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”

Further held that “The provision has application when 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 relatives of her husband for, or in connection with any demand for dowry.”

Section 113-B of the Evidence Act is also applicable for the matter at hand. Both Section 304-B IPC and Section 113-B of the Evidence Act were introduced by Dowry Prohibition (Amendment) Act 43 of 1986 with a vision to battle the increasing risk of dowry deaths. Section 113-B reads as follows:

“113-B. Presumption as to dowry death.-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.-for the purposes of this section, ‘dowry death’ shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 1860).”

The presumption shall be raised simply on confirmation of the following prerequisites:

“(1) The question before the court must be whether the accused has committed the dowry death of the woman.

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.”
4.15 Protection of woman from Domestic violence

The Rajasthan High Court in *Sukrit Verma v. State of Rajasthan*\(^\text{64}\) has made an observation that “Women have been subjected to violence, domestic or otherwise, throughout the pages of history—whether they be Helen of Troy, or Sita of Ramayana, whether they be Casandra of Troy, or Dropadi of Mahabharata. Women have been easy prey to the male ego, and dominance. Much as the Indian Civilization pays obedience to the feminine divine, but the harsh reality remains that throughout the length and breadth of this country, women are assaulted, tortured, and burnt in their daily lives. The phenomenal growth of crime against women has attracted the attention of the international community. The International organizations took a serious look at the epidemic called domestic violence. The Vienna Accord of 1994, and the Beijing Declaration and the Platform for Action (1995) felt the necessity for a proper law on this burning issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination against Women (CEDAW) asked the member nations to enact a proper law for dealing with the mischief of domestic violence.”

“In India, although the criminal law deals with domestic violence in the form of Section 498A IPC, but there was no provision in the Civil Law to deal with the said problem. In order to get rid of the mischief of domestic violence, the Parliament, in its wisdom, enacted the Act, which came into force on 26 October, 2006. The Act is a social beneficial piece of legislation, which should be given as wide and as liberal an interpretation as possible.

Thus, Section 20 of the Act is meant to ameliorate the financial condition of the aggrieved person, who may suddenly find herself to be without a hearth and home. Financially, the aggrieved person may exist in a suspended animation, if she is neither supported by the husband, nor by her parents. In order to protect women from such a purgatory, Section 20 bestows a right to seek monetary relief in the form of compensation and maintenance.

\(^{64}\) 2011 (2) WLN 624(Raj.)
Section 20, thus, is a powerful tool for ensuring gender equality in economic terms. Section 20, does not contain any exception in favour of the husband. In fact, it recognises the moral and legal duty of the husband to maintain the wife.”

Further held that “in an era of human rights and gender parity, the dignity of women is unquestionable. Articles 14 and 15 of the Constitution of India recognise the dignity of women. The Constitution empowers the Parliament to enact laws in favour of women. Flowing from the constitutional ranges, Section 125 Code of Criminal Procedure, Section 24 Hindu Marriage Act, Section 20 Domestic Violence Act, ensure that women are paid maintenance by the husband. Section 26 of the Act further lays down that the maintenance paid under the Act, would be in addition to maintenance paid under any other law being in force for the time being. Therefore, the provisions of the Act are supplementary to provisions of other law in force, which guarantee the right of maintenance to the women. Hence, the observations made by Their Lordship of Delhi High Court, in the case of Sanjay Bhardwaj, that ‘No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not’. Such an observation is clearly contrary to the provisions of law. Hence, this Court respectfully disagrees with the opinion of Their Lordship of the Delhi High Court.”

Also held that “The Law has always stood to favour of the women. For the Law recognises their vulnerability for survival in the cruel world. Women, being a keeper of hearth in home, need to be protected as they are the foundation of any society. If women are exposed to physical abuses, to sexual exploitation, the very foundation of the society would begin to weaken. It is only after recognising their importance, sociologically, that the ancient Indian Seers had opined that “Gods dwell only in those houses, where women are respected”. Thus, both the law and society recognise a moral and legal duty of the husband to maintain the wife.”
The Rajasthan High Court in *Gajendra Singh v. Minakshi Yadav*\(^6^5\) has held that “The Act is a beneficial piece of legislation, which is an outcome of the Vienna Accord of 1994, and the Beijing Declaration and the Platform for Action (1995). It is also a result of United Nations Committee on CEDAW. Undoubtedly domestic violence is being committed in India on an epidemic scale. Although the criminal law deals with domestic violence in the form of Section 498A IPC, it was felt that there is no remedy under the civil law. Therefore, in order to get rid of the mischief of domestic violence, the Parliament, in its wisdom, enacted the Act, which came into force on 26 October, 2006. Undoubtedly the Act is meant to protect the women from domestic violence committed against them by the husband and his family members. The Act has recognised the fact that domestic violence is limited not only to physical and mental cruelty, but can also extend to verbal and emotional abuse, and even to economic abuse. The Act has recognised the fact that mental cruelty can take the form of verbal and emotional abuse; such an abuse would include threat to causing physical abuse to any person in whom the aggrieved person is interested. Moreover, the Act has recognised that aggrieved person has a right to economic resources of the husband and his family members, has a right to stridhan, and has a right to be maintained. In case her economic rights are violated by the husband or his family members, then according to Section 3 of the Act, domestic violence is committed. Since the Act is a social beneficial piece of legislation, Section 3 of the Act must be given a liberal interpretation.

Moreover, she has been denied her stridhan, she has been denied maintenance, and she had been denied access to shared household even after October 26, 2006. Hence, civil wrongs are continuing even after the date when the Act has come into force. Therefore the question of retrospective application of the Act does not arise in the present case. After all as long as

\(^6^5\) 2022(1) Cr.L.R.(Raj.) 839
the civil wrongs are continued to be committed after 2006, the Act will control such acts of domestic violence.”

The Hon’ble Supreme Court in Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade And Others, has set aside the order of both trial court and high court in relation to the interpretation of the expression “respondent” in Section 2(q) of the Domestic Violence Act, 2005, and held that “It is true that the expression ‘female’ has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression ‘relative’, nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only. In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005.”

Before we go to the next section of this chapter we need to go through the Nirbhaya case which leads to the Criminal Amendment act 2013.

4.16 The Nirbhaya Case

The victim, a 23 year old woman and her boyfriend, were on their way home on the night after watching a film in Saket, South Delhi they entered an off-duty private bus at Munirka for Dwarka that was being driven by joyriders at about 9:30 pm at night. There were only six persons on the bus, including the driver. The woman’s friend became suspicious when the bus deviated from its normal route and its doors were locked. When he objected, all the six man, including the driver, taunt the pair. When the woman’s boyfriend attempted to interfere, he was restrained, and beaten unconscious with an iron bar. The men

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66 (2011) 3 SCC 650
then pulled the woman to the back of the bus, beating her with the bar and raping her whereas the bus driver continued to drive. As per the police information the woman try to fight her assailants, biting three of the assailants and leaving bite marks on the accused men. After thrashing and raping, the assailants threw both victims from the moving bus. After that the bus driver purportedly attempted to drive the bus over the woman, but she was pulled aside by her boyfriend. One of the perpetrators afterward cleans the vehicle to get rid of proof. The partially clad wounded were found on the road by a person walking by at around 11 pm at night. The passerby phoned the Delhi Police, who took the duo to Safdarjung Hospital, where the woman was given emergency medical aid and placed on Ventilation. The woman victim has injury marks, including many bite marks, all over her body. In compliance with Indian law, the real name of the victim was initially not released to the media, so pseudonyms were used for her by various media houses instead, including Jagruti (“awareness”), Jyoti (“flame”), Amanat (“treasure”), Nirbhaya (“fearless one”), Damini (“lightning”, after the 1993 Hindi film) and Delhi braveheart. The friend of Nirbhaya who was attacked, suffered broken limbs but survived. On 19 December 2012, the woman underwent her fifth surgery, removing most of her remaining intestine. On 21 December, the government appointed a committee of physicians to ensure she received the best medical care. By 25 December, she remained incubated, on life support and in critical condition. At a cabinet meeting chaired by Prime Minister Dr. Manmohan Singh on 26 December, the decision was made to fly her to Mount Elizabeth Hospital in Singapore for further care. Mount Elizabeth is a multi-organ transplant specialty hospital. On 28 December, at 11 am, her condition was extremely critical. The chief executive officer of the Mount Elizabeth Hospital said that the woman suffered brain damage, pneumonia, and abdominal infection, and that she was “fighting for her life.” Her condition continued to deteriorate, and she died at 4:45 am on 29 December, Singapore
Standard Time. Her body was cremated on 30 December in Delhi under high police security.

4.16.1 The Effect of Nirbhaya Case

Public protests took place in New Delhi on 21 December 2012 at India Gate and Raisina Hill; Thousands of protesters clashed with police and battled Rapid Action Force units. Demonstrators were lathi charged, shot with water cannon and tear gas shells, and arrested. Alike protests occurred throughout the country. Huge number of women belonging to various NGO’s and other organizations demonstrated in all parts of the country. Protests occurred online as well on the social networking sites Face book and WhatsApp, with users replacing their profile images with a black dot symbol. Tens of thousands signed an online petition protesting the incident. This led to The Government of India has set up Justice Verma Committee to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals of committing sexual assault against women after the Nirbhaya incident. The Committee headed by J. S. Verma, a former Chief Justice of India and one of India’s most highly regarded Chief Justices and eminent jurists submitted its report on January 23, 2013. It made recommendations on laws related to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms.

After the ‘Nirbhaya’ incident, Govt. of India has enacted the Criminal Law (Amendment Act), 2013, to redefine the sexual crimes against women. It provides for amendment of the Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973. The crime of rape has been altogether redefined and to say the least this definition and inclusion of some other acts of sexual nature against women in the offence of rape is a new era of criminal jurisprudence.

4.16.2 Changes Brought in Criminal Amendment Act, 2013

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The Following are the changes brought by the Criminal Amendment Act 2013; some existing section has been amended, substituted and inserted in Indian Penal Code 1860 to meet the requirement of present world specifically dealing with crime against woman The key changes made under the Indian Penal Code were made in section 375, where the definition of rape has been changed completely. The section 370, 376, 376A to 376E and 377 is also amended and few other new section are also included such as 370A, 326A, 326B, 354A to 354 D etc. under the criminal amendment act, 2013. The Sections herein are not written for the sake of repetition as it is already discussed in chapter- 2 of the research work.

Thus, to be precise, it is the start of a new era of criminal jurisprudence mainly in the matters of crimes against woman relating to sexual acts. It’s been twenty years since so many amendments has been incorporated in the Criminal law but the implementation of those laws are poor, so the time has come that every department of Government mainly the executive and judicial system now commits themselves for the proper implementation of these laws.

The Hon’ble Supreme Court had dismissed the Writ in *Sakshi v. Union of India and ors.* 70 on the contention that “It is well settled principle that the intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before

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ascribing to phrases used in it a meaning broader than that they would ordinarily bear.”

The Petition was dismissed but the Hon’ble Supreme Court still has adopted some suggestion given by the petitioner in this case and issues the following direction directions-

“(1) The provisions of sub-section (2) of section 327 Cr.P.C. shall in addition to the offences mentioned in the sub-section would also apply in inquiry or trial offences under sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:
   (i) A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
   (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the President Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
   (iii) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.”

The Government of India after the Nirbhaya incident amended the Criminal law same as urged by the Petitioner in this case but drafted law seems to be a hurriedly enacted law. Sometimes, it seems that certain rights of the women have been uncared for or have not been taken cared of while drafting this law, including the criminalization of marital rape and trying Armed forces accused of sexual offences under criminal law.

The Criminal law Amendment Act, 2013(supra) also amended certain section of Indian Penal Code, 1860 in which Acts of sexual violence including attempt to rape are elaborated to make sure that offences like sexual harassment, Stalking, Voyeurism and disrobing of woman by using Criminal Force and acid attack comes under its ambit. The following are the sections which are inserted by Criminal Law Amendment Act 2013(supra).
In Babu Ram v. Ragunath ji maharaj\textsuperscript{71} the Supreme Court has observed and held as under “At long last, the unfortunate and heroic saga of this litigation is coming to an end. It has witnessed a silver jubilee. Thanks to our system of administration of justice and our callousness and indifference to any drastic reforms in it. Cases like this, which are not infrequent, should be sufficient to shock our social as well as judicial conscience and actives us to move swiftly in the direction of overhauling and restructuring the entire legal and judicial system. The Indian people are very patient, but despite their infinite patience, they cannot afford to wait for twenty five years to get justice. There is a limit of tolerance beyond which it would be disastrous to push our people. This case and many others like it strongly emphasis the urgency of the need for legal and judicial reforms. A little tinkering here and there in the procedural laws will not help. What is needed is a drastic change, a new outlook, a fresh approach which takes into account the socio-economic realities and seeks to provide a cheap, socio-economic expeditious and effective instrument for realization of justice by all sections of the people, irrespective of their social or economic position or their financial resources.”

5. Judicial approach regarding crime against woman after Criminal Amendment Act 2013

In State v. Ram Singh and another, \textsuperscript{72}The Delhi Court while awarding four convicts in Delhi gang-rape case (Nirbhaya case) has said that “the gravity of the incident depicts the hair rising beastly and unparalleled behaviour. The subjecting of the prosecutrix to inhuman acts of torture before her death had not only shocked the collective conscience but calls for the withdrawal of the protective arm of the community around the convicts. This ghastly act of the convicts definitely fits this case in the bracket of rarest of rare cases.”

\textsuperscript{71} (1996) 3 SCC 492
\textsuperscript{72} FIR No. 413/2012 P.S.: Vasant Vihar, New Delhi.
“Death to all,” additional sessions judge Sh. Yogesh Khanna said while delivering the verdict in the Delhi gang-rape case that had evoked nationwide outrage and led the government to bring in a stringent anti-rape law. “These are the times when gruesome crimes against women have become rampant and courts cannot turn a blind eye to the need to send a strong deterrent message to the perpetrators of such crimes. The increasing trend of crimes against women can be arrested only once the society realize that there will be no tolerance from any form of deviance against women and more so in extreme cases of brutality such as the present one and hence the criminal justice system must instill confidence in the minds of people especially the women. The crime of such nature against a helpless woman, per se, requires exemplary punishment.” it said. The Delhi High Court found all the defendants guilty of rape, murder, unnatural offences and destruction of evidence. With the verdict, the High Court confirmed death sentence for all four men convicted. The court held that “the crime, which stirred widespread protests over sexual crimes against women in the country, fell into the judicial system’s ‘rarest of rare category’ that allows capital punishment.” But the Supreme Court of India has stayed the execution and allow them appeal against their conviction. The matter is still pending before the apex court.

In Ashabai & Anr v. State Of Maharashtra \(^7^3\) The Supreme Court has held that “In spite of stringent legislations in order to curb the deteriorating condition of women across the country, the cases related to bride burning, cruelty, suicide, sexual harassment, rape, suicide by married women etc. have increased and are taking place day by day. A complete overhaul of the system is a must in the form of deterrent punishment for the offenders so that we can effectively deal with the problem.”

In Deepak Gulathi v. State of Haryana,\(^7^4\) the Hon’ble Supreme Court on the consequences of rape on the women has held that “Rape is the most

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\(^7^3\) (2013) 2 SCC 224

\(^7^4\) (2013) 7 SCC 675
morally and physically reprehensible crime in a society, as it is an assault on the body, mind and on privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of the helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore, a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violated the human rights of the victim. Being the most hated crime, rape tantamount to serious blow to the supreme honour of the women, and affects both, her esteem and dignity. It causes physical and psychological harm to the victim, leaving upon her indelible marks.”

5.1 Guidelines Issued to Central and State Government regarding Acid Attack

Taking into account of the magnitude of the crime of acid throwing Hon’ble Supreme Court in *Laxmi v. Union of India* 75 has given detailed directions to both Central and State Governments. On 06.02.2013, a direction was given to the Home Secretary, Ministry of Home Affairs associating the Secretary, Ministry of Chemical and Fertilizers to convene a meeting of Chief Secretaries/concerned Secretaries of the State Governments and the Administrators of the Union Territories, inter alia, to discuss the following aspects:

(i) Enactment of appropriate provision for effective regulation of sale of acid in the States/Union Territories.

(ii) Measures for the proper treatment, after care and rehabilitation of the victims of acid attack and needs of acid attack victims.

(iii) Compensation payable to acid victims by the State/or creation of some separate fund for payment of compensation to the acid attack victims.

75 (2014) 4 SCC 427
The Supreme Court has passed the following orders regarding the sale of acid and matter thereof:

“6. the Centre and States/Union Territories shall work towards making the offences under the Poison Act, 1919 cognizable and non-bailable.

7. In the States/Union Territories, where rules to regulate sale of acid and other corrosive substances are not operational, until such rules are framed and made operational, the Chief Secretaries of the concerned States/Administrators of the Union Territories shall ensure the compliance of the following directions with immediate effect:

(i) Over the counter, sale of acid is completely prohibited unless the seller maintains a log/register recording the sale of acid which will contain the details of the person(s) to whom acid(s) is/are sold and the quantity sold. The log/register shall contain the address of the person to whom it is sold.

(ii) All sellers shall sell acid only after the buyer has shown:

a) A photo ID issued by the Government which also has the address of the person.

b) Specifies the reason/purpose for procuring acid.

(iii) All stocks of acid must be declared by the seller with the concerned Sub-Divisional Magistrate (SDM) within 15 days.

(iv) No acid shall be sold to any person who is below 18 years of age.

(v) In case of undeclared stock of acid, it will be open to the concerned SDM to confiscate the stock and suitably impose fine on such seller up to Rs. 50,000/-.  

(vi) The concerned SDM may impose fine up to Rs. 50,000/- on any person who commits breach of any of the above directions.

8. the educational institutions, research laboratories, hospitals, Government Departments and the departments of Public Sector Undertakings, who are required to keep and store acid, shall follow the following guidelines:

(i) A register of usage of acid shall be maintained and the same shall be filed with the concerned SDM.
(ii) A person shall be made accountable for possession and safe keeping of acid in their premises.

(iii) The acid shall be stored under the supervision of this person and there shall be compulsory checking of the students/personnel leaving the laboratories/place of storage where acid is used.

9. The concerned SDM shall be vested with the responsibility of taking appropriate action for the breach/default/violation of the above directions.

10. Section 357A came to inserted in the Code of Criminal Procedure, 1973 by Act 5 of 2009 w.e.f. 31.12.2009. Inter alia, this Section provides for preparation of 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.

11. We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared ‘Victim Compensation Scheme’ (for short Scheme). As regards the victims of acid attacks the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of Rs. 25,000/- in such scheme, the State of Rajasthan has provided for Rs. 2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must be enhanced to at least Rs. 3 lakhs as the after care and rehabilitation cost. The suggestion of learned Solicitor General is very fair.

12. We, accordingly, direct that the acid attack victims shall be paid compensation of at least ` 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh shall be paid to such victim within 15 days of occurrence of such
incident (or being brought to the notice of the State Government/ Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance of the above direction.”

In Parivartan Kendra v. Union of India 76 the Supreme Court has express grave concern over state’s failure to implement the guidelines issued in Laxmi v. Union of India (Supra) and held that “Court has enhanced the compensation given to the victim from ₹3 lakh to ₹10 lakh. Court has also directed all the State Governments and Union Territories to consider the plight of such victims and take appropriate steps with regard to inclusion of their names under the disability list.” The Further observation of the Hon’ble court was following-

“It is pertinent to mention here that the mandate given by this Court in Laxmi’s case nowhere restricts the Court from giving more compensation to the victim of acid attack, especially when the victim has suffered serious injuries on her body which is required to be taken into consideration by this court. In peculiar facts, this court can grant even more compensation to the victim than ₹ 3, 00,000/-.”

“When we consider the instant case of the victims, the very sight of the victim is traumatizing for us. If we could be traumatized by the mere sight of injuries caused to the victim by the inhumane acid attack on her, what would be the situation of the victim be, perhaps, we cannot judge. Nonetheless we cannot be oblivious of the fact of her trauma.”

The Supreme Court expresses its grief over the continuing acid attack and observed “These attacks have been rampant for the simple reason that there has been no proper implementation of the regulations or control for the supply and distribution of acid. There have been many cases where the victims

76 MANU/SC/1399/2015
of acid attack are made to sit at home owing to their difficulty to work. These instances unveil that the State has failed to check the distribution of acid falling into the wrong hands even after giving many directions by this Court in this regard. Henceforth, a stringent action be taken against those erring persons supplying acid without proper authorization and also the concerned authorities be made responsible for failure to keep a check on the distribution of the acid.”

“We cannot be unconscious of the fact that the victim of acid attack requires permanent treatment for the damaged skin. The mere amount of ₹3 lakhs will not be of any help to such a victim. We are conscious of the fact that enhancement of the compensation amount will be an additional burden on the State. But prevention of such a crime is the responsibility of the State and the liability to pay the enhanced compensation will be of the State. The enhancement of the Compensation will act in
1. It will help the victim in rehabilitation;
2. It will also make the State to implement the guidelines properly as the State will try to comply with it in its true sprit so that the crime of acid attack can be prevented in future.”

5.2 Responsibility of Courts in handling the cases related to the crimes against women:

In Shyam Narain v. State, NCT of Delhi77, the Supreme Court has openly talked about the judicial behaviour regarding crime against woman and said “Almost for the last three decades, the Supreme Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl (brutally raped by appellant), who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualized. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society.

77(2013) 7 SCC 77
The age-old wise saying that ‘child is a gift of the providence’ enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. When she suffers, the collective at large also suffers.”

The Supreme Court in this case further explained “Respect for reputation of women in society shows the basic civility of a civilized society. No member of society can afford to conceive the idea that he can create a hollow in the honour of women. Such thinking is not only lamentable but also deplorable. It would not be an examination to say that the thought of sullying the physical frame of a woman is the demolition of the excepted civilized norm.”

The Supreme Court also in Gurnaib Singh v. State of Punjab 78 held that “It is a matter of great shame and grave concern that brides are burnt or otherwise their life sparks are extinguished by torture, both physical and mental, because of demand of dowry and insatiably greed and sometimes, sans demand of dowry, because of the cruelty and harassment made it out to the nascent brides treating them with total incentivity destroying their desire to live and forcing them to commit suicide; a brutal self humiliation of life.”

The Supreme Court in dealing with above case also explained the position of Indian families “Respect of a bride in her matrimonial home glorified the solemnity and sanctity of marriage, reflects the sensitivity of a civilized society and, eventually aptomized her aspiration, dreamt of in nuptial bliss. But, the manner in which sometimes the brides are treated in many a home by the husband, in-laws and relatives creates a feeling of emotional numbness in the society. Daughter-in-law is to be treated as a member of the family with warm and effect and not as a stranger with despicable and ignoble

78(2013) 7 SCC 108.
indifference. She should not be treated as a house-maid. No impression should be given that she can be thrown out from her matrimonial home at any time.”

It gives an idea about the sensitiveness and responsiveness of higher Courts, the Supreme Court and the High Courts, regarding the crimes against women after the Nirbhaya incident.

It is most likely that the overall increase in reporting is a result of enhanced awareness amongst women and their family/support systems combined with directions of Hon’ble Supreme Court in Lalita Kumar v. Government of Uttar Pradesh\(^79\) regarding mandatory registration of FIR in cognizable cases and the introduction of Section 166A of Cr.P.C which makes its breach, punishable. Increased media rendezvous on the issue of crime against women has also played its part in mainstreaming and creating better understanding about the legal remedies available. While it is hard to depict a direct association between better public awareness and increased coverage of Crime against Woman, it is definitely likely to smooth the progress of women’s access to justice by making domestic & other social support structures more supportive. The Supreme Court issued the following Guidelines regarding the registration of FIR.

“(i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

\(^79\) (2014) 2 SCC 1
(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes
(b) Commercial offences
(c) Medical negligence cases
(d) Corruption cases
(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.”

5.3 The Concept of Zero FIR and E-FIR
Delhi police Chief Neeraj Kumar announced that Zero First Information Reports (FIRs) may be registered on the basis of a woman’s statement at any police station irrespective of jurisdiction. This means women can file an FIR at any police station and the complaint is required to be registered on the basis of the woman’s complaint verbatim. Mr. Kumar stated: “The woman’s statement has to be taken as gospel truth and a probe needs to be initiated on its basis.”

The introduction of the Zero FIR, the starting point towards improving criminal justice is the filing of the criminal complaint itself. It is well known that the filing of FIRs, particularly for cognizable offenses, is an extremely difficult exercise - more so for a rape victim who has to ceaselessly recount the horrific event. Police stations often refuse to register FIRs for cognizable complaints, and innumerable rapes around the country go unreported. The victims then are forced to file a private complaint in court under Section 156(3) of the Criminal Procedure Code seeking an order directing the police to register an FIR. The police chief’s announcement that the woman’s statement will be taken as the “gospel truth” is an important first step that will hopefully enable rape victims to register an FIR.

While the Supreme Court has, in various judgments, taken contradictory views on the issue of whether the police are required to investigate a complaint before registering an FIR under Section 154 of the Cr.P.C. it has repeatedly expressed its deep anguish over the failure of police to register FIRs, particularly in rape cases. Hopefully, the police will now register an FIR based on the woman’s statement as per the recently announced measures. However, the mandatory and automatic registration of FIRs can be ensured only through e-governance, that is, by providing for online registration of FIRs by citizens.80

80 http://www.thehindu.com/opinion/lead/going-from-zero-firs-to-efirs/article4329575.ece (Visited on 22nd February)
The Centre has asked all the states to make amendments in the state laws with respect to the registration of the Zero FIR on receipt of complaint or information about a crime without getting into argument related to the jurisdiction. Central Government, keeping in mind, the influence of the Zero FIR has warned by invoking the amendment in the criminal law that if there is any refusal with regards to the registering of the Zero FIR, it will lead to imprisonment. This ordered amendment empowers the police to register the complaint acknowledged in police station other then the jurisdictional police station where crime has been committed. The concept of Zero FIR is a free jurisdiction FIR, brought up in order to avoid the delay in filing the crime and to avoid wastage of time that adversely impacts the victim and gives a free way to offenders getting a chance to flee from the rule of the law.\textsuperscript{81}

The Process of implementing the registration of online FIR has been started in 2013 by the ministry of Home Affairs. Now almost eight states till now have adopted the process of E-FIR in every police station. The Concept of E-FIR is that under the E-FIR system, any citizen can now log in from any part in India and file an E-FIR. It means that every citizen can now claim his or her fundamental right in seeking justice against any criminal offense committed against him or her. It save time, money and mainly the harassment he/she suffered in police station during questioning. However the question that arises is that in India the rural people as well as in remote areas we don’t have the facility of internet as well as they are not aware of their rights. But it is a good step in e-governance and hopefully it will serve the purpose of getting justice

The Supreme Court in \textit{In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News}\textsuperscript{82} concluded that apathetic response on part of State police department lead to the shocking gang rape of 20 year old girl, which was staged by the Panchayat, and

\textsuperscript{81} http://blog.ipleaders.in/registering-fir-outside-jurisdiction/ (Visited on 22nd February)
\textsuperscript{82} (2014) 4 SCC 786
commented “As a long term measure to curb such crimes, a larger societal change is required via education and awareness. Government will have to formulate and implement policies in order to uplift the socioeconomic condition of women, sensitization of the Police and other concerned parties towards the need for gender equality and it must be done with focus in areas where statistically there is higher percentage of crimes against women.”

“The crimes, as noted above, are not only in contravention of domestic laws, but are also a direct breach of the obligations under the International law. India has ratified various international conventions and treaties, which oblige the protection of women from any kind of discrimination. However, women of all classes are still suffering from discrimination even in this contemporary society. It will be wrong to blame only on the attitude of the people. Such crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner. Thus, we implore upon the State machinery to work in harmony with each other to safeguard the rights of women in our country.”

The Supreme Court lashed out at the West Bengal government for its failure to defend “the fundamental rights” of a 20-year-old tribal woman who was gang raped by 13 men in Birbhum district and directed it enhance the amount of compensation paid to her by an additional Rs. 5 lakh, and said that “No compensation can be adequate. As the state has failed to protect the victim’s rights, it is duty-bound to provide compensation.”

The Supreme Court Further Pointed Out that “Likewise, all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, are statutorily obligated under Section 357C to provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Sections 326A, 376,376A, 376B, 376C, 376D or Section 376E of the IPC.”
In Re: Suo Motu Cognizance\(^\text{83}\), the Chief Justice of Delhi High court taking suomoto cognizance of definite gender insensitive comments made by Ld. Judge, the Special Fast Track Court who delved in character assassination of the victim of rape, warned against the gender bias approach in judiciary “The point which needs to be highlighted is that judicial pronouncements which are gender biased may be used as a standard by the police personnel and prosecutors in making decisions how they should investigate and prosecute cases.”

In State of Karnataka v. Shivanna @ TarkariShivanna\(^\text{84}\), the Apex Court has made an effort to fast track the procedure in cases of rape and gang rape. The court said that “it has been seen that though there are fast track courts for the disposal of cases also including the cases of rape but yet there is no fast track procedure established and followed with regard to the same resulting in regular repeated heinous offences. It observed that there is a vital need to introduce drastic amendments into the Cr.P.C. in the nature of the fast court procedures for Fast Track Courts especially in the cases involving trial for charge of rape.” In regard to this, the court issued the following interim direction to all police stations in the country:

1. “Upon receiving the information relating to the commission of crime of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement Under Section164 Code of Criminal Procedure A copy of the statement Under Section164 Code of Criminal Procedure should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement Under Section164 Code of Criminal Procedure should not be disclosed to any person till charge sheet/report Under Section173 Code of Criminal Procedure is filed.

\(^{83}\) 2014(1)RCR(Criminal)510
\(^{84}\) (2014) 8 SCC 913
2. The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

3. The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

4. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

5. Medical Examination of the victim: Section 164A Code of Criminal Procedure inserted by Act 25 of 2005 in Code of Criminal Procedure imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim Under Section 164 Code of Criminal Procedure.”

“that the statement of victim should as far as possible be recorded preferably before the Lady Judicial Magistrate under Section 164 Code of Criminal Procedure skipping over the recording of statement by the Police Under Section 161 Code of Criminal Procedure to be kept in sealed cover and thereafter the same be treated as evidence at the stage of trial which may be put to test by subjecting it to cross examination. We are further of the view that the statement of victim should as far as possible be recorded preferably before the Lady Judicial Magistrate under Section 164 Code of Criminal Procedure skipping over the recording of statement by the police under Section 161 Code of Criminal Procedure which is any case is inadmissible except for contradiction so that the statement of the accused thereafter be recorded Under Section 313 Code of Criminal Procedure The accused then can be committed to the appropriate Court for trial whereby the trial court can
straightway allow cross examination of the witnesses whose evidence were recorded earlier before the Judicial Magistrate.”

The Court further was of the view that “the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. We are of the view that if the evidence is recorded for the first time itself before the Judicial Magistrate Under Section 164 Code of Criminal Procedure and the same be kept in sealed cover to be produced and treated as deposition of the witnesses and hence admissible at the stage of trial with liberty to the defence to cross examine them with further liberty to the accused to lead his defence witness and other evidence with a right to cross examination by the prosecution, it can surely cut short and curtail the protracted trial if it is introduced at least for trial of rape cases which is bound to reduce the duration of trial and thus offer a speedy remedy by way of a fast track procedure to the Fast Track Court to resort to.”

In *Mohd. Haroon v. Union of India*85, a writ petition was filed against the State Police for not providing ample security to women, which resulted in several gang rapes being committed during the said communal bloodshed. The petition also highlighted the inaction on the part of State Police against the real perpetrator and the apathetic attitude towards the victim’s rehabilitation and security in various procedural matters, such as recording of victim’s statement and the medical examination. The Supreme Court pursuant to this obtained a status report from the State as well as, inter alia, directed recording of additional statements under Section 164 of the Cr.P.C. before a lady Magistrate and payment of compensation.

5.4 Punishment is a matter of discretion

In *Narinder Singh v. State of Punjab*86, the Apex Court held that there is no clarity as far as objective of punishment is concerned and stated that

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85 (2014) 5 SCC 252
86 (2014) 6 SCC 466
“The law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kinds. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why are those persons who commit offences subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.”

“Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well, namely, whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation, etc. In the absence of such guidelines in India, the courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the court in awarding a particular sentence. However, that may be a question of quantum.”

The Apex Court further states that “What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases. Therefore, in respect of such offences which are treated against
the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/philosophy behind Section 307 of the Code.”

In Sumer Singh v. Suraj bhan Singh the Supreme Court has stated while deciding on the issue of judge’s discretion regarding awarding the minimum and maximum sentence that “It is seemly to state here that though the question of sentence is a matter of discretion, yet they said discretion cannot be used by a court of law in a fanciful and whimsical manner. Very strong reasons on consideration of the relevant factors have to form the fulcrum for lenient use of the said discretion. It is because the ringing of poignant and inimitable expression, in a way, the warning of Benjamin N. Cardozo in the Nature of the Judicial Process:

“The Judge even when he is free is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in social life’.”

The Supreme Court further stated that “It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has

87 (2014) 7 SCC 323
reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court’s accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded; the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; Society does not withstand it; and sanctity of conscience abhors it. The old saying ‘the indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule’. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best sub served if the respondent is sentenced to undergo rigorous imprisonment for two years apart from the fine that has been imposed by the learned trial Judge.”

The apex court while concluding states that “Before parting with the case we are obliged, nay, painfully constrained to state that it has come to the notice of this Court that in certain heinous crimes or crimes committed in a brutal manner the High Courts in exercise of the appellate jurisdiction have imposed extremely lenient sentences which shock the conscience. It should not be so.”

In Shankar Kisanrao Khande v. State of Maharashtra 88 the Supreme Court held that “In my considered view that the tests that we have to apply, while awarding death sentence, are “crime test”, “criminal test” and the R-R Test and not “balancing test”. To award death sentence, the “crime test” has

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88 (2013)5 SCC 546
to be fully satisfied, that is 100% and “criminal test” 0%, and that is no Mitigating Circumstance favoring the accused. If there is any circumstance favoring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the “criminal test” may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favoring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is “society centric” and not “Judge centric” that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges.”

In Shimbhu v State of Haryana\(^89\) the Supreme Court while dealing with two question mainly under what circumstances the court has the power to award less then minimum sentence as prescribed by the law and a compromise entered between the parties can acceptable in court of law in heinous crime like rape or gang rape etc. has held that “the law on the issue can be summarized to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute. The power under the proviso should not be

\(^89\) (2014) 13 SCC 318
used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.”

The Apex Court further states that “a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) of IPC.”

“It is imperative to mention that the legislature through the Criminal Law (Amendment) Act, 2013 has deleted this proviso in the wake of increasing crimes against women. Though, they said amendment will not come in the way of exercising discretion in this case, on perusal of the above legislative provision and catena of cases on the issue, we feel that the present case fails to fall within the ambit of exceptional case where the Court shall use its extraordinary discretion to reduce the period of sentence than the minimum prescribed.”

In *State of Madhya Pradesh v. Madan lad*90 The Supreme Court has held that in a case of rape or attempt of rape, the idea of compromise under no circumstances can really be thought of. The Supreme Court accordingly ruled out mediation in such cases. The apex court has set aside the order of the

90 2015 (7) SCALE 261
Madhya Pradesh High Court where it had ordered mediation between rape accused and rape Survivor. The Apex Court come heavily on the High court judge and observed that “In the instant appeal, as a reminder, though repetitive, first we shall dwell upon, in a painful manner, how some of the appellate Judges, contrary to the precedents and against the normative mandate of law, assuming a presumptuous role have paved the path of unbelievable laconicity to deal with criminal appeals which, if we permit ourselves to say, raptures the sense of justice and punctures the criminal justice dispensation system”

“Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error. We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the elan vital, of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility.”

The Supreme Court bench of Justices Dipak Misra and Prafulla C. Pant further observed that “these are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasize, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the ‘purest treasure’, is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct.”
In Akil @ Javed v. State of NCT of Delhi\(^9\) The Supreme Court has taken a stern note on postponement in trial and directed all Sessions courts in the country to carry out rape trials daily and complete the procedure in 2 months from the date of beginning of examination of witnesses. and stated that “In particular, when examination of witnesses has begun, it shall be continued from day to day until all witnesses in attendance have been examined, unless the court finds adjournment beyond the following day necessary for reasons to be recorded.”

The Apex Court, referring to regular adjournments being sought, said: “We are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds.”

Postponements were granted for the asking, quite often to suit the ease of the advocate, the Apex Court said. “We make it clear that the legislature has frowned upon granting adjournments on that ground. At any rate, inconvenience of an advocate is not a “special reason” for bypassing the mandate of Section 309 of the Cr.P.C.”

The Bench directed all High Courts to issue circulars to subordinate courts to firmly stick to the prescribed procedure to ensure speedy trial and also rule out any manoeuvring taking place by granting an undue, long adjournment for the mere asking. “When witnesses of a party are present, the court should make every possible endeavour to record their evidence and they should not be called back again. Work fixation of the court should be so arranged as not to direct the presence of witnesses whose evidence cannot be recorded. Similarly, cross-examination should be complete immediately after the examination-in-chief and, if need be, within a short time thereafter. No long adjournment should be allowed.”

\(^9\) CRIMINAL APPEAL NO.1735 OF 2009
The Supreme Court Further stated that “We hope and trust that the High Courts would take serious note of the directions issued in the decisions reported in the Rajdeo Sharma case, which has been extensively quoted and reiterated in the subsequent decision of this court reported in the Shambhu Nath case, and comply with the directions at least in the future years. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judicial Academy to achieve the desired result. When witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing. Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.”

The Supreme Court said that “It is no justification to glide on any alibi by blaming the infrastructure for skirting the legislative mandates embalmed in Section 309 of the Code. A judicious judicial officer who is committed to his work could manage with the existing infrastructure for complying with the legislative mandates. The precept in the old homily that a lazy workman always blames his tools is the only answer to those indolent judicial officers who find fault with the defects in the system and the imperfections of the existing infrastructure for their tardiness in coping with such directions.”

“A fast-track court in Haryana’s Rohtak sentenced seven men to death for raping and murdering a 28-year-old Nepali woman. Additional district and Sessions Judge Seema Singhal called the case a rarest of rare while announcing her judgment. The case hit international headlines and drew comparisons with the rape and murder of Nirbhaya in Delhi because of its brutality and the involvement of a minor. The mentally challenged woman had come to Rohtak for treatment when she was raped and murdered brutally. The Rohtak victim’s body was found there days after she went missing on February 1, 2015 with blades, stones, condoms and pieces of a stick stuffed in her private parts. “People consider women as weak creatures,” Singhal said.
“...I can hear cries of women falling prey to crimes. This is a male-dominated society that believes women can be suppressed. Men, who commit such crimes, should be ashamed of their acts.”

The Mumbai sessions court while awarding life sentences in the Mumbai Gang Rape case to four of the accused in the telephone operator case. Has stated that “The manner in which the offence was committed reflects the depravity of the accused. The crime was not an impulsive act, but the premeditated outcome of a criminal conspiracy. They sexually ravished the girl and left her in a pathetic state. A proper signal has to be sent out to society. Even if in this case the accused are not reformed, others like them will be deterred. In some cases, mercy is justified. But in this case it would be misplaced and would be a mockery of justice”.

Following the conviction of the three repeat offenders (Vijay Jadhav, Qasim Bengali, and Mohammed Salim Ansari) in the gang rape, the prosecutor Nikam moved an application to add charges against them under section 376E of the IPC as they had committed another heinous crime of Gang rape earlier which was not reported at that time but reported afterword’s due to the public outcry and the manner in which they committed the gang rape of photojournalist in this case that gives the telephone operator courage to file a complained against them, which provides for the death sentence for repeated rape convictions. Demanding the death penalty, Nikam told the court, “The accused are sex-starved goons in shape of humans. They deserve maximum sentence. Any leniency shown to the accused would be a mockery of justice. Their crime has shocked collective consciousness.”

On 4 April 2014, the court awarded the death penalty to the three repeat offenders in the photojournalist rape case. This was the first time that rapists in India were given death sentences under section 376E of the IPC.

Siraj Khan, the other convict in the photojournalist case, was sentenced to life imprisonment.

Awarding the death penalty, the judge stated, “Mumbai gang-rape accused has least respect for law. They don’t have potential for reformation as per facts of case. The suffering that gang-rape survivor and her family have undergone is unparalleled. Mumbai gang-rape accused was emboldened since law enforcing agencies hadn’t caught them. If this is not the case where death sentence prescribed by law is not valid, which is? Exemplary and rarest of rare punishment is required in the case.” The judge further added that the crime violated all rights of the survivor. Joshi further observed, “The gang-rape accused were not only enjoying the act of sexual assault but also the survivor’s helplessness. It was executed in the most gruesome manner with no mercy or show of human dignity to the survivor. The accused were acting in pursuance of criminal conspiracy as judicially proved. The defence argued that the convicts were deprived of basic fundamental rights” and that their poor socioeconomic status should be looked at while considering death penalty. However, citing judgments by the Supreme Court, the judge stated that “Conviction cannot be dependent on the social and the economic status of the victim or the accused and the race, caste, creed of the accused cannot be taken into consideration.” Joshi ruled, “Depravity of their character is reflected from the fact that the accused enjoyed the act. They did not commit the crime under any duress or compulsion. They had enjoyed the act. This was a case, where the accused were completely unprovoked. The judge also rubbed the defense’s claims that the victims had suffered no physical injuries. The judge question whether such submissions made it appears like the accused had done some charity by letting her leave uninjured”. The judge further ruled, “This court had an opportunity to understand the trauma as she recalled them at the time of her testimony in the court. Questions like whether she has suffered any injuries are irrelevant and her trauma cannot be overlooked. Her testimony and her mother’s deposition in the court clearly tell
how heinous the crime was." Rejecting the accused plea for leniency, the judge ruled, "A defenseless, harmless victim was raped by the accused unprovoked ... This did not happen because of some momentary lapse."

Applauding the victim for her courage, the court observed, "This case would have also gone unreported if the victim had not come ahead and complained to the police. She took a bold step and lodged the complaint. Because of her, this and the other crime [the telephone operator case] came to light."93

An Uber cab driver sentenced by a Delhi court to life imprisonment till his natural death for raping a woman executive in 2014. The court awarded the maximum sentence for the offence, which endangered the life of the Victim. Shiv Kumar Yadav, the accused was given the life imprisonment by Additional Sessions Judge Kaveri Baweja who held that the convict while raping the victim abducted her with intent to compel her for marriage. "Convict is sentenced to rigorous imprisonment for life which shall mean imprisonment till his remaining natural life for the offence under section 376 (2) (m) (committing rape causes grievous bodily harm) of the IPC," the judge said and also imposed a fine of Rs. 21,000 on the accused.

The Additional Sessions Judge Kaveri Baweja also directed the Delhi Legal Services Authority to give compensation to the victim and to take care of the family of the convict.94

Justice Verma Commission in its report on Criminal Law (Amendment) Act, 2013 in the recommendations and suggestions part has mentioned that “available personnel of the judiciary and the infrastructure with few systematic changes can at least reduce heavy burden of arrears in Courts contributing to delays in enforcing the law of land. More effective control of the subordinate judiciary by the responsibility vested in the High Courts would ensure improved performance of the subordinate judiciary, which is the

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cutting edge of the justice delivery system. The High Courts have the pivotal role in the administration of justice by virtue of Article 235 of the Constitution. They have to lead by practice in addition to precept. The restatement of values of judicial life is a charter of faith for every judicial functionary at all levels.”